

14CV014791

NORTH CAROLINA

FILED

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CVS-_____

WAKE COUNTY

2014 NOV -7 AM 9:56

NORTH CAROLINA STATE
BOARD OF EDUCATION,

WAKE COUNTY, C.S.C.

BY Plaintiff,

v.

THE STATE OF NORTH CAROLINA and
THE NORTH CAROLINA RULES
REVIEW COMMISSION,

Defendants.

**VERIFIED COMPLAINT
FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiff the North Carolina State Board of Education ("Plaintiff" or "the Board"), complaining of the Defendants the State of North Carolina ("the State") and the North Carolina Rules Review Commission ("the RRC") (collectively, "Defendants"), alleges and states the following:

INTRODUCTION

1. This declaratory judgment action seeks a judicial determination as to whether the North Carolina Constitution precludes the RRC, a statutorily-created administrative agency, from exercising authority over the Board, a constitutional body.

2. In 1986, the General Assembly created an administrative review process through which rules adopted by virtually all executive branch agencies would be reviewed by an administrative agency, the RRC. Because the Board is not expressly named as an exempt entity under the law, the RRC has taken the position that the Board is subject to its authority.

3. Article IX, Section 4 of the North Carolina Constitution creates the Board as a constitutional fixture in its own right. The "[p]owers and [d]uties of the Board" are set forth in Article IX, Section 5 of the North Carolina Constitution, which provides:

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

4. Notwithstanding the Board's constitutional authority, the RRC since its creation in 1986 has purported to exercise authority over the Board. The RRC has done so by determining the limits of the Board's constitutional authority, objecting to the Board's rules, and striking down the Board's rules. In essence, the RRC deems its rules review process to be a substitute for the built-in state constitutional review process under which the Board's rules can only be revised or repealed by the General Assembly.

5. Having now made the decision to exercise the full extent of its constitutional authority, the Board brings this action for declaratory and injunctive relief to enjoin the RRC from exercising authority over the Board.

6. The Board seeks the following relief in this action:

- (a) a declaration that the legislation triggering the RRC's review process does not apply to the Board because the Board is not an agency within the executive branch;
- (b) a declaration that the RRC's exercise of authority over the Board violates Article IX, Section 5 of the North Carolina Constitution because it subverts the Board's general supervisory and administrative rulemaking authority on matters concerning North Carolina's free public schools;
- (c) a declaration that the RRC's exercise of authority over the Board violates the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution because it unconstitutionally delegates to the RRC the authority to

review, revise, or repeal rules of the Board, which are acts that only the General Assembly is authorized to take;

- (d) a declaration that the RRC's enabling statutes are facially unconstitutional because they allow the RRC to improperly exercise legislative power by striking down agency rules without bicameral passage and presentment of a bill as required by Article II, Section 22 of the North Carolina Constitution;
- (e) a declaration that the RRC's enabling statutes are facially unconstitutional and unconstitutional as applied to the Board because they permit the RRC to encroach on the judicial function in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;
- (f) a declaration that the RRC's enabling statutes are facially unconstitutional because even if the General Assembly could constitutionally delegate its authority to the RRC, which it cannot, it failed to provide adequate guiding standards in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;
- (g) a declaration, if the Court concludes that the Board is an agency within the executive branch, that the RRC's enabling statutes are facially unconstitutional because they permit the RRC to encroach on the executive function in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution; and
- (h) a permanent injunction enjoining the RRC from exercising authority over the Board.

PARTIES

7. The Board is a constitutional body created by Article IX of the North Carolina Constitution with the power and duty to “supervise and administer the free public school system and the educational funds provided for its support.” N.C. Const. Art. IX, § 5.

8. The State through its General Assembly enacts legislation, including the legislation described herein.

9. The RRC is a state administrative agency charged with reviewing rules adopted by virtually all executive branch agencies.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action because the Board seeks declaratory and injunctive relief pursuant to the North Carolina Constitution, the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253, *et seq.*, and N.C. Gen. Stat. § 7A-245.

11. Venue with respect to Counts 1, 2, 3, and the as-applied challenge in Count 5 lies in Wake County Superior Court pursuant to N.C. Gen. Stat. § 1-77 because the legislation described herein was enacted by the 1986 General Assembly in Wake County.

12. Venue with respect to Counts 4, 6, 7, and the facial challenge in Count 5 lies with a three-judge panel of the Wake County Superior Court pursuant to N.C. Gen. Stat. § 1-81.1 because these claims seek a declaration that the RRC’s enabling legislation is facially unconstitutional under the North Carolina Constitution.

FACTUAL ALLEGATIONS

Overview of the Board’s Constitutional Powers and Duties

13. The Board is unique among state government entities in North Carolina because it is a constitutional body that derives its broad powers directly from the people of North Carolina through the North Carolina Constitution.

14. The 1868 North Carolina Constitution established the framework of our present system of education by creating the Board as a constitutional entity responsible for governing our free public schools. Article IX, Section 9 of the 1868 North Carolina Constitution conferred broad powers on the Board, including the power “to legislate” with respect to North Carolina’s public schools:

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

15. In 1942, the voters ratified an amendment to further centralize power in the Board by expressly listing additional areas in which the Board – as opposed to other administrative agencies existing at the time – had constitutional authority. The amendment expressly stated that the Board retained all the powers that it held prior to the amendment – i.e., the powers given to the Board by the 1868 North Carolina Constitution. Thus, as amended in 1942, Article IX, Section 8 of the North Carolina Constitution provided:

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

16. In 1971, the North Carolina Constitution was rewritten to reflect a number of editorial – as opposed to substantive – revisions. As adopted in 1971, revised Article IX, Section 5 provides in its current form:

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

17. As in the 1942 amendment, the framers of the 1971 North Carolina Constitution expressly intended that the powers of the Board remain as extensive as they were since the 1868 Constitution. In the 1968 Report of the State Constitutional Study Commission, the Commission wrote that “[Article IX, Section 5] restates in much abbreviated form the duties of the State Board of Education, but without any intention that its authority be reduced.”

18. The same year the 1971 North Carolina Constitution was adopted, the Supreme Court of North Carolina in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), held that the Board had “legislative power” under Article IX, Section 5, and that the Board’s rules were “subject to limitation and revision” only “by acts of the General Assembly.” The Supreme Court further recognized that when the General Assembly attempts to review, revise, or repeal the Board’s rules, it must do so “specifically,” otherwise the Board’s rulemaking authority is “limited only by other provisions of the Constitution itself.”

19. Thus, since the creation of the Board in 1868, no state constitutional amendment or decision of the Supreme Court of North Carolina has limited the Board’s broad powers and duties as described above.

The RRC’s Encroachment on the Board’s Constitutional Authority

20. In 1986, the General Assembly created the RRC. Through its enabling legislation, the RRC is required to approve administrative rules before they can have the force and effect of law. The RRC is also authorized to strike down rules.

21. Under the RRC’s enabling statutes, an agency that adopts a rule must file that rule with the RRC within 30 days pursuant to N.C. Gen. Stat. § 150B-21.2(g). Under N.C. Gen. Stat.

§ 150B-21.10, the RRC in its sole discretion can then take one of three actions: (1) approve the rule, if it determines that the rule meets certain criteria; (2) object to the rule, if it determines that the rule does not meet the criteria; or (3) extend the period for reviewing the rule, if it determines that additional information is necessary to decide whether the rule satisfies the criteria.

22. Unless and until the RRC approves the rule, N.C. Gen. Stat. § 150B-21.3(b)(2) dictates that the agency's adopted rule is of no force and effect. If the RRC objects to the agency's adopted rule, then under N.C. Gen. Stat. § 150B-21.19(4), the rule cannot be implemented unless and until the agency revises the rule to address the RRC's objections.

23. The RRC's enabling legislation requires it to exercise authority over any "agency," which is defined by N.C. Gen. Stat. § 150B-2(1a) as "an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch."

24. Notwithstanding the Board's unique status as a constitutional body, the RRC since 1986 has purported to exercise control over the Board, deeming the Board an "agency" within the meaning of N.C. Gen. Stat. § 150B-2(1a). Though historically the Board has stopped short of bringing a legal challenge, the Board has repeatedly questioned the constitutionality of this purported exercise of authority by the RRC over the Board, a constitutional body.

25. Since its inception in 1986, the RRC or its staff has objected to or modified every rule adopted by the Board and submitted to the RRC for approval. Moreover, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the RRC would have objected to these rules or struck them down.

26. In addition, the RRC review process typically takes a minimum of six months and often longer. Thus, when the Board adopts rules, they do not have the force and effect of law until at least six months later. In the intervening months or, in some cases, years, statewide education policy is effectively enjoined by the RRC review process. In this regard, the RRC's exercise of authority over the Board's rulemaking erodes the Board's ability to timely address critical issues facing our State in the area of education.

The Board's Decision to Exercise the Full Extent of its Constitutional Authority

27. The Board as currently constituted has made the decision to exercise the full extent of its powers and duties under the North Carolina Constitution without unconstitutional interference by the RRC.

28. The Board has resolved that it will no longer voluntarily submit its rules for RRC approval. The Board will nevertheless deem its rules to have the immediate full force and effect of law.

29. The Board recognizes that its decision is in direct conflict with the RRC's interpretation and application of both N.C. Gen. Stat. § 150B-2(1a) and the RRC's enabling legislation. Accordingly, a declaratory judgment is necessary to determine the proper interpretation and application of the statutory and state constitutional provisions discussed herein.

COUNT 1 – DECLARATORY JUDGMENT
N.C. Gen. Stat. § 150B-2(1a)

30. The allegations contained in Paragraphs 1 through 29 of this Complaint are restated and incorporated herein by reference.

31. Under the North Carolina Administrative Procedure Act ("APA") N.C. Gen. Stat. §§ 150B-1, *et seq.*, only an "agency" is subject to the RRC.

32. For purposes of the APA, N.C. Gen. Stat. § 150B-2(1a) defines “agency” as “an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor’s Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch.”

33. The North Carolina Constitution does not create the Board as an agency within the executive branch. The Board is not named in Article II, III, or IV of the North Carolina Constitution. The Board’s authority derives solely from Article IX of the North Carolina Constitution, which creates the Board as a constitutional entity of independent authority that, within the scope of its functions, is coordinate with and equal to that of the other branches of State government.

34. The fact that the Board is not an “executive branch agency” subject to the RRC is further evident within the APA. N.C. Gen. Stat. § 150B-21.9(a)(1) provides that the RRC’s primary task is to “determine whether a rule . . . is within the authority delegated to the agency by the General Assembly.” This statutory provision cannot apply to the Board. Unlike executive branch agencies falling within N.C. Gen. Stat. § 150B-2(1a), the General Assembly did not create the Board and the Board does not derive its authority from the General Assembly. The Board is a constitutional fixture in its own right that derives its powers directly from the people of North Carolina through Article IX, Sections 4 and 5 of the North Carolina Constitution.

35. For the foregoing reasons, the Board is not an “agency” within the meaning of N.C. Gen. Stat. § 150B-2(1a). Accordingly, the Board is not subject to the RRC.

COUNT 2 – DECLARATORY JUDGMENT
Article IX, Section 5 of the North Carolina Constitution

36. The allegations contained in Paragraphs 1 through 35 of this Complaint are restated and incorporated herein by reference.

37. Under Article IX, Section 5 of the North Carolina Constitution, the Board has general supervisory and administrative rulemaking authority with respect to public education unless the General Assembly enacts specific legislation revising or repealing a particular rule adopted by the Board.

38. Because the Board is not listed as an exempt entity under N.C. Gen. Stat. § 150B-2(1a), the RRC deems its rules review process to be a substitute for the built-in state constitutional review process under which the Board's rules can only be revised or repealed by the General Assembly. The RRC's position is contrary to Article IX, Section 5 of the North Carolina Constitution.

39. The RRC is not "the General Assembly" as that term is used in Article IX, Section 5 of the North Carolina Constitution. The RRC is neither representative of the people of North Carolina nor accountable to the people of North Carolina. It is comprised entirely of unelected individuals appointed to the RRC who are not members of the General Assembly.

40. Any attempt by the General Assembly to review, revise, or repeal the Board's rules must be done "specifically." The 1986 General Assembly's establishment of a rules review process through which an administrative agency would review all rules adopted by all agencies on all subjects at all times is not a "law enacted by the General Assembly" that "specifically" revises or repeals a particular rule of the Board within Article IX, Section 5.

41. Accordingly, the RRC's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board violates Article IX, Section 5 of the North Carolina Constitution.

COUNT 3 – DECLARATORY JUDGMENT
Article I, Section 6, Article II, Section 1, and
Article IX, Section 5 of the North Carolina Constitution

42. The allegations contained in Paragraphs 1 through 41 of this Complaint are restated and incorporated herein by reference.

43. Only the General Assembly has the authority under Article IX, Section 5 to enact specific legislation revising or repealing a particular rule adopted by the Board. Nothing in the North Carolina Constitution permits the General Assembly to delegate that authority to the RRC or any other entity.

44. Accordingly, the RRC's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board violates Article I, Section 6, Article II, Section 1, and Article IX, Section 5 of the North Carolina Constitution.

COUNT 4 – DECLARATORY JUDGMENT
Article I, Section 6, Article II, Section 1, and
Article II, Section 22 of the North Carolina Constitution

45. The allegations contained in Paragraphs 1 through 44 of this Complaint are restated and incorporated herein by reference.

46. The RRC improperly exercises legislative power by striking down agency rules without bicameral passage and presentment of a bill as required by Article II, Section 22 of the North Carolina Constitution.

47. Accordingly, the RRC's enabling legislation is facially unconstitutional because it violates Article I, Section 6, Article II, Section 1, and Article II, Section 22 of the North Carolina Constitution.

COUNT 5 – DECLARATORY JUDGMENT
Article I, Section 6 and Article IV, Section 1
of the North Carolina Constitution

48. The allegations contained in Paragraphs 1 through 47 of this Complaint are restated and incorporated herein by reference.

49. Deciding whether a rule falls within a rulemaking entity's authority is a judicial function. When the RRC purports to make such a determination, it violates the separation of powers because it unconstitutionally encroaches on the functions of the judicial branch.

50. As applied to the Board, the RRC's determination of whether a rule is within the Board's authority encroaches even further on the functions of the judicial branch. The judicial branch is the sole arbiter of the North Carolina Constitution. When the RRC under N.C. Gen. Stat. § 150B-21.9(a)(1) purports to determine the limits of the Board's constitutional authority, it violates the separation of powers because it unconstitutionally encroaches on the functions of the judicial branch.

51. Accordingly, the RRC's enabling legislation is facially unconstitutional and unconstitutional as applied to the Board because it violates Article I, Section 6 and Article IV, Section 1 of the North Carolina Constitution.

COUNT 6 – DECLARATORY JUDGMENT
Article I, Section 6 and Article II, Section 1
of the North Carolina Constitution

52. The allegations contained in Paragraphs 1 through 51 of this Complaint are restated and incorporated herein by reference.

53. Even if the General Assembly could constitutionally delegate its Article IX, Section 5 authority to the RRC, which it cannot, the General Assembly could only delegate such authority to the RRC with adequate guiding standards.

54. N.C. Gen. Stat. § 150B-21.9(a) provides the RRC with vague and open-ended standards to use in deciding whether to strike down rules. N.C. Gen. Stat. § 150B-21.9(a) charges the RRC with determining whether a rule is “within the authority delegated to the agency,” whether it is “clear and unambiguous,” and whether it is “reasonably necessary to implement or interpret an enactment” of the General Assembly, Congress, or a federal agency. These are not adequate guiding standards.

55. In addition to providing the RRC with inadequate guiding standards, the RRC lacks the requisite expertise for such delegation to be effective. Furthermore, no adequate procedural safeguards exist to ensure the RRC’s accountability.

56. Accordingly, the RRC’s enabling legislation is facially unconstitutional because it violates Article I, Section 6 and Article II, Section 1 of the North Carolina Constitution.

COUNT 7 – DECLARATORY JUDGMENT
Article I, Section 6 and Article III, Section 1
of the North Carolina Constitution

57. The allegations contained in Paragraphs 1 through 56 of this Complaint are restated and incorporated herein by reference.

58. In the alternative to Count 1, if the Court concludes that the Board is an agency “in the executive branch” under N.C. Gen. Stat. § 150B-2(1a), then the RRC violates the separation of powers because it unconstitutionally encroaches on the executive function of rulemaking.

59. Accordingly, the RRC’s enabling legislation is facially unconstitutional because it violates Article I, Section 6 and Article III, Section 1 of the North Carolina Constitution.

WHEREFORE, Plaintiff prays that this Court:

- (a) Declare that the legislation triggering the RRC's review process does not apply to the Board because the Board is not an agency within the executive branch;
- (b) Declare that the RRC's exercise of authority over the Board violates Article IX, Section 5 of the North Carolina Constitution because it subverts the Board's general supervisory and administrative rulemaking authority on matters concerning North Carolina's free public schools;
- (c) Declare that the RRC's exercise of authority over the Board violates the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution because it unconstitutionally delegates to the RRC the authority to review, revise, or repeal rules of the Board, which are acts that only the General Assembly is authorized to take;
- (d) Declare that the RRC's enabling statutes are facially unconstitutional because they allow the RRC to improperly exercise legislative power by striking down agency rules without bicameral passage and presentment of a bill as required by Article II, Section 22 of the North Carolina Constitution;
- (e) Declare that the RRC's enabling statutes are facially unconstitutional and unconstitutional as applied to the Board because they permit the RRC to encroach on the judicial function in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;
- (f) Declare that the RRC's enabling statutes are facially unconstitutional because even if the General Assembly could constitutionally delegate its authority to the RRC, which it cannot, it failed to provide adequate guiding standards in violation

of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;

- (g) Declare, if the Court concludes that the Board is an agency within the executive branch, that the RRC's enabling statutes are facially unconstitutional because they permit the RRC to encroach on the executive function in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;
- (h) Enter a permanent injunction enjoining the RRC from exercising authority over the Board;
- (i) Assess costs against the State pursuant to N.C. Gen. Stat. § 1-263;
- (j) Award reasonable attorneys' fees to the Board as permitted by law; and
- (k) Grant the Board any and all other relief which this Court deems just and proper.

Respectfully submitted the 7th day of November, 2014.

POYNER SPRUILL LLP

By: 

for Robert F. Orr *by AHE w/permission*

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STATE BOARD OF EDUCATION**

STATE OF NORTH CAROLINA

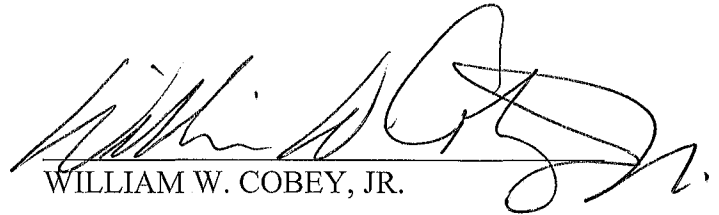
VERIFICATION

COUNTY OF WAKE

William W. Cobey, Jr., being first duly sworn, deposes and says:

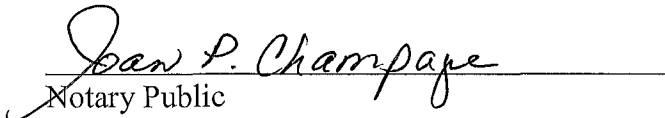
That he is the Chairman of the State Board of Education, the Plaintiff in this action; that he has read the foregoing Complaint and knows the contents thereof; that the allegations therein are true of his own knowledge, except as to those things therein stated upon information and belief; and that as to those matters and things stated upon information and belief, he believes them to be true.

This the 6 day of November, 2014.


WILLIAM W. COBEY, JR.

WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 6 day of November, 2014.


Notary Public

My commission expires: 1-9-2018

