STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

16 CVS 15607

2017 JUN -9 P 2:54

WAKE CO., C.S.C.

BY

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.

II. THE GENERAL ASSEMBLY'S ENACTMENT OF HB 17 WAS WELL WITHIN THE BOUNDS OF ITS CONSTITUTIONAL AUTHORITY.

A. The Board Has Failed To Accord Due Deference To The Legislature's Broad Authority To Enact Laws, As Protected By The Separation of Powers Doctrine.

"A clear understanding of the constitutionally prescribed powers and their division among the branches of government is a basis for stability and cooperation within government." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 651 (2016). The Board's substantive argument fails to recognize the constitutional duty, and constitutional authority of the General Assembly to enact laws. Consistent with its predecessors, the 1971 North Carolina Constitution unequivocally and broadly declares that "[t]he legislative power of the State shall be vested in the General Assembly[.]" Art. II, Sect. 1. "Unlike the Federal Constitution, 'a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it.'" *State ex rel. McCrory v. Berger*, 368 N.C. at 650 (*citations omitted*).

North Carolina's Constitution does not prohibit the General Assembly from enacting laws that affect education in general, and more specifically, the relationship between the appointed members of the State Board and the elected State Superintendent. Instead of prohibiting legislation, the Constitution unambiguously provides that "[t]he General Assembly shall provide by taxation *and otherwise* for a general and uniform system of free public schools," Art. IX, Sect. 2(1) (emphasis added), and makes the Board's rulemaking, supervisory and administrative authority on educational matters "subject to laws enacted by the General Assembly." Art. IX, Sect. 5. Instead of curtailing the General Assembly's authority to address matters related to education, our State Constitution specifically mandates the General Assembly's related legislative enactments.

Yet, despite this deeply rooted constitutional principle, that the legislature acts as "the agent of the people for enacting laws[,]" *Baker v. Martin*, 330 N.C. 331, 336 (1991), the Board makes a breathtaking and wide-reaching claim that the General Assembly's *only* legislative authority in the field of education is to enact laws (1) "*repealing* the Board's decisions[,]" or (2) "enact legislation *repealing* the Board's decisions ... by 'occupying the field,' as that term is used in preemption cases." (SBE Resp Br p 5) (emphasis in the original). In other words, the Board argues that the General Assembly is constitutionally authorized only to "'check' the Board on one of its decisions" by repealing or preempting the Board's action, but otherwise possesses no authority over statewide education. (SBE Resp Br p 6) According to this startling assertion, the Board essentially acts as the fourth branch of government in the field of education, subject only to occasional checks by the General Assembly.

The Board fundamentally misunderstands its own limited role to supervise and administer the free public school system "subject to laws enacted by the General Assembly[,]" and ignores legislature's broad constitutional authority to enact laws affecting statewide education, including the relationship between the Board and the Superintendent. The Board's constricted definition of legislative authority is not supported by the text of 1971 Constitution, contradicts well-established separation of powers' jurisprudence that gives great deference to General Assembly's enactments, and is contrary to the principle that "a restriction on the General Assembly is in fact a restriction on the people." *State ex rel. McCrory v. Berger*, 368 N.C. at 651 (citations omitted).

Further, as established in the State's and Superintendent's earlier briefs to the Court, the Board's constitutional interpretation is wholly unsupported by *Guthrie v. Taylor*, 279 N.C. 703 (1971), *State v. Whittle Communications*, 328 N.C. 456 (1991), *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 351, *cert. denied, app. dism'd by*, 363

N.C. 663 (2009). Despite prominence on this issue, none of these cases stand for the proposition that the General Assembly's role in education is limited only to retroactively repealing unfettered actions taken by the Board. To the contrary, these decisions reaffirm the constitutional principle that the General Assembly has the broad authority to set public policy regarding education through legislation, including those policies that may amend the scope of the Board's authority. *State v. Whittle Communications*, 328 N.C. at 470-471 (the General Assembly's statutes setting "public policy ... so that the State Board of Education does not have any authority over the contracts which local school boards may enter into concerning the purchase of supplementary instructional materials" are constitutionally sound). Likewise, "[N.C. Const. art. IX, sect. 5] constitutional grant of powers to the BOE may be limited and defined by 'laws enacted by the General Assembly.'" *Sugar Creek Charter Sch.*, 195 N.C. App. at 351. This Court should reject Plaintiff's attempt to dismantle the apparatus of our State's government of three distinct branches, to include the Board as a quasi-independent fourth branch. This Court should further reject the Board's attempts to curtail the General Assembly's legislative authority in the field of education to a mere, retroactive reviewer of the Board's otherwise unobstructed power.

B. HB 17 Is A Proper Exercise Of The General Assembly's Legislative Powers, And Does Not Amount To An Attempt "To Eliminate The Board's Role In Public Education Altogether[.][1]"

The Board's argument that HB 17 "eliminates" the Board from the field of education serves as a rhetorical diversion that fully ignores the text of the statute it challenges. As the State argued in its May 19 response brief, (State Resp Br p 7), the Board's supervisory and administrative authority over educational matters is explicitly recognized in HB 17. In that regard, the Board is

[1] (Board's Resp Br p 6)

free to continue its role in instituting policies, rules and regulations that concern the State's public schools, while the Superintendent is directed to administer the Board's rules and regulations, and support and provide assistance to the Board. *See* HB 17 (amending N.C. Gen. Stat. §§ 115C-11, -12, -19 and -21, -410, -535). HB 17's clarification of the general policy-setting authority of the Board in educational matters, and the day-to-day role of the Superintendent in administering such policies, which are both subject to law enacted by the General Assembly, is not constitutionally suspect.

A 10 December 1985 Attorney General Opinion explained that "the framers of the Constitution intended to make the Superintendent of Public Instruction, as the elected representative of the people, responsible for administration of the powers conferred upon the State Board of Education." (State Ex. 7)[2] "The purpose of the framers of [Art. IX, sect. 4(2) and Art. IX, sect. 5] of the Constitution was to eliminate any potential conflict of authority between the Superintendent and the State Board by making it clear that the power to administer the public school system rests with the State Board and that Superintendent is the person responsible for carrying out the policies of the State Board." (State Ex. 7 p 3). HB 17 exactly comports with that opinion. Contrary to the Board's argument, (Board Resp Br pp 6-9), the general principle that the

[2] The Board argues that the Superintendent is nothing more than "the officer who takes minutes at the Board's meetings and carries out various administrative functions at the direction of the Board." (Board Resp Br p 10) North Carolina's constitutional history explains otherwise. The 1943 Amendment to the N.C. Const. explicitly made the State Superintendent "the administrative head of the public school system." The "editorial changes" compiled for "clarity and consistency of language" encompassed by 1971 Constitution made no "substantive" alterations to the scope of the Superintendent's important role as a chief administrative officer in the system of North Carolina public schools. (See State Ex. 4 pp 3-9, State Ex. 6 pp 6-8, State Ex. 7 pp 2-3). Further contrary to the Board's confusing suggestion, there is little constitutional significance to the fact that Superintendent serves as a nonvoting (rather than voting) member of the State Board, as "[t]he chief administrative officers of governmental agencies sometimes serve as nonvoting, presiding officers of those agencies." (State Ex. 7 p 2)

legislature cannot entirely abolish the Board's constitutional powers, (as acknowledged by the State in this litigation and further expressed in 1994 Op. N.C. Att'y Gen. 41 and 1995 Op. N.C. Att'y Gen. 32), is not violated by HB 17. HB 17 is a proper legislative exercise by the General Assembly to clarify the roles of the Superintendent and the Board in administration of public schools.

The Board suggests that this Court disregard *Atkinson v. State*, No. 09-CVS-006655 as having no precedential value. (Board Resp Br p 13) Yet, "[t]he well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501 (1972). *Atkinson* has not been appealed, and thus constitutes a final superior court decision, and should be afforded due analytical weight.

The Board's next argument regarding the effect of decision in *Atkinson*, which recognized the inherent constitutional powers of the Superintendent, (Board Resp Br pp 13-14), is inconsistent with its position of the severely limited role of the Superintendent that is advanced in the remainder of its Brief. (Board Resp Br pp 13-14). Nevertheless, the decision of the Superior Court in *Atkinson* is fully compatible with the State's argument in this case, in that both Superintendent and the Board have constitutionally recognized powers in administering education in North Carolina, and both entities are subject to the laws enacted by the General Assembly. With *Atkinson*, the Board attempted to deprive the Superintendent of its inherent constitutional authority by assigning those executive responsibilities to the third party, accountable only to the Board. HB 17 neither eradicates either entity's roles in administration of public schools, nor assigns the Board's or the

Superintendent's educational responsibilities to third parties. Therefore, HB 17 falls squarely within the purview of the General Assembly's legislative powers.

Plaintiff has failed to articulate a sufficient response to the State's opposition to the Board's its motion for summary judgment and preliminary injunction. In that regard, State again refers this Court to the argument it propounded in previous filings. To the extent the Board belatedly present new issues in its own Reply brief, the State reserves the right to submit additional authorities and arguments.

CONCLUSION

This Court should dismiss the Board's Complaint for lack of subject matter and personal jurisdiction, for the State's sovereign immunity to declaratory judgment actions, and the Board's failure to state a cognizable claim. The Court should deny the Board's motions for preliminary injunction, and alternatively, enter a summary judgment for defendants for the reasons articulated in the State's various filings.

Respectfully submitted, this the 9th day of June, 2017.

JOSH STEIN
Attorney General

Amar Majmundar
Special Deputy Attorney General
NC Bar No. 24668
amajmundar@ncdoj.gov

Olga Vysotskaya de Brito
Special Deputy Attorney General
NC Bar No. 31846
ovysotskaya@ncdoj.gov

NC Department of Justice
P.O. Box 629

Raleigh, North Carolina 27602
Telephone: (919) 716-6820
Facsimile: (919 716-6759

CERTIFICATE OF SERVICE

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

Mr. Robert F. Orr,
Attorney at Law
orr@rforrlaw.com
3434 Edwards Mill, Suite 112-372
Raleigh, NC 27612
Counsel for Plaintiff

Mr. Andrew H. Erteschik
Attorney at Law
aerteschik@poynerspruill.com
Post Office Box 1801
Raleigh, NC 27602-1801
Counsel for Plaintiff

Mr. John M. Durnovich
Attorney at Law
jdurnovich@poynerspruill.com
301 S. College St., Suite 2300
Charlotte, NC 28202
Counsel for Plaintiff

Mr. Saad Gul
Attorney at Law
sgul@poynerspruill.com
Post Office Box 1801
Raleigh, NC 27602-1801
Counsel for Plaintiff

Philip R. Isley
pisley@bmlilaw.com
Blanchard, Miller, Lewis & Isley P.A.
1117 Hillsborough Street
Raleigh, NC 27603
Counsel for Superintendent

This the 9th day of June, 2017.

Amar Majmundar
Special Deputy Attorney General

State Ex. 7

APPENDIX O

LACY H. THORNBURG
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P.O. BOX 629
RALEIGH
27602-0629

10 December 1985

Senator Robert D. Warren
Representative Edward N. Warren
Legislative Building
Raleigh, North Carolina

RE: Constitutionality of Proposed Legislation Concerning the Duties and Position of the State Superintendent of Public Instruction

Gentlemen:

As Co-Chairmen of the Legislative Research Committee on the Superintendent of Public Instruction and the State Board of Education you have asked, through your Committee Counsel, Libby Lefler, for our opinion about the constitutionality of proposed legislation. We understand that this proposed legislation would (1) make the Superintendent of Public Instruction the Chairman of the State Board of Education, and (2) would establish the position of Commissioner of Public Schools and confer upon the Commissioner responsibility for administration of the public school system under the direction of the State Board of Education. We will review the parts of this proposed legislation separately.

1. Does The General Assembly Have The Power, Without A Constitutional Amendment, To Make The Superintendent Of Public Instruction The Chairman Of The State Board Of Education.

The Constitution of 1868 provided that the Superintendent of Public Instruction was a member of the State Board of Education and that the Chairman of the State Board was elected by the Board. Constitution of 1868, Article IX, §9. Effective July 1, 1971 the Constitution was rewritten. Under our present Constitution the Superintendent of Public Instruction is not a member of the State Board, but serves as the "secretary and chief administrative officer of the State Board." Constitution of 1970, Article IX, §§4(1) and (2). Further, our present

Constitution does not provide that the State Board shall elect its Chairman.

It was the express intention of the framers of our present Constitution to eliminate the Superintendent of Public Instruction as a voting member of the State Board. See Report of the N.C. State Constitution Study Commission, p. 87 (1968) where the drafters stated: "Proposed Sec. 4(1) modifies the State Board of Education slightly by eliminating the Superintendent of Public Instruction as a voting member of the Board while retaining him as the Board's secretary and chief administrative officer." The Report of the framers of the Constitution, however, is silent as to their intention in eliminating the provision of the Constitution of 1868 that the Board elect its Chairman. It may reasonably be assumed, however, that the framers believed that the election of the Chairman of the State Board was a relatively insignificant matter not appropriately addressed in the Constitution, and should be left to the General Assembly or the State Board itself. In this regard, G..S. §115C-11(a) provides: "The State Board of Education shall elect from its membership a chairman and vice-chairman."

The question arises as to whether the amendment to the Constitution eliminating the Superintendent of Public Instruction as a voting member of the State Board of Education deprived the General Assembly of the power to amend G.S. §115C-11(a) to make the Superintendent of Public Instruction Chairman of the State Board without the benefit of an amendment to the Constitution. In answering this question two principles appear especially pertinent. First, our State Constitution is "in no matter a grant of power" and the General Assembly has all political power not prohibited by the Constitution. LASSITER v. BOARD OF ELECTIONS, 248 N.C. 102, 112, 102 S.E.2d 853, aff'd 360 U.S 45 (1958). Second, in determing the effect of an amendment to the Constitution, the intention of the framers is controlling and their intention must be ascertained from the conditions existing at the time of the adoption of the amendment and the purpose sought to be accomplished by the amendment. PERRY v. STANCIL, 237 N.C. 442, 444, 75 S.E.2d 512 (1953); SNEED v. BOARD OF EDUCATION, 299 N.C. 609, 613-617, 264 S.E.2d 106 (1980). The express purpose of the framers of the Constitution of 1970 was to eliminate the Superintendent of Public Instruction as a voting member of the State Board. We find no indication that their purpose extended to prohibiting the Superintendent of Public Instruction from serving as the nonvoting, presiding officer of the State Board. The framers of the present Constitution expressly made the Superintendent of Public Instruction the chief administrative officer of the State Board. The chief administrative officers of governmental agencies sometimes serve as the nonvoting, presiding officers of those agencies. See

MARKHAM v. SIMPSON, 175 N.C. 135, 138-139, 95 S.E. 106 (1918) and 56 Am.Jur. 2d, Municipal Corporations, §165.

In sum, the General Assembly has all political powers not denied it by the Constitution. It appears that these powers include the power to make the chief administrative officer of a public agency the nonvoting, presiding officer of the governing body of the agency. In amending the Constitution it appears that the framers only intended to eliminate the Superintendent of Public Instruction as a voting member of the State Board of Education. It does not appear that the framers' purpose extended to prohibiting the General Assembly from making the Superintendent of Public Instruction the nonvoting, presiding officer of the State Board of Education. Thus, we are of the opinion that it is likely within the power of the General Assembly under the present Constitution to amend G.S. §115C-11(a) to make the Superintendent of Public Instruction the nonvoting Chairman of the State Board.

2. Does The General Assembly Have The Power, Without A Constitutional Amendment, To Establish The Position Of Commissioner Of Public Schools And Confer Upon That Office Responsibility For Administration Of The Public School System Under The Direction Of The State Board Of Education.

Article IX, §4(2) of our present Constitution makes the Superintendent of Public Instruction "the chief administrative officer of the State Board of Education" and Article IX, §5 provides that "the State Board of Education shall supervise and administer the free public school system". The purpose of the framers of these two provisions of the Constitution was to eliminate any potential conflict of authority between the Superintendent and the State Board by making it clear that the power to administer the public school system rests with the State Board and that the Superintendent is the person responsible for carrying out the polices of the State Board. Report of the N.C. State Constitution Study Commission, p.87 (1968).

If the General Assembly makes the Superintendnet of Public Instruction the nonvoting Chairman of the State Board of Education, it has been suggested that the General Assembly should at the same time create the position of Commissioner of Public Schools to serve as chief administrative officer of the State Board. The principles described above suggest that the General Assembly may not enact legislation depriving the Superintendent of Public Instruction of his powers as chief administrative officer of the State Board. The General Assembly has all political power not denied it by the Constitution, but 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 administration of the powers conferred upon the State Board of Education.

If our interpretation of the intention of the framers is correct, 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. While we doubt that the General Assembly now has the power to confer the constitutional duties of the Superintendent of Public Instruction on some other officer, we do believe that the framers of the Constitution did not intend to require that the Superintendent of Public Instruction perform those duties on a day-to-day basis without assistance. Thus, we believe that the Constitution would not prohibit the General Assembly from establishing the position of Commissioner of Public Schools and conferring upon that office the day-to-day administration of the powers of the State Board so long as such legislation requires that such responsibilities be exercised through the Superintendent of Public Instruction or under his direction.

We trust that our opinion will be of assistance to you and the members of your committee.

Very truly yours,

LACY H. THORNBURG
ATTORNEY GENERAL

Andrew A. Vanore, Jr.
Chief Deputy Attorney General

Edwin M. Speas, Jr.
Special Deputy Attorney General

EMSjr/ch