

STATE OF NORTH CAROLINA **FILED** IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NEW HANOVER COUNTY FILE NO. 21 CVS 003915

2021 OCT 28 P 3:51

DAVID A. PERRY, NEW HANOVER CO., C.S.C. PLAINTIFF'S REPLY TO THE
PLAINTIFF, BY _____ DEFENDANTS' MOTION TO DISMISS

vs.

NEW HANOVER COUNTY BOARD OF
EDUCATION;

Stephanie Adams, in her official capacity;

Nelson Beaulieu, in his official capacity;

Judy Justice, in her official capacity;

Stephanie Kraybill, in her official capacity;

Hugh McManus, in his official capacity;

Stephanie Walker, in her official capacity;

Peter Wildeboer, in his official capacity;

NEW HANOVER COUNTY SHERIFF'S
OFFICE;

Edward McMahon, in his official capacity

DEFENDANTS;

A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY: *Heather James*
Asst. Clerk of Superior Court

HERE COMES THE PLAINTIFF, David A. Perry, Pro Se, who beseeches this
Court to DENY the DEFENDANTS' **Motion to Dismiss**, which was filed electronically on
October 27, 2021 by Counsel on behalf of the following Defendants: New Hanover County
Board of Education, and Stephanie Adams, Nelson Beaulieu, Judy Justice, Stephanie Kraybill,
Hugh McManus, Stephanie Walker, Peter Wildeboar, in their official capacities.

Defense Counsel simultaneously submitted a **Notice of Hearing** on the
aforementioned motion for November 2, 2021. The Plaintiff previously sent a **Notice of Hearing**
PLAINTIFF'S REPLY TO THE DEFENDANTS' MOTION TO DISMISS - 1

1 for the same date in regard to its **Motion for a Preliminary Injunction**. As the hearing date is
2 quickly approaching, the Plaintiff, while not left with sufficient time to craft a legal
3 memorandum in support of the case, nonetheless submits this reply to the Defendants' dismissal
4 motion.

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6 Defendants' motion is "boilerplate" in nature, and states two general grounds for
7 the Court to dismiss the case. The first states that "Plaintiff's claims should be dismissed based
8 on a lack of subject matter jurisdiction." Besides the state and federal constitutional claims made
9 in the Plaintiff's complaint, the Plaintiff has clearly alleged that the Defendants have committed
10 violations of the NC Open Meetings Law (N.C.G.S. Chapter 143, Article 33C) by: 1) Denying
11 certain members of the public entrance to public and open session meetings of the New Hanover
12 County Board of Education, pursuant to G.S. 143-318.10(a) which states that "any person is
13 entitled to attend such a meeting." 2) By not providing a physical location for members of the
14 public to view and listen to electronic, public, and open meetings of the New Hanover County
15 Board of Education, pursuant to G.S. 143-318.13(a) which states that the public body "shall
16 provide a location and means whereby members of the public may listen to the meeting."
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19 G.S. 143.318.16(a) clearly states that:

20 The General Court of Justice has jurisdiction to enter mandatory or prohibitory
21 injunctions to enjoin (i) threatened violations of this Article, (ii) the recurrence of past
22 violations of this Article, or (iii) continuing violations of this Article. Any person may
23 bring an action in the appropriate division of the General Court of Justice seeking such an
24 injunction; and the plaintiff need not allege or prove special damage different from that
25 suffered by the public at large. It is not a defense to such an action that there is an
26 adequate remedy at law.

27 The New Hanover County Superior Court is a division of the General Court of Justice, and since
28 the Plaintiff resides in New Hanover County and the Defendants operate wholly within New

Hanover County, this Court is the proper division of the General Court of Justice for the Plaintiff
PLAINTIFF'S REPLY TO THE DEFENDANTS' MOTION TO DISMISS - 2

1 to file this lawsuit in. Furthermore, the Plaintiff is also seeking to have all actions of the New
2 Hanover County Board of Education made within 45 days of the initiation of this lawsuit be
3 declared as “null and void” as pursuant to G.S. 143-318.16A(a) which states that:

4
5 Any person may institute a suit in the superior court requesting the entry of a judgment
6 declaring that any action of a public body was taken, considered, discussed, or
7 deliberated in violation of this Article. Upon such a finding, the court may declare any
8 such action null and void. Any person may seek such a declaratory judgment, and the
9 plaintiff need not allege or prove special damage different from that suffered by the
10 public at large. The public body whose action the suit seeks to set aside shall be made a
11 party. The court may order other persons be made parties if they have or claim any right,
12 title, or interest that would be directly affected by a declaratory judgment voiding the
13 action that the suit seeks to set aside.

14 Therefore, it would not be in the interests of judicial economy for the Plaintiff to file this lawsuit
15 in New Hanover County District Court, only to have to turn around later and file it again in this
16 Court. The New Hanover County Superior Court clearly is the proper division of the General
17 Court of Justice for this case to heard in, and this Court clearly has subject matter jurisdiction
18 over the matter.

19 The second grounds on which the Defendants argue that this case should be
20 dismissed is that “Plaintiff’s claims should be dismissed based upon failure to state a claim upon
21 which relief may be granted.” (Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil
22 Procedure) The standard of review for this Court to take when considering dismissal upon this
23 basis is clear.

24 The standard of review of a motion to dismiss under Rule 12(b)(6) of the North Carolina
25 Rules of Civil Procedure is “ ‘whether, as a matter of law, the allegations of the
26 complaint, treated as true, are sufficient to state a claim upon which relief may be granted
27 under some legal theory. [.]’ ” Block v. County of Person, 141 N.C.App. 273, 277, 540
28 S.E.2d 415, 419 (2000) (quoting Harris v. NCNB, 85 N.C.App. 669, 670, 355 S.E.2d
838, 840 (1987)). (**Fisher v. Anderson, 667 S.E.2d 292 (N.C. App. 2008)**)

1 Therefore, all the Plaintiff's factual allegations must be considered as true. This Court must rely
2 on the Plaintiff's allegation that the New Hanover County Board of Education has created its own
3 board meeting attendance policy that requires masks in all circumstances and without exceptions,
4 and that Defendants are not simply following the orders of other government agencies. This
5 Court must rely on the Plaintiff's allegation that the New Hanover County Board of Education
6 has conducted electronic meetings without providing a physical location for the public to listen
7 to their meetings, and has enacted a policy that will continue this practice going forward. This
8 Court must rely on the Plaintiff's allegation that any COVID-19 pandemic that still exists is
9 limited in scope to those who have freely chosen not to receive a COVID-19 vaccine. This Court
10 must rely on the Plaintiff's allegation that the mask policy of the New Hanover County Board of
11 Education is not narrowly tailored because it does not exclude members of the public who have
12 received a COVID-19 vaccination. Finally, this Court must rely on the Plaintiff's allegation that
13 there are less restrictive means available to effectively reduce the transmission of COVID-19,
14 rather than completely excluding members of the public from attending school board meetings
15 without a mask.
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19 Furthermore, while the Plaintiff has not submitted a full legal memorandum as of
20 yet, the Plaintiff has presented the outline of a legal theory upon which relief can be granted.
21 North Carolina law is clear, "any person is entitled to attend" (G.S. 143-318.10(a)) school board
22 meetings. It does not say anywhere in NC law that a government body can create arbitrary or
23 unconstitutional attendance requirements. North Carolina law is also clear that a government
24 body must set up a location for members of the public to listen to the electronic meetings of the
25 school board (G.S. 143-318.13(a)). Nothing in NC law says that YouTube channels or the
26 COVID-19 pandemic are valid excuses for not following this requirement.
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1 Even if there are possible statutory exceptions to these prima facie violations of
2 the NC Open Meetings Law, the Plaintiff has outlined a legal theory that these exceptions must
3 meet strict judicial scrutiny. Attendance at, and full participation in, a school board meeting is an
4 exercise of our fundamental rights of assembly and petition that are guaranteed by the NC
5 Constitution (Article I, Section 12) and the US Constitution (1st Amendment).
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7 The Plaintiff believes that this legal theory is likely to prevail, and that this Court
8 should grant the Plaintiff's **Motion for a Preliminary Injunction**. However, even if this Court
9 disagrees with the Plaintiff and denies the Plaintiff's motion, it should at the very least delay
10 ruling on the Defendants' **Motion to Dismiss** until each of the parties has had adequate time to
11 prepare and submit memorandums of law in the case, and opposing parties have had adequate
12 time to submit replies to those memorandums of law. The Defendants mentioned in their
13 dismissal motion that they may submit legal memorandums in support of it before the hearing on
14 November 2, 2021. Even if those were submitted today, there is simply not enough time for the
15 Plaintiff to study, research, and submit a learned reply before the hearing. And there certainly
16 isn't enough time for the Plaintiff to craft and submit its own legal memorandum and give
17 opposing counsel enough time to submit a reply to it.
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20 The Plaintiff humbly beseeches this Court to DENY the Defendants' **Motion to**
21 **Dismiss**, or in the alternative to delay ruling upon it until it is fully briefed by all parties.
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24 Dated this 28th day of October, 2021.

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28 David A. Perry, Pro Se

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