

NORTH CAROLINA
COUNTY OF NEW HANOVER

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CVS 2745

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

JUN 29 A 9:29

NEW HANOVER COUNTY, C.S.C.

BY 

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 TRANSFERRING FACIAL
CHALLENGES TO A
THREE-JUDGE PANEL**

THIS MATTER, presently pending before the undersigned, is before the Court on the Court's own motion as to whether this matter requires transfer for hearing to a three-judge panel of Superior Court, Wake County.

Section 1-267.1 of the North Carolina General Statutes and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure require that facial challenges to the constitutionality of Acts of the North Carolina General Assembly must be heard and determined by a three-judge panel in the Superior Court of Wake County, and that all other matters in the case contingent upon the outcome of the facial challenge must also be stayed pending a final ruling on the facial challenge.

Defendant New Hanover County Board of Education ("Defendant NHCBOE") and Defendant James Rickie "Rick" Holliday ("Defendant Holliday") have each filed a Motion to Dismiss made pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure in response to Plaintiffs' Fourth Amended Complaint. This Court finds that Defendants

NHCBOE and Holliday, through a defense asserted in their respective Motions to Dismiss, have raised a facial challenge to the constitutionality of an Act of the North Carolina General Assembly—specifically, provisions of 2019 N.C. Sess. Laws 245 (“S.L. 2019-245”).

This Court, by separate order entered contemporaneously with this Order, has made the following rulings on the other motions pending before the Court:

- 1) Denied Defendant NHCBOE’s motion to dismiss made under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure;
- 2) Granted 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;
- 3) Denied 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;
- 4) Denied 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;
- 5) Granted 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 to the extent Plaintiffs asserted a stand-alone claim for “ratification”;
- 6) Stayed its ruling on 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;
- 7) Declined, 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;

- 8) Declined, 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; and
- 9) Stayed a ruling on Plaintiffs' motion to strike, which seeks to strike the facial challenge defenses raised in Defendants' Motions to Dismiss that have been transferred to a three-judge panel by this Order.

This Court finds that there is no other pending issue in this case which can be addressed without first resolving the facial constitutionality issues presented in Defendant NHCBOE's and Defendant Holliday's Motions to Dismiss.

It is therefore ORDERED for the reasons herein stated and upon the Court's own motion that:

1. The facial constitutional challenges raised in Defendants' Motions to Dismiss are transferred to a three-judge panel of Superior Court, Wake County, to be appointed by the Chief Justice of the Supreme Court of North Carolina, pursuant to N.C.G.S. § 1-267.1 and N.C.G.S. § 1A-1, Rule 42(b)(4);
2. Defendants' Motions to Dismiss based solely upon N.C.G.S. § 1A-1, Rule 12(b)(6) and presenting facial constitutional challenges to provisions of S.L. 2019-245 are referred to a three-judge panel for determination; and
3. Defendants' Motions to Dismiss based upon Rule 12(b)(1) are DENIED.
4. All matters that are contingent upon the outcome of the facial challenges are stayed pending a ruling on those challenges and until all appeal rights are exhausted.

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



The Honorable Phyllis M. Gorham
Senior Resident Superior Court Judge