

NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF NEW HANOVER

2022 JUN 29 A 9:30

FILE NO. 19 CVS 2745

NEW HANOVER COUNTY, C.S.C.

BY *AR*

JOHN DOES 1 to 14, inclusive, all
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

THE NEW HANOVER COUNTY BOARD
OF EDUCATION; MICHAEL EARL
KELLY; JAMES RICKIE "RICK"
HOLLIDAY, in his former official capacity;
TIMOTHY SCOTT MARKLEY, in his
former official capacity; and MIKE ROES 1
to 10, inclusive,

Defendants.

**ORDER ON DEFENDANTS'
MOTIONS TO DISMISS
and
PLAINTIFFS' MOTION
TO STRIKE**

THIS MATTER came on to be heard and was heard before the undersigned upon the following motions: 1) Defendant New Hanover County Board of Education's ("Defendant

NHCBOE”) and Defendant Timothy Scott Markley’s (“Defendant Markley”) Motions to Dismiss made under Rule 12(b)(1) and Rule 12(b)(6), filed with their Answer to Plaintiffs’ Fourth Amended Complaint on January 3, 2022; 2) Defendant NHCBOE’s and Defendant Markley’s Partial Motion to Dismiss Based on Constitutional Challenge made under Rule 12(b)(6), or alternatively under Rule 12(b)(1), filed contemporaneously with their Answer to Plaintiffs’ Fourth Amended Complaint on January 3, 2022; 3) Defendant James Rickie “Rick” Holliday’s (“Defendant Holliday”) Motion to Dismiss made under Rule 12(b)(6), filed with his Answer to Plaintiffs’ Fourth Amended Complaint, and by a separate Motion, on January 28, 2022; and 4) Plaintiffs’ Motion to Strike, filed on February 4, 2022.

This case has been designated exceptional under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and the undersigned has been assigned as the presiding Superior Court Judge by order of the Chief Justice of the Supreme Court of North Carolina. In this litigation, Plaintiffs have asserted the following causes of action against the following Defendants in the Fourth Amended Complaint:

- Count I: Negligence and Gross Negligence against all Defendants;
- Count II: Negligent Supervision against Defendants NHCBOE and Markley;
- Count III: Negligent Failure to Train against all Defendants except Defendant Kelly;
- Count IV: Breach of Fiduciary Duty against all Defendants;
- Count V: Assault and Battery against Defendants Kelly and NHCBOE;
- Count VI: Negligent Infliction of Emotional Distress against all Defendants;
- Count VII: Invasion of Privacy against all Defendants;

- Count VIII: Ratification against all Defendants except Defendant Kelly;
- Count IX: Negligence Per Se Based Upon a Violation of N.C.G.S. § 115C-288(g) against all Defendants except Defendant Kelly; and,
- Count X: Violation of the Right to a Sound Basic Education under N.C. Const. art. I, § 15 and art. IX, § 2 against Defendant NHCBOE.

Defendants NHCBOE and Markley and Defendant Holliday filed their respective Motions seeking to dismiss, under various theories, the claims asserted against them. Plaintiffs in turn moved to strike Defendants' motions premised on a constitutional challenge to provisions within the SAFE Child Act, 2019 N.C. Sess. Laws 245.

On March 8, 2022, via WebEx, the Court heard Defendants' Motions to Dismiss and Plaintiffs' Motion to Strike after the parties fully and extensively briefed their respective positions. The hearing concluded on March 10, 2022, and the matters were thereafter taken under advisement.

Defendant NHCBOE's Motion to Dismiss Pursuant to Rule 12(b)(1)

Defendant NHCBOE contends Plaintiffs' Tenth Cause of Action in the Fourth Amended Complaint should be dismissed because the Court lacks jurisdiction over the subject matter of this claim. Such a motion is properly made pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. *Williams v. New Hanover Cnty. Bd. of Educ.*, 104 N.C. App. 425, 428, 409 S.E.2d 753, 755 (1991). When ruling on a motion to dismiss under Rule 12(b)(1), "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) (citations and quotations omitted).

Plaintiffs’ claim asserted in Cause of Action 10 is based upon our Supreme Court’s recent opinion in *Deminski v. State Board of Education*, 2021-NCSC-58, and, in addition to monetary damages, seeks a remedy in the form of mandatory injunctive relief. Defendant NHCBOE contends the Court lacks jurisdiction over the subject matter for this claim because Plaintiffs have failed to exhaust their administrative remedies.

After solely considering the pleadings, the Court concludes that, when accepting as true the allegations of the Fourth Amended Complaint and construing them in the light most favorable to Plaintiffs, the Court has jurisdiction over the subject matter of the claim asserted in Plaintiffs’ Cause of Action 10. Accordingly, this Motion to Dismiss will be denied.

Defendants’ Motions to Dismiss Pursuant to Rule 12(b)(6)

When considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the “question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.” *Crouse v. Mineo*, 189 N.C. App. 232, 237, 658 S.E.2d 33, 36 (2008). Further, “the complaint is to be liberally construed, and the 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.’” *Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)). “Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (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." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

After considering the pleadings, and the submitted briefs and arguments of counsel¹, the Court, when treating the allegations of the Fourth Amended Complaint as true, rules upon each ground for dismissal in the Rule 12(b)(6) Motions to Dismiss as follows:

I. Defendant Markley's Motion to Dismiss All Causes of Action

Defendant Markley seeks to dismiss all claims asserted against him in Plaintiffs' Fourth Amended Complaint upon the contention that all claims asserted against him are solely in his former official capacity and are therefore duplicative of the claims against Defendant NHCBOE.

This Court agrees that Plaintiffs have failed to state claims against Defendant Markley that are wholly separate and apart from those against Defendant NHCBOE, and Defendant Markley's Motion to Dismiss on this ground will be granted; however, the allegations pertaining to actions of Defendant Markley will be retained as it applies to Plaintiffs' claims asserted against Defendant NHCBOE.

II. Defendant Holliday's Motion to Dismiss All Causes of Action

Defendant Holliday similarly seeks to dismiss all claims asserted against him in Plaintiffs' Fourth Amended Complaint upon the contention that all claims asserted against him are solely in his former official capacity and are therefore duplicative of the claims against Defendant NHCBOE.

¹ Matters outside of the Fourth Amended Complaint were introduced by counsel for Plaintiffs during the hearing on the Motions pending before the Court; however, the Court has excluded those matters from consideration in ruling upon Defendants' Motions to Dismiss made pursuant to Rule 12(b)(6).

This Court, however, disagrees with Defendant Holliday that Plaintiffs have stated claims against him that are wholly duplicative of those against Defendant NHCBOE. Accordingly, Defendant Holliday's Motion to Dismiss on this ground will be denied.

III. Defendant NHCBOE's Motion to Dismiss Plaintiffs' Eighth Cause of Action

Defendant NHCBOE seeks to dismiss Plaintiffs' Eighth Cause of Action in the Fourth Amended Complaint upon the contention that "Ratification" is not a claim but instead is a method of asserting liability for torts under a theory of *respondeat superior*.

The Court agrees, and the Motion to Dismiss on these grounds will be granted to the extent Plaintiffs assert a stand-alone claim for "ratification"; however, the allegations under this cause of action will be retained as it applies to Plaintiffs' other claims asserted against Defendant NHCBOE on a theory of *respondeat superior*.

IV. Defendant NHCBOE's Motion to Dismiss Plaintiffs' Fourth, Fifth, Seventh, Ninth, and Tenth Causes of Action Based Upon Reasons Other Than a Constitutional Challenge to an Act of the General Assembly

Defendant NHCBOE seeks to dismiss Plaintiffs' Fourth Cause of Action in the Fourth Amended Complaint for Breach of Fiduciary Duty upon the contention that there is no fiduciary relationship as a matter of law between Plaintiffs and Defendant NHCBOE.

Defendant NHCBOE seeks to dismiss Plaintiffs' Fifth Cause of Action in the Fourth Amended Complaint for Assault and Battery and Seventh Cause of Action in the Fourth Amended Complaint for Invasion of Privacy upon the contention that it cannot be held liable for the intentional torts of another based upon a theory of *respondeat superior*.

Defendant NHCBOE seeks to dismiss Plaintiffs' Ninth Cause of Action in the Fourth Amended Complaint for Negligence Per Se upon the contention that N.C.G.S. § 115C-288(g) is not a public safety statute which would serve to create a statutory right of action.

Defendant NHCBOE seeks to dismiss Plaintiffs' Tenth Cause of Action in the Fourth Amended Complaint for a Violation of the Right to a Sound Basic Education under N.C. Const. art. I, § 15 and art. IX, § 2 upon the contention that the statutory limitations period had expired for the claims that would have served as Plaintiffs' adequate administrative remedies.

In the context of the above-described grounds for dismissal set forth by Defendant NHCBOE in its Motion to Dismiss, this Court concludes that Plaintiffs' allegations are sufficient to state claims upon which relief may be granted. The above-described legal theories set forth by Defendant NHCBOE do not support a conclusion that it is beyond doubt that Plaintiffs could prove no set of facts in support of these claims which would entitle them to relief. Accordingly, Defendant NHCBOE's Motion to Dismiss on these grounds will be denied.

V. Defendant NHCBOE's Motion to Dismiss Based Upon the Assertion that S.L. 2019-245, §§ 4.1, 4.2(a), and 4.3 are Constitutional As-Applied to Defendant NHCBOE

Defendant NHCBOE seeks to dismiss Plaintiffs' claims asserted against it in the Fourth Amended Complaint that were previously time-barred under the applicable statutory limitations period but were otherwise revived by provisions of S.L. 2019-245. Defendant NHCBOE's Motion on this ground is based upon an as-applied challenge to the

constitutionality of the provisions of S.L. 2019-245 amending or rewriting N.C.G.S. §§ 1-17, 1-52, and 1-56. 2019 N.C. Sess. Laws. 245 §§ 4.1, 4.2(a), and 4.3.²

Plaintiffs contend that Defendant NHCBOE cannot challenge the constitutionality of S.L. 2019-245 as a defense to the claims asserted against it because Defendant NHCBOE is a state entity and because S.L. 2019-245 conferred a benefit on Defendant NHCBOE. The Court disagrees with both contentions.

Plaintiffs also contend that, if S.L. 2019-245 is unconstitutional and cannot revive any time-barred claims, the Court must determine whether the limitations period was equitably tolled by the conduct of Defendant NHCBOE. The Court determines that there are enough facts alleged in Plaintiff's complaint to successfully allege that either the claims were not accrued until 2019, bringing the filing of the complaint within the statute of limitations, or that the limitations period was equitably tolled. Defendants are free to raise the statute of limitations issue again if differing facts emerge during the discovery process.

Defendant NHCBOE, on the other hand, contends that S.L. 2019-245 encompasses claims against only the convicted abuser—here, Defendant Kelly—rather than claims against any defendant derived from child sexual abuse (i.e., claims against an employer on a theory of *respondeat superior*).

Plaintiffs' Fourth Amended Complaint contains sufficient allegations, when treated as true, for the Court to determine that claims asserted in Causes of Action 1 through 9 by the following individual Plaintiffs would have expired under the applicable statutory

² Counsel for Defendant NHCBOE clarified at the hearing of this matter that the constitutional challenges to these sections of S.L. 2019-245 is being made on an as-applied basis.

Defendant Holliday facially challenges the constitutionality of these same provisions, as discussed below, and at the hearing of these matters, counsel for Defendant Holliday maintained that the constitutional challenges in Defendant Holliday's Motion to Dismiss are solely facial challenges. Counsel, however, also reiterated his argument that any ground for dismissal granted in Defendant NHCBOE's favor should result in dismissal in Defendant Holliday's favor due to all claims against him being duplicative of those against Defendant NHCBOE.

limitations period prior to the enactment of S.L. 2019-245: John Does 2, 3, 5, 7, 8, 9, 10, 11, 13, and 14.

To the extent these challenged provisions of S.L. 2019-245 can be applied to revive already time-barred claims of these individual Plaintiffs against Defendant NHCBOE, such revival of a claim is constitutional. North Carolina courts presume that “laws enacted by the General Assembly are constitutional, and . . . will not declare a law invalid unless . . . it is unconstitutional beyond reasonable doubt. . . . [T]he violation must be plain and clear.” *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639 (2016). Constitutional analysis is dependent upon the text of the federal and state constitutions, the context in which the relevant constitutional provision was adopted, and applicable court precedent. *Id.*

While *Wilkes Cnty. v. Forester* and subsequent cases have found that “an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail[.]” this analysis is not tied to a specific provision of either the federal or state constitution. *McKinney et al. v. Goins*, 21-CVS-7438 at *13, *16 (N.C. Sup. Ct. 2021) (McGee, J. dissenting); *Wilkes Cnty. v. Forester*, 204 N.C. 163, 170 (1933)(offering only that the statute in question “takes away vested rights of defendants and therefore is unconstitutional”). Neither the North Carolina constitution nor the federal constitution directly guarantees a right to a statute of limitations defense. *McKinney et al. v. Goins*, 21-CVS-7438 at *13, *16 (N.C. Sup. Ct. 2021) (McGee, J. dissenting) (citing *Campbell v. Holt*, 115 U.S. 620 (1885)). The federal Constitution provides that no ex post facto criminal laws shall be enacted; the Constitution of North Carolina contains a similar provision. U.S. CONST. art. 1 § 9 cl. 13 (2022)(“No Bill of Attainder or ex post facto Law shall be passed”); N.C. CONST. art. 1 §16 (2022)(“ Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted.”). With

regard to retroactive civil laws, the North Carolina Constitution prohibits only retroactive taxes. N.C. CONST. art. 1 §16.

To support their as-applied challenge, Defendants cite Article 1 Section 19 of the North Carolina Constitution, which provides that “[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.” *Id.* at art. 1 §19 (2002). North Carolina courts have found the Law of the Land clause to be “synonymous with ‘due process of law’ under the Fourteenth Amendment.” *Bentley v. North Carolina Ins. Guaranty Ass’n*, 107 N.C. App. 1, 9 (N.C. Ct. App. 1992); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180 (2004).

In *Campbell v. Holt*, this Court held that “where lapse of time has not invested a party with title to real or personal property, a state legislature, consistent with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after [the] right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment[.]”; *Campbell v. Holt*, 115 U.S. 620 (1885).

North Carolina courts utilize a Fourteenth Amendment due process analysis which questions first whether a law affects a fundamental right. *Toomer v. Garrett*, 155 N.C. App. 462, 469 (2002). If a fundamental right is affected, the presumption in favor of constitutionality is reversed, and strict scrutiny applies, requiring demonstration whether the law is narrowly tailored to a compelling government interest. *Harper v. Hall*, 380 N.C. 317, 379 (2022). The United State Supreme Court has recognized fundamental rights such as the right to vote, First Amendment rights, “rights of a uniquely private nature”, and the right of interstate travel. *State ex rel. Utilities Comm’n v. Carolina Util. Customers Ass’n*,

336 N.C. 657, 681 n.6 (1994). If no fundamental right is affected, the analysis proceeds to evaluating whether a law is “unreasonable, arbitrary[,] or capricious, and [whether] the law [is] substantially related to the valid object sought to be obtained.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180-81 (2004). “[A]s long as there could be some rational basis for enacting the statute at issue, this Court may not invoke principles of due process to disturb the statute.” *Id.* at 181 (internal alterations omitted).

“The Sexual Assault Fast Reporting and Enforcement Act (‘the Act’) was enacted in 2019 to ‘strengthen and modernize’ our sexual assault laws.” *Lakins v. W. N.C. Conf. of the United Methodist Church*, 2022-NCCOA-337 at *P2 (N.C. Ct. App. May 17, 2022).

Defendants challenge Sections 4.1, 4.2(a), and 4.3 of S.L. 2019-245. These sections allow a victim of child sexual abuse to file a civil action against a defendant until the plaintiff reaches the age of 28, “extend to ten years the statute of limitations for a civil action based on sexual abuse suffered while a minor, [and] provide[] that ‘a plaintiff may file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age.’” *Lakins*, at *P2; S.L. 2019-245 4.1, 4.2(a), 4.3 (2021).

While the goals of the Act are admirable, they do not reach the level of a fundamental right, lowering the standard from strict scrutiny to rational basis. *State ex rel. Utilities Comm’n v. Carolina Util. Customers Ass’n*, 336 N.C. 657, 681 n.6 (1994); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180 (2004). “The General Assembly, which comprises the legislative branch, enacts laws that ‘protect or promote the health, morals, order, safety, and general welfare of society.’” *State ex rel. McCrory v. Berger*, 368 N.C. 633, 635 (2016). Strengthening and modernizing sexual assault laws, particularly in circumstances of sexual assault of a minor, is a valid legislative aim, and one that falls squarely within the purview

of legislative authority. Extending the time during which plaintiffs alleging child sexual assault may bring suit is substantially related to this goal and is not arbitrary, capricious, or unreasonable. Therefore, this Court concludes that S.L. 2019-245 is constitutional as-applied to Defendants.

Since the provisions challenged by Defendants are constitutional as-applied to Plaintiffs' specific claims, Plaintiffs' claims against Defendants are revived by statute and are therefore not time-barred. However, as discussed below, Defendant NHCBOE facially challenges the constitutionality of S.L. 2019-245 § 4.2(b) and this Court fully adjudicate Defendant's motion to dismiss until a three-judge panel of Superior Court, Wake County enters an order in this action ruling on the facial challenge. This Court will stay a ruling on the as-applied challenge pending a ruling on the facial challenge by a three-judge panel.

VI. Defendants NHCBOE's and Holliday's Motions to Dismiss Based Upon the Assertion that Provisions of S.L. 2019-245 are Facially Unconstitutional

Defendants NHCBOE and Holliday seek to dismiss Plaintiffs' claims asserted against them in the Fourth Amended Complaint that were previously time-barred under the applicable statutory limitations period but were otherwise revived by provisions of S.L. 2019-245.

Defendant Holliday's Motion on this ground is based upon a facial challenge to the constitutionality of S.L. 2019-245 §§ 4.1, 4.2(a), and 4.3. Defendant Holliday, as well as Defendant NHCBOE, also facially challenge the constitutionality of S.L. 2019-245 § 4.2(b).

In accordance with Rule 42(b)(4) of the North Carolina Rules of Civil Procedure, the Court declines to rule on Defendant NHCBOE's and Holliday's Motions to Dismiss under Rule 12(b)(6) that are based upon the assertion that provisions of S.L. 2019-245 are facially unconstitutional. By separate order to be entered contemporaneously with this Order, these

facial constitutional challenges will be transferred to a three-judge panel of Superior Court, Wake County, and this Motion to Dismiss presenting facial constitutional challenges to provisions of S.L. 2019-245 will be referred to the three-judge panel for determination.

Plaintiffs' Motion to Strike

Rule 12(f) of the North Carolina Rules of Civil Procedure provides, in relevant part, that “upon motion made by a party . . . the judge may order stricken from any pleading any insufficient defense.” N.C.G.S. § 1A-1, Rule 12(f). “A motion under Rule 12(f) is a device to test the legal sufficiency of an affirmative defense.” *Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598, 601, 574 S.E.2d 688, 691 (2002). “Matter 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 should be denied.” *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108 (1978).

Plaintiffs assert that Defendants’ constitutional challenges, raised in Defendants’ Answers and Motions to Dismiss as a defense to Plaintiffs’ claims, are insufficient as a matter of law and should therefore be stricken. Plaintiffs contend that the State of North Carolina, in enacting S.L. 2019-245, has decided that the State and its political subdivisions—*i.e.*, Defendant NHCBOE—can be retroactively subjected to liability for claims that were otherwise time-barred prior to the enactment of S.L. 2019-245. Plaintiffs further contend that a political subdivision of the State cannot raise constitutional challenges to causes of action asserted against it.

The Court concludes that the merits of the Motion to Strike cannot be fully adjudicated until such time as the facial constitutional challenges have been resolved on the merits; however, such a ruling can only be made by a three-judge panel of Superior Court, Wake County. Accordingly, a ruling by this Court on Plaintiffs’ Motion to Strike will

be stayed pending the three-judge panel's resolution of Defendant NHCBOE's and Defendant Holliday's facial challenges. Although the Motion to Strike will remain in the jurisdiction of this Court, the stay of this Court's ruling on the Motion to Strike does not preclude or otherwise prejudice Plaintiffs from offering the same arguments to the three-judge panel as those arguments relate to the merits of Defendants' facial constitutional challenge defenses.

Conclusion

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. Defendant NHCBOE's Motion to Dismiss made under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is DENIED.
2. Defendant Timothy Scott Markley's Motion to Dismiss made under Rule 12(b)(6) and premised upon the assertion that a claim against him solely in his former official capacity is duplicative of the claims against Defendant NHCBOE is GRANTED.
3. Defendant Holliday's Motion to Dismiss made under Rule 12(b)(6) and premised upon the same assertion that a claim against him in his former official capacity is duplicative of the claims against Defendant NHCBOE is DENIED.
4. Defendant NHCBOE's Motion to Dismiss made under Rule 12(b)(6) for a failure to state a claim as to Plaintiff's Fourth, Fifth, Seventh, Ninth, and Tenth Causes of Action in the Fourth Amended Complaint is DENIED.
5. Defendant NHCBOE's Motion to Dismiss made under Rule 12(b)(6) for a failure to state a claim as to Plaintiffs' Eighth Cause of Action in the Fourth Amended

Complaint is GRANTED to the extent Plaintiffs assert a standalone claim for “ratification”; however, the allegations under this cause of action shall be retained as it applies to Plaintiffs’ claims asserted against Defendant NHCBOE on a theory of *respondeat superior*.

6. Defendant NHCBOE’s motion to dismiss under Rule 12(b)(6) that is based upon the assertion that S.L. 2019-245, §§ 4.1, 4.2(a), and 4.3 are unconstitutional as-applied to Defendant NHCBOE is HEREBY STAYED pending a resolution of Defendant NHCBOE’s facial challenge to S.L. 2019-245 § 4.2(b).
7. The Court declines, in accordance with Rule 42(b)(4) of the North Carolina Rules of Civil Procedure, to rule on Defendant NHCBOE’s Motion to Dismiss under Rule 12(b)(6) that is based upon the assertion that S.L. 2019-245, § 4.2(b) is facially unconstitutional. By separate order to be entered contemporaneously with this Order, this facial constitutional challenge will be transferred to a three-judge panel of Superior Court, Wake County, and this Motion to Dismiss presenting facial constitutional challenges to provisions of S.L. 2019-245 will be referred to the three-judge panel for determination.
8. The Court declines, in accordance with Rule 42(b)(4) of the North Carolina Rules of Civil Procedure, to rule on Defendant Holliday’s Motion to Dismiss under Rule 12(b)(6) that is based upon the assertion that S.L. 2019-245, §§ 4.1, 4.2(a), 4.2(b), and 4.3 are facially unconstitutional. By separate order to be entered contemporaneously with this Order, this facial constitutional challenge will be transferred to a three-judge panel of Superior Court, Wake County, and this

Motion to Dismiss presenting facial constitutional challenges to provisions of S.L. 2019-245 will be referred to the three-judge panel for determination.

9. Plaintiffs' Motion to Strike, which seeks to strike the constitutional challenge defenses raised in Defendants' Motions to Dismiss, is HEREBY STAYED pending a resolution of Defendant NHCBOE's and Defendant Holliday's facial challenges by the three-judge panel.

SO ORDERED, this the 28 day of June, 2022.



The Honorable Phyllis M. Gorham
Senior Resident Superior Court Judge
Fifth Judicial District