

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

09 CVS 6655

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.)

AFFIDAVIT OF
JOHN L. SANDERS

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.

JOHN L. SANDERS, after being duly sworn, deposes and states the
following:

1. I received a law degree from the University of North Carolina in 1954 and was licensed to practice law in North Carolina from 1955 until 2000.

2. I was a member of the faculty of the Institute of Government at the University of North Carolina at Chapel Hill from 1956 to 1973 and from 1979 to 1994. I served as Director of the Institute from September 1, 1962, to October 31, 1973, and from January 1, 1979, to August 31, 1992. Between November 1, 1973 and December 31, 1978, I was the Vice-President for Planning of The University of North Carolina.

3. Through my work at the Institute of Government and as further described below, I have engaged in extensive study of North Carolina's constitutional history, including the development of the Constitution of 1868 and the Constitution of 1971. In particular, I am familiar with how the provisions in those two constitutions relating to the State Board of Education ("State Board") and Superintendent of Public Instruction ("Superintendent") have evolved since 1868.

4. In 1968, I served as staff director for the North Carolina State Constitution Study Commission ("Commission") and supervised the Institute of Government staff members who provided professional and some clerical support for the Commission. I did much of the Commission's research and drafting myself.

5. As part of my duties for the Commission, I served as principal draftsman of the Report of the North Carolina Constitution Study Commission to the North Carolina State Bar and the North Carolina Bar Association ("Study Commission Report") and of the draft of the proposed constitution submitted by

Governor Robert W. Scott to the General Assembly following completion of the Commission's work.

6. As a member of the faculty of the Institute of Government, I followed the progress of the proposed Constitution of 1971 through the legislative process and assisted committees and members of the General Assembly in their consideration of the proposed constitution.

7. I have written and published several articles concerning the Commission's work and the subsequent adoption of the Constitution of 1971, including "A Brief History of the Constitution of North Carolina" and "The Constitutional Development of North Carolina," published in the *North Carolina Manual*, as well as "State Constitutional Revision," published in *Popular Government* in September 1969.

8. This affidavit summarizes the historical development of provisions in the North Carolina Constitutions of 1868 and 1971 related to the State Board and the Superintendent.

CONSTITUTION OF 1868

9. The Constitution of 1868 created the State Board and the position of Superintendent. N.C. Const. of 1868, art. III, §§ 1, 13-14, art. IX, §§ 7-9 (1868).

State Board

10. Prior to 1868, there was a rudimentary state school system in North Carolina, partially financed by what was called the Literary Fund. The Constitution of 1868 created the State Board of Education, which was to assume

“all the powers and trusts of the President and Directors of the Literary Fund.” The State Board also was given “full power to legislate and make all needful rules and regulations” related to a free public school system (which was to be created by the General Assembly). All such rules and regulations, however, were subject to alteration, amendment or repeal by the General Assembly. *Id.*, art. IX, § 9. The members of the State Board included the Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction, and the Attorney General. *Id.*, art. IX, § 7.

Superintendent

11. The Constitution of 1868 created the position of Superintendent and made him a member of the executive branch. *Id.*, art. III, § 1. The Superintendent was designated a member of the Council of State, *id.*, art. III, § 14, but the only other duties of the Superintendent stated in the Constitution were to be a member of and secretary to the State Board. *Id.*, art. IX, §§ 7-8. Otherwise, the Superintendent’s duties were to be “prescribed by law.” *Id.*, art. III, § 13.

12. It should be noted that this particular feature of the Constitution – *i.e.*, the statement in Article III, which created the position, that the Superintendent’s duties “shall be prescribed by law,” followed by a highly generalized and abbreviated description of the Superintendent’s duties in Article IX – remained intact as the Constitution of 1868 was subsequently amended and also is a feature of the Constitution of 1971.

13. Amendments to the Constitution of 1868 altered the original provisions pertaining to the State Board and Superintendent as follows.

1873

14. In 1873 the position of Superintendent of Public Works was abolished and therefore was removed from the list of officers constituting the State Board. N.C. Pub. Laws 1972-73, ch. 84.

1876

15. As a result of amendments proposed by the 1875 constitutional convention and ratified by the voters, the provisions of Article IX relating to the State Board and Superintendent were renumbered. There were, however, no substantive changes. N.C. Const. of 1868, art. IX, §§ 8-10 (1876).

1942

State Board

16. Amendments approved by the voters in 1942 substantially altered the composition of the State Board and expanded its enumerated powers and duties. In place of the completely *ex officio* Board created in 1868, the Constitution now provided for a State Board made up of the Lieutenant Governor, Treasurer, Superintendent of Public Instruction, and one member (appointed by the Governor) from each congressional district in the State. N.C. Const. of 1868, art. IX, § 8 (1942); 1941 N.C. Sess. Laws 151.

17. According to Article IX, § 8, as amended, “[t]he general supervision and administration of the free public school system, and of the educational funds

provided for the support thereof,” were vested in the State Board. The Board succeeded to all powers and trusts of the State Board as previously constituted (including those of the President and Directors of the old Literary Fund) and also was given authority to “divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of text books to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto.” N.C. Const. of 1868, art. IX, § 9 (1942). The State Board’s powers remained expressly “subject to such laws as may be enacted from time to time by the General Assembly.” *Id.* In addition, the State Board was required to appoint a comptroller (subject to approval by the Governor), who under the direction of the Board would supervise and manage the Board’s fiscal affairs. The State Board also was instructed to elect its own chairman and vice-chairman. *Id.*, art. IX, § 8.

Superintendent

18. The 1942 amendments did not change the Article III provisions relating to the Superintendent. Article III, § 13 continued to state that the Superintendent’s duties would be “prescribed by law,” and Article III, § 14 continued to state that he would be a member of the Council of State. The amendment to Article IX provided that the Superintendent would remain secretary to the State Board and, somewhat confusingly, stated that he would “have general

supervision of the public schools” – while at the same time stating that “[t]he general supervision and administration of the free public school system, and of the educational funds provided for the support thereof,” were vested in the State Board, which also was given the power to “make all needful rules and regulations” regarding administration of the public school system. *Id.*, art. IX, §§ 8-9.

19. There was nothing in the 1942 amendments to suggest that the Superintendent had any constitutional powers or duties independent of the State Board, other than (as before) the right to be a member of the Board, its secretary, and a member of the Council of State. Starting in 1942, Article IX, § 8 briefly assigned the Superintendent “general supervision of the public schools,” but his specific duties were still to be “prescribed by law.” N.C. Const. of 1868, art. III, § 13 (1942). The State Board was more broadly vested with “general supervision and administration of the free public school system, and of the educational funds provided for the support thereof.” *Id.*, art. IX, § 8. The Board also retained the power to “make all needful rules and regulations” regarding administration of the public school system. *Id.*, art. IX, § 9. Moreover, the 1942 provision requiring the appointment of a Board-selected and Board-supervised comptroller meant that whatever supervisory powers the Superintendent might be given, they could not include “supervision and management of the fiscal affairs of the board.” *Id.*

State Board

20. Article IX, § 8 was soon amended again, with approval by the voters in 1944. 1943 N.C. Sess. Laws 468. The new language provided that the State Board would be comprised of the Lieutenant Governor, Treasurer, Superintendent of Public Instruction, and ten members appointed by the Governor (eight of whom were to be appointed from eight educational districts and two at-large). N.C. Const. of 1868, art. IX, § 8 (1944). The Board-appointed position of comptroller that had been constitutionally mandated in the 1942 amendments was eliminated from the Constitution, *id.*, although the State Board, pursuant to statute, continued to employ a controller to manage its fiscal affairs for some years afterwards. The list of State Board powers and duties contained in the 1942 amendments remained intact, including the power “generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto” – subject, as before, to laws enacted by the General Assembly. *Id.*, art. IX, § 9.

Superintendent

21. Article III, § 13 continued to state that the Superintendent’s duties would be “prescribed by law” and Article III, § 14 continued to state that he would be a member of the Council of State. The confusing 1942 language giving the Superintendent “general supervision of the public schools” was eliminated. N.C. Const. of 1968, art. IX, § 8 (1944). Article IX now stated simply that the

Superintendent “shall be the administrative head of the public school system and shall be secretary of the board.” Art. IX, § 8.

CONSTITUTION OF 1971

22. By the late 1960s, the Constitution of 1868 had been modified by 69 separate amendments and was in some respects becoming unwieldy. Some amendments had not been as comprehensive as they should have been to avoid internal inconsistencies, and some obsolete and invalid provisions had been allowed to remain in the Constitution. There was some concern among North Carolina’s political leaders that a 100-year-old constitution might not be well-adapted to a future that they accurately predicted would be characterized by rapid change on many fronts.

23. On October 27, 1967, then-Governor Dan Moore made a speech to the North Carolina State Bar in which he urged the Bar to sponsor a study “to review the State Constitution in the light of present and future demands upon State Government” and to “consider revising or even rewriting it.” In response, the State Bar and the North Carolina Bar Association formed a joint steering committee to plan such a study.

24. By March 1968, the steering committee had established the 25-member North Carolina State Constitution Study Commission referred to in paragraph 4 above as a joint agency of the State Bar and the Bar Association. The Commission was directed to report to those entities by December 16, 1968, so that

any recommendations it might make could be transmitted to the Governor and the General Assembly of 1969.

25. At its first meeting, on April 5, 1968, the Commission chose former Chief Justice of the North Carolina Supreme Court Emery Denny as its chairman and engaged the Institute of Government as its professional staff. As indicated above, I was the staff director.

26. The Commission's initial meetings were devoted to gaining a general orientation to its task, the organization of committees, and a public hearing held on May 31, 1968. By this time, it had become apparent to the Commission and its staff that the only practical way to update the Constitution was to rewrite the whole document. It was generally assumed that all of the needed revisions could be incorporated into a single, revised Constitution that could be approved or disapproved by a single vote. There was some concern, however, that presenting numerous changes in a single package carried with it an inherent danger – *i.e.*, the possibility that voter resistance to one or only a few controversial changes might lead to the rejection of numerous needed and non-controversial changes. Faced with this dilemma, the Commission decided to defer a decision on exactly how to proceed until it had considered the matter further.

27. Following the May 31 meeting, the Commission's various committees went to work developing proposed constitutional language. The full Commission came together again in the fall. At its October 11, 1968, meeting, the Commission approved a proposal from Chairman Denny to (1) submit one amendment setting

forth a revised Constitution that would reflect all of the editorial and non-controversial substantive changes that the Commission wanted to recommend, and (2) submit a series of perhaps six or eight other amendments, each embodying a potentially controversial recommendation of sufficient importance that the General Assembly and the voters should be able to act on it without prejudice to or from other proposed changes.

28. The Commission's editorial committee quickly developed the text of the proposed constitution – the amendment considered relatively non-controversial – and reported it to the Commission on November 8, 1968, at which time it was reviewed, revised and tentatively approved. The editorial committee then took the several relatively controversial recommendations that had been tentatively endorsed by the Commission and grouped them into nine separate amendments. Each of the nine was drawn so that if it was approved by voters, it would take effect as an amendment to either the proposed constitution or the then-still-extant Constitution of 1868, depending on the fate of the proposed constitution.

29. On November 27, 1968, the Commission gave final, unanimous approval to the proposed constitution and also approved the other nine separate amendments proposed by the editorial committee. The proposed constitution and the separate amendments were then incorporated into the Study Commission Report referred to in paragraph 5 above. The Study Commission Report was presented to the State Bar and the Bar Association, which presented it to Governor Moore on December 23, 1968.

30. The Study Commission Report described the Commission's proposal for constitutional revision as follows:

[W]e were unwilling to follow the course of our predecessor commissions and incorporate all of our recommendations into a single revised constitutional text which the General Assembly and the voters would have to approve or disapprove as a unit. Included in our recommendations are some on which citizens of the State will differ strongly, as well as many on which we believe that virtually all informed citizens can agree. We believe that the legislator or voter should not be forced to take all of our proposed changes to get any of them; and conversely, that he should not have to vote against all of our proposals merely in order to register his opposition to one or two proposals with which he disagrees.

Consequently, 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 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. . . .

Each of the other nine amendments incorporates 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.

Study Commission Report, p. 4.

31. The General Assembly convened on January 15, 1969, and considered the package submitted by the Commission (as well as proposals originating within the legislature itself) during the months that followed. Ultimately, the General

Assembly ratified and presented to the voters for approval the proposed constitution and six separate amendments. The voters approved the proposed constitution and five of the separate amendments at the general election held in November 1970, and the Constitution of 1971 became effective July 1, 1971.

32. The Constitution of 1971, as approved by the voters of North Carolina in November 1970, contained the following provisions, none of which has been changed since then:

Article III, Section 7. *Other elective officers.*

(1) *Officers.* A Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance shall be elected by the qualified voters of the State

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

Article III, Section 8. *Council of State.*

The Council of State shall consist of the officers whose offices are established by this Article.

Article IX, Section 4. *State Board of Education.*

(1) *Board.* The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session.
. . . .

(2) *Superintendent of Public Instruction.* The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.

Article IX, Section 5. *Powers and duties of Board.*

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support,

except the funds mentioned in Section 7 of this Article [the county school fund], and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

33. The text of each of the constitutional provisions quoted in paragraph 32 is identical to the language in the proposed constitution submitted by the Commission.

34. The Study Commission Report's commentary on Article III of the proposed constitution stated, among other things, the following:

Article III of the proposed constitution, while reorganized and abbreviated by the omission of repetitive, legislative-type, and executed provisions, contains few substantive changes of note.

Study Commission Report, p. 31.

35. The Study Commission Report's commentary on Article IX of the proposed constitution stated, among other things, the following:

Proposed Sec. 4(1) modifies the State Board of Education slightly by eliminating the Superintendent of Public Instruction as a voting member of the Board while retaining him as the Board's secretary and chief administrative officer. He is replaced as a member by an additional at-large appointee. . . . The Superintendent of Public Instruction will continue to be popularly elected, as required by Art. III, § 7(1). A potential conflict of authority between the Superintendent and the Board is eliminated by making clear that he is the administrative officer of the Board (Sec. 4[2]), which is to administer the public schools (Sec. 5).

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.

Study Commission Report, p. 34.

36. As can be seen from the constitutional text and commentary cited above, the composition of the State Board under the current Constitution includes the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor. It does not include the Superintendent. The State Board continues to have the power and duty to “supervise and administer the free public school system and the educational funds provided for its support” and to “make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.” N.C. Const. art. IX, § 5.

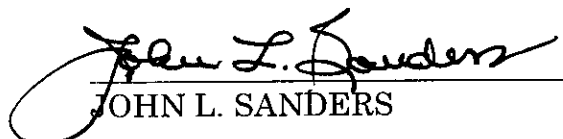
37. Under the Constitution of 1971, the Superintendent remains a constitutional officer whose “duties shall be prescribed by law” and a member of the Council of State. *Id.*, art. III, §§ 7-8. She is no longer a member of the State Board. *Id.*, art. IX, § 4(1). And instead of being identified as “administrative head” of the *public school system*, as under the most recent version of the Constitution of 1868, the Superintendent is now identified as “chief administrative officer” of the *State Board*. *Id.*, art. IX, § 4(2). As noted in the commentary to the Study Commission report cited in paragraph 35 above, this change was made to eliminate any conflict of authority between the Superintendent and the State Board – in other words, to make it clear that the Board administers the schools and the Superintendent works for the Board.

38. In summary, it is my opinion that an examination of North Carolina’s constitutional history, and in particular the Constitutions of 1868 and 1971, as they

evolved over the years, leads to the following conclusions regarding the State Board of Education and the Superintendent of Public Instruction:

- Since 1868, when the constitutional office of Superintendent of Public Instruction was created, the North Carolina Constitution has always provided that the duties of the Superintendent would be “prescribed by law.”
- “Law,” in this sense, refers both to enactments of the General Assembly and to rules and regulations adopted by the State Board with respect to its supervision and administration of the public school system, inasmuch as the Constitution, since 1868, has always empowered the Board to make such rules and regulations.
- Prior to 1942, the Superintendent had no *constitutionally* stated role in the public school system other than member of and secretary to the State Board. His only other duties, at least with respect to the public schools system, were those assigned to him by the General Assembly or the Board.
- Although the 1942 and 1944 amendments to Article IX of the Constitution of 1868 included language generally identifying the Superintendent as a significant administrative officer within the public school system, the Superintendent’s powers were never independent of the State Board’s authority to supervise and administer the public school system.
- The Superintendent’s constitutionally stated powers were diminished by the Constitution of 1971, which removed the Superintendent from voting member status on the State Board and made the Superintendent’s position expressly subordinate to the Board.

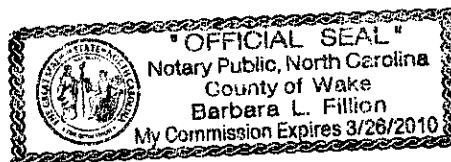
This is the 12 day of June, 2009.


JOHN L. SANDERS

Sworn and subscribed to before me,
this the 12th day of June, 2009.


NOTARY PUBLIC

My Commission Expires: 3/26/2010



CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **AFFIDAVIT OF JOHN L. SANDERS** in the above titled action upon all other parties to this cause by:

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

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

This the 19th day of June, 2009.



Mark A. Davis
Special Deputy Attorney General