

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 006655

JUNE ST. CLAIR ATKINSON, individually)
and in her official capacity as)
Superintendent of Public Instruction of the)
State of North Carolina; B and C,)

Plaintiffs,)

v.)

STATE OF NORTH CAROLINA;)
BEVERLY PERDUE, Governor of the State)
of North Carolina, in her official capacity;)
NORTH CAROLINA STATE BOARD OF)
EDUCATION; WALTER DALTON,)
Lieutenant Governor of the State of North)
Carolina, in his official capacity; JANET)
COWELL, State Treasurer of the State of)
North Carolina, in her official capacity;)
KATHY TAFT, RAY DURHAM, KEVIN)
HOWELL, SHIRLEY E. HARRIS,)
MELISSA E. BARTLETT, ROBERT)
THOMAS SPEED, WAYNE MCDEVITT,)
PATRICIA N. WILLOUGHBY, and JOHN)
A. TATE, III, Members of the North)
Carolina State Board of Education, in their)
official capacities; and WILLIAM C.)
HARRISON, Chief Executive Officer and)
Chairperson of the North Carolina State)
Board of Education,)

Defendants.)

**BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

In this lawsuit, Plaintiff, the State Superintendent of Public Instruction (hereafter "Superintendent"), asks the Judicial Branch of this State to declare what the duties of her office should be and to overrule the policy decisions made on this issue by the political branches of North

Carolina's government. Because the North Carolina Constitution expressly delegates that task to the political branches, Plaintiff's claims lack merit.

STATEMENT OF THE CASE AND FACTS

On April 3, 2009, Plaintiff filed this declaratory judgment action in Wake County Superior Court against Governor Beverly Perdue, the North Carolina State Board of Education (hereafter "State Board"), and the members of the State Board.¹ In her Complaint, Plaintiff seeks a declaration from this Court that various actions taken by the State affecting the duties of the Superintendent were unconstitutional.

The State filed an Answer to the Complaint and subsequently filed a Motion for Summary Judgment. The State now submits this memorandum of law in support of its Motion for Summary Judgment.

ARGUMENT

In her Complaint, Plaintiff appears to challenge the constitutionality of the following: (1) the North Carolina General Assembly's enactment fourteen years ago of 1995 N.C. SESS. LAWS 72 (hereafter "S.L. 1995-72"); (2) the actions of the State Board on March 4, 2009, creating the new position of Chief Executive Officer (hereafter "CEO") of the State Board; and (3) the simultaneous assumption by Defendant William C. Harrison (hereafter "Dr. Harrison") of two appointive offices, CEO of the State Board and Chairman of the State Board. For the reasons set out below, the State is entitled to summary judgment as to each of these claims.

¹ Defendants are referred to collectively in this brief as "the State."

I. SESSION LAW 1995-72 IS CONSTITUTIONAL IN ALL RESPECTS.

A. LEGISLATIVE ENACTMENTS IN NORTH CAROLINA ARE PRESUMED TO BE CONSTITUTIONAL.

A bedrock principle of North Carolina law is the strong presumption that enactments of the General Assembly are constitutional. Courts must resolve all doubts in favor of the constitutionality of a legislative act. *In re Denial of Approval to Issue \$30,000,000.00 of Single Family Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). In order for a statute to be held unconstitutional, “it must be plainly and clearly the case.” *Emerald Isle v. State*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987). In cases where two different interpretations of a law are possible, one being constitutional and the other being unconstitutional, a court must adopt the former and not the latter. *Wayne County Citizens Ass’n for Better Tax Control v. Wayne County Bd. of Comm’rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991). “A statute will not be declared unconstitutional unless its unconstitutionality is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground.” *City of Concord v. All Owners of Taxable Property*, 330 N.C. 429, 432, 410 S.E.2d 482, 483 (1991).

Our Supreme Court has emphasized that courts “have no power to review a statute with respect to its political propriety as long as it is within the legislative discretion and has a reasonable relation to the end sought to be accomplished.” *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946). “It is not the role of this Court to pass judgment on the wisdom and expediency of a statute.” *Emerald Isle*, 320 N.C. at 647, 360 S.E.2d at 761.

B. PLAINTIFF CANNOT OVERCOME THE PRESUMPTION THAT S.L. 1995-72 IS CONSTITUTIONAL.

1. Overview of Relevant Constitutional Provisions.

Both the State Board and the position of Superintendent were created by the North Carolina Constitution. Therefore, in order to resolve the claims before it in this action, the Court must examine the constitutional provisions relevant to each.²

a. The State Board.

The State Board exists pursuant to article IX, section 4 of the Constitution, which provides in pertinent part:

The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts. Of the appointive members of the Board, one shall be appointed from each of the eight educational districts and three shall be appointed from the State at large. Appointments shall be for overlapping terms of eight years. Appointments to fill vacancies shall be made by the Governor for the unexpired terms and shall not be subject to confirmation.

N.C. CONST. art. IX, § 4(1).

The powers of the State Board are set out in article IX, section 5 which states:

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.

Id. at art. IX, § 5.

² Contemporaneously herewith, Defendants are filing the affidavit of John L. Sanders, which contains a detailed chronological summary of the evolution of the constitutional provisions relevant to these issues.

b. The Superintendent.

The position of Superintendent exists by virtue of article III, section 7 of the Constitution - the same provision that also creates seven other offices in the Executive Branch. Article III, section 7 states in pertinent part:

(1) *Officers.* A Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

(2) *Duties.* Their respective duties *shall be prescribed by law.*

Id. at art. III, § 7(1)-(2) (emphasis added).

The only other direct constitutional reference to the Superintendent is found in article IX, section 4 - the section of the Constitution creating the State Board - which states that “[t]he Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.” *Id.* at art. IX, § 4(2).³

2. Overview of S.L. 1995-72.

The North Carolina Constitution requires the General Assembly to play a major role in the State’s public school system. Article IX, section 2 states that “[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . .” *Id.* at art. IX, § 2. Moreover, as noted above, article III, section 7 gives the General Assembly the power to define

³ The Superintendent is also indirectly mentioned in article III, section 8, which generally identifies members of the Council of State.

by statute the duties of the Superintendent. As is also shown above, article IX, section 5 confers authority upon the General Assembly regarding the actions of the State Board.

Pursuant to these constitutional delegations of authority, the General Assembly, in 1995, enacted S.L. 1995-72, entitled "An Act to Clarify the Statutes So As to Streamline the Operations of the State Education Agency." In this session law, the General Assembly modified the duties of the Superintendent - while preserving her status as secretary and chief administrative officer of the State Board - and manifested its unambiguous intent that the Superintendent should perform her duties "[s]ubject to the direction, control, and approval of the State Board." (S.L. 1995-72, Sections 1-2)

In addition, S.L. 1995-72 created three brand new statutes - which further demonstrate the General Assembly's intent regarding the State Board's authority over the Superintendent:

Sec. 3. Article 5 of Chapter 143A of the General Statutes is amended by adding three new sections to read:

§ 143A-39. *Creation.*

There is hereby created a Department of Public Instruction. The head of the Department of Public Instruction is the State Board of Education. Any provision of G.S. 143A-9 to the contrary notwithstanding, the appointment of the State Board of Education shall be as prescribed in Article [IX], Section 4(1) of the Constitution.

§ 143A-40. *State Board of Education; transfer of powers and duties to State Board.*

The State Board of Education shall have all powers and duties conferred on the Board by this Article, delegated to the Board by the Governor, and conferred by the Constitution and laws of this State.

§ 143A-42. *Superintendent of Public Instruction; creation; transfer of powers and duties.*

The office of the Superintendent of Public Instruction, as provided for by Article III, Section 7 of the Constitution, and the Department of Public Instruction are

transferred to the Department of Public Instruction. The Superintendent of Public Instruction shall be the Secretary and Chief Administrative Officer of the State Board of Education, and shall have all powers and duties conferred by the Constitution, by the State Board of Education, Chapter 115C of the General Statutes, and the laws of this State.

(*Id.* at Section 3)⁴

Finally, in S.L. 1995-72, the General Assembly directed the State Board to “review all State laws and policies governing the public school system to ensure their compliance with the intent of this act to restore constitutional authority to the State Board.” (*Id.* at Section 4)⁵

3. S.L. 1995-72 is Fully Consistent with the North Carolina Constitution.

Plaintiff is apparently contending in this action that S.L. 1995-72 somehow usurps the constitutional authority of the Superintendent. This contention is meritless as this session law is a straightforward application of the power delegated by the framers of the Constitution to the General Assembly in order to ensure the proper functioning of North Carolina’s public school system.

As shown above, the section of the Constitution creating the Superintendent’s position expressly states that his or her duties “*shall be prescribed by law.*” N.C. CONST. art. III, § 7(2) (emphasis added). Thus, the framers declined to set out a specific list of duties for the Superintendent. Instead, by using the phrase “shall be prescribed by law,” the framers opted to leave this task for the Legislature, empowering the General Assembly to determine for itself the appropriate duties to be exercised by the Superintendent.

⁴ These three newly created statutes were subsequently codified as N.C. GEN. STAT. §§ 143A-44.1, 143A-44.2, and 143A-44.3 (2009).

⁵ A copy of S.L. 1995-72 is attached hereto as Exhibit 1.

By claiming that S.L. 1995-72 is unconstitutional, Plaintiff is essentially arguing that the General Assembly is constitutionally barred from ever enacting legislation modifying the Superintendent's duties. This argument is directly inconsistent with the clear language of article III, section 7(2), which expressly contemplates (and, in fact, actually mandates) such legislative action. As such, Plaintiff's position cannot be reconciled with the Constitution.

This conclusion is directly supported by clear and unambiguous case law from the Supreme Court of North Carolina interpreting article III, section 7(2). As noted above, this section creates not only the position of Superintendent but also seven other offices: Secretary of State, Auditor, Treasurer, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. Article III, section 7(2) applies to all eight of these offices, stating that the duties of each "shall be prescribed by law."

Our Supreme Court has interpreted article III, section 7(2) as it applies to the Commissioner of Insurance and the Attorney General. In *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980), the Supreme Court addressed a claim alleging that the Commissioner of Insurance had exceeded his ratemaking authority. After reviewing article III, section 7, the Court concluded that the Commissioner's powers were those conferred upon him by the General Assembly:

While the Office of Commissioner of Insurance is created by Article III, sec. 7(1) of the North Carolina Constitution, sec. 7(2) of that Article says his duties shall be prescribed *by law*. Hence, the power and authority of the Commissioner emanate from the General Assembly and are limited by legislative prescription. The only power he has to fix rates is such power as the General Assembly has delegated to and vested in him.

Id. at 398, 269 S.E.2d at 561 (emphasis in original).

Likewise, in *Bailey v. N.C. Dept. of Revenue*, 353 N.C. 142, 540 S.E.2d 313 (2000), the Supreme Court was confronted with an issue requiring it to determine the powers possessed by the Attorney General. Relying upon the “shall be prescribed by law” language in article III, section 7(2), the Court concluded that the Attorney General’s “duties, therefore, *are left to the discretion of the General Assembly . . .*” *Id.* at 153, 540 S.E.2d at 320 (emphasis added).

Because the constitutional language relating to the powers of the Superintendent is identical, the holdings in *State ex rel. Comm’r of Ins.* and *Bailey* are directly controlling. Just as the General Assembly has the discretion to determine the duties of the Commissioner of Insurance and the Attorney General, it has the same discretion to do so with regard to the Superintendent.

By enacting S.L. 1995-72, the General Assembly has appropriately carried out the constitutional delegation contained in article III, section 7. Had the framers of the Constitution wished to articulate a list of specific job duties to be performed by the Superintendent, they would have done so. *See State ex rel. Martin v. Melott*, 320 N.C. 518, 522, 359 S.E.2d 783, 786 (1987) (“If the revisers of the Constitution had intended to give the Governor the power to appoint all officers whose appointments were not provided for in the Constitution, they could have easily done so.”).

The General Assembly was similarly authorized to legislatively address the powers of the State Board through the enactment of S.L. 1995-72. This authority was recognized by our Supreme Court in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), *cert. denied*, 406 U.S. 920 (1972). In *Guthrie*, a teacher sought a declaration that certain rules and regulations of the State Board relating to teacher certification renewals were invalid. *Id.* at 709, 185 S.E.2d at 198. Analyzing the validity of the regulations at issue, the Supreme Court focused on article IX, section 9, which stated at that time: “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.*” *Id.* at 710, 185 S.E.2d at 198 (emphasis added).⁶ The Supreme Court held that this phrase “was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly.” *Id.* at 710, 185 S.E.2d at 198.

The Supreme Court further ruled that the General Assembly had expressly given the State Board authority to oversee the certification of teachers. *Id.* at 711, 185 S.E.2d at 199. The Court held that this legislative authorization was consistent with the Constitution’s express delegation to the State Board of authority to regulate the qualifications of teachers. *Id.* at 710, 185 S.E.2d at 198.

Plaintiff simply disagrees with the wisdom of S.L. 1995-72. However, the desirability of this session law from a public policy perspective is for the Legislature - not Plaintiff - to decide. *See Martin v. N.C. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 672 (1970) (“Whether the public policy and program established by the 1969 Act is wise or unwise is for determination by the General Assembly.”). Plaintiff’s opinion of the General Assembly’s policy decision notwithstanding, S.L. 1995-72 is fully constitutional.

⁶ Because the 1971 Constitution did not become effective until five months before *Guthrie* was decided, 279 N.C. at 709, 185 S.E.2d at 198, the Supreme Court was construing the precursor to the 1971 Constitution. However, in its decision, the Court expressly stated that “there is no difference in substance between the powers of the State Board of Education with reference to this matter under the old and the new Constitutions.” *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 199. This is so because, in the current Constitution, the powers of the State Board are set out in article IX, section 5, which contains the phrase “subject to laws enacted by the General Assembly.” N.C. CONST. art. IX, § 5. Thus, both the former and the current Constitution gave the General Assembly the authority to regulate the powers of the State Board.

II. THE STATE BOARD ACTED WITHIN ITS CONSTITUTIONAL AUTHORITY IN CREATING THE POSITION OF CHIEF EXECUTIVE OFFICER.

In her second claim for relief, Plaintiff contends that the State Board's creation of the CEO position was unconstitutional. This contention is also incorrect.

A. CREATION OF CHIEF EXECUTIVE OFFICER POSITION.

On March 4, 2009, the State Board amended its Policy Manual by adopting a policy entitled "Policy Creating the Chief Executive Officer of the State Board of Education[.]" (West Aff., ¶¶ 2-4)

This policy reads:

In order to permit the State Board of Education to more effectively and efficiently administer and supervise the North Carolina free public school system, the State Board of Education creates the position of Chief Executive Officer of the State Board of Education. Subject to the direction, control, and approval of the State Board of Education, the Chief Executive Officer shall have and exercise such powers and duties as the State Board of Education shall from time to time delegate to him or her. The Chief Executive Officer shall be solely accountable and responsible to the State Board of Education without interference or contrary instructions from any other entity and shall serve at the pleasure of the State Board of Education.

(*Id.*, Ex. A)⁷

On that same date, the State Board also adopted a policy entitled "Policy delineating the delegation of authority from the State Board of Education to the Superintendent of Public Instruction and to the Chief Executive Officer[.]" This policy states in pertinent part:

Pursuant to Article IX, sec. 5 of the Constitution of North Carolina, G.S. 115C-12 and G.S. 143A-44.1 through 44.3, the State Board is responsible for the general supervision and administration of the North Carolina free public school system and is head of the Department of Public Instruction. In accordance with Article IX, sec. 4(2) and G.S. 115C-19 and 21 and G.S. 143A-44.3, the State Superintendent is the Secretary and Chief

⁷ A copy of this policy is attached hereto as Exhibit 2.

Administrative Officer of the State Board and carries out duties of the office subject to the direction, control, and approval of the State Board.

In accordance with these and other applicable laws, the State Board of Education (the State Board) hereby adopts these policies for the purposes of (1) describing the duties of the State Superintendent of Public Instruction (the State Superintendent) and the Chief Executive Officer (CEO) and (2) delegating certain powers and duties to the State Superintendent and CEO. The State Board may add to or remove from the delegated powers and duties as it may deem appropriate for the effective and efficient implementation of the State Board's authority. The State Board may further modify or repeal these policies at any time the Board deems such action appropriate.

(*Id.*, Ex. B) The policy then proceeds to delineate certain duties of the Superintendent and the CEO.

(*Id.*)⁸

As discussed more fully below, the State Board possessed the constitutional and statutory authority to create the CEO position through its enactment of these two policies. In taking this action, the State Board acted in accordance with its status as the entity vested with control over the North Carolina public school system.

B. PURSUANT TO THE NORTH CAROLINA CONSTITUTION AND THE ENACTMENTS OF THE GENERAL ASSEMBLY, THE STATE BOARD OF EDUCATION CONTROLS THE NORTH CAROLINA PUBLIC SCHOOL SYSTEM.

Article IX, section 5 of the Constitution empowers the State Board to “supervise and administer” North Carolina’s public school system. N.C. CONST. art. IX, § 5. Our Supreme Court has held that while resort to external sources is unnecessary where the meaning of constitutional language is clear, the plain meaning of a term may be ascertained by referring to its dictionary definition. *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510-11 (2004). The American Heritage Dictionary defines “supervise” to mean “. . . [t]o direct and inspect the performance of . . .” The

⁸ A copy of this policy is attached hereto as Exhibit 3.

word “administer” is defined as “. . . “[t]o have charge of; manage.” THE AMERICAN HERITAGE DICTIONARY (2d ed. 1982). Thus, the language employed by the framers of the Constitution leaves no doubt that overall authority for the public school system was intended to rest with the State Board (rather than with the Superintendent).

A similar intent to confer such authority upon the State Board has likewise been expressed by the General Assembly on several occasions. For example, N.C. GEN. STAT. § 115C-12, which sets out the powers and duties of the State Board, states:

The general supervision and administration of the free public school system shall be vested in the State Board of Education. The State Board of Education shall establish policy for the system of free public schools, subject to laws enacted by the General Assembly.

N.C. GEN. STAT. § 115C-12 (2009).

Session Law 1995-72 serves as the most recent, and the most emphatic, statement by the General Assembly affirming the State Board’s supremacy over the public school system in North Carolina. When speaking of the Superintendent’s duties in this session law, the General Assembly *on four occasions* states that the Superintendent’s duties are to be carried out “subject to the direction, control, and approval of the State Board.” (S.L. 1995-72, Sections 1-2)

The use of these three particular words - direction, control and approval - leaves no uncertainty as to the extent of the General Assembly’s desire for authority over North Carolina’s public schools to be centralized in the State Board. Because the session law does not define these terms, it is appropriate to determine their plain meaning by reference to a dictionary. *See State ex rel. Thornburg v. Currency in the Amount of \$52,029.00 in U.S. Currency*, 324 N.C. 276, 284, 378 S.E.2d 1, 5 (1989) (applying dictionary definition of statutory terms to ascertain their plain meaning).

“Direction” is defined in the American Heritage Dictionary as “. . . [m]anagement, supervision, or guidance of an action or operation . . .” “Control” refers to “. . . [a]uthority or ability to regulate, direct or dominate . . .” “Approval” is defined as “. . . [a]n official approbation; sanction . . .” THE AMERICAN HERITAGE DICTIONARY (2d ed. 1982).

The General Assembly could have expressed its intent by using any one of these terms in isolation. The fact that it used all three of them only emphasizes its intent that the Superintendent’s actions be subordinate to the will of the State Board.

As noted earlier, S.L. 1995-72 also created three brand new statutes. These three statutes served to (1) transfer the Office of Superintendent to the Department of Public Instruction; and (2) make clear that the State Board is the head of the Department of Public Instruction. (S.L. 1995-72, Section 3) The General Assembly further expressed its wishes by stating that “the intent of this act [is] to restore constitutional authority to the State Board.” (*See id.*, Section 4)

Reading all of these expressions of the General Assembly’s intent together, one cannot help but recognize an unmistakable legislative desire for the State Board to exercise ultimate authority over the public school system in this State. Thus, both the framers of the North Carolina Constitution and the members of the General Assembly have made clear that the Superintendent is, in all respects, subordinate to the State Board with regard to her role in the public school system.

C. THE ADOPTION OF POLICIES ESTABLISHING THE CEO POSITION WAS A PROPER EXERCISE OF THE CONSTITUTIONALLY RECOGNIZED POWER OF THE STATE BOARD TO SUPERVISE AND ADMINISTER THE PUBLIC SCHOOL SYSTEM IN NORTH CAROLINA.

The State Board’s creation of the CEO position and conferral of duties upon the occupant of that position, along with the concomitant effect on the Office of the Superintendent, was a lawful

exercise of the State Board's authority. This authority exists pursuant to both (1) article IX, section 5 of the Constitution, which expressly authorizes the State Board to "make all needed rules and regulations" in carrying out its power to "supervise and administer" the public school system; and (2) the General Assembly's mandate in S.L. 1995-72 that all of the Superintendent's duties are "subject to the direction, control, and approval" of the State Board, as well as its explicit transfer of the Office of the Superintendent to the Department of Public Instruction, of which the State Board is the head. *See* N.C. CONST. art. IX, § 5; S.L. 1995-72, Sections 1-3.

As a practical matter, the creation of the CEO position was eminently rational. Because the State Board does not meet on a day-to-day basis, it was logical for it to delegate to the CEO the duty of implementing the policies of the Department of Public Instruction - much as boards of directors in the private sector frequently appoint a chief executive officer for this same reason.

However, it is important to emphasize that the wisdom of the State Board's actions is not before this Court. Rather, the only question presented here is whether the State Board had the *legal authority* to create the CEO position. Because the answer is yes, the analysis need go no further. The State Board possessed the power not only to exercise direction and control over the Superintendent but also to provide for the efficient implementation of its policies through the creation of the CEO position.

Once again, the Supreme Court's decision in *Guthrie* is instructive. In *Guthrie*, the Supreme Court rejected the argument that the State Board lacked the authority to issue regulations regarding teacher certification. Citing the constitutional provisions contained in article IX setting out the powers of the State Board to make rules and regulations attendant to its authority over the public school system, the Supreme Court stated as follows: "We hold that the promulgation and

administration of the regulation of which the plaintiff complains fall within the authority conferred upon the State Board of Education by the Constitution of North Carolina . . .” *Guthrie*, 279 N.C. at 713, 185 S.E.2d at 200.

Guthrie is controlling in the present case as well. Plaintiff cannot dispute the fact that article IX, section 5 explicitly confers two powers on the State Board: (1) the authority to “supervise and administer” the public school system; and (2) the authority to issue rules and regulations deemed necessary to carry out this power. This is precisely what the State Board has done by virtue of its creation of the CEO position. Therefore, the State Board’s action was well within the bounds of its constitutional authority.

III. UNDER NORTH CAROLINA LAW, DR. HARRISON IS PERMITTED TO HOLD TWO APPOINTIVE POSITIONS SIMULTANEOUSLY.

In her final claim for relief, Plaintiff contends that Dr. Harrison is constitutionally barred from simultaneously occupying two appointed positions, Chairman of the State Board and CEO of the State Board. (Compl. at ¶¶ 67-69) This argument is foreclosed, however, by clear constitutional and statutory provisions.

The relevant provision of the North Carolina Constitution regarding this subject is article VI, section 9, which states, in pertinent part, as follows: “No person shall hold concurrently any two or more appointive offices or places of trust or profit, or any combination of elective and appointive offices or places of trust or profit, *except as the General Assembly shall provide by general law.*” N.C. CONST. art. VI, § 9 (emphasis added).

Thus, the Constitution prohibits the holding of dual appointed positions *only if* the General Assembly has not enacted a general law permitting the simultaneous assumption of such offices.

The General Assembly has, in fact, expressly enacted a general law allowing one to simultaneously hold two appointed positions. North Carolina General Statute § 128-1.1 states in pertinent part:

(a) Any person who holds an appointive office, place of trust or profit in State . . . government is hereby authorized by the General Assembly, pursuant to Article VI, Sec. 9 of the North Carolina Constitution, to hold concurrently one other appointive office, place of trust or profit, or an elective office in . . . State . . . government.

N.C. GEN. STAT. § 128-1.1(a) (2009).

The General Assembly, therefore, has exercised the authority conferred upon it in article VI, section 9. Plaintiff's argument on this issue, like her other arguments in this case, lacks merit.

IV. THE CLAIMS RAISED BY PLAINTIFF IN THIS CASE PRESENT NONJUSTICIABLE POLITICAL QUESTIONS.

For the reasons set out above, Plaintiff's claims in this action fail on their merits. However, dismissal is also proper because Plaintiff's claims raise nonjusticiable political questions.

The political question doctrine controls, essentially, when a question becomes not justiciable . . . because of the separation of powers provided by the Constitution. The . . . doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislative branch] or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions. . . It is well established that the . . . courts will not adjudicate political questions. A question may be held nonjusticiable under this doctrine if it involves a textually demonstrable constitutional commitment of the issue to a coordinate political department.

Bacon v. Lee, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (citations and internal quotation marks omitted).

In *Bacon*, our Supreme Court invoked this doctrine in the clemency context because the North Carolina Constitution expressly reserves the exercise of the clemency power to the Governor. The Court held that, aside from ensuring that a few basic due process safeguards required by the

United States Constitution were satisfied, any judicial limitation on the Governor's clemency powers would constitute an impermissible intrusion on the Governor's authority under the North Carolina Constitution. *Id.* at 717-18, 549 S.E.2d at 854. The Supreme Court concluded that separation of powers principles precluded judicial interference with the Executive Branch's exercise of its clemency powers. *Id.* at 721-22, 549 S.E.2d at 857.

An assumption by one branch of powers constitutionally delegated to other branches is precisely the result Plaintiff seeks in the present lawsuit. At bottom, Plaintiff is asking the Judicial Branch to invalidate policy decisions made by the political branches of our State government on a subject that the North Carolina Constitution expressly reserves to them.

In *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004), our Supreme Court applied the political question doctrine in the education context, holding that the trial court had erred in determining that the proper age at which children are eligible to attend public school was a justiciable issue. In a unanimous opinion, the Supreme Court, per Justice Orr, noted the existence of constitutional language stating that "the General Assembly shall provide that every child of *appropriate age* . . . shall attend the public schools[]" and the fact that the General Assembly had, pursuant to this constitutional authority, prescribed age requirements for school children. *Hoke County*, 358 N.C. at 639, 599 S.E.2d at 391 (emphasis added).

Our reading of the constitutional and statutory provisions leads us to conclude that the determination of the proper age for school children has indeed been squarely placed in the hands of the General Assembly. In addition, the United States Supreme Court has defined issues as nonjusticiable when either of the following circumstances are evident: (1) when the Constitution commits an issue, as here, to one branch of government; *or* (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue. In our view, not only are the applicable statutory and constitutional provisions persuasive in and of

themselves, but the evidence in this case demonstrates that the trial court was without satisfactory or manageable judicial criteria that could justify mandating changes with regard to the proper age for school children. Thus, with regard to the issue of whether the trial court erred by interfering with the province of the General Assembly - establishing the appropriate age for students entering the public school system - we conclude that the trial court did so err. First, our state's constitutional provisions and corresponding statutes serve to establish the issue as the exclusive province of the General Assembly and, second, there was no evidence at trial indicating the trial court had satisfactory or manageable criteria that would justify modifying legislative efforts. As a consequence, the Court holds that any trial court rulings that infringed on the legislative prerogative of establishing school-age eligibility were in error.

Id. (citations omitted).

An application of these two factors compels a finding that the issues raised by Plaintiff in the present case are similarly nonjusticiable political questions. With regard to the first factor, the application of the political question doctrine here is even more straightforward than in *Hoke County*. In *Hoke County*, the constitutional language at issue did not expressly state that the appropriate age of school children was to be "prescribed by law." See N.C. CONST. art. IX, § 3. Instead, the Supreme Court merely inferred the framers' intent that this decision was to be made by the General Assembly.

Here, inference is not required because the express delegation set out in article III, section 7 could not be clearer. With regard to the issue at the core of the present case - what the duties of the Superintendent should be - the Constitution uses plain and explicit language, stating that the Superintendent's duties "*shall be prescribed by law.*" By using such emphatic language, the framers of the Constitution have made, as *Bacon* put it, a "textually demonstrable constitutional commitment of the issue to a coordinate political department." See *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854. Indeed, it would be difficult, if not impossible, to draft a clearer example of language intended to

effectuate such a total delegation of authority on this subject to the political branches of State government.

Similarly, the second *Hoke County* factor also shows that application of the political question doctrine is even more appropriate here than in that case. In *Hoke County*, it would not have been difficult for the Supreme Court to choose a specific age between four and six years old at which children could begin attending public schools. However, based on its desire to avoid undertaking a task for which it was not suited, the Court declined the opportunity to do so.

In the present lawsuit, Plaintiff is asking this Court to engage in a much more difficult task - one that the Judicial Branch is even far less equipped to perform - than that presented in *Hoke County*. Here, Plaintiff boldly seeks to have this Court assume a policymaking role by drafting a list of duties to be performed by the Superintendent in connection with the operation of the Department of Public Instruction.

Plaintiff has not, and cannot, demonstrate that the Judicial Branch is equipped to undertake such a task. In *Hoke County*, the Court determined that there were no “satisfactory or manageable criteria that would justify [a court] modifying legislative efforts” on the issue of the appropriate age for entry into public schools. 358 N.C. at 639, 599 SE.2d at 391. It is even clearer that no standards exist that would enable this Court to create out of whole cloth a “job description” for the Office of the Superintendent - other than the Court’s wholly subjective notions of what is and is not wise public policy. These types of policy decisions are far better left to the political policymaking branches of government. *See Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 185, 381 S.E.2d 445, 452-53 (1989) (“Courts are ill-equipped to determine what the public policy is or should be, whereas that is a basic reason for the existence of our legislature.”).

Plaintiff is asking the Judicial Branch to serve as a “super-legislature” and to sit in judgment of policy decisions entrusted by the Constitution to other branches. This Court should follow the lead of the Court of Appeals, which observed in a case where a plaintiff likewise sought a declaratory judgment on a nonjusticiable issue:

Plaintiffs are not the first litigants who have attempted to have the courts rule on issues that are properly the subject of legislative determination . . . We likewise decline plaintiffs’ invitation in this case.

Royal v. State, 153 N.C. App. 495, 499, 570 S.E.2d 738, 741 (2002). See *Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986) (“The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials.”); *Multiple Claimants v. N.C. HHS, Div. of Facility and Detention Servs.*, 176 N.C. App. 278, 280-81, 626 S.E.2d 666, 668 (2006) (“This Court must . . . be ever vigilant not to act as a super-legislature that imposes its notion of public policy in the face of statutory determinations otherwise.”), *aff’d and modified on other grounds*, 361 N.C. 372, 646 S.E.2d 356 (2007). See also *City of Asheville v. State*, __ N.C. App. __, 665 S.E.2d 103, 133 (2008) (“[I]t is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures.”), *disc. review denied and appeal dismissed*, 363 N.C. 123, 2009 N.C. LEXIS 121 (2009).

Determining the duties to be performed by the Superintendent is both an issue that is constitutionally committed to coordinate branches of government and also one that defies determination by any satisfactory and manageable judicial criteria. For these reasons, it is a quintessential example of a nonjusticiable political question.

CONCLUSION

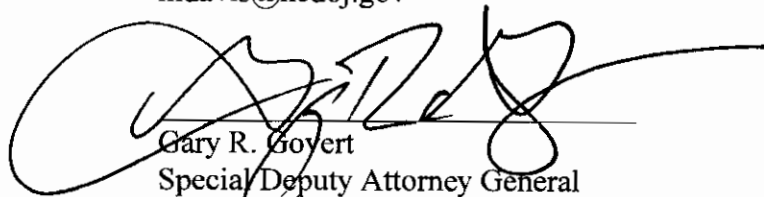
The issue before this Court is *not* whether the current formulation of Plaintiff's job duties is wise or unwise. Rather, the only issue presented is whether the North Carolina Constitution prohibits the acts taken by the General Assembly and the State Board. Because no such constitutional prohibition exists, summary judgment should be granted in favor of the State.

Respectfully submitted, this the 19th day of June, 2009.

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EXHIBIT 1

GENERAL ASSEMBLY OF NORTH CAROLINA
1995 SESSION
RATIFIED BILL

CHAPTER 72
HOUSE BILL 7

AN ACT TO CLARIFY THE STATUTES SO AS TO STREAMLINE THE
OPERATIONS OF THE STATE EDUCATION AGENCY.

Section 1. G.S. 115C-19 reads as rewritten:

"§ 115C-19. Chief administrative officer of the State Board of Education.

As provided in Article IX, Sec. 4(2) of the North Carolina Constitution, the Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education. ~~The Superintendent of Public Instruction shall administer the policies adopted by the State Board of Education.~~ As secretary and chief administrative officer of the State Board of Education, the 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. Subject to the direction, control, and approval of the State Board of Education, the Superintendent of Public Instruction shall carry out the duties prescribed under G.S. 115C-21."

Sec. 2. G.S. 115C-21 reads as rewritten:

"§ 115C-21. Powers and duties generally.

(a) Administrative Duties. ~~It Subject to the direction, control, and approval of the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:~~

- (1) To organize and establish a Department of Public Instruction which shall include such divisions and departments as ~~are the State Board considers necessary~~ for supervision and administration of the public school system, to administer the funds for the operation of the Department of Public Instruction, and to enter into contracts for the operations of the Department of Public Instruction system. All appointments of administrative and supervisory personnel to the staff of the Department of Public Instruction are subject to the approval of the State Board of Education, which may terminate these appointments for cause in conformity with Chapter 126 of the General Statutes, the State Personnel System.
- (2) To keep the public informed as to the problems and needs of the public schools by constant contact with all school administrators and teachers, by ~~his~~ personal appearance at public gatherings, and by information furnished to the press of the State.
- (3) To report biennially to the Governor 30 days prior to each regular session of the General Assembly, such report to include information

and statistics of the public schools, with recommendations for their improvement and for ~~such changes in the school law as shall occur to him.~~ changes in the school law.

- (4) To have printed and distributed such educational bulletins as ~~he shall deem~~ are necessary for the professional improvement of teachers and for the cultivation of public sentiment for public education, and to have printed all forms necessary and proper for the administration of the Department of Public Instruction.
- (5) To ~~have under his direction, in his capacity as the constitutional head of the public school system,~~ manage all those matters relating to the supervision and administration of the public school ~~system.~~ system that the State Board delegates to the Superintendent of Public Instruction.
- (6) To create a special fund within the Department of Public Instruction to manage funds received as grants from nongovernmental sources in support of public education. ~~The Superintendent may accept grants and gifts from corporations and other sources made in support of public education and may hold and disburse such funds, in accordance with the purposes, conditions, and limitations associated with such grants and gifts. Any special fund created pursuant to this subdivision shall be subject to audit by the State Auditor.~~ Effective July 1, 1995, this special fund is transferred to the State Board of Education and shall be administered by the State Board in accordance with G.S. 115C-410.
- (7) ~~To have solely under his direction and control all matters relating to provision of staff services and support to the State Board of Education, including implementation of federal programs on behalf of the State Board of Education, except as otherwise provided in the Current Operations Appropriations Act.~~

(b) Duties as Secretary to the State Board of Education. —~~As secretary, under the direction of the Board,~~ Subject to the direction, control, and approval of the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:

- (1) To administer through the Department of Public Instruction, ~~all the~~ instructional policies established by the Board.
- (1a) ~~To administer the funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.~~
- (2) To keep the Board informed regarding developments in the field of public education.
- (3) To make recommendations to the Board with regard to the problems and needs of education in North Carolina.
- (4) To make available to the public schools a continuous program of comprehensive supervisory services.
- (5) To collect and organize information regarding the public schools, on the basis of which he shall furnish the Board such tabulations and reports as may be required by the Board.

- (6) To communicate to the public school administrators all information and instructions regarding instructional policies and procedures adopted by the Board.
- (7) To have custody of the official seal of the Board and to attest all deeds, leases, or written contracts executed in the name of the Board. All deeds of conveyance, leases, and contracts affecting real estate, title to which is held by the Board, and all contracts of the Board required to be in writing and under seal, shall be executed in the name of the Board by the chairman and attested by the secretary; and proof of the execution, if required or desired, may be had as provided by law for the proof of corporate instruments.
- (8) To attend all meetings of the Board and to keep the minutes of the proceedings of the Board in a well-bound and suitable book, which minutes shall be approved by the Board prior to its adjournment; and, as soon thereafter as possible, to furnish to each member of the Board a copy of said minutes.
- (9) To perform such other duties as the Board may assign to him from time to time."

Sec. 3. Article 5 of Chapter 143A of the General Statutes is amended by adding three new sections to read:

"§ 143A-39. Creation.

There is hereby created a Department of Public Instruction. The head of the Department of Public Instruction is the State Board of Education. Any provision of G.S. 143A-9 to the contrary notwithstanding, the appointment of the State Board of Education shall be as prescribed in Article IV, Section 4(1) of the Constitution.

"§ 143A-40. State Board of Education; transfer of powers and duties to State Board.

The State Board of Education shall have all powers and duties conferred on the Board by this Article, delegated to the Board by the Governor, and conferred by the Constitution and laws of this State.

"§ 143A-42. Superintendent of Public Instruction; creation; transfer of powers and duties.

The office of the Superintendent of Public Instruction, as provided for by Article III, Section 7 of the Constitution, and the Department of Public Instruction are transferred to the Department of Public Instruction. The Superintendent of Public Instruction shall be the Secretary and Chief Administrative Officer of the State Board of Education, and shall have all powers and duties conferred by the Constitution, by the State Board of Education, Chapter 115C of the General Statutes, and the laws of this State."

Sec. 4. The State Board of Education shall review all State laws and policies governing the public school system to ensure their compliance with the intent of this act to restore constitutional authority to the State Board. The Board shall complete this review and make any recommendations for additional statutory changes to the General Assembly by June 1, 1995.

Sec. 5. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 9th day of May,
1995.

Dennis A. Wicker
President of the Senate

Harold J. Brubaker
Speaker of the House of Representatives

EXHIBIT 2

**NORTH CAROLINA STATE BOARD OF EDUCATION
Policy Manual**

Policy Identification

Priority: Twenty-First Century Systems

Category: State Board of Education/Department of Public Instruction Op

Policy ID Number: TCS-C-022

Policy Title: Policy Creating the Chief Executive Officer of the State Board of Education

Current Policy Date: 03/04/2009

Other Historical Information:

Statutory Reference:

Administrative Procedures Act (APA) Reference Number and Category:

In order to permit the State Board of Education to more effectively and efficiently administer and supervise the North Carolina free public school system, the State Board of Education creates the position of Chief Executive Officer of the State Board of Education. Subject to the direction, control, and approval of the State Board of Education, the Chief Executive Officer shall have and exercise such powers and duties as the State Board of Education shall from time to time delegate to him or her. The Chief Executive Officer shall be solely accountable and responsible to the State Board of Education without interference or contrary instructions from any other entity and shall serve at the pleasure of the State Board of Education.

EXHIBIT 3

NORTH CAROLINA STATE BOARD OF EDUCATION
Policy Manual

Policy Identification

Priority: Twenty-First Century Systems

Category: State Board of Education/Department of Public Instruction Op

Policy ID Number: TCS-C-013

Policy Title: Policy delineating the delegation of authority from the State Board of Education to the Superintendent of Public Instruction and to the Chief Executive Officer

Current Policy Date: 03/04/2009

Other Historical Information: Previous board dates: 01/08/1997, 06/05/1997, 09/04/1997, 10/04/1997, 11/06/1997, 12/04/1997, 03/05/1998, 11/05/1998, 10/07/1999, 12/06/2001, 12/04/2003, 05/06/2004, 09/02/2004, 02/01/2007

Statutory Reference:

Administrative Procedures Act (APA) Reference Number and Category:

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Pursuant to Article IX, sec. 5 of the Constitution of North Carolina, G.S. 115C-12 and G.S. 143A-44.1 through 44.3, the State Board is responsible for the general supervision and administration of the North Carolina free public school system and is head of the Department of Public Instruction. In accordance with Article IX, sec. 4(2) and G.S. 115C-19 and 21 and G.S. 143A-44.3, the State Superintendent is the Secretary and Chief Administrative Officer of the State Board and carries out duties of the office subject to the direction, control, and approval of the State Board.

In accordance with these and other applicable laws, the State Board of Education (the State Board) hereby adopts these policies for the purposes of (1) describing the duties of the State Superintendent of Public Instruction (the State Superintendent) and the Chief Executive Officer (CEO) and (2) delegating certain powers and duties to the State Superintendent and CEO. The State Board may add to or remove from the delegated powers and duties as it may deem appropriate for the effective and efficient implementation of the State Board's authority. The State Board may further modify or repeal these policies at any time the Board deems such action appropriate.

The State Board hereby delegates to the State Superintendent the powers and duties:

1. To keep the public informed as to the problems and needs of the public schools in accordance with G.S. 115C-21(a)(2) and in alignment with State Board policy;
2. To advise the State Board promptly and fully about problems and issues concerning the operation of the uniform system of free public schools and the education of the State's children;

3. Following approval by the Associate Superintendent for Financial and Business Services and the CEO, to execute all contracts entered into by the Department of Public Instruction on behalf of the State Board and to report these contracts to the State Board monthly as information;
4. Upon recommendation by the Associate Superintendent for Financial and Business Services and the CEO, to determine on behalf of the State Board the annual premium rate to be charged for insurance of school properties as provided by Article 38 of Chapter 115C of the North Carolina General Statutes and to report these rates to the State Board as information;
5. To execute and issue for and on behalf of the State Board documents signifying compliance with State or federal law or State Board policies or rules relating to licenses for principals, teachers, and all other school personnel required to have licenses;
6. To settle cases during litigation relating to license suspension and revocation. Department of Justice Education Section lawyer(s) and DPI and State Board staff members will advise the State Superintendent on settlement matters; and
7. Upon the receipt of a written request for reinstatement of a suspended or revoked license or for granting a new license after denial of a license, together with substantiating information, the State Superintendent will conduct an investigation sufficient to determine whether reasonable cause exists to reinstate the license or to grant a new license. The State Superintendent shall prepare and file a written recommendation concerning the request with the SBE.

The CEO shall report to the State Board. The State Board hereby delegates to the CEO the power and duty:

To manage the Department of Public Instruction on a day-to-day basis subject to the direction, control, and approval of the State Board; and

To approve all agency employment decisions for the positions of section chief and below, which decisions the CEO shall report to the State Board. The CEO shall report all employment requests for the positions of director and above to the State Board, which shall make the employment decision.

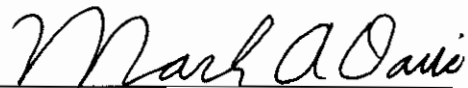
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via email; or
- Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Robert F. Orr
Jeannette K. Doran
N.C. Institute for Constitutional Law
333 East Six Forks Road, Suite 180
Raleigh, NC 27609

This the 19th day of June, 2009.



Mark A. Davis
Special Deputy Attorney General