

FILED

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

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 16 CVS 15607

JUL 14 PM 2: 27

NORTH CAROLINA STATE BOARD--)
OF EDUCATION,)
Plaintiff,)
vs.)
THE STATE OF NORTH CAROLINA)
AND MARK JOHNSON, in his official)
capacity,)
Defendants.)

ORDER

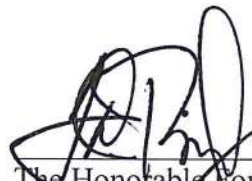
This cause came on for hearing before the undersigned three-judge panel presiding at the 29 June 2017 special setting of the Wake County Superior Court upon the motion for summary judgment filed by the North Carolina State Board of Education (“State Board”), the motion to dismiss filed by the State of North Carolina, and the motion for summary judgment filed by the North Carolina Superintendent of Public Instruction, Mark Johnson (“Superintendent”). Given that the Court has considered matters outside the face of the pleadings with regard to each of the parties’ arguments, and therefore upon its own motion converts the state’s motion to dismiss into a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

Whereupon, having considered arguments and materials submitted, the Court concludes that there is no genuine issue as to any material fact; that the State Board has failed to satisfy its burden of proof as to the facial unconstitutionality of any provision of the statute; and that the State of North Carolina and the Superintendent are entitled to judgment as a matter of law. For that reason, summary judgment is granted to the State of

North Carolina and the Superintendent, and the State Board's motion for summary judgment is denied.

This Court further notes that pending hearing in this matter there has been in effect a preliminary injunction whereby the implementation and enforcement of the statute has been enjoined. This Court notes that there is a likelihood of appeal from this order, including likely requests that the effect of this order be stayed pending such appeals. It is further ordered that the effect of this order and the implementation and enforcement of the challenged provisions of S.L. 2016-126 shall be and hereby are restrained and enjoined for a period of 60 days pending further orders of this court or any appellate court having jurisdiction over this matter so as to allow any motions by any of the parties herein requesting additional stays or dissolution of this stay pending appeal of this matter.

This the 30th day of June, 2017.



The Honorable Forrest Donald Bridges
Senior Resident Superior Court Judge



The Honorable James F. Ammons, Jr.
Senior Resident Superior Court Judge



The Honorable Martin B. McGee
Senior Resident Superior Court Judge

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NORTH CAROLINA STATE BOARD)
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Capacity,)
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**MEMORANDUM OF
OPINION**

This cause came on for hearing before the undersigned three-judge panel presiding at the 29 June 2017 special setting of the Wake County Superior Court, upon the motion for summary judgment filed by the North Carolina State Board of Education (“State Board”), the motion to dismiss filed by the State of North Carolina, converted on motion of the Court to a motion for summary judgment, and the motion for summary judgment filed by the North Carolina Superintendent of Public Instruction, Mark Johnson (“Superintendent”). In its Order, filed separately, this Court granted the motions for summary judgment filed by the Defendants and denied the Plaintiff’s motion, for the reasons explained below.

Acts of the General Assembly are presumed constitutional, and courts will declare them unconstitutional only when "it [is] plainly and clearly the case." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). The party alleging the unconstitutionality of a statute has the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887,

889 (1991). Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter. *Wayne County Citizens Association for Better Tax Control v. Wayne County Board or Commissioners*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991). Thus, courts afford great deference to acts of the General Assembly. The Court does not concern itself with political questions, nor with the wisdom of the legislation at hand. This Court has attempted to follow each of these principles in arriving at its decision.

This case involves a challenge to statutes which the Plaintiff alleges violate the following provisions of the North Carolina Constitution:

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

N.C. Const. art. IX, § 5.

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

N.C. Const. art. IX, § 4(2).

The legislation in question, Session Law 2016-126, transfers a number of powers and authorities from the State Board to the Superintendent. In addition to other changes, particular portions of the legislation provide as follows:

- 1) That the Superintendent “have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.” (amending G.S. 115C-21(a)(5) and replacing prior language giving the Superintendent the power to “manage all those matters relating to the supervision and administration of the public school system that the State Board delegates to the Superintendent of Public Instruction.”).

- 2) That the Superintendent has the power to “administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.” (amending G.S. 115C-21(b)(1b). Contemporaneously with this amendment, the General Assembly amended G.S. 115C-408(a) by adding the following language to that section: “The Superintendent of Public Instruction shall administer any available educational funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education.”).
- 3) That the State Board shall establish “all needed rules and regulations” for the system of free public schools... (amending G.S. 115C-12 by substituting the words “all needed rules and regulations” for “policy” in the previous version. The Act also adds the following language to the same provisions: “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 State Board contends that these provisions, among others, are in violation of Article IX, § 5, of the North Carolina Constitution, arguing that the powers transferred are the State Board’s constitutional powers to supervise and administer the public school system. In its filings, the State Board complains of a total of 62 provisions of S.L. 2016-126, contending that its constitutional powers are diminished by such legislation. The State of North Carolina and the Superintendent argued that any diminution of authority

and powers is allowed by the final clause of Article IX, § 5, making the State Board's powers "subject to laws enacted by the General Assembly." This Court concludes that many of the provisions of S.L. 2016-126, particularly those which were not specifically addressed by the Plaintiffs in their briefs and oral arguments, simply shift the details of day-to-day operations, such as hiring authority, from the State Board to the Superintendent. This Court further concludes that those aspects of the legislation appear to fall well within the constitutional authority of the General Assembly to define specifics of the relationship between the State Board of Education and the Superintendent of Public Instruction.

North Carolina's Constitution establishes two entities responsible for the governance of the public school system: the State Board and the Superintendent. The allocation of powers and duties between these two constitutional entities has changed over time such that there has been an ebb and flow of the powers of each entity over the years, depending on various acts of legislation. Nevertheless, it appears to be the clear intent of the Constitution that the State Board shall have the primary authority to supervise and administer the free public school system and the educational funds provided for the support thereof, and that the State Board is empowered to make all needed rules and regulations related to each of those functions, subject to laws passed by the General Assembly. It also appears clear that as secretary to the State Board and chief administrative officer of the State Board, the Superintendent is primarily responsible for overseeing the day-to-day management and operations of the state's free public school system.

While the parties disagree as to what, if any, limits are placed on the power of the General Assembly to shift responsibilities back and forth between the State Board and Superintendent, this Court does not consider it necessary to articulate a precise definition on that boundary. Suffice it to say, it is at least abundantly clear to this Court that this action by the General Assembly in enacting S.L. 2016-126 is not such a pervasive transfer of powers and authorities so as to transfer the inherent powers of the State Board to supervise and administer the public schools, nor does it render the State Board an “empty shell,” nor does this action, which Plaintiffs contend to be an infringement upon the constitutional powers and duties of the State Board of Education, operate to “unnecessarily restrict [the State Board of Education] engaging in constitutional duties.” *State v. Camacho*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991).

Because it considers the aforementioned itemized portions of the legislation as presenting the most serious constitutional challenge, this Court now addresses specifically each of those three provisions.

First, the State Board challenges the grant of power to the Superintendent under G.S. 115C-21(a)(5) to “have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.” This Court concludes that this language does not transfer the State Board’s power, but rather empowers the Superintendent to manage the day-to-day operations of the school system, subject to general oversight by the State Board. Contemporaneously with this amendment, the General Assembly placed a limit on the Superintendent’s authority in this subsection through the requirement, in S.L. 2016-126 § 2 (amending N.C. Gen. Stat. § 115C-12), that “[t]he State Board of Education shall establish all needed rules and

regulations for the system of free public schools, subject to 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 legislation further clarifies the Superintendent’s role by providing in S.L. 2016-126, § 3, that “[t]he Superintendent of Public Instruction 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[.]” These subsections places a limit on the Superintendent’s power, leaving the ultimate authority to supervise and administer the public school system with the State Board.

Second, the State Board challenges the grant of authority to the Superintendent to “administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.” Again, the statute provides a limiting principle for this exercise of authority by the Superintendent, providing in S.L. 2016-126 § 5 that “[t]he Superintendent of Public Instruction shall administer any available educational funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education,” thereby leaving the ultimate authority to supervise and administer the school system’s funds with the State Board.

Third, the State Board challenges the removal of “policy,” and its replacement with “all needed rules and regulations” in G.S. 115C-12. This Court concludes that deletion of the word “policy” does not change the constitutional role of the State Board of

Education. The North Carolina Constitution does not provide that the State Board establish “policy,” but rather “rules and regulations” related to its authority to supervise and administer the schools. This provision does not conflict with the roles of the parties as defined by the state constitution.

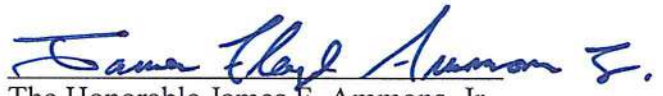
As noted previously, the State Board does not discuss in detail the additional provisions which it identifies in its complaint, and these provisions represent a permissible shift of day-to-day authority from the State Board to the Superintendent.

Because the statute continues to provide that the State Board supervise and administer the public schools and make all necessary rules and regulations to carry out that function, and because the Superintendent’s duties are limited by that power of the State Board, the plaintiff has not shown that this legislation violates the North Carolina Constitution. Summary judgment is therefore granted in favor of the defendants.

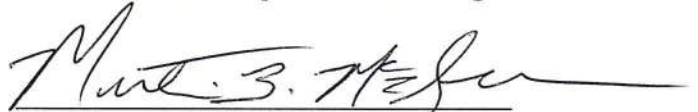
This the 6 day of July, 2017.



The Honorable Forrest Donald Bridges
Senior Resident Superior Court Judge



The Honorable James F. Ammons, Jr.
Senior Resident Superior Court Judge



The Honorable Martin B. McGee
Senior Resident Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on all parties by serving counsel as indicated below by U.S. Mail, postage prepaid, addressed as follows, with a courtesy copy via electronic mail:

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This the 14th day of July, 2017.



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