

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF WAKE

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  
SUPPORT OF PLAINTIFF’S MOTION  
FOR SUMMARY JUDGMENT**

Plaintiff, by and through undersigned counsel, file this Memorandum of Law in Support of her Motion for Summary Judgment. By way of a separate brief, Plaintiff will respond to Defendant’s Motion for Summary Judgment and Defendants’ Memorandum of Law.

## INTRODUCTION

Plaintiff instituted this action pursuant to the Uniform Declaratory Judgment Act, N.C.G.S. § 1-253, *et seq.*, to challenge the constitutionality of certain acts of the Governor of North Carolina, the General Assembly, and the North Carolina State Board of Education [“State Board”] in connection with the duties and authorities of the State Superintendent of Public Instruction [“Superintendent”], specifically those acts which impede or otherwise interfere with the duties and responsibilities of the Superintendent as the administrative head of the public school system of the State, as well as those acts which relate to and purportedly create the position of Chief Executive Officer [“CEO”], which position usurps the constitutional authority of the Superintendent. Specifically, Plaintiff seeks a declaration of the scope of the constitutional powers of the office of the Superintendent as identified at Article III, Section 7 and Article IX, Sections 4 and 5 of the North Carolina Constitution.

The primary issue in this case revolves around the constitutional status and responsibility of the duly elected Superintendent of Public Instruction. Plaintiff Dr. June Atkinson has twice been elected by the voters of the state to the constitutional office of Superintendent, most recently in November, 2008. The acts complained of in the complaint, in particular, the creation by the Board of the CEO position; the hiring of Dr. William Harrison for that position; and the attempt to empower Dr. Harrison with the constitutional authority residing in the Superintendent have created the constitutional conflict at the center of this Declaratory Judgment action. None of the actions taken by the General Assembly, the Governor, or the Board in accomplishing these acts can circumvent and nullify the constitutional authority of the Superintendent. In addition, since Dr. Harrison is also a duly appointed member of the Board and elected chairman, as well as a contractually employed individual hired by the Board and paid with state funds, the holding of

these two positions of trust violates the dual office holding provision of the N.C. Constitution (Art. XI, Sec. 9).

### **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; responsive briefs to be filed by July 1, 2009.

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

### **STATEMENT OF FACTS**

On November 2, 2004, the voters of North Carolina elected Plaintiff, Dr. June St. Clair Atkinson, as Superintendent of Public Instruction. On November 4, 2008, the People reelected Dr. Atkinson as Superintendent of Public Instruction.

Shortly after taking office in January 2009, Defendant Governor Beverly Perdue announced plans to create a new position in State government, the so-called Education CEO, who would manage public education in North Carolina. On January 26, 2009, Governor Perdue

appointed Defendant William Harrison to the State Board and asked the Board to elect him its chair. In her press release, the Governor described Dr. Atkinson, in her role as Superintendent, as “the state’s education ambassador.”

### **Parties**

Dr. Atkinson has brought this action in both her individual and official capacities. As alleged in the Complaint, Dr. Atkinson individually is a citizen and resident of Wake County, North Carolina. Dr. Atkinson, in her official capacity, is the duly elected Superintendent of Public Instruction for the State of North Carolina with her official offices in Raleigh, Wake County, North Carolina. In her capacity as Superintendent, Dr. Atkinson also serves as Secretary of the State Board which is headquartered in Raleigh, North Carolina.

Defendants herein are the Governor, the State, the State Board of Education and its members, including the Education CEO and Chair, in their official capacities,

### **Constitutional History**

The office of Superintendent was duly constituted in 1868. Since its inception, the constitutional provisions concerning the Superintendent position have undergone a series of modifications. The evolution of both the State Board of Education and the office of Superintendent are detailed below and summarized in a table which follows.

Pursuant to Article IX, Section 7 of the 1868 North Carolina Constitution, the Superintendent was a member of and served as Secretary of the State Board. The duties of the Superintendent, like those of several other constitutional officers were those “prescribed by law” pursuant to Article III, Section 13.

By constitutional amendment approved by an act of General Assembly in 1941, captioned “An Act to Amend the Constitution Providing for the Organization of the State Board

of Education and the Powers and Duties of the Same,” and ratified by the people in 1942, composition of the State Board was amended; however, the Superintendent remained a member of the State Board. *See* N.C. Const. 1868, as amended, Art. IX. Article IX, Section 8 was further amended to provide: “The State Superintendent of Public Instruction shall have general supervision of the public schools and shall be secretary of the board.” Pursuant to Section 9 of this Amendment, the powers and duties of the State Board were set forth with more specificity.

Yet another amendment was adopted by the General Assembly in 1943 and captioned “An Act to Amend the Constitution Providing for the Organization of the State Board of Education,” and ratified by the people on November 7, 1944. The amendment further refined Article IX, section 8 of the 1868 Constitution specifying: “[t]he general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, except those mentioned in Section five of this Article, shall . . . be vested in the State Board of Education to consist of the Lieutenant Governor, State Treasurer, the Superintendent of Public Instruction, and ten members to be appointed by the Governor[.]” This amendment also established: “The State Superintendent of Public Instruction shall be the administrative head of the public school system and shall be secretary of the board.”

Over the ensuing years frustration and disagreement developed over the conflicting responsibilities and oversight of public education. Much of the disagreement centered on the Board’s general supervisory authority over the public school system, the Superintendent’s independent authority as a constitutionally elected state officer, the Governor’s increasingly active role in public education and the legislative authority of the General Assembly. During the developing conflict and for various reasons, the entire North Carolina State Constitution was substantially revised by amendments in 1971. The substantially amended constitution is

generally referred to as the 1971 Constitution. With respect to public education, those amendments provide that the Superintendent is Secretary of the State Board and chief administrative officer of the State Board. The list of Board members does not include the Superintendent, thus that officer is generally no longer considered a State Board member, though Plaintiff does not concede the same, as argued below.

The development of the 1971 amendments, rather than their language alone, is essential to understanding the current duties and responsibilities of the Superintendent. As detailed below, a North Carolina State Constitution Study Commission proposed eliminating the Superintendent as a member of the State Board and as an elected officer. These drafters proposed that the Superintendent would be appointed by the State Board to serve as its Secretary and chief administrative officer. As a result of transforming the Superintendent position from one elected by the voters to one appointed by the State Board, the study commission recommended eliminating the Superintendent as a voting member of the State Board. However, once the proposals were submitted to the General Assembly for adoption, the legislature modified the proposal. The amendments submitted to and ratified by the voters maintained the Superintendent as an elected officer thus obviating the study commission's reason for dropping the Superintendent from the State Board. This evolution is more fully set forth in the following paragraphs.

At the request of the Governor, in 1967, the North Carolina State Bar and the North Carolina Bar Association appointed a commission to study a substantial revision of the State Constitution. This entity, known as the North Carolina State Constitution Study Commission ["the Commission"] was divided into four subject-matter committees including one committee that considered changes to Article IX, Education. Over the course of several months the

committee considered each provision in Article IX, taking testimony from a variety of experts in public education about potential changes to the Constitution. Much of the discussion dealt with the role of the Superintendent relative to the Board. As noted by Professor Robert E. Phay of the Institute of Government in a memo to the members of the Education, Welfare and Criminal Justice Committee of the North Carolina Constitutional Study Commission on June 12, 1968: “Section 8 provides for the State Superintendent and makes him the administrative head of the school system and thus independent of the Board. Should he instead be under the Board as its chief administrative officer as he is in most states?” (A copy of Prof. Phay’s memo is attached hereto as Exhibit A). Similarly, Governor Sanford proposed the Board of Education be appointed by the Governor and that the Superintendent of Public Instruction should be appointed by and responsible to the Board. Raleigh E. Dingman, Executive Secretary of the North Carolina State School Boards Association, likewise recommended that, “...there is considerable merit in the proposition that the State Superintendent of Public Instruction should be appointed by the State Board.... This section should also refer to the fact that the State Board would be the policy-making body of the public school system and the State Superintendent would be its administrative officer, and responsible to the State Board.” Taking the opposite tack was Dr. Charles F. Carroll, Superintendent of Public Instruction who advocated for retaining the Superintendent as an elected constitutional officer. He further advocated that the Superintendent become the executive head of the Board. “He noted that under the present arrangement he receives more instruction from the General Assembly than from the State Board of Education.” (cite).

On September 20, 1968, the “First Report of the Committee on Education, Welfare, and Criminal Justice to the North Carolina State Constitution Study Commission” was submitted.

This report described its proposed Section 4 as an amendment which

. . . modifies the State Board of Education by eliminating the State Superintendent of Public Instruction as a voting member of the Board while retaining him as the Board’s secretary. He is replaced by an additional at-large appointee. Continuity of board membership is not otherwise affected. The Board shall appoint the State Superintendent of Public Instruction, who will be its Secretary and chief administrative officer. (This also requires deletion of references to the Superintendent in Article III.)

Compl. Ex. B. Education Committee First Report, p. 1-2 (original pages i-ii).

The Committee’s proposed Section 5 restates, in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced.

The ultimate Report of the Committee submitted to the Commission made on September 24, 1968, contained the proposed following language amending the Constitution: “(5) Modifies the State Board of Education by eliminating the State Superintendent of Public Instruction as a voting member of the Board, but retains him as the Board’s Secretary. The exact language of the proposal is as follows: ‘The State Superintendent of Public Instruction shall be appointed by the State Board of Education and shall serve as its secretary and chief administrative officer.’”

On October 11, 1968, the State Constitution Study Commission met. The Minutes of the Meeting state the following: “Next on the agenda was consideration of the report of Mr. Carlyle’s Committee on Education, Welfare and Criminal Justice. Judge Denny indicated his opinion that there were only four matters of controversial nature involved in this committee report, the only following two of which are relevant here: appointment of the Superintendent of Public Instruction; membership of the Superintendent of Public Instruction on the Board of Education. In order to reduce the number of separate questions which must be submitted, Judge

Denny suggested that the committee's recommendation removing the Superintendent of Public Instruction from membership on the Board be amended so as to continue his membership thereon. The Commission approved this recommendation.

According to the Summary Report, a number of "editorial changes" to the Constitution were proposed by the Committee on Declarations. The Committee explained: "*None of our proposed editorial changes are intended to change what we believe to be the meaning of the present Constitution.*" (Emphasis added). Study Report, p. 3. The Summary Report continued by discussing "substantive changes" proposed by the Committee. Compl. Ex. A, Summary Report, pp. 3-9. No changes to Article IX, Education, were among the substantive changes listed in the Summary Report, thus any such proposed changes were intended to be editorial only, without substantive effect.

On December 16, 1968, the Commission submitted its final report ["Commission Report"] to the North Carolina State Bar and the North Carolina Bar Association and through them to the Governor and the General Assembly of 1969. In this report, it is stated: "...we have framed a series of ten interrelated but mutually independent amendments for submission to the General Assembly and the voters of the State." The Commission proposed Amendment No. 5, to be submitted for adoption by the voters of the state as a separate constitutional amendment amending Article III to eliminate the Superintendent of Public Instruction as a constitutionally elected officer. In addition it proposed amending the Constitution in Article IX, Sec. 8 (2) by stating "The Superintendent of Public Instruction shall be secretary and chief administrative officer of the State Board of Education. He shall be elected by the State Board of Education." An explanation for this proposed change is included in the Report noting in part, "...the job of administering a statewide school system serving over 1,100,000 children is a difficult and

complex one requiring professional knowledge and ability of a high order.”(Compl. Ex. C, pp. 119-20).

The Commission Report further states: “The first amendment effects a general editorial revision of the constitution, which will be referred to here as ‘the proposed constitution.’ The deletions, reorganizations, and improvements in the clarity and consistency of language will be found in the proposed constitution. Some of the changes are substantive, *but none is calculated to impair any present right of the individual citizen or to bring about any fundamental change in the power of state and local government or the distribution of that power.* We do not deem any of the changes contained in the proposed constitution to be of sufficient magnitude to justify its treatment as a separate amendment.” (Emphasis added).

The Commission Report further states: “Each of the other nine amendments incorporate a substantive constitutional change of such importance that we believe that the voters should have a chance to act upon it independently of the other individual amendments and of the proposed constitution.”

Thus after extensive study and review, the Commission recommended two major changes to the State Constitution pertaining to the State Board of Education and the Superintendent requiring amendment of the Constitution: (1) the Superintendent would no longer be a constitutionally elected officer under Article III and (2) the Superintendent would be appointed by the Board. Arguably the proposed changes did not include the removal of the Superintendent as a member of the State Board per Judge Denny’s recommendation which was adopted. Rather, the Superintendent’s new capacity as chief administrative officer and continued role as secretary would result in the Superintendent continuing as a Board member. The Commission Report set out the “proposed constitution” as Amendment 1 and also included Amendment 5, “Providing

for a Change in the Mode of Selection of Certain State Executive Officers,” an excerpted copy of which is attached to the Complaint as Exhibit C and incorporated by reference. Included in Amendment 5 was a proposal to eliminate the Superintendent as a constitutionally elected officer under Article III and instead have the Superintendent elected by the State Board. Further, Amendment 5 set out the responsibility of the Superintendent to be “secretary and chief administrative officer of the State Board of Education.”

Upon receipt of the Commission Report, the legislature modified the commission’s proposal. The General Assembly of 1969 enacted Session Law 1258 which put forth a substantially amended state constitution tracking in most respects the proposed constitution submitted by the Commission as Amendment No. 1 to become effective on July 1, 1971, if ratified by the qualified voters of the State. Session Law 1258, the proposed constitution, was ratified by a majority of voters in the general election of 1970. In addition, the qualified voters of the state ratified 6 amendments to the Constitution by majority vote on November 3, 1970. No amendment eliminating the Superintendent as an elected constitutional officer nor making the Superintendent subject to election or appointment by the State Board was submitted to the voters.

The ballot question submitted to voters in the general election of 1970 asked voters only to vote for or against “revision and amendment of the Constitution of North Carolina.” 1969 S.L. 1258, § 3. The ballot question did not suggest that the proposed amendment to Article IX that were included in the proposed constitution, set forth as Amendment No. 1, would have any substantive effect whatsoever. It was not the intent of the framers of the constitution to make substantive changes. Rather, any substantive changes would be submitted in separate individual amendments to the voters.

The 1970 proposed constitution revised Article IX, Section 4, in part, to read: “2. Superintendent of Public Instruction. The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.” Further, the Superintendent was not specifically included in the list of members of the State Board. However, the changes to Article IX were not submitted to the qualified voters of the State in 1970 as substantive changes, in that the same were submitted only as editorial amendments carrying no substantive effect.

The 1971 Constitution, at Article III, Section 7, provides for the election of a Superintendent by the qualified voters of the State in 1972 and every four years thereafter. It further establishes at Article IX, Section 4, the following as members of the State Board: the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The 1970 editorial amendment of the constitution, however, also included at Article IX, Section 4(2) stated: “The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.”

The 1971 Constitution further amended the duties of the State Board stating that the State Board shall supervise and administer the free public school system and the educational funds provided for its support and shall make all needed rules and regulations in relation thereto subject to laws enacted by the General Assembly. 1971 N. C. Const. Art. IX, § 5.

### **Political Developments Relative to the Superintendent’s Duties Since 1971**

Constitutional revisions have not been the only adjustments to the role of Superintendent. Legislative efforts have refined, or attempted to refine, the duties and responsibilities of the

Superintendent. The more significant of these efforts were alleged in the Complaint and are set out below.

Since the 1971 Constitution did not incorporate the substantive changes recommended in the Superintendent's constitutional role, the operation of the Superintendent's role continued not only through election cycles every four years but with the Superintendent continuing to exercise his or her role as the administrative head of the public school system and independent from the Board. (Although the Superintendent continued to implement the policies and regulations made by the Board and the laws enacted by the General Assembly). During the ensuing years, Dr. A. Craig Phillips emerged as one of the most powerful and influential Superintendents in the state's history. *See* Minutes of the November 1, 2007, State Board meeting honoring Dr. Phillips, attached hereto as Exhibit B; Interview with Hob. James E. Holshouser, Jr., March 13, 1998, Interview C-0328-2, Southern Oral History Program Collection (#4007), available online at [http://docsouth.unc.edu/sohp/html\\_use/C-0328-2.html](http://docsouth.unc.edu/sohp/html_use/C-0328-2.html) (viewed June 18, 2009). excerpt of which is attached hereto as Exhibit C. However, beginning with Phillips' retirement and the election of Governor James G. Martin, relations between the Superintendent and the Board began to erode and an increasing strident battle began over control of public education.

Between 1984 and 1992, at least two separate lawsuits were filed involving then-Superintendent Bob Etheridge and the State Board of Education over constitutional authority and powers of the respective entities. Both ended up being dismissed at the trial level (cite?) but the controversy over control of public education continued to fester with the General Assembly attempting to weigh in.

In 1987 the Legislative Research Commission filed a "Report to the 1987 General Assembly of North Carolina" relative to the Superintendent and the Board. The Report was a

response to bills previously introduced in the General Assembly to change the governance structure of the public education system in North Carolina, in particular the roles and responsibilities of the Superintendent and the Board. The proposed legislation called for the Superintendent to become the non-voting Chairman of the State Board of Education while creating the position of Commissioner of Public Schools to serve as the chief administrative officer of the State Board. An Advisory Opinion letter dated December 10, 1985, from the Attorney General signed by Andrew A. Vanore, Jr., Chief Deputy Attorney General, and Edwin M. Speas, Jr., Special Deputy Attorney General, was sent to Senator Robert D. Warren and Representative Edward N. Warren, both members of the General Assembly. In this Advisory Opinion letter, attorneys for the State deemed creation of a Commissioner of Public Schools to serve as chief administrative officer a violation of the Constitution. The Advisory Opinion states in part: "...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." The General Assembly has not enacted any legislation attempting to usurp the authority of the Superintendent. But, that is exactly what has transpired in this case by the actions of the Governor and the State Board. With the creation of the CEO position by the Board and the transfer of the authority and responsibility of the Superintendent as chief administrative officer to the CEO position, the Constitution has been violated. Compl. Ex. D.

Efforts to modify the role of the Superintendent were renewed in the 1990's. Before 1995, the duties of the Superintendent were not subject to the "direction, control and approval" of the State Board, but instead the Superintendent administered the day to day operations of the public school system through the Department of Public Instruction subject to the general

supervisory and administrative policy making authority of the State Board of Education and the laws of the state. In fact, the statutes in place prior to 1995 acknowledged the Superintendent as being the constitutional head of the public school system and having authority over all matters relating to the supervision and administration of the public school system. All that changed in 1995.

In 1995, growing conflicts between and among the Governor, the Board, and the Superintendent led to a legislative effort to shift authority. Numerous historical and constitutional duties of the Superintendent were transferred to the State Board and the Superintendent and his or her actions were made subject to “the direction, control, and approval of the State Board of Education.” Session law 1995-72 enacted N.C.G.S. § 143A-39, captioned “Creation,” which created a Department of Public Instruction pursuant to statute to be headed by the State Board rather than the Superintendent, and N.C.G.S. § 143A-42, captioned “Superintendent of Public Instruction; creation; transfer of powers and duties,” which transferred the office of the Superintendent and the Department of Public Instruction created by the Superintendent to the Department of Public Instruction created pursuant to N.C.G.S. § 143A-39. The duty to organize and manage the Department of Public Instruction had previously been assigned to the Superintendent without the provision that the State Board serve as the head of the Department of Public Instruction.

Following enactment of S.L. 1995-72, then-Superintendent Bob Etheridge requested an Advisory Opinion from the North Carolina Attorney General on the “Authority of the North Carolina General Assembly and the State Board of Education to Supervise and Control the Administrative and Secretarial Duties of the State Superintendent of Public Instruction.” In an opinion dated December 14, 1995, a copy of which was attached to the Complaint as Exhibit F

and incorporated by reference, Andrew A. Vanore, Jr., Chief Deputy Attorney General, responded 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.” The opinion letter went on, however, to discuss various cases and ultimately conclude that the State Board had the authority to determine and control the duties and responsibilities of the Superintendent.

From 1995 to the present, the constitutional, statutory and practical relationship of the Board and the Superintendent has been in flux and filled with uncertainty. For a period during the term of Mike Ward as Superintendent and Phil Kirk as Chairman of the Board, the Superintendent continued to run the public school system on a day-to-day basis, including implementation of the North Carolina Schools ABC’s program and the No Child Left Behind Act, subject to the general supervisory responsibilities of the Board. *See* Cong. Rec. E1646 (Sept. 15, 2007) (Statement of Rep. Price); *Leadership Achievers*, vol. 1, no. 3 (Center for School Leadership and Development, University of North Carolina, November 2004). In 2004, Plaintiff in this case Dr. June Atkinson was not sworn in to her position as Superintendent until approximately 9 months in to her term due to litigation arising out of her election. *See generally James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005). The Deputy Superintendent J.B. Buxton was given primary responsibilities in running DPI by the Board although as Deputy Superintendent Buxton was ultimately answerable by statute to the Superintendent, as set forth in Complaint Exhibit H, specifically the stricken portions of the State Board Policy Manual Policy No. EEO-C-013.

Upon election in 2008, Dr. Atkinson prepared to continue her constitutional responsibilities to run the public school system for our state on a day-to-day basis and to administer DPI and its personnel.

As argued below, Plaintiff submits that the advisory opinion of 1995 is inconsistent with the advisory opinion of 1985 and incorrectly interprets the holdings in the two cases relied on.

### **Creation of the Education CEO**

On January 26, 2009, Governor Perdue announced that she would ask the State Board to redefine the duties of its chair to include the responsibilities of the CEO, who would manage the administrative operation of the public school system. The Governor also announced that she would appoint Defendant William C. Harrison to the State Board and ask the State Board to elect him Chairman. The Governor further indicated that she would propose to the State Board that Harrison be hired as CEO. At the press conference during which she announced the creation of the CEO position, and in the press release issued in conjunction with it, the Governor described the role of Dr. Atkinson, Superintendent, as that of an “ambassador” for education. The Governor did not mention Dr. Atkinson’s election to the position of Superintendent and the Superintendent’s constitutional duty as chief administrative officer of the State Board, nor did she reference the voters who twice elected Dr. Atkinson to the duly constituted office of Superintendent.

In response to the Governor’s request, on March 4, 2009, the State Board formally created the position of CEO of the State Board. The State Board of Education Policy Manual describes the duties and responsibilities of the CEO at Policy ID Number EEO-C-022, a copy of which was attached to the Complaint as Exhibit G. In relevant part, the CEO’s duties and responsibilities are described thusly: “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.”

Contemporaneous with the creation of the CEO, the State Board also amended its Policy Manual at Policy ID Number EEO-C-013, entitled as amended “Policy delineating the delegation of authority from the State Board of Education to the Superintendent of Public Instruction and to the Chief Executive Officer.” (A copy of EEO-C-013 was attached to the Complaint as Exhibit H). Among other powers and duties articulated in Policy ID Number EEO-C-013, the CEO was delegated 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.”

Likewise on March 4, 2009, the State Board hired Defendant Harrison as CEO. The following day, Harrison was sworn in as a member of the State Board and then nominated and elected to serve as its chairperson. On March 5, 2009, Harrison began work as CEO of the State Board at an annual salary of \$265,000. This position is a full time job paid for with public revenue. It is a position of trust and profit under the auspices of the State. As alleged in the Complaint, the CEO position and salary slot are in actuality those of the office of Deputy Superintendent of Public Instruction and the former Executive Director of the State Board of Education as previously staffed. This information is set forth in part in the Conditions of Employment and Job Offer Acceptance (a copy of which was attached to the Complaint as Exhibit I.)

Since beginning his duties as CEO, Harrison has attempted and continues to attempt to infringe upon the duties and responsibilities that are inherent in the constitutional office of Superintendent including executing educational policy, hiring and supervising employees of

Department of Public Instruction, and generally attempting to serve as chief administrative officer over other critical functions of the public school system.

### **Plaintiff's Response to Defendants' Actions**

As alleged in the Complaint, after the Governor's announcement and before official action by the State Board concerning the position of CEO of the State Board, Dr. Atkinson questioned the constitutionality of such action. Continuing after the State Board fulfilled the Governor's request to name Defendant Harrison its Chair and after he began serving duly as CEO and Chair, Dr. Atkinson has renewed her objections and publicly and through direct communication questioned the constitutionality of such action. She has asserted her right as the constitutionally elected Superintendent to manage the operation of the public school system.

Plaintiff initiated this lawsuit on April 3, 2009, to seek a judicial answer to her constitutional questions. Additional facts will be provided in argument below as necessary to facilitate a full understanding of the complained of events and the legal bases of Plaintiff's claims.

### **STANDARDS OF CONSTITUTIONAL INTERPRETATION**

It is a long-standing principle in North Carolina law that “[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.” *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

While it is true that the legislature serves “as the lawmaking agent of the people,” *Martin*, 325 N.C. at 448, 385 S.E.2d at 478, this affirmation of the legislature's responsibility is consistently coupled with the mandate that any law enacted must be valid *pursuant to* North

Carolina's State Constitution. In fact, the judiciary has the power and the duty to declare a legislative act unconstitutional when such is "plainly and clearly the case." *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987) (quoting *Glenn v. Board of Education*, 210 N.C. 525, 529, 187 S.E. 781, 784 (1936)); see also *Kornegay v. Goldsboro*, 180 N.C. 441, 445-46, 105 S.E. 187, 189 (1920) (discussing scope of judicial review of legislative acts).

In determining whether government action is valid under the State Constitution, 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]." *Martin*, 325 N.C. at 449, 385 S.E.2d at 479 (citing *State v. Arrington*, 311 N.C. 633, 643, 319 S.E. 2d 254, 260 (1984)). In a brief review of North Carolina's history of state constitutional jurisprudence, 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 this crucial judiciary duty, 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)).

To determine whether an act of the General Assembly conflicts with the State Constitution, the Court is typically guided by the principle that a statute is presumed valid. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991). Nevertheless, “[t]he presumption of constitutionality is not . . . and should not be conclusive.” *Moore*, 331 N.C. at 4, 413 S.E.2d at 543.

The inconclusive nature of the “presumption of constitutionality” of a legislative act, *see Moore*, 331 N.C. at 4, 413 S.E.2d at 543, was highlighted by *Corum v. Univ. of N. C., et al.*, 330 N.C. 761, 413 S.E.2d 276 (1992), in which the Court stated:

It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation . . . is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

*Corum*, 330 N.C. at 784, 413 S.E.2d at 290 (internal citations omitted).

Thus, the Court has a clearly established duty to “ascertain and declare the intent of the framers of the Constitution and to reject any legislative act which is in conflict therewith.” *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).

The need for judicial review is no less where the governmental act requiring review is executive rather than legislative in nature. In the present case, an “irreconcilable conflict” exists between the action of Defendants in creating the position of Education CEO and in usurping the authority of the Superintendent, on one hand, and the will of the People in empowering the

Superintendent with constitutionally prescribed duties and electing Dr. Atkinson to fill that duly constituted office, on the other hand. *See Moore*, 331 N.C. at 4, 413 S.E.2d at 543. The actions of Defendants are contrary to Article I, Section 6; Article III, Section 7; Article IV, Section 9; and Article IX, Sections 4 and 5 of the North Carolina Constitution. The State “exceed[ed] its limitations,” *see Harris*, 216 N.C. at 764, 6 S.E. 2d at 866; Plaintiff’s rights have thereby been infringed upon; and it is imperative, therefore, for the Court to exercise its duty to declare the legislation and regulations unconstitutional.

### **ARGUMENT**

**I. THE SUPERINTENDENT HAS THE 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)**

The argument advanced by Plaintiff Dr. Atkinson is simple and straightforward. 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, “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. Superintendent’s Position on the State Board**

As set forth more fully in the Statement of Facts above, amendments ratified in 1971 modified the language describing the role of the Superintendent. Pursuant to the ratified version of the proposed amendments, the current Article IX, § 4, the Superintendent is not specifically listed in part (1) as a member of the Board but in part (2) is described as secretary and chief administrative officer of the State Board of Education. However, that language must be construed in light of the drafters' intent and our Supreme Court interpretations of that intent.

Minutes from the October 11, 1968, meeting of the Study Commission show that Commission member Judge 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 hereto as Exhibit B). In light of the actions of the Commission in accepting Judge 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 in to part (2) of Article IX, Section 4, the Superintendent's continued membership on the Board.

In the Commission Report, there were nine separate constitutional amendments proposed with Amendment 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 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. The interrelatedness of the transforming of the Superintendent into an appointive position elected by the State Board and eliminating the

Superintendent from the State Board is clear from the Education Committee Report which explained the proposal as:

. . . modif[ying] the State Board of Education by eliminating the State Superintendent of Public Instruction as a voting member of the Board while retaining him as the Board's secretary. He is replaced by an additional at-large appointee. Continuity of board membership is not otherwise affected. The Board shall appoint the State Superintendent of Public Instruction, who will be is Secretary and chief administrative officer. (This also requires deletion of references to the Superintendent in Article III.)

Compl. Ex. B. Education Committee First Report, p. 1-2 (original pages i-ii).

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.

#### B. Constitutional Duties of the Superintendent

Article III, § 7 (2) states, in reference to various elected constitutional officers, including the Superintendent, the Attorney General, the State Auditor and others: “Their respective duties shall be prescribed by law.” Other than the Treasurer’s obligation to sit on the State Board, the Superintendent alone has a separate constitutionally prescribed duty. This duty, found at Article IX, § 4 (2) of the current version of the N.C. Constitution is clear-cut: “The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.” This specific constitutional responsibility--consistent with the previous iterations in

the Constitution 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 with 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.

The inclusion of the new description of the role of the Superintendent from “administrative head of the public school system” to “chief administrative officer of the State Board of Education” must be viewed in the context of the framers intent and circumstances when proposing amendments to the new Constitution. *See Perry v. Stancil*, 237 N.C. 442 444, 75 S.E.2d 512, 514 (1953) (“A court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided.”).

As to the changes included in the “proposed Constitution”, 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 to fly in the face of 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.

*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 framers or drafters of the revisions confirm this. Supreme Court precedent confirms this. Therefore, there can be no contrary conclusion but that Dr. Atkinson has and has continued to be to the present vested with all of the constitutional responsibility and authority of her predecessors throughout the years.

Even the Attorney General has recognized that the role of the Superintendent cannot be legislatively recrafted for another office. In an Advisory Opinion letter previously referenced, Andrew A. Vanore, Jr., and Edwin M. Speas, Jr., of the Attorney General's Office deemed a proposal to reduce the authority and powers of the Superintendent unconstitutional. The Advisory Opinion states in part: "...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." (Compl. Ex. D) That is exactly what has transpired in this case. With the creation of the CEO position by the Board and the transfer of the authority and responsibility of the

Superintendent as chief administrative officer to the CEO position, the Constitution has been violated.

In interpreting the meaning of “chief administrative officer of the Board” which was adopted as part of the 1971 Constitution in describing the duties of the Superintendent, the *DuMont* court described the process as follows: “In summary, we are to determine (1) the intent of the framers and people adopting the 1970 Constitution, (2) the object and purpose of the 1970 Constitution, and (3) the evils, if any, sought to be remedied by that document.” *DuMont*, 304 N.C. at 634, 286 S.E.2d at 94. In applying that calculus to the language at issue, it must be concluded that the meaning and application of the Superintendent’s constitutional duties did not substantively change, even though the language did. While the Commission clearly evidenced not just a language change but a dramatically different constitutional structure for the Superintendent’s position, the Commission’s recommendations were not adopted by the General Assembly and thus obviously not submitted to the voters. The language changes have to be viewed as editorial rewrites, and the constitutional powers of the Superintendent to supervise and administer the public school system of the state on a day-to-day basis remains unchanged from pre-1971 circumstances.

C. Role of the State Board and the Relationship Between the Superintendent and the State Board

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....’ In addition the Board has the constitutional responsibility to make all needed rules and regulations in relation thereto, subject to the laws enacted by the General Assembly.” The operational framework for public education since 1868 has consistently shown that the Board has had the general oversight of the public school system and, as policy boards are

supposed to do, makes rules and regulations for the school system. Whatever statutory authority the Board might have over the Superintendent is the normal Board/chief administrative officer relationship. The chief administrative officer, in this case the Superintendent has the responsibility to execute the rules and regulations and policies of the Board and the laws passed by the General Assembly. 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 cannot be infringed on by either the State Board or the CEO.

In interpreting the constitutional scope of the Superintendent's position it is evident that at the very minimum, the Superintendent is charged constitutionally with carrying out the duties and policies of the Board on a day-to-day basis. Even the Advisory Opinion in 1995 acknowledges that. The term "chief administrative officer" means what it says. That person is the head of the administrative effort to carry out the Board's policies, rules and regulations. *See e.g.*, N.C.G.S. § 113A-258 (Executive director of Clean Water Trust Fund is chief administrative officer charged with supervision of all activities of trust fund); N.C.G.S. § 115D-3 (president of community college system shall be chief administrative officer and shall have professional staff as necessary to carry out statutory provisions); N.C.G.S. § 116-14 (president of University of North Carolina shall be its chief administrative officer and shall have professional staff as necessary to carry out statutory provisions); N.C.G.S. § 136-89.182 (executive director of state turnpike authority shall be chief administrative officer and shall be responsible for daily administration); N.C.G.S. § 143-246 (executive director of wildlife commission is chief administrative officer "charged with the supervision of all activities under jurisdiction of the commission). Because the Superintendent's role as chief administrative officer is constitutionally mandated, that job cannot be given to someone else.

The argument can also be made for a more expansive and independent role for the Superintendent based upon the *DuMont* case and the relevant evidence of the intent of the framers of the 1971 Constitution. The two amendments relative to the Superintendent's specific constitutional duty adopted in 1942 and modified in 1944 articulates the Superintendent's role as supervising the operation of the public school system and administering the public school system. The language change in the 1971 Constitution must be interpreted in light of the previous language. While substantive changes were included in this document, there were no changes that affected the provisions as previously worded. "Indeed we think that such an intent shows that the 1970 framers intended to preserve intact all rights under the 1868 Constitution." *DuMont*, 304 N.C. at 635, 286 S.E.2d at 94. "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." *Id.* at 637, 286 S.E.2d 95.

Needless to say, the Commission's proposal to eliminate the Superintendent as a constitutionally elected officer was not submitted to the voters, nor has it ever been submitted. Likewise, an amendment to make the Superintendent an appointive position subject to control of the Board was not submitted nor has it ever been. "The submission of substantive amendments separate and apart from the new constitution show clearly that the intent and purpose of the framers of the 1971 Constitution was to revise editorially only the 1868 Constitution. Substantive and fundamental matters were left to separate amendments to be considered individually by the voters." *DuMont*, at 639, 286 S.E.2d 96.

In conclusion, the following points are reiterated: (1) the Superintendent of Public Instruction is an independent constitutional officer of the state duly elected by the voters

pursuant to Article III; (2) the Superintendent is constitutionally charged with the day-to-day operation of the public school system and statutorily charged with running the Department of Public Instruction; (3) the Superintendent is the chief administrative officer of the Board and as such is the sole individual constitutionally authorized to carry out the policies, rules and regulations promulgated by the Board; (4) the Superintendent by virtue of her role as secretary and chief administrative officer of the Board is a member of the Board; (5) the Superintendent is subject to and responsible for carrying out the policies, rules and regulations promulgated by the Board but is not an employee of the Board; (6) to the extent that statutes enacted by the General Assembly conflicts with the constitutional authority and power of the Superintendent, those statutes are unconstitutional; (7) to the extent regulations or policies enacted by the Board conflict with the constitutional authority and power of the Superintendent to carry out her constitutional duties, those regulations are unconstitutional.

Therefore, 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)**

Prohibitions on the holding of more than one public office have been a part of the North Carolina Constitution since 1875 when added to the 1868 Constitution by amendment. Art. XIV, § 7, Const. 1868, as amended. With limited exceptions for the military, notary publics and constitutional convention delegates, no one may serve in two elective, two appointive or one

elective and one appointive office. This prohibition 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 constitution 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 which provides in pertinent part:

(a) Any person who holds an appointive office, place of trust or profit in State or local 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 either State or local government.

(b) Any person who holds an elective office in State or local 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, in either State or local government.

Thus, the statute attempts to permit an individual to hold up to two appointive or elective offices or a combination thereof. This is essentially a blanket exception for any two offices or places of trust or profit. However, a blanket exception for any two offices or places of trust or profit amounts to a wholesale circumvention of the relevant constitutional provision, entitled "*Dual office holding.*" N.C. Const. art. VI, § 9 (emphasis added). The constitution prohibits dual office holding and allows for the General Assembly to create exceptions. The intent of the framers was not to permit the legislature to void the constitutional prohibition on dual office holding generally. Rather, a commonsense and textual reading of the constitution reveals that the

framers intended to allow the creation of exceptions on a classification by classification basis. Such classifications should be drawn by reference to the offices or places of trust or profit to be held concurrently. For example, the General Assembly could create an exception permitting county attorneys to serve in the legislature. 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.

The prohibition on dual office holding exists to affect two objectives: increasing participation in government and preventing abuse of authority. John V. Orth, *The North Carolina State Constitution* 138 (1993). See also *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 9, 413 S.E.2d 541, 545 (1992) ("The evil the section seeks to prevent is that of *holding* more than one office simultaneously") (emphasis in original). 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. Given that the CEO purportedly reports to the State Board, an appointment to that position by a sitting member and chair of the State Board seems particularly ripe for potential abuse. Although there are no allegations of misconduct here, the potential for abuse is strong and it is precisely the reason dual office holding is prohibited by the constitution.

The Supreme Court previously passed on a similar situation. In *Barnhill v. Thompson*, 122 N.C. 493, 29 S.E. 720 (1898), the court considered whether the defendant could simultaneously serve as a county commissioner and as a member of the board of education. At that time, members of county boards of education were elected by the county commission, the clerk of court and the register of deeds. *Id.* at 495, 29 S.E. at 721. The Supreme Court discussed the common law rule that prohibited dual office holding where offices were incompatible and eventually held that the constitution prohibited the defendant from concurrently serving as

county commissioner and a member of the education board. Ultimately, the defendant was deemed to have vacated his position as county commissioner by accepting a position on the board of education. *Id. See also Whitehead v. Pittman*, 165 N.C. 89, 90, 80 S.E. 976 (1914) (invalidating vote cast by county commissioner because “his acceptance of the position of county superintendent of public instruction *eo instanti* vacated his position on the board of commissioners.”)

Even assuming that the General Assembly’s blanket exception at N.C.G.S. § 128-1.1 is valid., it provides no refuge for Defendants in this case. 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) member of the State Board; 2) the supposed Education CEO and 3) Chair of the State Board, a role with duties and responsibilities far beyond those typical of a chair

It is plain that no one person may hold more than two offices or places of trust or profit. Thus, the issue for this Court to determine is whether the role of Education CEO and the role of member and Chair of the State Board each constitute an office or place of trust or profit. As demonstrated, each position is an office or place of trust as contemplated by Article VI, § 9, and therefore cannot be filled by a single person.

Articulating the difference between “offices” and “places of trust or profit,” the Supreme Court explained: “The manifest intent of this section is to prevent double office holding, that is, that offices and places of public trust should not accumulate in any single person, and the superadded words of ‘places of trust or profit’ were put in to avoid evasion in giving too

technical a meaning to the preceding words.” *Doyle v. Alderman of Raleigh*, 89 N.C. 133 (1883); *see also Groves v. Barden*, 169 N.C. 8, 84 S.E. 1042 (1915).

Service on the State Board of Education is in and of itself a public office within the meaning of Article VI, § 9. *See generally Barnhill*, 122 N.C. at 495-96, 29 S.E. at 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.”); Attorney General Advisory Opinion, 40 N.C.A.G. 580 (1969) (concluding that positions of county commissioner and commissioner of a regional housing authority are “public offices” and thus one person cannot constitutionally hold both positions).

The so-called Education CEO is also a public office or place of trust or profit. The salary for that position is \$265,000 per year. The Conditions of Employment and Job Offer Acceptance delineate other benefits which inure to the CEO. Just as the name would tend to imply, the CEO position is an executive level position with substantial decision-making authority. Unlike certain part-time or temporary jobs held not subject to Article VI, § 9, the Education CEO is a full-time, permanent position. *Compare Grimes v. Holmes*, 207 N.C. 293, 176 S.E.2d 746 (1934) (upholding statute authorizing city council to appoint council member to serve as city manager temporarily “[i]n the event the city manager of a municipal corporation shall be sick, absent, or otherwise unable to perform the duties of his office, or should the position be vacant.”); *State v. Wood*, 175 N.C. 809, 820, 95 S.E. 1050, 1055 (1918) (“temporary” representative of the State is not an officer because appointment “did not require continuous public service”) (internal quotations omitted).

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 parliamentary duties and the chair of the State Board previously held such limited duties, *see* Rule 3.3 of Policy Id. No. TCS –C-006 of the North Carolina State Board of Education Policy Manual, dated April 7, 2005, 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. In fact, on January 26, 2009, The Governor called on the State Board to redefine the duties of its chair so that the chair would manage the administrative operation of the public school system.

The Constitution prohibits dual office holding in order to prevent abuse and promote participation in government. Those ends are served by giving effect to the plain language of Article VI, § 9. While the General Assembly has purportedly authorized to some extent dual office holding, no individual can hold more than two appointive or elective offices. Here, three of the state's most influential and important positions of leadership and decision-making in public education are service as a State Board member, State Board chair, and the newly created CEO job, assuming without conceding that the CEO position is valid as presently created. Allowing one person to fill all those positions diminishes rather than promotes participation in government. More significantly however, allowing a member of the State Board, particularly its chair, to serve as CEO, a position which reports to and is supervised by the State Board is fraught with the dangers of abuse. Even assuming for the sake of argument, that the State Board could create the position of Education CEO, that position could not constitutionally be filled by a member of the State Board. 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. Thus, even if the CEO position could exist, Defendant Harrison may not serve as both a member and chair of the State Board and as Education CEO.

**III. PLAINTIFF'S CLAIMS ARE NOT BARRED BY ANY AFFIRMATIVE DEFENSE ASSERTED BY DEFENDANTS.**

In their Answer, Defendants raised the political question doctrine, sovereign immunity and standing as defenses. In anticipation of arguments Plaintiff believes Defendants may raise in their brief, Plaintiff submits the following arguments in opposition to Defendants' asserted affirmative defenses. As argued below none of these doctrines applies here and therefore do not preclude an award of summary judgment to Plaintiff on the grounds argued above.

A. The Doctrine of Sovereign Immunity Does Not Apply to Challenges Questioning the Constitutionality of State Action.

Plaintiff's claims are not barred by sovereign immunity. By its very nature our government cannot obtain immunity from suit by a constitutional officer to enforce the constitutional functions of her office. Permitting the government to eviscerate the constitutional and then hide behind sovereign immunity would render our constitution a mere guideline, not the foundation of government and supreme law in North Carolina. The constitutional creation of elected officers on one hand and sovereign immunity from suit for breaching that framework and undermining constitutional officers on the other is simply absurd. If our constitution and the roles of constitutional officers have any import, the actions to enforce those roles cannot be subject to the sovereign immunity doctrine.

Our State Supreme Court has also refused to apply the doctrine of sovereign immunity to constitutional challenges to State tax measures. For example, in *Charlotte-Mecklenburg Hosp. Auth. V. N.C. Indus. Comm'n*, 336 N.C. 200, 443 S.E.2d 716 (1994), taxpayers sued a state

agency for misuse of tax proceeds. The defendants claimed sovereign immunity barred the action, but the Supreme Court held “[t]he proceeds of State tax levies appropriated by the General Assembly for one purpose may not lawfully be disbursed by State officers for a different purpose and a citizen and taxpayer of the State may sue to restrain such illegal diversion of public funds.” *Id. at 644*. A taxpayer's right to seek equitable relief “to enjoin the governing body of a municipal corporation *from transcending their lawful powers* or violating their legal duties in any mode which will injuriously affect the taxpayers--such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.,--is well settled.” *Id.* (quoting *Merrimon v. S. Paving & Constr. Co.*, 142 N.C. 427, 431-32, 142 S.E. 366, 367-68 (1906)) (comparing the right of taxpayers to sue government officials for illegal disbursements with right of shareholders of a corporation to bring *ultra vires* shareholder suits).

Defendants’ attempt to cut short Plaintiff’s claims by resort to the judicially created doctrine of sovereign immunity is contrary not only to precedent but also to our constitutional framework of governance. Allowing the State to avoid judicial determination of constitutional questions would obliterate our state republic by permitting the state to do as it wishes without concern for judicial scrutiny. The state constitution establishes our system of government. If the state may violate that framework with immunity, no effort to enforce the structure of our government could proceed and the will of the People, as voiced at the polls, will be forever muted.

**B. 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.**

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. Very simply, this is not a political question; it is a question of constitutional interpretation and application. “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. 336, 345, 488 S.E.2d, 336, 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).

There are established situations, or hallmarks, in which a case is deemed non-justiciable as a political question:

(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable or manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; (4) the impossibility of a court’s undertaking an independent resolution without expressing any lack of the respect due to the coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

*Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962).

Courts in North Carolina and around the country have not hesitated to entertain constitutional challenges to government conduct where the plaintiff seeks equitable relief.

Perhaps the best known of such cases in North Carolina is *Leandro v. State*, 346 N.C. 336, 488 S.E.2d. 249 (1997), in which 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 quickly disposed of the political question issue with a single substantive paragraph:

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.* at 345. (internal citations omitted).

More recently, in *News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 641 S.E.2d 698 (2007), the Court of Appeals held the political question doctrine was not a bar to the newspaper's action to seek clemency records pursuant to Public Record Law. The Governor argued that the clemency power rests exclusively with the Governor and, therefore, that any legislative enactment impinging upon the executive's clemency authority, including public record laws, runs afoul of separation of powers principles. However, the Court of Appeals rejected that argument holding that "[b]ecause the outcome of this dispute is governed by the meaning of [the contested constitutional provision], we conclude that the judicial branch has authority to resolve this dispute." *Id.* at 19, 641 S.E.2d at 702. That holding applies here. The outcome of this case, like the outcome of *News & Observer Publ'g*, is governed by the meaning of constitutional provisions, and the courts have jurisdiction to resolve the dispute.

Beyond the bounds of North Carolina, in a case eerily similar to this one, the Michigan Supreme Court considered the authority of the governor to issue executive orders eliminating the Michigan Department of Natural Resource ("DNR") and create a new one. Various nonprofit

corporations and legislators sued, alleging the Governor exceeded his limited legislative authority under the state constitution and a statute relating to executive power. The Michigan Supreme Court concluded that the issues were justiciable questions of constitutional law, not nonjusticiable political questions. *House Speaker v. Governor*, 506 N.W.2d 190 (Mich. 1993).

The political question doctrine should be invoked sparingly to bar judicial review. For 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. It is, as the *Leandro* court so aptly put it, 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.

At its core, this case centers on questions of what the duties and responsibilities of the Superintendent, a state constitutional officer, are; what limitations circumscribe the authority of the State or other state actors to interfere with those responsibilities; and what the constitutional interplay is 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.

C. Plaintiff has Standing in both her Individual and Official Capacities.

Defendants’ assertion that Plaintiff lacks standing borders on laughable. Defendants oddly phrased this defense in their Answer: “To the extent it is determined that Plaintiff lacks standing in her official or individual capacities to assert this action, Defendants plead the absence of standing in bar of her claims.”

“Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter.” *American Woodland Industries, Inc. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (N.C. App. 2002). The Declaratory Judgment Act itself confers standing upon any person whose “rights, status, or other legal relations are affected.” N.C.G.S. § 1-254. *See also Woodward v. Carteret County*, 270 N.C. 55, 153 S.E.2d 809 (1967) (The Uniform Declaratory Judgment Act furnishes a particularly appropriate method for determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their rights under the statute.).

Traditionally, the gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome. *Stanley v. Dep’t of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973). Constitutional challenges may be brought by those “who have been injuriously affected . . . in their persons, property or constitutional rights. *Piedmont Canteen Service, Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582 (1962). While *Piedmont Canteen* addressed a constitutional challenge to a statue, the same justification for standing applied, perhaps with greater force, to a constitutional challenge to executive action.

The central issues in this case revolve around Plaintiff’s official duties as Superintendent. She has twice been elected by the People. They have hired her to do a job, and she intends to do it. She has brought this action so that she may do just that. The complained of actions by Defendants have stripped from Dr. Atkinson the duties and responsibilities of a job she has a constitutional duty to perform.

## CONCLUSION

While the actions of the Governor, General Assembly, and Board may be well intended and consistent with the view of many that a better organizational structure for public education should be enacted, the actions complained of cannot supplant the constitutional framework adopted by the people. To the extent a change should be made, the proper procedure is for the requisite constitutional amendment or amendments to be passed by the General Assembly and presented to the voters of North Carolina for ratification.

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 hereinbefore alleged 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 grant her Motion for Summary Judgment and issue an Order granting relief as set forth in her Complaint and Petition for Declaratory Judgment.

DATED: This the 19<sup>th</sup> day of June, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF 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:

mdavis@ncdoj.gov  
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This the 19th day of June, 2009.

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