

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,

2017 JUL 15 P 3:34

BY [Signature]

Plaintiff,

v.

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

Defendants.

**PLAINTIFF'S MOTION  
FOR TEMPORARY STAY**

Pursuant to Section 1-500 of the North Carolina General Statutes and Rules 8(a) and 23(c) of the North Carolina Rules of Appellate Procedure, the North Carolina State Board of Education respectfully moves this Court for a temporary stay of its July 14, 2017 decision pending the Board's appeal.

**BACKGROUND**

On July 14, 2017, this Court issued a decision denying the Board's motion for summary judgment and granting summary judgment to the State of North Carolina and the Superintendent of Public Instruction ("SPI"). The Court temporarily stayed its decision, however, "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." July 14, 2017 Order at 2.

On July 20, 2017, the Board gave notice of appeal. The Board did not immediately seek a temporary stay pending the appeal, however, because within

hours of the Court's July 14, 2017 decision, counsel for both the Board and the SPI began a series of discussions about whether they could join in a motion to this Court for a temporary stay on agreed-upon terms that both parties could accept. In other words, before the Board brought the instant motion, it sought to resolve the issue without Court involvement.

The discussions between the Board's counsel and the SPI's counsel continued for over six weeks, from July 14, 2017 until August 29, 2017. These discussions involved dozens of lengthy telephone conferences, multiple face-to-face meetings, and virtually constant communication between both in-house counsel and outside litigation counsel for the Board and the SPI.<sup>1</sup> The parties could not have tried any harder to reach an agreement, and the Board commends the SPI, the SPI's in-house counsel, and the SPI's outside counsel for their diligence and professionalism throughout the course of these lengthy discussions.

Unfortunately, however, the parties were ultimately unable to come to an agreement on the terms of a temporary stay pending the Board's appeal. As a result, unless this Court extends the 60-day stay of its decision, Session Law 2016-126 will go into effect on September 12, 2017.

In advance of that September 12, 2017 deadline, the Board now seeks a temporary stay.

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<sup>1</sup> The substance of those discussions, of course, is protected by Rule 408 of the North Carolina Rules of Evidence, and will not be disclosed here.

## ARGUMENT

### **I. An extension of the July 14, 2017 temporary stay during the Board’s appeal is necessary to preserve the North Carolina Constitution’s nearly 150-year-old status quo.**

A trial court has the discretion to temporarily stay its denial of an injunction on the merits when the “injunction is the principal relief sought by the plaintiff” and it appears that “denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the appellate division, reversing the judgment of the lower court . . . .” N.C. Gen. Stat. § 1-500.<sup>2</sup>

Section 1-500 is essentially the trial-court version of the writ of supersedeas, the appellate writ aimed at “preserv[ing] the status quo pending the exercise of the appellate court’s jurisdiction.”<sup>3</sup> *City of New Bern v. Walker*, 255 N.C. 355, 356, 121 S.E.2d 544, 545-46 (1961). The focus of the Section 1-500 inquiry is not the *merits*; after all, in every Section 1-500 situation, the trial court has already ruled *against*

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<sup>2</sup> As a matter of logistics, the statute provides that “the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of.” N.C. Gen. Stat. § 1-500. Here, the Court issued a temporary restraining order on December 29, 2016 that blocked the challenged provisions of Session Law 2016-126 from taking effect. *See* Exhibit A. Thus, as a logistical matter, the relief the Board seeks here (a temporary stay of the Court’s July 14, 2017 decision) would simply involve keeping “the original restraining order granted in the case . . . in full force and effect until [the] appeal [is] finally disposed of.” *Id.*

<sup>3</sup> Even beyond N.C. Gen. Stat. § 1-500, this Court has broad authority to enter a stay to protect the rights of the litigants during the pendency of the appeal. *See, e.g.*, N.C. R. App. P. 8(a); N.C. R. App. P. 23(c).

the plaintiff on the merits. *See* N.C. Gen. Stat. § 1-500. Instead, the focus of the Section 1-500 inquiry is on preserving the *status quo* during the pendency of an appeal. *See id.* (ensuring that the plaintiff will not “be deprived of the benefits of any judgment of the appellate division reversing the judgment of the lower court”)

Section 1-500 is designed for precisely the situation here, as the North Carolina Supreme Court’s decision in *GI Surplus Store, Inc. v. Hunter* illustrates. 257 N.C. 206, 125 S.E.2d 764 (1962). In *Hunter*, the trial court ruled against the plaintiff on the merits of its constitutional challenge, but the trial court temporarily stayed its decision and enjoined the challenged law under Section 1-500. The Supreme Court upheld the trial court’s temporary stay as proper. *Id.* at 214, 125 S.E.2d at 770. In hindsight, the trial court’s temporary stay was also prudent: the Supreme Court ultimately reversed the trial court on the merits and struck down the law as unconstitutional. *Id.*

Here, Section 1-500 applies in full force because a temporary stay of this Court’s decision pending the Board’s appeal is necessary to preserve the North Carolina Constitution’s nearly 150-year-old status quo during the appeal.

Since the 1868 Constitution, the Board has supervised and administered the state’s public schools. *See* Bd. Sum. J. Br. at 6-9 (detailing nearly 150-year history of managing the state’s public school system). Throughout its history, the Board has exercised these powers and carried out these duties without disruption, regardless of the Board’s or SPI’s political affiliations at the time.

Without a temporary stay pending appeal, however, Session Law 2016-126 will move the entire \$10 billion public school system under the control of a single individual for the first time in North Carolina history. *See* Exhibit B, 1/4/17 Cobey Affidavit ¶ 9. This seismic shift will generate enormous disruption for our State’s public schools. *Id.* Worse, this seismic shift would occur overnight, without any transition period whatsoever. *Id.*

As part of this disruption, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI takes the position that he would be immediately empowered to unilaterally fire over a *thousand* state employees, including key senior policymaking leaders. *See* Exhibit C, 9/1/17 Cobey Affidavit ¶¶ 5-11. These employees could not realistically be “unfired,” of course, if this Court’s decision is later reversed on appeal. *Id.*

The SPI would also be immediately empowered to unilaterally take other drastic actions. For example, the SPI could immediately decide whether certain state public school system positions should be exempt from state personnel laws, execute new statewide contracts for the public school system, and jeopardize the Board’s ability to manage more than 150 existing contracts involving tens of millions of dollars. *See* Exhibit B, 1/4/17 Cobey Affidavit ¶ 10. These actions would be impossible to undo after the fact. *Id.*

As these examples illustrate, a temporary stay pending appeal is necessary to preserve the North Carolina Constitution’s nearly one-and-a-half-century status quo.

These concerns are intensified, moreover, by the fact that the appellate courts may very well reach a different conclusion than this Court on the merits—especially given that the standard of review is *de novo*.

Indeed, notwithstanding this Court’s ultimate decision, at the hearing on the parties’ dispositive motions, Judge Bridges acknowledged that the General Assembly’s cutting and pasting of the text of the North Carolina Constitution into Session Law 2016-126 and replacing the words “State Board of Education” with “Superintendent” was “very troubling.”<sup>4</sup> Prior to this Court’s decision, another Superior Court Judge expressed far greater concerns about the constitutionality of the challenged legislation.<sup>5</sup> As these comments show, it is certainly possible that the appellate courts could reach a different conclusion than this Court on *de novo* review.

Yet if the appellate courts reach a different conclusion and this Court’s decision is not temporarily stayed during the pendency of the appeal, the appellate courts will be left with the challenges of having to “unring the bell.” Sparing the litigants (and the appellate courts) from this situation is precisely why Section 1-

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<sup>4</sup> *Three judge panel hears arguments on education governance authority*, available at [www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/](http://www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/) (last visited September 5, 2017).

<sup>5</sup> In addition to the conclusions Judge Donald W. Stephens reached in his temporary restraining order, he remarked at the TRO hearing that the Board’s entitlement to relief was “straightforward,” that he “[did not] see any ambiguity,” and that the law is “significantly likely to be unconstitutional on its face.” Exhibit D, TRO Hearing Transcript pp. 6, 13, 24.

500 provides for a temporary stay pending appeal in cases, like this one, that are aimed at injunctive relief. *See* N.C. Gen. Stat. § 1-500.

Lastly, a balancing of the equities weighs heavily in favor of a stay pending appeal. The State even conceded as much at the TRO hearing:

[THE COURT]: And that [would be] a fairly easy balancing test, wouldn't it? A theoretical harm to the State and a real, practical harm to an agency that's constitutionally mandated to care for the public school children of the state.

[THE STATE'S COUNSEL]: Yes, sir.

Bd. Sum. J. Br., Ex. D at 34.

This concession makes sense, because a temporary stay pending the Board's appeal would not harm Defendants at all. The Board has exercised its constitutional powers and fulfilled its constitutional duties for nearly a century and a half. Surely Defendants would not be harmed by maintaining this longstanding status quo during the comparatively brief period of months that it will take for the appellate courts to resolve this dispute.

For all of these reasons, the Court should temporarily stay its July 14, 2017 decision pending the Board's appeal.

**II. At a minimum, a brief extension of the temporary stay is necessary to allow the appellate courts a sufficient opportunity to issue a temporary stay or writ of supersedeas.**

If the Court is inclined to deny the Board's request above, then the Board will seek the same relief from the appellate courts in the form of a motion for temporary stay and petition for writ of supersedeas. *See* N.C. R. App. P. 8(a) ("After a stay order or entry has been denied or vacated by a trial court, an appellant may apply

to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Rule 23.”); *see also* N.C. R. App. P. 23 (stating procedure for petitions for writs of supersedeas). Thus, at a minimum, the Court should extend the temporary stay to afford the appellate courts the opportunity to rule on the Board’s request.

As described above, 46 days of the 60-day stay elapsed during the course of the Board’s and the SPI’s attempt to reach an agreement that would have obviated the need for this Court to resolve the instant motion. To deny even a brief extension of the original 60-day temporary stay under these circumstances would be to punish the Board for its efforts to promote judicial economy by obtaining a resolution of these issues by consent. Under these circumstances, allowing the clock to simply run out would be unjust, particularly given the speed with which the Board is filing this motion—a mere four business days after the discussions between the Board and the SPI resulted in an impasse.

For these reasons, the Court should, at a minimum, extend its temporary stay until the appellate courts have had an opportunity to rule on the Board’s motion for temporary stay and petition for writ of supersedeas.

### **CONCLUSION**

The Board respectfully requests that the Court temporarily stay its July 14, 2017 decision during the pendency of the Board’s appeal.

In the alternative, the Board respectfully requests that the Court temporarily stay its July 14, 2017 decision until the appellate courts have had an opportunity to rule on the Board’s motion for temporary stay and petition for writ of supersedeas.




Respectfully submitted the 5th day of September, 2017.

**ROBERT F. ORR, PLLC**

**POYNER SPRUILL LLP**

By:

  
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BOARD OF EDUCATION**

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**COUNSEL FOR PLAINTIFF  
NORTH CAROLINA STATE  
BOARD OF EDUCATION**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and U.S. Mail to the following:

Amar Majmundar  
Olga E. Vysotskaya de Brito  
N.C. Department of Justice  
114 W. Edenton Street  
Raleigh, NC 27603  
*Counsel for the State of North Carolina*

Philip R. Isley  
Philip R. Miller, III  
E. Hardy Lewis  
Blanchard, Miller, Lewis & Isley P.A.  
1117 Hillsborough Street  
Raleigh, NC 27603  
*Counsel for The Honorable Mark Johnson,  
Superintendent of Public Instruction*

This the 5th day of September, 2017.



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Andrew H. Erteschik

# Exhibit A

FILED

NORTH CAROLINA  
WAKE COUNTY

2016 DEC 29 PM 3: 54

GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

NORTH CAROLINA STATE BOARD OF EDUCATION,  
WAKE COUNTY, C.S.C.  
BY \_\_\_\_\_

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

**TEMPORARY RESTRAINING ORDER**

**THIS MATTER** is before the Court on the Plaintiff North Carolina State Board of Education's motion for temporary restraining order.

The Court has considered the verified complaint and the arguments and submissions of counsel in attendance at the hearing on this motion. The Board's counsel were present at the hearing, and advised the Court that they had given the Defendant, the State of North Carolina, notice of the Board's intent to seek a temporary restraining order. The State's counsel were present at the hearing.

**IT APPEARS** to the Court that good cause exists to grant the motion.

First, the Board has shown that it is likely to succeed on the merits. It is well-settled that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment. Article IX, Section 5 of the North Carolina Constitution expressly confers certain "powers and duties" on the Board. Those constitutional powers and duties include:

- the power and duty to "supervise . . . the free public school system";
- the power and duty to "administer the free public school system";

- the power and duty to “supervise . . . the educational funds provided for [the free public school system’s] support”; and
- the power and duty to “administer . . . the educational funds provided for [the free public school system’s] support.”

The provisions of Session Law 2016-126 challenged in the verified complaint (hereinafter “the Transfer Legislation”) attempt to transfer these constitutional powers and duties, however, from the Board to the Superintendent of Public Instruction. Thus, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional.

Second, the Transfer Legislation will cause irreparable harm if not immediately enjoined. As a matter of law, violations of the North Carolina Constitution constitute *per se* irreparable harm. As described above, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional. Therefore, no further showing of irreparable harm is required. Even if a further showing of irreparable harm were required, moreover, the Transfer Legislation threatens to cause irreparable harm to the Board, the employees of the public school system, and—most importantly—North Carolina’s 1.5 million public school students unless the status quo is preserved. Thus, there is sufficient irreparable harm to warrant immediate injunctive relief.

Third, the balance of equities also favors granting immediate injunctive relief. As described above, without immediate injunctive relief, the Transfer Legislation will cause irreparable harm. Conversely, immediate injunctive relief will not result in any harm. The Board has exercised its constitutional powers and fulfilled its constitutional duties for the past 148 years. Allowing the Board to continue doing so while this case is resolved only preserves this longstanding status quo.

**WHEREFORE**, the Board's motion for temporary restraining order is **GRANTED**.

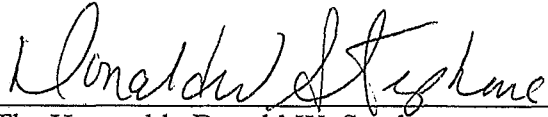
**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that until a decision on the Board's motion for preliminary injunction:

- (a) The State is restrained and enjoined from taking any action to implement or enforce the Transfer Legislation.
- (b) Under Rule 65(d) of the North Carolina Rules of Civil Procedure, the State's "officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice in any manner of [this] order by personal service or otherwise" are likewise enjoined from taking any action to implement or enforce the Transfer Legislation.

Counsel for the Board shall serve copies of this order on the Chief Deputy Attorney General, the President Pro Tempore of the North Carolina Senate, the Speaker of the North Carolina House of Representatives, and the Superintendent of Public Instruction-Elect.

Unless the State consents to an extension of this temporary restraining order, the Board's motion for preliminary injunction shall be heard before the undersigned Superior Court Judge ~~within ten days from the date of this order, or as soon thereafter as the Court may hear this matter.~~ *Friday January 6, 2017 at 9:30 Courtroom 10C.*

So ordered the 29th day of December at 4:00p.m.

  
The Honorable Donald W. Stephens  
Senior Resident Superior Court Judge  
Wake County Superior Court

*WWS*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served by hand-delivery to the following:

State of North Carolina  
c/o Grayson G. Kelley  
Chief Deputy Attorney General  
North Carolina Attorney General's Office  
114 W Edenton Street  
Raleigh, North Carolina 27603

The Honorable Philip E. Berger  
President Pro Tempore of the North Carolina Senate  
Legislative Building  
16 W. Jones Street, Room 2007  
Raleigh, North Carolina 27601

The Honorable Timothy K. Moore  
Speaker of the North Carolina House of Representatives  
Legislative Building  
16 W. Jones Street, Room 2304  
Raleigh, North Carolina 27601

Mark Johnson  
2680 Arbor Place Ct.  
Winston-Salem, North Carolina 27104

This the 30th day of December, 2016.

  
\_\_\_\_\_  
Andrew H. Erteschik

# **Exhibit B**



NORTH CAROLINA  
WAKE COUNTY

GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

**AFFIDAVIT OF  
WILLIAM W. COBEY, JR.**

I, William W. Cobey, Jr., declare under penalty of perjury as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I currently serve as the Chairman of the North Carolina State Board of Education.

I have served in this capacity since 2013, when Governor Pat McCrory appointed me to the Board and I was confirmed by the General Assembly.

3. Prior to serving as Chairman, I served as a member of the U.S. House of Representatives, as the Deputy Secretary of the North Carolina Department of Transportation, as the Secretary of the North Carolina Department of Environment, Health and Natural Resources, and for two terms as the Chairman of the North Carolina Republican Party.

4. I hold a bachelor of arts in chemistry from Emory University, a masters in business administration from the University of Pennsylvania's Wharton School of Business, and a masters in education from the University of Pittsburgh.

5. Under Article IX, Section 4 of the North Carolina Constitution, the Board is composed of "the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session." Article IX,

Section 4 requires that these Board members serve “overlapping terms of eight years.” These lengthy, overlapping terms ensures that, at all times, Board has at least a half century of combined experience supervising and administering North Carolina’s public school system and the funds provided for its support. This constitutional structure also maintains the Board’s institutional knowledge and expertise in education, enables smooth transitions between Board memberships, provides ample training opportunities for incoming members by experienced members, and insulates the Board from political cycles.

6. In addition, Article IX, Section 4 requires that eight of the Governor’s eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

7. On December 14, 2016, the General Assembly introduced House Bill 17. Within 48 hours, it passed both the House of Representatives and the Senate. Three days later, on December 19, 2016, House Bill 17 was signed into law as Session Law 2016-126.

8. Session Law 2016-126 contains provisions that attempt to transfer the Board’s constitutional powers and duties to the Superintendent of Public Instruction (“SPI”). Those provisions appear in Part I, Sections 1-12, 14-16, 24-15, and 28-30 (“the Transfer Legislation”).

9. For the past 148 years, the Board has been in charge of the public school system. The Transfer Legislation attempts to strip the Board of its constitutional powers and duties, however, and makes the SPI in charge of the public school system instead. Thus, without a preliminary injunction to preserve the status quo, the Transfer Legislation would reduce a 148-year-old constitutional entity to an empty shell, and would put the entire \$10 billion public

school system under the control of a single individual. Without a preliminary injunction to preserve the status quo, the Transfer Legislation would accomplish this seismic shift overnight.

10. Furthermore, without a preliminary injunction to preserve the status quo, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI would immediately be empowered to unilaterally hire and fire public school system employees, fire members of the Board's staff, determine whether certain public school system positions should be exempt from state personnel laws, execute new contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing contracts for tens of millions of dollars. These actions would be impossible to undo after the fact, even if this declaratory judgment action were ultimately resolved in favor of the Board.

11. I am unaware of any non-political justifications for dismantling North Carolina's 148-year-old constitutional structure for managing public education. Under Article I, Section 15 of the North Carolina Constitution, "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." I personally believe that guarding and maintaining that right should always be above politics.

William W. Cobey, Jr.  
William W. Cobey, Jr.

WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 4 day of January, 2017.

Joan P. Champagne  
Notary Public

My commission expires: Jan 9, 2018

[SEAL]



# **Exhibit C**

NORTH CAROLINA  
WAKE COUNTY

GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,  
Defendant.

**AFFIDAVIT OF  
WILLIAM W. COBEY, JR.**

I, William W. Cobey, Jr., being first duly sworn, testify as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I currently serve as the Chairman of the North Carolina State Board of Education. I have served in this capacity since 2013, when I was appointed by Governor Pat McCrory and confirmed by the General Assembly.
3. Prior to serving as Chairman of the Board, I served as a member of the U.S. House of Representatives, as the Deputy Secretary of the North Carolina Department of Transportation, as the Secretary of the North Carolina Department of Environment, Health and Natural Resources, and for two terms as the Chairman of the North Carolina Republican Party. I hold a bachelor of arts in chemistry from Emory University, a masters in business administration from the University of Pennsylvania's Wharton School of Business, and a masters in education from the University of Pittsburgh.

4. In its July 14, 2017 decision, this Court concluded that it is “the clear intent of the Constitution that the State Board shall have the primary authority to supervise and administer the free public school system.” July 14, 2017 Order at 4. The Court further concluded that Session Law 2016-126 “places a limit on the Superintendent’s power, leaving the ultimate authority to supervise and administer the public school system with the State Board.” *Id.* at 6.

5. Unless the Court’s July 14, 2017 decision is stayed, Session Law 2016-126 will go into effect on September 12, 2017. The Superintendent has taken the position that, if Session Law 2016-126 is allowed to take effect, he will immediately possess the sole hiring, firing, and supervisory authority over more than a *thousand* state employees.

6. These affected employees include senior employees who, before Session Law 2016-126, were known as “dual reports”—that is, they were accountable to both the Board and the Superintendent. Under Session Law 2016-126, however, these and other critical education policymaking leaders for the agency would report exclusively to the Superintendent. The Superintendent has also taken the position that these employees would serve at his pleasure. The affected senior employees include senior policymaking leaders such as the Deputy State Superintendent, the Chief Financial Officer, the Chief Academic Officer, the Director of Communications, the Director of Human Resources, the Chief Information

Technology Officer, the Internal Auditor, the Executive Director of the Office of Charter Schools, and the Superintendent of Innovative School Districts.

7. These senior policymaking leaders form the core team that enables the Board to effectively set policy for the public school system. Thus, without hiring authority, firing authority, or at least supervisory authority over the senior policymaking leaders noted above, the Board would be unable to exercise (in this Court's words) "the ultimate authority to supervise and administer the public school system."

8. For example, the Board needs specialized expertise from its Chief Information Technology Officer to develop information technology policies for the state's public schools. Similarly, the Board relies on the Internal Auditor's subject matter knowledge and experience to evaluate Board policies on investments and expenditures. The Board likewise relies on the Human Resources Director's expertise to advise the Board on personnel procedures. As these examples illustrate, the Board will be unable to exercise (in this Court's words) "the ultimate authority to supervise and administer the public school system" if it has no authority whatsoever over the hiring, firing, and supervisions of these senior policymaking positions.

9. In addition, if the continued employment of these senior policymaking leaders were to depend entirely on whether the Superintendent is pleased with them, they will be unable to effectively implement the Board's policies—particularly

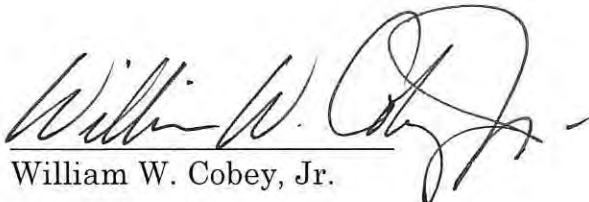


when there is a conflict between what the Superintendent believes is effective education policy and what the Board has decided is effective education policy. Indeed, the Superintendent has already communicated his disapproval of one or more of these senior policymaking leaders. *See, e.g.*, April 12, 2017 Mark Johnson Affidavit ¶ 12-14 (describing disapproval with Chief Financial Officer).

10. Moreover, if fired by the Superintendent, the key senior policymaking employees described above cannot be “unfired”—at least not without serious consequences to both the Board and the employees themselves. In addition, if these employees are fired and replaced by the Superintendent, the Board will have no means to discipline the new, replacement senior policymaking employees who fail to adhere to the Board’s policy directives.

11. Above and beyond the harm described above, the Superintendent’s dismissal of long-term, senior policymaking employees would also result in the loss of significant cumulative institutional expertise. Between them, the long-term senior policymaking employees offer a pool of accumulated experience and specialized knowledge that is an invaluable asset to the Board. This experience and knowledge, built up over years of service, will be lost in short order with their removal. This loss, by itself, will inflict irreparable harm on the Board and the public school system.

[signature on next page]

  
William W. Cobey, Jr.

WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 1st day of September, 2017.

  
Notary Public KIMBERLY K. SIMON

My commission expires: 2/6/22

[SEAL]



# Exhibit D

NC State Board Of Education vs. State of North Carolina

1	STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
		SUPERIOR COURT DIVISION
2	COUNTY OF WAKE	16-CVS-15607

3		
4	NORTH CAROLINA STATE	)
5	BOARD OF EDUCATION,	)
		)
6	Plaintiffs,	)
		)
7	vs.	)
		)
8	THE STATE OF NORTH	)
9	CAROLINA,	)
		)
10	Defendant.	)
		)

BEFORE: THE HONORABLE DONALD STEPHENS

TRANSCRIPT OF HEARING

TRANSCRIBED FROM A VIDEOTAPED PROCEEDING

DECEMBER 29, 2016

RALEIGH, NORTH CAROLINA

Reported in Stenotype by  
 Lauren M. McIntee, RPR  
 Transcript produced by computer-aided transcription

1 MS. VYSOTSKAYA: That is fine.

2 THE COURT: I apologize. That's not  
3 something that I would normally do. At least we'll  
4 know who I'm talking to. Otherwise, it might be  
5 confusing.

6 All right. I read the complaint. Looks kind  
7 of straightforward to me. So I don't know, I kind  
8 of had more questions about the specific injunctive  
9 relief that the Plaintiffs seek today, and whether  
10 or not this Court has jurisdiction to do anything in  
11 view of the past legislation that sort of gives the  
12 senior resident judge in the county of which an  
13 action like this is filed, the administrative use of  
14 notifying the Chief Justice that such a lawsuit is  
15 filed, that it is a claim that facially challenges  
16 the constitutionality of an act of the General  
17 Assembly, and to request the Chief Justice to  
18 appoint three judges to a panel of superior court to  
19 hear and consider the constitutional challenge.

20 The law is unclear as to what the presiding  
21 or senior resident judge in the county in which the  
22 action is filed has the authority to do beyond that.  
23 However, the law does not specifically say the court  
24 shall not, may not, cannot restrain legislation of  
25 the General Assembly that's challenged as

1 statute that may be, significantly likely to be,  
2 unconstitutional on its face.

3 I mean what happens in the middle of all that  
4 void? And why -- and that's, well, the first  
5 question. The second question is in terms of the  
6 immediacy of this law taking effect. What is the  
7 immediacy of this law needing to take effect from  
8 the interest of the people of North Carolina and the  
9 State of North Carolina? What is it about that,  
10 this law?

11 It will change dramatically the whole concept  
12 of how education is handled. And if it turns out  
13 the legislature got it wrong and we find out 6, 8,  
14 9, 10, 12 months later, just think about the  
15 disruption that that would cause. What is it that  
16 is so important about having this law put into  
17 effect on January the 1st of 2017?

18 MR. MAJMUNDAR: As to your first question,  
19 the General Assembly was silent as to what to do in  
20 these circumstance of -- situation, factual  
21 situation.

22 THE COURT: Sure.

23 MR. MAJMUNDAR: And so we can only infer from  
24 what the General Assembly did say and what they  
25 meant and who, which court would be responsible for

1 MR. ORR: -- the irreparable harm when you're  
2 ready.

3 THE COURT: Let me talk about, let me see,  
4 let me talk -- just a moment. Still got to decide  
5 you're right.

6 MR. ORR: Sure.

7 THE COURT: I see a lot of these challenges,  
8 alleged unconstitutional passages. Most of them,  
9 when you look at them it's clear on their face  
10 there's no basis to it at all, period. Period.  
11 Someone just trying to make a statement, trying to  
12 make a point, trying to show objection, but they  
13 don't have any place in a, in a court.

14 I don't see any ambiguity here. I don't know  
15 why all of a sudden one arose, and I don't know how  
16 it arose or where in the constitution that something  
17 would suggest that it arose. Can you help me  
18 understand this?

19 MR. MAJMUNDAR: I'll try, your Honor. The,  
20 the constitution does vest the Board of Education  
21 with authority, but the extent of the authority is  
22 subject to the laws in the General Assembly. The  
23 General Assembly has its own constitution.

24 THE COURT: Where?

25 MR. MAJMUNDAR: In Article IX, Section 5.

1 THE COURT: Okay. And that's a fairly easy  
2 balancing test, wouldn't it? A theoretical harm to  
3 the State and a real, practical harm to an agency  
4 that's constitutionally mandated to care for, care  
5 for the public school children of the state.

6 MR. MAJMUNDAR: Yes, sir.

7 THE COURT: So we're going to balance the  
8 harm to the public school children of this state  
9 based upon potential harm to them or the theoretical  
10 harm that the, would be caused by a declaration  
11 that, a potential declaration that the legislature  
12 built a bridge too far.

13 MR. MAJMUNDAR: That is the balancing test,  
14 your Honor. I would draw your attention to Page 12  
15 of the complaint.

16 THE COURT: All right.

17 MR. MAJMUNDAR: The damages cited by  
18 Plaintiffs on Page 12 relate to uncertainties  
19 associated with the making this portion of the  
20 statutes effective. There is no firm, fixed  
21 identifiable harm, but what might happen. And the  
22 Court of Appeals has said, you know, illusory-type  
23 damages are not sufficient with the TRO standards.

24 THE COURT: Well, sometimes when you close  
25 down an agency, it is almost impossible to quantify



1 STATE OF NORTH CAROLINA

2 COUNTY OF WAKE

3

4 REPORTER'S CERTIFICATE

5 I, LAUREN M. MCINTEE, Registered Professional  
6 Reporter and Notary Public for the State of North  
7 Carolina, certify that I was authorized to and did  
8 stenographically transcribe the foregoing proceeding  
9 from a video recording, and that the transcript is a  
10 true and accurate record of the testimony to the best of  
11 my ability.

12 I further certify that I am not a relative,  
13 employee, attorney, or counsel of any of the parties,  
14 nor am I a relative or employee of any of the parties'  
15 attorneys or counsels connected with the action, nor am  
16 I financially interested in the action.

17

18 Dated this 3rd day of January, 2017.

19



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LAUREN MCINTEE, RPR, Notary Public  
Notary Number: 201616600044

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