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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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 19th day of May, 2017.

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