

No. 333PA17

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE)
BOARD OF EDUCATION,)

Plaintiff-Appellant,)

v.)

THE STATE OF NORTH CAROLINA,)
and MARK JOHNSON, in his official)
capacity,)

Defendant-Appellee.)

From Wake County

DEFENDANT-APPELLEE THE STATE OF
NORTH CAROLINA'S NEW BRIEF

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DEFENDANT-APPELLEE THE STATE OF
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ISSUE PRESENTED

Does the General Assembly's Reallocation of Statutory Duties Between the North Carolina State Board of Education and the Superintendent of Public Instruction, through the Enactment of Session Law 2016-126, Unconstitutionally Eliminate the Board's Authority to Supervise and Administer the State Public School System?

INTRODUCTION

On 8 November 2016, North Carolina held general elections, which included a contested race for the office of the Superintendent of Public Instruction (“Superintendent”). Defendant Mark Johnson defeated the long-term incumbent Superintendent June Atkinson. As the newly elected Superintendent was transitioning into the job, the General Assembly enacted Act of December 16, 2016, H.B. 17, 4th Ex Sess., 2016 N.C. Sess. Laws 126 (“the Act”). The Act was intended “to restore authority to the Superintendent of Public Instruction as the administrative head of the Department of Public Instruction [Department],” and to clarify “the Superintendent’s role in the direct supervision of the public school system.” S.L. 2016-126, Sec. 30.

The Act restored the Superintendent as the head of the Department, and assigned or reassigned a number of statutory responsibilities to the Superintendent. At the same time, the General Assembly retained the language recognizing that “[t]he general supervision and administration of the free public school system shall be vested in the State Board of Education [Board].” N.C. Gen. Stat. § 115C-12 (as amended by S.L. 2016-126). The legislature emphasized the Board’s continued governing role in public education by delineating that the Board “shall establish *all needed rules and regulations for the system of free public schools*, subject to laws enacted by the General Assembly.” N.C. Gen. Stat. § 115C-12 (as amended by S.L. 2016-126).

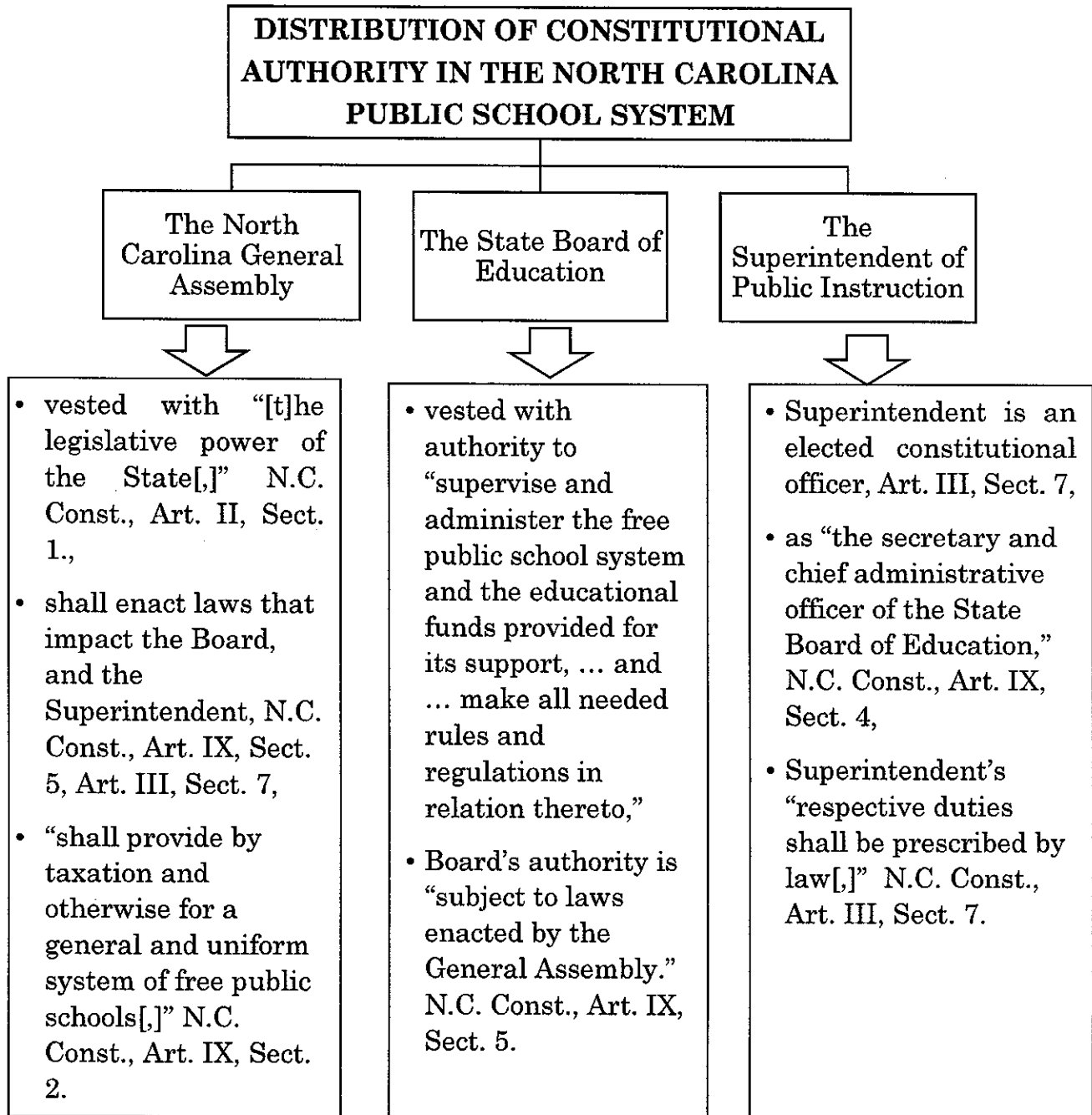
The Act highlighted that the role of the Superintendent in the school system is subject to the Board's direction by requiring the Superintendent to "administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction." N.C. Gen. Stat. § 115C-12 (as amended by S.L. 2016-126). In addition to recognizing the Board's general role in the supervision of public schools, the General Assembly retained a vast number of the Board's specific powers over the school system intact.

In its Brief, the Board fails to acknowledge the significant authority it retains over the administration of public schools after the enactment of the Act. Once again, as it did in its companion case,¹ the Board misidentifies the question, and misapprehends the position of the State of North Carolina. (Board's New Br pp 5, 16-17, 37-38) Contrary to the Board's contentions, the State does not subscribe to the proposition that "the Board's power 'is whatever the General Assembly says it is[.]'" (Board's New Br pp 5, 16-17, 37-38) The limits on the General Assembly's power to shape the Board's authority do exist, but are not implicated by the enactment of the Act.

The framers of the North Carolina Constitution split responsibilities over the system of secondary education, and created a three-legged stool to

¹ *North Carolina State Board of Education v. The State of North Carolina and the North Carolina Rules Review Commission* (N.C. Docket No. 110PA16, see description of the Board's erroneous position in N.C. Docket No. 110PA16 State's New Br pp 12-13, 18)

support the statewide operation of our public schools. The Constitution highlights the General Assembly's leading role, and distributes powers between the General Assembly, the Board, and the Superintendent as follows:



In the framers' design, the Board has general supervisory authority over administration of public schools. Meanwhile, the Superintendent executes and manages the public school system directly, on a day-to-day basis, according to the directions of the Board. The General Assembly has authority over the administration of public schools through its constitutional power to enact laws governing education, contouring the Superintendent's and the Board's statutory duties, and through the provision of funding. Throughout the years, the Legislature has promulgated a numerous laws that provide the management direction of public schools, and shape the relationship between the Board and the Superintendent. *See, e.g.,* N.C. Gen. Stat., ch. 115C.

During oral argument before the Superior Court three-judge panel, the Board acknowledged the three-prong nature of the framers' design. The Board conceded that the General Assembly has constitutional authority to enact laws to shape the development of public education. (T pp 21, 24-25) The Board also acknowledged that the Superintendent has a constitutional role in managing the public school system on a "day-to-day" basis, likening it to the role of "a chief operating officer" of a corporation. (T pp 18, 21)

Yet in its Brief, the Board fails to concentrate on any specific constitutional limits the General Assembly allegedly overlooked to shape the relationship between the Board and the Superintendent through the Act. Instead, the Board asks the Court to choose between sanctioning the existence

of the Board without educational powers, and approving legislative power without limits. Neither proposed option is valid, but the enactment of the Act does not present the choice between these options to the Court.

Instead, the issue presented to this Court is more nuanced: whether the Act preserves the Board's constitutional role to "supervise and administer" the public education system. Despite the Boards protestations, the Act reinstates the Superintendent's role as the head of the Department of Public Instruction, and rebalances a division of statutory duties between the Board and the Superintendent, without impermissibly constraining their constitutional powers.

The Board continues to retain constitutional responsibilities in the administration and supervision of public education. The Act fits within the four corners of the General Assembly's constitutional authority to make laws governing public education. The Board's contrary contentions are without merit.

STATEMENT OF THE FACTS

A. The General Assembly's Enactment of the Act.

On 14 December 2016, the Act was introduced in the General Assembly, with a working title "An act to clarify the Superintendent of Public Instruction's role as the administrative head of the Department of Public

Instruction, to change the appointments process for the boards of trustees for the constituent institutions of the University of North Carolina, to modify the appointment of heads of principal state departments, and to implement the statewide classification and compensation system.” The Act was ratified two days later by the General Assembly, and on 19 December 2016 became Sess. Laws 2016-126 upon Governor McCrory’s approval.² Pursuant to the General Assembly’s declaration, that legislation was enacted with the express goal “to clarify the Superintendent of Public Instruction’s role as the administrative head of the Department of Public Instruction.” S.L. 2016-126.

B. Proceedings at the Superior Court.

On 29 December 2016, the Board filed its Complaint against the State, which challenged the Act and requested a temporary restraining order. (R pp 3-37) The Board contended that the Act unlawfully transfers various powers of the Board, established by Article IX, Section 5 of the North Carolina Constitution, to the Superintendent. The Board alleged that the Act unconstitutionally transfers the Board’s four specific duties to “supervise ...

² The final title of S.L. 2016-126, as ratified, was “An act to clarify the Superintendent of Public Instruction’s role as the administrative head of the Department of Public Instruction, to change the appointments process for the Boards of Trustees for the Constituent Institutions of the University of North Carolina, to modify the appointment of heads of principal state departments, and to establish task force for safer schools.”

the free public school system[,]" (Count 1), to "administer the free public school system[,]" (Count 2), to "supervise ... the educational funds provided for [the free public school system's] support[,]" (Count 3), and to "administer ... the educational funds provided for [the free public school system's] support[,]" (Count 4). (R pp 12-13) The Board sought declaratory and injunctive relief. (R p 15)

The same day the Complaint was filed, the Honorable Judge Donald Stephens held a hearing and issued a temporary restraining order enjoining the relevant clauses of the Act. (R pp 38-41) On 6 January 2017, by consent of the parties and the newly elected Superintendent, the Court extended the temporary restraining order until a decision on the Board's motion for preliminary injunction. (R pp 43-45) On 30 January 2017, the Board moved for summary judgment on counts 1 through 4 of its Complaint. (R pp 46-47)

Given that the Board questioned the facial constitutionality of the Act, the case was assigned to a three-judge panel of Superior Court, Wake County. (R p 42) On 10 March 2017, the Board filed its Verified Amended Complaint to join the Superintendent, in his official capacity, as the State's co-defendant in this action. On 12 April 2017, the State answered and moved to dismiss.³

³ The State's motion to dismiss was converted into a motion for summary judgment. (R p 87)

(R pp 68-73) The Superintendent answered and moved for summary judgment.
(R pp 74-82)

Pursuant to Case Management Orders entered by the three-judge panel, (R pp 48-50), the parties submitted extensive briefs in this matter. On 29 June 2017, the three-judge panel heard the respective positions of all parties. (T pp 3-115)

C. Decision of the Three-Judge Panel.

On 30 June 2017, the three-judge panel issued its Order concluding that the Board failed to show that the Act is facially unconstitutional. (R pp 85-97) The panel observed that “many of the provisions of S.L. 2016-126, particularly those which were not specifically addressed by the Plaintiffs in their briefs and oral arguments, simply shift the details of day-to-day operations, such as hiring authority, from the State Board to the Superintendent.” (R p 90) The judges concluded that those aspects of the Act “fall well within the constitutional authority of the General Assembly to define specifics of the relationship between the State Board of Education and the Superintendent of Public Instruction.” (R p 90)

The three-judge panel considered the aspects of the Act that the Board challenges as unconstitutional. The panel concluded that those provisions of the Act are “not such a pervasive transfer of powers and authorities so as to

transfer the inherent powers of the State Board to supervise and administer the public schools, nor does it render the State Board an ‘empty shell[.]’” (R p 91) The panel therefore held that the Act did not restrict the Board from engaging in its constitutional duties. (R p 91) Addressing the Board’s main three arguments, the court concluded that:

- (1) the General Assembly’s intent in amending N.C. Gen. Stat. §§ 115C-21(a)(5) and 115C-12 was to not to strip the Board of its authority, but to “empower[] the Superintendent to manage day-to-day operations of the school system, subject to general oversight by the State Board[.]”;
- (2) the General Assembly left “the ultimate authority to supervise and administer the school’s funds” with the Board by making the Superintendent’s fiscal authority subject to “all needed rules and regulations adopted by the State Board of Education,”; and,
- (3) the Act did not conflict with any constitutional grant of authority through its emphasis on the Board’s power to adopt “all needed rules and regulations” instead of the power to adopt “policy.”

(R pp 91-93) The three-judge panel therefore granted summary judgment to Defendants. (R p 93) The court stayed the effect of its order and enjoined the

enforcement of the Act for a period of 60 days, anticipating the Board's appeal. (R pp 85-97)

The Board did appeal to the Court of Appeals. (R p 98) Thereafter, the Board requested an additional stay from the three-judge panel. The court granted that request in part. The Board requested an additional stay from this Court by writ of supersedeas, and moved for discretionary review prior to a determination by the Court of Appeals. This Court granted a partial stay, allowed discretionary review prior to consideration by the Court of Appeals, and ordered expedited briefing that placed this case on a parallel schedule with a companion case filed by the Board.

DISCUSSION OF LAW

Standard of Review

"Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). "If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-530, 187 S.E. 781, 784 (1936).

This Court reviews constitutional questions *de novo*. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016). In exercising

its *de novo* review, the Court presumes that laws enacted by the General Assembly are constitutional. *Baker*, 330 N.C. at 334-35, 410 S.E.2d at 889. Plaintiffs bear the burden of showing that the constitutional violation is plain and clear. *State ex rel. Martin v. Preston*, 325 N.C. 438 at 449, 385 S.E.2d 473 at 478 (1989).

Argument

I. The History of North Carolina's Constitution Reflects a Three-Prong Design of the State's Public Education System.

The Board's historical argument suggests that the framers of North Carolina Constitution sought to elevate the Board's educational responsibilities above those of the General Assembly and the Superintendent. (Board's New Br pp 21-38) Yet, a study of textual transformations in the constitutional text highlights the framers' intent to design a three-prong system of statewide public education, dividing various responsibilities between the General Assembly, the Board, and the Superintendent. At the same time, our constitutional history reflects one constant: through its ability to enact laws, the General Assembly has a principal role in shaping the State's secondary education. The authority of the Board and the Superintendent over public schools was subject, in various permutations, to laws enacted by the Legislature. Meanwhile, the Superintendent's and the Board's powers, and even the composition of the Board, shifted and fluctuated over time.

The pertinent constitutional history, discussed *infra*, shows that the Board's authority over the State's schools is not exclusive; it is limited and shared. By constitutional design, as the "chief administrative officer of the State Board of Education[.]" the Superintendent leads the day-to-day management of the public school system pursuant to the Board's directions. N.C. Const., Art. IX, Sec. 4(2). The framers' intended for the General Assembly to have the power to shape particulars of that relationship, and to enact laws that may limit and define the extent of the Board's and the Superintendent's authority over public education.

A. Framers' Narrowed and Focused the Scope of the Board's Powers.

In the interests of convenience and brevity, with respect to the constitutional evolution of the Board's role in the field of public education, the State relies on and incorporates the constitutional history argument from its Brief in the companion case. (N.C. Docket No. 110PA16-2 State's New Br pp 20-30) Three points pertaining to the history of our Constitution are nevertheless worthy of specific reference here.

First, the General Assembly's authority over State education predates the formation of the Board and the Superintendent. As the Board appropriately recognizes on its official website, the General Assembly actually created both: the predecessor of the Board (Directors of the Literary Fund – to which powers the Board later succeeded) and the predecessor of the

Superintendent (the Office of General Superintendent of Common Schools). “History of SBE,” Chapter One: The Beginning of North Carolina’s Public Schools & The Literary Fund, North Carolina State Board of Education, <https://stateboard.ncpublicschools.gov/about-sbe/history/chapter-one> (last accessed 10 January 2018).

Second, the framers made a deliberate choice in 1942 to limit the Board’s authority by providing that “[a]ll the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.” *Guthrie v. Taylor*, 279 N.C. 703, 710, 185 S.E.2d 193, 198 (1971) (quoting from 1868 N.C. Const. (amended 1942), Art. IX, Sec. 9). As explained in *Guthrie*, that constitutional language “was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly.” *Id.* The framers further expanded the General Assembly’s oversight of the matters affecting secondary education, beyond the power to revise and repeal the Board’s rules and regulations, through the 1942 Amendment to the 1868 Constitution. (See N.C. Docket No. 110PA16-2 State’s New Br pp 28-30)

Finally, the constitutional history also teaches that the framers specifically considered and rejected the options of (1) vesting the Board with the task of “*exclusive*’ supervision and administration of the public schools and

the State funds provided therefor,” and (2) eliminating “from the Constitution all references to the Board of Education and Superintendent of Public Instruction[.]” (N.C. Docket No. 110PA16-2 Board’s New Br App pp 76-78) (discussing the 1932 Education Report) The language giving the “exclusive” authority to the Board did not make it into the text of 1971 Constitution, resulting in the present day three-pronged public education system, with the General Assembly’s overarching legislative oversight responsibilities.

Today, unlike the General Assembly or Superintendent, only two of the Board’s members are directly elected by the people. The current authority of the State Board is set forth in a single paragraph of the 1971 Constitution:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, *subject to laws enacted by the General Assembly.*

N.C. Const., Art. IX., Sec. 5 (emphasis added). The 1971 Constitution, in plain and unambiguous language, establishes that the Board’s authority to supervise and administer free public schools, and its educational funds, is subject to laws enacted by the Legislature.

B. The Framers Envisioned the Superintendent's Constitutional Role as a Direct, Day-to-Day Administrator of a Statewide School System.

The Superintendent has served as a member and the executive leader of the Board from the beginning. Pursuant to 1868 Constitution, the State Board was composed of all the State executive branch officers. Yet, the framers singled out only two elected officials to emphasize their significance in the administration of education: the Governor was named the President, and the Superintendent was named the Secretary of the Board.⁴ 1868 Const., Art. IX, Sec. 8.

Through a sequence of constitutional amendments throughout the next century, the Superintendent's role has been described in various terms. The 1942 amendment, for example, specifically provided that alongside the Board, the "State Superintendent of Public Instruction shall have *general supervision* of the public schools." 1868 Const. (amended 1942), Art. IX, Sec. 9 (emphasis added).

This language was amended in 1944 to provide that "[t]he State Superintendent of Public Instruction shall be *the administrative head of the*

⁴ The term "Secretary" does not denote a clerical role in the North Carolina governmental hierarchy. The term "Secretary" is frequently used to refer to executive leaders of various governmental entities; for example, Secretary of the North Carolina Department of Natural and Cultural Resources, North Carolina Secretary of State, Secretary of the North Carolina Department of Health and Human Services.

public school system and shall be secretary of the board.” 1868 Const. (amended 1944), Art. IX, Sec. 9 (emphasis added). The Board hypothesized below, but presented no evidence, that the intent of the framers in making the 1944 amendment was to take away any of the Superintendent’s powers of direct management over public schools. The framers’ selection of the words “administrative head of the public school system” (describing the Superintendent as the head of the system) itself contradicts the Board’s limiting interpretation of the Superintendent’s role.

Article IX of the 1971 Constitution “has been rearranged to improve the order ... and its language has been modified to eliminate obsolete provisions[.]” (R 9(d) Doc Ex p 108) The November 3, 1970 revisions to the Constitution were editorial and retained the Superintendent’s historical role as the administrative head of the public schools, with inherent constitutional powers to accompany that role. The revisions attempted to eliminate a “potential conflict of authority between the Superintendent and the Board” by providing that “[t]he Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education[.]” 1971 Const., Art. IX, Sec. 4(2). (R 9(d) Doc Ex p 108)

The term “chief administrative officer of the State Board of Education” is not defined in the Constitution. In its Brief, the Board asks this Court to define the present day functions of the Superintendent to what amounts to a

clerical secretary. There is no support for that position in the express intent of the framers, history, or practice.

Under the terms of the 1971 Constitution, the Superintendent continues to be a constitutional officer and an elected member of the Council of State. N.C. Const., Art. III, Sec. 7(1). The Superintendent's role and duties, just as those of the Board, spring from the intent of the framers of the 1971 Constitution. In making a proposal to have the Superintendent appointed, rather than elected by popular vote,⁵ the framers described the "important post" of the Superintendent as "the job of administering a statewide school system ... [that is] difficult and complex one, requiring professional knowledge and ability of a high order." 1968 Report of North Carolina State Constitution Study Commission. (R 9(d) Doc Ex p 112) The framers' description, envisioning a chief executive responsible for "administering a statewide school system," stands in stark contrast to the Board's vision of the Superintendent as a bookkeeper.

The Superintendent's role as "chief administrative officer of the State Board of Education" is accompanied by "inherent constitutional authority" that

⁵ The proposed amendment to the North Carolina Constitution was not submitted to the voters. Nevertheless, the description of the Superintendent by the framers is informative, and squarely contrasts with the Board's position regarding the Superintendent's functions.

is vested by virtue of his constitutional status. See John V. Orth and Paul M. Newby, *"The North Carolina State Constitution"* (R 9(d) Doc Ex pp 82-83) (discussing *State v. Atkinson* (Wake Co. Sup Ct. 2009) (R 9(d) Doc Ex pp 79-95)) The Superintendent's "inherent constitutional authority" includes the power of "administering and managing the North Carolina Department of Public Instruction and administering the North Carolina public school system as directed by the State Board of Education." (Rule 9(d) Doc Ex pp 83, 108) The Board's view of the Superintendent's role as being inconsequential, is at best, mistaken.

The framers intended to make the Superintendent, as an elected representative of the people, the chief executive responsible for the administration of the Board's powers. (T pp 18, 21, 26-27) The Board suggests that the passage of the Act shortly after the general elections makes the law suspect. (State Board New Br pp 2-3) Yet, the timing of the enactment of the Act does not make the enactment constitutionally suspect; the enactment of clarifying legislation during transition is common sense. The Act accomplishes the constitutionally permissible legislative goals of (1) eliminating possible conflicts between the Board and the new Superintendent, (2) enacting legislation to clarify and tighten the distribution of statutory duties in the administration of public education between these two constitutional offices, and (3) establishing that the Superintendent is the head of the Department of

Public Instruction. Contrary to the Board's argument, those objectives are not inconsistent with the framers' intent.

C. The Revisions to the North Carolina Constitution Explicitly Recognize and Broaden the General Assembly's Power to Enact Laws Governing Public Education.

1. The General Assembly Historically Served as a Crucial Authority over the State's Educational Policy.

The General Assembly has always played an important role vis-à-vis the Board and the Superintendent in the field of public education. It is the sturdiest leg of the three-legged design created by the framers. The General Assembly's powers over education generally predate the existence of the Board and the Superintendent. The 1776 Constitution of North Carolina placed educational matters into the hands of the General Assembly by directing "[t]hat a school or schools shall be established by the Legislature, for the convenient instruction of youth [.]" 1776 Const., Sec. XLI (41). At the same time, it contained no references to a Superintendent or a Board; the offices of the Superintendent and the Board did not exist.

The text of the 1868 Constitution, similar to the constitutional language of the present day, delineated that the General Assembly "shall provide by taxation and otherwise for a general and uniform system of Public Schools[.]" 1868 Const., Art. IX, Sec. 2. The document further spelled out that the General Assembly had the ultimate authority to alter, amend or repeal the

Board's acts, rules, and regulations, and that "when so altered, amended or repealed, they shall not be re-enacted by the Board." 1868 Const., Art. IX, Sec. 9.

As the State argues in the companion case, the 1942 Amendment to the 1868 Constitution expanded legislative oversight over the Board, specifically, and over educational matters in general. (N.C. Docket No. 110PA16-2 State's New Br pp 23-28) The amendment explicitly made the Board's constitutional powers subject to laws enacted by the General Assembly.

The 1971 Constitution contains similarly broad authority for the General Assembly to enact laws that limit the Board's authority. (See argument *supra* pp 17-18) The Constitution does not prohibit the General Assembly from enacting laws that affect education in general, and more specifically, the relationship between the members of the Board and the Superintendent. Instead of prohibiting legislation, the current Constitution unambiguously provides that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools," Art. IX, Sec. 2(1), and makes the Board's rulemaking, supervisory and administrative authority on educational matters "subject to laws enacted by the General Assembly." Art. IX, Sec. 5.

2. North Carolina's Precedent Affirms the General Assembly's Constitutional Prerogative to Enact Laws Shaping and Limiting the Board's Powers.

Interpreting the text of the Constitution, our appellate courts have previously held that the General Assembly may enact laws limiting the Board's powers. In *Guthrie v. Taylor*, a public school teacher sued on behalf of himself and all other classroom teachers in the State for a judgment to declare the invalid certain rules and regulations of the Board pertaining to teacher certification. 279 N.C. 703, 713, 185 S.E.2d 193, 200 (1971), *cert. denied*, 406 U.S. 920 (1972). According to that plaintiff, the certification requirements mandated by the Board went beyond the permissible scope of certification requirements found in N.C. Gen. Stat. § 115 (repealed 1981). Accordingly, pursuant to that claim, the Board exceeded its authority under the statute.

In response, this Court noted that the Board derives its power from the Constitution and the General Assembly. *Id.* at 713, 185 S.E.2d at 200-201. The Court then opined that the General Assembly did not "specifically limit[] the authority of the State Board of Education to promulgate or administer rules and regulations" in relation to certification requirements, and in the "the silence of the General Assembly, the authority of the State Board to promulgate and administer regulations . . . was limited only by other provisions in the Constitution, itself." *Id.* at 710, 185 S.E.2d at 198-99. This Court recognized that the Board's constitutionally-derived powers are subject

to the General Assembly's ability to shape and limit the same through legislation.

Likewise, in *State v. Whittle Commc'ns*, 328 N.C. 456, 402 S.E.2d 556, *reh'g denied*, 328 N.C. 735, 404 S.E.2d 878 (1991), this Court held that local boards of education, rather than the Board, have complete and ultimate control over supplementary instructional materials in public schools, pursuant to the General Assembly's grant of such powers to the local boards. *Id.* at 464-65, 402 S.E.2d at 560-61. The Court noted that the "Constitution, which grants the State Board the authority ..., also limits this authority by making it 'subject to the laws enacted by the General Assembly.'" *Id.* at 464, 402 S.E.2d at 560. The Court's role in analyzing the Board's authority over the State's education system was to "examine our statutes to ascertain whether the General Assembly has enacted laws which would limit the power of the State Board[.]" *Id.* The Board's theory that its power over supplementary materials was grounded in the text of the Constitution itself, and that the Constitution alone limited its authority, was rejected.

Similarly, citing its broad constitutional powers, the Board sought to regulate speech pathologists employed in public schools, despite contrary rules in the Licensure Act for Speech and Language Pathologists. *N.C. Bd. of Exam'rs for Speech & Language Pathologists & Audiologists v. N.C. State Bd.*

of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996), *aff'd in part, disc. rev. improvidently all'd in part*, 345 N.C. 493, 480 S.E.2d 50 (1997). The Court of Appeals rejected the Board's claim of "plenary power" under the Constitution, and concluded that the Board's authority to administer public education is subject to other laws of the General Assembly, and are specifically limited by the Licensure Act. *Id.* at 20-21, 468 S.E.2d at 830 (observing that "[t]he Licensure Act ... provides explicit limitations upon the Board of Education and DPI. The Act ... is unquestionably constitutionally sound under *Guthrie*[,] cited *supra*).

The Court of Appeals in *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, likewise emphasized that "[N.C. Const. art. IX, sect. 5] constitutional grant of powers to 'the Board' may be limited and defined by 'laws enacted by the General Assembly.'" 195 N.C. App. 348, 351, 673 S.E.2d 667, 670, *cert. denied, app. dismiss'd by*, 363 N.C. 663, 687 S.E.2d 296 (2009).

Our State's appellate jurisprudence demonstrates that the Legislature can constitutionally limit the Board's Art. IX, Sec. 5 authority to supervise, administer, and oversee funds for the free public schools.⁶

⁶ The Board relies largely on decisions from the other states (Wyoming, Arizona, Idaho, North Dakota, Montana and West Virginia) in its argument that H.B. 17 is an unconstitutional transfer of power in North Carolina. (Board's New Br pp 33-35) That reliance is misplaced for four reasons. First, none of those states structure the administration of their public school systems in the same way that the North Carolina Constitution does. Second, in contrast

3. The General Assembly Has Altered the Division of Specific Duties Between the Board and the Superintendent in the Past.

The three-judge panel appropriately recognized that “[t]he allocation of powers and duties between [the Superintendent and the Board] has changed over time such that there has been an ebb and flow of the powers of each entity over the years, depending on various acts of legislation.” (R p 90)

Prior to 1995, the duties of the Superintendent were not subject to the “direction, control and approval” of the Board. Instead, the Superintendent was recognized as the constitutional head of the public school system. (*See* R 9(d) Doc Ex pp 308-10 summarizing 1995 statutory changes). Prior to 1995, the Board did not head the Department of Public Instruction. (*Id.*) Sess. Law 1995-72 (enacted 9 May 1995), and Sess. Law 1995-393 (enacted 10 July 1995) shifted portions of the Superintendent’s historical and statutory authority to the Board. (R 9(d) Doc Ex pp 114-17) In essence, that legislation modified N.C. Gen. Stat. §§ 115C-19, 115C-21, 143A-39, 143A-40, and 143A-42 by limiting

to this case, none of the cases from the other states implicated the delineation of responsibilities between two public offices, both constitutionally charged with duties and powers over education. Third, in contrast to the facts in this case, none of the cases cited by the Board contained the language explicitly preserving the Board’s big-picture power to govern public education through rules and regulations. Finally, those cases did not feature a large number of important powers left intact in the aftermath of the challenged legislation. The State incorporates by reference the additional argument distinguishing these out-of-state cases in the Superintendent’s New Br pp 29-32.

the scope of the Superintendent's authority, and granting additional powers to the Board.

In keeping with Sess. Laws 1995-72 and 1995-393, the Act amends N.C. Gen Stat., Art 115C and 143B to again clarify the respective roles of the Board and the Superintendent in the permissible manner described in more detail *infra*. That realignment reinstates the Superintendent's pre-1995 duties, gives the position specific statutory duties in managing several educational matters, and preserves the Board's obligations to set educational priorities through the promulgation of rules and regulations.

II. The Act Is a Constitutionally Sound Reallocation of Statutory Duties Between the Superintendent and the Board.

Where two different interpretations of a law are possible, one being constitutional and the other being unconstitutional, a courts must adopt the former. *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-315 (1991). Ultimately, "[a] statute will not be declared unconstitutional unless its unconstitutionality is so clear that no reasonable doubt can arise, or the statue cannot be upheld on any reasonable ground." *Concord v. All Owners of Taxable Property, etc.*, 330 N.C. 429, 432, 410 S.E.2d 482, 483 (1991).

When viewed in light of these seminal principles, the Constitution does not require invalidation of the Act.

A. The Act Does Not Eliminate the Board's Powers to Supervise and Administer the Public School System.

The Board argues that the Act "reassigns" or transfers its constitutional authority to the Superintendent, and "eliminates" the Board from the field of education. (Board's New Br pp 7-12, 18-21) The Board's argument ignores much of the text of the statute it now challenges.

In actuality, the Board's general supervisory and administrative authority over education is recognized and preserved in the Act. Section 2 of the Act (amending N.C. Gen. Stat. § 115C-12) unambiguously declares that "[t]he general supervision and administration of the free public school system shall be vested in the State Board of Education." It further specifies that the Board "shall establish all needed rules and regulations for the system of free public schools[.]" S.L. 2016-126, Sec. 2 (amending N.C. Gen. Stat. § 115C-12). The Act then limits the scope of the Superintendent's authority by declaring that he or she "shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction." In that regard, the Board continues its role in instituting policies, rules, and regulations that concern the administration of the State's public schools, while the Superintendent oversees the execution of the Board's rules and

regulations, and supports and provides assistance to the Board. *See* S.L. 2016-126 (amending N.C. Gen. Stat. §§ 115C-11, -12, -19 and -21, -410, -535).

With its challenge, the Board inventories the statutory changes as a result of the enactment of the Act. (Board's New Br pp 9-12). However, the Board neither attempts to explain what each of these changes means, nor purports to show how these changes, individually or in their totality, are contrary to the text of the Constitution. As the three-judge panel correctly concluded, most of the amendments made through the Act simply shift to the Superintendent some portion of statutory duties that General Assembly had been previously delegated to the Board.

The table below summarizes the substance of the pertinent statutory changes proposed in the Act:

Amended N.C. Gen. Stat. §§	Brief Summary of Pertinent Statutory Changes
115C-11	<ul style="list-style-type: none">• Permits the Superintendent to appoint student advisors and superintendent advisor, as advisors to the Board.• Authorizes the Superintendent to "provide technical and administrative assistance, including all personnel ... to the State Board of Education through the Department of Public Instruction." (R p 19) The Board is also authorized to appoint additional four personnel positions to support its operations. N.C. Gen. Stat. § 115C-11(j).

115C-12	<ul style="list-style-type: none">• Retains, in an unchanged form, all specifically defined powers and duties of the Board, subsections (1) through (45).• Reaffirms that “[t]he general supervision and administration of the free public school system shall be vested in the State Board.”• States that the Board “shall establish all needed rules and regulations for the system of free public schools[.]”• Provides that the Superintendent “shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction.”
115C-19	<ul style="list-style-type: none">• Highlights Sections 7 and 8 of Article III of the North Carolina Constitution by emphasizing that the Superintendent “shall be an elected officer and Council of State member and shall carry out the duties prescribed under G.S. 115C-21 as the administrative head of the Department of Public Instruction.”• Provides that the Superintendent “shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction.”

115C-21	<ul style="list-style-type: none">• Requires the Superintendent "to administer the funds appropriated for the operation of the Department of Public Instruction, in accordance with all needed rules and regulations adopted by the State Board of Education, and to enter into contracts for the operations of the Department of Public Instruction."• Reiterates the Superintendent's staff appointment and staff services' powers.• Makes the following substitution describing the Superintendent's duties "<u>To manage have under his or her direction and control, all these matters</u> relating to the <u>direct</u> supervision and administration of the public school system that the State Board delegates to the Superintendent of Public Instruction system."• Adds the requirement that the Superintendent shall "administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units."• Makes other adjustments in description of the Superintendent's duties reflecting his role as a secretary of the Board and head of the Department.
	<ul style="list-style-type: none">• Leaves intact the provision that "[t]he Board shall have general supervision and administration of the educational funds provided by the State and federal governments, except those mentioned in Section 7 of Article IX of the State

115C-408	<p>Constitution, and also excepting such local funds as may be provided by a county, city, or district.”</p> <ul style="list-style-type: none">• Adds the clause requiring the Superintendent to “administer any available educational funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education.”
115C-410	<ul style="list-style-type: none">• Provides that “[t]he Board is authorized to adopt all needed rules and regulations related to the creation and administration of special funds within the Department of Public Instruction to manage any funds received as grants from nongovernmental sources in support of public education.”• Specifies that “[i]n accordance with the State Board's rules and regulations, the Superintendent of Public Instruction is authorized to create and administer such special funds and to accept, receive, use, or reallocate to local school administrative units” the above gifts and grants.
126-5(d)	<ul style="list-style-type: none">• Permits the Superintendent to designate and to reverse a number of exempt status positions in the Department of Public Instruction.
143-745(a)(1)	<ul style="list-style-type: none">• Removes the Board as the head of the Department of Public Instruction.

143-44.1	<ul style="list-style-type: none">• Makes Superintendent of Public Instruction the head of the Department of Public Instruction.
143A-44.3	<ul style="list-style-type: none">• Minor tweaks. Retains language allowing the Board to delegate duties to the Superintendent.
Repeals 14-234(d6).	<ul style="list-style-type: none">• Repeals the exemption of the Board's chief executive employment contract from direct benefit limits on public contracting.
115C-75.5(4)	<ul style="list-style-type: none">• Permits the Superintendent to appoint the superintendent of Achievement School District ("ASD").
115C-75.6	<ul style="list-style-type: none">• Provides a shared scope of duties over ASD to the Superintendent.
115C-150.11	<ul style="list-style-type: none">• Retains the Board as the governing head of the Governor Morehead School for the Blind, the Eastern North Carolina School for the Deaf, and the North Carolina School for the Deaf. Clarifies that the Superintendent through the Department of Public Instruction has administrative duties over these schools.
115C-218	<ul style="list-style-type: none">• Makes several organizational changes to the composition of the statutorily-created North Carolina Charter School Advisory Board and the Office of Charter Schools.

<p>115C-218.20(b);</p> <p>115C-238.73(g);</p> <p>115C-332(g);</p> <p>115C-333(e);</p> <p>115C-333.1(g);</p> <p>115C-390.3(c);</p> <p>116-239.12(g); and</p> <p>143B-146.16(g)</p>	<ul style="list-style-type: none">• Changes in these statutes add protection/immunity for the Superintendent, alongside the Board, from civil liability for certain acts or omissions.• Changes in these statutes add protection/immunity for the Superintendent, alongside the Board, from civil liability for certain acts or omissions. (continued)
<p>115C-521</p>	<ul style="list-style-type: none">• Clarifies that the School Planning Division is the constituent unit of the Department of Public Instruction.
<p>115C-535</p>	<ul style="list-style-type: none">• Authorizes the Superintendent to operate insurance system for public school property "in accordance with all needed rules and regulations adopted by the State Board of Education" and consistent with policies of the State Human Resources Commission.
<p>Amends Sess. Laws 2015-241</p>	<ul style="list-style-type: none">• Clarifies certain duties of the Department of Public Instruction concerning the reduction of the Department's budget.

Sect. 29 and 30 of Sess. Laws 2016-126	<ul style="list-style-type: none">• Sec 29 directs the Board to revise its rules and regulations in accordance with S.L. 2016-126;• Sec 30 states that the intent of S.L. 2016-126 is “to restore authority to the Superintendent of Public Instruction as the administrative head of the Department of Public Instruction and the Superintendent’s role in the direct supervision of the public school system.”
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Most of the summarized changes are statutory amendments designed to highlight the direct, daily role of the Superintendent in carrying out the Board’s rules and regulations. The decisions in *Guthrie*, *Whittle Commc’ns*, *Sugar Creek*, and *Speech Pathologists*, cited *supra*, all recognize the General Assembly’s power to enact laws to create and shape the statutory duties of the various entities that administer the education system, as well as laws limiting the Board’s authority. In that sense, the Board does not contend that the General Assembly must be restrained in its allocation of statutory, rather than constitutional, duties; the General Assembly is not prohibited from statutorily limiting the Board’s powers.

As long as the Board continues to supervise and administer public school system, as it does in the aftermath of the Act and as shown *infra*, the General Assembly’s allocation of the statutory duties to the Superintendent is within its legislative authority. The Act’s clarification of the general, governing

authority of the Board in educational matters, and the day-to-day, direct role of the Superintendent in administering such policies as the head of the Department of Public Instruction, is not constitutionally suspect.

Further, the Act reflects legislative recognition of the practical realities of administering the public school system, where the Board meets once a month, while the Superintendent manages the public school system, in his capacity as a chief executive, on a daily basis. (R 9(d) Doc Ex pp 261-62), N.C. Gen. Stat. § 115C-11(b). The general rule in North Carolina is that absent "constitutional restraint, questions as to public policy are for legislative determination." *Whittle Commc'ns*, 328 N.C. at 470, 402 S.E.2d at 564 (quoting *Gardner v. N.C. State Bar*, 316 N.C. 285, 293, 341 S.E.2d 517, 522 (1986)). The Constitution permits the General Assembly to make a policy choice to highlight the Superintendent's direct, executive role in managing the public education as the head of the Department of Public Instruction and chief administrative officer of the Board.

A 10 December 1985 Attorney General Opinion explained that "the framers of the Constitution intended to make the Superintendent of Public Instruction, as the elected representative of the people, responsible for administration of the powers conferred upon the State Board of Education." (R

9(d) Doc Ex pp 363-64)⁷ According to that opinion, the Superintendent was to perform his constitutional responsibilities on "a day-to-day basis[.]" (R 9(d) Doc Ex p 364)

The Act comports with that opinion. Contrary to the Board's argument, the general principle that the legislature cannot abolish the Board's constitutional powers, (as acknowledged by the State from the outset in this litigation and further expressed in 1994 Op. N.C. Att'y Gen. 41 and 1995 Op. N.C. Att'y Gen. 32), is not violated by the reallocation of a number of statutory duties to the Superintendent pursuant to the new law. The Act is a proper legislative exercise to strengthen the role of the Superintendent as the head of the Department of Public Instruction, and to clarify the roles of the Superintendent and the Board in administration of public schools.

B. The Board Continues to Have Broad Power to Supervise and Administer Secondary Education in the Aftermath of the Act.

The Board is wrong when it argues that the Act reduces it to an "empty shell." Contrary to the Board's contention, the State has not conceded that the Act "strip[ped] the Board of its constitutional powers to supervise and administer the public school system[.]" (Board's New Br p 14) Indeed, S.L.

⁷ Contrary to the Board's suggestion, there is also little constitutional significance to Superintendent serving as a nonvoting (rather than voting) member of the State Board, as "[t]he chief administrative officers of governmental agencies sometimes serve as nonvoting, presiding officers of those agencies." (See R 9(d) Ex p 362) (10 December 1985 Op. N.C. Att'y Gen.)

2016-126 does no such thing. More significantly, the Board's position that it has been stripped of the authority to supervise and administer the public school system is belied by (1) the language of the Act which ensures that the Superintendent's "day-to-day" executive authority is carried out in accordance with rules and regulations adopted by the Board, and (2) the remaining statutory scheme granting the Board wide-ranging powers over issues affecting public education.

On the first point, as noted above, the Act itself reiterated in several sections the important role the Board continues to play in administering both the public school system, and the funds provided for its support. *See supra* pp 27-36. In fact, the Act's repeated focus on preserving the Board's power to enact mandatory "rules and regulations" (rather than nonbinding guidelines and policies) ensures that the Board's supervisory and administrative actions are binding upon the Superintendent and other stakeholders. (See T pp 82-84, 106)

On the second point, N.C. Gen. Stat. § 115C-12 continues to grant a wide scope of duties to the Board. Additionally, chapter 115C of the General Statutes retains a large number of the Board's important powers with regard to the supervision and administration of public schools. These powers include, but are not limited to:

- The authority vested in the Board by subsections (1) through (45) of N.C. Gen. Stat. § 115C-12 (among them are powers to make budget and request expansion of funds, apportion funds, establish and regulate teacher salaries, adopt textbooks, establish standard course of study and graduation requirements, provide education research, adopt policies, rules and regulations for school transportation, monitor acts of school violence, monitor the state of school profession, establish alternative learning programs and others);
- To approve classification, transfer, enlargement, merger and consolidation of the State's school districts, N.C. Gen. Stat. ch. 115C, Art. 7;
- To administer, alongside the Superintendent, the Achievement School District, and Innovation zones for low-performing schools, N.C. Gen. Stat. §§ 115C-75.6 through -75.13;
- To adopt, implement and revise the State's Basic Education Program, N.C. Gen. Stat. § 115C-81;
- To develop, implement and continuously evaluate the statewide Read to Achieve Program, N.C. Gen. Stat. § 115C-83.4;
- To ensure kindergarten level student entry assessment, N.C. Gen. Stat. § 115C-83.5;

- To develop and provide early grade reading assessments to public schools, N.C. Gen. Stat. § 115C-83.6;
- To develop and ensure accountability and compliance with the statewide grade promotions and retention standards; N.C. Gen. Stat. §§ 115C-83.7 through -83.10
- To implement the statewide program awarding school achievement, growth and performance grades and scores, N.C. Gen. Stat. § 115C-83.15;
- To select and adopt textbooks (and a standard course of study at each grade level) for use in the public schools, N.C. Gen. Stat. §§ 115C-85 through -102;
- To propose, revise and approve the State School Technology Plan, and to control and direct the State School Technology Fund, N.C. Gen. Stat. §§ 115C-102.5 through -102.6D;
- To grant certain waivers to local boards of education of State laws and rules, N.C. Gen. Stat. § 115C-105.26;
- To develop strategies for parent involvement, safe and orderly learning environment and conflict resolution programs, N.C. Gen. Stat. §§ 115C-105.32, - .33;

- To design and implement an accountability system for annual performance evaluation for each school in the State, N.C. Gen. Stat. § 115C-105.35;
- To identify and approve improvement plans, provide assistance teams and other improvement measures for low-performing schools, N.C. Gen. Stat. §§ 115C-105.37 through -105.41
- To ensure appropriate and free public education for children with disabilities, including compliance with the requirements of the state and federal IDEA laws, e.g., N.C. Gen. Stat. § 115C-107.2.

Chapter 115C of the General Statutes features many other examples of the Board's continued authority to supervise and administer public education in North Carolina. The Board's general supervisory and administrative powers over the public school system have not been unconstitutionally limited by the Act.

The Board also argues that the Act "attempts to transfer to the [Superintendent] the Board's constitutional power to supervise and administer the public school system's funds." (Board's New Br pp 11-12) This contention is similarly without merit.

With regard to fiscal affairs, the General Assembly left unchanged the sentence of N.C. Gen. Stat. § 115C-408(a) recognizing that "[t]he Board shall

have general supervision and administration of the educational funds provided by the State and federal governments.” S.L. 2016-126, Sec. 5. Pursuant to the the Act’s rewrite, the Board should exercise these general fiscal powers by adopting rules and regulations regarding “available educational funds.” *Id.* The Superintendent is expressly bound by the Board’s rules and regulations in administering the funds. *Id.*

In addition to the above general recognition of its fiscal authority, the Board continues to exercise a number of specific financial powers, the vast majority of which are unaffected by the Act:

- To accept, receive, use or reallocate federal funds and aid for improvement to the public school program, N.C. Gen. Stat. § 115C-409;
- To administer special funds received as grants from nongovernmental sources by adopting rules and regulations which bind the Superintendent, N.C. Gen. Stat. § 115C-410;
- To invest school funds, N.C. Gen. Stat. § 115C-411;
- To purchase land at mortgage sales, N.C. Gen. Stat. § 115C-412;
- To adjust debt for land or property sold by the Board; N.C. Gen. Stat. § 115C-413;

- To take, hold and convey property of the abolished commissions and boards to which powers the Board succeeded, N.C. Gen. Stat. § 115C-414;
- To provide “for the enrichment and strengthening of educational opportunities for the children of the State,” and to allot funds for teachers and other personnel to local school administrative units, N.C. Gen. Stat. § 115C-416;
- To promulgate a uniform budget format for local school units, and make revenues available for capital outlay purposes, N.C. Gen. Stat. § 115C-426;
- “[T]o issue rules and regulations having the force of law” regarding disbursement of money allocated to local school units by the State, and inquire and investigate internal procedures of local school units with respect to money, N.C. Gen. Stat. § 115C-436;
- To exercise various measures of fiscal control over disbursement of State funds by local boards, N.C. Gen. Stat. § 115C-438, -440, -441, -442, -447, -451;
- To administer qualified zone academy and qualified school construction bond programs; N.C. Gen. Stat. § 115C-489.6.

The Board's power to supervise educational funds provided for the system's support has therefore not been unconstitutionally withheld by the Act. N.C. Const., Art. IX, Sec. 5.

The Board has failed to show, through constitutional analysis or by citing to any facts, that the Act transgresses any limits on the General Assembly's power to enact laws related to education. The Act should therefore be declared a valid exercise of the General Assembly's power to enact laws affecting public education.

To the extent the Court finds that one or more sections of the Act are unconstitutional, the State incorporates by reference and relies upon the severability argument presented by the Superintendent. The Court should sever the unconstitutional provisions, if any, and uphold the validity of the remaining sections of the law.

CONCLUSION

For the foregoing reasons, this Court should affirm the three-judge panel's decision.

Respectfully submitted, this the 16th day of January, 2018.

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N.C. R. App. P. 33(b) Certification:
I certify that the attorney listed
below has authorized me to list his
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