

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

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

Plaintiffs,)

v.)

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

Defendants.

**COMPLAINT AND PETITION FOR
DECLARATORY JUDGMENT**

Plaintiffs, by and through undersigned counsel, file this Complaint and Petition for
Declaratory Judgment. Plaintiffs, complaining of Defendants, allege and say:

INTRODUCTION

1. This action is brought pursuant to the Uniform Declaratory Judgment Act, N.C.G.S. § 1-253 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.

PARTIES

(Plaintiff)

Pursuant to the Uniform Declaratory Judgment Act, the following individual is petitioning for a declaration as to the unconstitutionality of the acts of Defendants as hereinbelow set forth and 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, and for the purposes of this action is denominated as “Plaintiff”:

2. Plaintiff June St. Clair Atkinson, Ed.D., 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. As Superintendent, Dr. Atkinson also serves as Secretary of the State Board which is headquartered in Raleigh, Wake County, North Carolina. Accordingly, Dr. Atkinson has an interest in and seeks a declaration as to the unconstitutionality of certain acts of the Governor of North Carolina, the General Assembly, and the State Board in connection with the duties and authorities of the Superintendent, specifically those acts which

impede or otherwise interfere with the duties and responsibilities of the Superintendent to be 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 CEO of the State Board of Education and thereby usurp the constitutional authority of the Superintendent.

(Defendants)

Pursuant to N.C.G.S. § 1-260, the following are joined as parties who have an interest which would be affected by the declaration sought, and are for purposes of this action denominated as “Defendants”:

3. Defendant State of North Carolina is a general purpose state government which is capable of being sued, and which is being sued, for enacting as more specifically set forth below (through the General Assembly) legislation in violation of the North Carolina State Constitution, and for usurping (through the Governor and the State Board) the constitutional authority of the Superintendent.

4. Defendant Beverly Perdue is the Governor of the State of North Carolina and is sued in her official capacity for her actions as hereinbelow set forth which attempt to usurp the constitutional authority, duties and responsibilities of the office of the Superintendent.

5. Defendant State Board of Education and its members, identified below, are sued for actions as herein below set forth which attempt to usurp the constitutional authority, duties and responsibilities of the office of the Superintendent. Defendants Walter Dalton, in his official capacity as Lieutenant Governor of the State of North Carolina, and Janet Cowell, in her official capacity as State Treasurer of the State of North Carolina, are sued in their official capacities only as members of the State Board of Education. Kathy Taft, Ray Durham, Kevin Howell, Shirley E. Harris, Melissa E. Bartlett, Robert Thomas Speed, Wayne McDevitt, Patricia N.

Willoughby, John A. Tate, III, and William Harrison are each citizens and residents of the State of North Carolina; each is a current member of the State Board of Education and each is sued in his or her official capacity only as a member of the State Board. Defendant Harrison is chairman of the State Board and also CEO of the State Board, having been hired by the State Board of Education, and is sued in that official capacity as well. Defendants listed in Paragraph numbered 5 of this Complaint are hereinafter referred to as the “State Board Defendants.”

JURISDICTION AND VENUE

6. This action is brought pursuant to N.C.G.S. § 1-253, the Uniform Declaratory Judgment Act, for the purpose of determining the constitutionality of certain actions of the State of North Carolina by and through the Governor, the General Assembly, and the State Board of Education. This Court has jurisdiction over the subject matter of this action pursuant to N.C.G.S. § 1-253, the Uniform Declaratory Judgment Act.

7. This Court has jurisdiction over the parties pursuant to N.C.G.S. § 1-75.4.

8. Venue is proper in this Court pursuant to N.C.G.S. § 1-82.

FACTUAL BACKGROUND

Constitutional History

9. The office of Superintendent was duly constituted in 1868, and pursuant to Article IX, Section 7 of the 1868 North Carolina Constitution, the Superintendent served as a member of the State Board, together with the Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works and Attorney General. Article IX, Section 7 of the

1868 North Carolina Constitution provided: “The Governor shall be President, and the Superintendent of Public Instruction shall be Secretary, of the Board of Education.”

10. The 1868 Constitution further provided, at Article III, section 13: “The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Works, Superintendent of Public Instruction, and Attorney General shall be prescribed by law.”

11. Pursuant to 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 on November 3, 1942, Article IX of the 1868 State Constitution was amended so that the State Board would, from and after the first day of April 1943, consist of the Lieutenant Governor, State Treasurer, Superintendent of Public Instruction, and one member from each Congressional District to be appointed by the Governor. 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.

12. Pursuant to a constitutional amendment adopted by the General Assembly in 1943, 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, Article IX, section 8 of the 1868 Constitution was further refined. The 1943 Amendment specified that “[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[.]”

13. The 1943 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.”

14. In 1967, the North Carolina State Bar and the North Carolina Bar Association created the North Carolina State Constitution Study Commission [“the Commission”] at the request of then North Carolina Governor Dan K. Moore. The Commission divided its membership into four subject-matter committees.

15. On or about October 18, 1968, the Committee on Declarations of Principles and Policies and Miscellaneous to the Commission [“the Committee on Declarations”] issued a summary report of that committee [“Summary Report”], a copy of which is attached hereto as Exhibit A and incorporated by reference. This committee conducted a section-by-section review of the State Constitution for the purpose of classifying each section as (a) sound and useful as presently written, or (b) sound and useful but in need of some modification in language or arrangement, or (c) obsolete and unnecessary, or (d) questionable from the standpoint of substance and policy.” Summary Report, p. 1.

16. 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. 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.

17. On or about July 23, 1968, the Committee on Education, Welfare, and Criminal Justice issued its First Report to the Commission [“Education Committee First Report”]. Among the proposals was “Proposed Sec. 4 [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 will also require deletion of references to the Superintendent in Article III.)” Further the report states: “Proposed Sec. 5 restates, in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced.” A copy of this report is attached hereto as Exhibit B and incorporated by reference.

18. On or about 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.”

19. 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).

20. 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.”

21. 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 hereto 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.”

22. The proposed constitution as set forth in Amendment 1 and submitted to the General Assembly included provisions eliminating the Superintendent as a member of the State Board and redefining the role of the Superintendent as “chief administrative officer of the State Board of Education.”

23. 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 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. The resulting constitution is known as the 1971 Constitution. 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.

24. 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 amendments to Article IX that were included in the proposed constitution, set forth as Amendment 1, would have any substantive effect whatsoever. Upon information and belief, 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.

25. Upon information and belief, the intent of the framers of the 1970 proposed constitution was to merely update, modernize and revise editorially the 1868 Constitution and amendments to it.

26. 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 omitted from the list of members of the State Board.

27. The purported changes to Article IX described above 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.

28. 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.

29. The 1971 Constitution amended the 1868 Constitution so that Article IX, Section 4 established 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 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.”

30. 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.

Efforts to Revise the Role of the Superintendent

31. The Legislative Research Commission filed a “Report to the 1987 General Assembly of North Carolina” relative to the Superintendent and the State 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 State Board.

32. An Advisory Opinion letter dated 10 December 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, a copy of which is attached hereto as Exhibit D and incorporated by reference. The letter which is part of the “Report to the 1987 General Assembly of North Carolina” 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.”

33. The Advisory Opinion also stated: “...it appears that the framers of the Constitution intended to make the Superintendent of Public Instruction, as the elected representative of the people, responsible for the administration of the powers conferred upon the State Board of Education.”

34. Prior to 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.

35. In 1995, the General Assembly passed Session Law 1995-72, a copy of which is attached hereto as Exhibit E and incorporated by reference. Under this new statute, 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.”

36. By S.L. 1995-72, the General Assembly 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.

37. By S.L. 1995-72, the General Assembly enacted 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.

38. 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 is attached hereto 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.

39. The advisory opinion of 1995 is inconsistent with the advisory opinion of 1985 and incorrectly interprets the holdings in the two cases relied on. The correctness of the December 14, 1995, advisory opinion cited above was never litigated and, upon information and belief, to date, no judicial determination has been made as to the authority of the State Board to control the duties and responsibilities of the Superintendent.

Conduct of Defendants

40. On or about 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 Chief Executive Officer (“CEO”) of the State Board, who would manage the administrative operation of the public school system. The Governor also announced that she would appoint 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 of the State Board upon the State Board creating such a position.

41. At the press conference, during which she announced the creation of the CEO position, Governor Perdue described the role of Dr. Atkinson, Superintendent, as that of an “ambassador” for education.

42. Subsequent to the Governor’s announcement concerning the position of CEO of the State Board, Dr. Atkinson publicly and through correspondence questioned the constitutionality of such action and asserted her right as the constitutionally elected Superintendent to manage the operation of the public school system.

43. On or about 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 is attached hereto as Exhibit G and is incorporated by reference. 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.”

44. On or about March 4, 2009, the State Board of Education 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 is attached hereto as Exhibit H and incorporated by reference.) 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.”

45. The State Board’s attempt, as evidenced by its amendment to Policy ID Number EEO-C-013, to vest in the CEO the power and duty to manage the Department of Public Instruction “on a day-to-day basis” is contrary to N.C.G.S. § 115C-19 which vests in the Superintendent the duty to “manage on a day-to-day basis the administration of the free public school system.”

46. The State Board’s attempt, as evidenced by its amendment to Policy ID Number EEO-C-013, to vest in the CEO the power and duty to manage the Department of Public Instruction “on a day-to-day basis” is contrary to Article IX, Section 4(2) of the current version of the Constitution which provides: “The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education” and to the previous language of the Constitution prior to 1971 that stated the Superintendent was to be the administrative head of the public school system.

47. The State Board's attempt, as evidenced by its amendment to Policy ID Number EEO-C-013, to vest in the CEO the power and duty to manage Department of Public Instruction "on a day-to-day basis" is contrary to Article IX, Section 8 of the 1868 Constitution as amended in 1943 to provide that the Superintendent shall be the administrative head of the public school system and pursuant to the new language of the 1971 Constitution, "the chief administrative officer of the State Board of Education."

48. On or about 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.

49. Upon information and belief, on or about March 5, 2009, Harrison began work as CEO of the State Board at an annual salary of \$265,000, said position and salary slot in actuality being 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 is attached hereto as Exhibit I and incorporated by reference.)

50. The position of CEO of the State Board is a full time paid position in state government paid for through public revenue and is a position of trust and/or profit under the auspices of the State of North Carolina.

51. Upon information and belief, 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.

COUNT ONE

(THE SUPERINTENDENT HAS THE CONSTITUTIONAL RESPONSIBILITY AS ADMINISTRATIVE HEAD OF THE NORTH CAROLINA PUBLIC SCHOOL SYSTEM AND ALL ACTS OF THE GENERAL ASSEMBLY, THE STATE BOARD OF EDUCATION OR THE GOVERNOR ATTEMPTING TO DEPRIVE THE SUPERINTENDENT OF SUCH CONSTITUTIONAL AUTHORITY VIOLATES ARTICLE III, SECTION 7 AND ARTICLE IX, SECTION 4(2) OF THE NC CONSTITUTION.)

52. Plaintiffs incorporate by reference and re-allege fully herein the contents of the foregoing paragraphs 1 through 51.

53. The N.C. Constitution was amended by vote of the people on November 7, 1944, and specifically set out the constitutional role of the Superintendent as follows: “The State Superintendent of Public Instruction shall be the administrative head of the public school system and shall be secretary of the Board.”

54. The language of the 1944 amendment to Article IX of the N.C. Constitution defining the Superintendent’s constitutional role was consistent with prior language in the Constitution and with the practice and prior responsibilities of the Superintendent.

55. On November 3, 1970, a proposed revised N.C. Constitution was ratified by the people, said version being an extensive editorial rewrite of the 1868 N.C. Constitution as amended. The evils sought to be remedied were obsolete language, outdated style and illogical arrangement.

56. Important and significant substantive changes were not included in the proposed constitution but instead were dealt with in amendments separately submitted to the people of North Carolina for ratification.

57. To the extent that any changes made in the proposed constitution were substantive, none were 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.

58. Subsequent to the passage of the proposed constitution, the Superintendent, upon information and belief, continued to perform the same or similar duties as administrative head of the public school system of North Carolina, executing the rules and regulations enacted by the State Board and the laws enacted by the General Assembly.

59. Beginning in 1995 and continuing to the present, the State Board has attempted to exercise constitutional powers reserved for the Superintendent, including being the administrative head of the public school system and administering the Department of Public Instruction on a day-to-day basis including the hiring of staff and other functions necessary to administer the public schools of North Carolina.

60. The creation by the State Board of a position called “Chief Executive Officer of the State Board of Education” and the assignment to that position, the responsibility to manage the Department of Public Instruction on a day-to-day basis subject to the direction and control of the State Board and to approve all employment decisions for the positions of section chief and below violates Article III, Section 7(2) and Article IX, Section 4 of the N.C. Constitution in that these actions infringe upon and attempt to usurp the constitutional authority of the duly elected Superintendent.

COUNT TWO
(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 VIOLATES ARTICLE III, SECTION 7; AND

ARTICLE IX, SECTIONS 4 AND 5; AND ARTICLE 1, SECTION 6 OF THE NORTH CAROLINA CONSTITUTION.)

61. Plaintiffs incorporate by reference and re-allege fully herein the contents of the foregoing paragraphs 1 through 60.

62. As previously alleged, the position of CEO of the State Board of Education was created by the State Board and Defendant Harrison was hired in that position.

63. As previously alleged, the CEO position and thus Defendant Harrison in that position was vested by the State Board with duties, authority and powers that are within the constitutional authority of the Superintendent.

64. The actions of the State Board, acting through N.C.G.S. § 115C-12 and N.C. G.S. §§ 143A-44.1 through 44.3, in creating the CEO position, hiring Defendant Harrison, and vesting the position and Defendant Harrison with certain powers is a violation of Article III, Section 7; Article IX, Sections 4 and 5; and Article I, Section 6 of the North Carolina Constitution.

65. The actions of the State Board, acting through the Administrative Procedures Act (“APA”) by adopting Policy ID Numbers EEO-C-013 and EEO-C-022 authorizing the creation of the CEO position; delineating the CEO’s independence from the supervision of the Superintendent; and the delegation of certain powers and duties to the CEO violates Article III, Section 7; Article IX, Sections 4 and 5; and Article I, Section 6 of the North Carolina Constitution.

COUNT THREE

(SERVICE AS AN APPOINTED MEMBER OF THE STATE BOARD OF EDUCATION, A POSITION OF TRUST, AND SIMULTANEOUSLY AS CHIEF EXECUTIVE OFFICER OF THE STATE BOARD OF EDUCATION, A STATE SALARIED POSITION OF PROFIT AND TRUST VIOLATES ARTICLE VI, SECTION 9 OF THE NORTH CAROLINA CONSTITUTION.)

66. Plaintiffs incorporate by reference and re-allege fully herein the contents of the foregoing paragraphs 1 through 65.

67. As previously alleged, William C. Harrison was appointed CEO by the State Board on or about March 4, 2009, said position being a full time state government position paid for out of public revenue and a position of profit and trust.

68. On or about March 5, 2009, Defendant Harrison was appointed by the Governor pursuant to Article IX, Section 4(1) as a member of the State Board, a position of trust under the auspices of the State of North Carolina.

69. The concurrent holding of dual offices, to wit Chairman of the State Board, and a state position of employment, to wit CEO of the State Board, violates Article VI, Section 9 of the Constitution.

REQUEST FOR INJUNCTIVE RELIEF

70. 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.

WHEREFORE, Plaintiffs respectfully pray:

(A) That the Court issue an order declaring that the duties and responsibilities for administering and managing the Department of Public Instruction and administering

the North Carolina public school system are constitutionally vested in the Superintendent;

- (B) That the Court issue an order declaring that all acts by the Defendants purporting to create a position of CEO of the State Board and giving that CEO authority to run the Department of Public Instruction and administer the public school system usurps the constitutional powers of the Superintendent and are unconstitutional and thus null and void and unenforceable;
- (C) That the Court issue an order declaring that any existing legislative attempt to delegate the constitutional responsibility of the General Assembly to prescribe by law the duties of the Superintendent is unconstitutional and therefore null and void and unenforceable;
- (D) That the Court issue an order declaring that a member of the State Board cannot constitutionally serve as CEO of the State Board concurrent with his service as a State Board member;
- (E) That the Court enter preliminary and permanent injunctions pursuant to the constitutional violations alleged;
- (F) That the Court award the plaintiffs their reasonable attorney's fees as allowed by law;
- (G) That the Court tax the costs of this action against the Defendants; and
- (H) That the Court award such further and additional relief as the Court may deem necessary and proper.

DATED: This the _____ day of April, 2009

Respectfully submitted,

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