

No. COA 17-1259

NORTH CAROLINA COURT OF APPEALS

Plaintiff-Appellant,

From Wake County
No. 16-CVS-15607

Defendants-Appellees.

RULE 9(D) DOCUMENTARY EXHIBITS

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Plaintiff's memorandum in support of motions for summary judgment and motion for preliminary injunction (with exhibits), submitted 12 April 2017.....Doc Ex. 1

Defendant State of North Carolina's brief in support of motion to dismiss and in opposition to Plaintiff's motions for summary judgment and preliminary injunction (with exhibits), submitted 12 April 2017.....Doc Ex. 53

- (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.

Dennis A. Wicker
President of the Senate

Harold J. Brubaker
Speaker of the House of Representatives

GENERAL ASSEMBLY OF NORTH CAROLINA
1995 SESSION

CHAPTER 393
SENATE BILL 15

AN ACT TO FURTHER STREAMLINE THE STATUTES SO AS TO CLARIFY
THE CONSTITUTIONAL ROLE OF THE STATE BOARD OF EDUCATION.

The General Assembly of North Carolina enacts:

Section 1. G.S. 126-5(d) reads as rewritten:

- "(d) (1) General. — The Governor may designate as exempt policymaking positions, as provided below, in each of the following departments:
- a. Department of Administration;
 - b. Department of Commerce;
 - c. Department of Correction;
 - d. Department of Crime Control and Public Safety;
 - e. Department of Cultural Resources;
 - f. Department of Human Resources;
 - g. Department of Environment, Health, and Natural Resources;
 - h. Department of Revenue; and
 - i. Department of Transportation.

The Secretary of State, the Auditor, the Treasurer, the Attorney General, ~~the Superintendent of Public Instruction~~, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate as exempt policymaking positions, as provided below, in their respective offices. The State Board of Education may designate as exempt policymaking positions, as provided below, in the Department of Public Instruction.

- (2) Number. — The number of policymaking positions designated as exempt in each department or office listed in subsection (d)(1), except the Department of Commerce, shall be limited to one and two-tenths percent (1.2%) of the number of full-time positions in the department or office, or 30 positions, whichever is greater. The Governor may designate 85 policymaking positions as exempt in the Department of Economic and Community Development. Provided, however, that the ~~Governor or Governor~~, elected department head-head, or State Board of Education may request that additional policymaking positions be designated as exempt. The request shall be made by sending a list of policymaking positions that exceed the limit imposed by this subsection to the Speaker of the North Carolina House of Representatives and the President of the North Carolina Senate. A

copy of the list also shall be sent to the State Personnel Director. The General Assembly may authorize all, or part of, the additional policymaking positions to be designated as exempt. If the General Assembly is in session when the list is submitted and does not act within 30 days after the list is submitted, the list shall be deemed approved by the General Assembly, and the policymaking positions shall be designated as exempt. If the General Assembly is not in session when the list is submitted, the 30-day period shall not begin to run until the next date that the General Assembly convenes or reconvenes, other than for a special session called for a specific purpose not involving the approval of the list of additional positions to be designated as exempt; the policymaking positions shall not be designated as exempt during the interim.

- (3) Letter. – These positions shall be designated in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate by May 1 of the year in which the oath of office is administered to each Governor unless the provisions of subsection (d)(4) apply.
- (4) Vacancies. – In the event of a vacancy in the Office of Governor or in the office of a member of the Council of State, the person who succeeds to or is appointed or elected to fill the unexpired term shall make such designations in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate within 120 days after the oath of office is administered to that person. In the event of a vacancy in the Office of Governor, the State Board of Education shall make these designations in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate within 120 days after the oath of office is administered to the Governor.
- (5) Creation, Transfer, or Reorganization. – ~~The Governor or Governor,~~ elected department head ~~head,~~ or State Board of Education may designate as exempt a policymaking position that is created or transferred to a different department, or is located in a department in which reorganization has occurred, after May 1 of the year in which the oath of office is administered to the Governor. The designation must be made in a letter to the State Personnel Director, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate within 120 days after such position is created, transferred, or in which reorganization has occurred.
- (6) Reversal. – Subsequent to the designation of a policymaking position as exempt as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the ~~Governor or Governor,~~ by an elected department head ~~head,~~ or by the State Board of Education in a letter to the State Personnel Director, the

Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate.

- (7) Hearing Officers. — Except as otherwise specifically provided by this section, no employee, by whatever title, whose primary duties include the power to conduct hearings, take evidence, and enter a decision based on findings of fact and conclusions of law based on statutes and legal precedents shall be designated as exempt. This subdivision shall apply beginning July 1, 1985, and no list submitted after that date shall designate as exempt any employee described in this subdivision."

Sec. 2. Notwithstanding the provisions of G.S. 126-5(d), the State Board of Education may designate as exempt a policymaking position that is located in the Department of Public Instruction on or after the effective date of this act. The designation must be made in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate within 120 days after the effective date of this act.

Sec. 3. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 10th day of July, 1995.

Dennis A. Wicker
President of the Senate

Harold J. Brubaker
Speaker of the House of Representatives

- Doc. Ex. 181 -

S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute

115C-11 Elementary and
Secondary
Education; State
Board of
Education;
Organization and
internal
procedures of
Board

G.S. 115C-11(a1) and (a3) were not in the recodification of
115 to 115C, added later.



- Doc. Ex. 182 -

S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute	
115C-12	Elementary and Secondary Education; State Board of Education; Powers and duties of the Board generally
	Recodifies 115 as G.S. 115C-12 where the beginning of the statute reads " <u>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:</u> "

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S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
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SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute	
115C-19	Elementary and Secondary Education; Department of Public Instruction; Chief administrative officer of the State Board of Education
	Recodifies 115 as G.S. 115C-19 to read "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-21(a)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally
	Recodifies 115 as G.S. 115C-21(a) to read "Administrative Duties. - It shall be the duty of the Superintendent of Public Instruction."

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S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute		
115C-21(a)(1)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Recodifies 115 as G.S. 115C-21(a)(1) an administrative duty of the superintendent of public instruction to read <u>"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."</u>
115C-21(a)(5)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Recodifies 115 as G.S. 115C-21(a)(5) an administrative duty of the superintendent of public instruction to read <u>"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."</u>

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S.L. 1971-864
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S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute		
115C-21(a)(6)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	G.S. 115C-21(a)(6) was not in the recodification of 115 to 115C, added later.
115C-21(a)(7)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	G.S. 115C-21(a)(7) was not in the recodification of 115 to 115C, added later.
115C-21(a)(8)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	

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S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute		
115C-21(a)(9)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	
115C-21(b)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Recodifies 115 as G.S. 115C-21(b) which reads " <u>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:</u> "
115C-21(b)(1)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Recodifies 115 as G.S. 115C-21(b)(1) a duty of the superintendent of public instruction as the secretary to the State Board to read " <u>To administer through the Department of Public Instruction the instructional policies established by the Board.</u> "
115C-21(b)(1a)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	

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S.L. 1971-864
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S.L. 1981-423
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SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute		
115C-21(b)(1b)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	G.S. 115C-21(b)(1b) was not in the recodification of 115 to 115C, added later.
115C-21(b)(9)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Recodifies 115 as G.S. 115C-21(b)(9) a duty of the superintendent of public instruction as the secretary to the State Board to read <u>"To perform such other duties as the Board may assign to him from time to time."</u>
115C-408(a)	Elementary and Secondary Education; Financial Powers of the State Board of Education; Funds under control of the State Board of Education	Recodifies 115 as G.S. 115C-408 to read <u>"Funds under control of the State Board of Education. --- The Board shall have general supervision and administration of the educational funds provided by the State and federal governments, except those mentioned in Sec. 7 of Article IX of the State Constitution, and also excepting such local funds as may be provided by a county, city, or district."</u> G.S. 115C-408 was later split into four subsections.

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S.L. 1971-864
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S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute		
115C-410	Elementary and Secondary Education; Financial Powers of the State Board of Education; Power to accept gifts and grants	Recodifies 115 as G.S. 115C-410 to read "Power to accept, gifts and grants. — The Board is authorized to accept, receive, use, or reallocate to local school administrative units any gifts, donations, grants, bequests, or other forms of voluntary contributions."
126-5(d)(1)	North Carolina Human Resources Act; Personnel System Established; Employees subject to Chapter, exemptions	Section 1 rewrites G.S. 126-5(d)(1) to read following where the Governor may designate exempt policy making positions as the "Secretary of State, the Auditor, the Treasurer, the Attorney General, the Superintendent of Public Instruction, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate as exempt policymaking positions, as provided below, in their respective offices."

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S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute

126-5(d)(2) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

G.S. 126-5(d)(2) gives the Superintendent the authority to
designate exempt policymaking positions up to 1.2% of the
number of full time or 30 positions, whichever is greater.

126-5(d)(2a) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

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S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute

126-5(d)(4) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees
Subject to
Chapter,
exemptions

126-5(d)(5) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees
Subject to
Chapter,
exemptions

126-5(d)(6) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

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S.L. 1971-864
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S.L. 1981-423
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SECONDARY EDUCATION.

S.L. 1985-617
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General Statute

143-
745(a)(1) The Executive
Budget Act;
Internal Auditing;
Definitions, intent,
applicability

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S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute

143A-9	State Government Reorganization; General Provisions; Appointment of officers and employees, salaries, of department heads	Section 1, subsection 9 details the appointment of department officers and employees by the governor and gives an exception to departments headed by elected officials who are constitutional officers. Section 1(9) of this law is later codified as G.S. 143A-9.
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143A-39 through 143A-48	State Government Reorganization; Department of Public Instruction	Section 7 creates the Department of Public Education (DPE), by transfer from the Department of Public Instruction. The head of DPE is the State Board. Section 7, subsection 5 reads <u>"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."</u> Section 7 of this law is later codified as G.S. 143A-39 through G.S. 143A-48.
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S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
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SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute

143A-39 OR State Government see above
44.1 Reorganization;
Department of
Public Instruction;

143A-40 OR State Government
44.2 Reorganization;
Department of
Public Instruction

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S.L. 1971-864
AN ACT TO REORGANIZE STATE GOVERNMENT.

S.L. 1981-423
AN ACT TO RECODIFY CHAPTER 115 OF THE
GENERAL STATUTES, ELEMENTARY AND
SECONDARY EDUCATION.

S.L. 1985-617
AN ACT TO AMEND THE STATE PERSONNEL ACT.

General Statute

143A-42 OR State Government
44.3 Reorganization;
Department of
Public Instruction

Additional Notes

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S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
1989.

S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
EXPANSION BUDGET APPROPRIATIONS FOR THE
1992-93 FISCAL YEAR.

General Statute

115C-11 Elementary and
Secondary
Education; State
Board of
Education;
Organization and
internal
procedures of
Board

- Doc. Ex. 196 -

S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
1989.

S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
EXPANSION BUDGET APPROPRIATIONS FOR THE
1992-93 FISCAL YEAR.

General Statute

115C-12	Elementary and Secondary Education; State Board of Education; Powers and duties of the Board generally	Section 3 adds a new sentence after the first sentence of G.S. 115C-12 to read "The general supervision and administration of the free public school system shall be vested in the State Board of Education. <u>The State Board of Education shall establish policy for the system of free public schools, subject to laws enacted by the General Assembly.</u> The powers and duties of the State Board of Education are defined as follows:"
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S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
1989.

S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
EXPANSION BUDGET APPROPRIATIONS FOR THE
1992-93 FISCAL YEAR.

General Statute

115C-19	Elementary and Secondary Education; Department of Public Instruction; Chief administrative officer of the State Board of Education	Section 4 adds a new sentence after the first sentence of G.S. 115C-19 to read "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. <u>The Superintendent of Public Instruction shall administer the policies adopted by the State Board of Education.</u> "
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115C-21(a)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally
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- Doc. Ex. 198 -

S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
1989.

S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
EXPANSION BUDGET APPROPRIATIONS FOR THE
1992-93 FISCAL YEAR.

General Statute		
115C-21(a)(1)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	<p>In Section 5 the first sentence of G.S. 115C-21(a)(1) an administrative duty of the superintendent of public instruction deletes language referring to the State Board and reads as rewritten "To organize and establish, <i>subject to the approval of the State Board of Education</i>, a Department of Public Instruction which shall include such divisions and departments as are necessary for supervision and administration of the public school system."</p> <p>Section 78 amended G.S. 115C-21(a)(1) an administrative duty of the superintendent of public instruction to read as rewritten "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, <u>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.</u>"</p>
115C-21(a)(5)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	<p>In Section 6 G.S. 115C-21(a)(5) an administrative duty of the superintendent of public instruction reads as rewritten "To have under his direction, in his capacity as the <u>constitutional head of the public school system, all those matters relating to the supervision and administration of the public school system.</u>"</p>

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S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
1989.

S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
EXPANSION BUDGET APPROPRIATIONS FOR THE
1992-93 FISCAL YEAR.

General Statute

115C-
21(a)(6) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

115C-
21(a)(7) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

Section 6, subsection (g) amends G.S. 115C-21(a)
administrative duties of the superintendent of public
instruction by adding a new duty as subdivision G.S. 115C-
21(a)(7) which reads "To have solely under his direction
and control all matters relating to provision of staff services
and support to the State Board of Education, except as
otherwise provided in the Current Operations
Appropriations Act."

115C-
21(a)(8) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

- Doc. Ex. 200 -

S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
1989.

S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
EXPANSION BUDGET APPROPRIATIONS FOR THE
1992-93 FISCAL YEAR.

General Statute

115C-
21(a)(9) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

115C-21(b) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

115C-
21(b)(1) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

In Section 7 G.S. 115C-21(b)(1) a duty of the
superintendent of public instruction as the secretary to the
State Board reads as rewritten "To administer through the
Department of Public Instruction *the instructional policies
established by the Board, all policies established by the
Board.*"

115C-
21(b)(1a) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

And amends G.S. 115C-21(b) duties of the superintendent
of public instruction as the secretary to the State Board to
add a new duty G.S. 115C-21(b)(1a) which reads "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."

- Doc. Ex. 201 -

S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
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S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
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1992-93 FISCAL YEAR.

General Statute

115C-
21(b)(1b) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

115C-
21(b)(9) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

115C-408(a) Elementary and
Secondary
Education;
Financial Powers
of the State Board
of Education;
Funds under
control of the State
Board of Education

- Doc. Ex. 202 -

S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
1989.

S.L. 1991-312
MODIFICATIONS IN THE BASE BUDGET AND
EXPANSION BUDGET APPROPRIATIONS FOR THE
1992-93 FISCAL YEAR.

General Statute

115C-410 Elementary and
Secondary
Education;
Financial Powers
of the State Board
of Education;
Power to accept
gifts and grants

126-5(d)(1) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

- Doc. Ex. 203 -

S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
1989.

S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
EXPANSION BUDGET APPROPRIATIONS FOR THE
1992-93 FISCAL YEAR.

General Statute

126-5(d)(2) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

126-5(d)(2a) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

- Doc. Ex. 204 -

S.L. 1987-1025
AN ACT TO PROVIDE A GOVERNANCE STRUCTURE
FOR THE DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1989-752
THE EXPANSION BUDGET APPROPRIATIONS ACT OF
1989.

S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
EXPANSION BUDGET APPROPRIATIONS FOR THE
1992-93 FISCAL YEAR.

General Statute

126-5(d)(4) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees
Subject to
Chapter,
exemptions

126-5(d)(5) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees
Subject to
Chapter,
exemptions

126-5(d)(6) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

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S.L. 1991-812
MODIFICATIONS IN THE BASE BUDGET AND
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General Statute

143-
745(a)(1) The Executive
Budget Act;
Internal Auditing;
Definitions, intent,
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S.L. 1987-1025
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General Statute

143A-9 State Government
Reorganization;
General
Provisions;
Appointment of
officers and
employees,
salaries, of
department heads

143A-39 State Government
through Reorganization;
143A-48 Department of
Public Instruction

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General Statute

143A-39 OR State Government
44.1 Reorganization;
Department of
Public Instruction;

143A-40 OR State Government
44.2 Reorganization;
Department of
Public Instruction

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General Statute

143A-42 OR State Government
44.3 Reorganization;
Department of
Public Instruction

Additional Notes

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S.L. 1993-522

AN ACT TO DELETE THE REFERENCES TO THE
DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1995-72

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

S.L. 1995-393

AN ACT TO FURTHER STREAMLINE THE STATUTES
SO AS TO CLARIFY THE CONSTITUTIONAL ROLE OF
THE STATE BOARD OF EDUCATION.

General Statute

115C-11 Elementary and
Secondary
Education; State
Board of
Education;
Organization and
Internal
procedures of
Board

- Doc. Ex. 210 -

S.L. 1993-522

AN ACT TO DELETE THE REFERENCES TO THE
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S.L. 1995-72

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S.L. 1995-393

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THE STATE BOARD OF EDUCATION.

General Statute

115C-12 Elementary and
Secondary
Education; State
Board of
Education; Powers
and duties of the
Board generally

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DEPARTMENT OF PUBLIC EDUCATION.

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EDUCATION AGENCY.

S.L. 1995-393
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THE STATE BOARD OF EDUCATION.

General Statute	
115C-19	<p>Elementary and Secondary Education; Department of Public Instruction; Chief administrative officer of the State Board of Education</p> <p>Section 1 amends G.S. 115C-19 to add the following additional language and removes some 1981 language about administering policies to read as rewritten "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. <i>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 of Education, the Superintendent of Public Instruction shall carry out the duties prescribed under G.S. 115C-21.</i>"</p>
115C-21(a)	<p>Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally</p> <p>Section 2 amends G.S. 115C-21(a) administrative duties of the superintendent of public instruction to add language restricting the powers of the superintendent of public instruction. Reads as rewritten "Administrative Duties. <i>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:</i>"</p>

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General Statute		
115C-21(a)(1)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 amends G.S. 115C-21(a)(1) an administrative duty of the superintendent of public instruction to add language restricting the powers of the superintendent of public instruction. Reads as rewritten "To organize and establish a Department of Public Instruction which shall include such divisions and departments as are <u>the State Board considers</u> 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. <u>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.</u> "
115C-21(a)(5)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 amends G.S. 115C-21(a)(5) an administrative duty of the superintendent of public instruction to restrict the powers of the superintendent of public instruction and reads a rewritten "To have under his direction, in his capacity as the constitutional head of the public school system, <u>manage</u> all those matters relating to the supervision and administration of the public school system. <u>system that the State Board delegates to the Superintendent of Public Instruction.</u> "

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THE STATE BOARD OF EDUCATION.

General Statute		
115C-21(a)(6)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 amends G.S. 115C-21(a)(6) an administrative duty of the superintendent of public instruction to remove authority of the superintendent and reads as rewritten "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. <i>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. 115-410.</i>
115C-21(a)(7)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 repeals G.S. 115C-21(a)(7) an administrative duty of the superintendent of public instruction that read "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."
115C-21(a)(8)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	

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THE STATE BOARD OF EDUCATION.

General Statute		
115C-21(a)(9)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	
115C-21(b)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 amends G.S. 115C-21(b) to read as rewritten "Duties as Secretary to the State Board of Education -- As Secretary, under the direction of the Board, <u>Subject to the direction, control, and approval of the State Board of Education</u> , it shall be the duty of the Superintendent of Public Instruction."
115C-21(b)(1)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 amends G.S. 115C-21(b)(1) a duty of the superintendent of public instruction as the secretary to the State Board to read as rewritten "To administer through the Department of Public Instruction, <u>all the instructional</u> policies established by the Board."
115C-21(b)(1a)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 1 amends G.S. 115C-21(b)(1a) a duty of the superintendent of public instruction as the secretary to the State Board to remove references to the Department of Public Education to read as rewritten "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." Section 4 removes authority of the superintendent by striking G.S. 115C-21(b)(1a) a duty of the superintendent of public instruction as the secretary to the State Board which read "To administer the funds appropriated for the operations of the State Board of Education and for aid to local school administrative units."

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THE STATE BOARD OF EDUCATION.

General Statute

115C-
21(b)(1b) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

115C-
21(b)(9) Elementary and
Secondary
Education;
Department of
Public Instruction;
Powers and duties
generally

115C-408(a) Elementary and
Secondary
Education;
Financial Powers
of the State Board
of Education;
Funds under
control of the State
Board of Education

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SO AS TO CLARIFY THE CONSTITUTIONAL ROLE OF
THE STATE BOARD OF EDUCATION.

General Statute

115C-410 Elementary and
Secondary
Education;
Financial Powers
of the State Board
of Education;
Power to accept
gifts and grants

126-5(d)(1) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

Section 1 amends G.S. 125-5(d)(1) to remove the authority of the superintendent of public instruction and to increase Board authority to read as rewritten "The Secretary of State, the Auditor, the Treasurer, the Attorney General, the Superintendent of Public Instruction, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate as exempt policymaking positions, as provided below, in their respective offices. The State Board of Education may designate as exempt policymaking positions, as provided below, in the Department of Public Instruction."

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THE STATE BOARD OF EDUCATION.

General Statute

126-5(d)(2) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

Section 1 amends G.S. 125-5(d)(1) to add in the State Board and read as rewritten "Number. -- The number of policymaking positions designated exempt in each department or office listed in subsection (d)(1), except the Department of Commerce, shall be limited to one and two-tenths percent (1.2%) of the number of full-time positions in the department or office, or 30 positions, whichever is greater. The Governor may designate 85 policymaking positions as exempt in the Department of Economic and Community Development. Provided, however, that the Governor or Governor, elected department head head, or State Board of Education may request that additional policymaking positions be designated as exempt. (...)"

126-5(d)(2a) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

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THE STATE BOARD OF EDUCATION.

General Statute		
126-5(d)(4)	North Carolina Human Resources Act; Personnel System Established; Employees Subject to Chapter, exemptions	Section 1 amends G.S. 126-5(d)(4) to read as rewritten "Vacancies. -- In the event of a vacancy in the Office of Governor or in the office of a member of the Council of State, the person who succeeds to or is appointed or elected to fill the unexpired term shall make such designations in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate within 120 days after the oath of office is administered to that person. <u>In the event of a vacancy in the Office of the Governor, the State Board of Education shall make these designations in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate within 120 days after the oath of office is administered to the Governor.</u> "
126-5(d)(5)	North Carolina Human Resources Act; Personnel System Established; Employees Subject to Chapter, exemptions	Section 1 amends G.S. 126-5(d)(5) to read as rewritten "Creation, Transfer or Reorganization -- The <u>Governor or Governor, elected department head head, or State Board of Education</u> may designate as exempts policymaking position that is created or transferred to a different department. (...)"
126-5(d)(6)	North Carolina Human Resources Act; Personnel System Established; Employees subject to Chapter, exemptions	Section 1 amends G.S. 126-5(d)(6) to read as rewritten "Reversal. -- Subsequent to the designation of a policymaking position as exempt as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the <u>Governor or Governor, by an elected department head head, or by the State Board of Education</u> in a letter. (...)"

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S.L. 1995-393
AN ACT TO FURTHER STREAMLINE THE STATUTES
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THE STATE BOARD OF EDUCATION.

General Statute

143-
745(a)(1) The Executive
Budget Act;
Internal Auditing;
Definitions, Intent,
applicability

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S.L. 1993-522
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DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1995-72
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EDUCATION AGENCY.

S.L. 1995-393
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THE STATE BOARD OF EDUCATION.

General Statute

143A-9 State Government
Reorganization;
General
Provisions;
Appointment of
officers and
employees,
salaries, of
department heads

143A-39 State Government
through Reorganization;
143A-48 Department of
Public Instruction

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DEPARTMENT OF PUBLIC EDUCATION.

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STREAMLINE THE OPERATIONS OF THE STATE
EDUCATION AGENCY.

S.L. 1995-393
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SO AS TO CLARIFY THE CONSTITUTIONAL ROLE OF
THE STATE BOARD OF EDUCATION.

General Statute

143A-39 OR State Government
44.1 Reorganization;
Department of
Public Instruction;

Section 3 adds a new section G.S. 143A-39 OR 44.1 to
read "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
prescribed in Article IV, Section 4(1) of the Constitution."

143A-40 OR State Government
44.2 Reorganization;
Department of
Public Instruction

Section 3 adds a new section G.S. 143A-40 OR 44.2 to
read "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."

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S.L. 1993-522
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DEPARTMENT OF PUBLIC EDUCATION.

S.L. 1995-72
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STREAMLINE THE OPERATIONS OF THE STATE
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S.L. 1995-393
AN ACT TO FURTHER STREAMLINE THE STATUTES
SO AS TO CLARIFY THE CONSTITUTIONAL ROLE OF
THE STATE BOARD OF EDUCATION.

General Statute

143A-42 OR State Government
44.3 Reorganization;
Department of
Public Instruction

Section 3 adds a new section G.S. 143A-42 OR 44.3 to
read "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."

Additional Notes

Interesting whereas statements from the beginning of this
bill: 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.

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S.L. 2016-126
AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
AS THE ADMINISTRATIVE HEAD OF THE DEPARTMENT
OF PUBLIC INSTRUCTION...

General Statute		
115C-11	Elementary and Secondary Education; State Board of Education; Organization and internal procedures of Board	<p>Section 1 makes changes in G.S. 115C-11(a1) and (a3) to grant <u>the Superintendent</u>, rather than the Governor, the authority to appoint the student advisors and the superintendent advisor to the State Board of Education. Staggers the terms of the student advisors accordingly.</p> <p>Adds the following two subsections (i) and (j) to the end of G.S. 115C-11 "<u>(i) Administrative Assistance -- The Superintendent of Public Instruction shall provide technical assistance and administrative assistance, including all personnel except as otherwise provided in subsection (i) of this section, to the State Board of Education through the Department of Public Instruction.</u></p> <p><u>(j) Certain Personnel Appointed by the State Board -- The State Board may appoint only the following personnel positions to support the operations of the State Board of Education through the Department of Public Instruction:</u></p> <p>1) Attorney I (# 65023576) 2) Attorney II (#60009384) 3) Paralegal II (#65003194) 4) Administrative Assistant I (#60095070)*</p>

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AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
AS THE ADMINISTRATIVE HEAD OF THE DEPARTMENT
OF PUBLIC INSTRUCTION...

General Statute		
115C-12	Elementary and Secondary Education; State Board of Education; Powers and duties of the Board generally	Section 2 changes the word "policy" to "all needed rules and regulations" to utilize Constitutional language (Article IX, Section 5) and adds additional language regarding the Constitutional authority of the superintendent of public instruction. G.S. 115C-12 reads as rewritten "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 <u>policy</u> all needed rules and regulations for the system of free public schools, subject to the laws enacted by the General Assembly. <u>In accordance with Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction, as an elected officer and Council of State member, shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction.</u> The powers and duties of the State Board of Education are defined as follows:"

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AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
AS THE ADMINISTRATIVE HEAD OF THE DEPARTMENT
OF PUBLIC INSTRUCTION...

General Statute		
115C-19	Elementary and Secondary Education; Department of Public Instruction; Chief administrative officer of the State Board of Education	Section 3 adds additional language regarding the Constitutional authority of the superintendent of public instruction to G.S. 115C-19. Also deletes the 1995 revisions and restores the administering language. The language reads as rewritten "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. As <i>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</i> <u>As provided in Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction shall be an elected officer and Council of State member and shall carry out the duties prescribed under G.S.115C-21 as the administrative head of the Department of Public Instruction. The Superintendent of Public Instruction shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction.</u> "
115C-21(a)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 removes the 1995 language from G.S. 115C-21(a) and restores the 1981 language to read as rewritten "Administrative Duties. <i>Subject to the direction, control, and approval of the State Board of Education, it</i> <u>It shall be the duty of the Superintendent of Public Instruction:</u>

S.L. 2016-126
AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
AS THE ADMINISTRATIVE HEAD OF THE DEPARTMENT
OF PUBLIC INSTRUCTION...

General Statute		
115C-21(a)(1)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 removes the 1995 language from G.S. 115C-21(a)(1) an administrative duty of the superintendent of public instruction and restores the 1981 language with some modification to read as rewritten "To organize and establish a Department of Public Instruction which shall include <i>such</i> divisions and departments as the State Board considers necessary for supervision and administration of the public school system. <u>system, to administer the funds appropriated for the operation of the Department of Public Instruction, in accordance with all needed rules and regulations adopted by the State Board of Education, and to enter into contracts for the operations of the Department of Public Instruction.</u> 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 Instruction and the State Board of Education, except for certain personnel appointed by the State Board of Education as provided in G.S.115C-11(i), shall be under the control and management of the Superintendent of Public Instruction who may terminate these appointments for cause in conformity with Chapter 126 of the General Statutes, the North Carolina Human Resources Act.
115C-21(a)(5)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 removes the 1995 language from G.S. 115C-21(a)(5) an administrative duty of the superintendent of public instruction and restores the 1981 language with some modification to read as rewritten "To <u>manage have, under his or her direction and control, all those matters</u> relating to the <u>direct</u> supervision and administration of the public school system that the State Board delegates to the Superintendent of Public Instruction. <u>system.</u>

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S.L. 2016-126
AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
AS THE ADMINISTRATIVE HEAD OF THE DEPARTMENT
OF PUBLIC INSTRUCTION...

General Statute		
115C-21(a)(6)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 amends G.S. 115C-21(a)(6) an administrative duty of the superintendent of public instruction to read as rewritten "To create a <u>and administer special fund funds</u> within the Department of Public Instruction to manage funds received as grants from nongovernmental sources in support of public education. <i>Effective July 1, 1995, this special fund is transferred to the State Board of Education and shall be administered by the State Board education</i> in accordance with G.S. 115-410.
115C-21(a)(7)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	See G.S.115C-21(a)(9)
115C-21(a)(8)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 adds a new subsection G.S. 115C-21(a)(8) to the administrative duties of the superintendent of public instruction which reads "To administer, through the Department of Public Instruction, all needed rules and regulations established by the State Board of Education."

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General Statute		
115C-21(a)(9)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 adds a new subsection G.S. 115C-21(a)(9) to the administrative duties of the superintendent of public instruction which reads <u>"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(f), and support of the State Board of Education, including implementation of federal programs on behalf of the State Board."</u> This is largely reinstating G.S. 115C-21(a)(7) which was repealed in 1995.
115C-21(b)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 removes the 1995 language from G.S. 115C-21(b) and restores the 1981 language to read as rewritten <u>"Duties as Secretary to the State Board of Education -- Subject to the direction, control, and approval of the State Board of Education, As Secretary, under the direction of the Board, it shall be the duty of the Superintendent of Public Instruction:"</u>
115C-21(b)(1)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 removes G.S. 115C-21(b)(1) a duty of the superintendent of public instruction as the secretary to the State Board which read <u>"To administer through the Department of Public Instruction, all the instructional policies established by the Board."</u>
115C-21(b)(1a)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	See G.S.115C-21(a)(1b)

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115C-21(b)(1b)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 reinstates language previously in G.S. 115C-21(b)(1a) a duty of the superintendent of public instruction as the secretary to the State Board but removed in 1996 as a new subsection G.S. 115C-21(b)(1b) to read <u>"To administer the funds appropriated for the operations of the State Board of Education and for aid to local school administrative units."</u>
115C-21(b)(9)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 amends G.S. 115C-21(b)(9) a duty of the superintendent of public instruction as the secretary to the State Board to read as rewritten <u>"To perform such other duties as may be necessary and appropriate for the Superintendent of Public Instruction in the role as secretary to the Board may assign to him from time to time. Board."</u>
115C-408(a)	Elementary and Secondary Education; Financial Powers of the State Board of Education; Funds under control of the State Board of Education	Section 5 amends G.S. 115C-408(a) to read as rewritten <u>"It is the policy of the State of North Carolina to create a public school system that graduates good citizens with the skills demanded in the marketplace (...). The Board shall have general supervision and administration of the educational funds provided by the State and federal governments, except those mentioned in Section 7 of Article IX of the State Constitution, and also excepting such local funds as may be provided by a county, city, or district. The Superintendent of Public Instruction shall administer any available education funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education."</u> This language provides cohesiveness and mirrors language of a duty of the superintendent of public instruction as the secretary to the State Board in G.S. 115C-21(1b), previously G.S. 115C-21(1a); see above.

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General Statute		
115C-410	Elementary and Secondary Education; Financial Powers of the State Board of Education; Power to accept gifts and grants	Section 6 amends G.S. 115C-410 to read as rewritten "The Board is authorized to <u>adopt all needed rules and regulations related to the creation and administration of special funds within the Department of Public Instruction to manage any funds received as grants from nongovernmental sources in support of public education. In accordance with the State Board's rules and regulations, the Superintendent of Public Instruction is authorized to create and administer such special funds and to accept, receive, use, or reallocate to local school administrative units any gifts, donations, grants, devises, or other forms of voluntary contributions.</u> "
126-5(d)(1)	North Carolina Human Resources Act; Personnel System Established; Employees subject to Chapter, exemptions	The statute was changed prior to 2016 to move this language down to G.S. 126-5(d)(2). See below.

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General Statute		
126-5(d)(2)	North Carolina Human Resources Act; Personnel System Established; Employees subject to Chapter, exemptions	Sections 7 and 8 together amend G.S. 126-5(d)(2) to read as rewritten "Exempt Positions in Council of State Departments and Offices. -- The Secretary of State, the Auditor, the Treasurer, the Attorney General, the <u>Superintendent of Public Instruction</u> , the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate exempt positions. <i>The State Board of Education may designate exempt positions in the Department of Public Instruction.</i> The number of exempt policymaking positions in each department headed by an elected department head listed above in this subdivision shall be limited to 20 25 exempt policymaking positions or two percent (1%) (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions shall be limited to 20 25 positions or two percent (1%) (2%) of the total number of full-time positions, whichever is greater. <u>The number of exempt policymaking positions designated by the Superintendent of Public Instruction shall be limited to 70 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater.</u> "
126-5(d)(2a)	North Carolina Human Resources Act; Personnel System Established; Employees subject to Chapter, exemptions	Section 8 amends G.S. 126-5(d)(2a) to read as rewritten "Designation of Additional Positions -- The <u>Governor</u> , <u>Governor or</u> elected department <u>head</u> , or <u>State Board of Education</u> , <u>head</u> may request that additional positions be designated as exempt. (...)"

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General Statute		
126-5(d)(4)	North Carolina Human Resources Act; Personnel System Established; Employees Subject to Chapter, exemptions	Section 8 amends G.S. 126-5(d)(4) to remove the 1995 changes and reads as rewritten "Vacancies. — In the event of a vacancy in the Office of Governor or in the office of a member of the Council of State, the person who succeeds to or is appointed or elected to fill the unexpired term shall make such designations in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate within 120 days after the oath of office is administered to that person. <i>In the event of a vacancy in the Office of the Governor, the State Board of Education shall make these designations in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate within 120 days after the oath of office is administered to the Governor.</i> "
126-5(d)(5)	North Carolina Human Resources Act; Personnel System Established; Employees Subject to Chapter, exemptions	Section 8 amends G.S. 126-5(d)(5) to remove the 1995 changes and reads as rewritten "Creation, Transfer or Reorganization — The Governor Governor or, elected department head, or State Board of Education head may designate as exempts policymaking position that is created or transferred to a different department. (...)"
126-5(d)(6)	North Carolina Human Resources Act; Personnel System Established; Employees subject to Chapter, exemptions	Section 8 amends G.S. 126-5(d)(6) to remove the 1995 changes and reads as rewritten "Reversal. — Subsequent to the designation of a policymaking position as exempt as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the Governor Governor or, by an elected department head, or by the State Board of Education head, in a letter. (...)"

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General Statute		
143-745(a)(1)	The Executive Budget Act; Internal Auditing; Definitions, intent, applicability	Section 9 amends G.S. 143-745(a)(1) to read as rewritten "Agency head" means the Governor, a Council of State member, a cabinet secretary, the President of The University of North Carolina, the President of the Community College System, the State Controller, and other independent appointed officers with authority over a State agency. <i>The agency head for the Department of Public Instruction shall be the State Board of Education.</i> "Article 79 was created in S.L. 2007-424 and G.S. 143-745(a)(1) originally read as "Agency head" means the Governor, a Council of State member, a cabinet secretary, the Chief Justice of the Supreme Court, the President of The University of North Carolina, and the Superintendent of Public Instruction." This section was later amended in S.L. 2013-406 to read as rewritten "Agency head" means the Governor, a Council of State member, a cabinet secretary, the President of The University of North Carolina, the President of the Community College System, the State Controller, and other independent appointed officers with authority over a State agency and the Superintendent of Public Instruction. The agency head for the Department of Public Instruction shall be the State Board of Education."

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General Statute	
143A-9	State Government Reorganization; General Provisions; Appointment of officers and employees, salaries, of department heads
143A-39 through 143A-48	State Government Reorganization; Department of Public Instruction

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General Statute		
143A-39 OR 44.1	State Government Reorganization; Department of Public Instruction;	Section 10 amends G.S. 143A-44.1 to read as rewritten "Creation – There is hereby created a Department of Public Instruction. The head of the Department of Public Instruction is the <i>State Board of Education</i> . Any provision of G.S.143A-9 to the contrary notwithstanding, the appointment of the State Board of Education shall be prescribed in Article IV, Section 4(1) of the Constitution. <u>Superintendent of Public Instruction.</u> "
143A-40 OR 44.2	State Government Reorganization; Department of Public Instruction	Section 11 repeals this section.

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General Statute		
143A-42 OR	State Government	Section 12 amends this section to read as rewritten "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 <u>this Chapter and the Constitution, delegated to him or her by the Governor and by the State Board of Education, and conferred by Chapter 115C of the General Statutes, Statutes</u> and the laws of this State.
44.3	Reorganization;	
	Department of Public Instruction	

Additional Notes

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General Statute		
115C-11	Elementary and Secondary Education; State Board of Education; Organization and internal procedures of Board	<p>Section 1 makes changes in G.S. 115C-11(a1) and (a3) to grant <u>the Superintendent</u>, rather than the Governor, the authority to appoint the student advisors and the superintendent advisor to the State Board of Education. Staggers the terms of the student advisors accordingly. Adds the following two subsections (i) and (j) to the end of G.S. 115C-11 "(i) <u>Administrative Assistance</u> -- The Superintendent of Public Instruction shall provide technical assistance and administrative assistance, including all personnel except as otherwise provided in subsection (i) of this section, to the State Board of Education through the Department of Public Instruction.</p> <p>(j) <u>Certain Personnel Appointed by the State Board</u> -- The State Board may appoint only the following personnel positions to support the operations of the State Board of Education through the Department of Public Instruction:</p> <p>1) Attorney I (# 65023576) 2) Attorney II (#60009384) 3) Paralegal II (#65003194) 4) Administrative Assistant I (#60095070)"</p>



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General Statute

115C-12 Elementary and
Secondary
Education; State
Board of
Education; Powers
and duties of the
Board generally

Section 2 changes the word "policy" to "all needed rules and regulations" to utilize Constitutional language (Article IX, Section 5) and adds additional language regarding the Constitutional authority of the superintendent of public instruction. G.S. 115C-12 reads as rewritten "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 all needed rules and regulations for the system of free public schools, subject to the laws enacted by the General Assembly. In accordance with Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction, as an elected officer and Council of State member, shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction. The powers and duties of the State Board of Education are defined as follows:"

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General Statute		
115C-19	Elementary and Secondary Education; Department of Public Instruction; Chief administrative officer of the State Board of Education	<p>Section 1 amends G.S. 115C-19 to add the following additional language and removes some 1981 language about administering policies to read as rewritten "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. <u>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 of Education, the Superintendent of Public Instruction shall carry out the duties prescribed under G.S. 115C-21.</u>"</p> <p>Section 3 adds additional language regarding the Constitutional authority of the superintendent of public instruction to G.S. 115C-19. Also deletes the 1995 revisions and restores the administering language. The language reads as rewritten "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. <u>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 of Education, the Superintendent of Public Instruction As provided in Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction shall be an elected officer and Council of State member and shall carry out the duties prescribed under G.S. 115C-21 as the administrative head of the Department of Public Instruction. The Superintendent of Public Instruction shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction.</u>"</p>
115C-21(a)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	<p>Section 2 amends G.S. 115C-21(a) administrative duties of the superintendent of public instruction to add language restricting the powers of the superintendent of public instruction. Reads as rewritten "Administrative Duties. <u>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:</u>"</p> <p>Section 4 removes the 1995 language from G.S. 115C-21(a) and restores the 1981 language to read as rewritten "Administrative Duties. <u>Subject to the direction, control, and approval of the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:</u></p>

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General Statute		
115C-21(a)(1)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	<p>Section 2 amends G.S. 115C-21(a)(1) an administrative duty of the superintendent of public instruction to add language restricting the powers of the superintendent of public instruction. Reads as rewritten "To organize and establish a Department of Public Instruction which shall include such divisions and departments as are <u>the State Board considers necessary</u> 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. <u>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.</u>"</p> <p>Section 4 removes the 1995 language from G.S. 115C-21(a)(1) an administrative duty of the superintendent of public instruction and restores the 1981 language with some modification to read as rewritten "To organize and establish a Department of Public Instruction which shall include <u>such</u> divisions and departments as <u>the State Board considers necessary</u> for supervision and administration of the public school system. <u>system. to administer the funds appropriated for the operation of the Department of Public Instruction, in accordance with all needed rules and regulations adopted by the State Board of Education, and to enter into contracts for the operations of the Department of Public Instruction.</u> 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 instruction and the State Board of Education, except for certain personnel appointed by the State Board of Education as provided in G.S.115C-11(i), shall be under the control and management of the Superintendent of Public Instruction <u>who may terminate these appointments for cause</u> in conformity with Chapter 126 of the General Statutes, the North Carolina Human Resources Act.</p>

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General Statute			
115C-21(a)(5)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 amends G.S. 115C-21(a)(5) an administrative duty of the superintendent of public instruction to restrict the powers of the superintendent of public instruction and reads a rewritten "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.	Section 4 removes the 1995 language from G.S. 115C-21(a)(5) an administrative duty of the superintendent of public instruction and restores the 1981 language with some modification to read as rewritten "To manage have under his or her direction and control, all those 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.
115C-21(a)(6)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 amends G.S. 115C-21(a)(6) an administrative duty of the superintendent of public instruction to remove authority of the superintendent and reads as rewritten "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. 115-410.	Section 4 amends G.S. 115C-21(a)(6) an administrative duty of the superintendent of public instruction to read as rewritten "To create a and administer special fund funds within the Department of Public Instruction to manage funds received as grants from nongovernmental sources in support of public education. Effective July 1, 1995, this special fund is transferred to the State Board of Education and shall be administered by the State Board education in accordance with G.S. 115-410.

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General Statute		
115C-21(a)(7)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 repeals G.S. 115C-21(a)(7) an administrative duty of the superintendent of public instruction that read <i>"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."</i> See G.S.115C-21(a)(9)
115C-21(a)(8)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 adds a new subsection G.S. 115C-21(a)(8) to the administrative duties of the superintendent of public instruction which reads <i>"To administer, through the Department of Public Instruction, all needed rules and regulations established by the State Board of Education."</i>
115C-21(a)(9)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 adds a new subsection G.S. 115C-21(a)(9) to the administrative duties of the superintendent of public instruction which reads <i>"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."</i> This is largely reinstating G.S. 115C-21(a)(7) which was repealed in 1995.
115C-21(b)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 amends G.S. 115C-21(b) to read as rewritten <i>"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:"</i> Section 4 removes the 1995 language from G.S. 115C-21(b) and restores the 1981 language to read as rewritten <i>"Duties as Secretary to the State Board of Education -- Subject to the direction, control, and approval of the State Board of Education, As Secretary, under the direction of the Board, it shall be the duty of the Superintendent of Public Instruction:"</i>

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General Statute			
115C-21(b)(1)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 2 amends G.S. 115C-21(b)(1) a duty of the superintendent of public instruction as the secretary to the State Board to read as rewritten "To administer through the Department of Public Instruction, <u>all the instructional policies established by the Board.</u> "	Section 4 removes G.S. 115C-21(b)(1) a duty of the superintendent of public instruction as the secretary to the State Board which read "To administer through the Department of Public Instruction, <u>all the instructional policies established by the Board.</u> "
115C-21(b)(1a)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally	Section 4 removes authority of the superintendent by striking G.S. 115C-21(b)(1a) a duty of the superintendent of public instruction as the secretary to the State Board which read "To administer the funds appropriated for the operations of the State Board of Education and for aid to local school administrative units."	See G.S.115C-21(a)(1b)
115C-21(b)(1b)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally		Section 4 reinstates language previously in G.S. 115C-21(b)(1a) a duty of the superintendent of public instruction as the secretary to the State Board but removed in 1995 as a new subsection G.S. 115C-21(b)(1b) to read "To <u>administer the funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.</u> "
115C-21(b)(9)	Elementary and Secondary Education; Department of Public Instruction; Powers and duties generally		Section 4 amends G.S. 115C-21(b)(9) a duty of the superintendent of public instruction as the secretary to the State Board to read as rewritten "To perform such other duties as <u>may be necessary and appropriate for the Superintendent of Public Instruction in the role as secretary to the Board may assign to him from time to time. Board.</u> "

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General Statute	
115C-408(a) Elementary and Secondary Education; Financial Powers of the State Board of Education; Funds under control of the State Board of Education	Section 5 amends G.S. 115C-408(a) to read as rewritten "It is the policy of the State of North Carolina to create a public school system that graduates good citizens with the skills demanded in the marketplace (...). The Board shall have general supervision and administration of the educational funds provided by the State and federal governments, except those mentioned in Section 7 of Article IX of the State Constitution, and also excepting such local funds as may be provided by a county, city, or district. <u>The Superintendent of Public Instruction shall administer any available education funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education.</u> " This language provides cohesiveness and mirrors language of a duty of the superintendent of public instruction as the secretary to the State Board in G.S. 115C-21(1b), previously G.S. 115C-21(1a); see above.
115C-410 Elementary and Secondary Education; Financial Powers of the State Board of Education; Power to accept gifts and grants	Section 6 amends G.S. 115C-410 to read as rewritten "The Board is authorized to <u>adopt all needed rules and regulations related to the creation and administration of special funds within the Department of Public Instruction to manage any funds received as grants from nongovernmental sources in support of public education. In accordance with the State Board's rules and regulations, the Superintendent of Public Instruction is authorized to create and administer such special funds and to accept, receive, use, or reallocate to local school administrative units any gifts, donations, grants, devises, or other forms of voluntary contributions.</u> "

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S.L. 1995-393
AN ACT TO FURTHER STREAMLINE THE STATUTES
SO AS TO CLARIFY THE CONSTITUTIONAL ROLE OF
THE STATE BOARD OF EDUCATION.

S.L. 2016-126
AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
AS THE ADMINISTRATIVE HEAD OF THE DEPARTMENT
OF PUBLIC INSTRUCTION...

General Statute		
126-5(d)(1)	North Carolina Human Resources Act; Personnel System Established; Employees subject to Chapter, exemptions	Section 1 amends G.S. 125-5(d)(1) to remove the authority of the superintendent of public instruction and to increase Board authority to read as rewritten "The Secretary of State, the Auditor, the Treasurer, the Attorney General, the Superintendent of Public Instruction, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate as exempt policymaking positions, as provided below, in their respective offices. <u>The State Board of Education may designate as exempt policymaking positions, as provided below, in the Department of Public Instruction.</u> "
		The statute was changed prior to 2016 to move this language down to G.S. 126-5(d)(2). See below.
126-5(d)(2)	North Carolina Human Resources Act; Personnel System Established; Employees subject to Chapter, exemptions	Section 1 amends G.S. 125-5(d)(1) to add in the State Board and read as rewritten "Number. -- The number of policymaking positions designated exempt in each department or office listed in subsection (d)(1), except the Department of Commerce, shall be limited to one and two-tenths percent (1.2%) of the number of full-time positions in the department or office, or 30 positions, whichever is greater. The Governor may designate 85 policymaking positions as exempt in the Department of Economic and Community Development. Provided, however, that the Governor or Governor, elected department head <u>head or State Board of Education</u> may request that additional policymaking positions be designated as exempt. (...)"
		Sections 7 and 8 together amend G.S. 126-5(d)(2) to read as rewritten "Exempt Positions in Council of State Departments and Offices. -- The Secretary of State, the Auditor, the Treasurer, the Attorney General, the <u>Superintendent of Public Instruction</u> , the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate exempt positions. <u>The State Board of Education may designate exempt positions in the Department of Public Instruction.</u> The number of exempt policymaking positions in each department headed by an elected department head listed above in this subdivision shall be limited to 20 <u>25</u> exempt policymaking positions or two percent (1%) <u>(2%)</u> of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions shall be limited to 20 <u>25</u> positions or two percent (1%) <u>(2%)</u> of the total number of full-time positions, whichever is greater. <u>The number of exempt policymaking positions designated by the Superintendent of Public Instruction shall be limited to 70 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater.</u> "

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S.L. 1995-72
AN ACT TO CLARIFY THE STATUTES SO AS TO
STREAMLINE THE OPERATIONS OF THE STATE
EDUCATION AGENCY.

S.L. 1995-393
AN ACT TO FURTHER STREAMLINE THE STATUTES
SO AS TO CLARIFY THE CONSTITUTIONAL ROLE OF
THE STATE BOARD OF EDUCATION.

S.L. 2016-126
AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
AS THE ADMINISTRATIVE HEAD OF THE DEPARTMENT
OF PUBLIC INSTRUCTION...

General Statute

126-5(d)(2a) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees subject
to Chapter,
exemptions

Section 8 amends G.S. 126-5(d)(2a) to read as rewritten
"Designation of Additional Positions – The Governor,
Governor or elected department head, or State Board of
Education, head may request that additional positions be
designated as exempt. (...)"

126-5(d)(4) North Carolina
Human Resources
Act; Personnel
System
Established;
Employees
Subject to
Chapter,
exemptions

Section 1 amends G.S. 126-5(d)(4) to read as rewritten
"Vacancies. -- In the event of a vacancy in the Office of
Governor or in the office of a member of the Council of
State, the person who succeeds to or is appointed or
elected to fill the unexpired term shall make such
designations in a letter to the State Personnel Director, the
Speaker of the House of Representatives, and the
President of the Senate within 120 days after the oath of
office is administered to that person. In the event of a
vacancy in the Office of the Governor, the State Board of
Education shall make these designations in a letter to the
State Personnel Director, the Speaker of the House of
Representatives, and the President of the Senate within
120 days after the oath of office is administered to the
Governor."

Section 8 amends G.S. 126-5(d)(4) to remove the 1995
changes and reads as rewritten "Vacancies. -- In the event
of a vacancy in the Office of Governor or in the office of a
member of the Council of State, the person who succeeds
to or is appointed or elected to fill the unexpired term shall
make such designations in a letter to the State Personnel
Director, the Speaker of the House of Representatives, and
the President of the Senate within 120 days after the oath
of office is administered to that person. *In the event of a
vacancy in the Office of the Governor, the State Board of
Education shall make these designations in a letter to the
State Personnel Director, the Speaker of the House of
Representatives, and the President of the Senate within
120 days after the oath of office is administered to the
Governor."*

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S.L. 1995-72
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S.L. 2016-126
AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
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OF PUBLIC INSTRUCTION...

General Statute			
126-5(d)(5)	North Carolina Human Resources Act; Personnel System Established; Employees Subject to Chapter, exemptions	Section 1 amends G.S. 126-5(d)(5) to read as rewritten "Creation, Transfer or Reorganization -- The <u>Governor or Governor</u> , elected department <u>head head, or State Board of Education</u> may designate as exempts policymaking position that is created or transferred to a different department. (...)"	Section 8 amends G.S. 126-5(d)(5) to remove the 1995 changes and reads as rewritten "Creation, Transfer or Reorganization -- The <u>Governor Governor or</u> , elected department <u>head, or State Board of Education head</u> may designate as exempts policymaking position that is created or transferred to a different department. (...)"
126-5(d)(6)	North Carolina Human Resources Act; Personnel System Established; Employees subject to Chapter, exemptions	Section 1 amends G.S. 126-5(d)(6) to read as rewritten "Reversal. -- Subsequent to the designation of a policymaking position as exempt as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the <u>Governor or Governor</u> , by an elected department <u>head head, or by the State Board of Education</u> in a letter. (...)"	Section 8 amends G.S. 126-5(d)(5) to remove the 1995 changes and reads as rewritten "Reversal. -- Subsequent to the designation of a policymaking position as exempt as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the <u>Governor Governor or</u> , by an elected department <u>head, or by the State Board of Education head</u> in a letter. (...)"

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S.L. 1995-72
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AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
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OF PUBLIC INSTRUCTION...

General Statute		
143-745(a)(1)	The Executive Budget Act; Internal Auditing; Definitions, intent, applicability	Section 9 amends G.S. 143-745(a)(1) to read as rewritten "Agency head" means the Governor, a Council of State member, a cabinet secretary, the President of The University of North Carolina, the President of the Community College System, the State Controller, and other independent appointed officers with authority over a State agency. <i>The agency head for the Department of Public Instruction shall be the State Board of Education.</i> "Article 79 was created in S.L. 2007-424 and G.S. 143-745(a)(1) originally read as "Agency head" means the Governor, a Council of State member, a cabinet secretary, the Chief Justice of the Supreme Court, the President of The University of North Carolina, and the Superintendent of Public Instruction." This section was later amended in S.L. 2013-406 to read as rewritten "Agency head" means the Governor, a Council of State member, a cabinet secretary, the President of The University of North Carolina, the President of the Community College System, the State Controller, and other independent appointed officers with authority over a State agency and the Superintendent of Public Instruction. <i>The agency head for the Department of Public Instruction shall be the State Board of Education.</i> "

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S.L. 1995-72
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AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
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General Statute			
143A-9	State Government Reorganization; General Provisions; Appointment of officers and employees, salaries, of department heads		
143A-39 through 143A-48	State Government Reorganization; Department of Public Instruction		
143A-39 OR 44.1	State Government Reorganization; Department of Public Instruction;	Section 3 adds a new section G.S. 143A-39 OR 44.1 to read " <u>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 prescribed in Article IV, Section 4(1) of the Constitution.</u> "	Section 10 amends G.S. 143A-44.1 to read as rewritten " <u>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 prescribed in Article IV, Section 4(1) of the Constitution. Superintendent of Public Instruction.</u> "
143A-40 OR 44.2	State Government Reorganization; Department of Public Instruction	Section 3 adds a new section G.S. 143A-40 OR 44.2 to read " <u>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.</u> "	Section 11 repeals this section.

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S.L. 1995-72

AN ACT TO CLARIFY THE STATUTES SO AS TO
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S.L. 1995-393

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S.L. 2016-126

AN ACT TO CLARIFY THE SUPERINTENDENT'S ROLE
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OF PUBLIC INSTRUCTION...

General Statute

143A-42 OR 44.3 State Government
Reorganization;
Department of
Public Instruction
Section 3 adds a new section G.S. 143A-42 OR 44.3 to
read "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."

Section 12 amends this section to read as rewritten "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 this Chapter
and the Constitution, delegated to him or her by the
Governor and by the State Board of Education, and
conferred by Chapter 115C of the General Statutes,
Statutes and the laws of this State.



NORTH CAROLINA
DEPARTMENT OF JUSTICE
ATTORNEY GENERAL JOSH STEIN

tabbies

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December 14, 1995

Bob Etheridge, State Superintendent

N.C. Department of Public Instruction Education Building 301 North Wilmington Street Raleigh, North Carolina 27601-2825

RE: Advisory Opinion; Authority of the North Carolina General Assembly and the State Board of Education to Supervise and Control the Administrative and Secretarial Duties of the State Superintendent of Public Instruction; Article IX of the North Carolina Constitution; N.C.G.S. §§115C-19, and 115C-21

Dear Superintendent Etheridge:

We reply to your letter dated December 12, 1995 requesting our opinion on the following, which I quote directly from your December 12 letter: Among the legislation approved by the 1995 General Assembly were House Bill 7 and other statutes [Chapter 72 of the 1995 Session Laws, codified as N.C.G.S. §§115C-19, and 115C-21] that stripped the State Superintendent of Public Instruction of many historic duties and gave those duties to the State Board of Education.

I fully understand the legislation was designed to transfer to the State Board the responsibility for making educational policy for North Carolina schools. However, that same legislation specified that the State Superintendent was to be the chief administrative officer for the State Board of Education, with responsibility for implementing policy. Nowhere in the legislation do I find any stipulations that could be used to ignore the State Superintendent's chief administrative officer duties or lawfully pass those duties on to others, including the chairman of the State Board of Education or any other administrative officer appointed by the State Board. Therefore, I formally request that you issue in writing your interpretation of the language of the recent legislation affecting this office, with particular emphasis on those that constitute my duties as chief administrative officer. I ask that you deal with my rights to direct staff, to be notified of top administrative staff meetings, to sign contracts, and to be kept abreast of policy directions mandated by the State Board of Education.

The major change made by the General Assembly in House Bill 7, Chapter 72 of the 1995 Session Laws was to subordinate the statutorily designated duties of the State Superintendent of Public Instruction as chief administrative officer and secretary to the State Board of Education "to the direction, control, and approval of the State Board of Education." See, N.C.G.S. §115C19, which restates Article IX, Section 4(2) of the Constitution that the State Superintendent is the secretary and chief administrative officer of the State Board of Education "subject to the direction, control, and approval of the State Board of Education;" and N.C.G.S. §115C-21, which designates the administrative and secretarial duties of the State Superintendent "subject to the direction, control, and approval of the State Board of Education."

The Constitution gives the State Board the responsibility generally to supervise and administer the public school system. N.C. Constitution, Article IX, §4. Responsibility for the day-to-day operation of the public school system is given to the State Superintendent -- a constitutional officer elected by the people -- by making him the chief administrative officer of the State Board, as well as its secretary. N.C. Constitution, Article IX, §5. Most importantly, the Constitution expressly makes the authority and responsibilities of both the State Board and the State Superintendent subject to laws passed by the General Assembly. Article IX, §5 provides that the

State Board "shall supervise and administer the free public school system . . . subject to the laws enacted by the General Assembly." Article III, §7(2) provides that the Superintendent's "duties shall be prescribed by law." (Emphasis added). Unquestionably, the framers of the Constitution intended for the State Superintendent's powers and duties to be adjusted from time to time by the General Assembly.

Moreover, our Supreme Court has recognized the General Assembly's power in this regard and established several very important and pertinent doctrines concerning the constitutional powers of the State Board, which doctrines equally apply to the constitutional powers of the State Superintendent. Our Supreme Court has made crystal clear; (1) that the State Board's constitutional powers are subject to limitation and revision by acts of the General Assembly, (2) that the State Board is bound by the General Assembly's policy determinations, and (3) that the State Board acts beyond its authority when it attempts to take actions contrary to statute. Guthrie

v.

Taylor, 279 N.C. 703, 710, (1971), cert. denied, 406 U.S. 920, (1972). State v. Whittle Communications, 328 N.C. 456, 466, 468, 470-71, (1991). Although neither of these Supreme Court decisions directly addresses the constitutional powers of the State Superintendent, the rationale and conclusions reached by our Supreme Court in each decision apply with equal force to the constitutional authority of the General Assembly to change, extend or limit the responsibility and duties of the State Superintendent.

I.

In Guthrie v. Taylor, 279 N.C. 703 (1971), cert. den., 406 U.S. 920 (1972), the Supreme Court held that the State Board's powers are subject to limitation and revision by the General Assembly.

In the Guthrie case, a teacher attacked a State Board regulation that required teachers to renew their teaching certificates every five years by earning credits based on college courses completed at their own expense. The case arose under Article IX of the former Constitution which provided, in pertinent part, that:

Sec. 8: "State Board of Education. - The general supervision and administration of the free public school system . . . shall . . . be vested in the State Board of Education"

Sec. 9: "Powers and duties of the board. - The State Board of Education shall . . . have power . . . to regulate the grade, salary, and qualifications of teachers . . . and generally to supervise and administer the free public school system of the State and make all needful rules and regulations 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. Guthrie, 279 N.C. at 709-10, (emphasis added).

The Court then focused on the "subject to" language in former Section 9 and concluded that this clause empowered the General Assembly to limit and revise the State Board's express constitutional powers, including the power to regulate teacher qualifications -- a supervisory power expressly included in the Constitution. The Court held that in the absence of legislation to the contrary, the State Board had the authority to enact the challenged regulations:

The last sentence in Article 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. The Constitution, itself, however, conferred upon the State Board of Education 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. Thus, 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 of the Constitution itself.

Id., at 710. (emphasis added). The Court noted that the changes made in the 1971 Constitution (during the pendency of the case) retained in §5 of Article IX the provision making the State Board's powers "subject to the laws enacted by the General Assembly," and the Court concluded that "(t)here 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.

Without question, the Supreme Court decided in Guthrie 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.

In *State v. Whittle Communications*, 328 N.C. 456 (1991), the Supreme Court held that the State Board is bound by the General Assembly's policy determinations.

In *State v. Whittle Communications*, the State Board attempted to prevent local school districts from contracting with Whittle Communications for receipt of a short video news program known as Channel One. The determination of what type of educational materials could be presented to school children across the State logically comes within the ambit of the State Board's constitutional power to "supervise and administer" the State's public school system. That is what the State Board contended in court to support the rules it enacted to prevent local school boards from entering into Channel One contracts. However, the Supreme Court focused on the language in Article IX, §5 that the School Board's power was "subject to the laws enacted by the General Assembly" and concluded that "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." 328 N.C. at 464. The Court then concluded that the General Assembly had enacted a statute -- N.C.G.S. §115C-98(b) -- that placed the responsibility for selection of supplementary materials in the hands of the local school boards. As a consequence, the Supreme Court held that the State Board acted in excess of its authority by taking actions in contravention of that statute:

. . . Thus, the General Assembly, by adopting [N.C.G.S. §115C-98(b)] placed the decisionmaking process for the selection and procurement of these supplementary instructional materials in the exclusive domain of the local school boards . . . Since Channel One is a supplementary instructional material and since the General Assembly placed the procurement and selection of

supplementary instructional materials under the control of the local school boards, the State Board acted in excess of its authority in enacting this rule because the State Board had no authority to enact a rule on this subject.

Whittle Communications, 328 N.C. at 466. The *Whittle* case made clear that the General Assembly has the preeminent constitutional power to make policy decisions relating to the public school system which are binding on the State Board and the State Superintendent.

Finally, the intent of the General Assembly to subordinate the State Superintendent to the will and authority of the State Board when it enacted N.C.G.S. §§115C-19 and 115C-21 is beyond question. The General Assembly made all of the statutorily designated duties and responsibilities of the State Superintendent "subject to the direction, control, and approval of the State Board of Education." (emphasis added) Because the General Assembly did not define the words "direction," "control," or "approval," we look elsewhere to see what those words commonly mean. Black's Law Dictionary, DeLuxe Fourth Edition (1951) defines those words as follows:

Direction - the act of governing; management; superintendence. That which is imposed by directing; a guiding or authoritative instruction; order; command. Control - to exercise restraining or directing influence over; regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern. Approval - the act of confirming, ratifying, sanctioning, or consenting to some act or thing done by another. Although it would have sufficed for the General Assembly to indicate its intent that the State Board would clearly predominate over the State Superintendent in this regard by the use of only one of those three words, it chose three of the strongest expressions indicating authority over another.

Based on the clear language of Article III, §7(2) of the Constitution that the State Superintendent's "duties shall be prescribed by law," and the clear language of N.C.G.S. §§115C-19 and 115C-21 that all of the State Superintendent's prescribed duties as chief administrative officer and secretary to the State Board are "subject to the direction, control, and approval of the State Board of Education," it is our opinion that the State Board has the authority to determine and control the duties and responsibilities of the State Superintendent. Should the State Board conclude that the day-to-day operation of the Department of Public Instruction should be the responsibility of someone other than the State Superintendent, it is our opinion that the State Board has that authority by virtue of the laws enacted by the General Assembly. In exercising that authority, we are confident that the State Board recognizes that the State Superintendent is a constitutional officer, and that the State Board and the State Superintendent will work together for the good of all our citizens, and especially for our children.

Andrew A. Vanore, Jr. Chief Deputy Attorney General

North Carolina Department of Justice / Roy Cooper, Attorney General (919) 716-6400

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.)

**AFFIDAVIT OF NORTH CAROLINA
SUPERINTENDENT OF PUBLIC
INSTRUCTION MARK JOHNSON**

Mark Johnson, after being duly sworn, deposes and states the following:

1. While serving as a teacher at West Charlotte High School, I witnessed the struggles our students face both inside and outside of the classroom. My experiences in the classroom ultimately motivated me to seek elected office to work towards the improvement of our public schools. In 2014, I ran for and won a seat on the Winston-Salem/Forsyth County Board of Education. My work on a local school board focused on helping students overcome the achievement gap, but I also was on the front line of the frustrations of all parents, teachers, students, and school leaders. The need for many changes for our public schools became apparent: better professional development and support for teachers and principals, authentic review of state standards, calendar flexibility, genuine support of good local leaders, and a host of other policies necessary for the improvement of our public schools in North Carolina.

2. On November 8, 2016, the voters of North Carolina elected me as their next Superintendent of Public Instruction to bring the changes I promoted during our campaign.

3. I took the oath of office and arrived in Raleigh on January 2, 2017, with the intent of instilling the values of urgency, ownership, and innovation in the Department of Public

Instruction (hereinafter referred to as "DPI") to transform the culture and vision of DPI, as per the will and intent of North Carolina voters. Unfortunately, I have learned that the authority of the Superintendent of Public Instruction is severely limited by the past statutory provisions and by the policies and practices of the North Carolina State Board of Education (hereinafter referred to as the "State Board"). The impacts of these provisions and policies are especially evident in the staffing of DPI, which I will discuss in further detail. The end-result of these policies and practices is that the voters' intent of bringing positive change to DPI to better support our public schools, the reason North Carolina voters elected me, can and has been blocked by the State Board due to the current injunction.

4. The duties of the State Board and the Superintendent of Public Instruction are set forth in N.C.G.S. § 115C-12 and N.C.G.S. § 115C-21. The language of N.C.G.S. § 115C-21(a)(1) *prior* to the passage of HB 17 stated that the Superintendent of Public Instruction could make all appointments of administrative and supervisory personnel to the staff of DPI. However, the language of N.C.G.S. 115C-21(a)(1) *prior* to the passage of HB 17 also *restricted* such authority of the Superintendent of Public Instruction by stating that all appointments were "subject to the approval of the State Board of Education."

5. The State Board sets forth its procedures and authority through its own board policies. Importantly, SBOP-011 outlines certain operations and responsibilities of the State Board. **See Attachment A, SBOP-011.** Also, the State Board has instituted a policy delegating only certain, qualified powers and duties from the State Board to the Superintendent of Public Instruction. **See Attachment B, SBOP-013.** These policies *further restrict* the authority of the Superintendent of Public Instruction and divide DPI staff into three categories: State Board Office, "dual reports," and staff reporting to "dual reports."

6. First, in SBOP-011, the State Board granted itself the power to create advisory and support positions “accountable and responsible” only to the State Board. These include an Executive Director, Assistant Executive Director, Legislative Liaison/Policy Analyst, Board Staff Attorney, Board Staff Paralegal, Clerical Staff, and unlimited “other staff as approved by the State Board of Education.” Upon information and belief, there are roughly 14 positions in the State Board Office today. The North Carolina Constitution, Article IX, Section 4(2) states that the Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board; however, the staff for the State Board Office primarily handles the State Board communications, schedule, agenda, and policies. The Superintendent of Public Instruction has absolutely no authority or role in the selection or hiring of these State Board Office positions.

7. Second, in paragraph 4 of SBOP-013¹, the State Board identifies ten leadership positions in DPI that are “accountable and responsible” to the Superintendent of Public Instruction *and* the State Board (hereinafter “dual reports”). These ten positions include the Deputy State Superintendent, Chief Financial Officer, Chief of Staff, and Director of Communications. While SBOP-013 describes dual reports as accountable to both the State Board and Superintendent of Public Instruction, SBOP-011 states that the State Board shall make the *final* employment decisions respecting dual reports.

8. As an example of the dual reporting relationship causing confusion both inside and outside DPI, on January 5, 2017, DPI sent out a press release to its list serve with a statement from attorneys for the State Board, Bob Orr and Drew Erteschick, stating “we are pleased that

¹ EEO-C-013, *Policy delineating the delegation of authority from the State Board of Education to the Superintendent of Public Instruction and to the Chief Executive Officer*, appears to be a precursor to the current language of SBOP-013. EEO-C-013 granted the Chief Executive Officer for the State Board the authority “to manage the Department of Public Instruction on a day-to-day basis subject to the direction, control, and approval of the State Board.” The policy also required this CEO to report “all employment requests for the positions of director and above to the State Board, which shall make the employment decision.”

the legislation continues to be blocked, and that the *status quo has been maintained* for the Board, the public school system, and North Carolina's 1.5 million students" and highlighting the extension of the temporary restraining order. (*Emphasis added*). Upon information and belief, the Director of Communications, a dual report, was instructed to send out the press release by the State Board, a single member of the State Board, or staff for the State Board. I, the duly elected Superintendent of Public Instruction, was not informed of the release before it was sent. I only saw the release because I subscribe to the DPI list serve.

9. Lastly, under SBOP-013, while the Superintendent of Public Instruction has the delegated authority to approve, upon the recommendation of a dual report, all agency employment decisions for the positions of "Director" and below that report to a dual report, any disagreement between the Superintendent of Public Instruction and such dual report shall be reported to the State Board, which shall provide *final* resolution to the disagreement.

10. The cumulative effect of SBOP-011 and SBOP-013 severely hinders the authority of the Superintendent of Public Instruction to appoint staff of DPI. While other members of the Council of State may designate and hire for at least 20 exempt policymaking and 20 exempt managerial positions, as NC Superintendent of Public Instruction, I could hire only three confidential assistants and one exempt policymaking position in January. *See N.C.G.S. § 126-5(d)(2)*.

11. SBOP-011 outlines a specific process by which (i) the Chairman of the State Board shall report all the Superintendent of Public Instruction's requests to hire or promote dual reports to the State Board, and then (ii) the State Board shall make the final employment decisions respecting those positions. However, this policy does not reflect actual State Board processes. Upon information and belief, as opposed to evaluating a recommendation from the

Superintendent of Public Instruction, the State Board has routinely elected to appoint “*ad hoc* committees” comprised of board members and the Superintendent of Public Instruction to identify and evaluate potential candidates for dual reports.

12. Pursuant to the statutory authority contained in N.C.G.S. § 115C-21(a)(1) and the policy language contained in SBOP-011, I made a request in January 2017 to the Chairman of the State Board to hire a certain candidate who shares in my vision for North Carolina public education as my Chief Financial Officer of DPI, a dual report. The Chief Financial Officer manages the state and federal funds for public education that pass-through DPI and oversees financial services, school business, and support for school operations, school facility planning and operation, school nutrition services, and teacher licensure. The position of Chief Financial Officer is critical in implementing the changes on which I campaigned across the state of North Carolina. I selected a candidate who would have been a positive change agent for DPI.

13. Instead of voting to approve or disapprove my recommended candidate, the State Board chose to post an advertisement for the position and have an *ad hoc* committee comprised of the Chairman of the State Board and the Chair of the Business Operations Committee interview new internal and external candidates who applied for the position. The *ad hoc* committee then made *their own* recommendation to the full State Board. The full State Board voted to approve the *ad hoc* committee’s recommended candidate, who previously served as former Superintendent June Atkinson’s Chief of Staff.

14. The State Board did not follow its own policy nor did it hire a positive change agent. The State Board promoted more of the same after I was voted into office by the people of North Carolina to bring change to the financial management of DPI.

15. With the Chief of Staff position vacant, I asked the Chairman of the State Board in early March to remove the Chief of Staff position as a dual report and to permit me to select my own candidate for the position. The Chief of Staff serves as the *primary* point of contact for district leaders, charter school leaders, community leaders, members of the press, the Office of the Governor, and the University and Community Colleges Systems. The Chief of Staff also coordinates major initiatives for DPI and directs cross-agency work and program development. At this point in time, the State Board has made no change to the dual reporting structure for the Chief of Staff, and the Chairman of the State Board has informed me that the State Board has no intention to make such a change. As a result, I am still forced by the State Board to operate DPI without a Chief of Staff while the State Board defines the process by which they will hire a Chief of Staff.

16. The previous Deputy State Superintendent gave her notice of retirement in November 2016. I stood ready to hire a Deputy State Superintendent immediately upon the retirement of the previous Deputy State Superintendent in February 2017. Again, instead of voting on my recommendation, the Chairman of the State Board created another *ad hoc* committee to handle the hiring of a Deputy State Superintendent. While I am attempting to work with the State Board to fill this vacancy, it has taken months to agree on a job description, advertise, coordinate schedules, and interview candidates. Meanwhile, agency resources have been stretched extremely thin without a Deputy State Superintendent or Chief of Staff to help with the demands of operating DPI and responding to requests of the General Assembly, local school leaders, stakeholders, and constituents.

17. I alone cannot carry out my platform and ensure DPI provides the necessary support to our local school districts. In order to affect change, I need the authority to hire staff to

help carry out these goals. If I do not have the authority to direct agency resources, organize agency staff, and manage agency activities, I cannot make the changes the voters of North Carolina elected me to make.

18. The recent vacancies at DPI have created both the need and the opportunity to re-evaluate some of the reporting structures within the agency. Under the existing structure established by the State Board and former Superintendent June Atkinson, a total of almost 20 dual reports or direct reports report to me. Few institutional leaders would choose to structure their organization this way. In January, I made recommendations to the Chairman of the State Board for revisions to the organizational structure of DPI. Again, the Chairman created an *ad hoc* committee to recommend organizational changes of DPI to the full State Board. Despite my recommendations in January, there has been no decision or action by the State Board.

19. The need for the State Board to approve who various directors and sections chiefs report to has resulted in months of delay, interim organizational plans, and a lack of clarity for agency staff and local school districts.

20. Having both the State Board and the Superintendent of Public Instruction – up to 14 individuals in total – involved in the day-to-day management of DPI slows decision making to a crawl and makes it difficult to implement any changes or be responsive to the needs of the education community. DPI should be able to evolve, quickly if necessary, to serve immediate needs, support local districts, acknowledge shifts in state and federal resources, and take advantage of opportunities to innovate for public education. The full State Board meets in Raleigh an average of one and one-half days each month. I'm at DPI every week, but the staff and the agency must wait for the State Board to finalize what are frequently time-sensitive decisions.

21. While the State Board has delegated certain, qualified duties to the Superintendent of Public Instruction in the past, recent policy changes demonstrate that the State Board does intend to exert even greater oversight of the day-to-day management of DPI. SBOP-013 previously delegated to the Superintendent of Public Instruction the duty to execute agency contracts approved by the Chief Financial Officer and to report these contracts to the State Board monthly. On December 1, 2016, the State Board instituted a new policy on contract procedures. **See Attachment C, CNTR-002.** Under this new policy, all proposed and pending contracts shall also be reported to the State Board monthly, and State Board members may request additional information or a presentation on any executed or proposed contract from the Superintendent of Public Instruction or the Superintendent's designee. Presumably, this provides the State Board with the opportunity to comment on or influence contracts before they are signed.

22. Furthermore, save for the formally noticed meetings of the State Board each month where formal actions are taken, it is not the full State Board being briefed and speaking on internal issues, but only a few select members of the State Board or State Board staff.

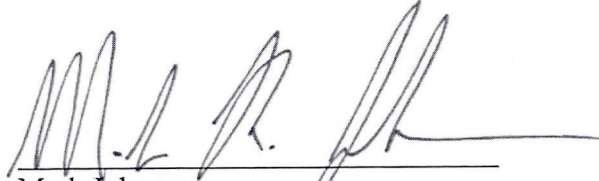
23. As an elected official, I am accountable to the voters of North Carolina. My name was on the 2016 statewide ballot. I am the duly-elected constitutional officer, vested with authority under N.C. Constitution, Article IX, Section 4(2) to serve as the secretary and chief administrative officer of the State Board of Education. The Superintendent of Public Instruction should not be denied the authority to serve as the administrative head and to manage the day to day administration of DPI.

24. None of the voters in North Carolina voted for 11 of the 13 voting members of the State Board. These members have no accountability to the voters of North Carolina. I firmly believe that the General Assembly, the elected body closest to the voters, has every right to

revise a statute so that the North Carolina Superintendent of Public Instruction has the right to manage the day to day of DPI.

FURTHER, Affiant sayeth not.

This the 12th day of April, 2017.



Mark Johnson
North Carolina Superintendent of
Public Instruction

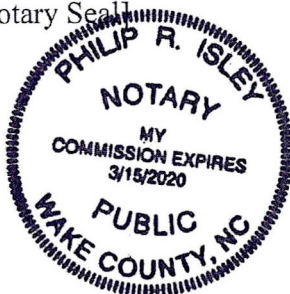
Sworn to and subscribed before me,
this the 12th day of April, 2017.



NOTARY PUBLIC

My Commission Expires: 3/15/2020

[Notary Seal]



CERTIFICATE OF SERVICE


The undersigned hereby certifies that a copy of the foregoing **Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson** was served upon the following attorneys by U.S. Mail and e-mail to the following:

Amar Majmundar
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Of Education*

This the 12th day of April, 2017.



Philip R. Isley

- Doc. Ex. 265 -
Attachment A

4/11/2017 Responsibilities of the SBE in supervising/administering the public school system of NC and the funds provided for its support — NC State Board of Educ...

Responsibilities of the SBE in supervising/administering the public school system of NC and the funds provided for its support

Item	Description
Policy Title	Responsibilities of the SBE in supervising/administering the public school system of NC and the funds provided for its support
Policy Category	SBE/DPI Operation (SBOP)
Policy ID	SBOP-011
Policy Date	2014-02-06
Previous Policy Dates	02/03/2004, 09/03/2009
Statutory Reference	GS 115C-12; GS 115C-21; NC Constitution, Article IX, Section 4 and 5

Formerly TCS-C-011

POLICY STATEMENT - OPERATION AND RESPONSIBILITIES

The Constitution of the State of North Carolina provides that the State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support. In order to carry out these constitutional duties, the State Board of Education believes it is necessary to outline in policy the various responsibilities associated with this mandate. Accordingly, the State Board of Education, as a matter of policy, delineates the following responsibilities:

1. The State Board of Education shall set all policies of the state of North Carolina regarding public education and shall supervise and administer the free public school system.
2. The State Board of Education shall have general supervision and administration of all public education funds provided by both state and federal government, including all prior year refunds, except as outlined in Section 7, Article IX of the State Constitution.
3. The State Board of Education shall accept and receive, use and reallocate to local administrative units federal grants and funds.
4. The State Board of Education shall have final authority for applying for federal funds or federal aid related to any phase of North Carolina's free public school system. Any expenditure of these funds shall be under the final authority of the State Board of Education.
5. The State Board of Education shall have authority to accept and disburse any private grants or funds.
6. The Chairman of the State Board of Education, in consultation with the State Superintendent and other Board members, shall set the agenda for each State Board of Education meeting.
7. The Chairman of the State Board shall meet regularly with the Superintendent and review the implementation of all the Department of Public Instruction's obligations under state and federal laws and State Board policies.
8. The Chairman of the State Board shall report all of the Superintendent's requests to hire, promote, terminate, discipline, reduce-in-force, increase or decrease the salary of or otherwise change the terms or conditions of employment of candidates for or persons employed in the positions listed in TCS-C-013, paragraph 4, to the State Board, which shall make the final employment decisions respecting those positions.
9. The State Board may create the following advisory and support positions which shall report to and be accountable and responsible to the State Board:

A. Executive Director;

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4/11/2017 Responsibilities of the SBE in supervising/administering the public school system of NC and the funds provided for its support — NC State Board of Educ...

B. Assistant Executive Director;

C. Legislative Liaison/Policy Analyst;

D. Board Staff Attorney;

E. Board Staff Paralegal;

F. Clerical staff; and

G. Other staff as approved by the State Board of Education.

10. The Superintendent shall execute those powers and perform those duties delegated to the Superintendent in TCS-C-013.

Delegation of Authority from the State Board of Education to the Superintendent of Public Instruction

Item	Description
Policy Title	Delegation of Authority from the State Board of Education to the Superintendent of Public Instruction
Policy Category	SBE/DPI Operation (SBOP)
Policy ID	SBOP-013
Policy Date	2016-12-01
Previous Policy Dates	01/08/1997, 06/05/1997, 09/04/1997, 10/04/1997, 11/06/1997, 12/04/1997, 03/05/1998, 11/05/1998, 10/07/1999, 12/06/2001, 12/04/2003, 05/06/2004, 09/02/2004, 02/01/2007, 03/04/2009, 09/03/2009, 02/06/2014, 11/06/2014, 09/03/15, 08/04/16, 09/01/2016

Formerly TCS-C-013

Pursuant to Article IX, sec. 5 of the Constitution of North Carolina, G.S. 115C-12 and G.S. 143A-44.1 through 44.3, the State Board is responsible for the general supervision and administration of the North Carolina free public school system and is head of the Department of Public Instruction. In accordance with Article IX, sec. 4(2) and G.S. 115C-19 and 21 and G.S. 143A-44.3, the State Superintendent is the Secretary and Chief Administrative Officer of the State Board and carries out duties of the office subject to the direction, control, and approval of the State Board.

In accordance with these and other applicable laws, the State Board of Education (the State Board) hereby adopts these policies for the purposes of delegating certain powers and duties to the State Superintendent of Public Instruction (the State Superintendent). The State Board may add to or remove from the delegated powers and duties as it may deem appropriate for the effective and efficient implementation of the State Board's authority. The State Board may further modify or repeal these policies at any time the Board deems such action appropriate. Except as described herein, the State Board retains all powers and duties regarding the general supervision and administration of the North Carolina free public school system and the Department of Public Instruction.

The State Board hereby delegates to the State Superintendent the following powers and duties:

1. To comply with, execute, and administer the policies of the State Board of Education;
2. To keep the public informed of the problems and needs of the public schools as identified by the State Board;
3. To advise the State Board promptly and fully about problems and issues concerning the uniform system of free public schools, the education of the State's children, and the Department of Public Instruction;
4. To organize and manage the Department of Public Instruction on a day-to-day basis subject to the direction, control, and approval of the State Board, provided:

The following positions in the Department of Public Instruction shall be responsible for the administration of the day-to-day operations of their respective divisions, sections and programs and shall exercise their responsibilities consistent with State Board policies and through the Superintendent and shall be accountable and responsible to the Superintendent and the State Board of Education:

- A. Deputy State Superintendent;
- B. Chief Financial Officer;
- C. Chief Information Technology Officer;
- D. Chief Academic and Digital Learning Officer;
- E. Chief of Staff;

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4/11/2017

Delegation of Authority from the State Board of Education to the Superintendent of Public Instruction — NC State Board of Education

- F. Director of Communication and Information Services;
- G. Director of Human Resources;
- H. Internal Auditor;
- I. Executive Director of the Office of Charter Schools; and
- J. Superintendent, Achievement School District

5. To approve, upon the recommendation of the Officer or Director listed in paragraph 4, all agency employment decisions for the positions of Director and below in their respective divisions, sections, and programs, which approvals the Superintendent shall report to the State Board, provided that any disagreement between the Superintendent and the Officer or Director shall be reported to the State Board which shall resolve the disagreement;

6. To execute all contracts entered into by the State Board pursuant to the State Board's Contract Procedure policy, to report these contracts to the State Board monthly as information, and to report proposed contracts, including but not limited to proposed new contracts and contract amendments, to the State Board monthly as information in accordance with the Contract Procedure policy. State Board members may request additional information or a presentation on any executed or proposed contract from the Superintendent or Superintendent's designee;

7. Upon recommendation by the Chief Financial Officer, to determine on behalf of the State Board the annual premium rate to be charged for insurance of school properties as provided by Article 38 of Chapter 115C of the North Carolina General Statutes and to report these rates to the State Board as information;

8. To execute and issue for and on behalf of the State Board documents signifying compliance with State law or State Board policies or rules relating to licenses for principals, teachers, and all other school personnel required to have licenses;

9. To initiate investigations to determine whether reasonable cause exists to suspend or revoke or take other disciplinary actions regarding licenses issued by the State Board, and prepare and file written charges with the State Board;

10. To settle cases relating to license suspension and revocation upon the advice and counsel of Department of Justice lawyer(s) and Department of Public Instruction and State Board staff members; and

11. Upon the receipt of a written request for reinstatement of a suspended or revoked license or for granting a new license after denial of a license, together with substantiating information, to conduct an investigation sufficient to determine whether reasonable cause exists to reinstate the license or to grant a new license and prepare and file a written recommendation concerning the request with the State Board.

Contract Procedure

Item	Description
Policy Title	Contract Procedure
Policy Category	Contracts and Grant (CNTR)
Policy ID	CNTR-002
Policy Date	2016-12-01

The following minimum procedures apply to all contracts entered into by the State Board of Education. The Superintendent, in exercising the duties regarding contracts delegated by the State Board pursuant to the State Board's Delegation of Authority from the State Board of Education to the Superintendent of Public Instruction policy, shall ensure compliance with this policy and all applicable North Carolina and federal laws. For purposes of this policy, the term "contract" means all written agreements that must be processed through the Department of Public Instruction Purchasing and Contracts Section, including but not limited to UNC Task Orders; contracts subject to the requirements of Article 3 of Chapter 143 and Article 15 of Chapter 143B of the General Statutes; and all amendments thereto. The term "contract" does not include memorandums of agreement, data sharing agreements, grants, or similar documents.

General Requirements:

1. All contracts must comply with all applicable State procurement laws, rules, and regulations, including those set forth in Article 3 of G.S. Chapter 143, Article 15 of G.S. Chapter 143B, and the North Carolina Administrative Code.
2. All requests for any type of contract must be preceded by an Intent to Contract approval form with proper signatures indicating internal approval and availability of funds.
3. No contract, regardless of amount, shall be entered into for more than three (3) years without prior approval from the Department of Administration Division of Purchase and Contract or Department of Information Technology, where such approval is required.
4. All contracts must have beginning and ending dates.
5. All contracts must include a not-to-exceed clause limiting the maximum expenditure for the term of the contract.
6. Where required by law, policy, or regulation and otherwise to the extent practicable, all contracts must be competitively bid.
7. To the extent practicable, all contracts should contain a payment plan that stipulates payments be made across at least three intervals and, for deliverable-based contracts, that payments shall not be made prior to completion and acceptance of deliverables.
8. All contracts must be in writing and:
 - a. Must be approved by the Chief Financial Officer and the Superintendent.
 - b. Must be signed by the Superintendent if the contract has an annual value of \$25,000.00 or above.
 - c. Must be signed by the Superintendent or Superintendent's designee if the contract has an annual value below \$25,000.00.
9. All contractual agreements shall be governed by and subject to applicable North Carolina and federal laws.

Monthly Report to State Board

All signed contracts must be reported to the State Board monthly as information. In addition, all proposed and pending contracts, including but not limited to proposed new contracts and contract amendments, shall be reported to the State Board monthly as information. Proposed and pending contracts required to be reported under this section are limited to those contracts with an annual value of \$25,000.00 or above and public school cooperative purchasing agreements (as defined in S.L. 2015-241 Section 8.14(b)).

State Board members may request additional information or a presentation on any executed or proposed contract from the Superintendent or Superintendent's designee.

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4/11/2017

Contract Procedure— NC State Board of Education

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.

**PLAINTIFF'S RESPONSE
TO DEFENDANTS' MOTION TO
DISMISS AND MOTION FOR
SUMMARY JUDGMENT**

Pursuant to the Court's March 1, 2017 case management order, the North Carolina State Board of Education respectfully submits the following response to the motion to dismiss filed by the State and the motion for summary judgment filed by the Superintendent of Public Instruction ("SPI").

INTRODUCTION

Defendants' dispositive motions concede that Article IX, Section 5 confers a "broad, nearly unlimited grant of power to the State Board . . . to supervise and administer the public schools," and that "[t]hese words—'supervise' and 'administer'—cover essentially everything." SPI's Br. at 7-8.

Nevertheless, Defendants claim that the General Assembly can disregard this direct delegation of constitutional powers and duties from the people of North Carolina to the Board, because the General Assembly is the supreme authority and can do whatever it wants. Defendants are mistaken.

For the reasons that follow, the Board is entitled to summary judgment.

ARGUMENT

I. THE STATE'S JURISDICTIONAL DEFENSE IS MERITLESS.

Before addressing the merits, the State attempts to defend this case on jurisdictional grounds. According to the State, the Board cannot bring claims against the State under Article IX of the North Carolina Constitution because the State's sovereign immunity bars those claims.

Relying on *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 660 S.E.2d 662 (2008), the State asserts that it can only be sued for violations of Article I of the North Carolina Constitution. State's Br. at 8-10. According to the State, plaintiffs have no recourse for violations of Articles II through XVI of the North Carolina Constitution, because sovereign immunity bars those claims. *Id.* Therefore, the State argues, because the claims in this lawsuit are Article IX claims, the complaint warrants dismissal.

Simply put, the State's view on sovereign immunity is wrong. The law is the opposite.

Less than a year after *Petroleum Traders* was issued, the North Carolina Supreme Court overruled it in *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009). There, the Supreme Court squarely held that Article IX claims, like the ones here, were *not* barred by sovereign immunity. *Id.* As the Court explained, if sovereign immunity barred all constitutional claims other than those in Article I of the North Carolina Constitution, the "practical effect . . . would be to allow the doctrine of sovereign immunity to 'stand as a barrier to North Carolina citizens who seek to remedy violations of their rights' under Articles II

through XVI of the North Carolina Constitution—a result the Court could not accept. *Id.* at 338, 678 S.E.2d at 354.

A few years later, the Court of Appeals held that in light of the Supreme Court's decision in *Craig*, the short-lived decision in *Petroleum Traders* was no longer good law. See *Richmond Cty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 739 S.E.2d 566, *disc. rev. denied*, 367 N.C. 215, 747 S.E.2d 553 (2013). Like *Craig*, *Richmond County* also involved Article IX claims, like the ones here. *Id.* And just as the Supreme Court held in *Craig*, the Court of Appeals in *Richmond County* held that those Article IX claims were not subject to sovereign immunity. *Id.*

Indeed, the Court in *Richmond County* recounted a long “line of cases allowing constitutional claims to proceed against the State under Article IX of our Constitution.” *Id.* at 590, 739 S.E.2d at 571. The Court also noted that it had “uncovered no case in which a plaintiff's Article IX constitutional claim was barred by the defense of sovereign immunity.” *Id.*

Despite all this, the State now invites this Court to apply sovereign immunity to the Board's Article IX claims. The State even relies on the overruled decision in *Petroleum Traders*. State's Br. at 8-10. Meanwhile, the State gives the Supreme Court's decision in *Craig* a passing mention, without acknowledging that it overruled *Petroleum Traders*. The State also did not call to this Court's attention the Court of Appeals' decision in *Richmond County*. *Id.*

While the Board appreciates the State's prerogative to advance a good faith argument for the extension, modification, or reversal of existing law, the State's

sovereign-immunity argument disregards controlling authority and should be rejected.

Similarly, the State's pleading-sufficiency argument, which is premised on its view of sovereign immunity, is inappropriate. The State contends that the complaint should be dismissed because it did not "allege that the State has waived its immunity." State's Br. at 7. Again, however, the State has no immunity from the claims in this lawsuit to begin with, because sovereign immunity does not apply to Article IX claims. *See supra* at 2-3. Thus, as our courts have recognized, it was unnecessary for the Board to plead that sovereign immunity is inapplicable. *See, e.g., Bolick v. Cty. of Caldwell*, 182 N.C. App. 95, 98, 641 S.E.2d 386, 389 (2007) (holding that when sovereign immunity does not apply, a "plaintiff is under no requirement to plead a waiver of sovereign immunity," because a "defendant could not waive an immunity that it did not possess").

For these reasons, the State's jurisdictional arguments should be rejected.

II. DEFENDANTS' SUBSTANTIVE ARGUMENTS ARE MISPLACED.

A. The phrase "subject to laws" does not allow the General Assembly to transfer the Board's constitutional powers and duties to someone else.

Defendants' primary defense to this lawsuit is their claim that the phrase "subject to laws enacted by the General Assembly" in Article IX, Section 5 gives the General Assembly unlimited authority to rearrange or "reallocate" (in Defendants' words) the constitutional responsibilities for managing our public schools. SPI's Br. at 23-24.

As support for their view, Defendants point to several North Carolina decisions that have addressed circumstances arising under Article IX, Section 5. None of these decisions, however, either address or support Defendants' argument.

There is a simple reason for this: In the Board's nearly 150-year existence, North Carolina's courts have never had to confront whether the legislature can transfer the Board's express constitutional powers and duties to someone else. Until December 2016, the constitutionally defined roles of the General Assembly the Board were understood.

Those constitutionally defined roles have also been embraced by the North Carolina cases interpreting the phrase "subject to laws" under Article IX, Section 5. Those cases fall into one of two categories:

First, the courts have held that Article IX, Section 5 permits the General Assembly to enacting legislation *repealing* the Board's decisions. *See Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971) (recognizing legislative repeal of Board's teacher-certification regulation).

Second, the courts have held that Article IX, Section 5 permits the General Assembly to enact legislation *repealing* the Board's decisions—in other words, by "occupying the field," as that term is used in preemption cases. *See State v. Whittle Commc'ns*, 328 N.C. 456, 402 S.E.2d 556 (1991) (recognizing legislature's preemption of Board's decisions on supplementary teaching materials); *N.C. Bd. of Exam'rs for Speech & Language Pathologists and Audiologists v. N.C. State Bd. of Educ.*, 122 N.C. App. 15, 468 S.E.2d 826 (1996), *aff'd*, 345 N.C. 493, 480 S.E.2d 50

(1997) (recognizing legislature's preemption of Board's regulations directed at speech pathologists); *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 673 S.E.2d 667 (2009) (recognizing legislature's preemption of Board's role in charter school funding disputes).

These two lines of cases reflect how Article IX, Section 5 was intended to function—and has, in fact, functioned—for nearly 150 years. Under these two lines of cases, the Board has the express power and duty to manage the public schools, and the phrase “subject to laws” allows the General Assembly to “alter, amend, or repeal” the Board's decisions—a built-in, constitutional checks-and-balances mechanism for our public schools. *See* 1868 N.C. Const. art. IX, § 9; 1942 N.C. Const. art. IX, § 9; 1971 N.C. Const. art. IX, § 5; *see also Guthrie*, 279 N.C. at 710, 185 S.E.2d at 199 (observing that there is no substantive difference between the 1868 Constitution and the current 1971 Constitution).

Here, however, the legislature did not merely “check” the Board on one of its decisions, as in the cases above. Instead, the legislature tried to *eliminate* the Board's role in public education altogether by transferring away its constitutional powers and duties to someone else. North Carolina's courts have never had occasion to consider a situation like this. This case is the first.

Fortunately, the Court is not addressing this first-impression issue on a blank slate. Long before the Attorney General's Office was engaged to represent the Defendants in this case, it issued an opinion on this precise issue. A 1994 Attorney General's Opinion confirmed that while the legislature could “limit” or “revise” the

Board's decisions under the checks-and-balances mechanism in Article IX, Section 5, the legislature could *not* transfer the Board's constitutional powers and duties to another entity. 1994 Op. N.C. Att'y Gen. 41. As the Opinion explained, "a legislative act *transferring* the State Board's constitutional power . . . would amount to more than a limitation or revision" under Article IX, Section 5, and instead, "would amount to the *denial* to the State Board of a power conferred on the State Board by the people." *Id.* (emphasis added).

The following year, the Attorney General again recognized this same principle, noting that this principle is followed uniformly in other states. *See* 1995 Op. N.C. Att'y Gen. 32 ("If powers are 'specifically conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize [those powers] to be performed by any other officer or authority.'") (quoting Thomas M. Cooley, *Constitutional Limitations* 213-15 (1927)).

The Attorney General was correct that this principle is followed uniformly in other states. Courts in other states that have considered this issue have held that the phrase "subject to laws" (or similar language) does not permit the legislature to eliminate or transfer constitutional powers and duties that a state constitution expressly confers on a particular entity. Bd. Br. at 12-13 (collecting cases); *see also, e.g., Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953)) (noting that state courts have "uniformly denounce[d]" the same arguments that Defendants make here).

As one recent example, the Wyoming state legislature in *Powers v. State*, 318 P.3d 300, 313 (Wyo. 2014), attempted to strip the Superintendent of Education of

various state-constitutional powers, relying on language in the state constitution providing that the Superintendent's powers "shall be prescribed by law." Like the Transfer Legislation here, the transfer legislation in *Powers* replaced the word "Superintendent" with the word "Director" (the new position) in virtually every applicable statute. *Id.*

The Wyoming Supreme Court rejected the attempted power transfer. The Court explained that "[w]hile the legislature can prescribe powers and duties of the Superintendent, it cannot eliminate or transfer powers and duties to such an extent that the Superintendent no longer maintains the power of 'general supervision of the public schools'"—in other words, the powers expressly conferred by the state constitution. *Id.* The Court determined that the Superintendent's remaining "limited and piecemeal" powers did not comport with the constitutional mandate that the Superintendent be responsible for "general supervision" of the public schools. *Id.* at 321. In other words, the Wyoming Constitution's "prescribed by law" provision did not provide the legislature with "unlimited authority" to delineate the powers and duties of the Superintendent. *Id.* at 323.

The same analysis applies here. Indeed, Defendants apparently concede—as they must—that the Transfer Legislation does not merely repeal or preempt a decision by the Board; instead, it attempts to *eliminate* the Board's express constitutional powers and duties by transferring them to the SPI.

The nature of this transfer is especially egregious given the "directly delegated" nature of the Board's constitutional powers and duties, which the

Supreme Court in *Guthrie* specifically recognized. *Guthrie*, 279 N.C. at 710, 712, 185 S.E.2d at 198-99. By “directly delegating” this broad, sweeping power to the Board in the Constitution itself, the people elevated the Board to a unique status. *Id.* They made it *mandatory* for the Board—and not some other officer—to hold those “directly delegated” powers and duties. N.C. Const. art. IX, § 5 (stating that “[t]he State Board of Education *shall* supervise and administer the free public school system and the educational funds provided for its support”) (emphasis added). Thus, by attempting to “reallocate” (in Defendants’ words) to the SPI the framer’s “direct delegation” of powers and duties to the Board, the General Assembly is attempting to do by statute what only the people can do by constitutional amendment. State’s Br. at 12, 16; SPI’s Br. at 16, 23-24.

In sum, while North Carolina’s Article IX, Section 5 case law has never addressed a legislative maneuver this extreme, bedrock principles of constitutional law—including those relied on by the Attorney General and other state supreme courts—condemn Defendant’s position.

B. The Transfer Legislation is not a “codification” of the SPI’s limited constitutional role.

Next, Defendants contend that the Transfer Legislation merely “codifies” the SPI’s constitutional role. As support for this contention, Defendants exaggerate the SPI’s role in ways that lack support in the constitutional text.

For instance, the State refers to the SPI as a constitutional “executive,” a “chief operating officer,” and even the Board’s “chief executive,” who enjoys “executive discretion.” State’s Br. at 14, 15, 16, 17, 19. None of these new, made-up

titles and powers, however, can be found anywhere in the North Carolina Constitution.

Instead, the North Carolina Constitution clarifies the opposite: The SPI has an extremely narrow constitutional role. Under Article IX, Section 4, the SPI's role is limited and subservient to the Board. N.C. Const. art. IX, § 4. The SPI is merely the non-voting, "secretary and chief administrative officer *of* the Board"—in other words, the officer who takes minutes at the Board's meetings and carries out various administrative functions at the direction of the Board. *Id.* (emphasis added).

This narrow role for the SPI is the product of the 1971 amendments to the Constitution. At the time the amendment passed, its framers explained that it was intended to "modif[y] 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." *Report of the State Constitutional Study Commission* at 87 (1968). Thus, "[a] potential conflict of authority between the Superintendent and the Board [was] eliminated by making clear that he is the administrative officer *of* the Board," and that by contrast, the Board "is to administer the public schools under [Article IX, Section 5]." *Id.* (emphasis added). In other words, in its current form, the North Carolina Constitution makes the SPI subservient to the Board, not the other way around.

In view of this amendment and the current constitutional text, Defendants' made-up titles and "executive" powers of the SPI amount to fiction. In reality, the

Transfer Legislation attempts to reopen the “potential conflict of authority” that the 1971 amendment conclusively resolved.

For these reasons, Defendants’ argument that the Transfer Legislation is a “codification” of the SPI’s constitutional role is incorrect.

C. Older statutes, such as the 1995 legislation involving the Board, are irrelevant to this Court’s enforcement of the North Carolina Constitution.

Next, Defendants argue that the Transfer Legislation should be deemed constitutional because the General Assembly has passed a number of statutes over the years that have made “modifications” to the powers and duties of the State Board. SPI’s Br. at 2. This argument fails for at least three reasons.

First, it is a basic premise of constitutional law that a legislature cannot defend the constitutionality of a statute by referring to more of its own statutes. *See, e.g., INS v. Chadha*, 462 U.S. 919, 967-75 (1983) (striking down legislative veto as unconstitutional despite its inclusion in hundreds of federal statutes dating back half a century). In essence, Defendants’ argument reduces to a “we’ve done it before” defense, which has no place in constitutional litigation. *See, e.g., New York v. United States*, 505 U.S. 144, 182 (1992) (striking down unconstitutional appropriation of another branch’s power, even when both branches had historically acquiesced).

Second, while Defendants contend that the Transfer Legislation is merely an amendment to legislation enacted in 1995, that contention rings hollow. The 1995 legislation simply confirmed the Board’s *constitutionally granted* powers, and served as a legislative recognition (albeit an unnecessary one) of what the North

Carolina Constitution had already provided since 1868. Just as the North Carolina Constitution has always made clear that the Board directs the SPI, and not the other way around, so did the 1995 legislation. *Compare* N.C. Session Law 1995-72 s. 1 (“[T]he 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.*”) (emphasis added), *with* N.C. Const. art. IX, § 5 (stating that “[t]he State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support”), *and id.* § 4(2) (“The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.”) (emphasis added).

It follows, then, that the General Assembly cannot use the 1995 legislation (or any other legislation) as a vehicle for transferring the Board’s constitutional powers and duties to the SPI simply by replacing the words “Board of Education” with “Superintendent of Public Instruction.” To accept this notion would be to allow the General Assembly to flip the framer’s constitutional design upside-down under the guise of “merely amending prior legislation.”

Indeed, this ruse is no different than if the General Assembly enacted a statute—albeit an unnecessary one—“codifying” the Governor’s constitutional veto power, then revised that statute years later to strip the Governor of the veto power and transfer that power to the Commissioner of Agriculture. Clearly, such a “statutory amendment” could not deprive the Governor of the constitutionally

granted veto power. As this example shows, the 1995 legislation—or any other past legislation, for that matter—is not a basis for justifying the Transfer Legislation.

Finally, none of the statutes that Defendants cite shed any light on the constitutionality of the Transfer Legislation for another important reason: None of these statutes attempted to strip the Board of its constitutional powers and duties and give those powers and duties to someone else. Rather, as described above, the Transfer Legislation is the only time the General Assembly has attempted to do so in the nearly 150-year history of the Board. Thus, these older statutes are simply irrelevant to the issue of first impression presented here.

For each of these reasons, Defendants cannot justify the Transfer Legislation by pointing to more legislation.

D. The *Atkinson* case actually undermines Defendants' position.

Next, the State cites *Atkinson v. State*, No. 09-CVS-006655, a 2009 decision of the Wake County Superior Court. State's Br. at 19. The State's mention of this decision is puzzling because, as a trial-court decision, it does not have precedential value. See *Bottom v. Bailey*, 238 N.C. App. 202, 212, 767 S.E.2d 883, 889 (2014). Even if it did, though, the *Atkinson* decision actually supports the Board's position and undermines Defendants' position.¹

Atkinson also involved an attempted reallocation of constitutional roles by the General Assembly. There, however, the law attempted to transfer the SPI's constitutional role to a third-party "Chief Executive Officer." *Atkinson* Order at 1-2.

¹ Notably, the SPI did not cite *Atkinson* in his summary-judgment brief.

The *Atkinson* Court rejected the General Assembly's attempt to rearrange constitutional roles, and it relied on the same legal principle that the Board asks this Court to follow here: that the reallocation of constitutional roles cannot be accomplished "without a constitutional amendment." *Atkinson* Order (State Ex. 3) at 1-2. The fact that the General Assembly's attempted transfer of "inherent power" in *Atkinson* flowed *away* from the SPI instead of *toward* the SPI, as the Transfer Legislation attempts here, does not change the result.

In this same vein, the State's argument that the Transfer Legislation "does nothing more than codify" *Atkinson* cannot withstand a review of that decision. State's Br. at 19. Even the portion of *Atkinson* that the State quotes in its brief shows that the State's assertion is incorrect. That passage states that "[t]he duties and responsibilities for . . . administering the North Carolina public school system *as directed by the State Board of Education* are vested in the [SPI]." *Id.* (emphasis added). In other words, the *Atkinson* Court also recognized that the SPI is subservient to the Board, and not the other way around.

In sum, *Atkinson* only undermines Defendants' arguments.

E. The SPI's own "difficulties" in adjusting to the job are irrelevant to this Court's enforcement of the North Carolina Constitution.

Lastly, the SPI attempts to buttress his legal arguments with a litany of complaints about his first few months in office, which he apparently found "frustrating." SPI's Br. at 22. For example, the SPI describes how he became upset when the bipartisan Board's thirteen members decided not to hire someone that he felt would have been a "positive change agent." SPI's Aff. ¶ 12.

The SPI's complaints are misguided, but more importantly, they are irrelevant. This Court's task is to enforce the North Carolina Constitution, not provide a forum for airing political or personal grievances.

The SPI's brief acknowledges that his own "difficulties" in adjusting to the job are not "a legal basis upon which a decision in this case should turn." SPI's Br. at 23. The SPI is correct on that point. Accordingly, the Court should disregard these materials as irrelevant.

F. The State's arguments in opposition to the Board's motion for summary judgment and motion for preliminary injunction are premature.

The Court's Case Management Order (as modified) called for the parties to submit "motions and supporting briefs" on April 12, 2017. Case Management Order ¶ 2. The State's brief, however, contains seven pages of argument anticipatorily *opposing* the Board's not-yet-filed brief in support of its motion for summary judgment and preliminary injunction. State's Br. at 17-23. These arguments are premature.

Accordingly, the Board will reply to these arguments when the Board files its reply brief on June 9, 2017.

CONCLUSION

The Board respectfully requests that the Court grant its motion for summary judgment and grant its motion for a preliminary injunction while the Court considers the Board's motion for summary judgment.

Respectfully submitted the 19th day of May, 2017.

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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:

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Superintendent of Public Instruction*

This the 19th day of May, 2017.



Andrew H. Erteschik

STATE OF NORTH CAROLINA

COUNTY OF WAKE

NORTH CAROLINA STATE BOARD OF
EDUCATION,

Plaintiff,

vs.

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

Defendants.

~~IN THE~~ **GENERAL COURT OF JUSTICE**
SUPERIOR COURT DIVISION

16 CVS 15607

2017 MAY 19 P 3:44

WAKE CO., N.C.

BY

**THE STATE OF NORTH CAROLINA'S RESPONSE TO PLAINTIFF'S MOTIONS FOR
SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION**

NOW COMES Defendant, the State of North Carolina, (the "State"), by and through the undersigned counsel, the Honorable Josh Stein, Attorney General of North Carolina, and Special Deputies Attorney General Olga Vysotskaya and Amar Majmundar, and responds to the North Carolina State Board of Education's (the "Board") Brief in Support of its Motion for Summary Judgement, and Motion for Preliminary Injunction. The Board's motions should be denied, and summary judgment should instead be entered against the Board as a matter of law.

INTRODUCTION

With its brief in support of its Motions for Summary Judgment and Preliminary Injunction, the Board argues that its constitutionally accorded authority cannot be usurped by legislation. On that very broad point, the State agrees. However, the Board extrapolates from that generic principle to conclude that its powers are inviolate; beyond the reach of the General Assembly and the populace it serves. In drawing that conclusion, the Board overlooks the legislative authority expressly embedded in the exact section of the Constitution that describes the Board's duties. Consequently, the Board has drawn incorrect conclusions regarding the

authority accorded to the General Assembly, the constitutionality of House Bill 17, ("HB 17"), and the merits of its Motion for Summary Judgment.

STANDARD OF REVIEW

The State incorporates by reference the standard of review for summary judgment and preliminary injunction, as set out in the State's principal Brief. (State Br pp 4-6). The State further draws the Court's attention to the principle that summary judgment may also be rendered against the movant, in favor of the non-moving party. *Clodfelter v. Bates*, 44 N.C. App. 107, 111, (1979), *cert. denied*, 299 N.C. 329 (1980) ("If [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.") Here, summary judgment against the Board on its facial challenges to HB 17 is appropriate.

ARGUMENT

I. THE GENERAL ASSEMBLY OPERATED WITHIN THE PARAMETERS OF ITS LEGISLATIVE AUTHORITY WHEN IT ENACTED HB 17.

A. The Board's General Powers To "Supervise and Administer the Free Public School System" Are "Subject to Laws Enacted by the General Assembly." N.C. Const., Art. IX, Sect. 5.

The framers of the North Carolina Constitution created a three-legged stool to support the operation of North Carolina's public education system: "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools[.]" N.C. Const., Art. IX, Sect. 2; the Superintendent is a constitutional officer, whose "respective duties shall be prescribed by law[.]" N.C. Const., Art. III, Sect. 7; and, the Board's supervisory, administrative and rule-making powers are "subject to laws enacted by the General Assembly." N.C. Const., Art. IX, Sect. 5. In its Brief, the Board argues that its "constitutional powers cannot be

transferred by statute.” (Pl MSJ Br p 5) It is accurate to note that the authority of a constitutional office cannot be transferred to another entity through the auspice of legislative enactments. *King v. Hunter*, 65 N.C. 603 (1871). Yet, the Board’s contentions are nevertheless without merit because (1) this general principle does not abrogate the General Assembly’s constitutional authority under N.C. Const., Art. III, Sect. 7 and Art. IX, Sect. 2; and, (2) the Constitution expressly limits the Board’s administrative and supervisory role over public education by making the Board subordinate to the “laws enacted by the General Assembly.” N.C. Const., Art. IX, Sect. 5. Consequently, HB 17 legitimately arises from the constitutionally dictated public education structure envisioned by the framers. This system of constitutional checks and balances, which guide the administration of public education, is fatal to Board’s action.

B. Given Historical Precedent And The Legislature’s Constitutional Authority, HB 17 Permissibly Assigns Executive Powers Of The Board To Its Chief Administrative Officer, The Superintendent Of Public Instruction.

In support of its position that HB 17 is an unlawful transfer of powers, the Board offers an interpretation of the history of North Carolina’s constitutional and statutory framework of the management of public education. (Pl MSJ Br pp 6-11) As argued in the State’s principal Brief, the Board misapprehends the constitutional, statutory, and historical predicates for the administration of the State’s public schools. (State Br pp 14-17)

Like the Board itself (which was created as a successor to the Directors of the Literary Fund), the office of Superintendent was established by the N.C. Constitution of 1868. 1868 N.C. Const., Art. IX, Sect. 7. Since that time, by revisions to the Constitution in 1942, 1944 and 1971, the membership of the Board has changed three times. The 1942 amendment provided that the “State Superintendent of Public Instruction shall have general supervision of the public schools.”

The subsequent 1944 amendment further provided that “[t]he State Superintendent of Public Instruction shall be the administrative head of the public school system.”

In 1968, the North Carolina Constitution Study Commission proposed to eliminate the Superintendent as a State-elected officer. The proposal was never submitted to the North Carolina voters for ratification. Instead, the 1971 Constitution set out the Superintendent’s role as “the secretary and chief administrative officer of the State Board of Education.” In general, the composition of the Board, and the role of the State Superintendent of Public Instruction, have been the most frequently amended provisions in Article IX. (See State Ex. 6 “Atkinson Complaint” pp 4-10 summarizing applicable constitutional history).¹ Nevertheless, both offices are rooted in the Constitution, and both are subject to legislative limits that prescribe the course and scope of their respective duties regarding the administration of public schools.

From the standpoint of statutory authority, and despite the Board’s contrary suggestions, the division of power between the Board and the Superintendent has also varied over time. (See State Br pp 16, 20; Superintendent’s Br pp 16-22) Prior to 1995, the duties of the Superintendent were not subject to the “direction, control and approval” of the State Board, and instead the Superintendent was recognized as the constitutional head of the public school system. (See State Ex. 6 “Atkinson Complaint” pp 10-12 summarizing statutory changes). Session Law 1995-72, (State Ex. 5), shifted portions of the Superintendent’s statutory authority to the Board. In essence, that legislation modified N.C. Gen. Stat. §§ 115C-19, 115C-21, 143A-39, 143A-40, and 143A-42 by limiting the scope of the Superintendent’s authority, and granting additional power to the Board.

¹ For convenience, the State labels exhibits attached hereto consecutively from those submitted with its principal Brief.

In keeping with Session Law 1995-72, HB 17 amends N.C. Gen Stat., Art 115C and 143B, and once again merely assigns and clarifies the respective roles of the Board and the Superintendent. Similar to previous statutes enacted pursuant to Article IX, section 5, HB 17 was also promulgated directly through the General Assembly's constitutional authority. Despite the Board's protestations, HB 17 does not strip away the Board's constitutional powers, but instead simply redefines powers that are subject to legislative modification. *See Guthrie v. Taylor*, 279 N.C. 703, 710 (1971) *cert. denied*, 406 U.S. 920 (1972); *State v. Whittle Communications*, 328 N.C. 456, 464 (1991). That realignment reinstates the Superintendent's pre-1995 duties, while cementing the Board's obligations to set educational policies through the promulgation of guidelines, rules, and regulations.

In summary, the Board's warnings of constitutional transgressions are belied by the history of legislative and constitutional changes regarding the administration of our State's public schools. The General Assembly has done nothing more than reorient the statutorily-prescribed aspects of the respective powers and duties of the Board and the Superintendent. The Board has failed to establish that its constitutional role is impermissibly subverted by HB 17.

C. Article IX, Sect. 5 Of The N.C. Constitution Permits The General Assembly To Enact Laws That Define And Direct The Board's Role.

In support of its argument, the Board cites out of context a portion of the transcript from the previous Temporary Restraining Order hearing to argue that the State conceded the issue of whether the General Assembly could enact laws that strip the Board of its constitutional powers. (Pl MSJ Br p 11). This citation highlights the Board's misperception of the parameters of the present argument: the question is not whether a statute may undercut constitutional authority, but rather, whether Article IX, section 5 provides an express legislative role in shaping the Board's authority. Although the Board possesses authority to "supervise and administer the free public

school system,” it is nevertheless also “subject to laws enacted by the General Assembly.” N.C. Const., Art. IX, Sect. 5.²

Similarly, the Board misapprehends the State’s arguments at the TRO hearing pertaining to the Superintendent’s constitutional role. Contrary to the Board’s suggestion, the State did not argue that any constitutional officer is free to supervise or administer the public school system. (PI MSJ Br p 12) Instead, the State argued that Article IX, section 5 authorizes the General Assembly to prescribe duties owed by the Superintendent and the Board. The Board’s fears that the “public school system would be supervised and administered by any government official or entity of its choice – even private entities or individuals” is simply a straw-man. (PI MSJ Br p 12) The Board and the Superintendent both possess constitutional responsibilities in relation to the State’s public schools, and the legislature may enact laws that shape that relationship.

It is certainly true that the “legislature could not reduce [a] constitutional office to an empty shell[.]” (PI MSJ Br p 12) HB 17 does no such thing. Neither the Superintendent nor the State have ever suggested that “the General Assembly can strip the Board of its constitutional powers and duties[.]” (PI MSJ Br p 14) Instead, the State simply points to the plain reading of Article IX, Section 5’s expression of a constitutional limitation on the Board through “laws enacted by the General Assembly.” According to the Supreme Court, “*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.’*” *State v. Whittle Communications*, 328 N.C. at 464 (emphasis added). Referring to similar revisions to the Constitution in 1943, the Supreme Court held that the language “subject

² Naturally, the State does not contend that the General Assembly maintains unbridled authority to enact laws pertaining to the role of the Board. However, the limits of those laws should be addressed through fact-based, as-applied challenges, rather than the academic, speculative and theoretical “slippery slope” concerns raised by the Board. (PI MSJ Br p 12)

to such laws as may be enacted from time to time by the General Assembly” found in Article IX, section 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.” *Guthrie v. Taylor*, 279 N.C. 703, 710 (1971), *cert. denied*, 406 U.S. 920 (1972). Accordingly, in interpreting the powers of the Board, this Court is to “examine our statutes to ascertain whether the General Assembly has enacted laws which would limit the power of the State Board” *Whittle Communications*, 328 N.C. at 464.

Contrary to Plaintiff’s unfounded concerns, the constitutional powers of the Board are explicitly recognized in HB 17. The General Assembly required the Superintendent to “provide technical assistance and administrative assistance ... to the State Board of Education through the Department of Public Instruction[,] N.C. Gen. Stat. § 115C-11(i), recognizes that the Board “shall establish all needed rules and regulations” and “the Superintendent of Public Instruction ... shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction[,]” N.C. Gen. Stat. §§ 115C-12, 115C-19, and acknowledged that Superintendent’s various administrative duties are subject to “rules and regulations established by the State Board.” N.C. Gen. Stat. § 115C-21. Although its powers have now been clarified by the General Assembly, it is incorrect to suggest that the Board has been reduced to an “empty shell” with the promulgation of HB 17. The Board errs when it fails to recognize that under Article IX, section 5, the General Assembly has, and may continue to articulate the responsibilities of the Board, whether they be sweeping or narrowly tailored. This Court should avoid that same error. For the reasons discussed above, the Board’s Motion for Summary Judgment should be denied, and judgment should be entered against it, as a matter of law.

II. THE MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED AS THE BOARD FAILED TO ESTABLISH ITS LIKELIHOOD OF SUCCESS ON THE MERITS, AND THE IRREPARABLE HARM IN THE ABSENCE OF INJUNCTION.

Preliminary injunction is an extraordinary measure, which acts as a restraint upon a party pending the final determination of a case, on the merits. N.C. Gen. Stat. § 1A-1, Rule 65. "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).³

The Board has neither sustained its burden of establishing that it will likely prevail on the merits of the case, nor that it will be irreparably harmed absent injunction. To the contrary, as argued above and in the State's opening brief, an entry of summary judgment in favor of the State is appropriate in light of the pleadings and supporting materials submitted by the parties with their initial briefs. HB 17 is a proper exercise of the legislative authority over public education that has been granted to the General Assembly by the N.C. Constitution. Further, HB 17 is consistent with the constitutional role of the Superintendent, and does not improperly encumber the Board's own authority over public schools.

HB 17 simply restores the authority of the Superintendent, as the administrative head of the Department, which existed prior to the 1995 statutory changes that assigned greater authority to the Board. The Board has not demonstrated, nor even contended, that any public harm resulted from past legislative changes. Similarly, the Board has failed to establish any

³ Again, for convenience, the State incorporates by reference its previous argument and authorities cited against the grant of preliminary injunction. (State Br pp 17-23)

irreparable loss stemming from the current legislative modifications, which are authorized and memorialized by our State's constitution. As such, this Court should reject the Board's unfounded predictions of constitutional ruination, and refuse to enjoin the State from implementing HB 17.

CONCLUSION

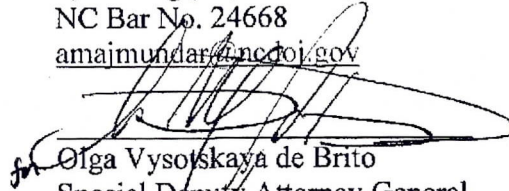
For the foregoing reasons, the State respectfully requests this Court to grant summary judgment in its favor, and deny Plaintiff's Motions for Summary Judgement and Preliminary Injunction.

This the 19th day of May, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing the State of North Carolina's Response to Plaintiff's Motions for Summary Judgment and Preliminary Injunction 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:

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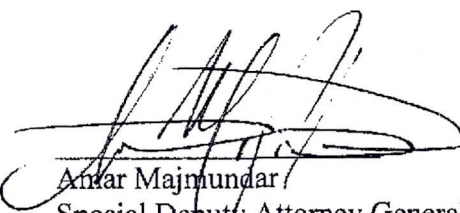
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This the 19th day of May, 2017.


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Special Deputy Attorney General

096V0116555

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

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

Plaintiffs,

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.

**COMPLAINT AND PETITION FOR
DECLARATORY JUDGMENT**

Plaintiffs, by and through undersigned counsel, file this Complaint and Petition for

Declaratory Judgment. Plaintiffs, complaining of Defendants, allege and say:

INTRODUCTION

1. This action is brought pursuant to the Uniform Declaratory Judgment Act, N.C.G.S. § 1-253 to challenge the constitutionality of certain acts of the Governor of North Carolina, the General Assembly, and the North Carolina State Board of Education ["State Board"] in connection with the duties and authorities of the State Superintendent of Public Instruction ["Superintendent"], specifically those acts which impede or otherwise interfere with the duties and responsibilities of the Superintendent as the administrative head of the public school system of the State, as well as those acts which relate to and purportedly create the position of Chief Executive Officer ["CEO"], which position usurps the constitutional authority of the Superintendent.

PARTIES

(Plaintiff)

Pursuant to the Uniform Declaratory Judgment Act, the following individual is petitioning for a declaration as to the unconstitutionality of the acts of Defendants as hereinbelow set forth and a declaration of the scope of the constitutional powers of the office of the Superintendent as identified at Article III, Section 7 and Article IX, Sections 4 and 5 of the North Carolina Constitution, and for the purposes of this action is denominated as "Plaintiff":

2. Plaintiff June St. Clair Atkinson, Ed.D., individually is a citizen and resident of Wake County, North Carolina. Dr. Atkinson, in her official capacity, is the duly elected Superintendent of Public Instruction for the State of North Carolina with her official offices in Raleigh, Wake County, North Carolina. As Superintendent, Dr. Atkinson also serves as Secretary of the State Board which is headquartered in Raleigh, Wake County, North Carolina. Accordingly, Dr. Atkinson has an interest in and seeks a declaration as to the unconstitutionality of certain acts of the Governor of North Carolina, the General Assembly, and the State Board in connection with the duties and authorities of the Superintendent, specifically those acts which

impede or otherwise interfere with the duties and responsibilities of the Superintendent to be the administrative head of the public school system of the State, as well as those acts which relate to and purportedly create the position of CEO of the State Board of Education and thereby usurp the constitutional authority of the Superintendent.

(Defendants)

Pursuant to N.C.G.S. § 1-260, the following are joined as parties who have an interest

which would be affected by the declaration sought, and are for purposes of this action

denominated as "Defendants":

3. Defendant State of North Carolina is a general purpose state government which is capable of being sued, and which is being sued, for enacting as more specifically set forth below (through the General Assembly) legislation in violation of the North Carolina State Constitution, and for usurping (through the Governor and the State Board) the constitutional authority of the Superintendent.

4. Defendant Beverly Perdue is the Governor of the State of North Carolina and is sued in her official capacity for her actions as hereinbelow set forth which attempt to usurp the constitutional authority, duties and responsibilities of the office of the Superintendent.

5. Defendant State Board of Education and its members, identified below, are sued for

actions as herein below set forth which attempt to usurp the constitutional authority, duties and responsibilities of the office of the Superintendent. Defendants Walter Dalton, in his official

capacity as Lieutenant Governor of the State of North Carolina, and Janet Cowell, in her official capacity as State Treasurer of the State of North Carolina, are sued in their official capacities only as members of the State Board of Education. Kathy Taff, Ray Durham, Kevin Howell, Shirley E. Harris, Melissa E. Bartlett, Robert Thomas Speed, Wayne McDewitt, Patricia N.

Willoughby, John A. Tate, III, and William Harrison are each citizens and residents of the State of North Carolina; each is a current member of the State Board of Education and each is sued in his or her official capacity only as a member of the State Board. Defendant Harrison is chairman of the State Board and also CEO of the State Board, having been hired by the State Board of Education, and is sued in that official capacity as well. Defendants listed in Paragraph numbered 5 of this Complaint are hereinafter referred to as the "State Board Defendants."

JURISDICTION AND VENUE

6. This action is brought pursuant to N.C.G.S. § 1-253, the Uniform Declaratory Judgment Act, for the purpose of determining the constitutionality of certain actions of the State of North Carolina by and through the Governor, the General Assembly, and the State Board of Education. This Court has jurisdiction over the subject matter of this action pursuant to N.C.G.S. § 1-253, the Uniform Declaratory Judgment Act.

7. This Court has jurisdiction over the parties pursuant to N.C.G.S. § 1-75.4.

8. Venue is proper in this Court pursuant to N.C.G.S. § 1-82.

FACTUAL BACKGROUND

Constitutional History

9. The office of Superintendent was duly constituted in 1868, and pursuant to Article IX, Section 7 of the 1868 North Carolina Constitution, the Superintendent served as a member of the State Board, together with the Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works and Attorney General. Article IX, Section 7 of the

1868 North Carolina Constitution provided: "The Governor shall be President, and the Superintendent of Public Instruction shall be Secretary, of the Board of Education."

10. The 1868 Constitution further provided, at Article III, section 13: "The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Works, Superintendent of Public Instruction, and Attorney General shall be prescribed by law."

11. Pursuant to constitutional amendment approved by an act of General Assembly in 1941, captioned "An Act to Amend the Constitution Providing for the Organization of the State Board of Education and the Powers and Duties of the Same," and ratified by the people on November 3, 1942, Article IX of the 1868 State Constitution was amended so that the State Board would, from and after the first day of April 1943, consist of the Lieutenant Governor, State Treasurer, Superintendent of Public Instruction, and one member from each Congressional District to be appointed by the Governor. Article IX, Section 8 was further amended to provide: "The State Superintendent of Public Instruction shall have general supervision of the public schools and shall be secretary of the board." Pursuant to Section 9 of this Amendment, the powers and duties of the State Board were set forth with more specificity.

12. Pursuant to a constitutional amendment adopted by the General Assembly in 1943, captioned "An Act to Amend the Constitution Providing for the Organization of the State Board of Education," and ratified by the people on November 7, 1944, Article IX, section 8 of the 1868 Constitution was further refined. The 1943 Amendment specified that "[t]he general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, except those mentioned in Section five of this Article, shall . . . be vested in the State Board of Education to consist of the Lieutenant Governor, State Treasurer, the Superintendent of Public Instruction, and ten members to be appointed by the Governor[.]"

13. The 1943 Amendment also established: "The State Superintendent of Public Instruction shall be the administrative head of the public school system and shall be secretary of the board."

14. In 1967, the North Carolina State Bar and the North Carolina Bar Association created the North Carolina State Constitution Study Commission ["the Commission"] at the request of then North Carolina Governor Dan K. Moore. The Commission divided its membership into four subject-matter committees.

15. On or about October 18, 1968, the Committee on Declarations of Principles and Policies and Miscellaneous to the Commission ["the Committee on Declarations"] issued a summary report of that committee ["Summary Report"], a copy of which is attached hereto as Exhibit A and incorporated by reference. This committee conducted a section-by-section review of the State Constitution for the purpose of classifying each section as (a) sound and useful as presently written, or (b) sound and useful but in need of some modification in language or arrangement, or (c) obsolete and unnecessary, or (d) questionable from the standpoint of substance and policy." Summary Report, p. 1.

16. According to the Summary Report, a number of "editorial changes" to the Constitution were proposed by the Committee on Declarations. The Committee explained: "*None of our proposed editorial changes are intended to change what we believe to be the meaning of the present Constitution.*" (Emphasis added). Study Report, p. 3. The Summary Report continued by discussing "substantive changes" proposed by the Committee. Summary Report, pp. 3-9. No changes to Article IX, Education, were among the substantive changes listed in the Summary Report, thus any such proposed changes were intended to be editorial only, without substantive effect.

17. On or about July 23, 1968, the Committee on Education, Welfare, and Criminal Justice issued its First Report to the Commission ["Education Committee First Report"]. Among the proposals was "Proposed Sec. 4 [which] modifies the State Board of Education by eliminating the State Superintendent of Public Instruction as a voting member of the Board while retaining him as the Board's Secretary. He is replaced by an additional at-large appointee. Continuity of board membership is not otherwise affected. The Board shall appoint the State Superintendent of Public Instruction, who will be its Secretary and chief administrative officer. (This will also require deletion of references to the Superintendent in Article III.)" Further the report states: "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." A copy of this report is attached hereto as Exhibit B and incorporated by reference.

18. On or about December 16, 1968, the Commission submitted its final report ["Commission Report"] to the North Carolina State Bar and the North Carolina Bar Association and through them to the Governor and the General Assembly of 1969. In this report, it is stated: "...we have framed a series of ten interrelated but mutually independent amendments for submission to the General Assembly and the voters of the State."

19. The Commission Report further states: "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." (Emphasis added).

20. The Commission Report further states: "Each of the other nine amendments incorporate 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."

21. The Commission Report set out the "proposed constitution" as Amendment 1 and also included Amendment 5, "Providing for a Change in the Mode of Selection of Certain State Executive Officers," an excerpted copy of which is attached hereto as Exhibit C and incorporated by reference. Included in Amendment 5 was a proposal to eliminate the Superintendent as a constitutionally elected officer under Article III and instead have the Superintendent elected by the State Board. Further, Amendment 5 set out the responsibility of the Superintendent to be "secretary and chief administrative officer of the State Board of Education."

22. The proposed constitution as set forth in Amendment 1 and submitted to the General Assembly included provisions eliminating the Superintendent as a member of the State Board and redefining the role of the Superintendent as "chief administrative officer of the State Board of Education."

23. The General Assembly of 1969 enacted Session Law 1258 which put forth a substantially amended state constitution tracking in most respects the proposed constitution submitted by the Commission as Amendment 1 to become effective on July 1, 1971, if ratified by the qualified voters of the State. Session Law 1258, the proposed constitution, was ratified by a majority of voters in the general election of 1970. The resulting constitution is known as the 1971 Constitution. In addition, the qualified voters of the state ratified 6 amendments to the

Constitution by majority vote on November 3, 1970. No amendment eliminating the Superintendent as an elected constitutional officer nor making the Superintendent subject to election or appointment by the State Board was submitted to the voters.

24. The ballot question submitted to voters in the general election of 1970 asked voters only to vote for or against "revision and amendment of the Constitution of North Carolina." 1969 S.L. 1258, § 3. The ballot question did not suggest that the proposed amendments to Article IX that were included in the proposed constitution, set forth as Amendment 1, would have any substantive effect whatsoever. Upon information and belief, it was not the intent of the framers of the constitution to make substantive changes. Rather, any substantive changes would be submitted in separate individual amendments to the voters.

25. Upon information and belief, the intent of the framers of the 1970 proposed constitution was to merely update, modernize and revise editorially the 1868 Constitution and amendments to it.

26. The 1970 proposed constitution revised Article IX, Section 4, in part, to read: "2. Superintendent of Public Instruction. The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education." Further the Superintendent was omitted from the list of members of the State Board.

27. The purported changes to Article IX described above were not submitted to the qualified voters of the State in 1970 as substantive changes, in that the same were submitted only as editorial amendments carrying no substantive effect.

28. The 1971 Constitution, at Article III, Section 7, provides for the election of a Superintendent by the qualified voters of the State in 1972 and every four years thereafter.

29. The 1971 Constitution amended the 1868 Constitution so that Article IX, Section 4 established the following as members of the State Board: the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The 1970 editorial amendment of the constitution included at Article IX, Section 4(2) stated: "The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education."

30. The 1971 Constitution further amended the duties of the State Board stating that the State Board shall supervise and administer the free public school system and the educational funds provided for its support and shall make all needed rules and regulations in relation thereto subject to laws enacted by the General Assembly. 1971 N. C. Const. Art. IX, § 5.

Efforts to Revise the Role of the Superintendent

31. The Legislative Research Commission filed a "Report to the 1987 General Assembly of North Carolina" relative to the Superintendent and the State Board. The report was a response to bills previously introduced in the General Assembly to change the governance structure of the public education system in North Carolina, in particular the roles and responsibilities of the Superintendent and the State Board.

32. An Advisory Opinion letter dated 10 December 1985 from the Attorney General signed by Andrew A. Vanore, Jr., Chief Deputy Attorney General, and Edwin M. Speas, Jr., Special Deputy Attorney General, was sent to Senator Robert D. Warren and Representative Edward N. Warren, both members of the General Assembly, a copy of which is attached hereto as Exhibit D and incorporated by reference. The letter which is part of the "Report to the 1987 General Assembly of North Carolina" states in part: "...it is doubtful that the General Assembly

without a constitutional amendment may take from the Superintendent of Public Instruction his responsibility as 'chief administrative officer' and confer that responsibility upon some other officer."

33. The Advisory Opinion also stated: "...it appears that the framers of the Constitution intended to make the Superintendent of Public Instruction, as the elected representative of the people, responsible for the administration of the powers conferred upon the State Board of Education."

34. Prior to 1995, the duties of the Superintendent were not subject to the "direction, control and approval" of the State Board, but instead the Superintendent administered the day-to-day operations of the public school system through the Department of Public Instruction subject to the general supervisory and administrative policy making authority of the State Board of Education and the laws of the state. In fact, the statutes in place prior to 1995 acknowledged the Superintendent as being the constitutional head of the public school system and having authority over all matters relating to the supervision and administration of the public school system.

35. In 1995, the General Assembly passed Session Law 1995-72, a copy of which is attached hereto as Exhibit E and incorporated by reference. Under this new statute, numerous historical and constitutional duties of the Superintendent were transferred to the State Board and the Superintendent and his or her actions were made subject to "the direction, control, and approval of the State Board of Education."

36. By S.L. 1995-72, the General Assembly enacted N.C.G.S. § 143A-39, captioned "Creation," which created a Department of Public Instruction pursuant to statute to be headed by the State Board rather than the Superintendent.

37. By S.L. 1995-72, the General Assembly enacted N.C.G.S. § 143A-42, captioned "Superintendent of Public Instruction; creation; transfer of powers and duties," which transferred the office of the Superintendent and the Department of Public Instruction created by the Superintendent to the Department of Public Instruction created pursuant to N.C.G.S. § 143A-39. The duty to organize and manage the Department of Public Instruction had previously been assigned to the Superintendent without the provision that the State Board serve as the head of the Department of Public Instruction.

38. Following enactment of S.L. 1995-72, then Superintendent Bob Etheridge requested an Advisory Opinion from the North Carolina Attorney General on the "Authority of the North Carolina General Assembly and the State Board of Education to Supervise and Control the Administrative and Secretarial Duties of the State Superintendent of Public Instruction." In an opinion dated December 14, 1995, a copy of which is attached hereto as Exhibit F and incorporated by reference, Andrew A. Vanore, Jr., Chief Deputy Attorney General, responded that the "responsibility for the day-to-day operation of the public school system is given to the State Superintendent—a constitutional officer elected by the people." The opinion letter went on, however, to discuss various cases and ultimately conclude that the State Board had the authority to determine and control the duties and responsibilities of the Superintendent.

39. The advisory opinion of 1995 is inconsistent with the advisory opinion of 1985 and incorrectly interprets the holdings in the two cases relied on. The correctness of the December 14, 1995, advisory opinion cited above was never litigated and, upon information and belief, to date, no judicial determination has been made as to the authority of the State Board to control the duties and responsibilities of the Superintendent.

Conduct of Defendants

40. On or about January 26, 2009, Governor Perdue announced that she would ask the State Board to redefine the duties of its chair to include the responsibilities of Chief Executive Officer ("CEO") of the State Board, who would manage the administrative operation of the public school system. The Governor also announced that she would appoint William C. Harrison to the State Board and ask the State Board to elect him Chairman. The Governor further indicated that she would propose to the State Board that Harrison be hired as CEO of the State Board upon the State Board creating such a position.

41. At the press conference, during which she announced the creation of the CEO position, Governor Perdue described the role of Dr. Atkinson, Superintendent, as that of an "ambassador" for education.

42. Subsequent to the Governor's announcement concerning the position of CEO of the State Board, Dr. Atkinson publicly and through correspondence questioned the constitutionality of such action and asserted her right as the constitutionally elected Superintendent to manage the operation of the public school system.

43. On or about March 4, 2009, the State Board formally created the position of CEO of the State Board. The State Board of Education Policy Manual describes the duties and responsibilities of the CEO at Policy ID Number EEO-C-022, a copy of which is attached hereto as Exhibit G and is incorporated by reference. In relevant part, the CEO's duties and responsibilities are described thusly: "Subject to the direction, control and approval of the State Board of Education, the Chief Executive Officer shall have and exercise such powers and duties as the State Board of Education shall from time to time delegate to him or her. 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 and shall serve at the pleasure of the State Board of Education.”

44. On or about March 4, 2009, the State Board of Education amended its Policy Manual at Policy ID Number EEO-C-013, entitled as amended “Policy delineating the delegation of authority from the State Board of Education to the Superintendent of Public Instruction and to the Chief Executive Officer.” (A copy of EEO-C-013 is attached hereto as Exhibit H and incorporated by reference.) Among other powers and duties articulated in Policy ID Number EEO-C-013, the CEO was delegated the power and duty “to manage the Department of Public Instruction on a day-to-day basis subject to the direction, control, and approval of the State Board.”

45. The State Board’s attempt, as evidenced by its amendment to Policy ID Number EEO-C-013, to vest in the CEO the power and duty to manage the Department of Public Instruction “on a day-to-day basis” is contrary to N.C.G.S. § 115C-19 which vests in the Superintendent the duty to “manage on a day-to-day basis the administration of the free public school system.”

46. The State Board’s attempt, as evidenced by its amendment to Policy ID Number EEO-C-013, to vest in the CEO the power and duty to manage the Department of Public Instruction “on a day-to-day basis” is contrary to Article IX, Section 4(2) of the current version of the Constitution which provides: “The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education” and to the previous language of the Constitution prior to 1971 that stated the Superintendent was to be the administrative head of the public school system.

47. The State Board's attempt, as evidenced by its amendment to Policy ID Number EEO-C-013, to vest in the CEO the power and duty to manage Department of Public Instruction "on a day-to-day basis" is contrary to Article IX, Section 8 of the 1868 Constitution as amended in 1943 to provide that the Superintendent shall be the administrative head of the public school system and pursuant to the new language of the 1971 Constitution, "the chief administrative officer of the State Board of Education."

48. On or about March 4, 2009, the State Board hired Defendant Harrison as CEO. The following day, Harrison was sworn in as a member of the State Board and then nominated and elected to serve as its chairperson.

49. Upon information and belief, on or about March 5, 2009, Harrison began work as CEO of the State Board at an annual salary of \$265,000, said position and salary slot in actuality being the office of Deputy Superintendent of Public Instruction and the former Executive Director of the State Board of Education as previously staffed. This information is set forth in part in the Conditions of Employment and Job Offer Acceptance (a copy of which is attached hereto as Exhibit I and incorporated by reference.)

50. The position of CEO of the State Board is a full time paid position in state government paid for through public revenue and is a position of trust and/or profit under the auspices of the State of North Carolina.

51. Upon information and belief, Harrison has attempted and continues to attempt to infringe upon the duties and responsibilities that are inherent in the constitutional office of Superintendent, including executing educational policy, hiring and supervising employees of Department of Public Instruction, and generally attempting to serve as chief administrative officer over other critical functions of the public school system.

COUNT ONE

(THE SUPERINTENDENT HAS THE CONSTITUTIONAL RESPONSIBILITY AS ADMINISTRATIVE HEAD OF THE NORTH CAROLINA PUBLIC SCHOOL SYSTEM AND ALL ACTS OF THE GENERAL ASSEMBLY, THE STATE BOARD OF EDUCATION OR THE GOVERNOR ATTEMPTING TO DEPRIVE THE SUPERINTENDENT OF SUCH CONSTITUTIONAL AUTHORITY VIOLATES ARTICLE III, SECTION 7 AND ARTICLE IX, SECTION 4(2) OF THE NC CONSTITUTION.)

52. Plaintiffs incorporate by reference and re-allege fully herein the contents of the foregoing paragraphs 1 through 51.

53. The N.C. Constitution was amended by vote of the people on November 7, 1944, and specifically set out the constitutional role of the Superintendent as follows: "The State Superintendent of Public Instruction shall be the administrative head of the public school system and shall be secretary of the Board."

54. The language of the 1944 amendment to Article IX of the N.C. Constitution defining the Superintendent's constitutional role was consistent with prior language in the Constitution and with the practice and prior responsibilities of the Superintendent.

55. On November 3, 1970, a proposed revised N.C. Constitution was ratified by the people, said version being an extensive editorial rewrite of the 1868 N.C. Constitution as amended. The evils sought to be remedied were obsolete language, outdated style and illogical arrangement.

56. Important and significant substantive changes were not included in the proposed constitution but instead were dealt with in amendments separately submitted to the people of North Carolina for ratification.

57. To the extent that any changes made in the proposed constitution were substantive, none were 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.

58. Subsequent to the passage of the proposed constitution, the Superintendent, upon information and belief, continued to perform the same or similar duties as administrative head of the public school system of North Carolina, executing the rules and regulations enacted by the State Board and the laws enacted by the General Assembly.

59. Beginning in 1995 and continuing to the present, the State Board has attempted to exercise constitutional powers reserved for the Superintendent, including being the administrative head of the public school system and administering the Department of Public Instruction on a day-to-day basis including the hiring of staff and other functions necessary to administer the public schools of North Carolina.

60. The creation by the State Board of a position called "Chief Executive Officer of the State Board of Education" and the assignment to that position, the responsibility to manage the Department of Public Instruction on a day-to-day basis subject to the direction and control of the State Board and to approve all employment decisions for the positions of section chief and below violates Article III, Section 7(2) and Article IX, Section 4 of the N.C. Constitution in that these actions infringe upon and attempt to usurp the constitutional authority of the duly elected Superintendent.

COUNT TWO

(THE CREATION OF A POSITION OF CHIEF EXECUTIVE OFFICER OF THE STATE BOARD OF EDUCATION AND THE ATTEMPTED DELEGATION OF AUTHORITY TO THAT POSITION AS THE ADMINISTRATIVE HEAD OF THE PUBLIC SCHOOL SYSTEM AND CHIEF ADMINISTRATIVE OFFICER OF THE STATE BOARD OF EDUCATION VIOLATES ARTICLE III, SECTION 7; AND

ARTICLE IX, SECTIONS 4 AND 5; AND ARTICLE 1, SECTION 6 OF THE NORTH CAROLINA CONSTITUTION.)

61. Plaintiffs incorporate by reference and re-allege fully herein the contents of the foregoing paragraphs 1 through 60.

62. As previously alleged, the position of CEO of the State Board of Education was created by the State Board and Defendant Harrison was hired in that position.

63. As previously alleged, the CEO position and thus Defendant Harrison in that position was vested by the State Board with duties, authority and powers that are within the constitutional authority of the Superintendent.

64. The actions of the State Board, acting through N.C.G.S. § 115C-12 and N.C. G.S. §§ 143A-44.1 through 44.3, in creating the CEO position, hiring Defendant Harrison, and vesting the position and Defendant Harrison with certain powers is a violation of Article III, Section 7; Article IX, Sections 4 and 5; and Article I, Section 6 of the North Carolina Constitution.

65. The actions of the State Board, acting through the Administrative Procedures Act ("APA") by adopting Policy ID Numbers EEO-C-013 and EEO-C-022 authorizing the creation of the CEO position; delineating the CEO's independence from the supervision of the Superintendent; and the delegation of certain powers and duties to the CEO violates Article III, Section 7; Article IX, Sections 4 and 5; and Article I, Section 6 of the North Carolina Constitution.

COUNT THREE

(SERVICE AS AN APPOINTED MEMBER OF THE STATE BOARD OF EDUCATION, A POSITION OF TRUST, AND SIMULTANEOUSLY AS CHIEF EXECUTIVE OFFICER OF THE STATE BOARD OF EDUCATION, A STATE SALARIED POSITION OF PROFIT AND TRUST VIOLATES ARTICLE VI, SECTION 9 OF THE NORTH CAROLINA CONSTITUTION.)

66. Plaintiffs incorporate by reference and re-allege fully herein the contents of the foregoing paragraphs 1 through 65.

67. As previously alleged, William C. Harrison was appointed CEO by the State Board on or about March 4, 2009, said position being a full time state government position paid for out of public revenue and a position of profit and trust.

68. On or about March 5, 2009, Defendant Harrison was appointed by the Governor pursuant to Article IX, Section 4(1) as a member of the State Board, a position of trust under the auspices of the State of North Carolina.

69. The concurrent holding of dual offices, to wit Chairman of the State Board, and a state position of employment, to wit CEO of the State Board, violates Article VI, Section 9 of the Constitution.

REQUEST FOR INJUNCTIVE RELIEF

70. The efforts by the State Board at the prompting and with the assistance of the Governor to usurp the powers of the Superintendent are unlawful and unconstitutional. The Superintendent will suffer substantial, real, and immediate irreparable harm for which there is no adequate remedy afforded at law unless this court issues a mandatory injunction directing the State Board to rescind its actions hereinbefore alleged attempting to transfer the authority and constitutional powers of the Superintendent to Defendant Harrison as CEO of the State Board.

WHEREFORE, Plaintiffs respectfully pray:

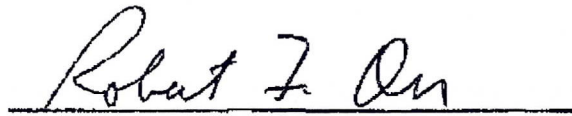
(A) That the Court issue an order declaring that the duties and responsibilities for administering and managing the Department of Public Instruction and administering

the North Carolina public school system are constitutionally vested in the Superintendent;

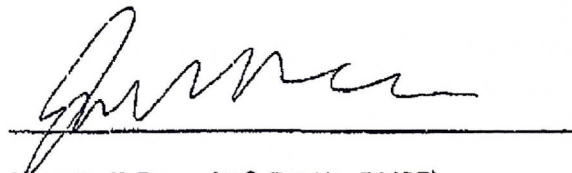
- (B) That the Court issue an order declaring that all acts by the Defendants purporting to create a position of CEO of the State Board and giving that CEO authority to run the Department of Public Instruction and administer the public school system usurps the constitutional powers of the Superintendent and are unconstitutional and thus null and void and unenforceable;
- (C) That the Court issue an order declaring that any existing legislative attempt to delegate the constitutional responsibility of the General Assembly to prescribe by law the duties of the Superintendent is unconstitutional and therefore null and void and unenforceable;
- (D) That the Court issue an order declaring that a member of the State Board cannot constitutionally serve as CEO of the State Board concurrent with his service as a State Board member;
- (E) That the Court enter preliminary and permanent injunctions pursuant to the constitutional violations alleged;
- (F) That the Court award the plaintiffs their reasonable attorney's fees as allowed by law;
- (G) That the Court tax the costs of this action against the Defendants; and
- (H) That the Court award such further and additional relief as the Court may deem necessary and proper.

DATED: This the 3rd day of April, 2009

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert F. Orr", is written over a horizontal line.

Robert F. Orr (N.C. Bar No. 6798)

A handwritten signature in cursive script, appearing to read "Jeanette K. Doran", is written over a horizontal line.

Jeanette K. Doran (N.C. Bar No. 29127)

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Pro Bono Counsel for Plaintiffs

NORTH CAROLINA
WAKE COUNTY

FILED 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.

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WAKE CO., C.S.C.

BY



**SUPERINTENDENT'S BRIEF
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

NOW COMES the North Carolina Superintendent of Public Instruction Mark Johnson ("Superintendent"), through undersigned counsel, and respectfully submits the following Brief in Opposition to the Motion for Summary Judgment filed by the plaintiff North Carolina State Board of Education ("State Board").

I. THE STATE BOARD IS NOT ENTITLED TO SUMMARY JUDGMENT.

A. The State Board's Constitutional Powers Are Subject to Limitation and Revision by Acts of the General Assembly.

Despite having litigated the scope and meaning of Article IX, Section 5 and its predecessor provision multiple times, the State Board in its principal brief hopes to convince this panel that this case presents a matter of first impression. It is the only way to explain the State Board's failure to analyze *any* of the North Carolina cases construing Article IX, Section 5. Instead of citing North Carolina authority, the State Board relies on at least seven out-of-state cases, two editions (1883 and 1927) of Thomas Cooley's constitutional law treatise, and a 1997 article from the West Virginia Law Review. The implication is that there must be no North Carolina case law on point. Both the State and the Superintendent, however, have disproved this conclusively in their principal briefs.

As already explained in great detail by both defendants, the North Carolina Supreme Court's decisions in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971) and *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991), control the outcome of this case. And as explained, it is not the results of these cases that dictate the result in the present case, but rather the analyses of Article IX, § 5,¹ concluding that the General Assembly, and not the State Board, is the supreme authority in all matters relating to North Carolina's public schools. *See* Superintendent's Brief in Support of Summary Judgment, 12 April 2017, at 6-11 ("Superintendent's Principal Brief"). *Guthrie* and *Whittle Communications* establish that the General Assembly has plenary power to limit and revise all powers of the State Board, even those expressly provided in the Constitution. *Id.*

This is the very issue before this panel. At least six pages of the Superintendent's principal brief are devoted *only* to discussion of these two cases. The State Board, by contrast, ignored them, citing *Guthrie* only in passing – a “*see, e.g.*” citation – for an uncontroversial proposition. The State Board not only fails to attempt to distinguish the holding in *Whittle Communications* from the holding it seeks here, it fails to mention the case at all. Again, the State Board discussed a total of zero North Carolina appellate opinions construing the constitutional provision at issue in this case.

Because the State Board did not analyze controlling North Carolina precedent, there is little in the way of rebuttal available to the Superintendent. In his principal brief, the Superintendent cited at least seven North Carolina appellate decisions that discuss Article IX, § 5, or its predecessor, of the North Carolina Constitution. Without exception, these cases reinforce

¹ As noted in the Superintendent's principal brief, the *Guthrie* opinion actually considered the predecessor provision in the North Carolina Constitution of 1868, as amended, prompting the Court to observe, “[T]here 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.” *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 199.

the principle of legislative supremacy in public school matters, including the constitutionally conferred authority to limit and revise the powers and duties of the State Board. These cases establish the Superintendent's and the State's entitlement to an entry of summary judgment upholding the constitutional legitimacy of House Bill 17 ("HB 17").

B. The Challenged Legislation Does Not Disenfranchise the State Board.

Although the State Board appears to claim in its amended complaint that as many as sixty-two provisions in HB 17 are unconstitutional (*See* Verified Amended Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunctive Relief ("Verified Amended Complaint"), 10 March 2017, ¶ 25), it chose to discuss only four of them in its principal brief. The State Board, of course, bears the burden of persuasion in overcoming the "great deference" afforded the General Assembly, and the "strong presumption that [each] statute is constitutional." *Rhyne v. K-Mart Corp.* 358 N.C. 160, 167-68, 594 S.E.2d 1, 7-8 (2004). To be sure, the State Board's sampling of four allegedly offending provisions will not suffice to invalidate the entirety of HB 17 (or at least those sixty-two provisions listed in paragraph 25 of the Verified Amended Complaint) even if one or more of these four sections were declared unconstitutional. The Supreme Court has held:

If the legislature intended that the constitutional part of [a] statute be enforced after the other part has been declared unconstitutional, and if the separate parts of the statute are not so interrelated and mutually dependent that one part cannot be enforced without reference to another, the offending part must be severed and the rest of the statute enforced.

Fulton Corp. v. Faulkner, 345 N.C. 419, 421-22, 481 S.E.2d 8, 10 (1997). The General Assembly's intention regarding the severability of HB 17 is quite clear. Section 42 of Session Law 2016-126 provides:

If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without

the invalid provisions or application, and to this end, the provisions of this act are severable.

S.L. 2016-126. The State Board has not offered any argument, moreover, to suggest that severing one or more of these four exemplars would upset the effectiveness of the remaining provisions of the law. Having noted this issue regarding severability, the Superintendent reiterates that the State Board's four exemplars are, in fact, legitimate exercises of the General Assembly's authority under Article IX, § 5 of the North Carolina Constitution, as demonstrated below.

The phrase "subject to laws enacted by the General Assembly" at the end of Article IX, § 5, discussed at length in the Superintendent's principal brief, "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." *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198 (Emphasis supplied). Each of the provisions cited by the State Board is simply a part of the restoration of relative powers and duties that existed between the Superintendent and the State Board prior to the General Assembly's 1995 legislation that stripped nearly all meaningful authority from the constitutional office of Superintendent of Public Instruction.

The first provision noted in the State Board's brief concerns an amendment to N.C. Gen. Stat. § 115C-21(a)(5). Prior to 1995, § 115C-21(a)(5) provided that one of the administrative duties of the Superintendent of Public Instruction was:

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.

S.L. 1981-423.

The 1995 legislation amended the statute as follows:

~~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. The obvious intent of the 1995 legislation was to subordinate the Superintendent's exercise of authority such that it was dependent on the State Board's specific delegation. The 2016 amendment removes the 1995 language and restores the provision to essentially the same language that had been in place since 1981:

~~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. As argued previously, the General Assembly's insertion, for the first time, of the adjective "direct" indicates a careful attention to policy in that it implies that the more "general" supervision and administration still resides with the State Board. As such, it hardly can be interpreted as "stripping the Board of its constitutional powers and duties altogether and transferring them to the SPI" as the State Board complains in its principal brief.

The State Board's second example concerns N.C. Gen. Stat. § 115C-21(b)(1b). Although the State Board refers to this as an "amendment" to § 115C-21(b)(1b), HB 17 actually creates this new subsection. The language of the new subsection, however, is not new. The General Assembly first used it in 1989, when it created a new Superintendent duty codified at § 115C-21(b)(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.

S.L. 1989-752. The allocation of this authority to the Superintendent in 1989 did not trigger any litigation. The General Assembly repealed § 115C-21(b)(1a) in the 1995 legislation. S.L. 1995-72. HB 17 restored this language in a form nearly identical to its 1989 predecessor subsection:

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.

S.L. 2016-126.

Given the General Assembly's repeated directives throughout HB 17 requiring the Superintendent to administer educational funds "in accordance with all needed rules and regulations adopted by the State Board of Education," the restoration of the 1989 language in the new § 115C-21(b)(1b) hardly can be considered an unconstitutional disenfranchisement of the State Board. For example, HB 17 adds this language to § 115C-408(a), which reads as amended:

It is the policy of the State of North Carolina to create a public school system that graduates good citizens with the skill demanded in the marketplace[.] The Board shall have general supervision and administration of the educational funds provided by the State and federal governments, except those mentioned in Section 7 of Article IX of the State Constitution, and also excepting such local funds as may be provided by a county, city, or district. The Superintendent of Public Instruction shall administer any available education funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education.

S.L. 2016-26. A similar directive is in the changes to 115C-410 regarding gifts and grants:

The Board is authorized to adopt all needed rules and regulations related to the creation and administration of special funds within the Department of Public Instruction to manage any funds received as grants from nongovernmental sources in support of public education. In accordance with the State Board's rules and regulations, the Superintendent of Public Instruction is authorized to create and administer such special funds and to accept, receive, use, or reallocate

to local school administrative units any gifts, donations, grants, devises, or other forms of voluntary contributions.

These and other similar provisions in HB 17 clarify the General Assembly's concern with the State Board's continuing role in the oversight and supervision of North Carolina's public schools and educational funds. In the context of the holdings in *Guthrie*, *Whittle Communications*, and the other North Carolina cases considering the language of Article IX, § 5 and its predecessor, the reallocation of duties and powers effectuated by the General Assembly in HB 17 are appropriate exercises of legislative policy-setting authority.

The State Board's third and fourth examples of purportedly unconstitutional disenfranchisement are even more obviously appropriate in that both of the "offending" amendments add new language expressly tethering the Superintendent's exercise of his or her authority to the rules and regulations promulgated by the State Board. In the 2016 amendments to N.C. Gen. Stat. § 115C-19, the only language the General Assembly deleted was the language that had been added in the 1995 legislation. *See*, S.L. 1995-72; S.L. 2016-126. As with other 1995 amendments, this language had subordinated every action of the Superintendent to the "direction, control, and approval" of the State Board. S.L. 1995-72. Although the 2016 legislation removed this millstone that had hindered the Superintendent's effectiveness, it restored pre-1995 language² requiring fealty to the State Board's policies, directing the Superintendent to "administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction." S.L. 2016-126.

Likewise, the amendments to N.C. Gen. Stat. § 115C-21(a)(1), which the State Board complains deprive it of its authority to administer funds, require all actions of the Superintendent

² See S.L. 1987-1025 ("The Superintendent of Public Instruction shall administer the policies adopted by the State Board of Education."). This language, as noted above, had been deleted in the 1995 legislation. S.L. 1995-72.

to be “in accordance with all needed rules and regulations adopted by the State Board of Education.” *Id.* Again, the language in the 2016 amendments adding “administer funds” and “enter into contracts” to the Superintendent’s duties was merely a restoration of language from 1989 legislation (with minor modifications) that had been deleted in the 1995 legislation. *See* S.L. 1989-752; S.L. 1995-72. The “in accordance with [State Board] rules and regulations” language quoted above appears for the first time in the 2016 amendments, reflecting the General Assembly’s intention that the State Board retain all of its policy-setting authority. S.L. 2016-126.

Thus, the four examples cited by the State Board in its amended complaint as emblematic of the legislative disenfranchisement wrought by HB 17 turn out to be anything but. They stand, rather, as examples of the General Assembly’s policy determination that the State Board should retain its power to establish the guidelines by which the Department of Public Instruction operates. It is fair to conclude that the other fifty-eight provisions in HB 17 cited by the State Board but not discussed in its principal brief are likewise anodyne.

C. **Even If Statements Of Counsel for the State of North Carolina During a TRO Hearing Could Be Construed as Stipulations of Law, Such Stipulations Are Not Binding on the Parties or the Court.**

In its principal brief, the State Board advances an aggressive and, in its view, dispositive, proposition that requires a specific response. The brief quotes a two-question colloquy between the Superior Court judge and counsel for the State in the hearing on the State Board’s motion for TRO.³ Memorandum in Support of Plaintiff’s Motion for Summary Judgment and Motion for Preliminary Injunction (“State Board’s Principal Brief”) at 11. Both questions are purely legal – they make no reference to facts in the case. *Id.* Both answers are statements of counsel’s belief as to the law as he understood it at the time of the TRO hearing. *Id.* Counsel’s first answer, agreeing

³ At the time of the hearing, the State was the sole defendant. Superintendent Johnson had not yet taken his oath of office and thus had not been named as a party.

that the General Assembly does not have authority to enact laws contrary to the language of the Constitution, is not controversial. His second answer, agreeing that “the General Assembly cannot take away [the State Board’s] constitutional mandates,” raises a host of ancillary questions, including what is meant by phrases like “take away” and “constitutional mandate.” *Id.* Still, counsel’s answer is not necessarily invalid when considered in the context of the holdings in *Guthrie*, *Whittle Communications*, and the other North Carolina cases construing the General Assembly’s broad power to revise and limit the authority of the State Board under Article IX, § 5.

The State Board, however, contends that these answers – at the hearing on its Motion for Temporary Restraining Order – end the case. It argues: “For purposes of summary judgment, that concession (by State’s counsel) is fatal.” *Id.* The brief cites to no legal authority in support of this claim. In fact, there is no legal authority to support this claim.

The Superior Court held the hearing on the afternoon of 29 December 2016. State Board’s Principal Brief, Ex. D at 3. According to the Clerk’s notation on the Summons, the State Board filed its original complaint at around 9:00 a.m. the same day. State’s counsel noted in his address to the Superior Court that “we’ve only had the complaint for a few hours.” *Id.*, Ex. D at 11. State’s counsel was careful and deliberate in his responses, couching them as his beliefs, not as a legal position binding his client. And of course, State’s counsel never took the position that he represented the Superintendent.

Most importantly, even viewing counsel’s statements most favorably for the State Board, they are not binding, much less dispositive of the case. Although it cites no authority, apparently the State Board contends that the statements of counsel constitute judicial admissions. Because the colloquy at issue addressed only matters of law, and not fact, any statement that might be

considered a concession would amount only to a stipulation of law which is of no legal consequence, and certainly not "fatal" as plaintiff urges. The Court of Appeals has observed:

A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of the dispute. Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence. *A stipulation as to the law is not binding on the parties or the court.* Generally, admissions are ordinarily made by a pleading, or lack thereof, or by a response, or failure to respond, to a pretrial demand for admissions, or by stipulation entered into before or at trial. *In the absence of express authority, an attorney generally has no power, by stipulation, agreement, or otherwise, to waive or surrender the substantial legal rights of his client.*

Bryant v. Thalhimer Bros., 113 N.C. App. 1, 14, 437 S.E.2d 519, 527 (1993), *appeal dismissed and disc. rev. denied*, 336 N.C. 71, 445 S.E.2d 29 (1994) (Emphasis supplied).

The case before this Court presents matters of great importance to the children and taxpayers of this State. The State Board's attempt to claim victory based upon an unfair interpretation of defense counsel's careful responses in a TRO hearing has no support in the law, and for good reason. All of the parties to this case, the State Board included, would best serve the citizens of North Carolina by seeking a ruling on the merits of the issues presented.

II. THE COURT SHOULD DISSOLVE THE PRELIMINARY INJUNCTION.

A. The Superintendent and the State of North Carolina Have Demonstrated a Likelihood of Success on the Merits by Citing and Analyzing the Controlling North Carolina Cases.

In the hours following the filing of this lawsuit late last December, without opposing briefs and against opposing counsel who had had little opportunity to prepare, the State Board was able to persuade a judge (also new to the issues presented) that it was likely to succeed on the merits of the claims raised in the complaint. Nearly five months later, the parties have filed extensive briefs arguing the merits. Both the Superintendent and the State of North Carolina have presented the Court with detailed analyses of the North Carolina cases that control the matters


raised in the State Board's amended complaint. The State Board has failed to acknowledge any of these cases, even to attempt to distinguish them from their own case. If this Court elects to consider the propriety of continuing the preliminary injunction pending its decision, the Superintendent respectfully contends that the likelihood of success analysis should shift in favor of the parties who have identified and analyzed the controlling precedent.

CONCLUSION

For the reasons stated and upon the authorities cited, the defendant, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully prays that this panel 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 the Superintendent and the State of North Carolina.

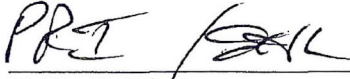
This the 19th day of May, 2017.

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CERTIFICATE OF SERVICE


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

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E. Hardy Lewis

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.

**PLAINTIFF'S REPLY
IN SUPPORT OF 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 reply in support of its motion for summary judgment and motion for preliminary injunction.

ARGUMENT

I. THE SPI'S ARGUMENTS ARE UNAVAILING.

A. The SPI's dismissive treatment of both North Carolina and out-of-state authority reveals the weaknesses in the SPI's position.

In the SPI's response, he implies that the Board lacks authority for a bedrock principle of constitutional law: that a constitutional body's powers and duties cannot be transferred to someone else without a constitutional amendment. The SPI chides the Board for citing cases from other state supreme courts, treatises, and law review articles rather than citing more North Carolina law. SPI Res. Br. at 1-3.

As the Board has repeatedly pointed out, however, no North Carolina court has ever addressed this precise issue because the General Assembly has never been so bold. Regardless, the SPI's criticism is unwarranted for multiple reasons.

First, Defendants overlook the Board's citation of *State v. Camacho*, a decision of the North Carolina Supreme Court. 329 N.C. 589, 594, 406 S.E.2d 868, 871 (1991). *Camacho* held that when the North Carolina Constitution confers powers and duties on a constitutional officer, any "encroachment" by other officers "invade[s] the province of an independent constitutional officer" and violates the North Carolina Constitution. Board Br. at 5 (citing *Camacho*).

In *Camacho*, the trial court determined that it was impermissible for a district attorney to employ a former public defender, and it directed the Attorney General's office to take over a prosecution. 329 N.C. at 591-93, 406 S.E.2d at 869-70. The Supreme Court reversed. *Id.* The Court held that because district attorneys are independent constitutional officers, the trial court could not transfer the district attorney's constitutional powers to another constitutional officer. *Id.*

The same legal principle applied in *Camacho* applies here. Despite this, the SPI ignores *Camacho* in his response.

Second, even the State's brief reveals North Carolina authority that undermines the SPI's arguments. State Res. Br. at 3 (citing *King v. Hunter*, 65 N.C. 603 (1871)). In *King*, the North Carolina Supreme Court considered whether the legislature could strip a local sheriff of his tax-collection duties and transfer them to a tax collector. 65 N.C. at 609. The 1868 Constitution had established the office of County Sheriff, with each sheriff's salary, fees and emoluments to be "prescribed by law." *Id.* In special legislation, however, the General Assembly attempted to

empower one county to strip its sheriff of his tax-collection duties and transfer those duties to a newly appointed tax collector. *Id.* at 609-10.

The Supreme Court struck down the legislation as unconstitutional. *Id.* at 612. The Court's "serious objection" to the law was that the attempted "division of the duties and emoluments of the Sheriff . . . [broke] faith with the people" who had chosen the Sheriff to perform the duty of tax collection. *Id.* As the Court noted, if a constitutional officer's duties could be transferred without a constitutional amendment, then "every other [constitutional] office in the State may be cut up." *Id.* Even the Governor would not be immune. *Id.*

In other words, the Supreme Court in *King* exposed the same constitutional flaws that the Board has pointed out here. *Compare id.* at 612, with Board Br. at 12-14 (explaining that the State's position has no limiting principle).

Finally, in view of the dozens of decisions from state supreme courts across the country that reject the SPI's position, the SPI's dismissive response is revealing.¹ The SPI's response brief does not confront *any* of these decisions.

¹ The Board cited seven out-of-state decisions as illustrative, using a "see, e.g." cite to signal to the Court that there are many other similar decisions. Board Br. at 12-13. There are, in fact, at least dozens more. *See, e.g., Powers v. State*, 318 P.3d 300, 308 (Wyo. 2014); *State ex rel. Discover Fin. Servs. v. Nibert*, 744 S.E.2d 625, 645 (W. Va. 2013); *State v. Hagerty*, 580 N.W.2d 139, 147 (N.D. 1998); *Murphy v. Yates*, 348 A.2d 837, 846 (Md. 1975); *Allen v. Rampton*, 463 P.2d 7, 13 (Utah 1969); *Thompson v. Legislative Audit Comm'n*, 448 P.2d 799, 801-02 (N.M. 1968); *Irishman's Lot, Inc. v. Sec. of State*, 62 N.W.2d 668, 670 (Mich. 1954); *Tucker v. State*, 35 N.E.2d 270, 292 (Ind. 1941); *Wright v. Callahan*, 99 P.2d 961, 966 (Idaho 1940); *State ex rel. Josephs v. Douglass*, 110 P. 177, 180 (Nev. 1910); *In re House Resolution*, 21 P. 486, 487 (Colo. 1888); *Blair v. Marye*, 80 Va. 485, 486 (Va. 1885); *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 414 (Wis. 1870); *Commonwealth v. Gamble*, 62 Pa. 343, 349 (Pa. 1869).

Instead, the SPI simply acts as though these decisions do not exist. The SPI apparently believes that even though other courts have “uniformly denounced” his argument, *Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953), no North Carolina court has done so yet, so he should win.

That argument needs no rebuttal.

B. The SPI fails to grasp the critical distinction between a “limitation” and *elimination*.

The SPI acknowledges that no North Carolina decision has ever sustained a legislative maneuver like the one at issue here. SPI Res. Br. at 2 (citing decisions but concluding that “it is not the results of these cases that dictate the result in the present case”). Instead, the SPI points to general language in *Guthrie* and *Whittle* acknowledging that, under the phrase “subject to laws” in Article IX, Section 5, the General Assembly may impose certain “limitations” on the Board.²

But the SPI asks the Court to push that concept of “limitation” a giant step further—a step that no North Carolina court has sustained, and which other state supreme courts have “uniformly denounced.” *Hudson*, 263 P.2d at 368. According to the SPI, the General Assembly can *eliminate* the Board’s powers and duties

² As the Board has explained, the narrow decisions in *Guthrie* and *Whittle* addressed specific instances in which the General Assembly merely “checked” the Board under Article IX, Section 5’s built-in, constitutional checks-and-balances mechanism. Bd. Res. Br. at 5-6. Those fact-specific holdings offer no authority for the SPI’s broad, sweeping perspective, which has no limiting principle—a point that the SPI’s response leave un rebutted. Bd. Br. at 12-14.

altogether, as it has attempted to do here.³ In other words, the SPI sees no difference between a “limitation” and *elimination*.

To its credit, the State attempts to distance itself from the SPI, acknowledging that for Article IX, Section 5 purposes, there is a critical distinction between a “limitation” and “elimination.”⁴ The State’s response brief makes the following concessions:

- “It is accurate to note that the authority of a constitutional office cannot be transferred to another entity through the auspice of legislative enactments.” State Res. Br. at 3.
- “Naturally, the State does not contend that the General Assembly maintains unbridled authority to enact laws pertaining to the role of the Board.” State Res. Br. at 6, n.2.
- “It is certainly true that the legislature could not reduce [a] constitutional office to an empty shell.” State Res. Br. at 6.
- The State “agrees” that “[the Board’s] constitutionally accorded authority cannot be usurped by legislation.” State Res. Br. at 1.

The State was correct to concede these points, and the SPI should have done the same.

³ The SPI has no authority for this proposition. Again, neither *Guthrie* nor *Whittle* even remotely support the SPI’s view.

⁴ While the State concedes this point, it goes on to contend—without elaborating—that the Transfer Legislation “does not strip away the Board’s constitutional powers.” State Res. Br. at 5. That argument is untenable. The General Assembly copied and pasted the Board’s constitutional powers and duties from the text of the North Carolina Constitution into the Transfer Legislation, then replaced the words “State Board of Education” with “Superintendent of Public Instruction.” Board Br. at 2-3. If that does not constitute stripping the Board of its constitutional powers, it is difficult to imagine what would. Moreover, the State has already conceded in open court that the Transfer Legislation would reduce the Board to an empty shell. *Id.*, Ex. D at 29.

After all, *eliminating* a constitutional entity's powers and duties—that is, eviscerating them to the point that the constitutional body is unable to discharge its constitutional functions—is never permissible without a constitutional amendment. *See, e.g., Powers v. State*, 318 P.3d 300, 322 (Wyo. 2014) (“We recognize that the 2013 Act does not ‘eliminate’ the office of Superintendent. It has, however, effectively marginalized the office and has left it ‘an empty shell.’”); *Hudson*, 263 P.2d at 368 (holding that even when all of a constitutional body's powers are legislatively prescribed, the legislature cannot reallocate the body's powers and “leave the office as an empty shell,” and that “[s]uch attempts have uniformly been denounced by courts of last resort”); *Wright v. Callahan*, 99 P.2d 961, 966 (Id. 1940) (holding that transferring powers, as opposed to limiting powers, “would be to permit the legislature to nullify the Constitution and reduce it to a mere scrap of paper”); *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986) (“By statutorily abolishing all of the independent core functions of a state executive office, the legislature, in effect, abolishes that office, and the will of the drafters, as expressed in Article IX, is thereby thwarted.”); *Thompson*, 448 P.2d at 801 (“Of course the legislature cannot abolish a constitutional office nor deprive the office of a single prescribed constitutional duty. Nor can this be done by indirection, such as depriving him of all statutory duties, thereby leaving the office in name only, an empty shell.”).

It is not difficult to tell the difference between a permissible “limitation” and impermissible *elimination*. A 1994 North Carolina Attorney General’s Opinion applying Article IX, Section 5 illustrates the point.

That Attorney General’s Opinion applied the common-sense distinction between a “limitation” and elimination to proposed legislation that attempted a similar (though far less egregious) transfer of the Board’s constitutional powers and duties. 1994 Op. N.C. Att’y Gen. 41. The proposed legislation at issue there would have created a Professional Teaching Standards Board. *Id.* The Standards Board would have been charged with setting standards for licensing teachers and issuing, renewing, and revoking licenses—responsibilities that fell within the State Board of Education’s constitutional powers and duties. *Id.* The question before the Attorney General was whether the legislation was constitutional.

The Attorney General correctly explained that the answer “depends on whether the transfer of the State Board’s constitutional duty . . . to another body to exercise independently of the State Board is only a *limitation or revision* of State Board’s constitutional duty,” or whether it went further and effectively amounted to an *elimination* of that duty—an attempted legislative transfer of constitutional power without a constitutional amendment. *Id.* (emphasis added.) In a holding that is directly on point here, the Opinion answered that question as follows:

[A] legislative act transferring the State Board’s constitutional power regarding teacher licensing to another agency to be exercised by that agency independently of the State Board would amount to more than a limitation or revision of the constitutional powers of the State Board. It would amount to the *denial* to the State Board of a power conferred on the State Board by the people.

While the General Assembly has the power to limit and revise the manner in which the State Board exercises its constitutional powers, the General Assembly in our opinion likely does not have the power to take away completely a constitutionally specified power of the State Board and give it to another agency.

Id. (emphasis added).

This critical distinction between a “limitation” and *elimination* dictates the same result here.

In sum, the decisions describing “limitations” on the Board do not support the SPI’s view that the General Assembly may *eliminate* the Board’s constitutional powers and duties. This notion has been “uniformly denounced” by state supreme courts, debunked by a North Carolina Attorney General’s Opinion, and prompted the SPI’s co-defendant, the State, to distance itself from the SPI’s aggressive claim. This Court should reject it here as well.

C. The SPI’s attempt at a severability argument fails.

In response to the Board’s motion for summary judgment, the SPI has raised the issue of severability. A severability analysis, however, has no application here.

Session Law 2016-126 is a single piece of legislation with 43 separate sections and thousands of lines of text, some of which comprise the Transfer Legislation. If the Board were challenging Session Law 2016-126 in its entirety, then perhaps the SPI’s proposed severability analysis would be appropriate.

The Board is not challenging the entire session law, however. Instead, the Board intentionally challenged no more of the legislation than necessary to safeguard the people of North Carolina’s express delegation of constitutional powers and duties to the Board.

The Board did so by only challenging those select provisions of Session Law 2016-126 in which the General Assembly attempted to transfer the Board's constitutional powers and duties to the SPI. Am. Compl. ¶¶ 24-25. The Board identified those provisions of Session Law 2016-126 in the complaint at a granular level, listing each of them individually, setting forth the statutes that they attempt to amend, and categorizing which of the Board's constitutional powers and duties they sought to transfer. Am. Compl. at 6-10. Then, in its briefs, the Board repeated this delineation, appropriately referring to and incorporating those portions of the complaint that targeted certain provisions of Session Law 2016-126 with precision.

Put simply, the Board appropriately used a scalpel, not a sledgehammer, to challenge the law. As a result, the remaining portions of Session Law 2016-126—namely, Sections 13, 18-23, 26-27, and 31-43—are not at issue in this litigation.

Given the nature of the Board's narrow challenge, the SPI's discussion of a "severability defense" is misguided. As the Board has explained in its complaint, opening brief, and response brief, the people of North Carolina in their constitution mandated that the SPI would be subservient to the Board, not the other way around. Yet on the face of each of the specifically challenged provisions of Session Law 2016-126, the General Assembly attempted to flip that constitutional structure on its head. Each of these specifically challenged provisions attempts to make the SPI—instead of the Board—in charge of either: (1) various duties relating to the general supervision and administration of the public schools, *compare* N.C. Const. art. IX, § 5, *with* Am. Compl. at 6-9 (specifying the specific sections of Session Law

2016-126 and the statutes they amend); and (2) various duties relating to the management of statewide public school budgets and finances, *compare* N.C. Const. art. IX, § 5, *with* Am. Compl. at 9-10 (specifying the specific sections of Session Law 2016-126 and the statutes they amend).

Notably, in the face of the Board's specific, targeted challenge, neither Defendant has attempted to rebut the points above. Nor has either Defendant offered a reason why any of the challenged provisions could or should be treated differently from the rest. Instead, the State and the SPI have focused their efforts on defending this case based on the phrase "subject to laws," or with other procedural defenses like the State's sovereign immunity defense. Unless and until the SPI attempts to distinguish a challenged provision from the rest, and unless and until the SPI attempts to offer a plausible rationale for why that provision does not invert the roles of the Board and the SPI, the Board is not obligated to anticipatorily concoct and refute potential rebuttal points for the SPI.

Even if this were the case, moreover, the SPI's attempt at a severability argument would still fail. When the State attempts to mitigate a constitutional challenge by clinging to a boilerplate severability clause, the Court must strike down the law as a whole if it is "a carefully meshed system" of legislation, "the cornerstones of which" are unconstitutional. *Flippin v. Jarrell*, 301 N.C. 108, 116, 270 S.E.2d 482, 489 (1980); *see also, e.g., G.I. Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 214, 125 S.E.2d 764, 769-70 (1962).

Here, the constitutional flaws in the “cornerstones” of the Transfer Legislation—discussed exhaustively in the complaint and the briefs⁵—are so broad and sweeping that, if upheld, they would effectively subsume all of the other provisions of the Transfer Legislation, rendering the remaining provisions superfluous.

Conversely, if the Court were to strike down only the cornerstones of the Transfer Legislation and leave other remnants of the unconstitutional transfer in place, it would result in dysfunction.⁶ After all, if the Board has the constitutional power and duty to direct the SPI and determine what authority it chooses to *delegate* to the SPI, that power and duty cannot exist alongside statutory provisions dictating what the SPI *shall administer* in the absence of Board input, direction, and approval. The Transfer Legislation must therefore “fall as a whole.” *Flippin*, 301 N.C. at 118, 270 S.E.2d at 488-89.

⁵ Those cornerstones of the Transfer Legislation are in Section 3 (amending N.C. Gen. Stat. § 115C-19) and Section 4 (amending N.C. Gen. Stat. §§ 115C-21(a)(1), 115C-21(a)(5), and 115C-21(b)(1b)).

⁶ See, e.g., N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1)) (mandating that the Board’s staff “shall be under the control and management of the [SPI]”); N.C. Sess. Law 2016-126 § 4 (creating N.C. Gen. Stat. § 115C-21(a)(9)) (“It shall be the duty of the [SPI] . . . [t]o have under his or her direction and control all matters relating to the provision of staff services . . .”); N.C. Sess. Law 2016-126 § 6 (amending N.C. Gen. Stat. § 115C-410) (“[T]he [SPI] is authorized to create and administer such special funds”); N.C. Sess. Law 2016-126 § 10 (amending N.C. Gen. Stat. § 143A-44.1) (“The head of the Department of Public Instruction is the . . . [SPI].”).

In sum, no severability analysis is necessary or appropriate. Moreover, even if the Court were to apply a severability analysis, the Transfer Legislation must fall as a whole. Thus, the SPI's attempted severability argument fails.

D. The SPI has failed to explain away the State's concessions.

The Board's opening brief identifies several concessions by the State that warrant summary judgment in the Board's favor—for example, the State's concession that “the General Assembly cannot take away [the Board's] constitutional mandates.” Board Br. at 11.

In response, the State was silent. The SPI, meanwhile, offers several different excuses for the State's concessions. Each of them fails.

First, the SPI argues that the State's concessions are in the eye of the beholder, because it depends on “what [the State] meant by phrases like ‘take away’ and ‘constitutional mandates.’” SPI Res. Br. at 9. The phrase “the General Assembly cannot *take away* [the Board's] *constitutional mandates*” has only one meaning: its plain meaning. Further proving that point, the SPI fails to offer any other possible meaning.

Second, the SPI questions whether the Attorney General's office had authority to make the concessions that it did. SPI Res. Br. at 10. The SPI quotes a 1994 Court of Appeals decision for the proposition that attorneys cannot “waive or surrender the substantial legal rights” of clients “[i]n the absence of express authority.” *Id.* That assertion is odd given that a North Carolina Deputy Attorney General has express authority to make binding concessions on the State. *See* N.C. Gen. Stat. § 114-4.4 (recognizing authority of deputy attorneys general); *see also*,

e.g., *City of Asheville v. North Carolina*, No. 391PA15, 794 S.E.2d 759, 772 (N.C. Dec. 21, 2016) (binding the State with concessions made by deputy attorney general during oral argument). The State, like everyone else, does not get a mulligan.

Finally, the SPI argues that because the State's concessions were about the *law*, they should not count. SPI Res. Br. at 10. While it is true that concessions about the law cannot bind the Court, when opposing parties agree on a legal proposition that is outcome-determinative, it is a strong indication of what the law actually is. *See, e.g., Dickson v. Rucho*, 366 N.C. 332, 342, 737 S.E.2d 362, 370 (2013) (applying party's requested legal interpretation of a statute in light of opposing counsel's concessions).

In sum, Defendants are left with the State's concession that the legislature "cannot take away [the Board's] constitutional mandates." Board Br. at 11.

II. DEFENDANTS' REMAINING ARGUMENTS ARE ADDRESSED IN THE BOARD'S EARLIER BRIEFS.

Defendants' remaining arguments not addressed above have been fully addressed by the Board's earlier briefs. Rather than belabor these issues or engage in repetition, the Board directs the Court's attention to the following points:

- Older statutes, such as the 1995 legislation involving the Board, are irrelevant to this Court's enforcement of the North Carolina Constitution. Board Res. Br. at 11-13.
- The Transfer Legislation is not a "codification" of the SPI's limited constitutional role. Board Res. Br. at 9-11.

III. DEFENDANTS HAVE EFFECTIVELY CONCEDED THAT A PRELIMINARY INJUNCTION IS APPROPRIATE.

While the SPI raises little opposition to the Board's request for a preliminary injunction, the State attempts to put up a fight. Two points, however, undercut the State's arguments.

First and foremost, as the Board's opening brief showed, constitutional violations amount to *per se* irreparable harm as a matter of law. Board Br. at 16-18. Thus, in a constitutional challenge like this one, the traditional "irreparable-harm analysis" for purposes of a preliminary injunction simply collapses into a merits analysis, making this Court's task simple. *Id.*

In both of its briefs on the requested preliminary injunction, the State leaves this point of law unrebutted. Likewise, so does the SPI. Thus, all the parties apparently agree that the law requires no further showing of irreparable harm.

Second, the Board's opening brief and accompanying affidavit of the Board's Chairman, William W. Cobey, Jr., described in great detail the irreparable harm that would occur immediately without a preliminary injunction to preserve the status quo. Specifically, Chairman Cobey's affidavit describes how the Transfer Legislation would reduce a nearly 150-year-old constitutional entity to an empty shell, and would immediately move the entire \$10 billion public school system under the control of a single individual for the first time in North Carolina's history. Board Br. at 17-18 (citing Cobey Aff. ¶¶ 9-10).

The State makes light of these real, tangible dangers to our public school system, accusing the Board of offering "speculative negative repercussions," State

Br. at 21, and “unfounded predictions of constitutional ruination.” State Res. Br. at 9. Yet the State has not offered a factual rebuttal—much less a counteraffidavit—suggesting that the serious harm forecast by the Board will not come to pass. In view of this oversight, there is no support for the State’s hyperbole.

Finally, the State closes its preliminary injunction arguments with the idea that “the Board[s] attempt to block the enforcement of a duly elected law . . . potentially . . . violate[s] the separation of powers doctrine” because it would get in the General Assembly’s way and offend our “tripartite structure of . . . government.” State Br. at 23. The State seems to have overlooked one of the oldest and most critical functions of the judiciary: that when the legislature enacts laws that are unconstitutional, our courts have a *duty* to declare those laws unconstitutional. *Bayard v. Singleton*, 3 N.C. 42 (1787); *see also, e.g., City of Asheville*, No. 391PA15, 794 S.E.2d at 766.

For all the reasons above and in the Board’s prior briefs, the Court should discharge that duty here.

CONCLUSION

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

Respectfully submitted the 9th day of June, 2017.

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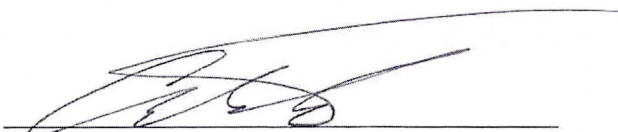
CERTIFICATE OF SERVICE

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:

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This the 9th day of June, 2017.



Andrew H. Erteschik

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.

THE STATE OF NORTH CAROLINA'S REPLY BRIEF

NOW COMES Defendant, the State of North Carolina, ("State"), by and through the undersigned counsel, pursuant to Rules 12(b)(1), (b)(2) and (b)(6) of the North Carolina Rules of Civil Procedure, and the Consent Scheduling Order signed on February 16, 2017 and modified on March 20, 2017, and submits this Reply Brief. In the interest of brevity, the State incorporates by reference its introduction, the procedural and factual history of the case, and the standards of review articulated in its previous submissions to the Court.

ARGUMENT

I. THE NORTH CAROLINA BOARD OF EDUCATION'S AMENDED COMPLAINT IS SUBJECT TO DISMISSAL FOR A LACK OF JURISDICTION, A FAILURE TO STATE A CLAIM, AND LACK OF PROPER CONTROVERSY.

The North Carolina Board of Education, ("Board"), continues to argue that its declaratory judgment action, premised upon its own interpretation of the North Carolina Constitution, should survive dismissal. The cornerstone of that argument is the proposition that the North Carolina Court of Appeals' decision in *Petroleum Traders v. State*, 190 N.C. App. 542 (2008) has been overruled by *Craig v. New Hanover Cty. Bd. Of Educ.*, 363 N.C. 334 (2009). (Board Resp Br pp

2-4). Nevertheless, the Board's analysis is mistaken, and the principles of sovereign immunity are fully applicable to this matter.

At the outset, it should be noted that *Petroleum Traders* is not referenced in the Supreme Court's opinion in *Craig*. In *Craig*, a mentally disabled student at the New Hanover Board of Education alleged that the local board of education, and the principal of his school, collectively failed to protect him from a sexual assault on the school's premises. The Court of Appeals "held that the doctrine of sovereign immunity defeats plaintiff's common law negligence claim because the Board does not carry insurance that would cover these claims and, thus, has never waived its immunity for the alleged injury." *Craig*, 363 N.C. at 335-336. Further, the majority of the Court of Appeals concluded that "plaintiff's common law negligence claim is an adequate remedy at state law, and thus, the constitutional claims are barred." *Craig*, 363 N.C. at 336. The Supreme Court reversed, and allowed that plaintiff to bring direct constitutional claims against the local board of education pursuant to *Corum v. University of North Carolina*, 330 N.C. 761 (1992), concluding that "common law negligence claim is not an adequate remedy at state law because the doctrine of governmental immunity prevails against it." *Craig*, 363 N.C. at 338. In essence, *Craig* addressed the plaintiff's *Corum* personal claims against government, in the absence of any other State remedy for his civil rights complaints. It is simply incorrect to argue that *Petroleum Traders'* holding establishing that the State enjoys sovereign immunity in actions brought pursuant to Declaratory Judgment Action was overruled by *Craig*. In fact, *Petroleum Traders* has since been cited approvingly by our appellate courts for the proposition that sovereign immunity generally applies in such actions: "[a]s is evident from the text, the statute does not expressly or impliedly waive the sovereign immunity of the State, and this Court has held that the Uniform Declaratory Judgment Act does not act as a general waiver of the State's sovereign immunity in declaratory

judgment actions.” *Sanders v. State Pers. Comm’n*, 236 N.C. App. 94, 111-112 (2014) (citing *Petroleum Traders*). The *Corum*-grounded exception announced in *Craig* fails to subvert the general principles of sovereign immunity as applied to declaratory judgment actions. As recently as in 2017, the Court of Appeals again recognized the principle that sovereign immunity generally continues to bar actions against the State, subject to “limited exception to sovereign immunity 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.’” *T & A Amusements, LLC v. McCrory*, 796 S.E.2d 376 (2017) (citing *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm’n*, 336 N.C. 200, 208, 443 S.E.2d 716, 721 (1994)).

The Court of Appeals opinion in *Richmond County Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 589 (2013) arguably creates a limited exception of a county suit against the State for an alleged deprivation of property in connection with payment of educational funds. *Richmond* principle based on the county’s alleged fiscal injury is not inconsistent with *Corum* exception. Yet, the instant case does not involve the deprivation of any property or personal, civil right guaranteed by our Constitution; instead, the case before the Court constitutes an academic and political dispute implicating two governmental entities, both of which are charged with the administration of public schools. Moreover, even as the present case features no actual, fact-based controversy between the parties sufficient to abrogate sovereign immunity, a decision in favor of the Board will present real peril to the separation of powers principle. The Board is obligated to establish a waiver of sovereign immunity. Given the unique and scholarly nature of this action and absence of a specific type of personal or property injury that existed in the exceptions cited by the Board, it is apparent that the Board has failed to meet its burden, and its claim therefore warrants dismissal.