STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09CVS06655

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

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.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, by and through undersigned counsel, files this Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. By way of a separate memorandum of law, filed and served on June 19, 2009, Plaintiff argued the basis for summary judgment in her favor.

INTRODUCTION

Defendants filed a Motion for Summary Judgment and argued in a memorandum of law in support thereof that Defendants are entitled to summary judgment on the grounds that: (1) Session Law 1995-72 is constitutional; (2) the State Board acted within its authority in creating the position of chief executive officer; (3) Defendant Harrison is permitted to hold dual offices; and (4) Plaintiff's claims are barred by the political question doctrine. For the reasons set forth below, and for the reasons articulated in Plaintiff's Memorandum of Law in Support of her Motion for Summary Judgment, Defendants are not entitled to summary judgment, and the Court should deny their motion and grant Plaintiff's Motion for Summary Judgment.

STATEMENT OF THE CASE

Plaintiff instituted this action on April 3, 2009, by filing a Complaint and Petition for Declaratory Judgment. By order dated April 22, 2009, Chief Justice Parker designated this case exceptional pursuant to Rule 2.1 of the General Rules of Practice and assigned the matter to Superior Court Judge Robert Hobgood.

Defendants answered the Complaint on June 3, 2009, and raised affirmative defenses of the political question doctrine, sovereign immunity, and standing. Defendants also purported to reserve the right to raise later any other affirmative defense which may become apparent in the future.

In anticipation of cross motions for summary judgment, counsel for all parties mutually agreed upon a briefing schedule as follows: opening briefs from all parties to be filed by June 19, 2009; and responsive briefs to be filed by July 1, 2009. Plaintiff filed and served her Motion for Summary Judgment, together with a Memorandum of Law on June 19, 2009. Defendants likewise filed a Motion for Summary Judgment and Memorandum of Law on that date.

Counsel for all Plaintiffs joined in requesting via email a two day extension for serving their respective responsive briefs on June 26, 2009. That request not having been decided, Defendants' counsel notified the Court on June 30, 2009, that, given the schedule of the Court and counsels' joint request, the parties would submit responsive briefs on July 3, 2009, rather than on July 1, 2009.

The Court has scheduled a hearing on the motions for July 15, 2009.

STATEMENT OF FACTS

Plaintiff relies on the Statement of Facts set forth in her Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment. Additional facts will be provided in argument below as necessary to provide a clear understanding of Plaintiff's claims and the inappropriateness of judgment for Defendants.

ARGUMENT

I. THE SUPERINTENDENT HAS CONSTITUTIONAL RESPONSIBILITY AS ADMINISTRATIVE HEAD OF THE NORTH CAROLINA PUBLIC SCHOOL SYSTEM, AND THE CREATION OF A POSITION OF CHIEF EXECUTIVE OFFICER OF THE STATE BOARD OF EDUCATION AND THE ATTEMPTED DELEGATION OF AUTHORITY TO THAT POSITION AS THE ADMINISTRATIVE HEAD OF THE PUBLIC SCHOOL SYSTEM AND CHIEF ADMINISTRATIVE OFFICER OF THE STATE BOARD OF EDUCATION VIOLATE ARTICLE I, SECTION 6, ARTICLE III, SECTION 7, AND ARTICLE IX, SECTIONS 4 AND 5 OF THE NORTH CAROLINA CONSTITUTION. (COUNTS 1 AND 2)

Defendants' memorandum of law focuses on Session Law 1995-72, but that focus misses the real crux of this case. In sum, Plaintiff's complaint is: The office of Superintendent is a constitutional office possessing certain constitutional responsibilities that cannot be taken away by legislation or regulation. *See In re Spivey*, 345 NC 404, 480 S.E.2d 693 (1997). Thus, it is the position of Dr. Atkinson that the specific duty assigned to the office of Superintendent, that is

"chief administrative officer of the State Board," is a duty that cannot be reduced or eliminated by legislation or regulation, nor may that duty be assigned to someone else, in this case the CEO Dr. Harrison.

A. <u>The State Board does not have the authority to create a Chief Executive Officer position and transfer to that position the constitutional duties of the Superintendent.</u>

In short, Defendants argue that because the duties of the Superintendent are to be "prescribed by law" pursuant to Article III, §7(2), and because the General Assembly enacted Session Law 1995-72 which manifested an intent that the Superintendent should perform her duties subject to the direction and control of the State Board, the State Board is empowered to create a new office, i.e. CEO, and give authority for running DPI and the public school system to that position. Defendants rely to a large extent upon the presumption of constitutional validity afforded to legislation. However, Defendants' reasoning is not on point. Defendants fail to address the duties constitutionally assigned to the Superintendent by Article IX, § 4(2), specifically the Superintendent's duty to serve as secretary and chief administrative officer of the State Board.

Defendants' actions in creating the CEO position are an attempt to usurp the inherent constitutional authority of the Superintendent and her express constitutional responsibility as chief administrative officer of the State Board. The chief executive officer is in essence the chief administrative officer. But for the substitution of "executive" for "administrative," the job titles are the same. In practice, the duties of the chief executive officer and the chief administrative officer are one in the same. Defendants make no attempt to distinguish between the roles of the CEO and the chief administrative officer, presumably because no genuine distinction exists. The constitution provides for a chief administrative officer and provides that that function is assigned to the Superintendent. Defendants have attempted to substitute their choice for the voters' choice

by renaming the chief administrative officer the "CEO" and giving that job to their preferred individual. The Attorney General opined in a 1985 Advisory Opinion that: "...it is doubtful that the General Assembly without a constitutional amendment may take from the Superintendent of Public Instruction his responsibility as 'chief administrative officer' and confer that responsibility upon some other officer." (Comp. Ex. D) While the General Assembly has not enacted any legislation attempting to usurp the authority of the Superintendent, that is exactly what the Defendants here have done.

To bolster their argument, Defendants point to two cases which they claim control. However, both cases are distinguishable. In the first case, *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980), the court considered the authority of the insurance commissioner. In the second case, *Bailey v. N.C. Dept. of Revenue*, 353 N.C. 142, 540 S.E.2d 313 (2000), the court considered the authority of the Attorney General. Both the Insurance Commissioner and the Attorney General, like the Superintendent, have such duties as "shall be prescribed by law," a clause in the constitution applicable to all Council of State officers. N.C. Const. art. III, § 7(2). However, the Superintendent has an express constitutional duty as secretary and chief administrative officer of the State Board. No other Council of State member, including the Insurance Commissioner and the Attorney General, has an express constitutional duty. Thus, the cases cited by Defendants for the proposition that the General Assembly has exclusive, unbridled authority to determine the duties of all Council of State members does not address the full scope of the Superintendent's duties and authority. Here is not a case of the General Assembly assigning duties to the Superintendent, but rather a case where the General Assembly has given a general grant to the State Board which assigns duties or attempts to revoke them. It is Article IX, § 4(2) which creates a floor for the duties of

Superintendent. Neither the General Assembly nor the State Board may reduce the Superintendent's duties below the mandate that she shall serve as secretary and chief administrative officer of the State Board.

Oddly, Defendants argue: "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." (Def. Memo. p. 9). True. But, the framers did, in fact, articulate specific job duties—secretary and chief administrative officer. Defendants' unwillingness (or inability) to reconcile their actions with the constitutional prescription that the Superintendent is the chief administrative officer cannot negate the constitutionally assigned duties of the Superintendent. A 1995 Advisory Opinion from the Attorney General opined that the "responsibility for the day-to-day operation of the public school system is given to the State Superintendent—a constitutional officer elected by the people." (Compl. Ex. F) Thus, the Attorney General concluded that the Superintendent's role is essential to carry out the policies adopted by the State Board.

Defendants continue their argument by maintaining that the State Board has the constitutional authority to "supervise and administer" the public school system in North Carolina, and so has authority to create a CEO position to carry out that duty. Defendants cited the dictionary definition of "administer": ". . .to have charge of; manage." That same definition would seem to apply with at least equal force to the Superintendent's duty as chief *administrative* officer. By Defendants' own authority, the Superintendent would, as chief administrative officer, have the constitutional authority "to have charge of " and "manage" on behalf of the State Board which, in turn, has the typical level of authority enjoyed by a board, not the authority for day-to-day management. The fact that the State Board has the duty to supervise and administer the school system does not in any way mean that it is free to take the authority of

the Superintendent to administer and supervise the public school system on a day-to-day basis in order for the State Board to satisfy its general duty of oversight of the schools.

Defendants maintain that the Superintendent is subordinate to and works for the State Board. But, in fact, the constitutional provision specifying that the duties of the Superintendent "shall be prescribed by law" does not reduce the Superintendent to a subordinate of the State Board, and neither does the rule-making authority of the State Board found at Article IX, § 5. The State Board has no remedy in the event that the Superintendent exceeds her prescribed duties or chooses not to perform them. The Superintendent has been selected by the voters and the Constitution gives no recourse to the State Board or the Governor should the Superintendent either exceed her prescribed duties or not perform them. Thus, the Superintendent is not answerable in any meaningful way to the State Board. Without some measure of enforcement, direction by the State Board to the Superintendent is a far cry from the roles of principal and agent suggested by Defendants. The State Board's constitutional authority to "supervise and administer the free public school system" does not render the Superintendent a subordinate of the State Board whose meaningful duties may be reassigned to a newly created position. Had the framers intended to make the Superintendent a subordinate of the State Board and subject to constructive termination by reassignment of duties, the framers could have done so expressly. This they did not do. Contrary to assertions of Defendants and the Sanders affidavit, the constitution does not state that the Superintendent is a subordinate of the State Board. Instead, the constitution assigns specific duties—secretary and chief administrative officer—to the Superintendent. Defendants may not constitutionally reallocate those functions to the CEO.

B. Constitutional Duties and Responsibilities of the Superintendent

As set forth more fully in Plaintiff's Memorandum of Law in Support of her Motion for Summary Judgment, constitutional amendments ratified in 1971 modified the language describing the role of the Superintendent. Pursuant to the ratified version of proposed constitutional amendment No. 1, the current Article IX, § 4, the Superintendent is not specifically listed in part (1) as a member of the Board but in part (2) she is described as secretary and chief administrative officer of the State Board of Education. For the sake of clarity it must be explained that the framers of the 1971 Constitution completed an editorial change which did not modify the substance of the constitution; this change was put to voters as Amendment No. 1 and described by the Study Commission as the "proposed constitution" though it was presented to voters in conjunction with nine other amendments. (Study Commission Report, p. 4, attached hereto as Exhibit A)Thus, voters were to consider ten amendments at once, including Amendment No. 5 which provided for a change in the mode of selection of certain state officers. The Study Commission Report offers commentary on the original proposal to include in Amendment No. 5 a change transforming the Superintendent from a popularly elected office to one elected or appointed by the State Board. Amendment Nos. 1 and 5 both, like several other amendments, appeared on the same ballot, but the changes were subject to ratification independent of each other. This was done so that voters could consider amendments separately and vote for or against each amendment without have to vote for or against *all* of the proposed changes.

Proposals by the Study Commission working on a substantial updating of the State Constitution had included changes to the Superintendent's office which would have eliminated the Superintendent as a popularly elected constitutional officer, have made the Superintendent

appointed by the State Board, and eliminated the Superintendent as a voting member of the State Board. However, the proposals were modified even before they reached the General Assembly.

Commission member Justice Denny proposed eliminating the recommendation removing the Superintendent from the State Board, and the Commission approved that recommendation. (Minutes from the October 11, 1968, meeting are attached to Plaintiff's Memo In Support of Summary Judgment as Exhibit B). In light of the actions of the Commission in accepting Justice Denny's proposal to eliminate the Committee recommendation to drop the Superintendent as a member of the Board, it is arguably the intent of the framers of this Constitution that the new language incorporates into part (2) of Article IX, § 4, the Superintendent's continued membership on the Board as part of her duties as "secretary and chief administrative officer of the State Board of Education." This is bolstered by the Study Commission report, cited in the affidavit of John Sanders filed by Defendants. The report states: "Proposed Sec. 4(1) [of Article IX] modifies the State Board of Education *slightly* by eliminating the Superintendent of Public Instruction as a *voting member* of the Board while retaining him as the Board's secretary and chief administrative officer," (Report p. 34) (emphasis added) Had the intent of the framers been to keep the Superintendent off the board entirely, then the report would not have specified that the Superintendent was to be eliminated as a "*voting*" member of the State Board.

In the Commission Report, there were nine separate constitutional amendments proposed with Amendment No. 5 which proposed to eliminate the Superintendent as a constitutionally elected officer under Article III and instead have the Superintendent elected by the State Board of Education. Additional language in proposed amendments to the constitution eliminating the Superintendent as a member of the Board and changing the duties of the Superintendent to an

administrative employee of the Board were obviously contemplated and recommended as complementing provisions contingent upon the Superintendent no longer being elected.

Notwithstanding the recommendation of the Education Committee and the Study Commission as a whole, when the General Assembly passed the package of constitutional amendments for a revised Constitution to be submitted to the voters, no amendment was submitted eliminating the Superintendent as an elected constitutional officer under Article III, nor changing the selection process for the Superintendent to an appointive position under the Board. Thus, the Superintendent has continued to this day to be a duly elected constitutional officer of the State – not an appointed employee subject to the control of the Board. Legislation to the contrary cannot trump the Constitution. After all, "[t]he purpose of a written constitution is to place limits on the power of the legislature." *Bailey v. State*, 348 N.C. 130, 154, 500 S.E.2d 54, 68 (1998) (citing *Trustees of the Univ. of N.C. v. Foy*, 5 N.C. 58, 1 Mur. 58 (1805)).

Generally, the duties of the Superintendent, like those of seven other popularly elected officers, are to be prescribed by law. But, unlike those other officers, the Superintendent has an express constitutional mandate: "The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education." This specific constitutional responsibility, particularly when taken with previous constitutional provisions relating to the Superintendent, the inherent constitutional authority of the Superintendent, and the practice of the office for over a hundred years, essentially empowers the Superintendent to run the public school system of the state on a day-to-day basis, through the DPI subject to the laws of the state and rules and regulations made by the State Board. This view is underscored by N.C.G.S. § 115C-21 which sets forth the duties of the Superintendent in some detail and by N.C.G.S.§ 115C-19 which states the Superintendent "manages on a day-to-day basis the administration of

the free public school system." This authority rests exclusively with Dr. June Atkinson as the duly elected Superintendent.

As to the changes included in the "proposed Constitution", specifically the shift in language from "administrative head of the public school system" to "chief administrative officer of the State Board of Education," it must be argued that the constitutional meaning of the revised language describing the Superintendent's duties is the same as it was prior to the adoption of the 1971 Constitution. As the Commission Report stated: "some of the changes are substantive, but none is calculated to impair any present right of the individual citizen or to bring any fundamental change in the power of state and local government or the distribution of power." Thus, to conclude that the Superintendent's constitutional authority is any less than it was pre-1971 would be wholly inconsistent with the expressed analysis of those who studied, drafted, and framed the changes to the Constitution. In addition, in the case of *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982), the Supreme Court affirmed this conclusion by stating:

> In other words, the new document enacted in 1970 . . . was not a fundamentally new constitution. It was an extensive editorial revision of the 1868 document. The evils sought to be remedied were obsolete language, outdated style and illogical arrangement. The intent, object and purpose of the framers and adopters was to correct those evils. Important and significant substantive changes were not included in the new document submitted in 1970, but were dealt with in amendments separately submitted to the people of North Carolina for their approval.
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> *Id.* at 636-37, 286 S.E.2d at 95.

The only conclusion that can be reached under these undisputed facts is that the constitutional role of the Superintendent has remained unchanged right up through and including the revisions to the Constitution in 1971.

The preceding views of the Superintendent's authority under the 1971 Constitution are bolstered by the history of the Superintendent's statutory duties. The office of Superintendent was created in 1868. Chapter 270 of the General Statutes, ratified on April 12, 1869, provided: "The Superintendent of Public Instruction shall direct the operations of the system of common schools and enforce the regulations and laws in relation thereto." That duty stood in tact for decades. *See* N.C.G.S. § 2541 (1883); N.C.G.S. § 4090 (1905). Detailed duties of the Superintendent were not enacted until four decades after it was first constituted. The first significant statutory duties were assigned to the Superintendent in 1919. At that time, the General Assembly provided that the Superintendent shall "look after the school interest of the state" and report to the governor. Further, the Superintendent was "to direct the operations of the public schools and enforce the laws and regulations in relation thereto. County boards of education were required to "obey the instructions of the state superintendent." These duties were constitutionalized in the 1942 when the constitution was amended so that the Superintendent had the duty of "general supervision of the public schools" and secretary of the State Board. N.C.G.S. § 93-10 (1919). At the time the 1971 Constitution was being drafted and debated, the statutory duties of the Superintendent required the Superintendent to run the public school system on a day-to-day basis. The statutory duties in existence at the time the framers drafted the 1971 Constitution colored not only the framers' perception of the Superintendent's duty but also what legislators and voters who ratified the 1971 Amendment believed the post-amendment role of the Superintendent would be.

Those statutory duties continued largely unchanged until the mid-1990s. As Prof. McColl explained in an affidavit submitted on behalf of Plaintiff, "[W]hile the 1971 Constitution modified the State Superintendent's responsibilities from administrative head of the public

school system to chief administrative officer of the board, there was *no operational change* after adoption of the 1971 Constitution." (McColl Aff. ¶ 19) (emphasis added) The history of the office of Superintendent, together with the records on the Study Commission and a careful review of the language of the 1971 Constitution reveal that the Superintendent is the state officer charged with responsibility for running North Carolina's school system by implementing the policies adopted by the State Board and laws enacted by the General Assembly but cannot be reduced to a mere figurehead by the State Board. Indeed, "The lack of change in responsibilities after the 1971 Constitution suggests that the intention was to clarify areas of responsibility to provide for a more effective and efficient government rather than to allow for the removal of elected State Superintendent from administrative responsibilities." (McColl Aff. ¶21(c)).

Prof. McColl discusses, in her affidavit, the allocation of responsibility between the State Board and the Superintendent. She describes their respective roles and the debate accompanying it thusly:

> Awareness of potentially conflicting roles of the State Board and State Superintendent is not only evident in debates regarding constitutional amendments in the 1930s and 1940s but also in reports leading to proposed revisions to the constitution in the 1950s and 1960s. The 1948 Report of the State Education Commission recommended "[t]he assignment to the board of *exclusive responsibility for policy making functions* and to the superintendent of *exclusive responsibility for executive functions*" (underline in original text, p. 376). The 1959 North Carolina Constitutional Commission recommended the shift from the State Superintendent as "the administrative head of the public school system" to the "chief administrative officer of the Board" to avoid conflicts with the Board provisions. (Report of the North Carolina Constitutional Commission, p.78) ... While the 1959 proposal was not submitted to voters, it was reviewed by the 1968 Constitution Study Commission that proposed identical language for the State Superintendent's role.
>
> (McColl Aff. ¶ 16)

Dr. Atkinson acknowledges that the Board is vested with the constitutional duty to "supervise and administer the free public school system and the educational funds provided for

its support." The State Board is comprised of volunteers appointed to the Board which meets once a month and obviously was never intended to run the school system on a day-to-day basis. Instead, the Superintendent, as chief administrative officer, has the constitutional duty to execute the State Board's efforts and implement its policies. In short, the Superintendent must *administer* the State Board's plans for the public school system of North Carolina. She is primarily the one responsible for doing so as the *chief* administrative officer. However, the Superintendent still retains the independent status as a duly elected constitutional officer who has responsibilities for the day-to-day operation of the public school system which cannot be infringed on by either the State Board or the CEO. As a constitutional officer, duly elected by the People, the Superintendent has certain inherent powers and duties. Those powers must be exercised and those duties performed without impediment from other officials or entities. The voters of the North Carolina hired Dr. Atkinson, and it is the voters to whom she is ultimately accountable. It would be odd indeed for the constitution to create an elected office and then place that office subordinate to a battery of officials who, as appointees, have no accountability to the voters whatsoever.

Defendants have submitted an affidavit of John Sanders to support of their assertion that the Superintendent is a subordinate of the State Board. Sanders quoted a portion of the Study Commission Report: "A potential conflict of authority between the Superintendent and the Board is eliminated by making clear that he is the administrative officer of the Board (Sec. 4[2]), which is to administer the public schools. (Sec. 5)." (Sanders. Aff. ¶ 35). Sanders then explains that this change was made to "make it clear" the Superintendent works for the Board. (Sanders Aff. ¶37). However, neither Sanders' affidavit nor Defendant's memorandum of law address the critical interplay among the proposed amendments. That is to say, any suggestion that the

Superintendent would "work for" the State Board was inherently dependent upon the transformation of the Superintendent's office from one popularly elected to one appointed by the State Board. While the Study Report states the Superintendent works for the Board, that statement takes into account a proposal to make the Superintendent an office appointed by the State Board as evidenced by the following observation in the Report: "We believe that the choice of a person to fill this important post [Superintendent] can be better made by the State Board of Education than by the voters at large or even by the Governor." (Study Commission Report p. 49).

Had an amendment been adopted which made the Superintendent an officer appointed by the State Board, then it would have made sense for the Superintendent to work for the Board. However, the Superintendent is a popularly elected constitutional officer and therefore accountable to the voters. The drafters of the 1971 amendments understood that popularly elected officers were accountable to the voters. In reference to the popularly elective offices the drafters proposed keeping, the Study Commission Report observed: "From the constitutional standpoint, these officers nevertheless hold their offices by gift of the voters, and so are only indirectly subject to supervision by the Governor." Because the Superintendent remains an elective office, that position, like other elected offices, is a gift from voters. It is to voters the Superintendent, like other elected officers, is accountable. (Study Commission Report p. 49)

In sum, Dr. Harrison in his capacity as chairman of the Board or as CEO of the Board or in both capacities, has no authority to displace the Superintendent in the performance of the supervision and administration of the public school system or in the operation of the Department of Public Instruction or in the role of chief administrative officer of the Board.

II. SIMULTANEOUS SERVICE AS AN APPOINTED MEMBER OF THE STATE BOARD OF EDUCATION, CHAIR OF THE STATE BOARD OF EDUCATION AND CHIEF EXECUTIVE

OFFICER OF THE STATE BOARD OF EDUCATION VIOLATES ARTICLE VI, SECTION 9 OF THE NORTH CAROLINA CONSTITUTION.
(COUNT 3)

Defendants argue that Defendant Harrison is permitted to serve as Chairman of the State Board and the CEO simultaneously because the General Assembly has authorized dual office holding. N.C.G.S. § 128-1.1(a). However, as explained in Plaintiff's Memorandum of Law in support of her Motion for Summary Judgment, that statutory authorization is constitutionally invalid and, in any event, Defendant Harrison is holding three offices though the statute purports to allow the holding of up to only two office.

The prohibition on dual office holding has been a part of the North Carolina Constitution since 1875 and is today found at Article VI, § 9(1) which states in pertinent part:

> It is salutary that the responsibilities of self-government be widely shared among the citizens of the State and that the potential abuse of authority inherent in the holding of multiple offices by an individual be avoided. . . . No person shall hold concurrently any two offices in this State that are filled by election of the people. 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.

The constitutional prohibition on dual office holding allows the General Assembly to provide exceptions by general law. The General Assembly has purported to authorize a person to hold two appointive, two elective or one elective and one appointive office by enactment of N.C.G.S. § 128-1.1. This is essentially a negation of the constitutional prohibition on dual office holding. Although the constitution permits the General Assembly to enact exceptions, such an exception should not be a blanket exception for any two offices or places of trust or profit. A blanket exception for any two offices amounts to a wholesale circumvention of the relevant constitutional provision, entitled "*Dual* office holding." N.C. Const. art. VI, § 9 (emphasis added). The intent of the framers was not to permit the legislature to thwart the constitutional

prohibition on dual office holding generally. Rather, common sense dictates that the framers intended that the General Assembly have authority to craft exceptions on a class by class basis. Such classifications should be drawn by reference to the offices or places of trust or profit to be held concurrently.

As explained by the Study Commission Report, "for example, the General Assembly could provide that the same man can be both tax collector and tax supervisor." (Report p. 33) The framers' vision was to permit the legislature to create exceptions based on *types* of office, not the *number* of office. Only by construing the General Assembly's authority to craft exceptions as limited to doing so on an office-by-office basis can the framers' general intent in banning dual office holding be given life. That intent was to affect two objectives: increasing participation in government and preventing abuse of authority. John V. Orth, *The North Carolina State Constitution* 138 (The University of North Carolina Press 1993). The latter goal is especially important where, as here, one individual holds not only an executive position but also a position on the entity which purports to supervise him.

Even assuming that the General Assembly's blanket exception at N.C.G.S. § 128-1.1 is valid, it does not obviate Plaintiff's claim. The statute purports to authorize an individual to hold *up to two* appointive or elective offices or places of trust or profit. By its plain language the statute does not authorize the holding of more than two such offices. Here, Dr. Harrison holds three offices and/or places of trust or profit: 1) a member of the State Board; 2) the supposed Education CEO and 3) the Chair of the State Board, a role with duties and responsibilities far beyond those typical of a chair. As more fully explained in Plaintiff's previous memorandum of law, service on the State Board of Education is in and of itself a public office. *See generally Barnhill*, 122 N.C. 193, 495-96, 29 S.E. 720, 721 (holding that the county board of education is a

public office); *see also* Attorney General Advisory Opinion, 40 N.C.A.G. 589 (1969) (concluding membership on the Board of Directors of the North Carolina Zoological Authority is a "public office"). The so-called Education CEO is also a public office; it is an executive level office enjoying an annual salary of $265,000 per year. Finally, the chairmanship of the State Board is also a public office in its own right, distinct from mere membership on the State Board. Although the role of chair is often a matter of purely procedural or parliamentarian duties, the chair of the State Board has developed, at the behest of the Governor, substantial daily responsibilities more akin to a full-time job than a traditional chairmanship.

Assuming solely for the sake of argument that the State Board could create the position of CEO, that position could not constitutionally be filled by a member of the State Board and its chair. Membership on, as well as Chairmanship of, the State Board is a public office and the Education CEO is a place of profit or trust. The Constitution could not be clearer: no one can hold all such offices at one time. A statutory exception permitting dual office holding is invalid as it attempts to create a blanket exception and, in any event, Defendant Harrison is holding more offices than the statute purports to allow. Thus, even if the CEO position could exist, Defendant Harrison may not serve as both a member and the chair of the State Board and as Education CEO.

III. PLAINTIFF'S CLAIMS ARE NOT BARRED BY THE POLITICAL QUESTION DOCTRINE.

In their Answer, Defendants raised the political question doctrine, sovereign immunity and standing as defenses. In anticipation of arguments Plaintiff believed Defendants would raise in their brief, Plaintiff submitted argument in her Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment. Plaintiff renews those arguments and provides additional

argument below on the political question doctrine, the only defense Defendants argued in their Memorandum of Law.

The Political Question Doctrine Does Not Apply to Actions Challenging the Constitutionality of Actions by the Executive and Legislative Branches of Government and Seeking a Judicial Determination of Constitutional Questions.

Defendants attempt to characterize Plaintiff's claims as political. Defendants maintain "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." (Def. Memo. p. 18). That is simply not the case. Rather, Plaintiff asks the court to interpret the constitution, a function uniquely reserved for the courts. Indeed, it is the duty of the courts to expound the Constitution.

For more than two centuries, North Carolina law has firmly established that "issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by [the North Carolina Supreme Court]." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (citing *State v. Arrington*, 311 N.C. 633, 643, 319 S.E. 2d 254, 260 (1984)). The Court noted the immemorial significance of the doctrine of judicial review:

> Prior to the creation of the United States of America by the ratification of the Constitution of the United States, North Carolina courts applied the doctrine of judicial review to strike down a legislative act as contrary to the Constitution of North Carolina. *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). Thus, approximately sixteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 135 (1803), North Carolina's courts were among the first to recognize the doctrine of judicial review.

Martin, 325 N.C. at 448, 385 S.E.2d at 478. Further emphasizing the fundamental importance of judicial review, the Court stated in *Moore v. Knightdale Bd. Of Elections*, 331 N.C.1, 413 S.E.2d 541 (1992):

> The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

Id., 331 N.C. at 4, 413 S.E.2d at 543 (citing *State v. Knight*, 169 N.C. 333, 351-52, 85 S.E. 418, 427 (1915)).

The political question doctrine "'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to...[another branch of government].'" *Bacon v. Lee*. 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (citing *Japan Whaling Ass'n. v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The doctrine exists because, if a matter is a political question, "[t]he judiciary is particularly ill-suited to make such decisions." *Id.*

Defendants have asserted the political question doctrine in bar of Plaintiff's claims and point to *Hoke County Bd. of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) for the proposition that the political question doctrine bars judicial review "when the Constitution commits an issue . . . to one branch of government; or (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." (Def. Memo. p. 18). Neither of those conditions exists in this case. Plaintiff asks for the court to determine the meaning of the constitutional mandate that the Superintendent "shall be secretary and chief administrative officer of the State Board." That does not involve an issue "committed" to another branch of government. It is, after all, the duty of the courts to interpret the Constitution. Further, this case does not present the kind of purely political question for which judicial criteria and standards do not exist. Courts interpret constitutional and statutory provisions daily.

The *Hoke County* court recognized the distinction between that which is "a purely political question, *id.* at 619, and justiciable questions with some political aspect, as evidenced by the fact that the *Hoke County* case found the question of setting the mandatory age for school attendance nonjusticiable but went on to interpret the meaning of the constitution's guarantee of a "sound basic education" and the State's duty to satisfy that guarantee and the precedent established in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 336 (1997). In short, this is not a political question; it is a question of constitutional interpretation and application, just as were the broader questions presented and adjudicated in *Hoke County*.

It is also worth pointing out that two previous lawsuits involved issues similar to this case in that the constitutional authority of both the Superintendent and the State Board was in controversy. In *North Carolina State Board of Education v. Etheridge,* filed in 1992, the State Board sued to obtain a judicial declaration concerning the constitutional and statutory duty of the State Board. Clearly, then, the Defendant State Board recognized the inapplicability of the political question doctrine to the types of issues raised here by Plaintiff. In another case, the Superintendent, represented by the Attorney General (like Defendants are in this case), instituted an action against the Governor and State Board challenging their efforts to transfer four positions from the Superintendent's supervision at DPI to the Department of Education. The trial court did not conclude the political question barred the claim, and significantly, the defendants did not even raise political question as a defense. (*Etheridge v. Martin, et al.,* Wake County Case No. 91 CVS 13046). The inapplicability of the political question doctrine was so clear-cut that the State Board did not bother to assert it in 1991 in its defense and saw it as no obstacle to its own lawsuit in 1992.

The mere fact that the principals in this case are political figures does not transform the nature of the suit from an action seeking constitutional interpretation to one seeking political redress. Courts have not hesitated to enter in similar debates. As our Supreme Court has so aptly expressed, it is the "duty" of the courts to interpret the constitution, and Dr. Atkinson has raised constitutional challenges which require interpretation of the constitution, not review of political decisions. *See Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 336, 345. In addition to the cases cited in Plaintiff's previous Memorandum of Law, the following cases presented justiciable questions of constitutional interpretation in the context of government structure and political personas: *State ex. Rel. Martin v. Melott*, 320 N.C. 518, 359 S.E.2d 783 (1987) (considering constitutionality of the legislature's delegation to the Chief Justice of the Supreme Court the power to appoint the Director of the Office of Administrative Hearings); *Mitchell v. North Carolina Indus. Dev. Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968) (considering constitutionality of statute authorizing use of public funds for business development); *State ex rel. Attorney General v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915) (considering constitutionality of legislation purporting to allow women to hold public office of notary public); *City of New Bern v. New Bern-Craven County Bd. Of Educ.*, 113 N.C. App. 98, 437 S.E.2d 655 (1993) (considering constitutionality of legislation that transferred jurisdiction over building code enforcement from city to county, in relation to construction of board of education property and other property); *James v. Hunt*, 43 N.C. App. 109, 258 S.E.2d 481 (1979) (considering governor's constitutional authority to suspend state officer); *Stratford v. City of Greensboro*, 124 N.C. 127, 32 S.E. 394 (1899) (considering constitutionality of street improvements financed by money borrowed from property owner); *Briggs v. City of Raleigh*, 195 N.C. 223, 141 S.E. 597 (1928) (considering challenge to certain proposed bonds of the city to finance the development

of a State fair); *Wells v. Housing Auth. of Wilmington*, 213 N.C. 744, 197 S.E. 693 (1938) (considering constitutionality of statute creating housing authority); *Webb v. Port Comm'n of Morehead City*, 205 N.C. 663, 172 S.E. 377 (1934) (considering challenge to statute creating port authority); *Nash v. Town of Tarboro,* 227 N.C. 283, 42 S.E.2d 209 (1947) (considering constitutionality of ordinance, passed pursuant to statute, providing for the issuance of bonds and levy of a tax for the acquisition and construction of a hotel); *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996) (considering constitutionality of economic development incentives); *Blinson v. State*, 186 N.C. App. 328, 651 S.E.2d 268 (2007) (considering constitutionality of economic development incentives); *Heatherly v. State*, 189 N.C. App. 213, 658 S.E.2d 11 (2008) (considering constitutionality of enactment of the Lottery Act); *Stanley v. Dept. of Conservation and Dev. of the State of North Carolina*, 284 N.C. 15, 199 S.E.2d 641 (1973) (considering constitutional challenge to creation of county authorities to finance pollution abatement facilities); *Foster v. North Carolina Medical Care Comm'n.,* 283 N.C. 110, 195 S.E.2d 517 (1973) (considering constitutionality of Medical Care Commission Hospital Facilities Finance Act); *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979); and *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989) (considering constitutionality of local government ownership of cable franchise).

The foregoing list of justiciable cases involving some political aspect illustrates that the courts have a unique role in our system of government. "When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits." *Leandro v. State*, 346 N.C. at 345, 488 S.E.2d at 345. For more than two centuries, North Carolina courts have recognized the need for judicial review and the role of the

judiciary to declare acts of the government unconstitutional. *Bayard v. Singleton*, 1 N.C. 5, 3 N.C. (Mart.) 42 (1797).

Courts in North Carolina and around the country have not failed to entertain constitutional challenges to government conduct where the plaintiff seeks equitable relief. Among these is *Leandro,* the predecessor of *Hoke County* which was relied on by Defendants. In *Leandro*, students, parents, and certain school boards filed a lawsuit alleging that the funding system for public schools in the state violated students' rights under the constitution. The Supreme Court in an opinion by Chief Justice Mitchell ably dispensed with the political question issue, dedicating a single substantive paragraph to the matter:

> It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution. When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits. Therefore, it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system. Defendants' argument is without merit.

Id. 346 N.C. at 345. (internal citations omitted).

Reduced to its simplest terms, this action asks what are the duties and responsibilities of the Superintendent, a state constitutional officer; what limitations circumscribe the authority of the State or other state actors to interfere with those responsibilities; and what is the constitutional interplay between the Superintendent and the State Board, both creatures of the constitution. There is no prudent reason for application of the political question doctrine here. The courts are often called upon to interpret constitutional and statutory provisions even in the midst of political decision-making. As the *Baker* Court explained, "[t]he mere fact that a political question is incidentally involved in a controversy does not necessarily make such controversy nonjusticiable." *Baker*, 369 U.S. at 209. Notwithstanding the rhetoric that accompanied the creation of the CEO position and the political offices of the respective parties, this case is just

another in a long list of justiciable cases calling for constitutional interpretation. Only the judicial branch can provide that interpretation; only the judicial branch can answer the questions raised in this case.

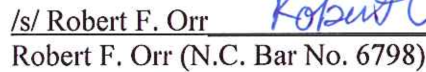
CONCLUSION

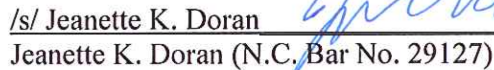
The efforts by the State Board at the prompting and with the assistance of the Governor to usurp the powers of the Superintendent are unlawful and unconstitutional. The Superintendent will suffer substantial, real, and immediate irreparable harm for which there is no adequate remedy afforded at law unless this court issues a mandatory injunction directing the State Board to rescind its actions attempting to transfer the authority and constitutional powers of the Superintendent to Defendant Harrison as CEO of the State Board.

For the foregoing reasons, Plaintiff respectfully requests this Honorable Court deny Defendants' Motion for Summary Judgment, grant Plaintiff's Motion for Summary Judgment and issue an Order granting relief as set forth in her Complaint and Petition for Declaratory Judgment.

DATED: This the 2nd day of July, 2009.

Respectfully submitted,

/s/ Robert F. Orr 
Robert F. Orr (N.C. Bar No. 6798)

/s/ Jeanette K. Doran 
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PLAINTIFF'S MEMRANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was served on all parties by depositing true copies thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

Mark A. Davis, Special Deputy Attorney General
Gary R. Govert, Special Deputy Attorney General
N.C. Dept. of Justice
P.O. Box 629
Raleigh, NC 27602-0629

Service of the foregoing was also made by e-mail as follows:

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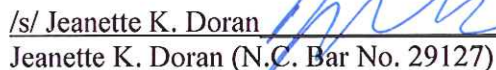
This the 2nd day of July, 2009.



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