STATE OF NORTH CAROLINA

COUNTY OF HALIFAX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 767

LATONYA SILVER, individually and as guardian ad litem of BRIANNA SILVER, LARRY SILVER III, and DOMINICK SILVER; BRENDA SLEDGE, individually and as guardian ad litem of ALICIA JONES; FELICIA SCOTT, individually and as guardian ad litem of JAMIER SCOTT; COALITION FOR EDUCATION AND ECONOMIC SECURITY; HALIFAX COUNTY BRANCH #5401, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs,

v.

THE HALIFAX COUNTY BOARD OF COMMISSIONERS

Defendant.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS AND MOTIONS TO STRIKE

Plaintiffs filed this action to vindicate the constitutional right of thousands of Halifax County schoolchildren to the opportunity for a sound basic education. Without any substantive analysis, Defendant Halifax County Board of Commissioners' (the "Board's") Motions to Dismiss and Strike (collectively, the "Motion") ask this Court to throw out a well-pled complaint brought on behalf of some of Halifax County's most vulnerable children. Because the Motion fails to meet even the Board's most basic burden, and because the Plaintiffs' Complaint withstands each of the Board's challenges in any event, the Motion must be denied.

I. PROCEDURAL HISTORY

Plaintiffs filed their Complaint on August 24, 2015, challenging the Board's maintenance of three separate, racially identifiable, and inequitably resourced school districts as a violation of Halifax County students' state constitutional right to the opportunity for a sound basic education. The Board requested and was granted an extension of time, and on November 2, 2015, filed its Answer, accompanied by the following putative motions: a Motion to Dismiss pursuant to Rule 12(b)(6) "as to the Entire Action"; a Motion to Dismiss pursuant to Rule 12(b)(6) "as to Attorney's Fees"; a Motion to Dismiss pursuant to Rules 12(b)(1), 9, and 17 as to Certain Plaintiffs; a Motion to Dismiss pursuant to Rules 12(b)(7) and 19 for Failure to Join Necessary Parties; and a Motion to Strike pursuant to Rule 12(f) the Introduction to the Plaintiffs' Complaint.

II. PLAINTIFFS' COMPLAINT SUFFICIENTLY STATES A CLAIM FOR RELIEF

When reviewing a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the court must "consider whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (citing *Coley v. State*, 360 N.C. 493, 494-95, 631 S.E.2d 121, 123 (2006)). North Carolina's pleading standard affords plaintiffs wide latitude, and complaints are "to be liberally construed." *State ex rel. Cooper v. Ridgeway Brands Mfg.*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008) (quoting *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997)). As the North Carolina Supreme Court has noted, a "trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Meyer*, 347 N.C. at 111-12, 489 S.E.2d at 888). A court may dismiss a complaint under Rule 12(b)(6) only if "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on

its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Hinson v. City of Greensboro*, 753 S.E.2d 822, 826 (N.C. App. 2014) (citing *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 2014 (2005)).

A. The Board Presents No Grounds, Argument or Authority in Support of its Rule 12(b)(6) Motion "As To Entire Action"

Defendant's Rule 12(b)(6) motion fails to comply with Rule 7(b)(1) of the North Carolina Rules of Civil Procedure and should therefore be dismissed. *Dusenberry v. Dusenberry*, 87 N.C. App. 490, 492, 361 S.E. 2d. 605, 606 (1987). Rule 7(b)(1) provides, in pertinent part: "An application to the court for an order shall be by motion which . . . shall be made by writing, shall state the grounds therefor, and shall set forth the relief or order sought." Despite Rule 7(b)(1)'s clear requirements, the Board's motion merely restates the rule under which it moves:

> The Defendant moves the Court to dismiss the complaint of the Plaintiffs, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, in that it fails to state a claim upon which relief can be granted, i.e., there is no law which supports the claim.

Motion at 1. As in the present case, the *Dusenberry* movant failed to state any grounds and merely cited the rule under which the motion had been brought. 87 N.C. at 492, 361 S.E. 2d. at 606. The court held that such a "bare bones" motion failed under Rule 7(b)(1), noting that "where court and adverse party cannot comprehend the basis of a motion, they are rendered powerless to respond to it." *Id.*

Even if the Board had complied with Rule 7(b)(1), it failed to carry its burden of proof, warranting denial of the motion. "The movant carries the burden of proof in a motion to dismiss for failure to state a claim." I R Const. Products Co. v. D.R. Allen & Son, Inc., 737 F. Supp. 895, 896 (W.D.N.C. 1990); *Neier v. State*, 151 N.C. App. 228, 233, 565 S.E.2d 229, 232 (2002) (it is

well-settled that "the movant has the burden of demonstrating that the action should be dismissed" when a motion is made under Rule 12(b)(6)). The Board presents no facts, argument, or analysis to accompany its restatement of Rule 12(b)(6), thereby failing to make even a minimal effort to satisfy its legal burden.

B. Plaintiffs' Allegations State a Claim Under the State Constitution

Setting aside the Board's failure to comply with Rule 7(b)(1) or carry its basic burden, the Board's motion should be denied because Plaintiffs' Complaint states a substantive claim on which relief can be granted. Plaintiffs' allegations, which must be taken as true at this stage of the litigation, properly state claims under our state constitution.

1. The Right to a Sound Basic Education

The North Carolina Constitution guarantees all children in the state an opportunity to receive a sound basic education. *See Leandro v. State ("Leandro I")*, 346 N.C. 336, 488 S.E.2d 249 (1997) (reversing grant of Rule 12(b)(6) motion); *Hoke County Bd. of Educ. v. State ("Leandro II")*, 358 N.C. 605, 599 S.E.2d 365 (2004) (affirming trial court's order holding that defendants had denied the "established right" to the opportunity for a sound basic education); *see also* N.C. Const. Art I, § 15; N.C. Const. Art. IX, § 2. In practice, this means that a public education system in North Carolina must be structured to provide children with certain skills and substantive knowledge.[1]

[1] Specifically, "[f]or the purposes of our Constitution, a 'sound basic education' is one that will provide the student with at least: (1) a sufficient ability to read, write, and speak the English language and sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) a sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices regarding issues that affect the student personally or that affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with

Courts determine whether a public education system meets this constitutional standard by assessing specific educational "inputs" and "outputs" identified by the Supreme Court. *See Leandro II*, 358 N.C. at 623, 599 S.E.2d at 381. Inputs are the educational resources provided to children in school, and they include, *inter alia*, the quality of teachers, administrators, programs, and curricula, as measured by "certifying standards," "accountability standards," and "funding allocation." *Id.* at 632, 599 S.E.2d at 386-87. At a minimum, every classroom must be "staffed with a competent, certified, well-trained teacher," and every school must be "led by a well-trained competent principal" and "provided, in the most cost effective manner, the resources necessary to support . . . the educational needs of all children[.]" *Id.* at 636, 599 S.E.2d at 389.

Outputs are the various measures of student performance. *Id.* at 622, 599 S.E.2d at 381. These include standardized test score data, student graduation rates, employment outcomes, and rates of success in post-secondary education. *Id.* With regard to standardized test scores, the Supreme Court has adopted a bright line rule: "Level III [grade-level] proficiency is the proper standard for demonstrating compliance with the *Leandro* decision." *Id.* at 625, 599 S.E.2d at 382.[2]

In addition to the inputs and outputs described above, the Supreme Court also considered the defendants' chosen "education delivery system" to determine whether students were receiving the ability "to avail themselves of an opportunity to receive a sound basic education." *Id.* at 632, 599 S.E.2d at 387. The Court concluded that the constitution required, at a minimum,

others in further formal education or gainful employment in contemporary society." *Leandro I*, 346 N.C. at 347, 488 S.E.2d at 259.

[2] Under guidelines set by the State Board of Education, students performing at Level III proficiency "consistently demonstrate mastery of the course subject matter and skills and are well prepared to be successful at a more advanced level in the content area." *Leandro II*, 358 N.C. at 624, 599 S.E.2d at 382. This level of proficiency corresponds to students who are "performing at grade level[.]" *Id.*

"a rational, comprehensive plan which strategically focuses available resources and funds towards meeting the needs of all children, including at-risk children, to obtain a sound basic education." *Id.* at 635, 599 S.E.2d at 389.

2. The Board Must Maintain an Education System that Does Not Impede Students' Opportunity to Receive a Sound Basic Education

To state a *Leandro* claim, a plaintiff must allege facts "that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system." *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 370, 731 S.E.2d 245, 253 (2012) (considering dismissal of *Leandro* claim based on allegations that district had failed to protect plaintiff's from sexual abuse by teacher). Plaintiffs' Complaint does just that— it establishes that the Board maintains a structure for public education in Halifax County that undermines the opportunity to receive a sound basic education. These allegations fall squarely within the *Leandro* framework and state claims upon which relief can be granted. *See generally* Compl. ¶¶ 26-124; Compl. Clm. 1 ¶¶ 1-5; Compl. Clm. 2 ¶¶ 1-5.

Plaintiffs allege that the Board's unnecessary maintenance of the three-district system undermines the academic performance of all Halifax County schoolchildren, significantly impedes those children's access to educational resources, and imposes a debilitating stigma upon students who are defined as "at-risk" under *Leandro*. Compl. ¶¶ 33-42; 210-223. All three districts consistently fail to meet the constitutional minimum of Level III proficiency on standardized tests.[3] Compl. ¶¶ 37-42. Plaintiffs further allege that the Board's chosen education system results in an unconstitutionally deficient level of educational resources provided to schoolchildren across Halifax County. Compl. ¶¶ 55-124; 210-223. Facilities languish in

[3] This fact alone establishes that Halifax County's educational system is constitutionally deficient; Plaintiffs have thus stated a claim on which relief can be granted. *See Leandro II*, 358 N.C. at 624, 599 S.E.2d at 382.

deteriorating and dangerous conditions, Compl. ¶¶ 57-72, teachers and principals lack necessary qualifications and experience, Compl. ¶¶ 73-106, and the quality and availability of classroom supplies, learning materials, curricula, and extracurricular activities suffer. Compl. ¶¶ 107-124. Additionally, the three-district system squanders educational resources and opportunities that might otherwise be available to students by incurring unnecessary, wasteful, and duplicative costs. Compl. ¶¶ 124-161.

These factual allegations establish the Board's violation of its constitutional obligation to exercise its authority over the three school districts in Halifax County in a manner that provides all students with the opportunity to receive a sound basic education. The Board's authority over the County's public schools includes the unilateral discretion to preserve, alter, or eliminate the current three-district structure. *See, e.g.*, N.C. Const., Art. IX, §§ 2, 7 (permitting the General Assembly to delegate certain responsibilities for public schools to local governments, and establishing county school funds); N.C.G.S. §§ 115C-68.1 (the Board has unilateral discretion to select and reorganize county school district structure), 115C-426(c) (the Board is required to provide for local public schools "in conformity with the educational goals and policies of the state"), 115C-431 (the Board is liable to school boards for failing to provide adequate funding to school districts), 115C-431(c) (the Board is required to provide for local public schools "in order to maintain a system of free public schools as defined by State law and State Board of Education policy"), 115C-408 ("facilities requirements" for public schools "will be met by county governments"), 115C-521 (the Board is responsible for providing school facilities, furniture, and apparatus), 115C-249 (the Board is responsible for providing buildings for bus and vehicle storage), 115C-522(c) (the Board is responsible for providing water supplies and sanitation facilities, as well as library, science, and classroom equipment, including instructional supplies

and books), 115C-524(b) (the Board is responsible for necessary maintenance of school buildings).

The Plaintiffs' Complaint pleads the necessary facts to state the constitutional claims asserted against the Board. The Board has presented no showing to the contrary. Pursuant to the 12(b)(6) standard of review, the Court should deny the Board's motion.

III. THE BOARD'S MOTION TO DISMISS UNDER RULE 12(B)(7) AND RULE 19 SHOULD BE DENIED, BUT IF A NECESSARY PARTY HAS NOT BEEN NAMED, THE APPROPRIATE REMEDY IS THE ADDITION OF ANY NECESSARY PARTY

Although the Board stressed the need to keep this case "simple" in opposing Plaintiffs' *pro hac vice* motions, it now seeks to complicate these proceedings by attempting to bring in a number of additional parties—the State and the three local school districts—whose presence is unnecessary to determine liability or to award the relief the Plaintiffs seek. In addition to being unnecessary, joining these parties would also distract from the narrow, straightforward question presented in the Complaint: whether the Board's maintenance of the three-district system impedes the provision of the opportunity for a sound basic education to students in Halifax County. The Board plays a crucial role in public education in Halifax County and remains the only entity in the state with unilateral authority to consolidate Halifax County's three racially-identifiable school districts. The Court should reject the Board's attempt to deflect its responsibility and deny the motion to dismiss the Complaint for failure to join necessary parties.

Even if the Court determines that there are other necessary defendants to this action, dismissal of the Complaint would be inappropriate. When reviewing a motion to dismiss for failure to join a necessary party pursuant to Rule 12(b)(7), the court "should determine if the absent party(ies) should be joined. If it decides in the affirmative, the court should order them brought into the action." *Godley Auction Co., Inc. v. Myers,* 40 N.C. App. 570, 573, 253 S.E.2d

362, 364 (1979). Contrary to the Board's requested relief, the proper remedy for lack of necessary parties is not to dismiss the action, but rather to allow for those parties to be brought into the action. *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978) ("Absence of necessary parties does not merit a nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead."); *Hardy ex rel. Hardy v. Beaufort Cnty. Bd. Of Educ.*, 200 N.C. App. 403, 408, 683 S.E.2d 774, 778 (2009) ("A trial court is in error when it dismisses a case because a necessary party has not been joined.").

There is, however, no reason to join any additional parties. The Board on its own has both full responsibility for the constitutional violations at issue and the unilateral power to rectify them. It is the Board's burden to establish that the State and the local school boards are necessary parties. "The burden of proof rests on the party raising the defense . . . to 'show that the person who was not joined is needed for a just adjudication." 7 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 1609 (3d ed.2001)." *American General Life and Acc. Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005).[4]

To determine whether a non-party is a necessary party, courts ask whether a complete determination of the controversy can be made in the non-party's absence. *Booker*, 294 N.C. at 156, 240 S.E.2d at 365-66 ("A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party."); *Thomas v. Thomas*, 43 N.C. App. 638, 643, 260 S.E.2d 163, 167 (1979) ("[T]he heart of the Rule lies in the proposition that all parties should be joined whose presence is necessary to a complete

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[4] The only state case Plaintiffs' counsel found regarding movant's burden under North Carolina's Rule 12(b)(7) is unpublished. *See Window World of St. Louis, Inc. v. Window World, Inc.*, No. 15 CVS 2, 2015 NCBC LEXIS 79, at * 2 & n.1 (N.C. Super. Ct. Aug. 10, 2015), attached hereto.

determination of the controversy."). This inquiry includes whether the relief sought can be awarded in the non-party's absence. *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1965) ("When a complete determination of the controversy cannot be made without the presence of a party, the court must cause it to be brought in . . . .").

Courts also consider whether the non-party has a material interest that will be directly affected by the outcome of the case, and whether the non-party will suffer prejudice in the absence of joinder. *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972); *Ludwig v. Hart*, 40 N.C. App. 188, 189-90, 252 S.E.2d 270, 272 (1979). A non-party does not become a necessary party simply by claiming a general interest in the outcome; the non-party must be so vitally interested that the case cannot be fully and finally determined without that person or entity. *See Crosrol Carding Dev., Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 452-53, 183 S.E.2d 834, 837-38 (1971) ("Carding Canada most assuredly has interests in this controversy, although its interests are not of such a nature as to render it impossible for the court to finally adjudicate the question of defendant's liability to plaintiff without Carding Canada's presence.").

A. All Necessary Parties Are Already Before the Court

1. <u>Plaintiffs' Requested Remedy Requires Only the Board as Defendant</u>

The Court can fully and finally determine liability and craft a remedy without the participation of either the State or the local school districts because the Complaint focuses squarely on the Board's unique, unilateral statutory authority and responsibility. Plaintiffs properly allege that the Board is responsible for structuring a public education system that delivers the opportunity to receive a sound basic education. Compl. ¶¶ 10, 22. Plaintiffs further allege that the Board's three-district system prevents Halifax County students from accessing that opportunity by delivering educational resources inefficiently and inequitably, and by

reinforcing a stigma of inferiority in the two black school districts. *Id.* ¶¶ 11, 16, 19, 31, 55, 74, 125-29, 161, 175, 211-14.

Plaintiffs do not seek to hold the State or the local school districts liable because the constitutional violation lies with the Board's maintenance of the three-district education delivery system, and the power to remedy that violation is within the Board's sole unilateral control. *See DeRossett v. Duke Energy Carolinas, LLC*, 206 N.C. App. 647, 660, 698 S.E.2d 455, 464 (2010) (non-parties were not necessary parties where the court's decision "ma[de] no attempt to determine the extent" of their rights or liabilities). This case is narrowly and properly focused on the Board's particular and critical role in providing the opportunity for a sound basic education. *See Gaither Corp. v. Skinner*, 238 N.C. 254, 256, 77 S.E.2d 659, 661 (1953) (holding that a plaintiff was entitled to pursue its action against a contractor without "having contested litigation between the contractor and his sub-contractor projected into the plaintiff's lawsuit"). The Court can resolve the question of the Board's liability without considering or adjudicating any issue regarding the State or the local school districts.

Plaintiffs' allegations establish the Board's vital role in delivering the opportunity for a sound basic education. In response, the Board's Motion merely lists a number of statutes and constitutional provisions generally describing the responsibilities of the State or the local school districts over certain school-related functions. MTD ¶¶ 9-13, 18. None of those provisions obviate, relieve, or otherwise impact the Board's essential education-related responsibilities at the core of this case, including funding school programs, allocating resources to schools, maintaining school facilities, setting the budget for the public school system, and structuring the county's system of public education. Compl. ¶¶ 10, 13-15, 22; *see* N.C. Const. art. IX, § 2

(funding); N.C. Const. art. IX, §7 (appropriation); N.C. Gen. Stat. § 115C-408 (facilities);[5] N.C. Gen. Stat. § 115C-426 (operating expenses); N.C. Gen. Stat. § 115C-68.1 (merger).

While any one of the entities with some designated responsibility for public education may independently undermine the provision of the opportunity for a sound basic education, this case is about the Board's failures—no one else's—and the Court can fully and finally determine the Board's constitutional liability and the appropriate remedy without joining the State or the local school districts.

2. The Board Can Unilaterally Provide the Remedy Plaintiffs Seek

The Board cannot and does not deny that it is the only entity with unilateral authority to provide the remedy Plaintiffs seek: consolidation of Halifax County's three racially-identifiable school districts. North Carolina General Statute § 115C-68.1 empowers the Board to adopt a plan for the consolidation of the three school districts in Halifax County. Tellingly, the statute provides that no other entity is permitted to be involved in the merger process: "[T]he county and city boards of education *shall not participate* by preparing, entering into, submitting, or agreeing to a plan, and the plan shall not be contingent upon approval of the voters."[6] *Id.* (emphasis added). This provisions is an integral part of a detailed statutory scheme that recognizes the primary role of the Board in structuring, funding, and maintaining the educational delivery

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[5] *See also* N.C. Gen. Stat. § 115C-521 (facilities, furniture, and apparatus needs); N.C. Gen. Stat. § 115C-249 (buildings for bus and other vehicle storage); N.C. Gen. Stat. § 115C-522(c) (library, science, and classroom equipment, including instructional supplies and books, as well as water supply and sanitary facilities); N.C. Gen. Stat. § 115C-524(b) (keeping school buildings in good repair); N.C. Gen. Stat. § 115C-534 (school property insurance); N.C. Gen. Stat. § 115C-525(b) (fire safety inspections).

[6] Although the statute requires final approval of the plan by the State Board of Education, this does not make the State a necessary party. *See Durham County*, 191 N.C. App. at 604 ("We do not, however, find the City of Durham to be a necessary party. Were the mandatory injunction to be granted, defendants would have to petition the City of Durham for a zoning grant to comply with the trial court's order, but even if the City were to deny such a petition, defendants could then come back before the trial court and argue an inability to comply.").

system in the county. The argument that the local school boards are necessary parties because they may lose "certain basic corporate rights" falls flat. *See* MTD ¶¶ 19, 21. As the statutory structure demonstrates, any alleged "corporate rights" that the school districts have related to this litigation derive from the Board, and continue only at the Board's discretion. *See, e.g.*, N.C. Gen. Stat. § 115C-518 (providing right of first refusal to boards of commissioners when boards of education dispose of real property); N.C. Gen. Stat. § 115C-530 (providing that operational leases entered into by boards of education for terms of three years or longer are subject to approval of boards of commissioners); N.C. Gen. Stat. § 115C-218.35 (providing that a board of commissioners "shall have the final decision-making authority on the leasing of the available building or land" when a charter school and local board of education cannot agree to terms for such a lease); *see also,* statutes cited at page 7 and footnote 5, *supra.*

The General Assembly has made a reasoned judgment that merger by the County Board of Commissioners not only does not require the participation of the local school boards, but specifically prohibits it. By contrast, the consolidation methods the Board references in support of its Motion require the direct involvement of various and multiple parties. *See* MTD ¶¶ 11, 22-23. Merger initiated by the local school boards must be approved by the Board, N.C. Gen. Stat. § 115C-67; and voluntary dissolution of a city school district requires that the State Board of Education draft the consolidation plan. N.C. Gen. Stat. § 115C-68.2. Those methods are irrelevant to the claims made and relief sought in this case.

The recently adopted state merger legislation, *see* MTD ¶ 16, underscores that the State is not a necessary party. The plain language of North Carolina General Statute § 115C-66.5 gives the State the right to merge *county school districts*, but not county and city school districts:

> Merger of *county school administrative units* by the State Board of Education. (a) Consolidation and Merger. – The State Board of Education shall have the authority to consolidate and merge *contiguous county school administrative units* or a group of county school administrative units in which each county unit is contiguous with at least one other county unit in the group.

Id. (emphasis added).

By its express terms, this statute has no bearing on, and gives the State Board of Education no power to effect the merger of city and county school districts. Far from suggesting that "it is the public policy of the State of North Carolina that the three districts in Halifax County remain as such," MTD ¶ 16, this statute, especially when read *in para materia* with N.C. Gen. Stat. § 115C-68.1, reflects the General Assembly's considered judgment that the county is the primary local jurisdictional boundary regarding education delivery systems, and that crossing county lines (to create inter-county districts) would require state action. Conversely, the new statute also implicitly recognizes that when it comes to uniquely intra-county issues like the merger of city and county school districts, the Board of County Commissioners—not the State—has primary authority and responsibility. The merger statute confirms that, had the State wanted to take control of intra-county mergers, it could have done so.

Requiring the joinder of the State or the local school districts is not only unnecessary to resolve the issues presented in the Complaint, but will also waste public and judicial resources. Plaintiffs' claims and basis for liability are correctly limited to the Board. The presence of these unnecessary parties will only distract from and delay resolution of the narrow question before the Court: whether the Board's maintenance of three racially-identifiable school districts undermines the provision of the opportunity for a sound basic education. The Board has failed to meet its burden to establish that the State and the local school boards are necessary parties, and its Rule 12(b)(7) motion should be denied. Alternatively, if the Court determines that additional parties

are necessary to this litigation, the appropriate remedy is to provide Plaintiffs the opportunity to join those parties, not dismissal of the Complaint.

IV. THE MOTION TO DISMISS UNDER RULE 12(B)(1), RULE 9, AND RULE 17 SHOULD BE DENIED BECAUSE ALL PLAINTIFFS ARE REAL PARTIES IN INTEREST, HAVE STANDING, AND ARE PROPERLY BEFORE THE COURT

A challenge to a party's standing is an issue of subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) "should be granted when it appears that the plaintiff is not entitled to *any* relief under any facts which could be presented in support of his claim." *Robinson v. Smith,* 219 N.C. App. 518, 520, 724 S.E.2d 629, 631 (2012) (citing *Harwood v. Johnson*, 326 N.C. 231, 239, 388 S.E.2d 439, 444 (1990)). When evaluating a motion to dismiss under Rule 12(b)(1), "a trial court may consider and weigh matters outside the pleadings. However, if the trial court confines its evaluation to the pleadings, the court must accept as true the plaintiff's allegations and construe them in the light most favorable to the plaintiff." *Munger v. State*, 202 N.C. App. 404, 410, 689 S.E.2d 230, 235 (2010) (citing *DOT v. Blue*, 147 N.C. App. 596, 603, 556 S.E.2d 609, 617 (2001)).

The Board contends that the Complaint should be dismissed because of lack of standing and because the named Plaintiffs are not real parties in interest. As a threshold matter—and as noted with regard to necessary parties (*supra,* at p. 9)—even if the Court agrees with the Board's contention that Plaintiffs are not real parties in interest, dismissal would not be appropriate. North Carolina's Rules of Civil Procedure specifically require that the Court give the Plaintiffs the opportunity to join or substitute the real party in interest. N.C. R. Civ. Pro. 17; *see also Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978) (requiring a continuance to provide reasonable time for necessary parties to be plead). While a trial court may correct the error *sua sponte*, it errs when ordering dismissal without first providing reasonable time for

substitution of the real party in interest. *See Land v. Tall House Bldg. Co.*, 150 N.C. App. 132, 136, 563 S.E.2d 8, 11 (2002).

The North Carolina Constitution confers standing upon any party that suffers harm. "All courts shall be open; [and] every person for an injury done him . . . shall have remedy by due course of law[.]" N.C. Const. Art I, §18; *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2010) (asserting same). A plaintiff must demonstrate that there is a justiciable controversy between adverse parties with a substantial interest in the litigation. *Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006) (quoting *Stanley Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). Standing turns on whether the party seeking relief has a sufficient personal stake in the outcome of the case to assure "that concrete adverseness" needed for a court to consider "difficult constitutional questions." *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282. A party is not required to show that an injury has already occurred, but that an injury is threatened or imminent. *Id.* at 642-43, 669 S.E.2d at 282.

A. Plaintiffs Latonya Silver, Brenda Sledge, and Felicia Scott Are Guardians In Fact of the Named Minor Children

The Board asserts that the individual Plaintiffs lack standing because they are not the guardians *ad litem* of the named minor children and therefore are not real parties in interest pursuant to Rule 17(a) of the North Carolina Rules of Civil Procedure. MTD ¶¶ 3-7. Under North Carolina law, a person under the age of 18 years is considered a minor. N.C. Gen. Stat. §1-17 (2005). A minor does not have the capacity to sue or be sued and must therefore appear in a civil action through a general or testamentary guardian or a guardian *ad litem*. N.C. Gen. Stat. §1A-1, Rule 17(b) (2011).

North Carolina law establishes that "parents are the natural guardians" of their minor children, N.C.G.S. § 35A-1201(a)(6), and further establishes that a guardian for a minor shall

only be appointed "when a minor . . . has no natural guardian." N.C.G.S. § 35A-1220. Although the complaint identified Ms. Silver and Ms. Scott as the guardians *ad litem* for their minor children, the Complaint also clearly identifies them as the mothers of their respective minor children. Compl. ¶¶ 1, 3. Similarly, Brenda Sledge is the maternal grandmother of Alicia Jones and was appointed her legal guardian by the Halifax County District Court on June 14, 2012. *Id.* ¶ 2; *see, In the Matter of Alicia Autumn Jones* 12JA 44. A plain reading of the Complaint demonstrates that all three individual Plaintiffs are the guardians in fact of the named minor children, and therefore the minor children have standing and are properly before the court.[7]

Additionally, Ms. Sliver, Ms. Sledge, and Ms. Scott each have standing individually. The denial to their family members of the opportunity to receive a sound basic education has and will continue to cause a deep and lasting injury to each of these parents and guardians. The emotional, personal, and economic burdens each has personally bears as the result of the constitutional deprivation by the Board constitutes "a personal stake in the outcome of the controversy," *Mangum,* 362 N.C. at 642, 669 S.E.2d at 282, and establishes standing in their individual capacities. The motion to dismiss the individual Plaintiffs should be denied.

B. The Coalition for Education and Economic Security (CEES) and the National Association for the Advancement of Colored People (NAACP) Have Standing to Maintain this Action

An organizational plaintiff may demonstrate standing to sue either on its own behalf, or on behalf of its members. Under North Carolina law, "[a] nonprofit association, in its own name,

[7] If, however, the Court determines that appointment of guardians *ad litem* is necessary, Ms. Silver, Ms. Sledge, and Ms. Scott are each eligible for appointment as guardians *ad litem* of their children or grandchild. Unless there is a conflict of interest, a family member is the most suitable guardian *ad litem* for a minor. As noted, each is the guardian in fact, and there are no conflicts of interest in this case, which does not involve monetary damages or the splitting of assets; there are no conflicting factual issues between the minor and the adult seeking guardian *ad litem*; and this case does not involve a claim against or between these family members.

may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution." N.C. Gen. Stat. Ann. § 59B-8(a). An organization has standing to bring suit on behalf of its members when: "(a) [the association's] members . . . have standing to sue in their own right; (b) the interests [the association] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159, 165-66, 552 S.E.2d 220, 225 (2001) (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977)); N.C. Gen. Stat. Ann. § 59B-8(b). The party invoking jurisdiction bears the burden of establishing these three elements. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002). CEES and NAACP clearly satisfy this test.

1. CEES and NAACP Members Have Standing to Sue Individually

To bring a claim on behalf of its members, an organization must first demonstrate that its members "have standing to sue in their own right." *Creek Pointe Homeowner's Ass'n, Inc.*, 146 N.C. App. at 165-66, 552 S.E.2d at 225. As the North Carolina Supreme Court explained: "[t]o have standing, the complaining association or one of its members must have some immediate or threatened injury." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990). Members of CEES and NAACP include Halifax County parents whose children are currently enrolled in public schools in Halifax County. Compl. ¶¶ 4-5. These parents and children will be directly affected by the outcome of this litigation. Compl. ¶ 5. Parents and their children face a direct and immediate injury as a result of the Board's decision to preserve three racially-disparate and inadequately resourced school districts, as that decision denies children the right to the opportunity for a sound basic education, including the skills necessary to compete in

a diverse global economy. Parents who are members of CEES and NAACP have individual standing to sue the Board for this alleged constitutional violation, and therefore so do the organizations representing those parents.

2. CEES and NAACP Seek to Protect Interests Germane to Their Organizational Purposes

Next, an organization must show that the interests it seeks to protect in the case are germane to its purpose. *Creek Pointe Homeowner's Ass'n, Inc.*, 146 N.C. App. at 165-66, 552 S.E.2d at 225. Here, CEES and NAACP seek the restructuring of an education system that has unconstitutionally deprived all Halifax County children of their right to the opportunity for a sound basic education. Ensuring that children receive an adequate public education free from racial stigma is directly related to each organization's purpose. Compl. ¶¶ 4-5. CEES is dedicated to helping protect the right of all children in Halifax County to receive a constitutionally compliant education. Its members are Halifax County residents who are committed to improving public education and advancing the social and economic wellbeing of all Halifax County residents. The Halifax County branch of the NAACP is also devoted to securing each Halifax County student's right to a sound basic education. The Halifax County branch of the NAACP is a local affiliate of the nation's oldest civil rights organization. For decades, the NAACP has dedicated itself to seeking justice for all persons, including equal educational opportunities for children, and the elimination of race-based discrimination. *Id.* The Halifax County branch of the NAACP has made educational equity and opportunity the core focus of its work for several years.

This lawsuit is integrally related to both CEES and NAACP's organizational missions. Their challenge to the Board's maintenance of three separate and racially-identifiable school districts is fundamental to each organization's purpose and therefore satisfies the second prong of this test.

3. Neither the Claim Asserted Nor the Relief Sought by CEES and NAACP Require Individual Members of The Organizations to be Named in the Lawsuit

Lastly, an organization must demonstrate that "neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." *Creek Pointe Homeowner's Ass'n, Inc.*, 146 N.C. App. at 165-66, 552 S.E.2d at 225. Crucial to consideration of this prong is whether "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *River Birch Associates*, 326 N.C.at 129, 388 S.E.2d at 555. "When an organization seeks declaratory or injunctive relief on behalf of its members, 'it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.'" *Id.* (internal citations omitted). Since CEES and NAACP are seeking injunctive relief, no individual member of either organization need be named in this lawsuit.

The Complaint demonstrates that both CEES and the NAACP satisfy the requirements for organizational standing.s The motion to dismiss these entities as Plaintiffs should be denied.

V. THE MOTION TO STRIKE AND MOTION TO DISMISS OR STRIKE "AS TO ATTORNEY'S FEES" ARE WITHOUT MERIT AND SHOULD BE DENIED

"Rule 12(f) of the North Carolina Rules of Civil Procedure allows the court to strike from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." *Carpenter v. Carpenter*, 189 N.C. App. 755, 759, 659 S.E.2d 762, 765 (2008) (citation omitted). Motions to strike are "addressed to the sound discretion of the trial

court and its ruling will not be disturbed absent an abuse of discretion." *Pete Wall Plumbing Co. v. Sandra Anderson Builders, Inc.*, 215 N.C. App. 220, 232, 721 S.E.2d 663, 671 (2011). Importantly, a "[m]atter should not be stricken unless it has *no possible bearing* upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied." *Id.* (emphasis added). *See also, Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 248 S.E.2d 103 (1978); *Reese v. Brooklyn Village, Inc.*, 209 N.C. App. 636, 653, 707 S.E.2d 249, 260 (2011). The Board simply cannot meet this high standard and its Motions to Strike must be denied.

A. There are No Grounds to Strike the Introduction to the Complaint

The "Introduction" to the Complaint was designed to succinctly summarize the issues and aid the Court and the Board in understanding the complex issues in Plaintiffs' case. The brief introductory section does not contain "any redundant, irrelevant, immaterial, impertinent, or scandalous matter."[8] The Board's Motion to Strike asserts—with no explanation—two grounds: that the Introduction is "redundant and impertinent." Defs.' Mtn. to Strike ¶ 2. The Introduction is not redundant, as it provides a concise summary of a complex set of factual allegations laid out in great detail in the remainder of the Complaint. Such introductory summaries are common, particularly in a lengthy and complex complaint, and can aid the finder of fact and the parties in quickly understanding the complaint. The use of introductory paragraphs to provide context and summarize the facts alleged is not improper. *Reese v. City of Charlotte*, 196 N.C. App. 557, 566-67, 676 S.E.2d 493, 499 (2009) (affirming the trial court's denial of a motion to strike

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[8] The claim that the Introduction "reads more like a press release" is not a valid reason under Rule 12(f) to strike a portion of a pleading. Similarly, that a portion of a pleading is not in numbered paragraphs is not a reason contemplated under Rule 12(f) to strike that portion of the pleading. As shown by its detailed Answer, the Board had no difficulty responding to the numbered allegations of the Complaint.

"Overview" paragraphs used in each section of a pleading, where such paragraphs were sufficiently related to the facts alleged). The allegation that the Introduction is "impertinent" is similarly baseless. While the Rules of Civil Procedure do not define "impertinent," when used in conjunction with pleadings it is understood to mean a "matter that is not relevant to the action or defense." BLACK'S LAW DICTIONARY at 871 (referring to the definition of "irrelevant," at 958) (10th ed. 2014). The Introduction is far from irrelevant. Instead, it lays out the basis for the Complaint in a way intended to make the Plaintiffs' case as clear and simple as possible to provide for a more efficient consideration of this matter, and provides a concise summary and roadmap of the facts alleged in the Complaint.[9] Because the Introduction does not include "any redundant, irrelevant, immaterial, impertinent, or scandalous matter" as required under Rule 12(f), the Board's motion to strike the Introduction should be denied.

B. There is No Basis to Dismiss or Strike Plaintiffs' Request for Attorneys' Fees

The Board moves to dismiss (pursuant to Rule 12(b)(6)), or in the alternative to strike (pursuant to Rule 12(f)) Plaintiffs' request for attorneys' fees. The motion improperly seeks to dismiss a portion of the relief requested through a rule designed to test the legal sufficiency of claims presented. A request for attorneys' fees is not a substantive claim, and the question of whether the Court should grant such relief if Plaintiffs prevail in this litigation cannot properly be considered under the 12(b)(6) standard. As a preliminary matter, any consideration of the issue is premature, since fees are only a matter of contention if Plaintiffs prevail in the litigation. Additionally, the Board's effort to dismiss Plaintiffs' request for attorneys' fees ignores the

[9] "Impertinent" might also be defined as "given to or characterized by insolent rudeness." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/impertinent While the Board does not suggest otherwise, nothing about the Introduction can reasonably be characterized as insolent or rude.

Court's discretion in granting such a remedy, which would only be exercised based on a full consideration of the merits of the Plaintiffs' successful litigation of this case.[10]

Even if Defendant could properly make a 12(b)(6) motion to limit the relief requested, accepting all allegations of the Complaint as true, Plaintiffs' request for attorneys' fees is appropriate and the motion should be denied. The Complaint alleges that the Board violates the constitutional right of all schoolchildren in Halifax County to the opportunity for a sound basic education. N.C.G.S. § 6-21.7 expressly provides a statutory basis for awarding attorneys' fees against the Board:

> In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs.

"If the trial court finds only that a local government acted outside the scope of its authority, the award of attorney's fees is discretionary." *Etheridge v. County of Currituck*, 762 S.E.2d 289, 298 (N.C. App. 2014). The award of attorneys' fees becomes mandatory if the trial court also "finds the local government's action was an abuse of discretion." *Id.* The Board does not have the authority, the discretion, or the right to violate the North Carolina Constitution, and in committing constitutional violations, the Board has acted outside of its authority. If Plaintiffs prevail at trial, it is within this Court's discretion to order the Board to pay their attorneys' fees. The Board's 12(b)(6) motion as to fees is an attempt to preemptively undermine the Court's broad discretion in granting reasonable and necessary lawyers' fees, and should be denied.

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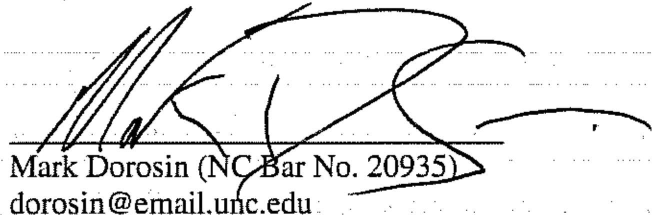
[10] Indeed, issues around attorneys' fees are litigated after the final judgment so that a court may most effectively exercise its discretion to determine Plaintiffs' efforts and any relevant lodestar. *See,.e.g., Barker Indus., Inc. v. Gould*, 146 N.C. App. 561, 553 S.E.2d 227 (2001).

To the extent that the motion seeks, in the alternative, to strike the request for attorneys' fees as a portion of the relief requested, it should also be denied. As explained above, a motion to strike is limited to "any redundant, irrelevant, immaterial, impertinent, or scandalous matter." Plaintiffs' request for attorneys' fees is expressly authorized by statute and is properly pled, relevant, material, and reasonable. The issue will ultimately be resolved by the Court, in its discretion, if Plaintiffs are successful in the litigation. The Board's attempt to short circuit this process and dismiss or strike the request for attorneys' fees should be denied.

VI. CONCLUSION

There are critical constitutional issues at the core of this litigation, and it is in all parties' best interest to move forward with discovery and with the full consideration and resolution of the merits of the Plaintiffs' claims. The Motions to Dismiss and to Strike should all be denied. Alternatively, if the Court determines that any of the motions have merit, the Complaint should not be dismissed; rather, Plaintiffs should be given leave to amend the Complaint to effectively address any procedural issues identified, and then the case should be allowed to move forward.

Respectfully submitted, this the 14th day of December, 2015



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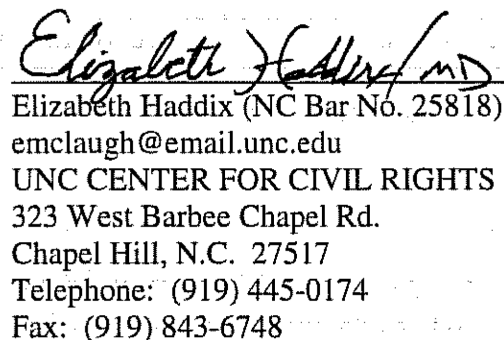

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CERTIFICATE OF SERVICE

The undersigned herby certifies that a copy of the foregoing RESPONSE IN OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS AND TO STRIKE was served upon the Defendant in the matter by placing a copy of same in the U.S. Mail, first-class postage paid, addressed to:

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This the 14th day of December, 2015