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No. COA 17-1259

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA STATE  
BOARD OF EDUCATION,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

From Wake County  
No. 16-CVS-15607

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Respectfully submitted, this 14<sup>th</sup> day of November, 2017.

COUNSEL FOR PLAINTIFF-  
APPELLANT NORTH CAROLINA  
STATE BOARD OF EDUCATION:

**ROBERT F. ORR, PLLC**

By: 

*for* Robert F. Orr *by AHE w/permission*  
N.C. State Bar No. 6798  
orr@rforrlaw.com  
3434 Edwards Mill, Ste. 112-372  
Raleigh, NC 27612  
Telephone: (919) 608-5335

COUNSEL FOR PLAINTIFF-  
APPELLANT NORTH CAROLINA  
STATE BOARD OF EDUCATION:

**POYNER SPRUILL LLP**

By: 

Andrew H. Erteschik  
N.C. State Bar No. 35269  
aerteschik@poynerspruill.com  
Saad Gul  
N.C. State Bar No. 35320  
sgul@poynerspruill.com  
P.O. Box 1801  
Raleigh, NC 27602-1801  
Telephone: (919) 783-2895  
Facsimile: (919) 783-1075

John M. Durnovich  
N.C. State Bar No. 47715  
jdurnovich@poynerspruill.com  
301 S. College St., Suite 2900  
Charlotte, NC 28202  
Telephone: (704) 342-5250  
Facsimile: (704) 342-5264

COUNSEL FOR DEFENDANT-  
APPELLEE THE STATE OF  
NORTH CAROLINA:

**NORTH CAROLINA  
DEPARTMENT OF JUSTICE**

By: 

*for* Amar Majmundar *by AHE w/permission*  
N.C. State Bar No. 24668  
amajmundar@ncdoj.gov  
Olga E. Vysotskaya de Brito  
N.C. State Bar No. 31846  
ovysotskaya@ncdoj.gov  
114 W. Edenton Street  
Raleigh, NC 27603  
Telephone: (919) 716-6820  
Facsimile: (919) 716-6759

COUNSEL FOR DEFENDANT-  
APPELLEE MARK JOHNSON,  
SUPERINTENDENT OF PUBLIC  
INSTRUCTION:

**BLANCHARD, MILLER,  
LEWIS & ISLEY P.A.**

By: 

*for* Philip R. Isley *by AHE w/permission*  
N.C. State Bar No. 19094  
pisley@bmlilaw.com  
Philip R. Miller, III  
N.C. State Bar No. 19171  
pmiller@bmlilaw.com  
E. Hardy Lewis  
N.C. State Bar No. 18272  
hlewis@bmlilaw.com  
1117 Hillsborough Street  
Raleigh, NC 27603  
Telephone: (919) 755-3993  
Facsimile: (919) 755-3994

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

Plaintiff,

v.

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

Defendants.

**MEMORANDUM IN SUPPORT  
OF PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT  
AND MOTION FOR  
PRELIMINARY INJUNCTION**

Pursuant to the Court's March 1, 2017 case management order, the North Carolina State Board of Education respectfully submits the following brief in support of its motion for summary judgment and motion for preliminary injunction.

**INTRODUCTION**

This constitutional challenge asks the Court to apply a bedrock principle of constitutional law: that when a constitution expressly confers powers and duties on a specific entity, those powers and duties cannot be transferred to a different entity without a constitutional amendment.

Article IX, Section 5 of the North Carolina Constitution expressly confers certain "powers and duties" on the Board. Those constitutional powers and duties include:

- the power and duty to "supervise . . . the free public school system";
- the power and duty to "administer the free public school system";



- the power and duty to “supervise . . . the educational funds provided for [the free public school system’s] support”; and
- the power and duty to “administer . . . the educational funds provided for [the free public school system’s] support.”

The Board has exercised those powers and fulfilled those duties since its creation in 1868. For the first time in North Carolina history, however, the General Assembly passed legislation in December 2016 that attempted to transfer the Board’s constitutional powers and duties to a single individual: the Superintendent of Public Instruction (“SPI”).

Without an opportunity for input from the Board, the education community, or the public, the General Assembly introduced this legislation (hereinafter “the Transfer Legislation”) in a special legislative session intended to address disaster relief.<sup>1</sup> Less than 48 hours after the Transfer Legislation was first introduced, it passed both the House and the Senate. Three days later, it was signed into law.

The constitutional flaw in the Transfer Legislation was obvious on its face: The General Assembly essentially copied and pasted the text of the North Carolina Constitution into the Transfer Legislation, then replaced the words “State Board of Education” with “Superintendent of Public Instruction.”

The following comparison illustrates this copying and pasting:

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<sup>1</sup> For the Court’s convenience, a copy of the Transfer Legislation is attached as Exhibit A.

Article IX, Section 5 of the North Carolina Constitution	The Transfer Legislation (N.C. Sess. Law 2016-126 § 4)
It shall be the “duty” of “ <i>the State Board of Education</i> . . . [to] supervise and administer the free public school system.”	“It shall be the duty of <i>the Superintendent of Public Instruction</i> . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.”

It takes no effort to spot this constitutional flaw.

For the reasons that follow, the Board is entitled to summary judgment, as well as a preliminary injunction to enjoin the legislation while the Court considers the Board’s motion for summary judgment.

#### STATEMENT OF RELEVANT FACTS

For brevity, the Board incorporates by reference the verified factual allegations of the amended complaint. Am. Compl. ¶¶ 11-26. Additional facts are discussed below where relevant.

#### GOVERNING STANDARDS

The governing standards for each of the Board’s motions are as follows:

##### Motion for Summary Judgment

“In cases ‘where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment.’” *Knight Publ’g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 488, 616 S.E.2d 602, 604 (2005) (quoting *Kessing v. Nat’l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)).

“The purpose of a summary judgment motion is to eliminate a trial when, based on the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are at issue.” *Loy v. Lorm Corp.*, 52 N.C. App. 428, 437, 278 S.E.2d 897, 903 (1981); *Kessing*, 278 N.C. at 534, 180 S.E.2d at 830.

Motion for Preliminary Injunction

A plaintiff is entitled to a preliminary injunction if it is: (1) “able to show likelihood of success on the merits of his case”; and (2) “likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983) (quoting *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)).

A preliminary injunction “is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *Id.* at 400, 302 S.E.2d at 759 (quoting *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357-58, 261 S.E.2d 908, 913, *appeal dismissed*, 449 U.S. 807 (1980)). Its purpose is to “preserve the status quo pending trial on the merits.” *Fayetteville St. Christian Sch.*, 299 N.C. at 357-58, 261 S.E.2d at 913.

When, as in this case, the “principal relief sought is a permanent injunction,” North Carolina courts “have consistently adhered to the proposition” that “it is particularly necessary that the preliminary injunction issue.” *North Carolina Elec. Membership Corp. v. North Carolina Dep’t of Econ. & Cmty. Dev.*, 108 N.C. App.



711, 721, 425 S.E.2d 440, 446 (1993) (quoting *McClure*, 308 N.C. at 408, 302 S.E.2d at 763).

## ARGUMENT

### **I. THE BOARD IS ENTITLED TO SUMMARY JUDGMENT.**

#### **A. Constitutional powers cannot be transferred by statute.**

It is a bedrock principle of constitutional law that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to a different entity without a constitutional amendment. *See, e.g., Guthrie v. Taylor*, 279 N.C. 703, 712-13, 185 S.E.2d 193, 200 (1971) (explaining that Article IX, Section 5 is “a direct delegation by the people, themselves, in the Constitution of the State, of [a] portion of their power,” and, therefore, “we look only to the Constitution to determine what power has been delegated”); *State v. Camacho*, 329 N.C. 589, 597, 406 S.E.2d 868, 871 (1991) (holding that when the North Carolina Constitution expressly confers powers and duties on a constitutional officer, any “encroachment” by the other branches “invade[s] the province of an independent constitutional officer” and violates the North Carolina Constitution); 1995 Op. N.C. Att’y Gen. 32 at 5 (quoting Thomas M. Cooley, *A Treatise on Constitutional Limitations* 215 (8th ed. 1927) (“[I]f powers are specifically conferred by the constitution upon [a] specified officer [or authority], the legislature cannot require or authorize [those powers] to be performed by any other officer or authority.”); Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 760 (1997) (stating the “fundamental proposition that when a state



constitution creates a constitutional office, the legislature may not by mere statute alter the core functions of that office”); Thomas M. Cooley, *A Treatise on Constitutional Limitations* 136 (5th ed. 1883) (stating that when “powers . . . are specially conferred by the constitution upon . . . [a] specified officer, the legislature cannot require or authorize [those powers] to be performed by any other officer or authority”).

Indeed, “[t]his is certainly not a novel concept. That the legislature may not alter a constitutional structure absent a constitutional amendment is so well established in state and federal constitutional law as to be axiomatic.” McGinley, 99 W. VA. L. REV. at 760 (collecting cases).

In short, the law that governs this case is straightforward. Simply put, constitutional powers and duties cannot be transferred by statute.

**B. The Transfer Legislation attempts to strip the Board of its constitutional powers and duties.**

The Board’s 148-year history of managing North Carolina’s public school system is essential to an understanding of the constitutional issue before the Court.

In 1868, the North Carolina Constitution proclaimed that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” 1868 N.C. Const. art. I, § 15. These words have remained unchanged in the North Carolina Constitution since 1868, and they are unique to North Carolina. No other state constitution includes these words or includes any right to education in its citizens’ bill of rights.

To ensure that the State lived up to this promise to “guard and maintain” the right to public education, the people of North Carolina in their 1868 Constitution established the public school system and created the Board.

Article IX, Section 2 of the 1868 Constitution required the General Assembly to “provide by taxation and otherwise for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State.”<sup>2</sup> In turn, Article IX, Section 7 conferred broad, sweeping power on a State Board of Education composed of “[t]he Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General.” Under Article IX, Section 9, the people conferred on the Board the “full power to legislate and make all needful rules and regulations in relation to Free Public Schools, and the Educational Fund of the State.”

In sum, the people of North Carolina in their 1868 Constitution “establishe[d] the public school system,” then required that the “General Assembly provid[e] for it” and “the State Board of Education . . . manage it.” *Lane v. Stanly*, 65 N.C. 153, 157 (1871). For the past 148 years, this constitutional structure has remained unchanged. Since 1868, the Board has supervised and administered all facets of public education in North Carolina.

Today, the North Carolina Constitution continues to confer these broad, sweeping powers and duties on the Board. The current North Carolina Constitution

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<sup>2</sup> For the Court’s convenience, a copy of Article IX of the 1868 North Carolina Constitution is attached hereto as Exhibit B.

was ratified by the voters in 1971. Article IX, Section 5 of the current North Carolina Constitution<sup>3</sup> states:

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.

That constitutional provision means exactly what it says: “The State Board of Education is in charge of the public school system.” John V. Orth and Justice Paul M. Newby, *The North Carolina State Constitution*, at 180 (2d ed. 2013).

The weight of this constitutional responsibility to the people is reflected in the Board’s composition. Under Article IX, Section 4 of the North Carolina Constitution, the Board is composed of “the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session.” Article IX, Section 4 requires that these Board members serve “overlapping terms of eight years.” These lengthy, overlapping terms ensure that the Board maintains its institutional knowledge and expertise in public education.

In addition, Article IX, Section 4 requires that eight of the Governor’s eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

In stark contrast to the broad, sweeping powers and duties that the North Carolina Constitution confers on the Board, the North Carolina Constitution has

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<sup>3</sup> For the Court’s convenience, a copy of Article IX of the 1971 North Carolina Constitution is attached hereto as Exhibit C.



always confined the SPI to a limited role. Article IX, Section 8 of the 1868 Constitution established the SPI as a member “*of the Board*” who served as the Board’s “Secretary.” 1868 N.C. Const. art. IX, § 8 (emphasis added). Today, Article IX, Section 4 of the North Carolina Constitution clarifies that the SPI is not even a voting member of the Board, and serves only as the “secretary and chief administrative officer *of the State Board of Education.*” N.C. Const. art. IX, § 4(2) (emphasis added).

Despite this clear delineation, however, the Transfer Legislation attempts to flip flop the Board’s and the SPI’s constitutionally mandated roles. As described in the amended complaint, the Transfer Legislation does so in two ways:

First, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the public schools. Am. Compl. ¶¶ 25(a)-(b). Most notably, Section 4 of the Transfer Legislation states: “It shall be the duty of the Superintendent of Public Instruction . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.” N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(5)). Thus, the Transfer Legislation attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

Second, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the educational funds provided for the public school system’s support. Am. Compl. ¶¶ 25(c)-(d). Most notably, the



Transfer Legislation states that “it shall be the duty of the Superintendent of Public Instruction to . . . administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.” N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(1b)). Likewise, Sections 3 and 4 state that the SPI, as the head of the Department of Public Instruction, will “administer the funds appropriated for [the Department’s] operation.” *Id.* § 3 (amending N.C. Gen. Stat. § 115C-19); *id.* § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1)). Thus, the Transfer Legislation attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

These constitutional conflicts are readily apparent. As described above, the General Assembly essentially copied and pasted the constitutional text into the Transfer Legislation, then replaced the words “State Board of Education” with “Superintendent of Public Instruction.” *See supra* at 3.

As the Court noted at the TRO hearing, this obvious constitutional flaw makes this case “straightforward.” Exhibit D, Transcript of TRO Hearing at 6. After all, “[i]f there is a conflict between a statute and the Constitution, [the] Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.” *City of Asheville v. North Carolina*, No. 391PA15, 794 S.E.2d 759, 766 (N.C. Dec. 21, 2016). That is the narrow, straightforward relief the Board seeks here.

For these reasons, the Board is entitled to summary judgment.

**C. The phrase “subject to laws enacted by the General Assembly” in Article IX, Section 5 does not permit the Board’s constitutional powers and duties to be stripped away.**

At the TRO hearing, the State initially suggested that the phrase “subject to laws enacted by the General Assembly” in Article IX, Section 5 is a “catchall” that allows the General Assembly to do anything it wants—including stripping the Board of its constitutional powers and duties altogether and transferring them to the SPI. Ex. D at 25.

Later in the hearing, however, the State conceded this issue:

[THE COURT]: Can the General Assembly enact laws that are contrary to the language of the constitution?

[THE STATE’S COUNSEL]: I do not believe they can, your Honor. Well, they can enact laws, but they can be stricken.

[THE COURT]: I don’t think they can either. It seems to me that this Article suggests that the Board shall administer and supervise and shall make rules and regulations consistent with their mandate under the constitution, which would be subject to the laws of the General Assembly, but the General Assembly cannot take away their constitutional mandates.

[THE STATE’S COUNSEL]: I do not believe the General Assembly can do that.

*Id.*

For purposes of summary judgment, that concession is fatal.

Moreover, the State was correct to concede this issue. For at least two distinct reasons, Article IX, Section 5 does not give the General Assembly the prerogative to strip the Board of its constitutional powers and duties and give them to someone else.

First and foremost, the State's requested interpretation of Article IX, Section 5 must be rejected because it has no limiting principle. If the State's requested interpretation were correct, the General Assembly could decide that North Carolina's public school system would be supervised and administered by any government official or entity of its choice—even private entities or individuals.

Nevertheless, the SPI has suggested that he is an appropriate recipient of the Board's constitutional powers and duties because he is a constitutional officer who is elected statewide. That logic is flawed. There are a number of constitutional officers who are elected statewide—for example, the Commissioner of Agriculture, the Commissioner of Labor, and the Commissioner of Insurance. By the SPI's logic, the State's requested interpretation would allow the General Assembly to decide that North Carolina's public school system should be supervised and administered by any one of these individuals.

For precisely that reason, state supreme courts that have considered similar state constitutional language—for example, “subject to laws” or “as prescribed by law”—have “uniformly denounced” the argument that the State makes here. *Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953) (holding that legislature could not reduce constitutional office to an empty shell, and noting further that similar efforts had “uniformly been denounced by courts of last resort”); *see also, e.g., State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986) (holding that legislature's power to modify duties of executive officials was inherently limited and could not deprive an office of all of its basic functions); *Am. Legion Post No. 279 v. Barrett*, 20



N.E.2d 45, 51 (Ill. 1939) (holding that constitutional provision requiring State Treasurer to perform “such duties as may be required by law” implied that the office had certain duties which could not be allocated elsewhere); *Ex parte Corliss*, 114 N.W. 962, 965 (N.D. 1907) (holding that the legislature’s power to prescribe duties for officers did not mean that it had the power to transfer their inherent duties to other officers); *Fant v. Gibbs*, 54 Miss. 396, 409 (Miss. 1877) (holding that legislature’s constitutional right to prescribe the duties and functions of district attorneys incorporated “implied prohibition of the power to deprive them of all duties”); *Love v. Baehr*, 47 Cal. 364, 367 (Cal. 1874) (observing that there are inherent limits on the legislature’s ability to delineate the “necessarily implied” duties and powers of a constitutional officer).

There is a good reason why courts across the country have all safeguarded their state constitutions against the kind of statutory circumvention the State is attempting here: “If . . . constitutional offices can be stripped of a *portion* of the inherent functions thereof, they can be stripped of *all* such functions . . . and the will of the framers of the constitution thereby thwarted.” *State ex rel. Banks v. Drummond*, 385 P.3d 769, 781-82 (Wash. 2016) (en banc) (emphasis added); *see also, e.g., Love*, 47 Cal. at 366 (observing that legislature’s discretion to define constitutional officers’ duties was obviously not unlimited, or it could compel the Treasurer to become a prison warden, the Controller to become a librarian, the Attorney General to become the head of mental health facilities, and the Secretary of State to become the manager of state hospitals); *Corliss*, 114 N.W. at 965



(observing that if legislature could assign duties from County Sheriff and State's Attorney to another entity, nothing could stop it from creating its own Governor or Attorney General).

For this reason alone, the State's argument fails.

The State's requested interpretation of Article IX, Section 5 is also flawed for another reason: It would violate the first and most basic rule of constitutional construction, which requires giving effect to each and every word of the text. *See Town of Boone v. State*, No. 93A15-2, 794 S.E.2d 710, 715 (N.C. Dec. 21, 2016) ("Each word informs a proper understanding of the whole."). This rule requires the Court to "lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." *Bd. of Educ. v. Bd. of Comm'rs*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904) (quoting Thomas M. Cooley, *Cooley's Constitutional Limitations* 92 (7th ed. 1903)); *see also, e.g., Lacy v. Fid. Bank of Durham*, 183 N.C. 373, 380, 111 S.E. 612, 615 (1922) (stating that the constitution should be "construed so as to allow significance to each and every part of it if this can be done by any fair and reasonable intendment").

Here, if "subject to laws enacted by the General Assembly" means that the General Assembly can strip the Board of its constitutional powers and duties, it

would reduce 28 words in the constitutional text to mere surplusage.<sup>4</sup> Under the State's requested interpretation, the Transfer Legislation would rewrite Article IX, Section 5 to read as follows:

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, § 5 (striketrough added).

The 28 words stricken above were carefully chosen by the framers and ratified by the people of North Carolina. Their obvious intent was to confer specific powers and duties on the Board. Thus, to render those 28 words meaningless would violate the first and most basic rule of constitutional construction.

In sum, the phrase "subject to laws enacted by the General Assembly" does not permit the General Assembly to rewrite the North Carolina Constitution by stripping the Board of its constitutional powers and duties and transferring those

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<sup>4</sup> Notably, the State admitted that the Transfer Legislation seeks to reduce the Board to a shell entity that merely makes rules and regulations, instead of one that supervises and administers the public schools, as Article IX, Section 5 requires:

[THE COURT]: So that's what it means when the Constitution says, "It shall be the duty of the State Board of Education to supervise and administer the free public school system?" Is that what that means? The Board will now make rules and regulations?

[THE STATE'S COUNSEL]: That's [what] the [Transfer Legislation] says. Its plain meaning is that they make the rules and regulations.

Ex. D at 29.

powers and duties to anyone it desires. For that reason, the State's only defense is without merit.

**II. THE BOARD IS ENTITLED TO A PRELIMINARY INJUNCTION WHILE THE COURT CONSIDERS THE BOARD'S MOTION FOR SUMMARY JUDGMENT.**

**A. The Board is likely to succeed on the merits.**

As described above, the Board is entitled to summary judgment. *See supra* at 5-16. For the same reasons, the Board has satisfied the first requirement for a preliminary injunction: a likelihood of success on the merits. *McClure*, 308 N.C. at 401, 302 S.E.2d at 759.

Therefore, for purposes of the Board's motion for preliminary injunction, the only remaining questions before the Court are: (1) whether the Board has shown irreparable harm; and (2) whether the balancing of equities favors the Board. *Id.*

**B. The Board has shown irreparable harm as a matter of law.**

As the Court correctly noted in its temporary restraining order, constitutional violations amount to *per se* irreparable harm as a matter of law. Exhibit E, Temporary Restraining Order at 2; *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965); *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 15, 431 S.E.2d 828, 834 (1993). Thus, in a constitutional challenge like this one, the irreparable-harm analysis simply collapses into a merits analysis. *See, e.g., Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002); *Dean v. Leake*, 550 F. Supp. 2d 594, 602 (E.D.N.C. 2008).



Here, as described above, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional. Thus, as the Court correctly concluded in its TRO, no further showing of irreparable harm is required. Ex. E at 2.

Even without this *per se* irreparable harm, however, the Board would still be entitled to a preliminary injunction to preserve the status quo for the public school system's 1.5 million students. As described in the affidavit of the Board's Chairman, William W. Cobey, Jr., without a preliminary injunction to preserve the status quo, the Transfer Legislation would reduce a 148-year-old constitutional entity to an empty shell, and would move the entire \$10 billion public school system under the control of a single individual for the first time in North Carolina's history. Exhibit F, Cobey Aff. ¶ 9. What is more, in the absence of a preliminary injunction, this dismantling of the Board's constitutional powers and duties would occur instantly. *Id.*

In addition, without a preliminary injunction to preserve the status quo, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI would immediately be empowered to unilaterally hire and fire the State's public school system employees, fire members of the Board's staff, determine whether certain state public school system positions should be exempt from state personnel laws, execute new statewide contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing



contracts involving tens of millions of dollars. Ex. F ¶ 10. These actions would be impossible to undo after the fact. *Id.*

Simply put, without a preliminary injunction to preserve the status quo, it would be impossible for the Board to “unring the bell.” This feature of the case, by itself, warrants a preliminary injunction.

**C. A balancing of the equities counsels in favor of a preliminary injunction.**

In addition to the two preliminary-injunction elements described above, the Court must perform “a careful balancing of the equities.” *McClure*, 308 N.C. at 400, 302 S.E.2d at 759 (quoting *Berry*, 293 N.C. at 701, 239 S.E.2d at 574). Notably, the State has conceded this issue:

[THE COURT]: And that [would be] a fairly easy balancing test, wouldn't it? A theoretical harm to the State and a real, practical harm to an agency that's constitutionally mandated to care for the public school children of the state.

[THE STATE'S COUNSEL]: Yes, sir.

Ex. D at 34.

The State was correct to concede this issue. As described above, the Transfer Legislation will cause *per se* irreparable harm unless it is preliminarily enjoined. Moreover, as described above, the Transfer Legislation would dismantle a constitutional entity that has been in charge of public education for 148 years, and instead, empower a single individual to take charge of public education—immediately empowering him to take actions that could not be undone. These equities counsel strongly in favor of the Board.

Conversely, a preliminary injunction would not harm the State at all. The Board has exercised its constitutional powers and fulfilled its constitutional duties for nearly a century and a half. Surely the State could not be harmed by maintaining this longstanding status quo during the relatively short time it will take this case to make its way through the courts.

Finally, the State lacks a non-political justification for the Transfer Legislation.<sup>5</sup> Ex. F. ¶ 11. This makes balancing the equities simple. Again, Article I, Section 15 of the North Carolina Constitution declares that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. Const. art. I, § 15. As Chairman Cobey’s affidavit notes, “guarding and maintaining that right should always be above politics.” Ex. F ¶ 11.

For these reasons, a balancing of the equities weighs in favor of a preliminary injunction.

### CONCLUSION

The Board respectfully requests that the Court grant its motion for summary judgment and grant its motion for a preliminary injunction to enjoin the Transfer Legislation while the Court considers the Board’s motion for summary judgment.

---

<sup>5</sup> The TRO hearing featured the following exchange:

[THE COURT]: When did [any constitutional ambiguity] arise? I wonder . . . when the ambiguity arose. Could it have been late on the evening of November the 8th or 9th [Election Night 2016] or something like that? Is that when the ambiguity arose?

[THE STATE’S COUNSEL]: It’s possible, Your Honor.


Ex. D at 15.

Respectfully submitted the 12th day of April, 2017.

**ROBERT F. ORR, PLLC**

**POYNER SPRUILL LLP**

By:



for Robert F. Orr by AHE  
N.C. State Bar No. 6798  
orr@rforrllaw.com  
3434 Edwards Mill, Suite 112-372  
Raleigh, North Carolina 27612  
Telephone: (919) 608-5335

**COUNSEL FOR PLAINTIFF  
NORTH CAROLINA STATE  
BOARD OF EDUCATION**

By:



Andrew H. Erteschik  
N.C. State Bar No. 35269  
aerteschik@poynerspruill.com  
Saad Gul  
N.C. State Bar No. 35320  
sgul@poynerspruill.com  
P.O. Box 1801  
Raleigh, NC 27602-1801  
Telephone: (919) 783-2895  
Facsimile: (919) 783-1075

John M. Durnovich  
N.C. State Bar No. 47715  
301 S. College St., Suite 2900  
Charlotte, NC 28202  
Telephone: 704.342.5250  
Facsimile: 704.342.5264  
jdurnovich@poynerspruill.com

**COUNSEL FOR PLAINTIFF  
NORTH CAROLINA STATE  
BOARD OF EDUCATION**



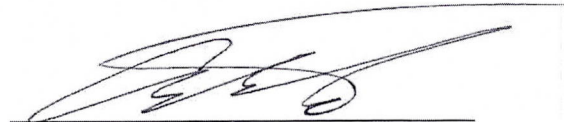
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and hand delivery prior to 5:00 p.m. to the following:

Amar Majmundar  
Olga E. Vysotskaya de Brito  
N.C. Department of Justice  
114 W. Edenton Street  
Raleigh, NC 27603  
*Counsel for the State of North Carolina*

Philip R. Isley  
Philip R. Miller, III  
E. Hardy Lewis  
Blanchard, Miller, Lewis & Isley P.A.  
1117 Hillsborough Street  
Raleigh, NC 27603  
*Counsel for The Honorable Mark Johnson,  
Superintendent of Public Instruction*

This the 12th day of April, 2017.



Andrew H. Erteschik

**SESSION LAW 2016-126**

Exhibit A to Memorandum in Support of  
Plaintiff's Motion for Summary Judgment and  
Motion for Preliminary Injunction

Duplicate Copy Omitted.

Original set forth in its entirety on R pp 18-37.

# **Exhibit B**



# CONSTITUTION OF NORTH CAROLINA OF 1868

## DELEGATES TO THE CONSTITUTIONAL CONVENTION<sup>79</sup>

Raleigh, January 14-March 17, 1868

President, Calvin J. Cowles, Wilkes

President *Pro Tem*, Richard W. King,<sup>80</sup> Lenoir

Secretary, T. A. Byrnes, Cumberland

Secretary *Pro Tem*, Joshua P. Andrews,<sup>81</sup> Wake

James H. Harris,<sup>82</sup> Wake

Assistant Secretary, John H. Bonner, [Wake]

Name	District	County	Name	District	County
W. A. B. Murphey	1		Wilson Carey	25	Caswell
John S. Parks	1		Phillip Hodnett	25	Caswell
William H. Logan	2	Rutherford	Henry M. Ray	26	Alamance
Jesse Rhodes	2	Henderson	William Merritt	27	Person
Julius S. Garland	3	[Mitchell]	John W. Graham	28	Orange
Thomas J. Candler	4	Buncombe	Edwin M. Holt	28	Orange
James H. Duckworth	4	Transylvania	William T. Gunter	29	Chatham
George W. Gahagan	4	Madison	John A. McDonald	29	Chatham
W. G. B. Garrett	5	Haywood	Joshua P. Andrews	30	Wake
George W. Dickey	6	Cherokee	Stokes D. Franklin	30	Wake
Mark May	6	Macon	James H. Harris	30	Wake
Edwin C. Bartlett <sup>83</sup>	7	Alleghany	B. S. D. Williams	30	Wake
Evan Benbow	7	Yadkin	Cuffey Mayo	31	Granville
George W. Bradley	7	Watauga	James J. Moore	31	Granville
Samuel Forkner	7	Surry	John W. Ragland	31	Granville
John G. Marler <sup>84</sup>	7	Yadkin	John A. Hyman	32	Warren
John H. Marshall <sup>85</sup>	7	Surry	John Read	32	Warren
John Q. A. Bryan	8	Wilkes	James T. Harris	33	Franklin
Calvin J. Cowles	8	Wilkes	John H. Williamson	33	Franklin
Wesley H. George	8	Iredell	James H. Hood	34	Cumberland
Calvin C. Jones	8	Caldwell	William A. Mann	34	Cumberland
Jerry Smith	8	Alexander	James M. Turner	35	Harnett
Milton Hobbs	9	Davie	Swain S. McDonald	36	Moore
Allen Rose	9	Rowan	George A. Graham	37	Montgomery
Isaac M. Shaver <sup>86</sup>	9	Rowan	Richmond T. Long, Sr.	38	Richmond
James S. McCubbins <sup>87</sup>	9	Rowan	Hiram L. Grant	39	Wayne
Plato Durham	10	Cleveland	Jesse Hollowell	39	Wayne
James R. Ellis	11	Catawba	Nathan Gulley	40	Johnston
Joseph H. King	12	Lincoln	John M. Patrick	41	Greene
Milot J. Aydlott	13	Gaston	Willie Daniel	42	Wilson
Edward Fullings	14	Mecklenburg	Jacob Ing	43	Nash
Silas N. Stilwell	14	Mecklenburg	Henry Eppes	44	Halifax
William Newson	15	Union	J. J. Hayes	44	Halifax
William T. Blume	16	Cabarrus	John H. Renfrow	44	Halifax
Levi C. Morton	17	Stanly	Henry T. Grant	45	Northampton
Henry Chillson	18	Anson	Roswell C. Parker	45	Northampton
George Tucker	18	Anson	Joseph H. Baker	46	Edgecombe
Riley F. Petree	19	Stokes	Henry C. Cherry	46	Edgecombe
Elijah B. Teague	20	Forsyth	Henry A. Dowd	46	Edgecombe
Isaac Kinney	21	Davidson	Richard W. King	47	Lenoir
Spencer Mullican	21	Davidson	Edwin Legg	48	Brunswick
Talton L. L. Cox	22	Randolph	Hayes Lennon	49	Colombus
Reuben F. Trogdon	22	Randolph	O. S. Hayes	50	Robeson
Albion W. Tourgee	23	Guilford	Joshua L. Nance	50	Robeson
G. William Welker	23	Guilford	Abiel W. Fisher	51	Bladen
Henry Barnes	24	Rockingham	Frederick F. French	51	Bladen
John French	24	Rockingham	Joseph C. Abbott	52	New Hanover

SEC. 4. It shall be the duty of the Legislature to provide for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts, by such municipal corporation.

**Article IX.**

*Education.*

SECTION 1. Religion, morality, and knowledge being necessary to good government and happiness of mankind, schools, and the means of education, shall forever be encouraged.

SEC. 2. The General Assembly at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years.

SEC. 3. Each County of the State shall be divided into a convenient number of Districts, in which one or more Public Schools shall be maintained, at least four months in every year; and if the Commissioners of any County shall fail to comply with the aforesaid requirement of this section, they shall be liable to indictment.

SEC. 4. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this State and not otherwise specially appropriated by the United States or heretofore by this State; also all monies, stocks, bonds, and other property now belonging to any fund for purposes of Education; also the net proceeds that may accrue to the State from sales of estrays or from fines, penalties and forfeitures; also the proceeds of all sales of the swamp lands belonging to the State; also all money that shall be paid as an equivalent for exemptions from military duty; also, all grants, gifts or devises that may hereafter be made to this State, and not otherwise appropriated by the grant, gift or devise, shall be securely invested, and sacredly preserved as an irreducible educational fund, the annual income of which, together with so much of the ordinary revenue of the State as may be necessary, shall be faithfully appropriated for establishing and perfecting, in this State, a system of Free Public Schools, and for no other purposes or uses whatsoever.

SEC. 5. The University of North Carolina with its lands, emoluments and franchises, is under the Control of the State, and shall be held to an inseparable connection with the Free Public School System of the State.

SEC. 6. The General Assembly shall provide that the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition; also, that all the property which has heretofore accrued to the State, or shall hereafter accrue from escheats, unclaimed dividends or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University.

SEC. 7. The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General, shall constitute a State Board of Education.

SEC. 8. The Governor shall be President, and the Superintendent of Public Instruction shall be Secretary, of the Board of Education.



SEC. 9. The Board of Education shall succeed to all the powers and trusts of the President and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to Free Public Schools, and the Educational fund of the State; but all acts, rules and regulations of said Board may be altered, amended, or repealed by the General Assembly, and when so altered, amended or repealed by the General Assembly, and when so altered, amended or repealed they shall not be reenacted by the Board.

SEC. 10. The first session of the Board of Education shall be held at the Capital of the State, within fifteen days after the organization of the State Government under this Constitution; the time of future meetings may be determined by the Board.

SEC. 11. A majority of the Board shall constitute a quorum for the transaction of business.

SEC. 12. The contingent expenses of the Board shall be provided for by the General Assembly.

SEC. 13. The Board of Education shall elect Trustees for the University, as follows: One trustee for each County in the State, whose term of office shall be eight years. The first meeting of the Board shall be held within ten days after their election, and at this and every subsequent meeting, ten Trustees shall constitute a quorum. The Trustees, at their first meeting, shall be divided, as equally as may be, into four classes. The seats of the first class shall be vacated at the expiration of two years; of the second class at the expiration of four years; of the third class at the expiration of six years; of the fourth class at the expiration of eight years; so that one fourth may be chosen every second year.

SEC. 14. The Board of Education and the President of the University, shall be *ex officio* members of the Board of Trustees of the University; and shall, with three other Trustees to be appointed by the Board of Trustees, constitute the Executive Committee of the Trustees of the University of North Carolina, and shall be clothed with the powers delegated to the Executive Committee under the existing organization of the Institution. The Governor shall be *ex officio* President of the Board of Trustees and Chairman of the Executive Committee of the University. The Board of Education shall provide for the more perfect organization of the Board of Trustees.

SEC. 15. All the privileges, rights, franchises and endowments heretofore granted to, or conferred upon, the Board of Trustees of the University of North Carolina by the Charter of 1789, or by any subsequent legislation, are hereby vested in the Board of Trustees, authorized by this Constitution, for the perpetual benefit of the University.

SEC. 16. As soon as practicable after the adoption of this Constitution, the General Assembly shall establish and maintain, in connection with the University, a Department of Agriculture, of Mechanics, of Mining and of Normal Instruction.

SEC. 17. The General Assembly is hereby empowered to enact that every child of sufficient mental and physical ability, shall attend the Public Schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means.



# **Exhibit C**

CONSTITUTION  
OF THE  
**State of North Carolina**

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PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

ARTICLE I

DECLARATION OF RIGHTS

That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare that:

SECTION 1. *The equality and rights of persons.* We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

SEC. 2. *Sovereignty of the people.* All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

SEC. 3. *Internal government of the State.* The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

SEC. 4. *Secession prohibited.* This State shall ever remain a member of the American Union; the people thereof are part of the American nation; there is no right on the part of this State to secede; and all attempts, from whatever source or upon whatever pretext, to dissolve this Union or to sever this Nation, shall be resisted with the whole power of the State.

SEC. 5. *Allegiance to the United States.* Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.



## ARTICLE IX

## EDUCATION

SECTION 1. *Education encouraged.* Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.

SEC. 2. *Uniform system of schools.*

(1) *General and uniform system; term.* The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) *Local responsibility.* The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

SEC. 3. *School attendance.* The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.

SEC. 4. *State Board of Education.*

(1) *Board.* The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts. Of the appointive members of the Board, one shall be appointed from each of the eight educational districts and three shall be appointed from the State at large. Appointments shall be for overlapping terms of eight years. Appointments to fill vacancies shall be made by the Governor for the unexpired terms and shall not be subject to confirmation.

(2) *Superintendent of Public Instruction.* The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.

SEC. 5. *Powers and duties of Board.* 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.

SEC. 6. *State school fund.* The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or



by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

SEC. 7. *County school fund.* All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

SEC. 8. *Higher education.* The General Assembly shall maintain a public system of higher education, comprising The University of North Carolina and such other institutions of higher education as the General Assembly may deem wise. The General Assembly shall provide for the selection of trustees of The University of North Carolina and of the other institutions of higher education, in whom shall be vested all the privileges, rights, franchises, and endowments heretofore granted to or conferred upon the trustees of these institutions. The General Assembly may enact laws necessary and expedient for the maintenance and management of The University of North Carolina and the other public institutions of higher education.

SEC. 9. *Benefits of public institutions of higher education.* The General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense.

SEC. 10. *Escheats.*

(1) *Escheats prior to July 1 1971.* All property that prior to July 1, 1971, accrued to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be appropriated to the use of The University of North Carolina.

(2) *Escheats after June 30, 1971.* All property that, after June 30, 1971, shall accrue to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be used to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State. The method, amount, and type of distribution shall be prescribed by law.

## ARTICLE X

### HOMESTEADS AND EXEMPTIONS

SECTION 1. *Personal property exemptions.* The personal property of any resident of this State, to a value fixed by the General Assembly but not less than \$500, to be selected by the resident, is exempted from sale under execution or other final process of any court, issued for the collection of any debt.

SEC. 2. *Homestead exemptions.*

# **Exhibit D**

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

NORTH CAROLINA STATE  
BOARD OF EDUCATION,  
  
Plaintiffs,  
  
vs.  
  
THE STATE OF NORTH  
CAROLINA,  
  
Defendant.

VS .

THE STATE OF NORTH  
CAROLINA,

Defendant.

BEFORE: THE HONORABLE DONALD STEPHENS

TRANSCRIPT OF HEARING

TRANSCRIBED FROM A VIDEOTAPED PROCEEDING

DECEMBER 29, 2016

RALEIGH, NORTH CAROLINA

Reported in Stenotype by  
Lauren M. McIntee, RPR

Transcript produced by computer-aided transcription



12/29/2016

NC State Board Of Education vs. State of North Carolina

Pages 2..5

<p>Page 2</p> <p>1 APPEARANCES 2 ON BEHALF OF THE PLAINTIFF: 3 Robert F. Orr, Esquire 4 Robert F. Orr, PLLC 5 3434 Edwards Mill, Suite 112-372 6 Raleigh, North Carolina 27612 7 (919) 608-5335 8 9 Andrew Erteschik, Esquire 10 Poyner Spruill, LLP 11 301 Fayetteville Street, Suite 1900 12 Raleigh, North Carolina 27601 13 (919) 783-2895 14 15 J.M. Durnovich, Esquire 16 Poyner Spruill, LLP 17 301 South College Street, Suite 2300 18 Charlotte, North Carolina 28202 19 (704) 342-5344 20 21 ON BEHALF OF THE DEFENDANT: 22 Amar Majmundar, Esquire 23 Olga Vysotskaya, Esquire 24 Office of the Attorney General 25 North Carolina Department of Justice 114 West Edenton Street Raleigh, North Carolina 27603 (919) 716-6820</p>	<p>Page 4</p> <p>1 we can't afford that, so we are recording this 2 audio. We do that, we would encourage you to, 3 first, tell us who you are so the record will 4 reflect that. Second, speak audibly and succinctly 5 so we can all hear today what you said and also some 6 person later trying to decipher it all will be able 7 to understand it listening to an audio that they 8 didn't see and hear. And please everyone don't 9 speak at the same time if you can avoid that. 10 So let me ask the Plaintiffs, I do recognize 11 a few folks, but anyway if you would identify 12 yourselves from left to my right on behalf first of 13 the Plaintiff and then on behalf of whoever is here 14 in response to this lawsuit. 15 MR. ORR: All right. Your Honor, I'm Bob Orr 16 on behalf of the State Board of Education. 17 THE COURT: Still Bob Orr? 18 MR. ORR: Still Bob Orr, your Honor. 19 THE COURT: Okay. 20 MR. ERTESCHIK: Good afternoon, your Honor. 21 Drew Erteschik with Poyner Spruill, and I have here 22 my colleague, J.M. Durnovich, also from Poyner 23 Spruill. 24 THE COURT: Okay. 25 MR. ERTESCHIK: We are honored to represent</p>
<p>Page 3</p> <p>1 The above-entitled matter came on for hearing 2 before the Honorable Donald Stephens, judge 3 presiding, on the 29th day of December, 2016, in 4 Raleigh, North Carolina. 5 ----- 6 THE COURT: On the file in the civil action, 7 looks like it's 16-CVS-15607. It's captioned, let's 8 see, the summons that I have at the point that I 9 have shows caption, North Carolina State Board of 10 Education as the Plaintiff and the State of North 11 Carolina as Defendant. The certification of notice 12 of the request for hearing this afternoon on the 13 Plaintiff's motion for temporary restraining order 14 appears to have served notice on the Office of the 15 Pro Tempore of the North Carolina Senate, Philip 16 Berger; the Office of the Speaker of the House, 17 Representative Timothy Moore; on the Superintendent 18 of Public Instruction, Mark Johnson; and notice was 19 also obviously given to the Attorney General's 20 Office, more particularly, to Grayson Kelley who is 21 head of the litigation section. 22 We being the, the judicial governing branch 23 of the government being the stepchild of the three 24 branches, we don't have a live court reporter here 25 taking down what everybody says because apparently</p>	<p>Page 5</p> <p>1 the State Board of Education. 2 THE COURT: Great. Thank you. Welcome. 3 MR. ORR: Thank you. 4 THE COURT: On behalf of whoever is here to 5 respond. 6 MR. MAJMUNDAR: Good afternoon, your Honor. 7 My name is Amar Majmundar. I'm with the Attorney 8 General's Office here on behalf of the State. 9 THE COURT: Okay. 10 MS. VYSOTSKAYA: And your Honor, my name is 11 Olga Vysotskaya. I'm a Special Deputy Attorney 12 General on behalf of the State. 13 THE COURT: All right. 14 MR. MAJMUNDAR: We'll be glad to provide 15 spelling. 16 MS. VYSOTSKAYA: Yes. 17 THE COURT: I understand. Have you filed 18 anything? 19 MR. MAJMUNDAR: We have not, your Honor. 20 THE COURT: Okay. All right. You might want 21 to let, let the clerk handle your specific spelling 22 for your name before you leave here today, or if you 23 have cards, that would be fine. And I, I apologize 24 profusely, but Olga, I may end up having to call you 25 over. Okay?</p>



<p style="text-align: right;">Page 6</p> <p>1 MS. VYSOTSKAYA: That is fine.</p> <p>2 THE COURT: I apologize. That's not</p> <p>3 something that I would normally do. At least we'll</p> <p>4 know who I'm talking to. Otherwise, it might be</p> <p>5 confusing.</p> <p>6 All right. I read the complaint. Looks kind</p> <p>7 of straightforward to me. So I don't know, I kind</p> <p>8 of had more questions about the specific injunctive</p> <p>9 relief that the Plaintiffs seek today, and whether</p> <p>10 or not this Court has jurisdiction to do anything in</p> <p>11 view of the past legislation that sort of gives the</p> <p>12 senior resident judge in the county of which an</p> <p>13 action like this is filed, the administrative use of</p> <p>14 notifying the Chief Justice that such a lawsuit is</p> <p>15 filed, that it is a claim that facially challenges</p> <p>16 the constitutionality of an act of the General</p> <p>17 Assembly, and to request the Chief Justice to</p> <p>18 appoint three judges to a panel of superior court to</p> <p>19 hear and consider the constitutional challenge.</p> <p>20 The law is unclear as to what the presiding</p> <p>21 or senior resident judge in the county in which the</p> <p>22 action is filed has the authority to do beyond that.</p> <p>23 However, the law does not specifically say the court</p> <p>24 shall not, may not, cannot restrain legislation of</p> <p>25 the General Assembly that's challenged as</p>	<p style="text-align: right;">Page 8</p> <p>1 Honor has honed in on the, on the exigency issue,</p> <p>2 which really is the first and foremost reason why</p> <p>3 this Court has the authority to, to issue a TRO. So</p> <p>4 the fact is, as your Honor has, has pointed out, the</p> <p>5 General Assembly when it enacted the 3-judge panel</p> <p>6 statute neglected to address a TRO situation like</p> <p>7 this one.</p> <p>8 THE COURT: I don't know if they neglected</p> <p>9 to. They chose not to.</p> <p>10 MR. ERTESCHIK: Or, or perhaps they did, your</p> <p>11 Honor. Perhaps, but in any event, the statute does</p> <p>12 not address a TRO situation. And so the, the</p> <p>13 realities of, of having the Chief Justice select a</p> <p>14 panel, appoint a panel, have the panel be available</p> <p>15 for a TRO, a situation like this one where</p> <p>16 legislation was passed in a matter of hours, less</p> <p>17 than 48 hours, immediately before Christmas with an</p> <p>18 effective date of New Year's, if the trial court</p> <p>19 doesn't have inherent authority to issue a TRO in a</p> <p>20 situation like that, I'm not sure when it could.</p> <p>21 And it should come as no surprise to the</p> <p>22 General Assembly in a statute that's silent on a TRO</p> <p>23 issue like this one that a trial court would have to</p> <p>24 exercise that inherent authority. So your Honor</p> <p>25 has, has hit on the factual situation on the ground.</p>
<p style="text-align: right;">Page 7</p> <p>1 unconstitutional unless and until such time as three</p> <p>2 judges determine it is unconstitutional.</p> <p>3 It doesn't say the senior resident judge or</p> <p>4 presiding judge shall not, cannot, or may not at</p> <p>5 all. So I assume if that was the law, then they</p> <p>6 would have declared that the senior resident judge</p> <p>7 shall not, cannot, may not enjoin an act of the</p> <p>8 legislature that on its face would be unlawful,</p> <p>9 unconstitutional, without questioning it.</p> <p>10 Otherwise, the people would have no right to</p> <p>11 stop and restrain a clearly unconstitutional act.</p> <p>12 And if it went on this way through the courts for 6</p> <p>13 or 8 or 10 or 12 months, that would be most</p> <p>14 unfortunate. It might imbalance the balance of</p> <p>15 powers between three separate entities that the</p> <p>16 people recognize as the way in which they govern</p> <p>17 themselves.</p> <p>18 So I'm kind of curious as to that. So tell</p> <p>19 me even if I have authority, first, to do anything,</p> <p>20 and then we'll talk about whether or not I should.</p> <p>21 MR. ERTESCHIK: Your Honor, just to state for</p> <p>22 the record, my name is Drew Erteschik, just because</p> <p>23 we don't have a court reporter here today.</p> <p>24 THE COURT: Sure.</p> <p>25 MR. ERTESCHIK: So, your Honor, I think your</p>	<p style="text-align: right;">Page 9</p> <p>1 Let me also, it may be helpful to, to add</p> <p>2 that there are two doctrinal reasons in addition to</p> <p>3 the, the exigencies that would allow your Honor to</p> <p>4 issue a TRO. So the first is that the 3-judge panel</p> <p>5 statutes are venue statutes. They're not</p> <p>6 jurisdictional statutes. Stevenson versus Bartlett</p> <p>7 teaches us that 1-267 is a venue statute, not a</p> <p>8 jurisdictional statute. So we have sought venue in</p> <p>9 this court under 1-77 based on the fact that the</p> <p>10 legislation was enacted here in Raleigh.</p> <p>11 If the State wants to make a motion to</p> <p>12 transfer venue or if this Court finds that, that</p> <p>13 venue is more appropriate in front of a 3-judge</p> <p>14 panel, that, that transferring venue is, is an</p> <p>15 option this Court has, but the Court of Appeals says</p> <p>16 that that, that a TRO takes precedence over that</p> <p>17 venue issue. So it's, so the first thing I want to</p> <p>18 clarify is it's not a question of jurisdiction.</p> <p>19 It's simply a question of, of venue, which gets</p> <p>20 addressed after a TRO.</p> <p>21 THE COURT: However, based upon that statute</p> <p>22 this Court could not declare sitting alone that</p> <p>23 this, this statute is unconstitutional.</p> <p>24 MR. ERTESCHIK: And that is the second</p> <p>25 doctrinal reason, your Honor. Your Honor has honed</p>



<p style="text-align: right;">Page 10</p> <p>1 in on that as well. So that, that issue the Supreme 2 Court addressed in the Town of Boone decision last 3 year in its November 10, 2015, order. That, that 4 issue is this, that the statute is only triggered by 5 a finding that the act is unconstitutional. And 6 that is not what we're asking the Court to find. 7 THE COURT: I understand that. 8 MR. ERTESCHIK: We are simply asking the 9 Court to find that we have a likelihood of success 10 on the merits. So your Honor, for, for the reasons 11 of exigencies that, that your Honor has honed in on 12 and those two doctrinal reasons, there is simply no 13 impediment to the Court issuing a TRO. And in fact, 14 your Honor, it, it would, the Court has more than 15 sufficient inherent authority to do so. 16 THE COURT: Okay. 17 MR. ERTESCHIK: Thank you, your Honor. 18 THE COURT: Mr. Majmundar, is he right or 19 wrong? And if he's wrong, why? 20 MR. MAJMUNDAR: Well, your Honor -- 21 THE COURT: And always take great care 22 telling the Court they can't do something, you know. 23 It's just, that's just a bad way to start off. 24 MR. MAJMUNDAR: Yeah. 25 THE COURT: Usually.</p>	<p style="text-align: right;">Page 12</p> <p>1 coming. 2 MR. MAJMUNDAR: That's right. I try not to 3 do that too often, your Honor. But under 267.1 the 4 3-judge panel has the authority to make decisions 5 based on the facial constitutionality -- 6 THE COURT: Sure. 7 MR. MAJMUNDAR: -- of the statute. In order 8 to, in order to render a TRO, this Court would be 9 responsible for making determination of the 10 likelihood of Plaintiffs prevailing on the merits, 11 which tends to infringe on the 3-judge panel's 12 opinion of deciding whether something is or is not 13 constitutional. It's -- this is very gray. There 14 is obviously no case law to suggest -- 15 THE COURT: Well, I mean, and tell me. What 16 would keep the Chief Justice from taking my letter 17 of notice to him, which is routine? I mean this is 18 not the first time we've had a constitutional 19 challenge in 3-judge panel. We do it all the time. 20 What would keep the Chief Justice from taking 21 my notice and just deciding that he's not in any big 22 hurry to appoint a panel? The panel has a hard time 23 scheduling when they can all meet, and then before 24 long it's three, four months down the road, and no 25 decision has been made by anything. And this is a</p>
<p style="text-align: right;">Page 11</p> <p>1 MR. MAJMUNDAR: I wouldn't dream of -- 2 THE COURT: If you had, if I had no 3 inclination of doing anything, it just piques my 4 interest when someone says I can't do it. 5 MR. MAJMUNDAR: I understand, your Honor. 6 THE COURT: All right. 7 MR. MAJMUNDAR: I think your interest was 8 piqued by the question of whether this Court can in 9 fact -- 10 THE COURT: Sure. 11 MR. MAJMUNDAR: -- pass judgement. 12 THE COURT: I mean it's, that's the, the 13 significant question that for which we have actually 14 no authority, direct authority anyway, under this 15 same type of facts scenario, but maybe after this 16 case we will. 17 MR. MAJMUNDAR: And that's, that's a 18 possibility, your Honor. One of the aspects, and 19 we've only had the complaint for a few hours -- 20 THE COURT: Sure. 21 MR. MAJMUNDAR: -- to digest, but one of the 22 aspects -- 23 THE COURT: Well, I mean it's not like you 24 didn't know it was coming. I mean my goodness, if 25 you read the News &amp; Observer, you'd know it's</p>	<p style="text-align: right;">Page 13</p> <p>1 statute that may be, significantly likely to be, 2 unconstitutional on its face. 3 I mean what happens in the middle of all that 4 void? And why -- and that's, well, the first 5 question. The second question is in terms of the 6 immediacy of this law taking effect. What is the 7 immediacy of this law needing to take effect from 8 the interest of the people of North Carolina and the 9 State of North Carolina? What is it about that, 10 this law? 11 It will change dramatically the whole concept 12 of how education is handled. And if it turns out 13 the legislature got it wrong and we find out 6, 8, 14 9, 10, 12 months later, just think about the 15 disruption that that would cause. What is it that 16 is so important about having this law put into 17 effect on January the 1st of 2017? 18 MR. MAJMUNDAR: As to your first question, 19 the General Assembly was silent as to what to do in 20 these circumstance of -- situation, factual 21 situation. 22 THE COURT: Sure. 23 MR. MAJMUNDAR: And so we can only infer from 24 what the General Assembly did say and what they 25 meant and who, which court would be responsible for</p>



<p style="text-align: right;">Page 14</p> <p>1 making the determinations, the facial determinations 2 of the constitutionality of the statute. It's not 3 to suggest this Court doesn't have dominion over an 4 exigent circumstance. 5 THE COURT: Sure. 6 MR. MAJMUNDAR: It's just silent to, to that 7 point, your Honor. 8 THE COURT: And historically courts have 9 always had that inherent authority to, you know, 10 keep the status quo unchanged until the important 11 legal issues can be resolved so that neither side 12 gets hurt, diminish the potential for harm until, 13 until the legal questions get resolved. Where would 14 be the harm? 15 MR. MAJMUNDAR: Well, and in that respect, 16 your Honor, and again this, you know, we've not had 17 a chance to discuss this -- 18 THE COURT: Okay. 19 MR. MAJMUNDAR: -- with the General Assembly, 20 but I think the HB 17, this portion of HB 17 is the 21 General Assembly's attempt to clarify; and in fact, 22 that's what the act is called, to clarify the, the 23 role of the Superintendent -- 24 THE COURT: It did not appear to me to be 25 confusing. But what, what was the necessity for</p>	<p style="text-align: right;">Page 16</p> <p>1 face of the constitution? 2 MR. MAJMUNDAR: I believe that's true, your 3 Honor. 4 THE COURT: And it's the face of the 5 constitution and the ambiguities on the face of the 6 constitution that somehow or another we just 7 discovered this issue. 8 MR. MAJMUNDAR: Yes, Judge. 9 THE COURT: Okay. So do you agree or 10 disagree that I have the authority to do anything? 11 MR. MAJMUNDAR: I believe, your Honor, you 12 have the authority to do things. I'm only bringing 13 to the Court's attention there is some tension with 14 respect to the way the statute is written and the 15 purpose of the statute -- 16 THE COURT: All right. 17 MR. MAJMUNDAR: -- versus the exigent 18 circumstances. 19 THE COURT: Okay. So do I have the authority 20 to enter a temporary restraining order if they 21 impress me to the point that they convince me that 22 there is a, there's a reasonable possibility or 23 likelihood of prevailing on the merits and that 24 there could be irreparable harm if the, if this 25 particular statute was put into effect and</p>
<p style="text-align: right;">Page 15</p> <p>1 clarification? 2 MR. MAJMUNDAR: Well, that, that's a question 3 I think that, you know, as litigation goes 4 forward -- 5 THE COURT: When did it arise? I wonder 6 when, what, when the confusion, when the ambiguity 7 arose. Could it have been late on the evening of 8 November the 8th or 9th or something like that? Is 9 that when the ambiguity arose? 10 MR. MAJMUNDAR: It's possible, your Honor. 11 It could have been prior to that. There is actually 12 a prior case. In fact, Justice Orr was involved in 13 the case of Superintendent Atkinson -- 14 THE COURT: Sure. 15 MR. MAJMUNDAR: -- which there was a question 16 about the constitutionality of the, the role of the 17 Superintendent, what powers the Superintendent has, 18 some questions as to what role the Board of 19 Education plays in terms of our state's educational 20 system. 21 THE COURT: Which have never been resolved by 22 appellate courts. 23 MR. MAJMUNDAR: Not, not together. I 24 don't -- 25 THE COURT: Shall we go back and look at the</p>	<p style="text-align: right;">Page 17</p> <p>1 implemented immediately? 2 MR. MAJMUNDAR: I agree, your Honor, that the 3 concept and purpose of a temporary restraining order 4 to prevent a harm is not compatible with the way 5 1-267.1 is set up. 6 THE COURT: Okay. Well, even if I can do 7 that for 10 days, I guess we'll have this same 8 conversation next week on I assume a motion for 9 preliminary injunction. 10 MR. ERTESCHIK: Well, your Honor, I'm glad 11 to, to address that. So we have a motion for 12 preliminary injunction in our complaint as -- 13 THE COURT: Well, I mean that's just in your 14 complaint. You know, in terms of preliminary 15 affairs, I mean it's something, I don't normally 16 convert a TRO into a motion for preliminary 17 injunction -- 18 MR. ERTESCHIK: Oh -- 19 THE COURT: -- unless the other side comes in 20 and says we're ready to be heard. And I, I don't 21 get that -- 22 MR. ERTESCHIK: Right. 23 THE COURT: -- I don't get that feeling today 24 from the, these folks who just got summoned down 25 here to, you know, be heard, so.</p>



<p style="text-align: right;">Page 18</p> <p>1 MR. ERTESCHIK: Certainly, your Honor --</p> <p>2 THE COURT: But I mean not --</p> <p>3 MR. ERTESCHIK: -- we're not have asking for</p> <p>4 that.</p> <p>5 THE COURT: So I'm going to be asking the</p> <p>6 same questions on the preliminary injunction because</p> <p>7 at that point this Court may have to declare</p> <p>8 something with reference to the nature of the</p> <p>9 statute, the nature of the likelihood of success,</p> <p>10 that it comes close to making some kind of</p> <p>11 declaration about the constitutionality of it.</p> <p>12 MR. ERTESCHIK: And, and, your Honor, it, it</p> <p>13 seems to us that in this Court's inherent authority,</p> <p>14 for the same reasons that the Court is able to issue</p> <p>15 a TRO, that it makes sense to, if the Court is</p> <p>16 inclined, to, to grant our motion for TRO, to have</p> <p>17 that TRO last until a 3-judge panel be impaneled.</p> <p>18 THE COURT: I don't have any authority to do</p> <p>19 that.</p> <p>20 MR. ERTESCHIK: Well, your Honor, the</p> <p>21 alternative I think is to come back, to come back</p> <p>22 here in 10 days --</p> <p>23 THE COURT: When they're better prepared to</p> <p>24 argue this.</p> <p>25 MR. ERTESCHIK: And, and we certainly could</p>	<p style="text-align: right;">Page 20</p> <p>1 And I mean who knows how long that would take</p> <p>2 at, all while the state government is trying to</p> <p>3 operate, and the two departments are at odds with</p> <p>4 who should be doing what. Not the best way to</p> <p>5 operate a business, and certainly not the best way</p> <p>6 to operate a government.</p> <p>7 But, so let's, but anyway, the purpose of my</p> <p>8 comment was that whatever I do is for a short period</p> <p>9 of time, and it's only subject to review by a</p> <p>10 3-judge panel, and after they convene they may</p> <p>11 strike my order completely. And that's certainly</p> <p>12 their prerogative.</p> <p>13 Why don't I hear the, why don't I hear your</p> <p>14 contention of what you believe the merits would show</p> <p>15 and why you are likely to prevail and why you</p> <p>16 contend that there will be irreparable harm if this</p> <p>17 law is put into immediate effect. And then I'll</p> <p>18 hear y'all's response to that. Judge Orr.</p> <p>19 MR. ORR: Thank you, your Honor. And thank</p> <p>20 you for being willing to hear this on short notice,</p> <p>21 you and your staff.</p> <p>22 THE COURT: I know, that's what we do.</p> <p>23 MR. ORR: We appreciate that.</p> <p>24 THE COURT: That's why I did that. Yes, sir.</p> <p>25 MR. ORR: Mindful of your admonition to be</p>
<p style="text-align: right;">Page 19</p> <p>1 do that.</p> <p>2 THE COURT: Okay.</p> <p>3 MR. ERTESCHIK: We could have this same</p> <p>4 discussion.</p> <p>5 THE COURT: Well, we may. In the absence of</p> <p>6 their consent, I, we, I suspect that's the best you</p> <p>7 can do. Okay. I mean, you know, in fairness.</p> <p>8 MR. ERTESCHIK: And, and we would be fine</p> <p>9 with that, your Honor.</p> <p>10 THE COURT: Okay. Let me -- and you also say</p> <p>11 that whatever I do or fail to do is subject to</p> <p>12 review by the 3-judge panel. If I enter any type of</p> <p>13 injunctive relief, it's still subject to review by</p> <p>14 the 3-judge panel that will ultimately decide the</p> <p>15 issue. And then if they find the statute</p> <p>16 constitutional, they will dismiss this lawsuit. If</p> <p>17 they find it unconstitutional, then that can</p> <p>18 determine whether or not they will issue any kind of</p> <p>19 injunctive relief pending appellate review.</p> <p>20 Of course, I don't know where the appellate</p> <p>21 review goes now. I assume it works its way up</p> <p>22 through the 3-judge panel of the Court of Appeals</p> <p>23 and then maybe en banc review by the Court of</p> <p>24 Appeals and then ultimately maybe to the Supreme</p> <p>25 Court.</p>	<p style="text-align: right;">Page 21</p> <p>1 succinct.</p> <p>2 THE COURT: Sure.</p> <p>3 MR. ORR: This is a very straightforward</p> <p>4 constitutional challenge. It is the position as</p> <p>5 articulated in our declaratory judgment complaint</p> <p>6 that the Constitution of North Carolina delegates</p> <p>7 three very specific constitutional powers to the</p> <p>8 State Board of Education, which is a constitutional</p> <p>9 body. And those are to administer, to supervise the</p> <p>10 free public school system of the state, and to</p> <p>11 supervise the financial resources, the operation of</p> <p>12 the public school system of our state. And these</p> <p>13 constitutional powers have been placed since 1868.</p> <p>14 And probably the single clearest place to</p> <p>15 call the Court's attention is Page 2 of the</p> <p>16 complaint where the two comparative boxes are one</p> <p>17 showing Article IX, Section 5 of the Constitution</p> <p>18 which says, "It shall be the duty of the State Board</p> <p>19 of Education to supervise and administer the free</p> <p>20 public school system." And juxtapose that with the</p> <p>21 portion of Session Law 2016-126, Section 4 which</p> <p>22 says, "It shall now" -- and I'm adding in "now"</p> <p>23 because in the legislation it strikes out the term</p> <p>24 the "State Board of Education" and puts in its place</p> <p>25 that "the Superintendent of Public Instruction is to</p>



<p style="text-align: right;">Page 22</p> <p>1 have under his or her direction and control all 2 matters relating to the direct supervision and 3 administration of the public school system." 4 If that is not a direct attempt to transfer 5 the constitutional powers delegated exclusively to 6 the State Board of Education, I don't know what 7 does. And while the statute is comprehensive in a 8 number of ways, it is pointedly specific in its 9 intent and attempt to transfer what have 10 historically and are the constitutional powers of 11 the State Board of Education to the newly elected 12 Superintendent of Public Instruction who will take 13 office on January 1st, the effective date of this 14 legislation. 15 In a nutshell, that's what this case is 16 about, your Honor. I'm happy to answer any 17 questions. Mr. Erteschik will talk about the 18 irreparable harm, but that is the core of our 19 constitutional claim in this declaratory judgment 20 action. 21 THE COURT: Well, tell me, under the 22 constitution what do you contend is as clear from 23 the language of the constitution? I'm reading 24 Section 8 of Article IX. It says the Superintendent 25 of Public Instruction is a member of the Board and</p>	<p style="text-align: right;">Page 24</p> <p>1 MR. ORR: -- the irreparable harm when you're 2 ready. 3 THE COURT: Let me talk about, let me see, 4 let me talk -- just a moment. Still got to decide 5 you're right. 6 MR. ORR: Sure. 7 THE COURT: I see a lot of these challenges, 8 alleged unconstitutional passages. Most of them, 9 when you look at them it's clear on their face 10 there's no basis to it at all, period. Period. 11 Someone just trying to make a statement, trying to 12 make a point, trying to show objection, but they 13 don't have any place in a, in a court. 14 I don't see any ambiguity here. I don't know 15 why all of a sudden one arose, and I don't know how 16 it arose or where in the constitution that something 17 would suggest that it arose. Can you help me 18 understand this? 19 MR. MAJMUNDAR: I'll try, your Honor. The, 20 the constitution does vest the Board of Education 21 with authority, but the extent of the authority is 22 subject to the laws in the General Assembly. The 23 General Assembly has its own constitution. 24 THE COURT: Where? 25 MR. MAJMUNDAR: In Article IX, Section 5.</p>
<p style="text-align: right;">Page 23</p> <p>1 is Secretary of the Board. And then that was under 2 the 1868 Constitution. And then later under the 3 revised constitution, Section 4, Superintendent, 4 Superintendent of Public Instruction is the 5 Secretary and Chief Administrative Officer of the 6 State Board of Education. And you note that he's 7 not a voting member. 8 MR. ORR: Right. 9 THE COURT: What is the constitutional role 10 of the Superintendent? 11 MR. ORR: I think the constitutional role is 12 limited to the two specific provisions that you just 13 articulated. 14 THE COURT: He's the Secretary and Chief 15 Administrative Officer of the Board? 16 MR. ORR: That's correct, your Honor. 17 THE COURT: Follow the instruction and 18 policies set by the Board. 19 MR. ORR: That's correct. And nothing else, 20 your Honor. 21 THE COURT: Okay. Well, let's see if we can 22 figure out where the ambiguity lies. Okay. Thank 23 you. 24 MR. ORR: And Mr. Erteschik will talk to -- 25 THE COURT: Let me --</p>	<p style="text-align: right;">Page 25</p> <p>1 THE COURT: Wait a minute. Okay. Go ahead. 2 MR. MAJMUNDAR: And so the powers and the 3 duties of the Board under Section 5 are delineated. 4 That's true, but the catchall, the caveat to that is 5 subject to the laws in the General Assembly. 6 THE COURT: Wait a minute. Let me read, read 7 Section 5 again. Just give me a minute. 8 All right. State Board of Education shall 9 supervise and administer the free public school 10 system and the educational funds provided for its 11 support, except the funds mentioned in Section 7 of 12 this article, and shall make all needed rules and 13 regulations in reference, in relation thereto 14 subject to laws enacted by the General Assembly. 15 Can the General Assembly enact laws that are 16 contrary to the language of the constitution? 17 MR. MAJMUNDAR: I do not believe they can, 18 your Honor. Well, they can enact laws, but they can 19 be stricken. 20 THE COURT: I don't think they can either. 21 It seems to me that this article suggests that, that 22 the Board shall administer and supervise and shall 23 make rules and regulations consistent with their 24 mandate under the constitution, which would be 25 subject to the laws of the General Assembly, but the</p>



<p style="text-align: right;">Page 26</p> <p>1 Assembly, General Assembly cannot take away their 2 constitutional mandates. 3 MR. MAJMUNDAR: I do not believe the General 4 Assembly can do that, your Honor. 5 THE COURT: Okay. What have they done? 6 MR. MAJMUNDAR: I think, your Honor, and in 7 keeping with Judge Hobgood's decision a number of 8 years ago that Justice Orr knows about, 9 Superintendent, the person, the Superintendent has 10 invested in that power, in that authority, 11 constitutional authority in that position. And I 12 think without having actually -- 13 THE COURT: What is the, what is his 14 constitutional authority? I mean he, we do know 15 that he is Secretary to the Board and that he's 16 the -- the language -- the Chief Administrative 17 Officer of the Board. What does that mean? 18 MR. MAJMUNDAR: I think that contemplates the 19 day-to-day administration of education in this 20 state. 21 THE COURT: Subject to the policies and 22 decisions of the Board? 23 MR. MAJMUNDAR: I don't believe that's -- I 24 think that's a consistent interpretation, your 25 Honor.</p>	<p style="text-align: right;">Page 28</p> <p>1 Why is -- these are two entities recognized 2 by the constitution. Why are, where is the 3 ambiguity? It appears that this, this statute has 4 turned over all responsibilities currently existing 5 with the Board to that Superintendent. What's -- if 6 this statute is constitutional, what is it the Board 7 will do now? 8 MR. MAJMUNDAR: Grant -- 9 THE COURT: And, and how, and what extent 10 could they, if they can do nothing, enforce it? 11 MR. MAJMUNDAR: According to the plain 12 reading of the statute now, it seems to suggest that 13 the Board will be responsible for promulgating and 14 enacting rules associated with the, the state's 15 education system; so the actual rule-making 16 procedures associated with, for instance, the EPA, 17 complying with the EPA or passing the policies as 18 sometimes the Board is want to do. 19 According to the plain meaning of the 20 statute, the Board's role is that provision, to 21 enact the rules and regulations, which does in many 22 ways correspond with Section 5 of Article IX, to 23 make all needed rules and regulations thereto. And 24 so when the General Assembly modifies the pertinent 25 statutes through HB 17, it's identifying to make all</p>
<p style="text-align: right;">Page 27</p> <p>1 THE COURT: That's what? 2 MR. MAJMUNDAR: It's a consistent 3 interpretation. The Superintendent by virtue of 4 that office has the authority to constitutional 5 mandate to go ahead and provide for the day-to-day 6 operations of our state school system. In keeping 7 with that constitutional authority, the General 8 Assembly here with HB 17, as far as I understand, 9 seems to be clarifying that role of the 10 Superintendent, which presumably the General 11 Assembly had believed has always existed. Why 12 there's an ambiguity now is a question you've asked 13 a couple times. I'm not sure why the ambiguity 14 became apparent here. 15 THE COURT: I, I'm having a hard time finding 16 ambiguity. That's what my, that's my hang-up. 17 MR. MAJMUNDAR: I understand, your Honor. 18 THE COURT: Well, I mean it's like, okay, you 19 have a Board that, that makes decisions with 20 reference to funding, policy, and everything for 21 education in this state. You have a Superintendent 22 that is the sole Chief Operating Officer of the 23 Board and that operates as a Secretary, the Chief 24 Administrative Officer, and carries out the policies 25 and dictates of the Board.</p>	<p style="text-align: right;">Page 29</p> <p>1 needed rules and regulations as being the authority 2 of the Board of Education. 3 THE COURT: So that's what it means when the 4 constitution says, "It shall be the duty of the 5 State Board of Education to supervise and administer 6 the free public school system"? Is that what that 7 means? The Board will now make rules and 8 regulations? 9 MR. MAJMUNDAR: That's way, your Honor, 10 that's the, the statute says. Its plain meaning is 11 that they make the rules and regulations. 12 THE COURT: Okay. All right. All right. 13 Thank you. 14 You tell me why you, you believe that I 15 should not allow this temporary restraining order 16 even if I find that there, there is likely to be a 17 successful constitutional challenge to this statute. 18 I assume you contend that there would be no 19 immediate harm, irreparable harm that would require 20 this Court to intervene and enjoin the effective 21 date of the implementation of the statute. 22 MR. MAJMUNDAR: This is a first-blush review 23 of the complaint, your Honor. There are a couple 24 points that we thought we would at least bring to 25 the Court's attention.</p>



<p style="text-align: right;">Page 30</p> <p>1 THE COURT: Okay.</p> <p>2 MR. MAJMUNDAR: One is a jurisdictional</p> <p>3 issue, not a 267.1 issue, but whether or not this</p> <p>4 Court has jurisdiction over declaratory judgment</p> <p>5 that, declaratory judgment act over the State of</p> <p>6 North Carolina, whether we waive sovereign immunity</p> <p>7 for the purposes of this action. The complaint</p> <p>8 features no allegations suggesting such a waiver.</p> <p>9 And according to the Petroleum Traders case, unless</p> <p>10 it is a claim brought under the declaration of</p> <p>11 rights of the constitution, this Court doesn't have</p> <p>12 jurisdiction over the State. And that's a personal</p> <p>13 jurisdiction issue.</p> <p>14 THE COURT: So you're saying core pleading?</p> <p>15 MR. MAJMUNDAR: Okay. I think the pleading</p> <p>16 doesn't necessarily set out what needs to be set out</p> <p>17 for there to be an expression of a waiver of</p> <p>18 sovereign immunity. I don't think their</p> <p>19 allegation --</p> <p>20 THE COURT: So the State has to waive</p> <p>21 sovereign immunity for an agency or citizen to</p> <p>22 challenge the constitutionality of a statute that is</p> <p>23 arguably unconstitutional on its face?</p> <p>24 MR. MAJMUNDAR: According to the Supreme</p> <p>25 Court in Petroleum Traders, the State has not waived</p>	<p style="text-align: right;">Page 32</p> <p>1 MR. MAJMUNDAR: Judge Hobgood, your Honor.</p> <p>2 THE COURT: Which was not available?</p> <p>3 MR. MAJMUNDAR: It was not.</p> <p>4 THE COURT: Stands, it's the law of that</p> <p>5 case. It stands for that case. It's not binding on</p> <p>6 this court, and it's not binding on the, any other</p> <p>7 court.</p> <p>8 MR. MAJMUNDAR: That's true, your Honor. I</p> <p>9 don't disagree with you.</p> <p>10 THE COURT: So it's like one of those</p> <p>11 unpublished opinions of the Court of Appeals. You</p> <p>12 know it's there, but it's not precedent for</p> <p>13 anything, and it may be instructive or not.</p> <p>14 MR. MAJMUNDAR: Finally, your Honor, with</p> <p>15 respect to a TRO, there's a balancing of the</p> <p>16 equities. The --</p> <p>17 THE COURT: Balance them for me.</p> <p>18 MR. MAJMUNDAR: The prevention of a newly</p> <p>19 enacted statute signed by the government is I think</p> <p>20 part and parcel harm to the State of North Carolina.</p> <p>21 This is a --</p> <p>22 THE COURT: Can you --</p> <p>23 MR. MAJMUNDAR: The General Assembly speaks</p> <p>24 for the people.</p> <p>25 THE COURT: Okay. Can you pragmatically</p>
<p style="text-align: right;">Page 31</p> <p>1 its sovereign immunity.</p> <p>2 THE COURT: Okay.</p> <p>3 MR. MAJMUNDAR: So that's a jurisdictional</p> <p>4 issue. With respect to the likelihood of success,</p> <p>5 and it's not really taking a position, but Judge</p> <p>6 Hobgood found a contrary position than what is being</p> <p>7 espoused today by Plaintiffs. And I'm not sure from</p> <p>8 the face of the complaint we've seen anything from</p> <p>9 Plaintiffs to suggest that they have met their</p> <p>10 burden, which it's their burden, that they will, in</p> <p>11 fact, prevail on the merits.</p> <p>12 And there's a lot of allegations. There's a</p> <p>13 lot of speculations what the harm would be, but I'm</p> <p>14 not sure there's anything in the complaint other</p> <p>15 than the suggestion that it must be wrong; the</p> <p>16 General Assembly must have gotten it wrong because</p> <p>17 they didn't appreciate the, the constitutional</p> <p>18 authority of the Board of Education.</p> <p>19 So there is a question as to who and where</p> <p>20 the constitutional authority lies with respect to</p> <p>21 the education system of this state, at least in</p> <p>22 previous instances with the Atkinson v. State case.</p> <p>23 And finally, your Honor --</p> <p>24 THE COURT: Who is, what judge made that</p> <p>25 determination?</p>	<p style="text-align: right;">Page 33</p> <p>1 explain that harm to me?</p> <p>2 MR. MAJMUNDAR: It is a role of the General</p> <p>3 Assembly to promulgate these statutes. It's the</p> <p>4 role of the governor to approve or disapprove. And</p> <p>5 anytime a Court impedes upon the ability of the</p> <p>6 General Assembly and the government to do that, then</p> <p>7 there's a potential separation of powers issue.</p> <p>8 THE COURT: Well, suppose I had passed the</p> <p>9 statute that terminated the State Board of Education</p> <p>10 in its entirety and transferred all of its authority</p> <p>11 to the Superintendent.</p> <p>12 MR. MAJMUNDAR: Is your --</p> <p>13 THE COURT: Does that same rule apply?</p> <p>14 MR. MAJMUNDAR: Well, I think the rule</p> <p>15 applies, but the question is weighing the harm to</p> <p>16 the State's ability to pass laws versus the harm</p> <p>17 that is inflicted to the other side. I think the</p> <p>18 harm exists. The question is whether it's</p> <p>19 outweighed by the harm to the other side.</p> <p>20 THE COURT: Well, actually the practical</p> <p>21 effect is just that, isn't it? The practical effect</p> <p>22 of this law if it goes into effect is just what I</p> <p>23 said, isn't it?</p> <p>24 MR. MAJMUNDAR: I believe that's the position</p> <p>25 Plaintiffs have espoused today.</p>



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1 THE COURT: Okay. And that's a fairly easy  
2 balancing test, wouldn't it? A theoretical harm to  
3 the State and a real, practical harm to an agency  
4 that's constitutionally mandated to care for, care  
5 for the public school children of the state.  
6 MR. MAJMUNDAR: Yes, sir.  
7 THE COURT: So we're going to balance the  
8 harm to the public school children of this state  
9 based upon potential harm to them or the theoretical  
10 harm that the, would be caused by a declaration  
11 that, a potential declaration that the legislature  
12 built a bridge too far.  
13 MR. MAJMUNDAR: That is the balancing test,  
14 your Honor. I would draw your attention to Page 12  
15 of the complaint.  
16 THE COURT: All right.  
17 MR. MAJMUNDAR: The damages cited by  
18 Plaintiffs on Page 12 relate to uncertainties  
19 associated with the making this portion of the  
20 statutes effective. There is no firm, fixed  
21 identifiable harm, but what might happen. And the  
22 Court of Appeals has said, you know, illusory-type  
23 damages are not sufficient with the TRO standards.  
24 THE COURT: Well, sometimes when you close  
25 down an agency, it is almost impossible to quantify

Page 35

1 the impact of that event. Maybe that's what they  
2 meant.  
3 MR. MAJMUNDAR: It's possible, your Honor.  
4 I'm sure that we'd like an answer to that question.  
5 THE COURT: All right.  
6 MR. MAJMUNDAR: I'm glad to answer any  
7 questions if you have any.  
8 THE COURT: Not picking on you, but you're  
9 the one standing.  
10 MR. MAJMUNDAR: I understand.  
11 THE COURT: Appreciate you being here.  
12 I don't think the State will be harmed for 10  
13 days, so I'll hear you. That's a more important  
14 question next week on your motion for preliminary  
15 injunction. Okay. I think at that time maybe  
16 you'll have a better insight on answering that  
17 question.  
18 In fairness, maybe the State will have a  
19 better opportunity of assessing that as well and  
20 have a better opportunity to address anything else  
21 in the constitutional context so that these  
22 attorneys can confer with people who are responsible  
23 for drafting this legislation to understand the  
24 ambiguities they saw, and they may be in a better  
25 position to articulate those next week when they

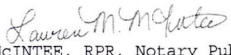
Page 36

1 come.  
2 So in fairness I believe, I am going to  
3 determine that there is, that I do have the inherent  
4 authority to exercise injunctive relief in this  
5 matter pending further review by a 3-judge panel of  
6 superior court judges who, which panel will evaluate  
7 the constitutional claims and challenges, but I do  
8 have the authority in the interim to order that this  
9 statute not be implemented, not be enforced, not be  
10 put into effect until those constitutional  
11 challenges are presented to a 3-judge panel or until  
12 the Defendants can be heard further in objection to  
13 the motion for preliminary injunction.  
14 We can set it for next week as far as I know.  
15 I mean can you do it Friday? Is that enough time  
16 for everybody? Y'all got a calendar to look at, see  
17 what your calendars look like?  
18 MR. ORR: And Friday would be fine. We have  
19 a draft proposed order --  
20 THE COURT: Okay.  
21 MR. ORR: -- if your Honor would like to look  
22 at it.  
23 THE COURT: Sure, I would. I would.  
24 MR. ORR: Approach?  
25 THE COURT: Would that be sufficient time for

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1 y'all --  
2 MR. MAJMUNDAR: Yes, your Honor.  
3 THE COURT: -- to confer, be prepared to file  
4 any additional pleading with the Court, and address  
5 these issues further as necessary? And then we'll  
6 hear you with regard to everything we talked about  
7 today.  
8 If anybody can find any additional precedent  
9 with reference to the power of this Court to enter  
10 not a temporary restraining order, but a preliminary  
11 injunction; and if the Court does enter a  
12 preliminary injunction, whether or not the Court has  
13 the authority to make any declarations with  
14 reference to constitutionality of this statute that  
15 would be enforceable. I don't want to overstep my  
16 authority. So I'll hear further from y'all next  
17 week. Let me, just have a seat y'all. Let me look  
18 at, let me look at your order.  
19 All right. The language is sufficient for,  
20 for a TRO. I probably will be a little more  
21 particular about language in a preliminary  
22 injunction if I were to consider a preliminary  
23 injunction. Again, all of this, these orders are  
24 subject to review, modification, or vacation by a  
25 3-judge panel appointed by the Chief Justice that is



<div>Page 38</div> <div>1 assigned to address this case and these issues in</div> <div>2 the event one is appointed next week and convenes</div> <div>3 and prior to the, the date set for this preliminary,</div> <div>4 preliminary injunction hearing and takes some</div> <div>5 action. And I will make sure that they, the Court</div> <div>6 recognizes that they have full jurisdiction over the</div> <div>7 issues, all issues.</div> <div>8 So I will allow a motion for temporary</div> <div>9 restraining order. I will enjoin and restrain the</div> <div>10 implementation of this legislation. It will not be</div> <div>11 put into effect until further order of this Court.</div> <div>12 The Court sets the motion for preliminary injunction</div> <div>13 to be heard before myself on next Friday, looks like</div> <div>14 January the 6th or soon thereafter as the Court</div> <div>15 directs. 9:30. Anything further? All right.</div> <div>16 Thank you, gentlemen.</div> <div>17 MR. ORR: Thank you, your Honor.</div> <div>18 MR. MAJMUNDAR: Thank you.</div> <div>19 THE COURT: We'll be adjourned.</div> <div>20 (End of recording.)</div> <div>21</div> <div>22</div> <div>23</div> <div>24</div> <div>25</div>	
<div>Page 39</div> <div>1 STATE OF NORTH CAROLINA</div> <div>2 COUNTY OF WAKE</div> <div>3</div> <div>4 REPORTER'S CERTIFICATE</div> <div>5 I, LAUREN M. MCINTEE, Registered Professional</div> <div>6 Reporter and Notary Public for the State of North</div> <div>7 Carolina, certify that I was authorized to and did</div> <div>8 stenographically transcribe the foregoing proceeding</div> <div>9 from a video recording, and that the transcript is a</div> <div>10 true and accurate record of the testimony to the best of</div> <div>11 my ability.</div> <div>12 I further certify that I am not a relative,</div> <div>13 employee, attorney, or counsel of any of the parties,</div> <div>14 nor am I a relative or employee of any of the parties'</div> <div>15 attorneys or counsels connected with the action, nor am</div> <div>16 I financially interested in the action.</div> <div>17</div> <div>18 Dated this 3rd day of January, 2017.</div> <div>19 </div> <div>20 LAUREN MCINTEE, RPR, Notary Public</div> <div>21 Notary Number: 201616600044</div> <div>22</div> <div>23</div> <div>24</div> <div>25</div>	

# Exhibit E

FILED

NORTH CAROLINA

WAKE COUNTY

2016 DEC 29 PM 3: 54

GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

NORTH CAROLINA STATE BOARD OF EDUCATION, WAKE COUNTY, C.S.C.

BY AA  
Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

**TEMPORARY RESTRAINING ORDER**

**THIS MATTER** is before the Court on the Plaintiff North Carolina State Board of Education's motion for temporary restraining order.

The Court has considered the verified complaint and the arguments and submissions of counsel in attendance at the hearing on this motion. The Board's counsel were present at the hearing, and advised the Court that they had given the Defendant, the State of North Carolina, notice of the Board's intent to seek a temporary restraining order. The State's counsel were present at the hearing.

**IT APPEARS** to the Court that good cause exists to grant the motion.

First, the Board has shown that it is likely to succeed on the merits. It is well-settled that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment. Article IX, Section 5 of the North Carolina Constitution expressly confers certain "powers and duties" on the Board. Those constitutional powers and duties include:

- the power and duty to "supervise . . . the free public school system";
- the power and duty to "administer the free public school system";



- the power and duty to “supervise . . . the educational funds provided for [the free public school system’s] support”; and
- the power and duty to “administer . . . the educational funds provided for [the free public school system’s] support.”

The provisions of Session Law 2016-126 challenged in the verified complaint (hereinafter “the Transfer Legislation”) attempt to transfer these constitutional powers and duties, however, from the Board to the Superintendent of Public Instruction. Thus, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional.

Second, the Transfer Legislation will cause irreparable harm if not immediately enjoined. As a matter of law, violations of the North Carolina Constitution constitute *per se* irreparable harm. As described above, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional. Therefore, no further showing of irreparable harm is required. Even if a further showing of irreparable harm were required, moreover, the Transfer Legislation threatens to cause irreparable harm to the Board, the employees of the public school system, and—most importantly—North Carolina’s 1.5 million public school students unless the status quo is preserved. Thus, there is sufficient irreparable harm to warrant immediate injunctive relief.

Third, the balance of equities also favors granting immediate injunctive relief. As described above, without immediate injunctive relief, the Transfer Legislation will cause irreparable harm. Conversely, immediate injunctive relief will not result in any harm. The Board has exercised its constitutional powers and fulfilled its constitutional duties for the past 148 years. Allowing the Board to continue doing so while this case is resolved only preserves this longstanding status quo.

**WHEREFORE**, the Board's motion for temporary restraining order is **GRANTED**.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that until a decision on the Board's motion for preliminary injunction:

- (a) The State is restrained and enjoined from taking any action to implement or enforce the Transfer Legislation.
- (b) Under Rule 65(d) of the North Carolina Rules of Civil Procedure, the State's "officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice in any manner of [this] order by personal service or otherwise" are likewise enjoined from taking any action to implement or enforce the Transfer Legislation.

Counsel for the Board shall serve copies of this order on the Chief Deputy Attorney General, the President Pro Tempore of the North Carolina Senate, the Speaker of the North Carolina House of Representatives, and the Superintendent of Public Instruction-Elect.

Unless the State consents to an extension of this temporary restraining order, the Board's motion for preliminary injunction shall be heard before the undersigned Superior Court Judge

~~within ten days from the date of this order, or as soon thereafter as the Court may hear this matter.~~ *Friday January 6, 2017 at 9:30 Courtroom 10C.*

So ordered the 29th day of December at 4:00p.m.

*Donald W. Stephens*  
The Honorable Donald W. Stephens  
Senior Resident Superior Court Judge  
Wake County Superior Court

*WWS*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served by hand-delivery to the following:

State of North Carolina  
c/o Grayson G. Kelley  
Chief Deputy Attorney General  
North Carolina Attorney General's Office  
114 W Edenton Street  
Raleigh, North Carolina 27603

The Honorable Philip E. Berger  
President Pro Tempore of the North Carolina Senate  
Legislative Building  
16 W. Jones Street, Room 2007  
Raleigh, North Carolina 27601

The Honorable Timothy K. Moore  
Speaker of the North Carolina House of Representatives  
Legislative Building  
16 W. Jones Street, Room 2304  
Raleigh, North Carolina 27601

Mark Johnson  
2680 Arbor Place Ct.  
Winston-Salem, North Carolina 27104

This the 30th day of December, 2016.

  
\_\_\_\_\_  
Andrew M. Erteschik



# Exhibit F

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

**AFFIDAVIT OF  
WILLIAM W. COBEY, JR.**

I, William W. Cobey, Jr., declare under penalty of perjury as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I currently serve as the Chairman of the North Carolina State Board of Education.

I have served in this capacity since 2013, when Governor Pat McCrory appointed me to the Board and I was confirmed by the General Assembly.

3. Prior to serving as Chairman, I served as a member of the U.S. House of Representatives, as the Deputy Secretary of the North Carolina Department of Transportation, as the Secretary of the North Carolina Department of Environment, Health and Natural Resources, and for two terms as the Chairman of the North Carolina Republican Party.

4. I hold a bachelor of arts in chemistry from Emory University, a masters in business administration from the University of Pennsylvania's Wharton School of Business, and a masters in education from the University of Pittsburgh.

5. Under Article IX, Section 4 of the North Carolina Constitution, the Board is composed of "the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session." Article IX,

Section 4 requires that these Board members serve “overlapping terms of eight years.” These lengthy, overlapping terms ensures that, at all times, Board has at least a half century of combined experience supervising and administering North Carolina’s public school system and the funds provided for its support. This constitutional structure also maintains the Board’s institutional knowledge and expertise in education, enables smooth transitions between Board memberships, provides ample training opportunities for incoming members by experienced members, and insulates the Board from political cycles.

6. In addition, Article IX, Section 4 requires that eight of the Governor’s eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

7. On December 14, 2016, the General Assembly introduced House Bill 17. Within 48 hours, it passed both the House of Representatives and the Senate. Three days later, on December 19, 2016, House Bill 17 was signed into law as Session Law 2016-126.

8. Session Law 2016-126 contains provisions that attempt to transfer the Board’s constitutional powers and duties to the Superintendent of Public Instruction (“SPI”). Those provisions appear in Part I, Sections 1-12, 14-16, 24-15, and 28-30 (“the Transfer Legislation”).

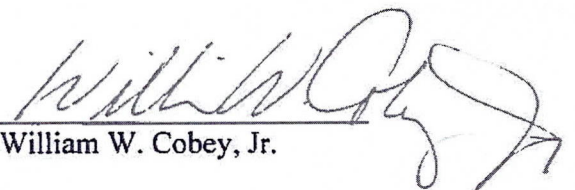
9. For the past 148 years, the Board has been in charge of the public school system. The Transfer Legislation attempts to strip the Board of its constitutional powers and duties, however, and makes the SPI in charge of the public school system instead. Thus, without a preliminary injunction to preserve the status quo, the Transfer Legislation would reduce a 148-year-old constitutional entity to an empty shell, and would put the entire \$10 billion public



school system under the control of a single individual. Without a preliminary injunction to preserve the status quo, the Transfer Legislation would accomplish this seismic shift overnight.

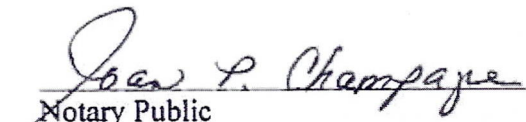
10. Furthermore, without a preliminary injunction to preserve the status quo, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI would immediately be empowered to unilaterally hire and fire public school system employees, fire members of the Board's staff, determine whether certain public school system positions should be exempt from state personnel laws, execute new contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing contracts for tens of millions of dollars. These actions would be impossible to undo after the fact, even if this declaratory judgment action were ultimately resolved in favor of the Board.

11. I am unaware of any non-political justifications for dismantling North Carolina's 148-year-old constitutional structure for managing public education. Under Article I, Section 15 of the North Carolina Constitution, "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." I personally believe that guarding and maintaining that right should always be above politics.

  
William W. Cobey, Jr.

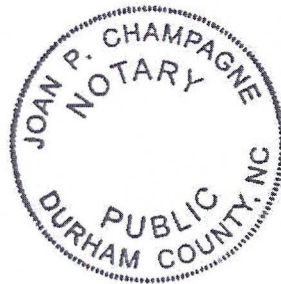
WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 4 day of January, 2017.

  
Notary Public

My commission expires: Jan 9, 2018

[SEAL]



STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF WAKE

16 CVS 15607

NORTH CAROLINA STATE BOARD OF )  
EDUCATION, )

Plaintiff, )

v. )

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

Defendants. )

**THE STATE OF NORTH CAROLINA'S BRIEF IN SUPPORT OF ITS  
MOTIONS TO DISMISS AND IN OPPOSITION TO THE PLAINTIFF'S MOTIONS  
FOR PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT**

NOW COMES Defendant State of North Carolina, (the "State"), by and through the undersigned counsel, and pursuant to Rules 12(b)(1), (b)(2) and (b)(6) of the North Carolina Rules of Civil Procedure and Consent Scheduling Order signed on February 16, 2017 and modified on March 20, 2017 by the Honorable Forrest Donald Bridges, and submits this Brief in support of its motions to dismiss the North Carolina State Board of Education's (the "Board") Verified Amended Complaint, ("Complaint"), and in opposition to the Board's motion for preliminary injunction and motion for summary judgment.

**INTRODUCTION**

On December 14, 2016, the North Carolina General Assembly introduced House Bill 17, ("HB 17"), designated as "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.” (State Ex. 1) HB 17 passed the House and the Senate, and was signed into law on December 19, 2016. Session Law 2016-126. The Board filed an Amended Complaint contending that HB 17 unlawfully transfers various powers of the Board established by Article IX, Section 5 of the North Carolina Constitution, to the North Carolina Department of Public Instruction, (“DPI”). *Inter alia*, the Board alleges that HB 17 unconstitutionally transfers the Board’s duties to “supervise ... 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). (Pl Am Compl pp 10-12) The Board seeks declaratory and injunctive relief.

#### **PROCEDURAL BACKGROUND**

The Board filed its Complaint against the State, accompanied by a request for a temporary restraining order, (“TRO”), on December 29, 2016. On the same day, the Honorable Judge Donald Stephens issued a temporary restraining order enjoining the relevant clauses of HB 17. On January 6, 2017, by consent of the parties and the newly elected Superintendent of the Public Instruction, Mark Johnson, the Court extended the temporary restraining order until a decision on the Board’s motion for preliminary injunction. On January 30, 2017, the Board moved for summary judgment on counts 1 through 4 of its Complaint.

On March 10, 2017, the State Board filed its Verified Amended Complaint to join Superintendent Johnson, in his official capacity, as the State’s co-defendant in this action. Pursuant to the modified Consent Case Management Order entered by this Court, the State now submits its brief in support of its motions to dismiss, and in opposition to the Board’s motions for

preliminary injunction and summary judgment. The State intends to submit additional briefs in accordance with the State Management Order in this case.

### **STANDARD OF REVIEW**

#### **Rule 12(b) Dismissal Standards.**

Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *Hardy v. Beaufort County Bd. of Educ.*, 200 N.C. App. 403 (2009). “When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings.” *DOT v. Blue*, 147 N.C. App. 596, 603 (2001), *disc. review denied*, 356 N.C. 434 (2002) (internal citations omitted).

Under Rule 12(b)(2), a claim should be dismissed when the court lacks authority to exercise personal jurisdiction over the defendant. *Transtector Sys. v. Electric Supply, Inc.*, 113 N.C. App. 148 (1993). The Court of Appeals has held that the doctrine of sovereign immunity presents a question of personal jurisdiction. *See Green v. Kearney*, 203 N.C. App. 260, 266 (2010). Moreover, the claimant is required to affirmatively plead a waiver of sovereign immunity. *Id.* The North Carolina Supreme Court has not definitively determined whether sovereign immunity presents an issue of subject matter or personal jurisdiction.

Rule 12(b)(6) tests the legal sufficiency of the complaint, where the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or deductions of fact are not admitted. *Sutton v. Duke*, 277 N.C. 94, 98 (1970). A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *State of Tenn. ex rel Tenn. Dep't of Health & Env't v. Env'tl. Mgmt. Com.*, 78 N.C. App. 763 (1986). An “esoteric analysis of the issue” in the absence of the specifically pleaded facts in the complaint does not

survive a motion to dismiss under Rule 12(b)(6). *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 449, *disc. rev. denied*, 323 N.C. 366 (1988). To prevent dismissal under Rule 12(b)(6), a party must (1) give sufficient notice of the events on which the claim is based to enable the adverse party to respond and prepare for trial, and (2) state sufficient facts to satisfy the substantive elements of a legally recognized claim. *Hewes v. Johnston*, 61 N.C. App. 603 (1983).

#### **Standards for Preliminary Injunction.**

A preliminary injunction may be entered in order to preserve the status quo until the rights of the parties can be determined through a trial on the merits. *Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co.*, 15 N.C. App. 634 (1972). It is well established that a temporary injunction is an “extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only: (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a movant is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 577 (2002), *disc. review denied*, 356 N.C. 668 (2003). Notably, conclusory allegations of irreparable harm, supported only by allegations of a verified complaint, are insufficient to permit a trial court to determine whether a preliminary injunction should issue. *Town of Knightdale v. Vaughn*, 95 N.C. App. 649 (1989).

The movant bears the burden of establishing their right to a preliminary injunction. *Pruitt v. Williams*, 25 N.C. App. 376, *appeal dismissed*, 288 N.C. 368 (1975). The issuance of a preliminary injunction is a matter of discretion to be exercised by the presiding judge after a careful balancing of the equities. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393 (1983). “[A]



preliminary injunction . . . is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation” *Ridge Cmty. Inv’rs, Inc. v. Berry*, 293 N.C. 688, 701 (1977).

**Standards for Summary Judgment Pursuant to Rule 56.**

The propriety of summary judgment in declaratory judgment actions is governed by the same rules applicable to other actions. *North Carolina Life & Accident & Health Ins. Guar. Ass’n v. Underwriters Nat’l Assurance Co.*, 48 N.C. App. 508, *cert. denied and appeal dismissed*, 301 N.C. 527 (1980), *rev’d on other grounds*, 455 U.S. 691 (1982). Under the rule, a party is entitled to summary judgment if it can establish through the pleadings and affidavits, that there is no genuine issue as to any material fact, that only issues of law remain and that it is entitled to judgment as a matter of law. *Whittington v. North Carolina Dep’t of Human Resources*, 100 N.C. App. 603, 605 (1990). Facts necessary to support summary judgment must be established by pleadings, depositions, answers to interrogatories, admissions or affidavits. *Cieszko v. Clark*, 92 N.C. App. 290 (1988). Where the pleadings and attendant supporting documents affirmatively disclose that the nature of the controversy presents a good faith and actual dispute on one or more material issues, summary judgment cannot be ordered. *Page v. Sloan*, 281 N.C. 697 (1972). “If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper.” *Hyde Insurance Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138 (1975).

The movant’s burden in a motion for a declaratory summary judgment regarding the constitutionality of our State statutes is especially heavy given that “a statute enacted by the General Assembly is presumed to be constitutional.” *Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 18 (2002) (*citing Wayne Cty. Citizens Ass’n for Better Tax Control v. Wayne Cty. Bd. of Comm’rs*, 328 N.C. 24, 29 (1991).) “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 (1991), *quoting Gardner v. Reidsville*, 269 N.C. 581, 595 (1967).

Summary judgment may also be appropriate against the moving party. If the non-movants clearly establish that there is no genuine issue as to the nonexistence of material facts which are necessary as an essential element of any cause of action against them, then they are entitled to summary judgment on that action. *Clodfelter v. Bates*, 44 N.C. App. 107 (1979), *cert. denied*, 299 N.C. 329 (1980); *Little v. National Servs. Indus., Inc.*, 79 N.C. App. 688 (1986).

### ARGUMENT

The Board, in essence, complains that HB 17 granted the newly elected Superintendent of Public Instruction powers that are currently reserved for the appointed members of the Board. Plaintiff alleges that the Superintendent’s expanded powers of oversight over the Department of Public Instruction (“DPI”), including powers to administer personnel and DPI grants, departmental budget allocations and contracts, is unconstitutional. The Board’s Complaint against the State should be dismissed on the grounds of sovereign immunity and for failure to state a claim under the Declaratory Judgment Act. HB 17 is a valid codification of the Superintendent’s oversight over public schools, in his constitutional capacity as “chief administrative officer of the State Board of Education,” and no existing, fact-based controversy between the Board and Superintendent was presented within the four-corners of the Complaint.

Instead, Plaintiff’s Complaint presents scholarly and abstract questions of law, which require no immediate resolution by the courts. Further, because the allegations of the Board’s Complaint and attachments thereto fall short of establishing a constitutional violation, and are

not likely to succeed on the merits, its motions for preliminary injunction and summary judgment should be denied as a matter of law.

**I. The Board's Complaint Should Be Dismissed For Lack Of Personal Jurisdiction, Lack Of Subject Matter Jurisdiction, And For Failure To State A Claim. Further, the Board's Motion for Summary Judgment Should be Denied.**

**A. The Board's Complaint Should Be Dismissed Pursuant To Rules 12(b)(1), (b)(2) And (b)(6), And Its Motion For Summary Judgment Should Be Denied As A Matter of Law Based On The State's Sovereign Immunity To Declaratory Judgment Actions Under The Circumstances Alleged.**

The doctrine of sovereign immunity is well settled in North Carolina. "It is an established principle of jurisprudence, resting on grounds of sound public policy that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit." *Welch Contracting, Inc. v. N.C. Dep't of Transp.*, 175 N.C. App. 45, 51 (2005) (internal citations omitted). "By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute." *Id.*

**1. Sovereign Immunity - Pleading Requirements.**

In order to sustain an action against the sovereign, a claimant must allege that the State has waived its immunity to be sued before the action may proceed, and absent those allegations, the claim must be dismissed for want of jurisdiction. *Green v. Kearney*, 203 N.C. App 260, 268 (2010). "This requirement does not, however, mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity." *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 38 (2005). Here, a review of the Board's Verified Amended Complaint reveals absolutely no



allegations, factual or otherwise, that the State has waived its sovereign immunity to this suit. According to the opinions of the Court of Appeals, the Board's claim should be dismissed pursuant to Rule 12(b).

**2. Sovereign Immunity - Constitutional Claims.**

The four counts of the Board's Complaint seek relief under the terms of the Declaratory Judgment Act, accompanied by a request for injunctive relief. (Pl Am Compl pp 10-12) Even had Plaintiff made the necessary allegations of a waiver of sovereign immunity, jurisdiction under the Act is not automatically invoked. In fact, as it pertains to the State and its agencies, the Court of Appeals has explicitly held that sovereign immunity is not waived by the Act. *Petroleum Traders Corp. v. State*, 190 N.C. App. 542 (2008). The Court of Appeals has recently reiterated in *T & A Amusements, LLC v. McCrory*, 796 S.E.2d 376 (N.C. App. Feb. 7, 2017), that the only limited exception to the State's sovereign immunity under Declaratory Judgment Act is "in certain cases where plaintiffs seek declaratory or injunctive relief against State agencies that act 'in excess of the authority granted [to them] under [a] statute and invade or threaten to invade personal or property rights of a citizen in disregard of the law.'" Slip Op at 8. The State has not expressly waived sovereign immunity, and in fact, no such waiver exists under the plain terms of the Declaratory Judgment Act. Moreover, the State has not acted in excess of any authority granted by statute, nor invaded the Board's property rights. As such, Plaintiff's only recourse is to cull a waiver of immunity from common law pursuant to *Corum v. University of North Carolina*, 330 N.C. 761 (1992). However, as was true in *Petroleum Traders*, *Corum* fails to provide the Board any refuge.

In *Corum*, the Supreme Court held that “[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights [of our Constitution].” *Id.* at 785-86, 413. However, with *Petroleum Traders*, the Court of Appeals specifically noted that “[o]ur appellate courts have applied the holding of *Corum* to find a waiver of sovereign immunity only in cases wherein the plaintiff alleged a violation of a right protected by the Declaration of Rights.” *Id.* at 548. With *Petroleum Traders*, the Court of Appeals went on to specifically note that “every other case waiving sovereign immunity based on *Corum*,” alleged a violation of a right protected by the Declaration of Rights, *Id.* at 550, that “*Corum* contains no suggestion of an intention to eliminate sovereign immunity for any and all alleged violations of the N.C. Constitution,” *Id.* at 551, and that “*Corum* is properly limited to claims asserting violation of the plaintiffs personal rights as set out in the N.C. Constitution Declaration of Rights.” *Id.* at 551.

Moreover, *Petroleum Traders* specifically bars claims against the sovereign predicated upon constitutional clauses that articulate procedural rules, rather than those where personal rights have been abridged by the State. That is precisely the case here as the Board’s claim rests entirely upon the terms of Article IX, Section 5 of the State’s Constitution which provides that “[t]he State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, ... subject to laws enacted by the General Assembly.” This clause articulates no personal right. Absent the intrusion upon the Board’s *Corum*-like personal rights, no waiver of sovereign immunity may be implied. *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334

(2009). The Board's Complaint should be dismissed, and its motions for preliminary injunction and for summary judgment should be denied on the basis of the State's sovereign immunity.

It should be noted that a dismissal of the present action does not foreclose future cases where a putative plaintiff, with appropriate personal stakes based on enactment of HB 17, may be harmed by actions of the Superintendent taken in furtherance of the powers allocated under that statute. In that instance, a proper controversy worthy of adjudication might be present. Nevertheless, the Board's current Amended Complaint, which is theoretical and academic in its scope, simply does not present a suitable controversy.

**3. The Board's Complaint Should Be Dismissed Pursuant To Rule 12(b)(6) For A Failure To State A Claim.**

This Court should also dismiss this action pursuant to Rule 12(b)(6), and deny the Board's motion for summary judgment pursuant to Rule 56, based on the Board's failure to present a justiciable controversy. Pursuant to the North Carolina Declaratory Judgment Act, "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254 (2015).

Generally, the actions of the General Assembly are presumed constitutional and a plaintiff must demonstrate a constitutional defect beyond a reasonable doubt. A claimant "face[s] a heavy burden of persuasion" when attacking legislative acts of the General Assembly as being unconstitutional. *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631 (2003). "Every presumption favors the validity of a statute. It will not be declared invalid



unless its unconstitutionality be determined beyond reasonable doubt.” *Id.* (quoting *Baker v. Martin*, 330 N.C. 331, 334 (1991)). Any doubt as to the legislature’s power to act must be resolved in favor of the legislature. *Baker*, 330 N.C. at 338. Acts of the General Assembly are entitled to “great deference, and a statute will not be declared unconstitutional under [the] Constitution unless the Constitution clearly prohibits that statute.” *In re Spivey*, 345 N.C. 404, 413 (1997). Therefore, the Board must clearly allege, supported by sufficient facts, that the policy choices enacted by the General Assembly through enactment of HB 17 violate Article IX, Section 5 of the Constitution. The Board fails to do so in its Complaint.

**a. Strong Presumption of Constitutionality.**

A bedrock principle of North Carolina law is the strong presumption that enactments of the General Assembly are constitutional. Courts must resolve all doubts in favor of the constitutionality of a legislative act. *In re Denial of Approval to Issue \$30,000,000.00 of Single Family Housing Bonds, etc.*, 307 N.C. 52, 57 (1982). In order for a statute to be held unconstitutional, “it must be plainly and clearly the case.” *Emerald Isle v. State*, 320 N.C. 640, 647 (1987). In cases where two different interpretations of a law are possible, one being constitutional and the other being unconstitutional, a court must adopt the former and not the latter. *Wayne Cty. Citizens Ass’n for Better Tax Control v. Wayne Cty. Bd. of Comm’rs*, 328 N.C. 24, 29 (1991). “A statute will not be declared unconstitutional unless its unconstitutionality is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground.” *City of Concord v. All Owners of Taxable Property, etc.*, 330 N.C. 429, 432 (1991).

Our Supreme Court has emphasized that courts “have no power to review a statute with respect to its political propriety as long as it is within the legislative discretion and has a reasonable relation to the end sought to be accomplished.” *Greensboro-High Point Airport Auth v. Johnson*, 226 N.C. 1, 8 (1946). “It is not the role of this Court to pass judgment on the wisdom and expediency of a statute.” *Emerald Isle*, 320 N.C. at 647, 360 S.E.2d at 761. The presumption of HB 17’s constitutionality is not overcome by the conclusory contrary allegations in the Board’s Amended Complaint. In fact, the text of the Constitution, and the historical context and decisions provided by our appellate courts, confirm that the General Assembly is within its constitutional prerogative to pass laws that reallocate the distribution of administrative power between the Superintendent and the Board, and thereby limiting some of the Board’s powers through properly enacted legislation.

**b. The Power Of The State Board To Supervise And Administer The Public School System And Attendant Educational Funds Are Limited By The Enactments Of The General Assembly Under The N.C. Constitution.**

The powers of the State Board are set out in article IX, section 5, which provides that:

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., § 5 (emphasis added). On its face, the text of section of art. IX, section 5 of the N.C. Constitution establishes that the framers intended to make the Board’s power to supervise and administer free public schools, and its educational funds, subordinate to the

specific educational and funding laws enacted by the Legislature. In that vein, interpreting the text of the Constitution, our appellate courts have previously held that the General Assembly can constitutionally enact laws limiting the Board's powers.

In *Guthrie v. Taylor*, a certified public school teacher sued on behalf of himself and all other classroom teachers in the State for a judgment to declare the invalidity of certain rules and regulations of the Board pertaining to teacher certification. 279 N.C. 703, 713 (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), and that as a result, the Board exceeded its authority under the statute. The North Carolina Supreme Court noted that the Board derives power from the Constitution and the General Assembly. *Id.* at 713. The Court then held 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. In its reasoning, the Supreme 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.

The appellate courts have otherwise recognized that the Board's power over the administration of elementary and secondary education is not unfettered, and is limited by General Assembly's enactments. For example, in *State v. Whittle Communications*, 328 N.C. 456 (1991), the Supreme Court held that local boards of education, rather than the State Board, have complete and ultimate control over supplementary instructional materials in public schools,



pursuant to General Assembly's grant of such powers to the local boards. Similarly, citing its broad constitutional powers, the Board sought to regulate speech pathologists employed in public schools. *North Carolina Bd. of Examiners for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ.*, 122 N.C. App. 15 (1996). The appellate courts again disagreed with that contention, concluding that the Board's constitutional powers to administer public education are subject to other laws of the General Assembly, and are specifically limited by enactment of the Licensure Act for Speech and Language Pathologists. *Id.* The cited jurisprudence demonstrates that the Legislature can constitutionally control and limit the Board's powers to supervise, administer, and oversee funds for the free public schools.

**c. The Superintendent's Well-Established Constitutional And Statutory Role In Administering The Public School System, Executing Rules And Regulations Enacted By The Board And Laws Enacted By The General Assembly.**

The overall ability of the General Assembly to control and limit the Board's powers over free public education is further enhanced in the context of this case by a special constitutional role afforded to the Superintendent in the administration of public education. The Superintendent of Public Instruction is a constitutional officer, and an elected member of the Council of State. N.C. Constitution, Article III, section 7(1). The Superintendent's role and duties, just as those of the State Board, are specifically established in the N.C. Constitution. While the Superintendent, as the Board, is subject to the laws enacted by the General Assembly, *id.*, Article IX, Section 4(2) expressly confers on the Superintendent a power and duty to "be the secretary and chief administrative officer of the State Board of Education." That role is accompanied by "inherent constitutional authority" that rests in the superintendent by virtue of his constitutional status. *See*

John V. Orth and Paul M. Newby, *"The North Carolina State Constitution"* pp 179-180; *State v. Atkinson* (Wake Co. Sup Ct. 2009). (State Ex. 2, 3)

Article IX, section 4(2) of the N.C. Constitution makes the Superintendent "the chief administrative officer of the Board, while Article IX, section 5 delineates that the Board "shall supervise and administer the free public school system and the educational funds ... subject to laws enacted by the General Assembly." From the text of the Constitution, it appears that the intent of the framers was to eliminate a conflict of authority that could arise between the Board and the Superintendent. The Board was to administer the public school system, and the Superintendent was to execute the policies of the Board. *Report of the N.C. State Constitution Study Commission* (1968). (State Ex. 4)

The framers of the Constitution intended to make the Superintendent, as an elected representative of the people, the chief executive responsible for administration of the Board's powers. The November 3, 1970 revisions to the N.C. 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. Conversely, the N.C. Constitution does not prohibit the Superintendent from being responsible, as a chief executive, for the administration and supervision of public schools pursuant to the policies and rules of the Board. The final decision of the Superior Court in *Atkinson v. State*, recognizing the "inherent constitutional authority and power of the duly elected State Superintendent," supports this conclusion. (State Ex. 3) The enactment of HB 17 at or near the time of transition to a newly elected Superintendent supports the constitutionally appropriate goals of (1) eliminating possible conflicts between the Board and the Superintendent, and (2) enacting legislation to clarify the

respective roles in the administration of public education between these two constitutional offices.

**d. The Challenged Portions Of HB 17 Which Reallocate Statutory Duties To The Superintendent From The Board Are Within The General Assembly's Constitutional Prerogative To Legislate In The Sphere Of "General and Uniform Free Public Schools."**

The North Carolina Constitution requires the General Assembly to play a major role in the State's public school system. Article IX, Section 2 confers upon the General Assembly the constitutional duty to "provide by taxation and otherwise for a general and uniform system of free public schools... ." Article III, section 7 accords the General Assembly the power to define by statute the duties of the Superintendent. Similarly, Article IX, section 5 confers authority upon the General Assembly to enact laws regarding the actions of the Board. HB 17 elucidates the constitutional power of the General Assembly, without violating any duties allegedly reserved to the Board or the Superintendent.

HB 17 simply restores the balance of responsibilities and authorities between the Board and the Superintendent as it existed prior to statutory changes enacted by the Legislature in 1995. Prior to 1995, the duties of the Superintendent were not subject to the "direction, control and approval" of the State Board. Prior to the General Assembly's passage of Session Law 1995-72, North Carolina's statutes acknowledged the historical and constitutional duties of the Superintendent as the head of the public school system, possessing the constitutional responsibility over supervision and administration of the public schools. (State Ex. 5) HB 17 reestablishes in the Superintendent some of the duties that had been previously transferred by the General Assembly to the Board, and appropriately reiterates that the Superintendent's executive power includes the administration of "all needed rules and regulations adopted by the State



Board of Education.” N.C. Gen. Stat. § 115-19, as rewritten; *see* N.C. Gen. Stat. § 115-21(a)(8), as rewritten. Additionally, HB 17 codified the administrative and executive discretion over the operation of the DPI by the Superintendent, by virtue of his constitutional role as “chief administrative officer of the State Board of Education.” N.C. Const., Article IX, Section 4(2). That codification arguably reflects the powers historically granted to previous superintendents by the Board, and ensures the continuation of this informal grant with succeeding Superintendents. Pursuant to HB 17, the administration of DPI, DPI’s personnel, as well as the funds of DPI and the Board are within the prerogative of the Superintendent as the “chief operating officer of the State Board of Education.” That allocation of administrative oversight violates no Constitutional provision, contrary to the Board’s assertions in the Complaint.

**II. The Board’s Motions For Preliminary Injunction And Summary Judgment Should Be Denied.**

On the face of its Verified Complaint, and for the reasons articulated *supra* in support of the State’s motion to dismiss, the Board is neither able to show likelihood of success on the merits of his case, nor demonstrate that it is likely to sustain irreparable loss unless the injunction is issued. *See DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 577 (2002), *disc. review denied*, 356 N.C. 668 (2003). Similarly, the Board is unable to demonstrate that it should be entitled to a summary disposition in its favor, as a matter of law, based on the allegations made in the Complaint.<sup>1</sup>

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<sup>1</sup> Pursuant to the Consent Case Management Order, the State intends to present future additional arguments in opposition to the Board’s contentions, that are due to be filed contemporaneously with the responsive pleadings of the respective defendants.

**A. The Board's Alleged Constitutional Authority Is Subject To Legislative Control.**

In pursuit of a preliminary injunction, the Board relies upon Article IX, Section 5 of the North Carolina Constitution, which again provides that:

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.*

(Emphasis added). The exact constitutional provision relied upon in the Complaint also serves to expressly limit that authority by subjecting the Board to the laws enacted by the State's legislature. While there is no question that the Board, like the Superintendent, draws authority from the Constitution, it must be acknowledged that it is also subject to the scrutiny and ancillary statutory provisions enacted by the General Assembly. Indeed, the North Carolina Supreme Court has specifically opined that movant derives power not only from the Constitution, but also from the General Assembly. *Guthrie v. Taylor*, 279 N.C. at 713 (1971).

**B. The Superintendent of Public Instruction Is Vested With Constitutional Authority.**

The Board's dual sources of authority exist today as they existed in 1971 with *Guthrie*, including statutory amendments enacted in 1995 that transferred many of the powers the Board has enjoyed for over two decades, but that were previously maintained by the Superintendent. Prior to 1995, the Superintendent was deemed the constitutional head of the public school system with the authority to preside over all matters relating to the supervision and administration of that system.

Now, as the General Assembly enacts HB 17 to again define and clarify the roles of the Board *vis a vis* the Superintendent of Public Instruction, the Board seeks to deny the legislative

source, and limitation, of its authority. The Board's denial of the legislature's constitutional duty to define the roles of the various educational entities of this State not only fails to recognize the express constitutional limitations of its dominion over public education, it further serves to lessen the obligations of the office of the State Superintendent, a constitutional entity in its own right, which is responsible for the day-to-day operation of the public school system.

The constitutional authority of the Superintendent, separate from the Board, was accurately defined in the matter of *Atkinson v. State*, 09 CVS 006655 (Wake County) (2009), wherein it was alleged that the State and the Board unconstitutionally sought to strip the authority and obligations from the elected Superintendent, for transfer to a "Chief Executive Officer" designated by and through the Board of Education. Relying upon the historical and contemporary constitutional analysis offered in the Superintendent's verified complaint, the trial court correctly determined in *Atkinson* that:

[T]he duties and responsibilities for 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 are vested in the duly elected State Superintendent of Public Instruction under the Constitution of North Carolina as the Chief Administrative Officer of the State Board of Education until such time as the qualified voters of North Carolina specify otherwise by a constitutional amendment.

(State Ex. 3) As a final superior court decision, *Atkinson* represents a heretofore unchallenged appreciation of the role of the Superintendent, in the context of the constitutional prerogative over the day to day administration of the public school system. HB 17 does nothing more than codify that accepted role.



**C. The General Assembly Has Historically Expressed Its Legislative Authority To Clarify The Obligations Of The Board And The Superintendent Without Triggering Constitutional Concerns.**

As previously discussed, in 1995 the General Assembly enacted various amended statutes which served to remove from the Superintendent, and deliver to movants, much of the authority that is at issue with the present action. (State Ex. 5) A comparison of these respective sets of statutes reveals a reciprocal approach taken by the General Assembly with regard to which of the State's two educational entities would be vested with the primary obligation to manage the day to day educational endeavors of the State's children. Whereas prior to 1995, the Superintendent was statutorily charged with virtually each major obligation associated with the day to day operation of the free public school system, following the statutory amendments of that year, the Board of Education was granted that authority.

With the enactment of HB 17, the General Assembly has chosen to revert to the historical, pre-1995 definitional model of where primary authority lies. Although the 1995 statutes and the present statutes accomplish the similar objective of clarifying the roles of the respective public educational agencies, only now does the Board raise question about what it contends is constitutionally dubious overreach by the legislature. Nevertheless, the Board's acquiescence with the General Assembly's determinations in 1995 should be viewed as agreement by the Board that the State's legislature possesses the constitutional authority to amend the Board's mission and role in public education. Especially when juxtaposed against its former behavior, the Board's current critique regarding the provenance of the General Assembly lacks historical substantiation, and serves to contradict their claims of a constitutional violation.

**D. The Board Has Failed To Show That It Is Irreparably Harmed By The Enactment Of The Pertinent Session Laws.**

The Board cannot show irreparable harm as a result of the enactment of HB 17. Even though the allegations in the Board's Amended Complaint offer speculative negative repercussions, the reality is that such surmise is simply insufficient to warrant the extraordinary remedy of a preliminary injunction. The apprehension or expectation of damages, (or fear thereof), simply does not constitute harm as contemplated by the applicable jurisprudence, especially in light of the demanded extraordinary and drastic remedy of a preliminary injunction.

Indeed, the verified complaint reveals movant's own uncertainty as to what damages, if any, may result from the enactment of HB 17. Specifically citing the need for preliminary injunctive relief, the Board claims as damages:

- "[U]ncertainty over whether the Board will continue to supervise and administer the public school system's \$10 billion dollar budget..."
- "[U]ncertainty in employment status for dozens of state employees."
- "[U]ncertainty for nearly 1,000 state employees..."
- Harm that may result to the State's students because of these various "uncertainties."

(Pl Am Compl, ¶ 41) These fears, drafted in terms of uncertainties, fail to constitute the imminent damages necessary to warrant a preliminary injunction.

Moreover, even if true, the damages alleged by the Board amount to nothing more than its disapproval that another State entity might assume a greater role in the administration of public education. Stated alternatively, nothing alleged by the Board actually constitutes a harm to students, employees, or budgets: the only possible repercussion is a shift of the Board's

singular and unassailable control over education processes to an entity that is that is directly answerable to the public on election day, every four years. If it is true that “[t]he people have a right to the privilege of education and it is the duty of the State to guard and maintain that right,” then the constitutionally permissible shifting of authority from an entity that is not directly answerable to the citizenry, to one that must account for all decisions made on behalf of the public, fails to constitute a “harm” worthy of preliminary injunction.

In contrast, movant has failed to make any substantiated allegation that the provisions of HB 17 abolish the Board’s constitutional power to dictate policy through the proposal and adoption of “all needed rules and regulations in relation thereto.” Consequently, it must be fairly concluded that the harms described by the Board, real or perceived, squarely fail to support their demand for a preliminary injunction.

**E. The Balancing Of The Equities Does Not Favor The Board.**

A balancing of the equities demonstrates that the Board’s desire to monopolize the State’s education system is manifestly outweighed by the bridling effect upon the constitutional authority of the General Assembly, and the throttling of the Superintendent’s ability to meet the demands made by the public that elected him. In that regard, it should be noted that the DPI performs a wide variety of complex functions including, but not limited to oversight over finances and federal grants, monitoring of academic standards and appropriate curricula, teacher licensure, and statewide testing standard and protocols. By enactment of HB 17, and with an eye toward a more efficient and centralized model, the General Assembly has announced its intention to assist the Superintendent’s endeavors to direct DPI with the grant of increased authority, resources, and tools.



It will likely be noted that the timing the General Assembly's actions correspond with the change of administration. In response, it should be further noted that this timing underlines the legitimate goal of the General Assembly to precisely define the authoritative scope of each entity, and resolve any potential tension between the Board and the Superintendent at the time that a new Superintendent takes office.

Moreover, the Board attempt to block the enforcement of a duly elected law not only presents an unwarranted obstruction to State governance, it potentially serves to violate the separation of powers doctrine. "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. "[T]he principal function of the separation of powers[ ] . . . is to maintain the tripartite structure of the . . . Government—and thereby protect individual liberty— by providing a safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Bacon v. Lee*, 353 N.C. 696, 715, *cert. denied*, 533 U.S. 975 (2001) (alterations in original) (quotation marks omitted). As such, "the fundamental law guarantees to the Legislature the inherent right to discharge its functions and to regulate its internal concerns in accordance with law without interference by any other department of the government." *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 503 (1922). "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). The Board's motions for preliminary injunction and summary judgment should be denied.

**CONCLUSION**

This Court should dismiss the Board's Complaint for lack of subject matter and personal jurisdiction, the State's sovereign immunity to declaratory judgment actions and for failure to state a cognizable claim. The Court should further deny the Board's motions for preliminary injunction and summary judgment for the reasons articulated in this Brief, and as further briefed according to the deadlines set by this Court in its Case Management Order.

Respectfully submitted, this the 12<sup>th</sup> day of April, 2017.

JOSH STEIN

Attorney General

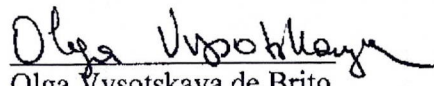


Amar Majumdar

Special Deputy Attorney General

NC Bar No. 24668

amajmundar@ncdoj.gov



Olga Vysotskaya de Brito

Special Deputy Attorney General

NC Bar No. 31846

ovysotskaya@ncdoj.gov

NC Department of Justice

P.O. Box 629

Raleigh, North Carolina 27602

Telephone: (919) 716-6820

Facsimile: (919) 716-6759

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the forgoing Brief has been served on the following counsel by electronic mail, and by depositing the same in the United States mail, postage prepaid, and addressed as follows:

Mr. Robert F. Orr,  
Attorney at Law  
[orr@rforrlaw.com](mailto:orr@rforrlaw.com)  
3434 Edwards Mill, Suite 112-372  
Raleigh, NC 27612  
*Counsel for Plaintiff*


Mr. John M. Durnovich  
Attorney at Law  
[jdurnovich@poynerspruill.com](mailto:jdurnovich@poynerspruill.com)  
301 S. College St., Suite 2300  
Charlotte, NC 28202  
*Counsel for Plaintiff*

Philip R. Isley  
[pisley@bmlilaw.com](mailto:pisley@bmlilaw.com)  
Blanchard, Miller, Lewis & Isley P.A.  
1117 Hillsborough Street  
Raleigh, NC 27603  
*Counsel for Superintendent*

Mr. Andrew H. Erteschik  
Attorney at Law  
[aerteschik@poynerspruill.com](mailto:aerteschik@poynerspruill.com)  
Post Office Box 1801  
Raleigh, NC 27602-1801  
*Counsel for Plaintiff*

Mr. Saad Gul  
Attorney at Law  
[sgul@poynerspruill.com](mailto:sgul@poynerspruill.com)  
Post Office Box 1801  
Raleigh, NC 27602-1801  
*Counsel for Plaintiff*

This the 12th day of April, 2017.

  
Amar Majmundar  
Special Deputy Attorney General



**SESSION LAW 2016-126**

State Exhibit 1 to State of North Carolina's  
Brief in Support of its Motions to Dismiss and  
in Opposition to the Plaintiff's Motions for  
Preliminary Injunction and Summary Judgment

Duplicate Copy Omitted.

Original set forth in its entirety on R pp 18-37.

## Article IX

### *Education*

#### Section 1

*Education encouraged.* Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.

The declaration of rights, in a section new in 1868, proclaimed the people's "right to the privilege of education" (Article I, Section 15). Article IX implements that right, leading off with a general statement on the utility of knowledge (as well as religion and morality) copied from the venerable Northwest Ordinance of 1787.<sup>47</sup>

#### Section 2

*Uniform system of schools.*

1. General and uniform system; term. The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

2. Local responsibility. The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as

<sup>47</sup> 1 U.S. Stats. 52. See Proceedings and Debates, 1868 (March 6, 1868), *North Carolina Standard*, March 7, 1868.

it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

Although the 1776 constitution had called for publicly supported schools "for the convenient Instruction of Youth," a statewide system of public or, as they were then called, common schools was not established until legislation in 1839. In 1868 free public schools with at least a four-month term were enshrined in the constitution, although in practice the goal was not achieved for decades. The minimum term was lengthened to six months by amendment in 1918, by which time ideal and reality were at last congruent. The 1971 constitution raised the minimum to nine months, where it had in fact been fixed by statute since 1943.

The Reconstruction Constitution had eschewed any mention of race, but a post-Reconstruction amendment in 1876 required segregated schooling ("separate but equal"). Outlawed in 1954 by the U.S. Supreme Court's ruling in *Brown v. Board of Education*, racially segregated education was forbidden by the 1971 constitution. If the nondiscrimination clause added to Article I, Section 19 were not enough, the present section firmly requires the public schools to provide equal opportunities to "all students."

Recently attention has shifted from the question of racial discrimination as such to the question of economic discrimination. (Given the unequal distribution of wealth among the races, the two generally go together.) Specifically the question is whether a system of financing public schools that leaves poorer districts with less money to spend per pupil passes constitutional muster. The state supreme court has held that it does: What is required is equal access to a "sound basic education," not "substantially equal funding or educational advantages" in each district (*Leandro v. State*, 1997). Each district must, however, have funding sufficient to provide an opportunity to obtain such an education (*Hoke County Board of Education v. State*, 2004). The requirement that public education be "free" has not been interpreted to exclude absolutely all charges. Modest and reasonable fees for supplementary instructional materials, such as laboratory equipment or art supplies, may be required of all students able to pay (*Sneed v. Greensboro City Board of Education*, 1980).

The constitution requires that the public school system be "general and uniform." The challenge in interpreting this requirement is to reconcile it with the permission expressly given in Subsection 2 to local government (if authorized by the General Assembly) to use local revenues "to add to or supplement any public school or post-secondary school program." Decisions of the state supreme court illustrate that, while a "general and uniform system of free public schools" requires a minimum uniform funding, the existence of distinct state and county school funds (Sections 6 and 7) creates an environment in which funding inequality is not only possible but probable (*Beaufort County Board*



of Education v. Beaufort County Board of Commissioners, 2009; Hoke County Board of Education v. State, 2004; Leandro v. State, 1997).

Just as schools in the "general and uniform system" may be unequally funded, they may also have unique school calendars. This section allows the General Assembly to authorize local school boards to provide year-round schooling for a portion of the students within a school district (Wake Cares, Inc. v. Wake County Board of Education, 2009).

### Section 3

*School attendance.* The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.

The General Assembly must enact a compulsory school attendance law, but the school a child attends need not be part of the state's public school system. The requisite education may be acquired at a properly qualified private school, or even at a "home school" (Delconte v. State, 1985). In recent years, "charter schools," publicly funded schools that are exempt from some of the rules and regulations that apply to public schools, have been added to the public education system. As part of its responsibility under this section, the General Assembly has the exclusive authority to determine the appropriate school attendance age. The legislature's decision on this matter is a nonjusticiable political question (Hoke County Board of Education v. State, 2004).

### Section 4

*State Board of Education.*

1. Board. The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts. Of the appointive members of the Board, one shall be appointed from each of the eight educational districts and three shall be appointed from the State at large. Appointments shall be for overlapping terms of eight years. Appointments to fill vacancies shall be made by the Governor for the unexpired terms and shall not be subject to confirmation.

2. Superintendent of Public Instruction. The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.

The superintendent of public instruction, an elected member of the Council of State, is an executive branch officer (Article III, Section 7, Subsection 1). Although the duties of the superintendent, as of the other members of the Council of State, "shall be prescribed by law" (Article III, Section 7, Subsection 1), the superintendent is given a specific constitutional assignment: "the secretary and chief administrative officer"—but not a member—of the

State Board of Education. A final superior court decision recognized "inherent constitutional authority" in the superintendent: "The duties and responsibilities for 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 are vested in the duly elected State Superintendent of Public Instruction" and "any employee of the North Carolina Department of Instruction must be accountable and responsible to the state Superintendent of Public Instruction, as well as the State Board of Education" (Atkinson v. State, 2009).

#### Section 5

*Powers and duties of Board.* 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.

The State Board of Education is in charge of the public school system and administers the state school fund but not the county school fund (Section 7). Because the duty to attend school may be satisfied at schools other than the public schools (Article IX, Section 3), the state has the authority to make reasonable regulations for those schools; it may delegate its authority in this regard to the State Board of Education (State v. Williams, 1960).

#### Section 6

*State school fund.* The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State; and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

See the commentary following Section 7.

#### Section 7

*County school fund.*

(a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the



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several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

(b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.

The public schools are "free" because they are paid for by the public. Three funds exist. The state school fund, the subject of Section 6, is funded principally from appropriations, but includes (among other sources) the proceeds of sales of the state's "swamp lands." A relic from the 1868 constitution, the latter is today an unlikely source. A 1972 amendment, reflecting heightened awareness of the environment, declares it to be the public policy of the state to preserve its "wetlands" (Article XIV, Section 5). The state school fund in Section 6 is dedicated to "maintaining a uniform system of free public schools" across the state and is administered by the state. The two funds in Section 7, funded by the "profits" of justice—fines, penalties, and forfeitures—focus on the local government, specifically the counties. The proceeds collected by a county are retained and used "exclusively for maintaining free public schools" in the county. The proceeds collected by state agencies, on the other hand, are distributed to the counties on a per pupil basis regardless of the locus of the activity leading to their collection and are also to be used "exclusively for maintaining free public schools." The wording of the dedicated uses of the funds in these two sections suggests that "uniform" (at least in this regard) does not mean uniformly funded (*Beaufort County Board of Education v. Beaufort County Board of Commissioners*, 2009; *Hoke County Board of Education v. State*, 2004; *Leandro v. State*, 1997).

As education has grown increasingly expensive, more attention has focused on the revenue generated by the successful prosecution of crime, the "clear proceeds" of which is dedicated to education. "Clear proceeds" has been held to mean the total amount of the fine, penalty, or forfeiture less the cost of collection; it does not include the overall cost of enforcing the law in question (*Cauble v. City of Asheville*, 1985), nor does it include money set aside for future law enforcement (*Shore v. Edmisten*, 1976). In 1985 the General Assembly stepped in with a legislative definition, limiting the allowable cost of collection to no more than 10 percent of the total (North Carolina General Statutes § 115C-437).

It is violation of state "penal laws" that produce fines, penalties, and forfeitures for the benefit of the county school fund; the state supreme court has interpreted this phrase expansively to mean "laws that impose a monetary payment for their violation... regardless of whether the... proceeding is civil or criminal" (*Mussallam v. Mussallam*, 1988). Subsection (b), added by amendment in 2003,



expressly permits the General Assembly to allocate "civil penalties" as well as forfeitures and fines collected by state agencies to a state fund to be appropriated "on a per pupil basis, to the counties exclusively for maintaining free public schools."

No benefit accrues from violation of federal laws, unless the law directs that any forfeiture accrues to the state (*State ex rel. Thornburg v. 532 "B" Street*, 1993). This is unexceptionable; more troublesome is the provision of federal forfeiture law, permitting the sharing of proceeds with local law enforcement officers (*United States v. Alston*, 1989). Given the extent of overlap between state and federal penal laws, this means a local police department ends up with considerably more revenue in case it invites federal involvement; the county school fund is the only loser.

#### Section 8

*Higher education.* The General Assembly shall maintain a public system of higher education, comprising The University of North Carolina and such other institutions of higher education as the General Assembly may deem wise. The General Assembly shall provide for the selection of trustees of The University of North Carolina and of the other institutions of higher education, in whom shall be vested all the privileges, rights, franchises, and endowments heretofore granted to or conferred upon the trustees of these institutions. The General Assembly may enact laws necessary and expedient for the maintenance and management of The University of North Carolina and the other public institutions of higher education.

The idea of a public university was first mentioned in the 1776 constitution, and the University of North Carolina was duly chartered in 1789. In 1805 the charter was amended, replacing the original co-optative board of trustees with one appointed by the General Assembly and chaired by the governor (at that time elected by the legislature). As part of the enhancement of executive power in the 1868 constitution, the State Board of Education was authorized to appoint the university's trustees, but with the resurgence of legislative power after Reconstruction, the General Assembly reclaimed control by amendment in 1873. The provision, permitting the General Assembly to provide for the selection of trustees (now members of the Board of Governors) allows it to keep the power of appointment for itself (North Carolina General Statutes § 116-6).

#### Section 9

*Benefits of public institutions of higher education.* The General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense.

See the commentary following Section 10.



Section 10

*Escheats.*

1. Escheats prior to July 1, 1971. All property that prior to July 1, 1971, accrued to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be appropriated to the use of The University of North Carolina.

2. Escheats after June 30, 1971. All property that, after June 30, 1971, shall accrue to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be used to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State. The method, amount, and type of distribution shall be prescribed by law.

The idea that higher education could be provided "free of expense," capping the free public school system, was first mentioned as a goal in 1868. Although never realized in practice—it was always promised only to the extent "practicable"—the state has strived to keep charges for state residents low. Public funding of the university began in 1789 with the assignment of the state's right to escheats—that is, the real property of those who die without a will or known heirs. Like escheats is the state's right to "unclaimed dividends, or [unclaimed] distributive shares of the estates of deceased persons"—to which is now added by statute other unclaimed personal property, such as abandoned bank accounts and the contents of abandoned safe deposit boxes. Until June 30, 1971, all such property belonged to the university outright, although since 1946 it had been held as an endowment fund for scholarships; thereafter it benefits higher education indirectly, by aiding "worthy and needy" state residents enrolled in any public institution of higher education in the state.

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE  
COUNTY OF WAKE SUPERIOR COURT DIVISION  
JULY 17 11 FILE NO. 09 CVS 006655

JUNE ST. CLAIR ATKINSON, COMMISSIONER  
Individually and in her official capacity as  
Superintendent of Public Instruction of the  
State of North Carolina;

Plaintiff.

v.

**ORDER**

STATE OF NORTH CAROLINA; *et al.*,  
Defendants.

THIS CAUSE came on to be heard before the undersigned Judge Presiding in the Wake County Civil Superior Court on 15 July 2009 pursuant to Motions for Summary Judgment under Rule 56 of the North Carolina Rules of Civil Procedure filed by the Plaintiff and the Defendants. The Plaintiff was represented at this hearing by Robert F. Orr, Attorney at Law, and Jeanette K. Doran, Attorney at Law, of the N.C. Institute for Constitutional Law. The Defendants were represented at this hearing by Mark A. Davis, Special Deputy Attorney General, and Gary R. Govert, Special Deputy Attorney General, of the North Carolina Department of Justice. All pleadings, briefs, memorandum, affidavits and other relevant material were provided to the Court by the attorneys prior to this hearing.

The Court finds that there is no genuine issue of any material fact and that the Plaintiff is entitled to Summary Judgment as a matter of law on Count One of the Complaint and Petition for Declaratory Judgment and Partial Summary Judgment on that portion of Count Two of the Complaint and Petition for Declaratory Judgment that challenges the constitutional authority of the State Board of Education to limit the inherent constitutional authority and power of the duly elected State Superintendent of Schools as the chief administrative officer of the State Board of Election. The Defendants are entitled to Summary Judgment on Count Three of the Complaint and Petition for Declaratory Judgment as a matter of law pursuant to N.C. Gen. Stat. §128-1.1, and Partial Summary Judgment on that portion of Count Two of the Plaintiff's Complaint and Petition for Declaratory Judgment that challenges the constitutional authority of the State Board of Education to create a position in the North Carolina Department of Education.

The General Assembly and the State Board of Education do not have the power, without a constitutional amendment, to deprive the duly elected Superintendent of Public Instruction of her inherent power as chief administrative officer of the State Board of Education. The General Assembly and the State Board of Education do not have the power, without a constitutional amendment, to confer on the Chief Executive Officer of



the State Board of Education the inherent powers of the duly elected Superintendent of Public Instruction as the chief administrative officer of the State Board of Education.

The General Assembly has mandated that the general supervision and administration of the free public school system shall be vested in the State Board of Education. The State Board of Education shall establish policy for the system of free public schools, subject to laws enacted by the General Assembly. N.C. Gen. Stat. §115C-12. However, the General Assembly also specified that all the powers and duties exercised by the State Board of Education shall be in conformity with the Constitution. N.C. Gen. Stat. §115C-12(9).

The wisdom of having a "Chief Executive Officer" appointed by the State Board of Education at a salary of \$265,000 per year is not for this court to decide. There is no question that the job of administering a statewide public school system is difficult and complex. It is uncontroverted that 41 years ago all candidates for the position of State Superintendent of Schools in the election of 1968 advocated that the office be filled by appointment of the State Board of Education. Since that time, many persons have advocated the selection of the State Superintendent of Public Instruction by appointment. However, the people of North Carolina have never voted by a constitutional amendment to select the Superintendent of Public Instruction by appointment rather than by election.

That portion of the State Board Policy Manual Policy ID Number EEO (now TCS) - C-022 that states that the Chief Executive Officer shall be "solely" accountable and responsible to the State Board of Education "without interference or contrary instructions from any other entity" is unconstitutional to the extent that it purports to limit the inherent constitutional authority of the duly elected State Superintendent of Public Instruction as Chief Administrative Officer of the State Board of Education without having been submitted to and approved by the qualified voters of the State of North Carolina in a constitutional amendment.

The State Board of Education and General Assembly of North Carolina may not, without a constitutional amendment approved by the qualified voters of North Carolina, take from the Superintendent of Public Instruction her responsibility as "chief administrative officer" of the State Board of Education and confer that responsibility upon a "Chief Executive Officer." The State Constitution does not prohibit the General Assembly from establishing a position that has the authority and power to administer the day to day operations of the Department of Public Instruction as designated by the State Board of Education so long as such legislation requires that such responsibilities be exercised through the Superintendent of Public Instruction or under her supervision.

**WHEREFORE, IT IS ORDERED BY THE COURT** that the duties and responsibilities for 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 are vested in the duly elected State Superintendent of Public Instruction under the Constitution of North Carolina as the Chief Administrative Officer of the State Board of Education until such time as the qualified voters of North Carolina



specify otherwise by a constitutional amendment. This Order is a result of the Court allowing the Plaintiff's Motion for Summary Judgment on Count One of the Complaint and Petition for Declaratory Judgment.

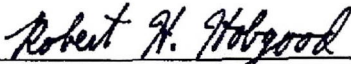
It is further **Ordered by the Court** that all acts by the Defendants purporting to give the office of Chief Executive Officer as created by the State Board of Education authority to run the North Carolina Department of Public Instruction and administer the public school system without being accountable and responsible to and without interference or contrary instructions from the duly elected State Superintendent of Public Instruction are unconstitutional and therefore null and void and unenforceable until such time as the qualified voters of North Carolina specify otherwise by a constitutional amendment. This ruling specifically holds that that portion of the State Board Policy Manual Policy ID Number EEO (now TCS) -C-022 that states that the Chief Executive Officer shall be "solely" accountable and responsible to the State Board of Education "without interference or contrary instructions from any other entity" is unconstitutional and null and void and unenforceable in that it purports to limit the inherent constitutional authority of the duly elected State Superintendent of Public Instruction as Chief Administrative Officer of the State Board of Education. The State Superintendent of Public Instruction must supervise the Chief Executive Officer without countermanding any other policy adopted by the State Board of Education. Any employee of the North Carolina Department of Instruction must be accountable and responsible to the State Superintendent of Public Instruction, as well as the State Board of Education, until such time as the duly qualified voters specify otherwise by a constitutional amendment. This Order is a result of the Court allowing Partial Summary Judgment for the Plaintiff on Count Two of the Complaint and Petition for Declaratory Judgment.

It is further **Ordered by the Court** that the Plaintiff's Motion for Summary Judgment on Count Three of the Complaint and Petition for Declaratory Judgment is denied and the Defendants' Motion for Summary Judgment on Count Three of the Complaint and Petition for Declaratory Judgment is allowed.

Implicit in the Court's rulings today, the Defendants' Motion for Summary Judgment on Count One of the Complaint and Petition for ~~Summary~~ <sup>Declaratory</sup> Judgment is denied. The affirmative defenses raised by the Defendants in the Answer of the doctrine of sovereign immunity, nonjusticiable political question and Plaintiff's lack of standing are denied and dismissed by the Court.

It is further **Ordered by the Court** that Defendants' Motion for Summary Judgment on that portion of Count Two of the Plaintiff's Complaint and Petition for Declaratory Judgment that challenges the constitutional authority of the State Board of Education to create a position in the State Department of Public Instruction by whatever title is allowed.

This the 17<sup>th</sup> day of July, 2009.

  
ROBERT H. HOBGOOD  
Judge Presiding

**MEMORANDUM ORDER FOR INJUNCTIVE RELIEF**

The duly elected North Carolina Superintendent of Public Instruction will suffer immediate and irreparable harm for which there is no adequate remedy at law unless the terms of this Order are enforced by a permanent injunction. The Court allows a permanent injunction to enforce the terms of this Order. The Court directs Mr. Orr to draft the Order allowing a permanent injunction. No bond is required.

This the 17<sup>th</sup> day of July, 2009, at 12:15 P.M.

  
\_\_\_\_\_  
ROBERT H. HOBGOOD  
Judge Presiding



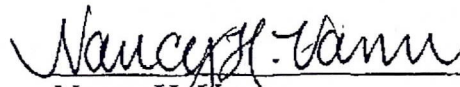
**Certificate of Service**

The undersigned Deputy Clerk of Court of Wake County hereby certifies that a copy of the foregoing Order, was served on the following parties to this action by hand delivery.

Robert Orr  
Jeanette Duran  
333 E. Six Forks Road, Suite 180  
Raleigh, NC 27609

Mark A. Davis  
Gary R. Govert  
N.C. Department of Justice  
P. O. Box 629  
Raleigh, NC 27602

This the 17<sup>th</sup> day of July, 2009.

  
Nancy H. Vann

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09CVS06655

JUNE ST. CLAIR ATKINSON,  
individually and in her official capacity as  
Superintendent of Public Instruction of the  
State of North Carolina;

Plaintiff,

v.

STATE OF NORTH CAROLINA;  
BEVERLY PERDUE, Governor of the  
State of North Carolina, in her official  
capacity; NORTH CAROLINA STATE  
BOARD OF EDUCATION; WALTER  
DALTON, Lieutenant Governor of the  
State of North Carolina, in his official  
capacity; JANET COWELL, State  
Treasurer of the State of North Carolina, in  
her official capacity; KATHY TAFT, RAY  
DURHAM, KEVIN HOWELL, SHIRLEY  
E. HARRIS, MELISSA E. BARTLETT,  
ROBERT THOMAS SPEED, WAYNE  
MCDEVITT, PATRICIA N.  
WILLOUGHBY, and JOHN A. TATE, III,  
Members of the North Carolina State Board  
of Education, in their official capacities;  
and WILLIAM C. HARRISON, Chief  
Executive Officer and Chairperson of the  
North Carolina State Board of Education

Defendants.

**INJUNCTION AND DECLARATORY  
JUDGMENT**

This Court having granted partial summary judgment for Plaintiff in the above-captioned case by Order dated July 17, 2009, now hereby issues this permanent injunction and declaratory judgment pursuant to N.C.G.S. § 1-254. The Court having held a hearing on July 15, 2009, and having issued its order in open court on July 17, 2009, having considered the arguments of counsel, and being otherwise sufficiently advised,

**COPY**

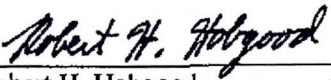
**IT IS HEREBY ORDERED** that the Plaintiff's Petition for Declaratory Judgment and permanent injunction is **GRANTED**. Defendant North Carolina State Board of Education is hereby permanently enjoined from taking any action not in conformance with the Court's Order dated July 17, 2009. Specifically:

1. Defendant State Board of Education shall not and is hereby enjoined from giving the office of Chief Executive Officer of the State Board of Education or any similar or like position, the authority to run the North Carolina Department of Public Instruction and administering the free public school system of the State without said position being accountable and responsible to and without interference or contrary instructions from Defendant State Board of Education and the duly elected Superintendent, until such time, if ever, as the qualified voters of North Carolina specify otherwise by constitutional amendment;
2. Defendant State Board of Education shall not and is hereby enjoined from precluding any and all employees of the North Carolina Department of Public Instruction from being accountable to and responsible to the Superintendent of Public Instruction, as well as the North Carolina State Board of Education, until such time, if ever, as the qualified voters of North Carolina specify otherwise by constitutional amendment;
3. Defendant State Board of Education shall not and is hereby enjoined from attempting to implement in any fashion that portion of the State Board Policy Manual ID Number EEO (now TCS)-C-022 that states that the Chief Executive Officer shall be "solely" accountable and responsible to the State Board of Education "without interference or contrary instructions from any other entity," as the same are unconstitutional; and



4. Any employee of the North Carolina Department of Public Instruction must be accountable and responsible to the State Superintendent of Public Instruction as well as the State Board of Education.

So ordered this the 12<sup>th</sup> day of August, 2009, at 9:34 P.M.

  
\_\_\_\_\_  
Robert H. Hobgood,  
Judge Presiding

Report of the  
**NORTH CAROLINA  
STATE CONSTITUTION  
STUDY COMMISSION**

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to the North Carolina State Bar  
and the North Carolina Bar Association

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# I

## INTRODUCTION

### The Nature of a State Constitution

The purpose of a state constitution has been well described by the late John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit (1931-58), in these words:

The purpose of a state constitution is two-fold: (1) to protect the rights of the individual from encroachment by the State; and (2) to provide a framework of government for the State and its subdivisions. It is not the function of a constitution to deal with temporary conditions, but to lay down general principles of government which must be observed amidst changing conditions. It follows, then, that a constitution should not contain elaborate legislative provisions, but should lay down briefly and clearly the fundamental principles upon which the government shall proceed, leaving it to the people's representatives to apply these principles through legislation to conditions as they arise.

The legal nature of a state constitution derives from the nature of the state in the American system. In theory, the people of each state are sovereign—the source of all political power within that state. Through the medium of their state constitution, they have endowed their state government—especially the legislative branch—with all of their governmental powers except those reserved to the people by the terms of the constitution itself. The states in turn, through the United States Constitution and its amendments, have delegated a portion of their powers to the United States. The result is that the United States is a government of enumerated powers, while the state governments possess all powers not denied them by the terms of their own constitutions or the federal Constitution. A state constitution is not a grant of enumerated powers. To the extent that it grants powers, it does so in the broadest possible terms—it says, for example, that “The legislative authority shall be vested in . . . a Senate and House of Representatives.” Thus when a question arises as to whether the General Assembly possesses the power to enact a proposed

measure, the presumption is that it does have the power unless in the state constitution itself or in the federal Constitution some denial of that power can be found.

It is essential to keep this point in mind in interpreting state constitutions, for what may appear in form to be a grant of authority to the General Assembly to act on a particular matter normally is in legal effect a limitation, not a grant. For example, Art. V, § 3, of the Constitution of North Carolina states that “The General Assembly may also tax trades, professions, franchises, and incomes, Provided the rate of tax on incomes shall not in any case exceed ten percent (10%) . . . .” This is not the source of the General Assembly's power to tax income; it levied an income tax under its general legislative authority long before the constitution mentioned the matter. The provision above quoted is a *limitation* on the rate of tax on incomes to a maximum of 10 per cent. To repeal that provision would not take away the power of the General Assembly to levy an income tax; it would instead take away the top limit on the rate.

From this it follows that in drafting or amending state constitutions, it is desirable to avoid expressions that purport to grant authority to the General Assembly, since they lead at best to confusion and at worst to a serious misconception of the function of a state constitution and especially of the authority of the legislature.

### The Need for Constitutional Revision

Despite their intended permanence, constitutions deal with the issues familiar to the time of their adoption and reflect the viewpoints, insights, and limitations of their draftsmen. Convictions change over time, even as to what are the “general principles of government which must be observed amidst changing conditions.” And constitution writers sometimes cannot forego the temptation to impose their own views as to details of policy and procedure on future generations to which those views may not be relevant.

Thus it is necessary that a state constitution be amended from time to time as problems arise that were not contemplated when the constitution was drafted, or



as old solutions prove inadequate to governmental problems in their new manifestations. Amendments are, however, seldom comprehensive in scope. They usually are adopted in response to specific, present needs. They typically are aimed at getting a particular result and are so drawn as to make the minimum necessary change in the constitution and thus to excite the minimum opposition. Incompleteness and even inconsistency in the language of the constitution sometimes result. Therefore the piecemeal amendment process does not eliminate the need for an occasional review of the whole constitution to determine whether it speaks to present issues and in terms understandable to the age, and whether it constitutes a clear and effective expression of the current public will on the matters that it purports to cover.

Throughout the United States, the decade of the nineteen sixties has witnessed a great deal of effort aimed at the revision of state constitutions. Several states have undertaken general revisions of their state constitutions. Some of them, such as Michigan, Hawaii, and Florida, have been successful. Others, including New York, Maryland, and Rhode Island, have not. Yet other states, notably California and Pennsylvania, have undertaken to reform their constitutions in stages over several years. A major factor in opening the way to the current wave of constitutional revision has been the reapportionment of both houses of all state legislatures on the basis of population. This has removed one of the chief former barriers to constitutional change—the fear that it would result in a modification of the scheme of representation that enabled the dominant legislative group to retain its power.

The Constitution of North Carolina was adopted in 1868. In the intervening century, it has been amended 69 times, while 28 proposed amendments have been defeated at the polls. Each amendment has altered from one or two words to an entire article of the constitution, although the tendency has been to make the minimum change essential to gaining the object at hand. No constitutional convention has met in this State since 1875, nor have the people voted since that time on whether to hold a convention. Commissions established by the General Assembly proposed extensive amendments to the constitution in 1913 and complete revisions of that document in 1933 and 1959. The 1913 amendments were rejected by the voters. The 1933 and 1959 revisions never reached the voters, although that of 1933 was approved by the General Assembly and that of 1959 by the Senate.

As a result, despite the frequency with which the constitution has been altered (especially in the last quarter-century), it has not undergone a thorough updating in a century. In consequence, it contains considerable matter that is clearly obsolete, having long ago served its intended purpose, such as provisions stating

when the officers elected in 1868 should take office and an 1875 instruction to the General Assembly to establish a Department of Agriculture. It also contains several provisions that are invalid because in conflict with the Constitution of the United States, such as the provision on racial segregation in the public schools. More significantly, in some respects it handicaps effective governmental response to the needs of the people—for instance, in the dispersion of the executive authority of state government and in some of the financial restraints imposed on local government. For all of these reasons, the centennial year of 1968 was an auspicious time for a thorough re-examination of the Constitution of North Carolina.

#### Establishment of This Commission

Governor Dan K. Moore reflected this conclusion in a speech to the North Carolina State Bar on October 27, 1967, wherein he urged the State Bar to take the leadership in sponsoring a study to determine whether the constitution needs "revision or even rewriting . . ." and to make the results of that study available to his successor and to the General Assembly.

The Council of the North Carolina State Bar accepted the Governor's challenge and obtained the agreement of the North Carolina Bar Association to make it a joint undertaking. The presidents of the two bar organizations appointed five members each to constitute a Steering Committee to develop a plan for the study, select the members to conduct it, and find the money to finance it.

The President of the North Carolina State Bar appointed to the Steering Committee the following attorneys: Charles B. Aycock of Kinston; Davis C. Herring of Southport; Claude V. Jones of Durham; William D. Sabiston, Jr., of Carthage; and Robert G. Sanders of Charlotte.

The President of the North Carolina Bar Association appointed to the Steering Committee the following attorneys: William J. Adams, Jr., of Greensboro; Richard C. Erwin, Sr., of Winston-Salem; Francis J. Heazel of Asheville; William T. Joyner of Raleigh; and Lindsay C. Warren, Jr., of Goldsboro.

Governor Moore, at the invitation of the two Presidents, designated Colonel Joyner as Chairman of the Steering Committee. The Committee chose Mr. Jones as its Vice-Chairman.

Meeting on February 9 and March 8, 1968, the Steering Committee selected twenty-five persons to constitute the North Carolina State Constitution Study Commission. Fifteen lawyers and ten non-lawyers were chosen, representing all geographic sections of the State, the two political parties, and a variety of professional, economic, and ethnic backgrounds. It prepared and adopted a plan for the work of the Commission (see Appendix 1) in which it stated that the



... Commission will make a study of the Constitution of North Carolina and give consideration to the question whether there is a need for either rewriting or amending the Constitution. Such study should consider not only the question of editorial improvements, [and] the elimination of archaic provisions, but also any broad and substantial matters concerning the present and future demands upon our State government. No limits are placed on the field of the Commission's study of the Constitution or on its recommendation.

The Commission was directed to report to the sponsoring bar organizations and to do so, if feasible, by December 16, 1968. It was contemplated that the Commission's report would be transmitted by those groups to the Governor and the General Assembly of 1969 for their consideration.

The Steering Committee, with the aid of Governor Moore, obtained a grant of \$25,000 from the Z. Smith Reynolds Foundation, Incorporated, to meet the Commission's expenses.

#### Organization of the Commission

At its initial meeting on April 5, the State Constitution Study Commission chose as its Chairman the former Chief Justice of the Supreme Court of North Carolina, Emery B. Denny. It elected as its Vice-Chairmen Archie K. Davis of Winston-Salem and Judge Rudolph I. Mintz of Wilmington and as its Secretary Bert M. Montague of Raleigh. It engaged the Institute of Government to serve as its professional staff.

Four subject-matter committees of six members each were established by the Commission. They were:

- I. Committee on Structure, Organization, and Powers of State Government
- II. Committee on Structure, Organization, and Powers of Local Government and Government Finance
- III. Committee on Education, Welfare, and Criminal Justice
- IV. Committee on Declarations of Principles and Policies and Miscellaneous.

Much later in the course of its work, the Commission also established an Editorial Committee.

The chairmen and members of these committees were appointed by the Chairman of the Commission. (Appendix 2 lists the chairmen and members of the committees.) Every member of the Commission except its Chairman served on one of the four subject-matter committees, and five of them also served on the Editorial Committee.

#### Commission Procedures

The Commission met four times during April and May. It heard numerous witnesses, some of whom came

on the express invitation of the Commission and some of whom came in response to a general invitation to interested citizens to appear and discuss the need for constitutional revision. From June until mid-September, the work of the Commission was carried on by its four subject-matter committees. Each committee held five or six meetings, usually in Raleigh. The members heard witnesses on the particular matters within their charge. They examined the constitutions of other states, especially those adopted or proposed in recent years. They carefully reviewed those portions of the Constitution of North Carolina assigned to them in order to determine the need for changes both editorial and substantive. They prepared drafts of revised articles and sections of the constitution for consideration by the Commission.

During the fall, the Commission held a series of four meetings at which it received and reviewed the recommendations of each of its subject-matter committees. Action on committee recommendations was in every instance delayed until the next meeting after the one at which presented.

The Commission then established the Editorial Committee and gave it the task of preparing a revised text of the proposed constitution and of the separate amendments in a clear and consistent style. The texts prepared by the Editorial Committee were twice reviewed, modified, and approved by the Commission. The text of this report was adopted by the Commission at its ninth and final meeting on November 27.

#### Objective

Our ultimate objective throughout this study has been to help obtain for North Carolina a constitution that deals in a realistic, direct, and understandable way with the current and foreseeable problems of the State that are appropriate to be dealt with in the constitution. We would emphasize the phrase "appropriate to be dealt with in the constitution." The State and local governments face many needs and problems that raise no constitutional change issue. Their solution is now within the competence of the General Assembly and of local governments.

In order to achieve this general objective of an up-to-date constitution, we consider it necessary to eliminate from the constitution obsolete and unconstitutional provisions, to simplify and make more consistent and uniform the language of the document, to reorganize its content in some instances for the sake of greater clarity, and especially to make several changes in the structure of the executive branch of state government and in the allocation of powers among the branches and levels of government that will enable our state and local governments to meet effectively the needs of the people for efficient and responsive governmental service and protection.



### Approach

It has been apparent from early in our study that this objective could not be reached realistically by drafting a host of separate constitutional amendments. That route would be too complicated at every level, because the changes are too numerous and many of them are too interrelated for that approach to be practicable. Thus we were compelled to the same conclusion as that reached by the constitutional study commissions of 1931-33 and 1957-59: the constitution had to be revised as a whole.

Yet we were unwilling to follow the course of our predecessor commissions and incorporate all of our recommendations into a single revised constitutional text which the General Assembly and the voters would have to approve or disapprove as a unit. Included in our recommendations are some on which citizens of the State will differ strongly, as well as many on which we believe that virtually all informed citizens can agree. We believe that the legislator or voter should not be forced to take all of our proposed changes in order to get any of them; and conversely, that he should not have to vote against all of our proposals merely in order to register his opposition to one or two proposals with which he disagrees.

Consequently, we have framed a series of ten inter-related but mutually independent amendments for submission to the General Assembly and the voters of the State.

At this point, it should be observed that the present Constitution of North Carolina (unlike those of some states) does not limit the number of amendments that can be submitted to the voters at any one time, nor does it limit each amendment to one subject or to one article of the constitution. Thus the General Assembly is free to submit as many amendments, and with such content, as it sees fit.

The first amendment effects a general editorial revision of the constitution, which will be referred to here as "the proposed constitution." The deletions, reorganizations, and improvements in the clarity and consistency of language will be found in the proposed constitution. Some of the changes are substantive, but none is calculated to impair any present right of the individual citizen or to bring about any fundamental change in the power of state and local government or the distribution of that power. We do not deem any of the changes contained in the proposed constitution to be of sufficient magnitude to justify its treatment as a separate amendment. Without detracting from the importance of the other amendments that we are recommending, we believe that the work of this Commission will have been justified if this proposal alone is approved by the General Assembly and the voters.

Each of the other nine amendments incorporates a substantive constitutional change of such importance that we believe that the voters should have a chance to act upon it independently of the other individual amendments and of the proposed constitution. Accordingly, each of these nine amendments has been drawn so that it can be adopted or rejected by the voters on its own merits. Take, for example, the amendment allowing the voters to elect a Governor to two successive terms of office. If a majority of those voting on that amendment favor it, and if a majority of those voting on the proposed constitution favor it, then the two-term amendment will become a part of the revised constitution. If a majority of those voting on the two-term amendment favor it while a majority disapprove the proposed constitution, then the two-term amendment will take effect as an amendment to the present constitution. If a majority disapprove the two-term amendment, of course the present one-term limit remains in force. The same illustration applies in the same way to the other eight individual amendments: if approved by the voters, each will take effect either as part of the present constitution or as part of the proposed constitution, depending on the fate of the latter.

In addition to the proposed constitution (which will constitute the first amendment), we recommend separate amendments:

2. Requiring judges and solicitors to be licensed attorneys, and requiring the General Assembly to establish a mandatory retirement age for judges and procedures for the disciplining and removal of judicial officers;
3. Granting the veto power to the Governor;
4. Empowering the voters to elect a Governor and Lieutenant Governor for two successive terms;
5. Providing for a change in the mode of selection of certain state executive officers;
6. Reducing the residence time for voting in state elections to six months;
7. Authorizing trial on information and waiver of jury trial in noncapital cases;
8. Requiring the General Assembly to reduce the administrative departments to 25 and authorizing the Governor to reorganize the administrative departments, subject to legislative disapproval;
9. Revising the income tax provision to make possible joint returns by husband and wife and accommodation of the State to the federal income tax;
10. Reassigning future escheats.

Each of these amendments is explained more fully in Part IV of this report, where the texts of the amendments are also set out.



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**Local Government Finance Amendment**

In addition to these amendments which we are sponsoring, we wish to draw the reader's attention to another amendment which is set forth as Appendix 3 of this report. That amendment proposes extensive changes in the provisions of the constitution affecting local government finance. It was prepared by the Local

Government Study Commission, working in close cooperation with this Commission. It has been so drawn that it would dovetail with our proposed constitution and amendments. We have examined that amendment carefully and have approved it in principle. We believe, however, that the active sponsorship of that amendment should be left to the Local Government Study Commission.

### III

## Commentary on the Proposed CONSTITUTION of NORTH CAROLINA

#### Introduction

In preparing this proposed constitution, we have taken the first step toward providing North Carolina with a constitution that deals in a realistic, direct, and understandable way with the current and foreseeable problems of the State that are appropriate to be dealt with in the constitution. To gain that objective fully will require that the separate amendments that follow later in this report be adopted as well. The proposed constitution is, however, an essential beginning toward that goal, for it is in this document that the editorial pruning, rearranging, rephrasing, and modest amendments occur. The more substantial changes have been reserved for handling in separate amendments.

In this commentary, we will explain the editorial rules followed in preparing this proposed constitution and then offer an article-by-article explanation of our recommended text.

#### Editorial Rules

1. We have retained the current division of the constitution into 14 articles, and while the captions of those articles have been altered slightly in some instances, their subject matter is the same as in the present constitution.

2. In several instances, we have reorganized the contents of an article in order to set forth its provisions in more logical sequence as an aid to ready understanding. Articles I and II have been so treated, for example.

3. In several instances, we have transferred sections from one article to another in order to gain a more logical grouping by subject matter—for instance, to group in Article V the finance provisions now found in five separate articles.

4. We have omitted clearly obsolete matter, such as transitional provisions that have served their purpose and instructions to the General Assembly to take action long ago accomplished.

5. We have omitted provisions that are clearly invalid because contrary to the Constitution of the United States,

such as the requirement of racial segregation in the public schools and the grandfather clause under which certain illiterate men were allowed to register prior to 1908.

6. We have omitted provisions that we deemed to be legislative in nature and therefore inappropriate to the constitution, such as the present enumeration in Article XI of the types of charitable and correctional institutions to be maintained by the State.

7. We have tried to make the language of the constitution uniform throughout where uniformity of meaning was intended. For example, the phrase "qualified voters" has been substituted throughout for the various expressions now used to mean the same thing—"voters," "electors," "qualified electors," "the people," "them," and the like. The term "legislature" has been changed to read "General Assembly."

8. We have tried to make the language more direct and contemporary and to avoid archaic legalisms, where these changes would make the document more understandable to all.

9. We have altered expressions that appear to be grants of power to the General Assembly but in fact are limitations on its authority, so that the nature of those provisions will not be mistaken.

10. We have sought to impose standardization of style in spelling, punctuation, capitalization, paragraphing, and the expression of numbers and dates that the original Constitution of 1868 never had and its 69 amendments have further denied it.

11. Abbreviation of the constitution for brevity's sake has not been a primary consideration but has been an incident of our work, since the great majority of the changes embraced in the proposed constitution take the form of deletions of or contractions in language. In a few instances, however (in dealing with the public debt provisions, for example), we have decided that clarity would be aided by a more detailed statement of the constitutional provisions in lieu of the present language, even where no substantive change was sought.

Notwithstanding all of these enumerated changes, there are many sections of the proposed constitution



that reflect no change from their statement in the present constitution, save perhaps a new section number. We have not engaged in wholesale tinkering with the constitution for mere nicety of expression, but have recommended change only where there was some good result to be anticipated.

#### Article I. Declaration of Rights

The bulk of the Declaration of Rights was brought forward by the Convention of 1868 from the Constitution of 1776, with several significant changes and additions being made at that time. In the intervening century, there have been few substantive amendments to the Declaration. Thus it is to be expected that the Declaration deals with problems fresh and meaningful to its authors of 1776 and its revisors of 1868—for example, it regulates the quartering of troops in private houses and forbids imprisonment for debt. We do not propose the removal from the Constitution of any of these ancient guarantees of liberty. We have sought instead to express them in some instances in more direct and understandable language, and in a few instances, to augment them by adding similar guarantees of a more current character.

Proposed Sec. 14 adds a guarantee of freedom of speech.

Proposed Sec. 19 adds to the present law of the land provision a guarantee of equal protection of the laws and a prohibition of improper discrimination by the State.

Proposed Sec. 22 makes clear what now can be determined only from an obscure constitutional provision and judicial decisions interpreting it: that in most misdemeanor cases, indictment by a grand jury is not essential and trial may proceed upon the warrant.

Proposed Sec. 26 prohibits the exclusion of anyone from jury service on account of sex, race, religion, or national origin.

Proposed Sec. 36 eliminates an ambiguous and potentially troublesome inference in present Sec. 38 that the General Assembly possesses only those powers specifically delegated to it by the Constitution, which is directly contrary to the strongly prevailing theory in North Carolina (and elsewhere) that the General Assembly, by virtue of the general grant of the legislative power in Art. II, § 1, possesses all legislative powers not denied to it by the terms of the State or federal Constitution.

In addition to these substantive changes, we have proposed the transfer, without change, of present Sec. 6 (dealing with the Confederate and Reconstruction debts) to the article on finance, and the transfer of present Sec. 34 (dealing with state boundaries) to the miscellaneous article.

In order to make it clear that the rights secured to the people by the Declaration of Rights are commands and not merely admonitions to proper conduct on the part of the government, the words "should" and "ought"

have been changed to read "shall" throughout the Declaration.

In a few instances, obsolete words have been replaced by current words to make the meaning of the Declaration clear to today's readers.

Finally, the present Declaration of Rights is casually arranged, with related sections scattered throughout the article in no consistent order. We propose a new and more logical grouping of the sections in the foregoing text, because we believe that this will aid the reader in understanding this lengthy and important article of our constitution.

#### Article II. Legislative

While Article II, dealing with the General Assembly, has been reorganized, the text found in the proposed constitution contains almost no substantive changes.

The new organization is intended to set forth in a more logical sequence than does the present constitution the provisions dealing with the establishment of the General Assembly; the number, apportionment, qualifications, election, and terms of members of the Senate and House of Representatives; filling vacancies in the membership of the legislature; frequency of sessions; officers of the two houses and their selection; compensation; journals; legislative powers and procedure; and limitations upon the powers of the General Assembly.

The provisions governing the apportionment of the two houses, adopted by the people in November, 1968, have been brought forward in the proposed text with no substantive change. The sections on qualifications apply as of the time of the election, since members take office at that time.

In order to make clear the authority of either house to adjourn over the weekend and omit the formal Saturday sittings of the General Assembly, proposed Art. II, § 20, states that "Either house may, of its own motion, adjourn for a period not in excess of three days."

Three present sections prescribing limitations on the power of the General Assembly to enact local and private legislation (Art. II, §§ 10, 11, and 29) have been combined into proposed Sec. 24. One minor change in that section deserves notice. Present Art. II, § 29, adopted in 1916, prohibits local legislation "Extending the time for the assessment or collection of taxes. . . ." The term "assessment of taxes" is subject to more than one interpretation. It may mean the determination of the value of property for tax purposes, or it may mean the imposition or fixing of a rate of taxation, for example. To avoid ambiguity and to make clear what we believe was the intended meaning of the term "assessment" as used in the 1916 amendment, we have substituted the word "levy" for "assessment," so that the prohibition now bars the enactment of local legislation "Extending the time for the levy or collection of taxes. . . ." Logic also supports this change, since it is more appropriate for the



constitution to deal with the time when taxes are imposed on property than for it to deal with the time when property is valued for tax purposes.

We propose the transfer from Article II to Article V (Finance) of present Secs. 30 and 31, protecting sinking funds and retirement funds from diversion. We recommend the deletion of a long-meaningless and consistently ignored requirement that notice be given of an intention to enact private laws and of a long-ago performed direction to the legislature to regulate entails.

### Article III. Executive

We are recommending several changes that affect the executive branch of state government and especially the Governor, but these are of sufficient moment that they take the form of separate amendments. Article III of the proposed constitution, while reorganized and abbreviated by the omission of repetitive, legislative-type, and executed provisions, contains few substantive changes of note.

The proposed Article III opens by vesting the executive power in the Governor; this parallels the provisions vesting the legislative power in the General Assembly and the judicial power in the courts. It provides for the election of the Governor and Lieutenant Governor for four-year terms and continues to make them ineligible for immediate re-election (Sec. 2). The qualifications for those offices are not changed, but it is made clear that they must be met at the time of election. The provision that the Governor may take his oath in the presence of the General Assembly is omitted (Sec. 4), since he does not in fact do so at present, the legislative convening date falling about two weeks after the inauguration of the Governor.

The Governor's duties, now randomly set forth in several sections of Article III, have been collected in Sec. 5. The only addition to the list gives constitutional status to the Governor's present statutory responsibility for preparing and recommending the state budget to the General Assembly and for administering it after enactment (Sec. 5[3]). The detail about reports to the General Assembly on the exercise of the clemency power is omitted as more appropriate for statutory than constitutional coverage. The 1953 direction to the General Assembly to establish the Board of Paroles, long since accomplished, is omitted as obsolete (Sec. 5[6]). The detailed provision about reports to the Governor from various officers has been reduced to a simple statement that the Governor may require written information from any administrative department head at any time (Sec. 5[9]).

The statement of the Lieutenant Governor's duties (Sec. 6) has been broadened to make clear what is already the fact: that the Governor may delegate to him and the General Assembly may assign to him additional duties as they see fit.

The present list of eight elected executive officers (in addition to the Governor and Lieutenant Governor) is found in proposed Sec. 7, and their duties continue to be prescribed by law.

The membership of the Council of State (now seven of the elected executives with the Governor serving as its Chairman and the Attorney General sitting in as its legal adviser) is enlarged to include all of the elected executives, the Lieutenant Governor being the only one who has not regularly sat with the Council (Sec. 8). This is in fulfillment of the idea that the Lieutenant Governor should be a better informed and more active participant in the work of the executive branch. A few procedural details regarding the Council have been omitted because they clearly are within the competence of the Council itself or of the General Assembly. The main duties of the Council of State will continue to be prescribed by law.

Provisions of present Article III directing the General Assembly to establish a Department of Agriculture (1875) and authorizing it to establish a Department of Justice (1937) are omitted, as their purposes were long ago accomplished.

### Article IV. Judicial

The judicial article was entirely rewritten by an amendment approved by the voters in 1962. Thus it now requires few changes of an editorial or substantive nature.

Proposed Art. IV, § 8, sets forth a general instruction to the General Assembly to provide for the retirement and recall of Justices and Judges of the General Court of Justice. This provision replaces separate provisions in present Art. IV, §§ 6(1) and 6A (pertaining to the retirement of Justices of the Supreme Court and Judges of the Court of Appeals), and broadens the coverage to include Superior and District Court Judges.

The old language giving the Supreme Court long-unused jurisdiction to hear claims against the State is omitted from proposed Sec. 12(1). This type of claim is heard by the Industrial Commission under a statutory procedure.

The authority of the Attorney General to recommend revision of the solicitorial districts is omitted from Sec. 18(1), as that duty is now performed under statutory assignment by the Director of the Administrative Office of the Courts.

Present Sec. 20, defining various types of general laws for the purposes of Article IV, has been transferred to Article XIV and made applicable to the entire constitution.

### Article V. Finance

Article V has been rearranged and edited to present its subject matter in a more logical and understandable



order. Several sections have been transferred to Article V from elsewhere in the constitution, so that all of the constitutional matter concerning public finance is contained therein. Several clarifying amendments have been made, and two substantive amendments are proposed.

#### Substantive Amendments

Present Art. V, § 3, grants a \$2,000 income tax exemption to "a married man with a wife living with him." Thus a married woman whose husband has no taxable income is not constitutionally entitled to a \$2,000 exemption even though she may be the principal support of the family. Since 1951, however, G.S. § 105-149(2) has permitted a husband to allow his wife to claim his \$2,000 exemption when she has taxable income but he does not. Proposed Art. V, § 2(6), grants a \$2,000 exemption "to the income-producing spouse of a married couple living together." This amendment gives constitutional status to the present provisions of G.S. § 105-149(2) and requires no amendment of the existing income tax laws.

Present Art. V, § 4, forbids the State to lend its credit to private corporations without a direct vote of the people, except to aid in the completion of railroads unfinished as of 1868 "or [to railroads] in which the State has a direct pecuniary interest." The language referring to railroads unfinished as of 1868 has been deleted and the exception recast to permit the State to lend its credit without a vote of the people to "a corporation in which the State has a controlling interest" (Sec. 3[2]). Thus, the State would be permitted to lend its credit to any corporation in which it owns or controls a majority of the voting stock, but may not lend its credit without a vote of the people to corporations in which it owns or controls less than a majority of the voting stock. For example, under the proposed amendment the State will continue to have authority to aid the North Carolina Railroad, a corporation in which the State owns a majority of the voting stock, but may not lend its credit to General Motors without a vote of the people even though it may have a "direct pecuniary interest" in that corporation through ownership of shares in the corporation by the Teachers' and State Employees' Retirement System.

#### Clarifying Amendments

In proposed Sec. 1 it is made clear that municipal capitation (poll) taxes may be levied only on persons subject to the county capitation tax. This has always been the practice, but the present language is not clear on the point.

Prior to the decision of the Supreme Court in *Sykes v. Clayton*, 274 N.C. 398 (decided October 30, 1968), there was some doubt as to whether the phrase "other subjects" in the portion of present Art. V, § 3, relating to classification of property for taxation, prohibited the General

Assembly from authorizing the levy of any tax other than privilege license taxes on a local-option basis. *Sykes v. Clayton* held that the classification provisions apply only to the property tax. In view of this decision, we have deleted from proposed Art. V, § 2(2), as unnecessary, the word "subject" and the sentence specifically permitting local classification for privilege license tax purposes.

The decision of the Supreme Court in *Harris v. Board of Commissioners*, 274 N.C. 343 (1968), rendered meaningless the phrase in present Art. V, § 8, exempting school taxes levied "for the term required by Article IX, Section 3, of the Constitution . . ." from the 20-cent limitation on the county property tax rate. The phrase has therefore been omitted from proposed Art. V, § 2(4), as unnecessary and confusing.

The language in present Art. V, § 3, purporting to grant authority to the General Assembly to tax "trades, professions, franchises, and incomes," is omitted from proposed Art. V, § 2(6). This language is not the source of the General Assembly's authority to tax these subjects, and it has never described the full range of the taxing power; thus it is surplusage at best and is a potential source of misunderstanding. (The present maximum income tax rate of 10 per cent and the minimum exemptions are retained.)

Proposed Art. V, §§ 3 and 4, express in two separate sections, one for the State and one for local government, the debt restrictions now set out in Art. V, § 4, and incorporate the provisions of present Art. VII, § 6, concerning voter approval of debt for "necessary expenses" in excess of the two-thirds limitations. The tax aspect of present Art. VII, § 6 (dealing with necessary expense), has been transferred to proposed Art. V, § 2(5). In proposed Sec. 4, authority for local governments to borrow without a vote "to repel invasions" has been deleted as obsolete.

Article II, § 31, of the present constitution, protecting State retirement funds from diversion, has been transferred to proposed Sec. 6(2) in a substantially edited but substantively unchanged form, except that the use of retirement system funds for disability and death benefits is expressly permitted, as the statutes now provide.

Present Art. VII, § 7, limiting expenditures to appropriations, is transferred to become proposed Sec. 7(2), rewritten to make it applicable to cities as well as counties and to delete an obsolete reference to township treasuries.

#### Editorial Amendments

The remaining amendments to Article V are editorial in nature. Attention is directed to two of these. Throughout the proposed constitution the terms "municipality" and "municipal corporation" have been avoided except where substantive results might follow from the use of



another term, as in present Art. V, § 5 (proposed Sec. 2[3]), concerning exemption from taxation of the property of "municipal corporations." The phrase "cities and towns and other units of local government" has been uniformly substituted for these terms. Also, whenever a vote of the people is required by the constitution, a standard phrase has been employed to replace the present variety of expressions.

#### Article VI. Suffrage and Eligibility to Office

The substantive changes proposed in Article VI are few.

The constitution now bars from voting and office holding a person who has been found guilty of committing a felony against the State of North Carolina, unless he has been restored to the rights of citizenship in a judicial proceeding. The proposed constitution extends that bar to those who have been convicted of felonies against the United States or another state.

It is desirable, in the interest of ease and uniformity of administration as well as voter understanding, that the election laws of this State exhibit a greater degree of uniformity than is now required by the constitution or found in the laws. Accordingly, proposed Art. VI, § 3, requires that all laws governing the registration of voters and the conduct of elections for federal, state, district, and county offices be uniform throughout the State. The General Assembly is required to enact general laws (thus permitting classification on the basis of population or other appropriate factors) governing voter registration and the conduct of elections for all municipal officers. (Variations by local act would not be prohibited as to elections other than for officers.)

Art. VI, § 6, now provides that "Every voter . . . shall be eligible to office." The State Supreme Court says that this provision means also that *only* voters are eligible to office. It is commonly supposed that it is also necessary that a person be a registered voter in the jurisdiction that he is to serve. This has created problems for state and local governments in filling appointive positions that are at least technically classified as offices and for which it may be necessary to seek applicants from outside the jurisdiction. One not already a registered voter of the jurisdiction is not eligible for appointment. As a practical matter, this restriction is often overlooked because the necessities of governmental recruiting force an employer to look outside the boundaries of the jurisdiction. Proposed Art. VI, § 6, deals with this problem by providing that every qualified voter shall be eligible for *election* to office (and by inference that only qualified voters are eligible for election to office). Proposed Art. VI, § 8, makes this clear by requiring that a candidate for an elective office be qualified to vote in an election for that office. These changes leave the General Assembly with the authority

to determine to what extent the holders of *appointive* offices must be qualified voters in the jurisdiction they serve, either at the time of appointment or later.

The dual office-holding provision has been moved from Article XIV to become Art. VI, § 9. While extensively rewritten, the chief effect of the revision is to enable the General Assembly to permit by general law the concurrent holding of two or more appointive offices, or one elective and one or more appointive offices. This will allow the General Assembly to do directly what is now done by assigning the duties of one office to be performed by another, or by declaring the holder of an office to be a "commissioner for a special purpose," or by other indirect means. Thus, for example, the General Assembly could provide that the same man can be both tax collector and tax supervisor. Otherwise, the proposed ban on double office holding is fully as effective as the present one. It expressly forbids the holding of two elective offices at the same time.

We recommend the omission of the obsolete and unconstitutional grandfather clause under which certain illiterate males were allowed to register prior to December 1, 1908, and other obsolete transitional provisions from the 1900 suffrage amendment.

#### Article VII. Local Government

Although present Article VII sets out a form of county government, the General Assembly has authority, by virtue of present Sec. 10, to modify by statute any of its provisions, except Secs. 5, 6, 7, and 9. It has often exercised that power. The proposed Constitution transfers Secs. 6, 7, and 9 (dealing with financial matters) to Article V, leaving only Sec. 5 (providing for the office of Sheriff) beyond the power of the General Assembly to modify by statute. In view of this fact, the proposed constitution omits all of the remainder of present Art. VII except Sec. 5, and substitutes as Sec. 1 a general description of the General Assembly's power to provide for the organization and powers of local government. (Sec. 1 is not a delegation of power to the General Assembly but is merely a recognition of its power in this regard.)

Present Sec. 5 (providing for the Sheriff) is retained as proposed Sec. 2 with minor amendments. The method of filling vacancies in the office of Sheriff is left to legislative discretion, and it is made clear that the General Assembly may provide a procedure for removing unfit Sheriffs from office, which has already been done by G.S. § 128-16.

A final Sec. 3 is added to make it clear that a merged or consolidated city-county shall be deemed to be both a city and a county for such constitutional purposes as legislative representation and restrictions on the power of local governments to tax and incur debt.



### Article VIII. Corporations

Present Article VIII contains three sections dealing with business corporations and other non-municipal corporations and a fourth section dealing with cities and towns. This last section (Sec. 4) we recommend be transferred to Article VII (Local Government) with some modifications.

The three sections dealing with non-municipal corporations date from 1868, with an amendment adopted in 1916 requiring in effect that business corporations be incorporated under general laws rather than by special act of the General Assembly, as had been the frequent practice prior to that time. We have retained present Secs. 1 and 3, with no substantive change. Present Sec. 2 is obsolete and meaningless and is deleted.

### Article IX. Education

Article IX has been rearranged to improve the order of treatment of the subjects dealt with by that article, and its language has been modified to eliminate obsolete provisions and to make the article reflect current practice in the administration and financing of schools.

Proposed Sec. 1 adds "libraries" to the list of institutions that the General Assembly is urged to encourage.

Proposed Sec. 2 extends the mandatory school term from six months to a minimum of nine months and eliminates the restrictive age limits on tuition-free public schooling. It also authorizes units of local government to which the General Assembly assigns a share of the responsibility for financing public education to finance educational programs (including public schools, technical institutes, and community colleges) from local revenues. It omits the now-unconstitutional language on the separation of the races in the public schools.

Proposed Sec. 3 makes it mandatory (rather than permissive) that the General Assembly require public school attendance and omits the obsolete limitation on compulsory attendance to a total of sixteen months.

Proposed Sec. 4(1) modifies the State Board of Education slightly by eliminating the Superintendent of Public Instruction as a voting member of the Board while retaining him as the Board's secretary and chief administrative officer. He is replaced as a member by an additional at-large appointee. Continuity of board membership is not otherwise affected. The Superintendent of Public Instruction will continue to be popularly elected, as required by Art. III, § 7(1). A potential conflict of authority between the Superintendent and the Board is eliminated by making clear that he is the administrative officer of the Board (Sec. 4[2]), which is to administer the public schools (Sec. 5).

Proposed Sec. 5 restates, in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced.

Proposed Sec. 6 restates present Sec. 4, dealing with

the state school fund, without substantive change.

Proposed Sec. 7 restates present Sec. 5, dealing with the county school fund, without change except to delete obsolete references to "proceeds from the sale of estrays" and militia exemption payments.

Proposed Sec. 8 extends present Sec. 6 (which deals only with the University) to take account of the duty of the State to maintain institutions of higher education in addition to The University of North Carolina.

Two present sections are omitted: Sec. 10, which has served its intended purpose, and Sec. 12 (the Pearsall Amendment), which has been judicially declared to be unconstitutional in its entirety.

### Article X. Homesteads and Exemptions

The provisions of this Article date from 1868, with few amendments. The amounts of the homestead and personal property exemptions (\$1,000 and \$500 respectively) are absolute, and were set in 1868. If these figures were reasonable then, they long ago ceased to be so. While we do not propose any specific amount by which they should be increased (or indeed that they be increased at all), we do believe that the General Assembly should be able to set the amounts of the personal property and homestead exemptions at what it considers reasonable levels from time to time, with the present constitutional figures being treated as minimums.

The provision as to married women's property (proposed Art. X, § 4) is retained unchanged.

In the interest of clarity, the sections of Article X have been rearranged and the language has been simplified, without intended change in meaning except to broaden the protection given insurance for the benefit of the wife and children of the insured.

### Article XI. Punishments, Corrections, and Charities

This Article, which dates from 1868 with minor amendments adopted in 1876 and 1880, has been substantially abbreviated by the elimination of eight sections of 1868 vintage that have served their intended purpose or are so detailed as to be more appropriate for statutory than for constitutional treatment. In their place we recommend proposed Sec. 3, a broadly phrased mandate to the General Assembly to provide appropriate institutions and agencies to minister to the charitable and correctional needs of the State.

Proposed Sec. 4 replaces the more detailed statement regarding the Board of Public Welfare and its duties.

Proposed Secs. 1 and 2 restate present Secs. 1 and 2, dealing with permissible punishments for crime and the crimes punishable by death, without change except for the elimination of the 1876 provision authorizing the farming-out of prisoners, an obsolete practice that is adequately covered by statute.

#### **Article XII. Military Forces**

Proposed Article XII substitutes a single-section statement of the Governor's authority as Commander in Chief of the military forces of the State for the more detailed present Article XII. The omitted provisions are adequately dealt with by statute.

#### **Article XIII. Conventions; Constitutional Amendment and Revision**

The two sections of present Article XIII, dealing with conventions of the people and amendments to the constitution, date from 1875. They are vague and incomplete, especially with respect to conventions. The proposed language incorporates established North Carolina theory and practice with respect to the matters covered.

#### **Article XIV. Miscellaneous**

Our proposed revision of the Miscellaneous Article calls for the omission of Sec. 1, which was an 1868 transitional provision; of Sec. 2; and of Sec. 8, which is inconsistent with the Constitution of the United States and therefore void. It proposes the transfer of Secs. 3, 4, 5, and 7 to more appropriate articles of the constitution,

and the transfer of one section from the Declaration of Rights to Article XIV. Present Sec. 6 of this article is retained as Sec. 1 without substantive change.

Proposed Sec. 3 defines various types of general laws required or authorized by the constitution. It is adapted from present Article IV, Sec. 20.

Proposed Sec. 4 provides for the continuity of laws not in conflict with the proposed constitution and specifies that the adoption of the proposed constitution will not cut short any term of office begun under the present constitution.

#### **Time of Election on Proposed Constitution**

The bill to submit the proposed constitution to the voters will call for it to be voted on "at the next general election," as required by present Art. XIII, § 2. Unless the General Assembly exercises its authority to call for an earlier vote, "the next general election" will be that of November 3, 1970.

#### **Effective Date**

The bill submitting the proposed constitution to the voters will provide that the constitution, if ratified by the people, will take effect on January 1, 1971.



AMENDMENT NO. 5

*Providing for a Change in the Mode of Selection of Certain State Executive Officers*

**Proposed Constitution**

**Article III**

1     Sec. 5(8). *Appointments*. Except as otherwise  
2 provided in this Constitution, the Governor shall  
3 appoint and may remove the heads of all administra-  
4 tive departments and agencies of the State. All  
5 other officers in the administrative service of the  
6 State shall be appointed and may be removed as  
7 provided by law.

1     Sec. 7(1). *Officers*. An Auditor, a Treasurer, and  
2 an Attorney General shall be elected by the qualified  
3 voters of the State in 1972 and every four years  
4 thereafter, at the same time and places as members  
5 of the General Assembly are elected. Their term of  
6 office shall be four years and shall commence on the  
7 first day of January next after their election and  
8 continue until their successors are elected and  
9 qualified.

**Article IX**

1     Sec. 4(2). *Superintendent of Public Instruction*.  
2 The Superintendent of Public Instruction shall be  
3 the secretary and chief administrative officer of the  
4 State Board of Education. He shall be elected by  
5 the State Board of Education.

**Present Constitution**

**Article III**

1     Sec. 1. *Executive power; Governor and Lieu-*  
2 *tenant Governor*. The executive power of the State  
3 shall be vested in the Governor. The Governor and  
4 the Lieutenant Governor shall be elected by the  
5 qualified voters of the State in 1972 and every four  
6 years thereafter, at the same time and places as  
7 members of the General Assembly are elected. Their  
8 term of office shall be four years and shall commence  
9 on the first day of January next after their election  
10 and continue until their successors are elected and  
11 qualified.

1     Sec. 3. *Contested elections*. A contested election  
2 for any office established by this Article shall be  
3 determined by joint ballot of both houses of the  
4 General Assembly in the manner prescribed by law.

1     Sec. 7. *Information*. The Governor may at any

2 time require information in writing from the head  
3 of any administrative department or agency upon  
4 any subject relating to the duties of his office.

1     Sec. 10. *Appointments*. Except as otherwise  
2 provided in this Constitution, the Governor shall  
3 appoint and may remove the heads of all adminis-  
4 trative departments and agencies of the State. All  
5 other officers in the administrative service of the  
6 State shall be appointed and may be removed as  
7 provided by law.

1     Sec. 12. *Succession to office of Governor*. [In  
2 paragraph 3, strike "Secretary of State" and insert  
3 "Attorney General" in lieu thereof.]

1     Sec. 13. *Other elective officers*.

2     (1) *Officers*. An Auditor, a Treasurer, and an  
3 Attorney General shall be elected by the qualified  
4 voters of the State in 1972 and every four years  
5 thereafter, at the same time and places as members  
6 of the General Assembly are elected. Their term of  
7 office shall be four years and shall commence on the  
8 first day of January next after their election and  
9 continue until their successors are elected and  
10 qualified.

11     (2) *Duties*. Their respective duties shall be  
12 prescribed by law.

13     (3) *Vacancies*. If the office of any of these  
14 officers shall be vacated by death, resignation, or  
15 otherwise, it shall be the duty of the Governor to  
16 appoint another to serve until his successor is elected  
17 and qualified. Every such vacancy shall be filled by  
18 election at the first election for members of the  
19 General Assembly that occurs more than 30 days  
20 after the vacancy has taken place, and the person  
21 chosen shall hold the office for the remainder of the  
22 unexpired term fixed in this Section. When a va-  
23 cancy occurs in the office of any of the officers  
24 named in this Section and the term expires on the  
25 first day of January succeeding the next election for  
26 members of the General Assembly, the Governor  
27 shall appoint to fill the vacancy for the unexpired  
28 term of the office.

29     (4) *Interim officers*. Upon the occurrence of a  
30 vacancy in the office of any one of these officers for  
31 any of the causes stated in the preceding paragraph,  
32 the Governor may appoint an interim officer to  
33 perform the duties of that office until a person is  
34 appointed or elected pursuant to this Section to fill  
35 the vacancy and is qualified.



36 (5) *Acting officers.* During the physical or men-  
37 tal incapacity of any one of these officers to perform  
38 the duties of his office, as determined pursuant to  
39 this Section, the duties of his office shall be per-  
40 formed by an acting officer who shall be appointed  
41 by the Governor.

42 (6) *Determination of incapacity.* The General  
43 Assembly shall by law prescribe with respect to  
44 those officers, other than the Governor, whose offices  
45 are created by this Article, procedures for deter-  
46 mining the physical or mental incapacity of any  
47 officer to perform the duties of his office, and for  
48 determining whether an officer who has been tem-  
49 porarily incapacitated has sufficiently recovered his  
50 physical or mental capacity to perform the duties  
51 of his office. Removal of those officers from office for  
52 any other cause shall be by impeachment.

1 Sec. 14. *Council of State.* The Council of State  
2 shall consist of the officers whose offices are created  
3 by this Article.

1 Sec. 16. *Seal of State.* There shall be a seal of the  
2 State, which shall be kept by the Governor and  
3 used by him as occasion may require, and shall be  
4 called "The Great Seal of the State of North Caro-  
5 lina". All grants and commissions shall be issued in  
6 the name and by the authority of the State of North  
7 Carolina, sealed with "The Great Seal of the State  
8 of North Carolina", and signed by the Governor.

#### Article IX

1 Sec. 8. *State Board of Education.*

2 (1) *Board.* The State Board of Education shall  
3 consist of the Lieutenant Governor, the Treasurer,  
4 and eleven members appointed by the Governor,  
5 subject to confirmation by the General Assembly in  
6 joint session. The General Assembly shall divide the  
7 State into eight educational districts. Of the ap-  
8 pointive members of the Board, one shall be  
9 appointed from each of the eight educational dis-  
10 tricts and three shall be appointed from the State  
11 at large. Appointments shall be for overlapping  
12 terms of eight years. Appointments to fill vacancies  
13 shall be made by the Governor for the unexpired  
14 term and shall not be subject to confirmation.

15 (2) *Superintendent of Public Instruction.* The  
16 Superintendent of Public Instruction shall be the  
17 secretary and chief administrative officer of the State  
18 Board of Education. He shall be elected by the  
19 State Board of Education.

#### COMMENTARY

We recommend that the list of elected state executive

officers be reduced from ten to five. We propose that the Governor, Lieutenant Governor, Auditor, Treasurer, and Attorney General continue to be elected by the people for four-year terms; that the Superintendent of Public Instruction be chosen by the State Board of Education; and that the Secretary of State, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance be appointed by the Governor.

From 1776 until 1835, the General Assembly elected the Governor. From 1776 until 1868 it also elected all of the other state executive officers and a seven-member Council of State, a part-time body that served solely as a check on the exercise of the Governor's few powers. The Constitution of 1868, belatedly reflecting the influence of Jacksonian democracy, made all of the state executives subject to popular election for four-year terms. The elected list then comprised the Governor, Lieutenant Governor (established in 1868), Secretary of State, Auditor, Treasurer, Attorney General, Superintendent of Public Instruction, and Superintendent of Public Works. (The last-named officer was eliminated in 1873.) In 1944, an amendment was adopted adding the Commissioners of Agriculture, Labor, and Insurance to the list of those constitutionally required to be elected, although they had been elected by requirement of statute for many decades.

In 1868, the elected executives were all of the principal executive officers of the State. As other executive offices were created in the late 1800's, they too were made elective—the Commissioners of Agriculture, Labor, and Insurance being the only extant examples. Many executive offices with large responsibilities have been created since 1900, but none is filled by popular election. This group includes, for example, the Chairman of the State Highway Commission, Commissioner of Motor Vehicles, Commissioner of Revenue, Commissioner of Public Welfare, Commissioner of Correction, Director of Conservation and Development, and Director of Administration, to name but a few. All are appointed by the Governor or (in two instances) are chosen by a board with the Governor's approval. Thus whether one of the state executive offices is filled today by vote of the people or by appointment appears to have more to do with the age of the office than with the nature and weight of its responsibilities.

The result is that each four years, the voter is confronted by a ballot listing candidates for ten executive positions. Relatively few of the State's two million voters have more than a faint idea of the duties of most of these offices; still fewer are in position to know the qualities of the occupants of and candidates for most of those posts. Thus the vast majority of the voters are poorly prepared to make an understanding selection of the men who are to fill those posts. The fact is that for many decades, nearly all of these officers (other than the Governor and Lieutenant Governor) have reached their places through



appointment by the Governor to fill a vacancy, have won nomination in the party primary without significant opposition, and have shared the success of the Democratic state ticket in the general election.

From the constitutional standpoint, these officers nevertheless hold their offices by gift of the voters, and so are only indirectly subject to supervision by the Governor. Thus the Governor's ability to coordinate the activities of state government and to mount a comprehensive response to the problems of the day are handicapped if the elected department heads choose not to cooperate with him.

We believe that reducing the list of elected officers would make possible a more knowledgeable choice on the part of the voters, who would have a smaller list of offices and candidates to consider, and it would make possible more effective coordination of the administrative operations of state government.

We would retain on the elective list the Governor and Lieutenant Governor, for obvious reasons; the Auditor, because of his function as the post auditor of state financial transactions; the Treasurer, because of his responsibilities as the custodian of state funds; and the Attorney General, because of his function as counsel to state government. These last three officers serve in part as observers of the Governor and should be sufficiently independent of his control to raise objections in case of fiscal or legal irregularities on his part.

These five officers would also constitute the Council of State. That body historically has not functioned in a manner comparable to the President's Cabinet. Its members have never been "the Governor's men," holding office by his appointment and subject to removal by him. For a long time, it has not included all of the heads of major state departments. Its assigned functions (most of them statutory) have been to serve as a check on the Governor and his actions. Currently the Council's concerns are largely confined to approving the Governor's actions with respect to property acquisitions and dispositions by the State, the borrowing of money, and the calling of extra sessions of the General Assembly. We believe that these functions can be as well and as independently performed by the revised Council of State as they can be at present.

Our reasons for eliminating the Superintendent of Public Instruction from the ballot differ from those applying to the other four. Today, any voter in the State can be elected to any of these five offices, including that of Superintendent of Public Instruction. Yet the

job of administering a statewide school system serving over 1,200,000 children is a difficult and complex one, requiring professional knowledge and ability of a high order. We believe that the choice of a person to fill this important post can be better made by the State Board of Education than by the voters at large or even by the Governor. The change would, among other things, relieve the Superintendent of the kind of political pressures and obligations that may logically accompany a periodic political candidacy.

We note that the Superintendent-elect has advocated that the office be filled by appointment of the Board, as did his opponents in the primary and general elections of 1968. (We note also that only twenty-one of the states now choose their Superintendent of Public Instruction or equivalent officer by popular election.)

While the office of Secretary of State is one of great antiquity and prestige, we do not consider its present duties to be of such character as to require that it be filled by popular election.

The Commissioner of Agriculture heads an important state department and is responsible for assistance and regulatory programs affecting not only the farmers but the processors, distributors, and consumers of farm products as well. For this reason, we believe that the post is one that should be subject to supervision and direction by the Governor through his own appointee, as is the case with other comparable line agencies of the State. (Of the forty-seven states with an officer equivalent to our Commissioner of Agriculture, only twelve choose him by popular election.)

The Commissioners of Labor and Insurance perform essentially regulatory functions of a nature that makes it more appropriate that their offices be filled by appointment than by popular election. (Only eight states elect their Commissioner of Insurance and only five elect their Commissioner of Labor or equivalent.)

Even if taken out of the constitution, these four offices would continue to exist unless abolished by legislative action. Their duties would be subject to legislative determination, as they now are.

While the portion of this amendment dealing with the present constitution appears to be somewhat more extensive than is the portion dealing with the proposed constitution, that merely reflects the simpler and briefer character of the proposed document. As to the matter that Amendment No. 5 covers, the legal effects would be the same, whether it is adopted as an amendment to the proposed constitution or as an amendment to the present constitution.



GENERAL ASSEMBLY OF NORTH CAROLINA  
1995 SESSION

CHAPTER 72  
HOUSE BILL 7

AN ACT TO CLARIFY THE STATUTES SO AS TO STREAMLINE THE  
OPERATIONS OF THE STATE EDUCATION AGENCY.

The General Assembly of North Carolina enacts:

Section 1. G.S. 115C-19 reads as rewritten:

**"§ 115C-19. Chief administrative officer of the State Board of Education.**

As provided in Article IX, Sec. 4(2) of the North Carolina Constitution, the Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education. The Superintendent of Public Instruction shall administer the policies adopted by the State Board of Education. As secretary and chief administrative officer of the State Board of Education, the Superintendent manages on a day-to-day basis the administration of the free public school system, subject to the direction, control, and approval of the State Board. Subject to the direction, control, and approval of the State Board of Education, the Superintendent of Public Instruction shall carry out the duties prescribed under G.S. 115C-21."

Sec. 2. G.S. 115C-21 reads as rewritten:

**"§ 115C-21. Powers and duties generally.**

(a) Administrative Duties. It Subject to the direction, control, and approval of the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:

- (1) To organize and establish a Department of Public Instruction which shall include such divisions and departments as are the State Board considers necessary for supervision and administration of the public school system, to administer the funds for the operation of the Department of Public Instruction, and to enter into contracts for the operations of the Department of Public Instruction, system. All appointments of administrative and supervisory personnel to the staff of the Department of Public Instruction are subject to the approval of the State Board of Education, which may terminate these appointments for cause in conformity with Chapter 126 of the General Statutes, the State Personnel System.
- (2) To keep the public informed as to the problems and needs of the public schools by constant contact with all school administrators and teachers, by ~~his~~ personal appearance at public gatherings, and by information furnished to the press of the State.



- (3) To report biennially to the Governor 30 days prior to each regular session of the General Assembly, such report to include information and statistics of the public schools, with recommendations for their improvement and for ~~such changes in the school law as shall occur to him.~~ changes in the school law.
- (4) To have printed and distributed such educational bulletins as ~~he shall deem~~ are necessary for the professional improvement of teachers and for the cultivation of public sentiment for public education, and to have printed all forms necessary and proper for the administration of the Department of Public Instruction.
- (5) To ~~have under his direction, in his capacity as the constitutional head of the public school system,~~ manage all those matters relating to the supervision and administration of the public school ~~system.~~ system that the State Board delegates to the Superintendent of Public Instruction.
- (6) To create a special fund within the Department of Public Instruction to manage funds received as grants from nongovernmental sources in support of public education. ~~The Superintendent may accept grants and gifts from corporations and other sources made in support of public education and may hold and disburse such funds, in accordance with the purposes, conditions, and limitations associated with such grants and gifts. Any special fund created pursuant to this subdivision shall be subject to audit by the State Auditor. Effective July 1, 1995, this special fund is transferred to the State Board of Education and shall be administered by the State Board in accordance with G.S. 115C-410.~~
- (7) ~~To have solely under his direction and control all matters relating to provision of staff services and support to the State Board of Education, including implementation of federal programs on behalf of the State Board of Education, except as otherwise provided in the Current Operations Appropriations Act.~~

(b) Duties as Secretary to the State Board of Education. — ~~As secretary, under the direction of the Board,~~ Subject to the direction, control, and approval of the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:

- (1) To administer through the Department of Public Instruction, ~~all the~~ instructional policies established by the Board.
- ~~(1a) To administer the funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.~~
- (2) To keep the Board informed regarding developments in the field of public education.
- (3) To make recommendations to the Board with regard to the problems and needs of education in North Carolina.
- (4) To make available to the public schools a continuous program of comprehensive supervisory services.



- (5) To collect and organize information regarding the public schools, on the basis of which he shall furnish the Board such tabulations and reports as may be required by the Board.
- (6) To communicate to the public school administrators all information and instructions regarding instructional policies and procedures adopted by the Board.
- (7) To have custody of the official seal of the Board and to attest all deeds, leases, or written contracts executed in the name of the Board. All deeds of conveyance, leases, and contracts affecting real estate, title to which is held by the Board, and all contracts of the Board required to be in writing and under seal, shall be executed in the name of the Board by the chairman and attested by the secretary; and proof of the execution, if required or desired, may be had as provided by law for the proof of corporate instruments.
- (8) To attend all meetings of the Board and to keep the minutes of the proceedings of the Board in a well-bound and suitable book, which minutes shall be approved by the Board prior to its adjournment; and, as soon thereafter as possible, to furnish to each member of the Board a copy of said minutes.
- (9) To perform such other duties as the Board may assign to him from time to time."

Sec. 3. Article 5 of Chapter 143A of the General Statutes is amended by adding three new sections to read:

**"§ 143A-39. Creation.**

There is hereby created a Department of Public Instruction. The head of the Department of Public Instruction is the State Board of Education. Any provision of G.S. 143A-9 to the contrary notwithstanding, the appointment of the State Board of Education shall be as prescribed in Article IV, Section 4(1) of the Constitution.

**"§ 143A-40. State Board of Education; transfer of powers and duties to State Board.**

The State Board of Education shall have all powers and duties conferred on the Board by this Article, delegated to the Board by the Governor, and conferred by the Constitution and laws of this State.

**"§ 143A-42. Superintendent of Public Instruction; creation; transfer of powers and duties.**

The office of the Superintendent of Public Instruction, as provided for by Article III, Section 7 of the Constitution, and the Department of Public Instruction are transferred to the Department of Public Instruction. The Superintendent of Public Instruction shall be the Secretary and Chief Administrative Officer of the State Board of Education, and shall have all powers and duties conferred by the Constitution, by the State Board of Education, Chapter 115C of the General Statutes, and the laws of this State."

Sec. 4. The State Board of Education shall review all State laws and policies governing the public school system to ensure their compliance with the intent of this act to restore constitutional authority to the State Board. The Board shall complete this



review and make any recommendations for additional statutory changes to the General Assembly by June 1, 1995.

Sec. 5. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 9th day of May, 1995.

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Dennis A. Wicker  
President of the Senate

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Harold J. Brubaker  
Speaker of the House of Representatives

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16 CVS 15607

NORTH CAROLINA STATE BOARD OF EDUCATION,  
Plaintiff,

v.

STATE OF NORTH CAROLINA and  
MARK JOHNSON, in his official capacity,  
Defendants.

**SUPERINTENDENT'S BRIEF  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

NOW COMES the North Carolina Superintendent of Public Instruction Mark Johnson (hereinafter referred to as the "Superintendent"), by and through the undersigned counsel, and hereby submits the following Brief in Support of Motion for Summary Judgment.

**STATEMENT OF THE CASE**

Plaintiff filed a Verified Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunctive Relief on 29 December 2016. By order of the Chief Justice of the North Carolina Supreme Court, the three judge panel obtained this case on 3 January 2017. Plaintiff filed its motion for summary judgment on 30 January 2017. The three judge panel issued a case management order on 16 February 2017. Plaintiff filed its Amended Verified Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunctive Relief on 10 March 2017. The Superintendent filed his Answer and Defenses, Motion for Summary Judgment and his Affidavit on 12 April 2017. This case is ripe for hearing upon all motions for summary judgment. Summary judgment will resolve all claims for relief in the pleadings.

**UNDISPUTED FACTS**

On 14 December 2016, Representatives David Lewis, Rob Bryan, Craig Horn and Steve Ross filed House Bill 17 ("HB 17") entitled, "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" in the North Carolina General Assembly. The North Carolina House and Senate ratified HB 17 on 16 December 2016. On 19 December 2017, the Governor signed HB 17 into law as Session Law 2016-126, a copy of which is attached hereto as **Exhibit "A."**<sup>1</sup>

Article IX, Section 5 of the North Carolina Constitution states as follows:

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, § 5 (Emphasis supplied).

As it is plainly stated in the above-referenced provision of the North Carolina Constitution, the General Assembly is the definitive promulgator of powers and duties of the State Board of Education ("State Board"). Since the People ratified the 1971 North Carolina Constitution, there have been numerous amendments and modifications to the powers and duties of the State Board as well as the Superintendent by the General Assembly. Examples of the shifting roles and duties of the State Board and the Superintendent through specific legislation passed by the General Assembly may be seen by examining a number of Session Laws from 1971 through 2016, portions of which are attached hereto as **Exhibit "B"**:

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<sup>1</sup>The Ratified Bill title changed to, "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."

1. Session Law 1971-864 – An Act to Reorganize State Government (Creation of Department of Public Education and defining roles of State Board and Superintendent);
2. Session Law 1981-423 – An Act to Recodify Chapter 115 of the General Statutes, Elementary and Secondary Education (Recodifies N.C.G.S. §115 as N.C.G.S. §115C and confers additional powers granted to the Superintendent, *e.g.*, N.C.G.S. §115C-21(a)(5) amended an administrative duty of the Superintendent by adding the following language, “To have under his direction, in his capacity as the constitutional administrative head of the public school system, all those matters relating to the supervision and administration of the public school system, except the supervision and management of the fiscal affairs of the State Board.”);
3. Session Law 1987-1025 – An Act to Provide a Governance Structure for the Department of Public Education (Continued expansion of powers to the Superintendent, *e.g.*, N.C.G.S. §115C-21(a)(1) deleted language referring to the State Board and read as amended, “To organize and establish a Department of Public Instruction which shall include such divisions and departments as are necessary for supervision and administration of the public school system.” For the second time since 1981, N.C.G.S. §115C-21(a)(5) was amended again to read as follows, “To have under his direction, in his capacity as the constitutional head of the public school system, all those matters relating to the supervision and administration of the public school system.”);
4. Session Law 1993-522 – An Act to Delete the References to the Department of Public Education; (Portions of the preamble in this session law are notable: “. . . Whereas, the functions of the Department of Public Education have been and continue to be performed by the Department of Public Instruction under the supervision of the Superintendent of Public Instruction, and Whereas, the current references in the General Statutes to the Department of



Public Education and the Department of Public Instruction have resulted in confusion about the respective roles of the State Board of Education and the Superintendent that resulted in litigation between them; and Whereas, the General Assembly is authorized under Article IX, Sections 2 and 5, and Article III, Section 7(1) and (2), of the Constitution to enact legislation defining the respective roles of the State Board of Education and the Superintendent of Public Instruction under the Constitution.”);

5. Session Law 1995-72 – An Act to Clarify the Statutes so as to Streamline the Operations of the State Education Agency (This session law removed a great deal of duties from the Superintendent);

6. Session Law 1995-393 – An Act to Further Streamline the Statutes so as to Clarify the Constitutional Role of the State Board of Education (This session law removed a great deal of duties from the Superintendent); and

7. Session Law 2016-126 – 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. (This session law is attached as **Exhibit “A”** and will be discussed in further detail in the Superintendent’s Argument).

#### **LEGAL STANDARD**

Acts of the General Assembly are presumed to be constitutional. In construing laws enacted by the General Assembly, all inferences are made in favor of the constitutionality of the legislative action. *Rhyne v. K-Mart Corp.* 358 N.C. 160, 594 S.E.2d 1 (2004). The “[Supreme] Court gives acts of the General Assembly great deference, and a statute will not be declared

unconstitutional unless the Constitution clearly prohibits the statute.” *Id.* at 167, 594 S.E.2d at 7. Thus, there is a strong presumption that HB 17 is constitutional. *Id.* at 168, 594 S.E.2d at 8.

Summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). Summary judgment is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed. *Lawyers Title Ins. Corp. v. Zogreo*, 208 N.C. App. 88, 100, 702 S.E.2d 222, 230 (2010). As will be shown below, the Superintendent is entitled to summary judgment based upon the clear language of Article IX, Section 5 of the North Carolina Constitution.

### **ARGUMENT**

#### **I. THE CONSTITUTIONAL GRANT OF POWERS TO THE NORTH CAROLINA STATE BOARD OF EDUCATION MAY BE LIMITED AND DEFINED BY “LAWS ENACTED BY THE GENERAL ASSEMBLY.”**

In its amended complaint the State Board stakes an aggressive claim to inviolable authority over essentially every aspect of the operation of North Carolina’s public schools. This claim, however, is based upon a misinterpretation of Article IX, § 5 of the Constitution of North Carolina, because it ignores that the People, in creating the State Board, made it wholly subservient and auxiliary to the General Assembly. North Carolina courts have recognized the primacy of the General Assembly time and again in cases involving questions about the powers and duties of the State Board. In the current case, the challenged legislation is to a great degree directed toward restoring the balance of powers that existed between the parties in 1995 prior to substantial revisions to Chapters 115C, 126, and 143. A ruling that such legislation amounts to



an unconstitutional intrusion upon the powers of the State Board, aside from reversing decades-old Supreme Court precedent, would invert the hierarchy of authority established by the citizens of this State, enshrining the State Board above the elected General Assembly as the supreme policy-setting entity for the public schools. Such a ruling also would bar the Legislature from prescribing duties for the elected Superintendent, in violation of Article III, § 7. The motions for summary judgment of the State of North Carolina and the Superintendent should be granted, and the motion of the plaintiff State Board denied.

**A. North Carolina Courts Uniformly Have Recognized the Supremacy of the General Assembly in Regulating the Authority of the State Board and the Superintendent.**

The outcome of the present case will turn on the Court's analysis of a simple eight word phrase: "subject to laws enacted by the General Assembly." These words are at the end of, and qualify the entirety of, the constitutional provision conferring powers and duties to the State Board of Education:

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, § 5 (1971) (Emphasis supplied).

A few months after the effective date of the 1971 revisions to Article IX (Education) of the Constitution, the Supreme Court considered a challenge to the State Board's constitutional authority and rendered what remains today the most important interpretation of the "subject to" phrase, holding:

Where, as here, power to make rules and regulations has been delegated to an administrative board or agency by the Constitution, itself, the delegation is absolute, except insofar as it is limited by the Constitution of the State, by the Constitution of the United States or by the Legislature . . . pursuant to power expressly conferred upon it by the Constitution.

*Guthrie v. Taylor*, 279 N.C. 703, 712 185 S.E.2d 193, 200 (1971).<sup>2</sup> *Guthrie* involved a legal challenge by a North Carolina schoolteacher to a teacher certification regulation promulgated by the State Board, claiming, among other things, that the State Board exceeded its constitutional and statutory authority in enacting such a regulation. The Court began its analysis by reviewing the constitutional grant of power to the State Board, specifically, the power “generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto.” *Id.* at 709-10, 185 S.E.2d at 198 (quoting N.C. CONST., Art. IX, § 9 (1868)). After quoting the “subject to such laws as may be enacted from time to time by the General Assembly” phrase at the end of Article IX, § 9, the Supreme Court acknowledged the principle that should guide the outcome of this case: “The last sentence of Art. IX, § 9 above quoted, 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.* at 710, 185 S.E.2d at 198 (Emphasis supplied).

It is important to note that the Supreme Court in *Guthrie* made clear that the General Assembly has plenary power to limit and revise even the *express* authority conferred upon the State Board in the Constitution. The genius of this constitutionally provided legislative check on the exercise of power by the State Board is that it allows for a broad, nearly unlimited grant of power to the State Board itself in Article IX. That is, the State Board has the constitutional authority to supervise and administer the public schools. These words – “supervise” and

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<sup>2</sup> The Supreme Court in *Guthrie* actually considered the predecessor to Art. IX, § 5 of the Constitution of 1971 - Art. IX, § 9 of the Constitution of 1868 – the last sentence of which read: “All 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.” N.C. Const., Art. IX, § 9 (1868). The *Guthrie* Court made note of the revisions to the Constitution and even quoted the new provision, observing that “there is no difference in substance between the powers of the State Board of Education with reference to this matter under the old and the new Constitutions.” *Id.* at 710, 185 S.E.2d at 199.



“administer” – cover essentially everything. There is no need to weigh down the Constitution with a laundry list of the different tasks the State Board is allowed to do. The State Board can do anything in furtherance of its authority to supervise and administer the public schools. Anything that is, except those things limited by the General Assembly.

Again, *Guthrie* makes this clear. The plaintiff teacher complained that the State Board lacked authority to enact regulations pertaining to the certification of teachers. Nowhere in the Constitution does (or did) any provision specifically address certification of teachers. Nonetheless, these broad, general grants of authority to “supervise” and “administer” the public schools “conferred upon the [State Board] the powers so enumerated, including the powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system.” *Id.* “Thus,” the Court continued, “in the silence of the General Assembly, the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution itself.” *Id.* at 710, 195 S.E.2d at 198-99.

In a more recent case, the Supreme Court provided further illustration of the plenary nature of the General Assembly’s oversight powers with regard to public education. *State v. Whittle Communications* presented the question of whether the State Board of Education’s broad constitutional authority to supervise and administer the public schools of North Carolina could be curtailed by a legislative enactment transferring certain supervisory authority instead to local school districts. 328 N.C. 456, 402 S.E.2d 556 (1991). The controversy arose out of the development and promotion by defendant Whittle Communications (Whittle) of an in-school video news program called Channel One, which was designed to keep students informed on

current affairs. *Id.* at 458, 402 S.E.2d at 557. The daily program was twelve minutes long, with two of the twelve minutes consisting of commercial advertising. *Id.* at 459, 402 S.E.2d at 557.

Whittle made a presentation concerning Channel One to the State Department of Public Instruction in July, 1989, and began marketing to local school boards in the fall of 1989. *Id.* at 459, 402 S.E.2d at 558. The State Board of Education considered Channel One at its regular January meeting and decided it needed additional time to study the matter before its February meeting. *Id.* On 1 February 1990, the State Board adopted a temporary rule prohibiting local school boards from entering into contracts that limited teacher discretion regarding presentation of subject matter and required students to watch commercials – the very type of contract school boards were contemplating signing with Whittle. *Id.* at 459-60, 402 S.E.2d at 558. The Thomasville City Board of Education entered into a contract with Whittle to provide the Channel One programming one week after the State Board of Education promulgated the temporary rule prohibiting such contracts. *Id.* at 459, 402 S.E.2d at 558. Eleven days after execution of the contract by the Thomasville Board, the State Board filed a lawsuit against Whittle and the Thomasville Board seeking a declaration that the contract between the defendants was void and unenforceable. *Id.* at 461, 402 S.E.2d at 558. As in the present case, the State Board also sought and obtained a temporary restraining order enjoining the defendants from implementing the 8 February 1990 contract. *Id.* at 461, 402 S.E.2d at 559.

The Superior Court dismissed the State Board's complaint and declared that the Thomasville Board's contract with Whittle was valid and enforceable under North Carolina law, but its order did not squarely address the issue that became the basis of the Supreme Court's decision affirming the outcome. *Id.* at 461-62, 402 S.E.2d at 559. The Supreme Court, instead of focusing on less substantive issues such as exhaustion of administrative remedies or whether the



State Board followed proper procedure in enacting the temporary rule, looked directly to the question of the source of authority that might support the State Board's attempt to prohibit contracts like the one between the Thomasville Board and Whittle. Channel One, the Court observed, constituted "supplementary instructional materials," as opposed to "textbooks," and while oversight of textbooks is the job of the State Board, supplemental materials are the responsibility of local school boards. *Id.* at 463, 402 S.E.2d at 560. Justice Frye, writing for six members of the Court,<sup>3</sup> held:

We conclude that the State Board of Education did not have the authority to promulgate a temporary rule governing this contract because the contract involves supplementary materials, an area which the General Assembly has delegated to the local school boards to oversee. *See* N.C. Gen. Stat. § 115C-98(b).

*Id.* at 462-63, 402 S.E.2d at 559-60.

Just as in *Guthrie*, the *Whittle Communications* opinion explicitly acknowledges the supremacy of the Legislature in setting educational policy and allocating responsibilities among the various entities of the public school system in North Carolina:

Article IX, § 5 of the North Carolina Constitution, which grants the State Board the authority to "make all needed rules," also limits this authority by making it "subject to the laws enacted by the General Assembly." Thus, we must examine our statutes to ascertain whether the General Assembly has enacted laws which would limit the power of the State Board in the area of selection of materials such as Channel One which we conclude is a supplementary instructional material.

*Id.* at 464, 402 S.E.2d at 560-61. It is noteworthy that whereas in this case the State Board of Education is complaining about a legislative allocation of responsibilities as between two constitutional entities, the *Whittle Communications* Court held that the State Board's authority to

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<sup>3</sup> Justice Harry C. Martin, in dissent, did not raise any question regarding the authority of the General Assembly to allocate sole responsibility for such contracts to the local school boards despite that such authority clearly falls within the scope of "supervising" and "administering" the public schools of North Carolina. *See generally, id.* at 472-73, 404 S.E.2d at 566.

“supervise” and “administer” public schools could be legislatively reassigned to *local school systems*, which are creations of statute. *See generally*, N.C. Gen. Stat. Chapter 115C, Article 5.

Indeed, *Whittle* makes clear that these constitutional powers cannot be exercised in a manner that interferes with the authority that the General Assembly has granted to local school boards. The Court does this by juxtaposing the statute that prescribes procedures for local school boards to follow in adopting textbooks against the statute prescribing procedures relating to supplementary materials. *Id.* at 465-66, 402 S.E.2d at 561. Regarding textbooks, the guiding statute (N.C. Gen. Stat. § 115C-98(a)) “directed the local school boards to adopt rules and regulations concerning the local operation of the textbook program, but these rules and regulations were not to be ‘inconsistent with the policies of the State Board of Education concerning the local operation of the textbook program.’” *Id.* at 466, 402 S.E.2d at 561. The Court continued:

The General Statutes do not contain a similar direction to the State Board of Education for the adoption of supplementary instructional materials. The only statute which speaks to this issue is N.C.G.S. § 115C-98(b) which directs each local school board to adopt “written policies concerning the procedures” used in the adoption of supplementary instructional materials in its own unit. Furthermore, this statute contains no limitation on the local school boards’ directive to adopt these written policies on supplementary instructional materials similar to the limitation concerning the local adoption of rules dealing with the local operation of the textbook program found in § 115C-98(a). . . . Thus, the General Assembly, by adopting chapter 519 in 1969, placed the decision-making process for the selection and procurement of these supplementary instructional materials in the *exclusive domain of the local school boards* while clearly making the rules adopted by the local boards concerning textbooks subject to the policies of the State Board.

*Id.* at 466, 402 S.E.2d at 561-62 (Emphasis supplied). Although the details of *Whittle Communications* can be somewhat cumbersome, the principle on which the outcome is based is simple – in the North Carolina public schools, the General Assembly is the ultimate arbiter and delegator of powers and duties.



Every grant of power to local school boards by the General Assembly would be unconstitutional if the outcome advocated in this case by the State Board actually were the law of North Carolina. Yet the courts of this State, without exception, have recognized that the General Assembly has the discretion and authority to delegate matters of supervision and administration of public schools to local boards. In a recent case, the Court of Appeals held:

The General Assembly “may delegate to local administrative units the power to make such rules and regulations as may be deemed necessary and expedient, and when so delegated it is peculiarly within the province of the administrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions.”

*Wake Cares, Inc. v. Wake County Board of Education*, 190 N.C. App. 1, 17, 660 S.E.2d 217, 227 (2008) (quoting *Coggins v. Board of Education of Durham*, 223 N.C. 763, 767, 28 S.E.2d 527, 530 (1944)), *see also Hughey v. Cloninger*, 297 N.C. 86, 93, 253 S.E.2d 898, 903 (1979) (“In its discretion the General Assembly may delegate to local administrative units the general supervision and control of schools within their boundaries.” (citing *Coggins, supra*)).

This principle of legislative supremacy in matters of public education has become so well-settled since *Guthrie* that it does not provoke much discussion in the more recent cases. In a 2009 opinion, the Court of Appeals quoted Article IX, § 5 of the North Carolina Constitution in its entirety and observed: “Therefore, this constitutional grant of powers to the BOE may be limited and defined by ‘laws enacted by the General Assembly.’” *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Board of Education*, 195 N.C. App. 348, 351, 673 S.E.2d 667, 670 (2009)<sup>4</sup> (quoting last sentence of N.C. CONST., Art. IX, § 5). In fact, the State Board itself

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<sup>4</sup> The heading at the top of the Argument section of this brief is a direct quote of LexisNexis Headnote 5 from this case.

has been admonished previously in the Appellate Division when making overly ambitious claims to “plenary authority”:

Finally, defendants (including the State Board of Education) claim “exclusive authority to regulate the professional qualifications of persons employed in North Carolina schools” as “the Constitution itself grants the State Board [this] plenary authority.” This power is unfettered, the Board of Education asserts, as its “authority regarding certification of school professionals does not derive from the General Assembly *at all*.” [Emphasis by the Court.] Defendants have misapprehended their power under the N.C. Constitution and the Act. Certainly, they are subject to both. Article IX, § 5 of the North Carolina Constitution is unambiguous on this point, as it states: “The State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, *subject to laws enacted by the General Assembly*.” [Emphasis by the Court.] Moreover, this Constitutional provision was interpreted by our Supreme Court in *Guthrie v. Taylor* [citation omitted]. There, the Court held that Article IX, § 5 “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.”

*N.C. Bd. of Examiners for Speech & Language Pathologists and Audiologists v. N.C. State Bd. of Education*, 122 N.C. App. 15, 20, 468 S.E.2d 826, 830 (1996), *affirmed*, 345 N.C. 493, 480 S.E.2d 50 (1997). Just as in the *Pathologists and Audiologists* case cited immediately above, the State Board of Education in the current case has misapprehended its power under the North Carolina Constitution. The 2016 legislation challenged in the complaint is a legitimate exercise of the constitutionally-conferred plenary authority of the General Assembly. As such, this Court should grant defendants’ motions for summary judgment and dismiss the amended complaint.

**B. Since the Creation of the State Board of Education in the Constitution of 1868, Every Action of the State Board Has Been Subject to Reversal by the General Assembly.**

From the inception of the North Carolina State Board of Education as provided in the Constitution of 1868, the State Board’s authority as administrator and policy-setter for the State’s public school system has been subordinate to that of the General Assembly. The original text of



the Constitution of 1868 authorizing the formation of the State Board is unambiguous in establishing the supremacy of the General Assembly over the State Board of Education:

The Board of Education shall succeed to all the powers and trusts of the president and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; ***but all acts, rules and regulations of said board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed they shall not be re-enacted by the board.***

N.C. CONST. of 1868, Art. IX, § 10. (Emphasis supplied). It is difficult to envision a clearer way than this to express the intention of the People that, as broad as the grant of authority to the State Board may be, it is entirely subject to the control of the directly elected members of the General Assembly.

In 1942 the People made certain amendments to the 1868 Constitution, including changes to the "Powers and duties of Board" section, then at Article IX, § 9:

The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text books to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulation in relation thereto. ***All 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.***

N.C. CONST. of 1868, Art. IX, § 9 (1942) (Emphasis supplied). The effect of this change in the final sentence of the provision, if anything, is to increase the power of the General Assembly to control the actions of the State Board. That is, whereas the original language authorized the General Assembly to *react* to acts, rules, and regulations of the State Board, the revised language

empowered the General Assembly to take *preemptive* measures to exercise its control over the public schools.

Without exception, North Carolina courts and commentators have referred to the changes to the “powers and duties of Board” section of the Constitution of 1971 as “revisions” without any substantive effect. *See, e.g., Guthrie*, supra at 710, 185 S.E.2d at 199; *N.C. State Bar v. DuMont*, 304 N.C. 627, 640, 286 S.E.2d 89, 97 (1982) (noting that “the 1970 Constitution was meant to be an editorial revision of the 1868 Constitution and that fundamental changes in the constitution were made only by separate amendment.”). Although quoted in full above, for the reader’s convenience, the provision reads:

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, § 5 (Emphasis supplied). Here, then, the operative phrase “subject to laws enacted by the General Assembly” means exactly the same thing it meant in the old constitution, albeit expressed more economically. The comma at the end of “thereto” establishes beyond question that the operative phrase applies to the entirety of the provision and not merely to the State Board’s rulemaking power.

Given the clarity of the Constitution’s language concerning the relative positions of the Legislature and the State Board, there is no need for weighty examinations of 150 year old committee meeting minutes in search of some hidden object of the framers that the passage of time may have obscured. Here, the intent of the framers is as clear today as it was a century and a half ago, or a half century ago: the State Board is given full power, but that power is wholly subject to the General Assembly’s power.



**C. The 2016 Legislation Was a Legitimate Exercise of The General Assembly's Power to Limit and Define the Constitutionally Enumerated Powers of the State Board, and Largely Mirrors a Reallocation of Similar Scope Enacted in 1995.**

The State Board's amended complaint breathlessly claims that the General Assembly's enactment of HB 17 has upset some totemic order within the State's public school system "for the first time in the State Board's 148-year history." Amended Complaint, ¶ 3. This is false. In fact, HB 17 is a carefully drafted effort to restore the relative duties and powers among the major entities in public education as they existed prior to the enactment of Session Laws 1995-72 and 1995-393. For instance, the example the State Board presents (graphically, in paragraph 4) as emblematic of the General Assembly's overreach actually is simply removing 1995 language giving oversight authority to the State Board and restoring the provision to its pre-1995 language.

As will be discussed in more detail below, this and the other changes in HB 17 are directed at returning to the Superintendent of Public Instruction authority that had been stripped through the far-reaching 1995 legislation. The objective of the legislature here is to re-establish the traditional role of the Superintendent as the chief day-to-day, or *direct*, administrator of the State's public schools, while reinforcing the State Board's traditional role as the chief policy-setting, "legislative," *general* administrative body for the schools. Inherent in this objective is the legislative recognition that the Superintendent, a directly elected individual on the job 365 days a year, is far better suited to respond to the day-to-day challenges of the public schools than the State Board, which meets a total of 18 days a year and is comprised of eleven appointed and two elected individuals<sup>5</sup> – most of whom have full-time jobs not involving the public school system.

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<sup>5</sup> See Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson, ¶¶ 20, 24 [hereinafter "Johnson Affidavit"].

The new legislation continues the longstanding tradition requiring that the Superintendent's actions be grounded in policy established by the State Board. As discussed in Section A above, HB 17 is a legitimate exercise by the General Assembly in the push-and-pull of "limitation and revision" of the relative duties of these constitutional entities as provided in Article IX, § 5. *See Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198.

Although the amended complaint points to dozens of provisions in HB 17 as offending Article IX, § 5, a plurality (40%) of the items listed in paragraph 25(b) involve changes made to N.C. Gen. Stat. 115C-21, which provides for the "powers and duties generally" allocated to the Superintendent. These amendments are detailed in Section 4 of the Session Law, which is attached to this brief as **Exhibit "A."**<sup>6</sup> A closer look at these amendments begins to reveal the legislative objectives behind them.

Subsection (a) of § 115C-21 contains a numbered list of administrative duties the General Assembly has allocated to the Superintendent. HB 17 made the following change to the preamble:

(a) Administrative Duties. – ~~Subject to the direction, control, and approval of the State Board of Education, it~~ It shall be the duty of the Superintendent of Public Instruction:

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<sup>6</sup> To facilitate a detailed review of the changes contained in HB 17, and to trace these changes to their antecedents in previous legislation, defendant Superintendent of Public Instruction has created two spreadsheets containing changes made by HB 17 to Chapter 115C, Section 126-5(d), and Chapters 143 and 143A. The larger of the two spreadsheets, attached as **Exhibit "C"** lists the statute number and subsection vertically on the left-hand side of the spreadsheet, and details changes made to the statute in the various session laws passed since 1971 (the year of the last revision to the Constitution). A blank cell on the spreadsheet indicates that the session law made no change to the corresponding statute subsection. Although a printed version of the spreadsheet is being provided with this brief, the spreadsheet is difficult to use in printed form. The spreadsheet in electronic form is much easier to use. At the time of filing, counsel will forward the electronic file of the spreadsheet to all other counsel and to the Trial Court Administrator for forwarding to the three judge panel.

The second spreadsheet uses information from the first spreadsheet, but in a more focused way to show only the changes made in HB 17 as compared to the two 1995 session laws at which the more recent legislation was directed. This spreadsheet is attached as **Exhibit "D."**



The removal of the “Subject to . . . the Board of Education” language here appears particularly troubling to the State Board, in that the amended complaint quotes this part of the statute at least twice (§ 4, § 25(a)). The deleted passage, however, dates only as far back as 1995. See S.L. 1995-72. Prior to the 1995 amendment, the statute read exactly as it reads in HB 17, and in fact had read that way at least since the recodification of Chapter 115 as Chapter 115C in 1981. See S.L. 1981-423. HB 17 is merely removing the 1995 amendment and restoring the prior statutory language.

Section 4 of HB 17 also restores the most important provision related to the ongoing management responsibility for the public schools to its pre-1995 language. It is instructive to consider the changes to this statute, § 115C-21(a)(5), in the context of its evolution from 1981, to 1995, to 2016.

The 1981 version reads:

(5) To have under his direction, in his capacity as the constitutional administrative head of the public school system, all those matters relating to the supervision and administration of the public school system, except the supervision and management of the fiscal affairs of the Board.

S.L. 1981-423. In 1995, the Legislature made the Superintendent’s exercise of his or her duties under this provision entirely subject to the direction of the State Board:

(5) ~~To have under his direction, in his capacity as the constitutional head of the public school system,~~ manage all those matters relating to the supervision and administration of the public school ~~system.~~ system that the State Board delegates to the Superintendent of Public Instruction.

S.L. 1995-72. In HB 17, the General Assembly deletes the language added in 1995 and, with minor modification, restores the 1981 language to read:

(5) To manage have under his or her direction and control, all ~~these~~ matters relating to the direct supervision and administration of the public school ~~system that the State Board delegates to the Superintendent of Public Instruction.~~ system.

S.L. 2016-126. It is important to note that the 2016 changes here represent more than a simple return to the pre-1995 state of affairs between the Superintendent and the State Board. The inclusion, for the first time, of the adjective “direct” indicates a concern on the part of the General Assembly that the Superintendent concern himself or herself with the day-to-day administration of the public schools, while implicitly acknowledging that the State Board still controls the bigger picture administrative issues.

This recognition of the continuing vitality of the State Board as policy-setting entity is not an isolated example of the General Assembly’s intentions. Section 4 of HB 17 adds a new subsection, § 115C-21(a)(8) to the Superintendent’s duties, which reads:

(8) To administer, through the Department of Public Instruction, all needed rules and regulations established by the State Board of Education.

S.L. 2016-126.

A further illustration of the General Assembly’s effort to allocate day-to-day duties to the Superintendent and big-picture, “legislative” duties to the State Board is observed in changes made to personnel and staffing provisions in Chapters 115C and 126. For example, the General Assembly created a new subsection in the “administrative duties” provisions - § 115C-21(a)(9) – which reads:

(9) To have under his or her direction and control all matters relating to the provision of staff services, except certain personnel appointed by the State Board, as provided in G.S. 115C-11(j), and support of the State Board of Education, including implementation of federal programs on behalf of the State Board.



*Id.* This language is nearly identical to a prior version of § 115C-21(a)(7), which had been repealed by the 1995 legislation:

(9) To have solely under his direction and control all matters relating to provision of staff services and support to the State Board of Education, including implementation of federal programs on behalf of the State Board of Education, except as otherwise provided in the Current Operations Appropriations Act.

S.L. 1991-812.

As explained in detail in Superintendent Johnson's Affidavit filed contemporaneously with this Brief, issues related to staffing and organizational hierarchy have bedeviled the day-to-day workings of the Department of Public Instruction. See, generally, Johnson Affidavit at ¶¶ 6-19. The State Board's insistence on micromanaging nearly all hiring decisions, coupled with its inability make quick decisions because of its limited meeting schedule, mean that full-time, day-to-day positions at the Department of Public Instruction remain unfilled for months. It is this sort of engineered ineffectiveness that the General Assembly took action to correct in passing HB 17. Likewise, the HB 17 changes to § 126-5(d) restore the Superintendent to a decision-making role in staffing and personnel matters under the North Carolina Human Resources Act. The General Assembly had removed the Superintendent from this role in 1995, substituting the State Board instead. S.L. 1995-393.

The foregoing examples represent only a few of the changes made by HB 17, but illustrate the predominant motivation of the General Assembly in enacting the law. In 1995 the General Assembly, in passing Chapters 72 and 393 of the 1995 Session Laws, marginalized the constitutional office of Superintendent of Public Instruction – reducing it in stature to little more than a spokesperson role. The then-elected Superintendent, Bob Etheridge, complained to the

Department of Justice and sought an Attorney General Advisory Opinion regarding the constitutionality of this legislation. Chief Deputy Attorney General Andrew A. Vanore, Jr., acknowledging that the legislation “stripped the State Superintendent of Public Instruction of many historic duties and gave those duties to the State Board of Education[.]” advised that Superintendent Etheridge’s complaint was a political matter, but not a constitutional one. *In re Advisory Opinion*, 1995 N.C. AG LEXIS 77 (14 Dec. 1995). A copy of this Advisory Opinion is attached as **Exhibit “E.”** Observing that the Supreme Court had held that the Constitution’s “subject to such laws . . . enacted . . . by the General Assembly,” language “empowered the General Assembly to limit and revise the State Board’s express constitutional powers,” the Attorney General Opinion concluded:

Without question, the Supreme Court decided in *Guthrie*<sup>7</sup> that, even as to powers expressly conferred on the State Board by the Constitution, exercise of the State Board's enumerated powers is subject to laws enacted by the General Assembly. If the General Assembly may change the State Board's enumerated constitutional powers and duties, the General Assembly likewise may change, the State Superintendent's enumerated constitutional powers and duties.

*Id.*

In 2016, the General Assembly thought again about the role it had created for the Superintendent, and thought again about whether such a role best served the mission of the State’s public school system. Such questions of public policy are for legislative determination. *Martin v. N.C. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970). Just as the 1995 legislation stripping away the Superintendent’s traditional powers was a legitimate exercise of the General Assembly’s constitutional franchise, HB 17, in restoring autonomy to a constitutionally established, directly elected office, reflects the best judgment of the legislature in current educational policy. The North Carolina Supreme Court has observed that the wisdom of

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<sup>7</sup> *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971) (discussed *infra* at pp. 6-8).



an enactment is a legislative and not a judicial question: “The General Assembly has the right to experiment with new modes of dealing with old evils[.]” *Id.* at 37, 175 S.E.2d at 675. Through the enactment of HB 17, the 2016 General Assembly determined that the time had come to move on from the 1995 experiment in marginalizing the office of Superintendent of Public Instruction. The newly restored balance between the State Board and the Superintendent is authorized by the plain language of the North Carolina Constitution. Redress for the State Board’s complaints may be found only in the voting booth, and not at the courthouse.

**D. The Superintendent's Experience and Article III, Section 7.**

Because of the existence of the preliminary injunction in this case halting the implementation of HB 17, the Superintendent took his oath of office subject to the 1995 legislation that the General Assembly had acted to curtail in 2016. As detailed in his affidavit, the experience of his first few months in office subject to the old law has been both frustrating and illuminating.

The Superintendent has observed during his short tenure that in complex organizations such as the Department of Public Instruction, governance by committee regarding day-to-day operations is a recipe for ineffectiveness. This is compounded when the “committee” making the day-to-day administrative decisions only meets as a body for one and one-half days per month. Johnson Affidavit, ¶ 20. Time-sensitive decisions often sit unresolved for weeks or months as the Department of Public Instruction waits for the State Board to meet and arrive at some consensus. *Id.* at ¶¶ 13, 15, 19-21. HB 17 will eliminate this organizational malaise by restoring the Superintendent’s role as chief administrative officer of the Department of Public Instruction as well as of the State Board as provided in Article IX, §4(2) of the North Carolina Constitution.

Operating under the 1995 laws has been illuminating because it has given the Superintendent insight into the tendency of organizations to use authority bestowed upon them to consolidate power to the exclusion of other actors perceived as rivals. As detailed in the Superintendent affidavit, the State Board, having achieved effective supremacy over the office of Superintendent through the 1995 legislation, changed internal policies to eliminate the Superintendent from participating in hiring decisions for State Board positions, and to aggregate to itself nearly all staffing decisions for the Department of Public Instruction. Johnson Affidavit, ¶¶ 5-10. In fact, despite that other members of the Council of State may designate and hire for at least 20 exempt policymaking and 20 exempt managerial positions, the Superintendent was granted only four, two of which were classified as administrative assistants. *Id.* at ¶ 10.

The State Board also protects its power and marginalizes the Superintendent through a dual reporting structure for employees under which ten leadership positions in the Department of Public Instruction that normally would report to a Superintendent instead are “accountable and responsible” to both the Superintendent and the State Board. *Id.* at ¶ 7. These positions, including the *Deputy* Superintendent, serve two masters, although because the State Board has the final say in employment decisions, any conflict likely is resolved in favor of the latter. *Id.*

Although the difficulties being experienced by the Superintendent of Public Instruction are not in themselves a legal basis upon which a decision in this case should turn, the description of these difficulties provides a lens through which the crucial constitutional question can be considered. The People have provided for two entities in the Constitution with responsibility for the public schools. The framers wisely avoided prescribing a detailed list of specific areas of subject matter for each entity to oversee. Instead, the Constitution gives plenary authority to the General Assembly to allocate and then reallocate powers and duties to meet the needs of the



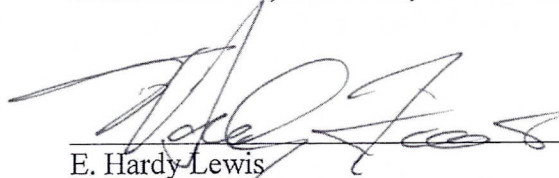
State's children at different points in time. In reallocating responsibilities for the public schools, the General Assembly exercised its authority not only under Article IX, § 5, but also under Article III, § 7, which provides that the duties of constitutionally-established elected officers, including the Superintendent of Public Instruction, "shall be prescribed by law." The passage of HB 17 is a legislative act to restore balance in the relative authority vested in the popularly elected, full-time Superintendent of Public Instruction and the largely appointed, part-time State Board. This Court should declare that the legislation passed and ratified as session law 2016-126 is constitutional, and enter summary judgment against the plaintiff and in favor of the defendants.

#### **CONCLUSION**

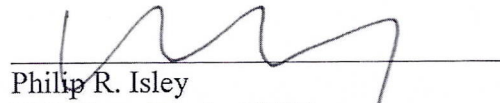
For the reasons stated and upon the authorities cited, the defendant, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully requests that the Court enter an order declaring that the legislation challenged in plaintiff's amended complaint is constitutional, dissolving the preliminary injunction, and entering final judgment against plaintiff and in favor of defendants.

This the 12<sup>th</sup> day of April, 2017.

**BLANCHARD, MILLER, LEWIS & ISLEY, P.A.**



E. Hardy Lewis  
N.C. State Bar #: 18272



Philip R. Isley  
N.C. State Bar #: 19094  
1117 Hillsborough Street  
Raleigh, NC 27603  
Telephone: 919.755.3993  
Facsimile: 919.755.3994  
*Attorneys for North Carolina Superintendent  
of Public Instruction Mark Johnson*



**CERTIFICATE OF SERVICE**


The undersigned hereby certifies that a copy of the foregoing **Brief in Support of Motion for Summary Judgment** was served upon the following attorneys by U.S. Mail and e-mail to the following:

Amar Majmundar  
Olga E. Vysotskaya de Brito  
N.C. Department of Justice  
114 W. Edenton Street  
Raleigh, NC 27603  
*Counsel for the State of North Carolina*

Andrew H. Erteschik  
Poyner Spruill, LLP  
Post Office Box 1801  
Raleigh, NC 27602  
*Counsel for North Carolina State Board  
Of Education*

Robert F. Orr  
Robert F. Orr, PLLC  
3434 Edwards Mill, Suite 112-372  
Raleigh, NC 27612  
*Counsel for North Carolina State Board  
Of Education*

This the 12<sup>th</sup> day of April, 2017.

  
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Philip R. Isley

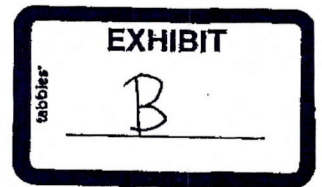
**SESSION LAW 2016-126**

Exhibit A to Superintendent's Brief in Support  
of Motion for Summary Judgment

Duplicate Copy Omitted.

Original set forth in its entirety on R pp 18-37.





NORTH CAROLINA GENERAL ASSEMBLY  
1971 SESSION

CHAPTER 864  
HOUSE BILL 863

AN ACT TO REORGANIZE STATE GOVERNMENT.

The General Assembly of North Carolina enacts:

Organization

**Section 1.** (1) Short title. — This act shall be known and may be cited as the "Executive Organization Act of 1971."

(2) Head of department; defined. — Whenever the term "Head of the Department" is used it shall mean the head of one of the principal departments created by this act.

(3) Agency; defined. — Whenever the term "Agency" is used it shall mean and include, as the context may require, an existing department, institution, commission, committee, board, division, bureau, officer or official.

(4) Policy making authority and administrative powers of Governor; delegation. — The Governor, in accordance with Article III of the Constitution of North Carolina, shall be the Chief Executive Officer of the State. Subject to the Constitution and laws of this State, the Governor shall be responsible for formulating and administering the policies of the executive branch of the State government. Where a conflict arises in connection with the administration of the policies of the executive branch of the State government with respect to the reorganization of State government, such conflict shall be resolved by the Governor, and the decision of the Governor shall be final.

(5) Office of the Lieutenant Governor. — The Lieutenant Governor shall maintain an office in a State building in the City of Raleigh which office shall be open during normal working hours throughout the year. The Lieutenant Governor shall serve as President of the Senate and perform such additional duties as the Governor or General Assembly may assign to him. This subsection shall become effective January 1, 1973.

(6) Types of transfers. — (a) Under this act, a Type I transfer means the transferring of all or part of an existing agency to a principal department established by this act. When all or part of any agency is transferred to a principal department under a Type I transfer, its statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, are transferred to the principal department.

When any agency, or part thereof, is transferred by a Type I transfer to a principal department under the provisions of this act, all its prescribed powers, duties, and functions, including but not limited to rule making, regulation, licensing, and promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications are transferred to the head of the principal department into which the agency, or part thereof, has been transferred.

(b) Under this act, a Type II transfer means the transferring intact of an existing agency, or part thereof, to a principal department established by this act. When any agency, or part thereof, is transferred to a principal department under a Type II transfer, that agency, or part thereof, shall be administered under the direction and supervision of that principal department, but shall exercise all its prescribed statutory powers independently of the head of the principal department, except that under a Type II transfer the management functions of any transferred



agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.

(c) Whenever the term "management functions" is used it shall mean planning, organizing, staffing, directing, coordinating, reporting and budgeting.

(7) Agencies not enumerated; continuation. — Any existing department, institution, board or commission not enumerated in this act but established or created by the General Assembly shall continue to exercise all its powers, duties and functions.

(8) Internal organization of departments; allocation and reallocation of duties and functions; limitations. — The Governor shall cause the administrative organization of each department to be examined with a view to promoting economy and efficiency.

The Governor may reorganize and organize the principal departments and assign and reassign the duties and functions among the divisions and other units, division heads, officers, and employees; except as otherwise expressly provided by statute.

When such changes affect existing law they must be submitted in accordance with Article III, Section 5 of the Constitution. The head of a principal department shall have legal custody of all books, papers, documents and other records of the department. The head of a principal department shall be responsible for the preparation and presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department.

(9) Appointment of officers and employees. — Any provisions of law to the contrary notwithstanding, and subject to the provisions of the Constitution of the State of North Carolina, the head of a principal department, except those departments headed by elected officials who are constitutional officers, shall be appointed by the Governor and serve at his pleasure. The salary of the head of each of the principal departments, except in those departments headed by elected officials who are constitutional officers, shall be set by the Advisory Budget Commission on the recommendation of the Governor. Salaries for these positions shall be filed with the General Assembly pursuant to G.S. 143-34.3 commencing with the 1973 General Assembly.

The head of a principal department shall appoint the Chief Deputy or Chief Assistant and such Chief Deputy or Chief Assistant shall be subject to the State Personnel Act. Except where appointment by the Governor is prescribed by existing statute, the head of the principal department shall appoint the administrative head of each transferred agency and, subject to the provisions of the State Personnel Act, appoint all employees of each division, section or other unit under a principal department. In establishing the position of Secretary, and the supporting staff for the principal departments, the cost of such staff positions will be met insofar as possible by utilizing existing positions or funds available from vacant positions within agencies assigned to the principal departments.

(10) Governor; continuation of powers and duties. — All powers, duties and functions vested by law in the Governor or in the Office of Governor are continued, except as otherwise provided by this act.

The immediate staff of the Governor shall not be subject to the State Personnel Act; however, salaries for these positions shall be filed with the General Assembly pursuant to G.S. 143-34.3 commencing with the 1973 General Assembly.

(11) Principal departments. — Except as otherwise provided by this act, or the State Constitution, all executive and administrative powers, duties and functions, not including those of the General Assembly and the judiciary, previously vested by law in the several State agencies, are vested in the following principal offices or departments.

- (1) Office of the Governor
- (2) Office of the Lieutenant Governor
- (3) Department of the Secretary of State
- (4) Department of State Auditor



- (5) Department of State Treasurer
- (6) Department of Public Education
- (7) Department of Justice
- (8) Department of Agriculture
- (9) Department of Labor
- (10) Department of Insurance
- (11) Department of Administration
- (12) Department of Transportation and Highway Safety
- (13) Department of Natural and Economic Resources.
- (14) Department of Human Resources
- (15) Department of Social Rehabilitation and Control
- (16) Department of Commerce
- (17) Department of Revenue
- (18) Department of Art, Culture and History.
- (19) Department of Military and Veterans' Affairs

**Sec. 2.** Office of the Governor; creation. — There is hereby created an Office of the Governor.

**Sec. 3.** Office of the Lieutenant Governor; creation. — There is hereby created an Office of the Lieutenant Governor.

Department of the Secretary of State

**Sec. 4.** (1) Department of the Secretary of State; creation. — There is hereby created a Department of the Secretary of State.

(2) Head of Department. — The Head of the Department of the Secretary of State is the Secretary of State.

(3) Secretary of State; transfer of powers and duties to Secretary. — The Secretary of State shall have such powers and duties as are conferred on him by Section 1 of this act, delegated to him by the Governor, and conferred by the Constitution and laws of this State.

(4) Secretary of State; transfer of powers and duties to Department. — Except as otherwise provided in the Constitution or in this act, all powers, duties and functions vested by law in the Secretary of State are transferred by a Type I transfer to the Department of the Secretary of State.

(5) The State Board of Elections; transfer. — The State Board of Elections, as contained in Article 3 of Chapter 163 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of the Secretary of State.

(6) Notaries public; powers, duties and functions; transfer. — All of the powers, duties and functions of the Governor under G.S. 10-1 of the General Statutes are transferred by a Type I transfer to the Department of the Secretary of State.

Department of State Auditor

**Sec. 5.** (1) Department of State Auditor; creation. — There is hereby created a Department of State Auditor.

(2) Head of Department. — The head of the Department of the State Auditor is the State Auditor.

(3) State Auditor; transfer of powers and duties to State Auditor. — The State Auditor shall have such powers and duties as are conferred on him by Section 1 of this act, delegated to him by the Governor, and conferred by the Constitution and laws of this State.

(4) State Auditor; transfer of powers and duties to Department. — Except as otherwise provided in the Constitution or by this act, all powers, duties and functions of the State Auditor are transferred by a Type I transfer to the Department of the State Auditor.

(5) North Carolina Firemen's Pension Fund; transfer. — The North Carolina Firemen's Pension Fund, as contained in Article 3 of Chapter 118 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Auditor.

(6) The Law Enforcement Officers' Benefit and Retirement Fund; transfer. — The Law Enforcement Officers' Benefit and Retirement Fund, as contained in Article 12 of Chapter 143 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Auditor.

(7) State Board of Pensions; transfer. — The State Board of Pensions, as contained in Article 2 of Chapter 112 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Auditor.

#### Department of State Treasurer

**Sec. 6.** (1) Department of State Treasurer; creation. — There is hereby created a Department of State Treasurer.

(2) Head of Department. — The head of the Department of State Treasurer is the State Treasurer.

(3) State Treasurer; transfer of powers and duties to State Treasurer. — The State Treasurer shall have such powers and duties as are conferred on him by Section 1 of this act, delegated to him by the Governor, and conferred by the Constitution and laws of this State.

(4) State Treasurer; transfer of powers and duties to Department. — Except as otherwise provided in the Constitution or in this act, all powers, duties and functions vested by law in the State Treasurer are transferred by a Type I transfer to the Department of State Treasurer.

(5) Local Government Commission; transfer. — The Local Government Commission, as contained in Article 1 of Chapter 159 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer.

(6) Teachers' and State Employees' Retirement System; transfer. — The Teachers' and State Employees' Retirement System, and the Board of Trustees, as contained in Article 1 of Chapter 135 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer.

(7) North Carolina Local Governmental Employees' Retirement System; transfer. — The North Carolina Local Governmental Employees' Retirement System, as contained in Article 3 of Chapter 128 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer.

(8) Public Employees' Social Security Agency; powers, duties and functions; transfer. — All of the powers, duties and functions of the Public Employees' Social Security Agency as contained in Article 2 of Chapter 135 of the General Statutes and the laws of this State, are transferred by a Type I transfer to the Department of State Treasurer.

(9) Legislative Retirement Fund; transfer. — The Legislative Retirement Fund, as provided for in G.S. 120-4.1 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer.

(10) The Tax Review Board; transfer. — The Tax Review Board, as created by G.S. 105-269.2 of the General Statutes and the laws of this State, is transferred by a Type II transfer to the Department of State Treasurer.

#### Department of Public Education

**Sec. 7.** (1) Department of Public Education; creation. — There is hereby created a Department of Public Education.

(2) Head of Department. — Head of the Department of Public Education is the State Board of Education. Any provision of Section 1, Subsection (9) of this act to the contrary



notwithstanding, the appointment of the State Board of Education shall be as prescribed in Article IV, Section 4(1) of the Constitution.

(3) State Board of Education; transfer of powers and duties to State Board. — The State Board of Education shall have such powers and duties as are conferred on the Board by Section 1 of this act, delegated to the Board by the Governor and conferred by the Constitution and laws of this State.

(4) State Board of Education; transfer of powers and duties to Department. — Except as otherwise provided in the Constitution or in this act, all powers, duties and functions vested by law in the State Board of Education are transferred by a Type I transfer to the Department of Public Education.

(5) Superintendent of Public Instruction; creation; transfer of powers and duties. — The office of the Superintendent of Public Instruction, as provided for by Article III, Section 7, of the Constitution, and the Department of Public Instruction are hereby transferred to the Department of Public Education. The Superintendent of Public Instruction shall be the Secretary and Chief Administrative Officer of the State Board of Education, and shall have such powers and duties as are conferred by the Constitution, by the State Board of Education, Chapter 115 of the General Statutes, and the laws of this State.

(6) Department of Community Colleges; transfer. — The Department of Community Colleges, as contained in Article 115A of the General Statutes and the laws of this State, is hereby transferred by a Type I transfer to the Department of Public Education.

(7) North Carolina Vocational Textile School; transfer. — The North Carolina Vocational Textile School, and Board of Trustees, as contained in Article 6 of Chapter 1 15A of the General Statutes and the laws of this State, are hereby transferred by a Type II transfer to the Department of Public Education.

(8) Interstate Compact for Education; transfer. — All of the rights, duties and privileges of this State obtained as a party to the Interstate Compact for Education as contained in Article 43 of Chapter 115 of the General Statutes and the laws of this State, shall be supervised and administered by the Superintendent of Public Instruction.

(9) North Carolina Advancement School; transfer. — The North Carolina Advancement School, as contained in Article 44 of Chapter 115 of the General Statutes and the laws of this State, is hereby transferred by a Type I transfer to the Department of Public Education.

(10) Interstate Agreement on Qualifications of Educational Personnel. — All the rights, duties and privileges of this State obtained as a party to the Interstate Agreement on Qualifications of Educational Personnel as contained in Article 17A of Chapter 115 of the General Statutes and the laws of this State shall be supervised and administered by the Superintendent of Public Instruction.

(11) Textbook Commission; transfer. — The Textbook Commission, as created by G.S. 115-206.3 and the laws of this State, is hereby transferred by a Type I transfer to the Department of Public Education.

#### Department of Justice

Sec. 8. (1) Department of Justice; creation. — There is hereby created a Department of Justice.

(2) Head of Department. — The head of the Department of Justice is the Attorney General.

(3) Attorney General; transfer of powers and duties to Attorney General. — The Attorney General shall have such powers and duties as are conferred on him by Section 1 of this act, delegated to him by the Governor, and conferred by the Constitution and laws of this State.



(4) Attorney General; transfer of powers and duties to Department. — Except as otherwise provided in the Constitution or in this act, all powers, duties and functions vested by law in the Attorney General are transferred by a Type I transfer to the Department of Justice.

(5) State Bureau of Investigation; transfer. — The State Bureau of Investigation, as contained in Article 4 of Chapter 114 of the General Statutes and the laws of this State, is hereby transferred by a Type I transfer to the Department of Justice.

(6) Fire Investigators; transfer. — The duties of the Commissioner of Insurance with respect to the investigation of all fires, including forest fires, as contained in Article 1 of Chapter 69 of the General Statutes and the laws of this State, are hereby transferred by a Type I transfer to the Department of Justice; provided, however, that the duties of the Commissioner of Insurance with respect to the inspection of buildings, the removal of dangerous materials therefrom, hospital insurance, insurance regulation, and the preparation of annual reports, as contained in Chapters 57 and 58 of the General Statutes and G.S. 69-4 and G.S. 69-6, shall continue to be among the duties of the Commissioner of Insurance.

(7) General Statutes Commission; transfer. — The General Statutes Commission as contained in Article 2 of Chapter 164 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of Justice.

(8) Company Police; powers, duties and functions; transfer. — All of the powers, duties and functions of the Governor contained in Chapter 74A of the General Statutes and the laws of this State relating to the appointment and commission of special police are hereby transferred by a Type I transfer to the Department of Justice.

(9) Police Information Network; transfer. — The Police Information Network, as created by G.S. 114-10.1 and the laws of this State, is hereby transferred by a Type I transfer to the Department of Justice.

#### Department of Agriculture

**Sec. 9.** (1) Department of Agriculture; creation. — There is hereby created a Department of Agriculture.

(2) Head of Department. — The head of the Department of Agriculture is the Commissioner of Agriculture.

(3) Commissioner of Agriculture; transfer of powers and duties to Commissioner. — The Commissioner of Agriculture shall have such powers and duties as are conferred on him by Section 1 of this act, delegated to him by the Governor, and conferred by the Constitution and laws of this State.

(4) Commissioner of Agriculture; transfer of powers and duties to Department. — Except as otherwise provided in the Constitution or in this act, all powers, duties and functions vested by law in the Commissioner of Agriculture are transferred by a Type I transfer to the Department of Agriculture.

(5) Board of Agriculture; transfer. — The Board of Agriculture, as contained in Article I of Chapter 106 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of Agriculture.

(6) Structural Pest Control Division; transfer. — The Structural Pest Control Division of the Department of Agriculture, as contained in Article 4C of Chapter 106 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of Agriculture.

(7) The North Carolina Agricultural Hall of Fame; transfer. — The North Carolina Agricultural Hall of Fame, as contained in Article 50B of Chapter 106 of the General Statutes and the laws of this State, is hereby transferred by a Type I transfer to the Department of Agriculture.



NORTH CAROLINA GENERAL ASSEMBLY  
1981 SESSION

CHAPTER 423  
HOUSE BILL 336

AN ACT TO RECODIFY CHAPTER 115 OF THE GENERAL STATUTES, ELEMENTARY  
AND SECONDARY EDUCATION.

The General Assembly of North Carolina enacts:

**Section 1.** Chapter 115 of the General Statutes is repealed and replaced with the following:

**"Chapter 115C.**

**"Elementary and Secondary Education.**

**"SUBCHAPTER I.**

**"GENERAL PROVISIONS.**

**"ARTICLE 1.**

**"Definitions and Preliminary Provisions.**

**"§ 115C-1. General and uniform system of schools.** — A general and uniform system of free public schools shall be provided throughout the State, wherein equal opportunities shall be provided for all students, in accordance with the provisions of Article IX of the Constitution of North Carolina. Tuition shall be free of charge to all children of the State, and to every person 18 years of age, or over, who has not completed a standard high school course of study. There shall be operated in every local school administrative unit a uniform school term of nine months, without the levy of a State ad valorem tax therefor.

**"§ 115C-2. Administrative procedure.** — All action of agencies taken pursuant to this Chapter, as agency is defined in G.S. 150A-2, is subject to the requirements of the Administrative Procedure Act, Chapter 150A of the General Statutes.

**"§ 115C-3. Access to information and public records.** — Except as otherwise provided in this Chapter, access to information gathered and public records made pursuant to the provisions of this Chapter must be in conformity with the requirements of Chapter 132 of the General Statutes.

**"§ 115C-4. Open meetings law.** — Meetings of governmental bodies held pursuant to the provisions of this Chapter must be in conformity with the requirements of Article 33C of Chapter 143 of the General Statutes.

**"§ 115C-5. Definitions.** — As used in this Chapter unless the context requires otherwise:

(a) The State Board of Education may be referred to as the 'Board' or as the 'State Board.'

(b) The governing board of a city administrative unit is 'the \_\_\_\_\_ city board of education.'

(c) The governing board of a county administrative unit is 'the \_\_\_\_\_ county board of education.'

(d) The governing board of the school district is 'the \_\_\_\_\_ district committee.'

(e) 'Local board' or 'board' means a city board of education, county board of education, or a city-county board of education.

(f) 'Local school administrative unit' means a subdivision of the public school system which is governed by a local board of education. It may be a city school administrative unit, a county school administrative unit, or a city-county school administrative unit.

(g) he executive head of a school shall be called 'principal.'

(h) The executive officer of a local school administrative unit shall be called 'superintendent.' 'Superintendent' means the superintendent of schools of a public school system or, in his absence, the person designated to fulfill his functions.

(i) 'Supervisor' means a person paid on the supervisor salary schedule who supervises the instructional program in one or more schools and is under the immediate supervision of the superintendent or his designee.

(j) The term 'tax-levying authority' means the board of county commissioners of the county or counties in which an administrative unit is located or such other unit of local government as may be granted by local act authority to levy taxes on behalf of a local school administrative unit.

"§§ 115C-6 to 115C-9: Reserved for future codification purposes.

**"SUBCHAPTER II.**

**"ADMINISTRATIVE ORGANIZATION OF STATE AND LOCAL EDUCATION AGENCIES.**

**"ARTICLE 2.**

**"State Board of Education.**

"§ 115C-10. **Appointment of Board.** — The State Board of Education shall consist of the Lieutenant Governor, the State Treasurer, and 11 members appointed by the Governor, subject to confirmation by the General Assembly in joint session. Of the appointive members of the State Board of Education, one shall be appointed from each of the eight educational districts and three shall be appointed as members at large. Appointments shall be for terms of eight years and shall be made in four classes. Appointments to fill vacancies shall be made by the Governor for the unexpired terms and shall not be subject to confirmation.

The Governor shall transmit to the presiding officers of the Senate and the House of Representatives, on or before the sixtieth legislative day of the General Assembly, the names of the persons appointed by him and submitted to the General Assembly for confirmation; thereafter, pursuant to joint resolution, the Senate and the House of Representatives shall meet in joint session for consideration of an action upon such appointments.

"§ 115C-11. **Organization and internal procedures of Board.** — (a) **Presiding Officer.**— The State Board of Education shall elect from its membership a chairman and vice-chairman. A majority of the Board shall constitute a quorum for the transaction of business. Per diem and expenses of the appointive members of the Board shall be provided by the General Assembly. The chairman of the Board shall preside at all meetings of the Board. In the absence of the chairman, the vice-chairman shall preside; in the absence of both the chairman and the vice-chairman, the Board shall name one of its own members as chairman pro tempore.

(b) **Regular meetings of Board.** — The regular meetings of the Board shall be held each month on a day certain, as determined by the Board. The Board shall determine the hour of the meeting, which may be adjourned from day to day, or to a day certain, until the business before the Board has been completed.

(c) **Special Meetings.** — Special meetings of the Board may be set at any regular meeting or may be called by the chairman or by the secretary upon the approval of the chairman: Provided, a special meeting shall be called by the chairman upon the request of any five members of the Board. In case of regular meetings and special meetings, the secretary shall give notice to each member, in writing, of the time and purpose of the meeting, by letter directed to each member at his home post-office address. Such notice must be deposited in the Raleigh Post Office at least three days prior to the date of meeting.

(d) **Voting.**— No voting by proxy shall be permitted. Except in voting on textbook adoptions, all voting shall be viva voce unless a record vote or secret ballot is demanded by any member, and a majority of those present and voting shall be necessary to carry a motion.



(e) Voting on Adoption of Textbooks. — A majority vote of the whole membership of the Board shall be required to adopt textbooks, and a roll call vote shall be had on each motion for such adoption or adoptions. A record of all such votes shall be kept in the minute book.

(f) Committees. — The Board may create from its membership such committees as it deems necessary to facilitate its business. The chairman of the Board shall with approval of the majority of the Board appoint members to the several committees authorized by the Board and to any additional committees which the chairman may deem to be appropriate.

(g) Record of Proceedings. — All of the proceedings of the Board shall be recorded in a well-bound and suitable book, which shall be kept in the office of the Superintendent of Public Instruction, and open to public inspection.

(h) Rules and Regulations. — The Board shall adopt reasonable rules and regulations not inconsistent herewith, to govern its proceedings which the Board may amend from time to time, which rules and regulations shall become effective when filed as provided by law: Provided, however, a motion to suspend the rules so adopted shall require a consent of two-thirds of the members. The rules and regulations shall include, but not be limited to, clearly defined procedures for electing the officers of the State Board referred to in G.S. 115C-11(a), fixing the term of said officers, specifying how the voting shall be carried out, and establishing a date when the first election shall be held.

"§ 115C-12. Powers and duties of the Board generally. — The general supervision and administration of the free public school system shall be vested in the State Board of Education. The powers and duties of the State Board of Education are defined as follows:

- (1) Financial Powers. — The financial powers of the Board are set forth in Article 30 of this Chapter.
- (2) Power to Divide the Administrative Units into Districts. — The Board shall have power to create in any county administrative units a convenient number of school districts, upon the recommendation of the county board of education. Such a school district may be entirely in one county or may consist of contiguous parts of two or more counties. The Board may modify the district organization in any administrative unit when it is deemed necessary for the economical and efficient administration and operation of the State school system, when requested to do so by the appropriate local board of education.
- (3) Divisions of Functions of Board. — The Board shall divide its duties into two separate functions, insofar as may be practicable, as follows:
  - a. All those matters relating to the supervision and administration of the public school system, except the supervision and management of the fiscal affairs of the Board, shall be under the direction of the Superintendent in his capacity as the constitutional administrative head of the public school system.
  - b. All those matters relating to the supervision and administration of the fiscal affairs of the public school fund committed to the administration of the State Board of Education shall be under the supervision and management of the controller.
- (4) Appointment of Controller. — The Board shall appoint a controller, subject to the approval of the Governor, who shall serve at the will of the Board and who, under the direction of the Board, shall have supervision and management of the fiscal affairs of the Board.
- (5) Apportionment of Funds. — The Board shall have authority to apportion and equalize over the State all State school funds and all federal funds granted to the State for assistance to educational programs administered within or sponsored by the public school system of the State.



- (6) Power to Demand Refund for Inaccurate Apportionment Due to False Attendance Records. — When it shall be found by the State Board of Education that inaccurate attendance records have been filed with the State Board of Education which resulted in an excess allotment of funds for teacher salaries in any school unit in any school year, the school unit concerned may be required to refund to the State Board the amount allotted to said unit in excess of the amount an accurate attendance record would have justified.
- (7) Power to Alter the Boundaries of City School Administrative Units and to Approve Agreements for the Consolidation and Merger of School Administrative Units Located in the Same County. — The Board shall have authority, in its discretion, to alter the boundaries of city school administrative units and to approve agreements submitted by county and city boards of education requesting the merger of two or more contiguous city school administrative units and the merger of city school administrative units with county school administrative units and the consolidation of all the public schools in the respective units under the administration of one board of education: Provided, that such merger of units and reorganization of school units shall not have the effect of abolishing any special taxes that may have been voted in any such units.
- (8) Power to Make Provisions for Sick Leave. — The Board shall provide for a minimum of five days per school term of sick leave with pay for all public school employees and shall promulgate rules and regulations providing for necessary substitutes on account of said sick leave. The pay for a substitute shall be fixed by the Board. The Board may provide to each local school administrative unit not exceeding one percent (1%) of the cost of instructional services for the purpose of providing substitute teachers for those on sick leave as authorized by law or by regulations of the Board, but not exceeding the provisions made for other State employees.
- (9) Miscellaneous Powers and Duties. — All the powers and duties exercised by the State Board of Education shall be in conformity with the Constitution and subject to such laws as may be enacted from time to time by the General Assembly. Among such duties are:
  - a. To certify and regulate the grade and salary of teachers and other school employees.
  - b. To adopt and supply textbooks.
  - c. To adopt a standard course of study upon recommendation of the Superintendent of Public Instruction: Provided, however, that in the event the Superintendent does not recommend a standard course of study satisfactory to the Board, the Board may cause an independent professional study to be made, with such assistance as it may deem necessary, to the end that a standard course of study appropriate to the needs of the children of the State shall be recommended to the Board for adoption; whereupon the Board shall require a public hearing to be held on the question of the adoption of the standard course of study thus proposed and it shall thereafter adopt the recommendations with such changes as the Board may deem appropriate, which shall be required as the minimal program of every public school in the State. The standard course of study thus established shall be reviewed by the Board biennially.



- d. To formulate rules and regulations for the enforcement of the compulsory attendance law.
- e. To manage and operate a system of insurance for public school property, as provided in Article 38 of this Chapter.

In making substantial policy changes in administration, curriculum, or programs the Board should conduct hearings throughout the regions of the State, whenever feasible, in order that the public may be heard regarding these matters.

- (10) Power to Provide for Programs or Projects in the Cultural and Fine Arts Areas. — The Board is authorized and empowered, in its discretion, to make provisions for special programs or projects of a cultural and fine arts nature for the enrichment and strengthening of educational opportunities for the children of the State.

For this purpose, the Board may use funds received from gifts or grants and, with the approval of the Director of the Budget, may use State funds which the Board may find available in any budget administered by the Board.

- (11) Power to Conduct Education Research. — The Board is authorized to sponsor or conduct education research and special school projects considered important by the Board for improving the public schools of the State. Such research or projects may be conducted during the summer months and involve one or more local school units as the Board may determine. The Board may use any available funds for such purposes.

- (12) Duty to Provide for Sports Medicine and Emergency Paramedical Program. — The State Board of Education is authorized and directed to develop a comprehensive plan to train and make available to the public schools personnel who shall have major responsibility for exercising preventive measures against sports related deaths and injuries and for providing sports medicine and emergency paramedical services for injuries that occur in school related activities. The plan shall include, but is not limited to, the training, assignment of responsibilities, and appropriate additional reimbursement for individuals participating in the program.

The State Board of Education is authorized and directed to develop an implementation schedule and a program funding formula that will enable each high school to have a qualified sports medicine and emergency paramedical program by July 1, 1984.

The State Board of Education is authorized and directed to establish minimum educational standards necessary to enable individuals serving as sports medicine and emergency paramedical staff to provide such services, including first aid and emergency life saving skills, to students participating in school activities.

- (13) Power to Purchase Liability Insurance. — The Board is authorized to purchase insurance to protect board members from liability incurred in the exercise of their duty as members of the Board.
- (14) Duty to Provide Personnel Information to Local Boards. — Upon request, the State Board of Education and the Department of Public Instruction shall furnish to any county or city board of education any and all available personnel information relating to certification, evaluation and qualification including, but not limited to, semester hours or quarterly hours completed, graduate work, grades, scores, etc., that are on that date in the files of the State Board of Education or Department of Public Instruction.



- (15) Duty to Develop Noncertified Personnel Position Evaluation Descriptions. — The Board is authorized and directed to develop position evaluation descriptions covering those positions in local school administrative units for which certification by the State Board of Education is not normally a prerequisite. The position evaluation descriptions required in this subdivision are to be used by local boards of education as the basis for assignment of noncertified employees to an appropriate pay grade in accordance with salary grades and ranges adopted by the State Board of Education. No appropriations are required by this subdivision.
- (16) Power with Regard to Salary Schedules.
- a. Support personnel refers to all public school employees who are not required by statute or regulation to be certified in order to be employed. The State Board of Education is authorized and empowered to adopt all necessary rules for full implementation of all schedules to the extent that State funds are made available for support personnel.
  - b. Salary schedules for the following public school support personnel shall be adopted by the State Board of Education: school finance officer, office support personnel, property and cost clerks, aides, maintenance supervisors, custodial personnel, and transportation personnel. The Board shall classify these support positions in terms of uniform pay grades included in the salary schedule of the State Personnel Commission.
  - c. Salary schedules for other support personnel, including but not limited to maintenance and school food service personnel, shall be adopted by the State Board of Education. The Board shall classify these support positions in terms of uniform pay grades included in the salary schedule of the State Personnel Commission. These schedules shall apply if the local board of education does not adopt a salary schedule of its own for personnel paid from other than State appropriations.

"§§ 115C-13 to 115C-17: Reserved for future codification purposes.

"ARTICLE 3.

"Department of Public Instruction.

"§ 115C-18. Election of Superintendent of Public Instruction. — The Superintendent of Public Instruction shall be elected by the qualified voters of the State in 1972 and every four years thereafter at the same time and places as members of the General Assembly are elected. His term of office shall be four years and shall commence on the first day of January next after election and continue until his successor is elected and qualified.

If the office of the Superintendent of Public Instruction is vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another to serve until his successor is elected and qualified. Every such vacancy shall be filled by election at the first election for members of the General Assembly that occurs more than 30 days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in Article III, Section 7 of the Constitution of North Carolina. When a vacancy occurs in the office and the term expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill the vacancy for the unexpired term of the office. Upon the occurrence of a vacancy in the office for any of the causes stated herein, the Governor may appoint an interim officer to perform the duties of that office until a person is appointed or elected pursuant to Article III, Section 7 of the Constitution of North Carolina to fill the vacancy and is qualified.



The time of the election of the Superintendent of Public Instruction shall be in accordance with the provisions of Article 1 of Subchapter I of Chapter 163 of the General Statutes.

The election, term and induction into office of the Superintendent of Public Instruction shall be in accordance with the provisions of G.S. 147-4.

**"§ 115C-19. Chief administrative officer of the State Board of Education.** — As provided in Article IX, Section 4(2) of the North Carolina Constitution, the Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.

**"§ 115C-20. Office and salary.** — The Superintendent of Public Instruction shall keep his office in The Education Building in Raleigh, and his salary shall be the same as for Court of Appeals Judges as set by the General Assembly in the Budget Appropriation Act.

**"§ 115C-21. Powers and duties generally.** — (a) Administrative Duties. — It shall be the duty of the Superintendent of Public Instruction:

- (1) To organize and establish, subject to the approval of the State Board of Education, a Department of Public Instruction which shall include such divisions and departments as are necessary for supervision and administration of the public school system. All appointments of administrative and supervisory personnel to the staff of the Department of Public Instruction shall be subject to the approval of the State Board of Education, which shall have authority to terminate such appointments for cause in conformity with Chapter 126 of the General Statutes, the State Personnel System.
- (2) To keep the public informed as to the problems and needs of the public schools by constant contact with all school administrators and teachers, by his personal appearance at public gatherings, and by information furnished to the press of the State.
- (3) To report biennially to the Governor 30 days prior to each regular session of the General Assembly, such report to include information and statistics of the public schools, with recommendations for their improvement and for such changes in the school law as shall occur to him.
- (4) To have printed and distributed such educational bulletins as he shall deem necessary for the professional improvement of teachers and for the cultivation of public sentiment for public education, and to have printed all forms necessary and proper for the administration of the Department of Public Instruction.
- (5) To have under his direction, in his capacity as the constitutional administrative head of the public school system, all those matters relating to the supervision and administration of the public school system, except the supervision and management of the fiscal affairs of the Board.

(b) Duties as Secretary to the State Board of Education. — As secretary, under the direction of the Board, it shall be the duty of the Superintendent of Public Instruction:

- (1) To administer through the Department of Public Instruction the instructional policies established by the Board.
- (2) To keep the Board informed regarding developments in the field of public education.
- (3) To make recommendations to the Board with regard to the problems and needs of education in North Carolina.
- (4) To make available to the public schools a continuous program of comprehensive supervisory services.



- (5) To collect and organize information regarding the public schools, on the basis of which he shall furnish the Board such tabulations and reports as may be required by the Board.
- (6) To communicate to the public school administrators all information and instructions regarding instructional policies and procedures adopted by the Board.
- (7) To have custody of the official seal of the Board and to attest all deeds, leases, or written contracts executed in the name of the Board. All deeds of conveyance, leases, and contracts affecting real estate, title to which is held by the Board, and all contracts of the Board required to be in writing and under seal, shall be executed in the name of the Board by the chairman and attested by the secretary; and proof of the execution, if required or desired, may be had as provided by law for the proof of corporate instruments.
- (8) To attend all meetings of the Board and to keep the minutes of the proceedings of the Board in a well-bound and suitable book, which minutes shall be approved by the Board prior to its adjournment; and, as soon thereafter as possible, to furnish to each member of the Board and the controller a copy of said minutes.
- (9) To perform such other duties as the Board may assign to him from time to time.

"§§ 115C-22 to 115C-26: Reserved for future codification purposes.

"ARTICLE 4.

"Office of the Controller.

"§ 115C-27. **Appointment of controller, salary.** — The Board shall appoint a controller, subject to the approval of the Governor, who shall serve at the will of the Board. The salary of the controller shall be fixed by the Governor subject to the approval of the Advisory Budget Commission and shall be paid from Board appropriations.

"§ 115C-28. **Fiscal affairs of the Board defined.** — All matters pertaining to the budgeting, allocation, accounting, auditing, certification, and disbursing of public school funds, now or hereafter committed to the administration of the State Board of Education, are included within the meaning of the term 'fiscal affairs of the Board' and, under the direction of the Board, shall be supervised and managed by the controller. The fiscal affairs of the Board shall also include:

- (1) The preparation and administration of the State school budget, including all funds appropriated for the maintenance of the public school term.
- (2) The allotment of teachers.
- (3) The protection of State funds by appropriate bonds.
- (4) Workers' compensation as applicable to school employees.
- (5) Sick leave.
- (6) The administration of such federal funds as may be made available by acts of Congress for the use of public schools.
- (7) Administration of all State funds derived from the sale and rental of textbooks in the public schools.
- (8) The operation of plant, and other auxiliary agencies under the administration of the Board.
- (9) Administration of the Public School Insurance Fund.
- (10) All fiscal matters embraced in the objects of expenditure referred to in current acts of the General Assembly appropriating funds for the system of free public schools.

"§ 115C-29. **Controller's powers and duties generally.** — (a) The controller is constituted the executive administrator of the Board in the supervision and management of the fiscal affairs of the Board. In this capacity it shall be his duty, under the direction of the Board, to administer



GENERAL ASSEMBLY OF NORTH CAROLINA  
1987 SESSION

CHAPTER 1025  
HOUSE BILL 331

AN ACT TO PROVIDE A GOVERNANCE STRUCTURE FOR THE DEPARTMENT  
OF PUBLIC EDUCATION.

The General Assembly of North Carolina enacts:

**Section 1.** G.S. 115C-12(3) and (4) are repealed.

**Sec. 2.** Article 4 of Chapter 115C of the General Statutes is repealed.

**Sec. 3.** G.S. 115C-12 is amended by adding a new sentence after the first sentence to read:

"The State Board of Education shall establish policy for the system of free public schools, subject to laws enacted by the General Assembly."

**Sec. 4.** G.S. 115C-19 is amended by adding a new sentence at the end to read:

"The Superintendent of Public Instruction shall administer the policies adopted by the State Board of Education."

**Sec. 5.** The first sentence of G.S. 115C-21(a)(1) is rewritten to read:

"To organize and establish a Department of Public Instruction which shall include such divisions and departments as are necessary for supervision and administration of the public school system."

**Sec. 6.** G.S. 115C-21(a)(5) is rewritten to read:

"(5) To have under his direction, in his capacity as the constitutional head of the public school system, all those matters relating to the supervision and administration of the public school system."

**Sec. 7.** G.S. 115C-21(b)(1) is rewritten to read:

"(1) To administer through the Department of Public Instruction, all policies established by the Board."

**Sec. 8.** G.S. 115C-21(b)(8) is amended by deleting the words "and the controller".

**Sec. 9.** G.S. 115C-47(21) is amended by deleting the words "controller of the".

**Sec. 10.** The first sentence of G.S. 115C-90 is rewritten to read:

"The publishers' sealed bids shall be opened in the presence of two persons designated by the State Board of Education and one person designated by the Superintendent of Public Instruction."

**Sec. 11.** The fourth sentence of G.S. 115C-275 is amended by deleting the words "and the controller of the State Board of Education".

**Sec. 12.** G.S. 115C-276(n) is amended by deleting the words "controller of the".

**Sec. 13.** G.S. 115C-432(d) is amended by deleting the words "Controller of the".

**Sec. 14.** The seventh sentence of G.S. 115C-447 is amended by deleting the words "Controller of the".

**Sec. 15.** Except as otherwise provided in this act, Chapter 115C of the General Statutes is amended by deleting the language "controller of the State Board of Education", "Controller of the State Board of Education", "controller", or "Controller", and substituting the language "State Board of Education".

**Sec. 16.** The Office of the Controller of the State Board of Education is transferred to the Department of Public Instruction. This transfer shall have all of the elements of a Type I transfer, as that term is defined in G.S. 143A-6(a).

**Sec. 17.** This act shall become effective February 1, 1989.

In the General Assembly read three times and ratified this the 30th day of June, 1988.



GENERAL ASSEMBLY OF NORTH CAROLINA  
1993 SESSION

CHAPTER 522  
HOUSE BILL 935

AN ACT TO DELETE THE REFERENCES TO THE DEPARTMENT OF PUBLIC  
EDUCATION.

Whereas, a Department of Public Education was created in the Executive Reorganization Act of 1971; and

Whereas, the Department of Public Education is the only department created in the Executive Reorganization Act of 1971 that never had staff positions funded by the General Assembly; and

Whereas, the Department of Public Instruction was organized and established pursuant to G.S. 115C-21(a)(1); and

Whereas, the functions of the Department of Public Education have been and continue to be performed by the Department of Public Instruction under the supervision of the Superintendent of Public Instruction; and

Whereas, the current references in the General Statutes to the Department of Public Education and the Department of Public Instruction have resulted in confusion about the respective roles of the State Board of Education and the Superintendent that resulted in litigation between them; and

Whereas, the General Assembly is authorized under Article IX, Sections 2 and 5, and Article III, Section 7(1) and (2), of the Constitution to enact legislation defining the respective roles of the State Board of Education and the Superintendent of Public Instruction under the Constitution; Now, therefore,

The General Assembly of North Carolina enacts:

Section 1. G.S. 115C-21(b)(1a) reads as rewritten:

"(1a) To administer the funds appropriated ~~to the Department of Public Education~~ for the operations of the State Board of Education and for aid to local school administrative units."

Sec. 2. G.S. 115C-146.3(b) reads as rewritten:

"(b) ~~The Department of Public Education~~ State Board of Education shall cause local school administrative units to make available special education and related services to all preschool handicapped children whose parents or guardians request these services."

Sec. 3. G.S. 115C-238.2(b)(1) reads as rewritten:

"(1) Are exempt from State requirements to submit reports and plans, other than local school improvement plans, to the ~~Department of Public Education~~; they State Board of Education and the Department of

Public Instruction. They are not exempt from federal requirements to submit reports and plans to the Department."

Sec. 4. G.S. 115C-318 reads as rewritten:

**"§ 115C-318. Liability insurance for nonteaching public school personnel.**

~~The Department of Public Education and the~~ The State Board of Education shall provide for liability insurance for nonteaching public school personnel to the extent that such personnel's salaries are funded by the State. The insurance shall cover claims made for injury liability and property damage liability on account of an act done or an omission made in the course of the employee's duties. As provided by law or the rules and policies of the ~~Department of Public Education~~ State Board of Education or the local school administrative unit, the ~~Department and~~ State Board of Education shall comply with the State's laws in securing the insurance and shall provide it at the earliest possible date for the 1982-83 school year. Funds for this purpose shall be allocated from the State's Contingency and Emergency Fund. Nothing in this section shall prevent the ~~Department and~~ State Board from furnishing the same liability insurance protection for nonteaching public school personnel not supported by State funds, provided that the cost of the protection shall be funded from the same source that supports the salaries of these employees."

Sec. 5. G.S. 115C-489.4(a) reads as rewritten:

"(a) There is created the Commission on School Facility Needs. The Commission shall be located administratively in the Department of Public ~~Education~~ Instruction but shall exercise all its prescribed statutory powers independently of the State Board of Education and the Department of Public Instruction."

The Commission shall consist of five members appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S. 120-121, one of whom shall be recommended by the President of the Senate to serve as cochairman, and five members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, one of whom shall be recommended by the Speaker of the House of Representatives to serve as cochairman.

The initial terms of members shall expire July 1, 1991. Their successors shall serve for four-year terms. A vacancy shall be filled for the remainder of the unexpired term in accordance with G.S. 120-122.

The initial meeting of the Commission shall be called jointly by the cochairmen.

Members of the Commission who are not State officers or employees shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5. Members who are State officers or employees shall be reimbursed for travel and subsistence in accordance with G.S. 138-6.

The Department of Public Instruction shall provide requested professional and clerical staff to the Commission. The Commission may also employ professional and clerical staff and may hire outside consultants to assist it in its work."

Sec. 6. G.S. 115D-3 reads as rewritten:

**"§ 115D-3. Department of Community Colleges; staff.**



The Department of Community Colleges shall be a principal administrative department of State government under the direction of the State Board of Community Colleges, and shall be separate from the free public school system of the State ~~and the Department of Public Education. State, the State Board of Education, and the Department of Public Instruction.~~ The State Board has authority to adopt and administer all policies, regulations, and standards which it deems necessary for the operation of the Department.

The State Board shall elect a President of the North Carolina System of Community Colleges who shall serve as chief administrative officer of the Department of Community Colleges. The compensation of this position shall be fixed by the State Board from funds provided by the General Assembly in the Current Operations Appropriations Act.

The President shall be assisted by such professional staff members as may be deemed necessary to carry out the provisions of this Chapter, who shall be elected by the State Board on nomination of the President. The compensation of the staff members elected by the Board shall be fixed by the State Board of Community Colleges, upon recommendation of the President of the Community College System, from funds provided in the Current Operations Appropriations Act. These staff members shall include such officers as may be deemed desirable by the President and State Board. Provision shall be made for persons of high competence and strong professional experience in such areas as academic affairs, public service programs, business and financial affairs, institutional studies and long-range planning, student affairs, research, legal affairs, health affairs and institutional development, and for State and federal programs administered by the State Board. In addition, the President shall be assisted by such other employees as may be needed to carry out the provisions of this Chapter, who shall be subject to the provisions of Chapter 126 of the General Statutes. The staff complement shall be established by the State Board on recommendation of the President to insure that there are persons on the staff who have the professional competence and experience to carry out the duties assigned and to insure that there are persons on the staff who are familiar with the problems and capabilities of all of the principal types of institutions represented in the system. The State Board of Community Colleges shall have all other powers, duties, and responsibilities delegated to the State Board of Education affecting the Department of Community Colleges not otherwise stated in this Chapter."

Sec. 7. G.S. 120-65 reads as rewritten:

**"§ 120-65. Assistance of Department of Human Resources ~~and Department of Public Education. Resources, State Board of Education, and Department of Public Instruction.~~**

The Department of Human Resources ~~and the Department of Public Education Resources, the State Board of Education, and the Department of Public Instruction~~ are hereby declared vital departments of State government to ~~especially assist said especially the~~ Commission and to furnish ~~them it~~ with information, and to the extent permitted by the Commission, to ~~actively participate actively~~ in the work and deliberations of the Commission."



Sec. 8. G.S. 121-4(5) reads as rewritten:

"(5) With the cooperation of the ~~Department of Public Education, State Board of Education and the Department of Public Instruction~~ to develop, conduct, and assist in the coordination of a program for the better and more adequate teaching of State and local history in the public schools and the institutions of the community college system of North Carolina, including, as appropriate, the preparation and publication of suitable histories of all counties and of other appropriate materials, the distribution of such materials to the public schools and community college system for a reasonable charge, and the coordination of this program throughout the State."

Sec. 9. G.S. 122C-113(b1) reads as rewritten:

"(b1) The Secretary shall cooperate with the State Board of Education in coordinating the responsibilities of the ~~Department of Human Resources and of the Department of Public Education Resources, the State Board of Education, and the Department of Public Instruction~~ for adolescent substance abuse programs. The Department of Human Resources, through its Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, shall be responsible for intervention and treatment in non-school based programs. The ~~Department of Public Education State Board of Education and the Department of Public Instruction~~ shall have primary responsibility for in-school education, identification, and intervention services, including student assistance programs."

Sec. 10. G.S. 126-4(7) reads as rewritten:

"(7) Cooperation with the ~~Department of Public Education, State Board of Education, the Department of Public Instruction, the University of North Carolina, and the Community Colleges of the State~~ and other appropriate resources in developing programs in, including but not limited to, management and supervisory skills, performance evaluation, specialized employee skills, accident prevention, equal employment opportunity awareness, and customer service; and to maintain an accredited Certified Public Manager program."

Sec. 11. G.S. 130A-236 reads as rewritten:

**"§ 130A-236. Regulation of sanitation in schools.**

For the protection of the public health, the Commission shall adopt rules to establish sanitation requirements for public, private and religious schools. The rules shall address, but not be limited to, the cleanliness of floors, walls, ceilings, storage spaces and other areas; adequacy of lighting, ventilation, water supply, toilet and lavatory facilities; sewage collection, treatment and disposal facilities; and solid waste disposal. The Department shall inspect schools at least annually. The Department shall submit written inspection reports of public schools to the ~~Department of Public Education State Board of Education~~ and written inspection reports of private and religious schools to the Department of Administration."

Sec. 12. G.S. 143A-11 reads as rewritten:

**"§ 143A-11. Principal departments.**



Except as otherwise provided by this Chapter, or the State Constitution, all executive and administrative powers, duties and functions, not including those of the General Assembly and the judiciary, previously vested by law in the several State agencies, are vested in the following principal offices or departments:

- (1) Office of the Governor.
- (2) Office of the Lieutenant Governor.
- (3) Department of the Secretary of State.
- (4) Department of State Auditor.
- (5) Department of State Treasurer.
- (6) Department of Public ~~Education~~-Instruction.
- (7) Department of Justice.
- (8) Department of Agriculture.
- (9) Department of Labor.
- (10) Department of Insurance.
- (11) Department of Administration.
- (12) Department of Transportation.
- (13) Department of Environment, Health, and Natural Resources.
- (14) Repealed by Session Laws 1973, c. 476, s. 6.
- (15) Department of Social Rehabilitation and Control.
- (16) Department of Commerce.
- (17), (18) Repealed by Session Laws 1973, c. 476, s. 6.
- (19) Repealed by Session Laws 1973, c. 620, s. 9."

Sec. 13. The name of Article 5 of Chapter 143A of the General Statutes reads as rewritten:

"ARTICLE 5.

"Department of Public ~~Education~~-Instruction."

Sec. 14. G.S. 143A-39, 143A-40, 143A-41, 143A-42 and 143A-44 are repealed.

Sec. 15. G.S. 143A-48 reads as rewritten:

**"§ 143A-48. Textbook Commission; transfer.**

The Textbook Commission, as created by G.S. 115C-87 and the laws of this State, is hereby transferred by a Type I transfer to the Department of Public ~~Education~~-Instruction."

Sec. 16. G.S. 143B-181 reads as rewritten:

**"§ 143B-181. Governor's Advisory Council on Aging – members; selection; quorum; compensation.**

The Governor's Advisory Council on Aging of the Department of Human Resources shall consist of 33 members, 29 members to be appointed by the Governor, two members to be appointed by the Lieutenant Governor, and two members to be appointed by the Speaker of the House of Representatives. The composition of the Council shall be as follows: one representative of the Department of Administration; one representative of the Department of Cultural Resources; one representative of the Employment Security Commission; one representative of the Teachers' and State Employees' Retirement System; one representative of the Commissioner of Labor; one

representative of the Department of Public ~~Education; Instruction;~~ one representative of the Department of Environment, Health, and Natural Resources; one representative of the Department of Insurance; one representative of the Department of Crime Control and Public Safety; one representative of the Department of Community Colleges; one representative of the School of Public Health of The University of North Carolina; one representative of the School of Social Work of The University of North Carolina; one representative of the Agricultural Extension Service of North Carolina State University; one representative of the collective body of the Medical Society of North Carolina; and 19 members at large. The at large members shall be citizens who are knowledgeable about services supported through the Older Americans Act of 1965, as amended, and shall include persons with greatest economic or social need, minority older persons, and participants in programs under the Older Americans Act of 1965, as amended. The Governor shall appoint 15 members at large who meet these qualifications and are 60 years of age or older. The four remaining members at large, two of whom shall be appointed by the Lieutenant Governor and two of whom shall be appointed by the Speaker of the House of Representatives, shall be broadly representative of the major private agencies and organizations in the State who are experienced in or have demonstrated particular interest in the special concerns of older persons. At least one of each of the at-large appointments of the Lieutenant Governor and the Speaker of the House of Representatives shall be persons 60 years of age or older. The Council shall meet at least quarterly.

Members at large shall be appointed for four-year terms and until their successors are appointed and qualify. **Ad interim** appointments shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate one member of the Council as chairman to serve in such capacity at his pleasure.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Human Resources."

Sec. 17. G.S. 143B-417(1) reads as rewritten:

- "(1) To determine the number of student interns to be allocated to each of the following offices or departments:
- a. Office of the Governor
  - b. Department of Administration
  - c. Department of Correction
  - d. Department of Cultural Resources
  - e. Department of Revenue
  - f. Department of Transportation
  - g. Department of Environment, Health, and Natural Resources



- h. Department of Commerce
- i. Department of Crime Control and Public Safety
- j. Department of Human Resources
- k. Office of the Lieutenant Governor
- l. Office of the Secretary of State
- m. Office of the State Auditor
- n. Office of the State Treasurer
- o. Department of Public ~~Education~~ Instruction
- p. Repealed by Session Laws 1985, c. 757, s. 162, effective July 1, 1985
- q. Department of Agriculture
- r. Department of Labor
- s. Department of Insurance
- t. Office of the Speaker of the House of Representatives
- u. Justices of the Supreme Court and Judges of the Court of Appeals
- v. Department of Community Colleges
- w. Office of State Personnel
- x. Office of the Senate President Pro Tempore;"

Sec. 18. G.S. 147-45 reads as rewritten:

**"§ 147-45. Distribution of copies of State publications.**

The Secretary of State shall, at the State's expense, as soon as possible after publication, provide such number of copies of the Session Laws and Senate and House Journals to federal, State, and local governmental officials, departments and agencies, and to educational institutions of instruction and exchange use, as is set out in the table below:

<u>Agency or Institution</u>	<u>Session Laws</u>	<u>Assembly Journals</u>
Governor, Office of the	3	2
Lieutenant Governor, Office of the	1	1
Secretary of State, Department of the	3	3
Auditor, Department of the State	3	1
Treasurer, Department of the State	3	1
Local Government Commission	2	0
Public Education, Department of	4	0
<del>Superintendent of Public Instruction</del>	3	1
Controller	1	0
Division of Community Colleges	3	1
<del>Regional Service Centers</del>	1 ea.	0
<u>State Board of Education</u>	<u>1</u>	<u>0</u>
<u>Department of Public Instruction</u>	<u>3</u>	<u>1</u>
<u>Controller</u>	<u>1</u>	<u>0</u>
<u>Technical Assistance Centers</u>	<u>1 ea.</u>	<u>0</u>
<u>Department of Community Colleges</u>	<u>3</u>	<u>1</u>

Justice, Department of		
Office of the Attorney General	25	3
Budget Bureau (Administration)	1	0
Property Control (Administration)	1	1
State Bureau of Investigation	1	0
Agriculture, Department of	3	1
Labor, Department of	5	1
Insurance, Department of	5	1
Administration, Department of	1	1
Budget Bureau	2	1
Controller	1	0
Property Control	1	0
Purchase and Contract	2	0
Policy and Development	1	0
Veterans Affairs Commission	1	0
Environment, Health, and Natural		
Resources, Department of	1	0
Division of Environmental Management	2	0
Board of Environment, Health, and		
Natural Resources	1	0
Soil and Water Conservation Commission	1	0
Wildlife Resources Commission	2	0
Revenue, Department of	5	1
Human Resources, Department of	3	0
Board of Human Resources	1	0
Health Services, Division of	3	0
Mental Health, Developmental		
Disabilities, and Substance Abuse Services,		
Division of	1	0
Social Services, Division of	3	0
Facilities Services, Division of	1	0
Youth Services, Division of	1	0
Hospitals and Institutions	1 ea.	0
Transportation, Department of	1	0
Board of Transportation	3	0
Motor Vehicles, Division of	1	0
Commerce, Department of	1	0
Economic Development, Division of	2	0
State Ports Authority	1	0
Alcoholic Beverage Control Commission,		
North Carolina	2	0
Banking Commission	2	0
Utilities Commission	8	1
Industrial Commission	7	0



Labor Force Development Council	1	0
Milk Commission	5	0
Employment Security Commission	1	1
Correction, Department of	1	0
Department of Correction	2	0
Parole Commission	2	0
State Prison	1	0
Correctional Institutions	1 ea.	0
Cultural Resources, Department of	1	0
Archives and History, Division of	5	1
State Library	5	5
Publications Division	1	1
Crime Control and Public Safety, Department of	2	1
North Carolina Crime Commission	1	0
Adjutant General	2	0
Elections, State Board of	2	0
Office of Administrative Hearings	2	0
Legislative Branch		
State Senators	1 ea.	1 ea.
State Representatives	1 ea.	1 ea.
Principal Clerk – Senate	1	1
Principal Clerk – House	1	1
Reading Clerk – Senate	1	1
Reading Clerk – House	1	1
Sergeant at Arms – House	1	1
Sergeant at Arms – Senate	1	1
Enrolling Clerk	1	0
Engrossing Clerk	1	0
Indexer of the Laws	1	0
Legislative Building Library	35	15
Judicial System		
Justices of the Supreme Court	1 ea.	1 ea.
Judges of the Court of Appeals	1 ea.	1 ea.
Judges of the Superior Court	1 ea.	0
Emergency and Special Judges of the Superior Court	1 ea.	0
District Court Judges	1 ea.	0
District Attorneys	1 ea.	0
Clerk of the Supreme Court	1	1
Clerk of the Court of Appeals	1	1
Administrative Office of the Courts	4	1
Supreme Court Library	AS MANY AS REQUESTED	
Colleges and Universities		
The University North Carolina System		

Administrative Offices	3	0
University of North Carolina, Chapel Hill	65	25
University of North Carolina, Charlotte	3	1
University of North Carolina, Greensboro	3	1
University of North Carolina, Asheville	2	1
University of North Carolina, Wilmington	2	1
North Carolina State University, Raleigh	5	3
Appalachian State University	2	1
East Carolina University	3	2
Elizabeth City State University	2	1
Fayetteville State University	2	1
North Carolina Agricultural and Technical University	2	1
North Carolina Central University	5	5
Western Carolina University	2	1
Pembroke State University	2	1
Winston-Salem State University	2	1
North Carolina School of the Arts	1	1
Private Institutions		
Duke University	6	6
Davidson College	3	2
Wake Forest University	5	5
Lenoir Rhyne College	1	1
Elon College	1	1
Guilford College	1	1
Campbell College	5	5
Wingate College	1	1
Pfeiffer College	1	1
Barber Scotia College	1	1
Atlantic Christian College	1	1
Shaw University	1	1
St. Augustine's College	1	1
J.C. Smith University	1	1
Belmont Abbey College	1	1
Bennett College	1	1
Catawba College	1	1
Gardner-Webb College	1	1
Greensboro College	1	1
High Point College	1	1
Livingstone College	1	1
Mars Hill College	1	1
Meredith College	1	1
Methodist College	1	1
North Carolina Wesleyan College	1	1



Queens College	1	1
Sacred Heart College	1	1
St. Andrews Presbyterian College	1	1
Salem College	1	1
Warren Wilson College	1	1
County and Local Officials		
Clerks of the Superior Court	1 ea.	1 ea.
Register of Deeds	1 ea.	1 ea.
Federal, Out-of-State and Foreign		
Secretary to the President	1	0
Secretary of State	1	1
Secretary of Defense	1	0
Secretary of Agriculture	1	0
Secretary of the Interior	1	0
Secretary of Labor	1	1
Secretary of Commerce	1	1
Secretary of the Treasury	1	0
Secretary of Health, Education and Welfare	1	0
Secretary of Housing and Urban Development	1	0
Secretary of Transportation	1	0
Attorney General	1	0
Postmaster General	1	0
Bureau of Census	1	0
Bureau of Public Roads	1	0
Department of Justice	1	0
Department of Internal Revenue	1	0
Veterans' Administration	1	0
Farm Credit Administration	1	0
Securities and Exchange Commission	1	0
Social Security Board	1	0
Environmental Protection Agency	1	0
Library of Congress	8	2
Federal Judges resident in North Carolina	1 ea.	0
Federal District Attorneys resident in North Carolina	1 ea.	0
Marshal of the United States Supreme Court	1	0
Federal Clerks of Court resident in North Carolina	1 ea.	0
Supreme Court Library exchange list	1 ea.	0

One copy of the Session Laws shall be furnished the head of any department of State government created in the future.

State agencies, institutions, etc., not found in or covered by this list may, upon written request from their respective department head to the Secretary of State, and upon the discretion of the Secretary of State as to need, be issued copies of the Session

Laws on a permanent loan basis with the understanding that should said copies be needed they will be recalled."

Sec. 19. Section 86(g) of Chapter 321 of the 1993 Session Laws reads as rewritten:

"(g) Of the funds appropriated to the Board of Governors for the 1993-94 fiscal year, up to the sum of fifteen thousand dollars (\$15,000) shall be used to conduct the work of the Joint Committee. Of the funds appropriated to the ~~Department of Public Education~~ for aid to local school administrative units for the 1993-94 fiscal year, up to the sum of fifteen thousand dollars (\$15,000) shall be used to conduct the work of the Joint Committee."

Sec. 20. G.S. 115C-102.5, as enacted in Section 135(a) of Chapter 321 of the 1993 Session Laws, reads as rewritten:

"(a) There is created the Commission on School Technology. The Commission shall be located administratively in the Department of Public ~~Education-Instruction~~ but shall exercise all its prescribed statutory powers independently of the ~~State Board of Education and the Department of Public Instruction~~."

Sec. 21. Section 208(c) of Chapter 321 of the 1993 Session Laws reads as rewritten:

"(c) Funds for ~~Department of Public Education~~. Aid to Local School Administrative Units. - Funds appropriated to the ~~Department of Public Education~~ Aid to Local School Administrative Units in this act for members of the Willie M. Class are to establish a supplemental reserve fund to serve only members of the class identified in Willie M., et al. v. Hunt, et al., formerly Willie M., et al. v. Martin, et al. These funds shall be allocated by the State Board of Education to the local education agencies to serve those class members who were not included in the regular average daily membership and the census of children with special needs, and to provide the additional program costs which exceed the per pupil allocation from the ~~State Public School Fund~~ Aid to Local School Administrative Units and other State and federal funds for children with special needs."

Sec. 22. Section 208(e) of Chapter 321 of the 1993 Session Laws reads as rewritten:

"(e) Reporting Requirements. - The Department of Human Resources and the ~~Department of Public Education~~ Resources, the State Board of Education, and the Department of Public Instruction shall submit, by May 1 of each fiscal year, a joint report to the Governor and the General Assembly on the progress achieved in serving members of the Willie M. Class. The report shall include the following unduplicated data for each county: (i) the number of children nominated for the Willie M. Class; (ii) the number of children actually identified as members of the Class in each county; (iii) the number of children served as members of the Class in each county; (iv) the number of children who remain unserved or for whom additional services are needed in order to be determined to be appropriately served; (v) the types and locations of treatment and education services provided to Class members; (vi) the cost of services, by type, to members of the Class and the maximum and minimum rates paid to providers for each service; (vii) the number of cases whose treatment costs were in excess of one hundred



fifty percent (150%) of the average annual per client expenditure; (viii) information on the impact of treatment and education services on members of the Class; (ix) an explanation of, and justification for, any waiver of departmental rules that affect the Willie M. program; and (x) the total State funds expended, by program, on Willie M. Class members, other than those funds specifically appropriated for the Willie M. programs and services."

Sec. 23. Section 208(f) of Chapter 321 of the 1993 Session Laws reads as rewritten:

"(f) ~~The Departments of Human Resources and Public Education~~ Department of Human Resources, the State Board of Education, and the Department of Public Instruction shall provide periodic reports of expenditures and program effectiveness on behalf of the Willie M. Class and to the Fiscal Research Division. As part of these reports, the Departments shall explain measures they have taken to control and reduce program expenditures."

Sec. 24. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 24th day of July, 1993.

Dennis A. Wicker  
President of the Senate

Daniel Blue, Jr.  
Speaker of the House of Representatives

GENERAL ASSEMBLY OF NORTH CAROLINA  
1995 SESSION

CHAPTER 72  
HOUSE BILL 7

AN ACT TO CLARIFY THE STATUTES SO AS TO STREAMLINE THE  
OPERATIONS OF THE STATE EDUCATION AGENCY.

The General Assembly of North Carolina enacts:

Section 1. G.S. 115C-19 reads as rewritten:

**"§ 115C-19. Chief administrative officer of the State Board of Education.**

As provided in Article IX, Sec. 4(2) of the North Carolina Constitution, the Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education. The Superintendent of Public Instruction shall administer the policies adopted by the State Board of Education. As secretary and chief administrative officer of the State Board of Education, the Superintendent manages on a day-to-day basis the administration of the free public school system, subject to the direction, control, and approval of the State Board. Subject to the direction, control, and approval of the State Board of Education, the Superintendent of Public Instruction shall carry out the duties prescribed under G.S. 115C-21."

Sec. 2. G.S. 115C-21 reads as rewritten:

**"§ 115C-21. Powers and duties generally.**

(a) Administrative Duties. It Subject to the direction, control, and approval of the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:

- (1) To organize and establish a Department of Public Instruction which shall include such divisions and departments as are the State Board considers necessary for supervision and administration of the public school system, to administer the funds for the operation of the Department of Public Instruction, and to enter into contracts for the operations of the Department of Public Instruction. system. All appointments of administrative and supervisory personnel to the staff of the Department of Public Instruction are subject to the approval of the State Board of Education, which may terminate these appointments for cause in conformity with Chapter 126 of the General Statutes, the State Personnel System.
- (2) To keep the public informed as to the problems and needs of the public schools by constant contact with all school administrators and teachers, by ~~his~~—personal appearance at public gatherings, and by information furnished to the press of the State.



- (3) To report biennially to the Governor 30 days prior to each regular session of the General Assembly, such report to include information and statistics of the public schools, with recommendations for their improvement and for ~~such changes in the school law as shall occur to him.~~ changes in the school law.
- (4) To have printed and distributed such educational bulletins as ~~he shall deem~~ are necessary for the professional improvement of teachers and for the cultivation of public sentiment for public education, and to have printed all forms necessary and proper for the administration of the Department of Public Instruction.
- (5) ~~To have under his direction, in his capacity as the constitutional head of the public school system,~~ manage all those matters relating to the supervision and administration of the public school system, system that the State Board delegates to the Superintendent of Public Instruction.
- (6) To create a special fund within the Department of Public Instruction to manage funds received as grants from nongovernmental sources in support of public education. ~~The Superintendent may accept grants and gifts from corporations and other sources made in support of public education and may hold and disburse such funds, in accordance with the purposes, conditions, and limitations associated with such grants and gifts. Any special fund created pursuant to this subdivision shall be subject to audit by the State Auditor.~~ Effective July 1, 1995, this special fund is transferred to the State Board of Education and shall be administered by the State Board in accordance with G.S. 115C-410.
- (7) ~~To have solely under his direction and control all matters relating to provision of staff services and support to the State Board of Education, including implementation of federal programs on behalf of the State Board of Education, except as otherwise provided in the Current Operations Appropriations Act.~~

(b) Duties as Secretary to the State Board of Education. — ~~As secretary, under the direction of the Board,~~ Subject to the direction, control, and approval of the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:

- (1) To administer through the Department of Public Instruction, ~~all the~~ instructional policies established by the Board.
- (1a) ~~To administer the funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.~~
- (2) To keep the Board informed regarding developments in the field of public education.
- (3) To make recommendations to the Board with regard to the problems and needs of education in North Carolina.
- (4) To make available to the public schools a continuous program of comprehensive supervisory services.