

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 15607

FILED
2017 APR 12 P 3:02
NORTH CAROLINA STATE
BOARD OF EDUCATION,
Plaintiff,
v.
STATE OF NORTH CAROLINA and
MARK JOHNSON, in his official capacity,
Defendants.

**AFFIDAVIT OF NORTH CAROLINA
SUPERINTENDENT OF PUBLIC
INSTRUCTION MARK JOHNSON**

Mark Johnson, after being duly sworn, deposes and states the following:

1. While serving as a teacher at West Charlotte High School, I witnessed the struggles our students face both inside and outside of the classroom. My experiences in the classroom ultimately motivated me to seek elected office to work towards the improvement of our public schools. In 2014, I ran for and won a seat on the Winston-Salem/Forsyth County Board of Education. My work on a local school board focused on helping students overcome the achievement gap, but I also was on the front line of the frustrations of all parents, teachers, students, and school leaders. The need for many changes for our public schools became apparent: better professional development and support for teachers and principals, authentic review of state standards, calendar flexibility, genuine support of good local leaders, and a host of other policies necessary for the improvement of our public schools in North Carolina.
2. On November 8, 2016, the voters of North Carolina elected me as their next Superintendent of Public Instruction to bring the changes I promoted during our campaign.
3. I took the oath of office and arrived in Raleigh on January 2, 2017, with the intent of instilling the values of urgency, ownership, and innovation in the Department of Public

Instruction (hereinafter referred to as “DPI”) to transform the culture and vision of DPI, as per the will and intent of North Carolina voters. Unfortunately, I have learned that the authority of the Superintendent of Public Instruction is severely limited by the past statutory provisions and by the policies and practices of the North Carolina State Board of Education (hereinafter referred to as the “State Board”). The impacts of these provisions and policies are especially evident in the staffing of DPI, which I will discuss in further detail. The end-result of these policies and practices is that the voters’ intent of bringing positive change to DPI to better support our public schools, the reason North Carolina voters elected me, can and has been blocked by the State Board due to the current injunction.

4. The duties of the State Board and the Superintendent of Public Instruction are set forth in N.C.G.S. § 115C-12 and N.C.G.S. § 115C-21. The language of N.C.G.S. § 115C-21(a)(1) *prior* to the passage of HB 17 stated that the Superintendent of Public Instruction could make all appointments of administrative and supervisory personnel to the staff of DPI. However, the language of N.C.G.S. 115C-21(a)(1) *prior* to the passage of HB 17 also *restricted* such authority of the Superintendent of Public Instruction by stating that all appointments were “subject to the approval of the State Board of Education.”

5. The State Board sets forth its procedures and authority through its own board policies. Importantly, SBOP-011 outlines certain operations and responsibilities of the State Board. **See Attachment A, SBOP-011.** Also, the State Board has instituted a policy delegating only certain, qualified powers and duties from the State Board to the Superintendent of Public Instruction. **See Attachment B, SBOP-013.** These policies *further restrict* the authority of the Superintendent of Public Instruction and divide DPI staff into three categories: State Board Office, “dual reports,” and staff reporting to “dual reports.”

6. First, in SBOP-011, the State Board granted itself the power to create advisory and support positions “accountable and responsible” only to the State Board. These include an Executive Director, Assistant Executive Director, Legislative Liaison/Policy Analyst, Board Staff Attorney, Board Staff Paralegal, Clerical Staff, and unlimited “other staff as approved by the State Board of Education.” Upon information and belief, there are roughly 14 positions in the State Board Office today. The North Carolina Constitution, Article IX, Section 4(2) states that the Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board; however, the staff for the State Board Office primarily handles the State Board communications, schedule, agenda, and policies. The Superintendent of Public Instruction has absolutely no authority or role in the selection or hiring of these State Board Office positions.

7. Second, in paragraph 4 of SBOP-013¹, the State Board identifies ten leadership positions in DPI that are “accountable and responsible” to the Superintendent of Public Instruction *and* the State Board (hereinafter “dual reports”). These ten positions include the Deputy State Superintendent, Chief Financial Officer, Chief of Staff, and Director of Communications. While SBOP-013 describes dual reports as accountable to both the State Board and Superintendent of Public Instruction, SBOP-011 states that the State Board shall make the *final* employment decisions respecting dual reports.

8. As an example of the dual reporting relationship causing confusion both inside and outside DPI, on January 5, 2017, DPI sent out a press release to its list serve with a statement from attorneys for the State Board, Bob Orr and Drew Erteschick, stating “we are pleased that

¹ EEO-C-013, *Policy delineating the delegation of authority from the State Board of Education to the Superintendent of Public Instruction and to the Chief Executive Officer*, appears to be a precursor to the current language of SBOP-013. EEO-C-013 granted the Chief Executive Officer for the State Board the authority “to manage the Department of Public Instruction on a day-to-day basis subject to the direction, control, and approval of the State Board.” The policy also required this CEO to report “all employment requests for the positions of director and above to the State Board, which shall make the employment decision.”

the legislation continues to be blocked, and that the *status quo has been maintained* for the Board, the public school system, and North Carolina's 1.5 million students" and highlighting the extension of the temporary restraining order. (*Emphasis added*). Upon information and belief, the Director of Communications, a dual report, was instructed to send out the press release by the State Board, a single member of the State Board, or staff for the State Board. I, the duly elected Superintendent of Public Instruction, was not informed of the release before it was sent. I only saw the release because I subscribe to the DPI list serve.

9. Lastly, under SBOP-013, while the Superintendent of Public Instruction has the delegated authority to approve, upon the recommendation of a dual report, all agency employment decisions for the positions of "Director" and below that report to a dual report, any disagreement between the Superintendent of Public Instruction and such dual report shall be reported to the State Board, which shall provide *final* resolution to the disagreement.

10. The cumulative effect of SBOP-011 and SBOP-013 severely hinders the authority of the Superintendent of Public Instruction to appoint staff of DPI. While other members of the Council of State may designate and hire for at least 20 exempt policymaking and 20 exempt managerial positions, as NC Superintendent of Public Instruction, I could hire only three confidential assistants and one exempt policymaking position in January. ***See N.C.G.S. § 126-5(d)(2).***

11. SBOP-011 outlines a specific process by which (i) the Chairman of the State Board shall report all the Superintendent of Public Instruction's requests to hire or promote dual reports to the State Board, and then (ii) the State Board shall make the final employment decisions respecting those positions. However, this policy does not reflect actual State Board processes. Upon information and belief, as opposed to evaluating a recommendation from the

Superintendent of Public Instruction, the State Board has routinely elected to appoint “*ad hoc* committees” comprised of board members and the Superintendent of Public Instruction to identify and evaluate potential candidates for dual reports.

12. Pursuant to the statutory authority contained in N.C.G.S. § 115C-21(a)(1) and the policy language contained in SBOP-011, I made a request in January 2017 to the Chairman of the State Board to hire a certain candidate who shares in my vision for North Carolina public education as my Chief Financial Officer of DPI, a dual report. The Chief Financial Officer manages the state and federal funds for public education that pass-through DPI and oversees financial services, school business, and support for school operations, school facility planning and operation, school nutrition services, and teacher licensure. The position of Chief Financial Officer is critical in implementing the changes on which I campaigned across the state of North Carolina. I selected a candidate who would have been a positive change agent for DPI.

13. Instead of voting to approve or disapprove my recommended candidate, the State Board chose to post an advertisement for the position and have an *ad hoc* committee comprised of the Chairman of the State Board and the Chair of the Business Operations Committee interview new internal and external candidates who applied for the position. The *ad hoc* committee then made *their own* recommendation to the full State Board. The full State Board voted to approve the *ad hoc* committee’s recommended candidate, who previously served as former Superintendent June Atkinson’s Chief of Staff.

14. The State Board did not follow its own policy nor did it hire a positive change agent. The State Board promoted more of the same after I was voted into office by the people of North Carolina to bring change to the financial management of DPI.

15. With the Chief of Staff position vacant, I asked the Chairman of the State Board in early March to remove the Chief of Staff position as a dual report and to permit me to select my own candidate for the position. The Chief of Staff serves as the *primary* point of contact for district leaders, charter school leaders, community leaders, members of the press, the Office of the Governor, and the University and Community Colleges Systems. The Chief of Staff also coordinates major initiatives for DPI and directs cross-agency work and program development. At this point in time, the State Board has made no change to the dual reporting structure for the Chief of Staff, and the Chairman of the State Board has informed me that the State Board has no intention to make such a change. As a result, I am still forced by the State Board to operate DPI without a Chief of Staff while the State Board defines the process by which they will hire a Chief of Staff.

16. The previous Deputy State Superintendent gave her notice of retirement in November 2016. I stood ready to hire a Deputy State Superintendent immediately upon the retirement of the previous Deputy State Superintendent in February 2017. Again, instead of voting on my recommendation, the Chairman of the State Board created another *ad hoc* committee to handle the hiring of a Deputy State Superintendent. While I am attempting to work with the State Board to fill this vacancy, it has taken months to agree on a job description, advertise, coordinate schedules, and interview candidates. Meanwhile, agency resources have been stretched extremely thin without a Deputy State Superintendent or Chief of Staff to help with the demands of operating DPI and responding to requests of the General Assembly, local school leaders, stakeholders, and constituents.

17. I alone cannot carry out my platform and ensure DPI provides the necessary support to our local school districts. In order to affect change, I need the authority to hire staff to

help carry out these goals. If I do not have the authority to direct agency resources, organize agency staff, and manage agency activities, I cannot make the changes the voters of North Carolina elected me to make.

18. The recent vacancies at DPI have created both the need and the opportunity to re-evaluate some of the reporting structures within the agency. Under the existing structure established by the State Board and former Superintendent June Atkinson, a total of almost 20 dual reports or direct reports report to me. Few institutional leaders would choose to structure their organization this way. In January, I made recommendations to the Chairman of the State Board for revisions to the organizational structure of DPI. Again, the Chairman created an *ad hoc* committee to recommend organizational changes of DPI to the full State Board. Despite my recommendations in January, there has been no decision or action by the State Board.

19. The need for the State Board to approve who various directors and sections chiefs report to has resulted in months of delay, interim organizational plans, and a lack of clarity for agency staff and local school districts.

20. Having both the State Board and the Superintendent of Public Instruction – up to 14 individuals in total – involved in the day-to-day management of DPI slows decision making to a crawl and makes it difficult to implement any changes or be responsive to the needs of the education community. DPI should be able to evolve, quickly if necessary, to serve immediate needs, support local districts, acknowledge shifts in state and federal resources, and take advantage of opportunities to innovate for public education. The full State Board meets in Raleigh an average of one and one-half days each month. I'm at DPI every week, but the staff and the agency must wait for the State Board to finalize what are frequently time-sensitive decisions.

21. While the State Board has delegated certain, qualified duties to the Superintendent of Public Instruction in the past, recent policy changes demonstrate that the State Board does intend to exert even greater oversight of the day-to-day management of DPI. SBOP-013 previously delegated to the Superintendent of Public Instruction the duty to execute agency contracts approved by the Chief Financial Officer and to report these contracts to the State Board monthly. On December 1, 2016, the State Board instituted a new policy on contract procedures. **See Attachment C, CNTR-002.** Under this new policy, all proposed and pending contracts shall also be reported to the State Board monthly, and State Board members may request additional information or a presentation on any executed or proposed contract from the Superintendent of Public Instruction or the Superintendent's designee. Presumably, this provides the State Board with the opportunity to comment on or influence contracts before they are signed.

22. Furthermore, save for the formally noticed meetings of the State Board each month where formal actions are taken, it is not the full State Board being briefed and speaking on internal issues, but only a few select members of the State Board or State Board staff.

23. As an elected official, I am accountable to the voters of North Carolina. My name was on the 2016 statewide ballot. I am the duly-elected constitutional officer, vested with authority under N.C. Constitution, Article IX, Section 4(2) to serve as the secretary and chief administrative officer of the State Board of Education. The Superintendent of Public Instruction should not be denied the authority to serve as the administrative head and to manage the day to day administration of DPI.

24. None of the voters in North Carolina voted for 11 of the 13 voting members of the State Board. These members have no accountability to the voters of North Carolina. I firmly believe that the General Assembly, the elected body closest to the voters, has every right to

revise a statute so that the North Carolina Superintendent of Public Instruction has the right to manage the day to day of DPI.

FURTHER, Affiant sayeth not.

This the 12th day of April, 2017.



Mark Johnson
North Carolina Superintendent of
Public Instruction

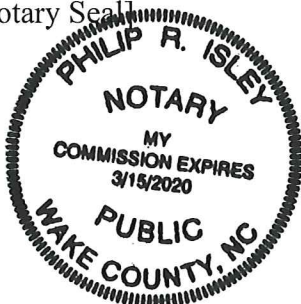
Sworn to and subscribed before me,
this the 12th day of April, 2017.



NOTARY PUBLIC

My Commission Expires: 3/15/2020

[Notary Seal]



CERTIFICATE OF SERVICE

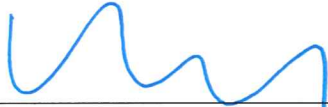
The undersigned hereby certifies that a copy of the foregoing **Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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This the 12th day of April, 2017.



Philip R. Isley

Attachment A

Responsibilities of the SBE in supervising/administering the public school system of NC and the funds provided for its support

Item	Description
Policy Title	Responsibilities of the SBE in supervising/administering the public school system of NC and the funds provided for its support
Policy Category	SBE/DPI Operation (SBOP)
Policy ID	SBOP-011
Policy Date	2014-02-06
Previous Policy Dates	02/03/2004, 09/03/2009
Statutory Reference	GS 115C-12; GS 115C-21; NC Constitution, Article IX, Section 4 and 5

Formerly TCS-C-011

POLICY STATEMENT - OPERATION AND RESPONSIBILITIES

The Constitution of the State of North Carolina provides that the State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support. In order to carry out these constitutional duties, the State Board of Education believes it is necessary to outline in policy the various responsibilities associated with this mandate. Accordingly, the State Board of Education, as a matter of policy, delineates the following responsibilities:

1. The State Board of Education shall set all policies of the state of North Carolina regarding public education and shall supervise and administer the free public school system.
2. The State Board of Education shall have general supervision and administration of all public education funds provided by both state and federal government, including all prior year refunds, except as outlined in Section 7, Article IX of the State Constitution.
3. The State Board of Education shall accept and receive, use and reallocate to local administrative units federal grants and funds.
4. The State Board of Education shall have final authority for applying for federal funds or federal aid related to any phase of North Carolina's free public school system. Any expenditure of these funds shall be under the final authority of the State Board of Education.
5. The State Board of Education shall have authority to accept and disburse any private grants or funds.
6. The Chairman of the State Board of Education, in consultation with the State Superintendent and other Board members, shall set the agenda for each State Board of Education meeting.
7. The Chairman of the State Board shall meet regularly with the Superintendent and review the implementation of all the Department of Public Instruction's obligations under state and federal laws and State Board policies.
8. The Chairman of the State Board shall report all of the Superintendent's requests to hire, promote, terminate, discipline, reduce-in-force, increase or decrease the salary of or otherwise change the terms or conditions of employment of candidates for or persons employed in the positions listed in TCS-C-013, paragraph 4, to the State Board, which shall make the final employment decisions respecting those positions.
9. The State Board may create the following advisory and support positions which shall report to and be accountable and responsible to the State Board:

A. Executive Director;

- B. Assistant Executive Director;
- C. Legislative Liaison/Policy Analyst;
- D. Board Staff Attorney;
- E. Board Staff Paralegal;
- F. Clerical staff; and
- G. Other staff as approved by the State Board of Education.

10. The Superintendent shall execute those powers and perform those duties delegated to the Superintendent in TCS-C-013.

Attachment B

4/11/2017

Delegation of Authority from the State Board of Education to the Superintendent of Public Instruction — NC State Board of Education

Delegation of Authority from the State Board of Education to the Superintendent of Public Instruction

Item	Description
Policy Title	Delegation of Authority from the State Board of Education to the Superintendent of Public Instruction
Policy Category	SBE/DPI Operation (SBOP)
Policy ID	SBOP-013
Policy Date	2016-12-01
Previous Policy Dates	01/08/1997, 06/05/1997, 09/04/1997, 10/04/1997, 11/06/1997, 12/04/1997, 03/05/1998, 11/05/1998, 10/07/1999, 12/06/2001, 12/04/2003, 05/06/2004, 09/02/2004, 02/01/2007, 03/04/2009, 09/03/2009, 02/06/2014, 11/06/2014, 09/03/15, 08/04/16, 09/01/2016

Formerly TCS-C-013

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

In accordance with these and other applicable laws, the State Board of Education (the State Board) hereby adopts these policies for the purposes of delegating certain powers and duties to the State Superintendent of Public Instruction (the State Superintendent). The State Board may add to or remove from the delegated powers and duties as it may deem appropriate for the effective and efficient implementation of the State Board's authority. The State Board may further modify or repeal these policies at any time the Board deems such action appropriate. Except as described herein, the State Board retains all powers and duties regarding the general supervision and administration of the North Carolina free public school system and the Department of Public Instruction.

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

1. To comply with, execute, and administer the policies of the State Board of Education;
2. To keep the public informed of the problems and needs of the public schools as identified by the State Board;
3. To advise the State Board promptly and fully about problems and issues concerning the uniform system of free public schools, the education of the State's children, and the Department of Public Instruction;
4. To organize and manage the Department of Public Instruction on a day-to-day basis subject to the direction, control, and approval of the State Board, provided:

The following positions in the Department of Public Instruction shall be responsible for the administration of the day-to-day operations of their respective divisions, sections and programs and shall exercise their responsibilities consistent with State Board policies and through the Superintendent and shall be accountable and responsible to the Superintendent and the State Board of Education:

- A. Deputy State Superintendent;
- B. Chief Financial Officer;
- C. Chief Information Technology Officer;
- D. Chief Academic and Digital Learning Officer;
- E. Chief of Staff;

- F. Director of Communication and Information Services;
- G. Director of Human Resources;
- H. Internal Auditor;
- I. Executive Director of the Office of Charter Schools; and
- J. Superintendent, Achievement School District

5. To approve, upon the recommendation of the Officer or Director listed in paragraph 4, all agency employment decisions for the positions of Director and below in their respective divisions, sections, and programs, which approvals the Superintendent shall report to the State Board, provided that any disagreement between the Superintendent and the Officer or Director shall be reported to the State Board which shall resolve the disagreement;

6. To execute all contracts entered into by the State Board pursuant to the State Board's Contract Procedure policy, to report these contracts to the State Board monthly as information, and to report proposed contracts, including but not limited to proposed new contracts and contract amendments, to the State Board monthly as information in accordance with the Contract Procedure policy. State Board members may request additional information or a presentation on any executed or proposed contract from the Superintendent or Superintendent's designee;

7. Upon recommendation by the Chief Financial Officer, to determine on behalf of the State Board the annual premium rate to be charged for insurance of school properties as provided by Article 38 of Chapter 115C of the North Carolina General Statutes and to report these rates to the State Board as information;

8. To execute and issue for and on behalf of the State Board documents signifying compliance with State law or State Board policies or rules relating to licenses for principals, teachers, and all other school personnel required to have licenses;

9. To initiate investigations to determine whether reasonable cause exists to suspend or revoke or take other disciplinary actions regarding licenses issued by the State Board, and prepare and file written charges with the State Board;

10. To settle cases relating to license suspension and revocation upon the advice and counsel of Department of Justice lawyer(s) and Department of Public Instruction and State Board staff members; and

11. Upon the receipt of a written request for reinstatement of a suspended or revoked license or for granting a new license after denial of a license, together with substantiating information, to conduct an investigation sufficient to determine whether reasonable cause exists to reinstate the license or to grant a new license and prepare and file a written recommendation concerning the request with the State Board.

Attachment C

4/11/2017

Contract Procedure — NC State Board of Education

Contract Procedure

Item	Description
Policy Title	Contract Procedure
Policy Category	Contracts and Grant (CNTR)
Policy ID	CNTR-002
Policy Date	2016-12-01

The following minimum procedures apply to all contracts entered into by the State Board of Education. The Superintendent, in exercising the duties regarding contracts delegated by the State Board pursuant to the State Board's Delegation of Authority from the State Board of Education to the Superintendent of Public Instruction policy, shall ensure compliance with this policy and all applicable North Carolina and federal laws. For purposes of this policy, the term "contract" means all written agreements that must be processed through the Department of Public Instruction Purchasing and Contracts Section, including but not limited to UNC Task Orders; contracts subject to the requirements of Article 3 of Chapter 143 and Article 15 of Chapter 143B of the General Statutes; and all amendments thereto. The term "contract" does not include memorandums of agreement, data sharing agreements, grants, or similar documents.

General Requirements:

1. All contracts must comply with all applicable State procurement laws, rules, and regulations, including those set forth in Article 3 of G.S. Chapter 143, Article 15 of G.S. Chapter 143B, and the North Carolina Administrative Code.
2. All requests for any type of contract must be preceded by an Intent to Contract approval form with proper signatures indicating internal approval and availability of funds.
3. No contract, regardless of amount, shall be entered into for more than three (3) years without prior approval from the Department of Administration Division of Purchase and Contract or Department of Information Technology, where such approval is required.
4. All contracts must have beginning and ending dates.
5. All contracts must include a not-to-exceed clause limiting the maximum expenditure for the term of the contract.
6. Where required by law, policy, or regulation and otherwise to the extent practicable, all contracts must be competitively bid.
7. To the extent practicable, all contracts should contain a payment plan that stipulates payments be made across at least three intervals and, for deliverable-based contracts, that payments shall not be made prior to completion and acceptance of deliverables.
8. All contracts must be in writing and:
 - a. Must be approved by the Chief Financial Officer and the Superintendent.
 - b. Must be signed by the Superintendent if the contract has an annual value of \$25,000.00 or above.
 - c. Must be signed by the Superintendent or Superintendent's designee if the contract has an annual value below \$25,000.00.
9. All contractual agreements shall be governed by and subject to applicable North Carolina and federal laws.

Monthly Report to State Board

All signed contracts must be reported to the State Board monthly as information. In addition, all proposed and pending contracts, including but not limited to proposed new contracts and contract amendments, shall be reported to the State Board monthly as information. Proposed and pending contracts required to be reported under this section are limited to those contracts with an annual value of \$25,000.00 or above and public school cooperative purchasing agreements (as defined in S.L. 2015-241 Section 8.14(b)).

State Board members may request additional information or a presentation on any executed or proposed contract from the Superintendent or Superintendent's designee.

