

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 15607

FILED

2017 SEP -8 A 10:17

NORTH CAROLINA STATE
BOARD OF EDUCATION,)
WAKE COUNTY, C.S.C.)

Plaintiff,)
BY: [Signature])

v.)

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

Defendants.)
_____)

**SECOND AFFIDAVIT OF NORTH
CAROLINA SUPERINTENDENT
OF PUBLIC INSTRUCTION MARK
JOHNSON**

Mark Johnson, after being duly sworn, deposes and states the following:

1. I likewise compliment the State Board of Education's in-house and outside counsel for their professionalism throughout conversations to try and advance a joint motion for a temporary stay on agreed-upon terms. These conversations began in earnest on 10 August 2017 and had concluded by 29 August 2017. While I wish we could have reached an agreement, I strongly disagree with the need to extend the stay, as well as the unsupported and exaggerated representations made by Plaintiff in its motion.

2. Citing only Chairman Cobey's Affidavit filed on 5 September 2017, Plaintiff asserts that if Session Law 2016-126 is allowed to go into effect "the entire \$10 billion public school system" will be "under the control of a single individual for the first time in North Carolina history." (See Plaintiff's Motion for Temporary Stay, p. 5). This is false for several reasons. Most importantly, this statement in no way reflects the reality of how our public schools are run in North Carolina. While it is true that the State of North Carolina spends over \$9 billion on K-12 education annually, decision-making for our public schools is, and has been for

many years, divided among the General Assembly, the State Board of Education, Superintendent of Public Instruction, local school boards, charter school boards, local superintendents, and principals. Session Law 2016-126 does not fundamentally alter the day-to-day administration of our public schools in North Carolina, nor does it strip the State Board of Education of all or even most of its authority over the public school system. Pursuant to Session Law 2016-126, sec. 2, Plaintiff maintains the authority “to establish all needed rules and regulations for the system of free public schools, subject to laws enacted by the General Assembly,” among a multitude of other statutory powers and duties. Contrary to Plaintiff’s claim, there simply will not be a “seismic shift.”

3. Plaintiff also claims based on Chairman Cobey’s Affidavit that “the SPI takes the position that he would be immediately empowered to unilaterally fire over a *thousand* state employees.” (See Plaintiff’s Motion for Temporary Stay, p. 5). This falsehood could not be further from the truth. Such a hysterical claim unnecessarily strikes fear into the staff of the department. I have *never* taken such a position, nor does Session Law 2016-126 contemplate such a power. By default, Department of Public Instruction (“DPI”) employees are subject to Chapter 126 of the General Statutes and therefore cannot be fired without just cause. Only a fraction of DPI employees could be designated exempt and subject to removal at-will under Session Law 2016-126. Although some senior policymaking leaders at DPI could be designated exempt, this currently is a common practice in both Cabinet and Council of State agencies. Many of the senior policymaking leaders at DPI have already been designated exempt by the Plaintiff and could be removed at-will by the Plaintiff today.

4. Again citing only Chairman Cobey’s Affidavit filed on 5 September 2017, Plaintiff also warns against the Superintendent having authority to execute new statewide

contracts and to manage more than 150 existing contracts involving tens of millions of dollars. (See Plaintiff's Motion for Temporary Stay, p. 5). However, the State Board of Education's current delegation in CNTR-002 *already* largely grants the Superintendent the authority to sign and manage contracts on behalf of DPI, subject to certain reporting requirements to the Plaintiff. Therefore, granting the Superintendent the power "to enter into contracts for the operations of the Department" under Session Law 2016-126 does not even represent a radical departure from current practice at DPI.

5. Despite the consistent representations by Plaintiff that it wishes to preserve the status quo, on 7 September 2017, the Plaintiff voted to fill an existing vacancy for Chief Academic Officer over my multiple objections. Even though the Chief Academic Officer position was vacant for over four (4) months, Plaintiff acted to fill the vacancy merely five (5) calendar days before the stay which maintains the authority of Plaintiff to hire for this position was set to expire. Session Law 2016-126 confers authority on the Superintendent to hire for this position.

6. Plaintiff argues that the temporary stay is prudent to preserve the North Carolina Constitution's nearly 150-year-old status quo during the appeal. However, any claim that the powers and duties of the State Board of Education and Superintendent of Public Instruction have not changed in 150-years is simply wrong and ignores the facts and legislative history that is well-known to Plaintiff. This issue was thoroughly briefed in prior submissions. The General Assembly has adjusted the powers and duties of both entities on many occasions – most notably in 1995. Many of the powers and duties granted to the Superintendent of Public Instruction by Session Law 2016-126 also belonged to the Superintendent prior to 1995.

7. Based upon the outrageous and exaggerated "facts" asserted in Plaintiff's Motion for Temporary Stay, Plaintiff has failed to meet its burden for the relief sought in its motion.

FURTHER, Affiant sayeth not.

This the 8 day of September, 2017.



Mark Johnson
North Carolina Superintendent of
Public Instruction

Sworn to and subscribed before me,
this the 8 day of September, 2017.



NOTARY PUBLIC

My Commission Expires: Nov. 23, 2018

[Notary Seal]



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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This the 8th day of September, 2017.



Philip R. Isley