IN THE CIRCUIT COURT OF JEFFERSON COUNTY
CIVIL DIVISION / BIRMINGHAM

SHARPER D. ADAMS, *et al.*,	)	
PLAINTIFFS,	)	
vs.	)	**CV 13-900242-MGG**
	)	
STATE OF ALABAMA BOARD OF EDUCATION;	)	
DR. THOMAS B. BICE, individually and in his official capacity as STATE SUPERINTENDENT OF EDUCATION;	)	
DR. EDWARD R. RICHARDSON, individually and in his official capacity as STATE INTERVENTION CHIEF FINANCIAL OFFICER for DEFENDANT BIRMINGHAM BOARD OF EDUCATION;	)	
BIRMINGHAM BOARD OF EDUCATION, a local governmental entity;	)	
APRIL M. WILLIAMS, individually, and in her official capacity as PRESIDENT, BIRMINGHAM BOARD OF EDUCATION; and,	)	
DR. CRAIG WITHERSPOON, individually, and in his official capacity as SUPERINTENDENT, BIRMINGHAM BOARD OF EDUCATION,	)	
	)	
DEFENDANTS,	)	

ORDER and PARTIAL SUMMARY DECLARATORY JUDGMENT

I. INTRODUCTION

Every PLAINTIFF[1] in this action was a "non-probationary" employee of DEFENDANT BIRMINGHAM BOARD OF EDUCATION [hereafter, ***"BBOE"***]. Each PLAINTIFF alleges his/her job was illegally terminated in July, 2012, without due process as a result of a REDUCTION IN FORCE [hereafter, ***"RIF"***] ordered by DEFENDANT DR. THOMAS B. BICE [hereafter, ***"BICE"***], STATE SUPERINTENDENT of DEFENDANT ALABAMA STATE BOARD OF EDUCATION [hereafter, ***"SBOB"***]. The RIF ordered by BICE was implemented by DR. EDWARD R. RICHARDSON whom BICE appointed Chief Financial Officer for the BBOE [hereafter, ***"RICHARDSON"***]. RICHARDSON acted to implement the RIF after the BBOE under the leadership of DEFENDANT APRIL M. WILLIAMS [hereafter, ***"WILLIAMS"***] failed to do so despite the recommendation of DEFENDANT DR. CRAIG WITHERSPOON [hereafter, ***"WITHERSPOON"***].

Hereafter, SBOE, BICE and RICHARDSON may be collectively referred to as ***"the STATE DEFENDANTS,"*** and, BBOE, WILLIAMS and WITHERSPOON may be

[1] Any reference to PLAINTIFFS hereafter is understood to include the eleven individuals allowed to intervene in this action per the ORDER entered April 22, 2103.

collectively referred to as ***"the BIRMINGHAM DEFENDANTS."*** After extensive briefing, this action came on to be heard before the Court May 15, 2013, with all counsel of record present.

II. THE PLEADINGS

[A] In their FIRST AMENDED COMPLAINT, PLAINTIFFS set out three claims in this action:

- **COUNT ONE** – DECLARATORY JUDGMENT;
- **COUNT TWO** – DENIAL OF DUE PROCESS [42 U.S.C. §1983; and,
- **COUNT THREE** – VIOLATION OF ADMINISTRATIVE PROCEDURES [under Alabama statutes discussed below].
    - On April 9th INTERVENORS adopted the FIRST AMENDED COMPLAINT as their pleading.

[B] On April 19, 2013, the SBOE DEFENDANTS filed a MOTION TO DISMISS arguing:

- PLAINTIFFS' AMENDED COMPLAINT is an impermissible collateral attack on the FINDING OF FACTS, CONCLUSIONS OF LAW, and DECLARATORY JUDGMENT AND PERMANENT INJUNCTION entered August 13, 2012, by the Honorable Houston L. Brown [hereafter, collectively, ***"JUDGE BROWN's ORDER"***][2] in the consolidated actions *Witherspoon v. Drew, et al.* (CV 12-0936-HLB, filed 7/18/12) [the ***"WITHERSPOON case"***] and, *STATE OF ALABAMA BOARD OF EDUCATION, et.al. v. BIRMINGHAM CITY BOARD OF EDUCATION, et.al.* (CV 12-902271-EAF, filed 7/20/12) [the ***"SBOB case"***] [collectively, the ***"CONSOLIDATED CASES"***]; and,
- the personnel changes to PLAINTIFFS' employment status, i.e., the RIF, was a permissible action within the scope of BICE's authority under the laws of Alabama.
- On April 23rd the BBOE DEFENDANTS filed a MOTION TO DISMISS adopting and incorporating the MOTION TO DISMISS filed by the STATE DEFENDANTS.

Hereafter, these MOTIONS TO DISMISS are collectively referred to as ***"the MOTION"***.

[2] In their FIRST AMENDED COMPLAINT and subsequent pleadings PLAINTIFFS refer to the *"Witherspoon litigation"* while all DEFENDANTS refer to the *"BBoE Action."* Clearly, the parties are referencing Judge Brown's August 13, 2012, DECLARATORY JUDGMENT AND PERMANENT INJUNCTION.

[C] On May 7th PLAINTIFFS filed their MEMORANDUM IN OPPOSITION;
- May 9th INTERVENORS adopted same as their pleading.

[D] On May 10th the STATE DEFENDANTS filed their REPLY.

[E] On May 14th PLAINTIFFS filed their MOTION FOR LEAVE TO FILE SURREPLY TO DEFENDANTS' REPLY; with the proposed SURREPLY attached;

[F] On June 3, 2013, PLAINTIFFS filed their SUPPLEMENTAL EVIDENCE in support of their May 7th OPPOSITION.

The Court **GRANTS** PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY and has considered same. However, the Court **STRIKES** PLAINTIFFS' June 3rd SUPPLEMENTAL EVIDENCE as evidence in this record; none the less, the filing of SB60 is a matter of public record. However, this Court will not speculate or assume the reasons why SB60 was drafted and introduced.

From the foregoing, for analysis and discussion, the Court chooses to frame three core disputed issues it must resolve, to-wit:

1. whether PLAINTIFFS' claims constitute a non-party collateral attack on all of JUDGE BROWN'S ORDER, or any part of it;

2. if not, did the SBOE have specific authority to mandate and implement a RIF of non-probationary BBOE employees; and,

3. if so, whether the SBOE conducted the RIF according to "other applicable law," including, but not limited to, various Alabama acts, statutes, case law and administrative rules, as well as policies and procedures established by BBOE pursuant to Alabama law;

III. PROCEDURAL DISPOSITION

On May 15, 2013, after extensive briefing, with numerous exhibits attached by DEFENDANTS and PLAINTIFFS, pursuant to prior ORDER the Court heard oral argument on the MOTION for over two hours. The parties thoroughly argued the issues presented in this dispute, as enumerated above and discussed in detail below. Having considered all of the foregoing, the Court exercises its discretion to treat this MOTION TO DISMISS as a properly noticed MOTION FOR SUMMARY JUDGMENT.

Under the Alabama Rules of Civil Procedure, the Court is allowed to treat a motion to dismiss as a Rule 56 motion for summary judgment. *Banks, Finley, White & Co. v. Wright*, 864 So.2d 324 (Ala.Civ.App. 2001). But, the normal requirements of R. 56 must be met, to-wit: (1) assuming movant has secured a date for hearing prior to filing, the non-movant must receive adequate notice of the trial court's intention to treat the motion as one for summary judgment; and, (2) the non-movant must receive a reasonable opportunity to present material in opposition. *Id.* A written order detailing the conversion is not necessary, only that the parties be aware that the motion is, in fact, being treated as a summary judgment. *Id.*

Here, in the interest of judicial administration and unique circumstances, the Court elects to **CONSIDER** the MOTION TO DISMISS as a MOTION FOR SUMMARY JUDGMENT[3]. There are no disputed material facts at this juncture and posture[4] as all issues framed are questions of law to be decided by the Court. Further, the Court **DETERMINES** the briefs filed by the parties on the MOTION TO DISMISS and the oral arguments presented May 15, 2013, were submitted in the same manner as if a motion for summary judgment was before the Court. Where policy considerations of summary judgment have been fully satisfied, literal adherence is not required. *Cofield v. City of Huntsville*, 527 So.2d 1259 (Ala.1988).

Here, in summation, the MOTIONS TO DISMISS:

1. contained matters outside of the pleadings [consisting entirely of public documents] in this record;
2. was extensively briefed;
3. was vigorously argued with more than 10 days' notice as required by Rule 56;[5] and,
4. presented no disputed issue of fact, only questions of law.

For these reasons, the Court **DETERMINES** literal adherence to Ala. R. Civ. Pro. 56 is not required, and therefore, **TREATS** the MOTION TO DISMISS as a *MOTION FOR SUMMARY*

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[3] In *Randolph County v. Thompson*, 502 So.2d 357 (Ala.1987), a case argued both in the brief and oral argument by all parties here, the Alabama Supreme Court acknowledged *"At hearing, Thompson's motion to dismiss was treated as a motion for summary judgment."* p.361.

[4] However, the Court **NOTES** PLAINTIFFS' contention at p.3 of their MEMORANDUM OF LAW IN OPPOSITION *"… that BBOE records reflecting the start dates for certain individuals were modified, which effected their tenure with the Board."* This is a disputed fact to be addressed by subsequent evidentiary filings as directed in ¶13 of the PARTIAL DECLARATORY JUDGMENT below.

[5] See the ORDER entered May 1, 2013 in this matter, detailing the briefing schedule and fixing the date for oral arguments.

JUDGMENT and further, **TREATS** PLAINTIFFS' REPLY as a *CROSS-MOTION FOR SUMMARY JUDGMENT*. Under the Ala. R. Civ. Pro. the nomenclature of a motion is not controlling. *Ex parte Hartford Ins. Co.,* 394 So.2d 933 (Ala.1981)

IV. DISCUSSION

(A) NON-PARTY COLLATERAL ATTACK

The MOTION argues this action is due to be dismissed as the FIRST AMENDED COMPLAINT is a non-party collateral attack on the same issues previously adjudicated in the CONSOLIDATED CASES that resulted in JUDGE BROWN'S ORDER. DEFENDANTS cite *Randolph County v. Thompson*, 502 So.2d 357, 362 (Ala.1987) in support, arguing *Randolph County* recognized the general rule regarding such a collateral attack by referencing 49 *C.J.S. Judgments* §414 (1947). It states:

> *"A stranger to the record, who was not a party to the action in which the judgment was rendered or in privity with a party, is not prohibited from impeaching the validity of the judgment in a collateral proceeding; but in ORDER to do so he must show that he has rights, claims or interests which would be prejudiced or injuriously affected by the enforcement of the judgment, and which accrued prior to its rendition, unless the judgment is absolutely void. Thus situated he may attack the judgment on the ground of want of jurisdiction, or for fraud or collusion; but he cannot object to it because of mere errors or irregularities or for any matters which might have been set up in defense to the original action."*

Randolph County, Id., p.362

Defendant's reliance on *Randolph County* to establish this action is a collateral attack on every aspect and every issue addressed in JUDGE BROWN'S ORDER is misplaced, i.e., it's not "apples to apples." This Court reads *Randolph County* to strongly support Plaintiffs' position. Briefly, without restating the facts in detail, in *Thompson v. Wallace* [as this term is used in *Randolph County*] the Circuit Court declared since Thompson received a pardon, he was entitled to become a supernumerary sheriff per ALA. CODE §36-22-60 [1975].[6] Gov. Wallace timely appealed, but subsequently dismissed the appeal. Thus, Thompson's legal right to supernumerary status per §36-22-60 was legally established. Randolph County, however, moved to intervene after the appeal was voluntarily dismissed. The Circuit Court denied intervention.

[6] Hereafter, all cites to Alabama statutes are to ALA. CODE [1975].

Randolph County then filed a separate, new action, *Randolph County v. Thompson*, "seeking a declaratory judgment as to whether it had to pay Thompson's salary as a supernumerary sheriff." *Randolph County*, p.361. The Circuit Court granted Thompson's motion for summary judgment ruling it did, and Randolph County appealed. After eliminating the pages of annotated headnotes and pages used by the Court to frame this issue, the Alabama Supreme Court opinion in *Randolph County v. Thompson* is approximately nine pages. However, the Supreme Court took only one page [including two lengthy excerpts] to rule Randolph County's declaratory judgment action was clearly a collateral attack on the judgment in *Thompson v. Wallace*. After all, Thompson had established his legal right to supernumerary status, §36-22-62(a), in clear and unambiguous language, requires an Alabama county to pay the salary of a supernumerary sheriff, and Randolph County is an Alabama county. Finally, it must be noted our Supreme Court's quick, in no uncertain terms, dismissal of Randolph County's "collateral attack" issue occurred even though the trial court's granting summary judgment was not based on the collateral attach issue.

The rest of the *Randolph County* opinion sets out the Supreme Court's analysis concluding, however, that Randolph County did have the right to intervene in *Thompson v. Wallace*, even though that action was effectively over once Gov. Wallace voluntarily dismissed the appeal. The Supreme Court's determination that Randolph County should have been allowed to intervene in *Thompson v. Wallace*, when applied to the posture of this action, establishes why PLAINTIFFS are entitled to advance their claims. In this discussion, the Court analogizes PLAINTIFFS' argument this action is not a collateral attack on JUDGE BROWN'S ORDER to Randolph County's position it should have been allowed to proceed in *Thompson v. Wallace*.

In *Randolph County*, Court stated,

> The proper approach to this inquiry was very well explained in *State ex rel. Wilson v. Wilson,* 475 So.2d 194, 196 (Ala.Civ.App.1985):
>
> > "To intervene in a proceeding under Rule 24(a)(2), the intervenor must have a direct, substantial, and legally protectable interest in the proceeding. *United States v. Perry County Board of Education,* 567 F.2d 277 (5th Cir.1978). There is no 'clear-cut test' to determine if such an interest exists. Rather, courts should use a flexible approach, which focuses on the circumstances of each application for intervention. *Perry County Board of Education,* 567 F.2d at 279."

As non-tenured BBOE employees, PLAINTIFFS unquestionably have a direct, substantial, and legally protectable interest in the consolidated actions. This *legally protectable interest* is contemplated and/or acknowledged in:

- §16-1-33(b): "Each board shall adopt a written reduction-in-force policy consistent with Section 16-1-30. The policy shall include, but shall not be limited to, layoffs, recalls, and notification of layoffs and recalls. The reduction-in-force policy of the board shall be based on objective criteria."

- BBOE RIF POLICY 3092, "… subject to any applicable statutory and constitutional limitations …"

- BBOE RIF POLICY 3093, "… subject to any applicable statutory and constitutional limitations …"

- §16-6B-4: " … Nothing in Chapter 13A or this section shall be construed to deprive any employee of any procedural or substantive right that would otherwise be guaranteed to the employee under the United States Constitution and the laws of the State of Alabama."

  [Emphasis added]

The next prong of analysis is whether PLAINTIFFS are so situated that the deposition of the CONSOLIDATED CASES under JUDGE BROWN'S ORDER may, practically speaking, impair or impede each's ability to protect the due process property rights as set out above. "This requirement of Rule 24(a) must be measured by a 'practical' rather than a 'technical' yardstick." *Randolph County,* p.363. Clearly, if PLAINTIFFS are not allowed to proceed in this action they cannot protect the property interests in their respective jobs.

The final analysis is whether the PLAINTIFFS' interests were adequately represented by any party in the *Witherspoon case* and/or the *SBOE* case. As to *Witherspoon*, the answer is easy … no, they were not. As to the SBOE action, the answer is not readily clear. Theoretically, one might argue that by taking over the management and control of the Birmingham Board of Education due to its dire financial condition, the SBOE and BICE had the best interests of BBOE's employees in mind by trying to keep the BBOE afloat, still employing teachers and other classifications. The BBOE opposed intervention entirely; clearly, in so doing it only sought to protect and enforce its right to govern Birmingham's public schools without State intervention. Having no choice but to accept and comply with JUDGE BROWN'S ORDER, the BBOE acquiesced in the RIF as submitted by BICE. Litigating BICE's authority to intervene, then direct and implement this RIF, without notice to effected employees, simply cannot be

interpreted in any way that BBOE adequately represented PLAINTIFF's rights, sufficient to establish aligned interests. On the facts of the present action, as was the Supreme Court in *Randolph County*, this Court is not persuaded PLAINTIFFS' interests were adequately represented by the BBOE or the SBOE.

In sum, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT is **DENIED, in part,** as to the defense the instant action is an impermissible collateral attack on every ruling on every issue in JUDGE BROWN'S ORDER. It follows, therefore, PLAINTIFFS have standing to bring this action.

(B) AUTHORITY OF STATE BOARD OF EDUCATION TO INTERVENE

PLAINTIFFS contend the underlying RIF was conducted illegally because BICE had no authority to usurp the autonomy of the BBOE by mandating and implementing a RIF when the BBOE did not elect to do so. As authority for this position, PLAINTIFFS argue the holding of the Alabama Supreme Court in *Richardson v. Terry*, 893 So.2d 277 (Ala.2004), and, various provisions of §§16-24C-1, *et.seq.*, popularly referred to as the "STUDENTS FIRST ACT" [hereafter, ***"SFA"***]. PLAINTIFFS submit both as authority establishing the sovereignty of local superintendents and local school boards in determining termination and transfers of personnel.

On the contrary, the STATE DEFENDANTS contend §16-6B-4 [hereafter, ***"§16-6B-4"*** and/or "***INTERVENTION STATUTE***"] grants the STATE SUPERINTENDENT, acting individually or through a Chief Financial Officer appointed by the STATE SUPERINTENDENT, the authority to intervene to ensure the financial viability and stability of a local board in financial crisis. STATE DEFENDANTS maintain the Alabama Legislature, by enacting the INTERVENTION STATUTE, gave the SBOE broad statutory authority to authorize its STATE SUPERINTENDENT to intervene in the financial management of a local board.

The question of STATE SUPERINTENDENT BICE's authority to intervene <u>generally in the financial management</u> of the BBOE, due to its dire financial condition, was previously **ESTABLISHED** in JUDGE BROWN'S ORDER. This Court does not question whether or not: the STATE SUPERINTENDENT had the authority to recommend financial intervention to the SBOE; the SBOE acted properly in authorizing BICE to intervene; BICE had the authority to appoint a Chief <u>Financial</u> Officer for the BBOE; the CFO had the authority to act for BICE until BBOE's fiscal operations were deemed stable enough to function on its own. As established in

JUDGE BROWN'S ORDER, in the FINDINGS OF FACT, it was unquestionable the BBOE was in financial despair and in-need of financial intervention.

Provided however, as discussed below, the undersigned respectfully **DISAGREES** with part of JUDGE BROWN'S ORDER, specifically, to-wit:

- CONCLUSIONS OF LAW, at ¶ 7, p.3 which reads: *"The Plaintiffs STATE BOARD OF EDUCATION and State Superintendent DR. THOMAS R. BICE were authorized by specific Alabama statutory laws to take all of the actions they have taken with respect to the BIRMINGHAM BOARD OF EDUCATION at all material times."*

- DECLARATORY JUDGMENT AND PERMANENT IN JUNCTION, at ¶1, p.2 which reads: *"Plaintiffs have succeeded on the merits;"*

[Emphasis added]

To this Court, whether STATE DEFENDANTS were authorized to conduct the subject RIF under the general grant of authority to intervene in BBOE's financial management [and, by definition, whether they have succeeded on the merits], is resolved as a question of law by determining legislative intent. Specifically, did the Alabama Legislature, by enacting §16-6B-4 which *conferred upon* the STATE SUPERINTENDENT the authority to financially oversee local school boards as BBOE, intend to *relieve* the STATE SUPERINTENDENT from complying with other applicable Alabama law, here, specifically § 16-24C-1, *et. seq.*; and, more specifically, §§ 16-24C-6 and 7 relating to certain personnel actions.

(C) WAS THE RIF DIRECTED AND IMPLEMENTED BY BICE LAWFUL?

(1) DID BICE HAVE AUTHORITY TO DIRECT A RIF AT THE BBOE?

PLAINTIFFS direct this Court to *Richardson v. Terry*, 893 So.2d 277 (Ala.2004) as authority to declare BICE's RIF actions were unlawful. The direct predecessor statutes to the INTERVENTION STATUTE and the SFA, to-wit: respectively, §16-6B-4 and §§16-24-1, *et. seq*. were at issue in *Richardson* There, under the authority of the then current § 16-6B-4, the State Superintendent similarly elected to intervene and take control of the finances of the City of Bessemer Board of Education and make personnel transfers. The Bessemer Board of Education passed the personnel proposal without a recommendation from the Bessemer Superintendent. In overturning this action the Circuit Court found that certain provisions of

§ 16-24-1, *et.seq.* controlled, and neither the Bessemer Board or the Bessemer Superintendent could deviate from the statutory procedures set out. Since the relevant statutes were not followed, the Court held the personnel actions taken by the State Superintendent were void. The Supreme Court affirmed this part of the Circuit Court's ruling but reversed and remanded on other non-related grounds.

Here, the inverse happened. BBOE SUPERINTENDENT WITHERSPOON made personnel recommendations [ordered by BICE] to the BBOE which it did not approve. Although factually distinguishable and controlled by different, successor statutes from the case at hand, the legal reasoning and analysis of the mechanics of conflicting statutes put forth by the Alabama Supreme Court in *Richardson* is still sound and applicable. However, after *Richardson,* the then controlling statutes, §16-6B-4 and §§16-24-1, *et. seq.,* were substantively changed by the Alabama Legislature, but, at different times, and years apart.

STATE DEFENDANTS argue Act 2006-196 [effective June 1, 1996], among other things, amended §16-6B-4 to enhance and enlarge the STATE SUPERINTENDENT's intervention authority, thereby abrogating *Richardson'*s precedent. Essentially, say STATE DEFENDANTS, '§ 16-6B-4 is all that's needed.' PLAINTIFFS contend although § 16-6B-4 was amended post *Richardson*, enactment of Act 2011-270 [even though it specifically repealed § 16-24-1, *et.seq.*] still mandates certain procedures be followed regarding personnel actions taken by local boards. Essentially, say PLAINTIFFS, 'well, you can use S 16-6B-4, but you cannot ignore other applicable law.' Therefore, to resolve this dispute, the Court must attempt to discern the intent of the Alabama Legislature in enacting both acts.

The overarching principle that guides Alabama courts in analyzing Alabama statutes is the principle of separation of powers. This principle is not merely good judicial philosophy as a result of Alabama case law precedent, but is a constitutional mandate. Alabama's constitution contains an explicit, strongly-worded separation of powers provision. See *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So.2d 204 (2005), ("The Constitution of Alabama expressly adopts the doctrine of separation of powers that is only implicit in the Constitution of the United States."); *Ex parte James*, 836 So.2d 813, 815 (Ala. 2002) ("In Alabama, separation of powers is not merely an implicit "doctrine" but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns."). Article III, Section 43 of the Alabama Constitution of 1901 provides, in pertinent

part, that "[i]n the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, ... the judicial [department] shall never exercise the legislative and executive powers, or either of them;"

'[T]o declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative....' " *Ex parte Christopher,* 1120387, 2013 WL 5506613 (Ala. Oct. 4, 2013), (citing *Sanders v. Cabaniss*, 43 Ala. 173, 180 (1869) (quoting *Thomas M. Cooley, Constitutional Limitations* 91–95 (1868)). See also *DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc.,* 729 So.2d 270, 276 (Ala.1998) ("[I]t is our job to say what the law is, not to say what it should be."). [Emphasis added] As stated in *DeKalb Cnty. LP Gas Co.,* at 276, in determining the meaning of a statute the Court looks to the plain meaning of the words as written by the legislature.

> *" 'Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.' "*

citing *Blue Cross & Blue Shield v. Nielsen,* 714 So.2d 293, 296 (Ala.1998) (quoting *IMED Corp. v. Systems Eng'g Assocs. Corp.,* 602 So.2d 344, 346 (Ala.1992)).

Further, our Supreme Court has explained various factors to consider that may demonstrate the intent of the legislature. These include:

- the legislative history behind a statute or section of a statute; *Bowlin Horn v. Citizens Hosp.,* 425 So.2d 1065, 1070 (Ala.1982) (stating that "in determining legislative intent, courts may look to the history of the statute");

- the interpretation placed on a statute by the executive or administrative agency charged with its enforcement is given great weight and deference by a reviewing court. *Alabama Metallurgical Corp. v. Alabama Public Service Comm'n,* 441 So.2d 565 (Ala.1983); *See also Daniel Sr. Living of Inverness I, LLC v. STV One Nineteen Sr. Living, LLC*, 2012 WL 335894 at *4 (Ala.Civ.App.Feb.3, 2012).

- the language of the entire statute under review must be read together and the determination of any ambiguity must be made on the basis of the entire statute; *Perry v. City of Birmingham,* 906 So.2d 174, 176 (Ala.2005); *Sheffield v. State, 708 So.2d 899* (Ala.Cr.App.1997);

- just as statutes dealing with the same subject are read *in pari materia*, parts of the same

statute are to be read *in pari materia* and each part is entitled to equal weight when construing certain sections of a statute together to determine the meaning of a particular section; *Darks Dairy, supra*; and, a Court must give effect to each part of the statute, if possible, without doing violence to some other portion of the statute. *Ex parte Holladay*, 466 So.2d 956, 960 (Ala.1985), quoting *Ex parte Darnell, supra;* and,

- reasonable presumptions that every word, sentence, or provision the Legislature used served a useful purpose and therefore some effect is to be given to each, as well as the presumption that the Legislature did not use superfluous words or provisions. *Ex parte Holladay*, 466 So.2d 956, 960 (Ala.1985); *see also, McDonald v. State,* 32 Ala.App. 606, 28 So.2d 805 (1947) (the legislature will not be presumed to have used language without any meaning or application); and, *Ex parte Darnell,* 262 Ala. 71, 76 So.2d 770 (1954);

Regardless of which principle of statutory construction a court might emphasize, the word '*shall'* must be considered. '*Shall*' has been defined as follows:

> *"'As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always [been] or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means "must" and is inconsistent with a concept of discretion.' "*

Holcomb v. Carraway, 945 So.2d 1009, 1019 (Ala.2006), (Quoting *Black's Law Dictionary* 1375 (6th ed.1991).)

The reason[s] the Legislature decided to pass the INTERVENTION STATUTE and the SFA are not readily available since there is no legislative history. "The State of Alabama does not preserve committee reports, or the debates that surround the adoption of legislation; so, we are unable to review the legislative history of the statute, but '[w]hen [a] statutory pronouncement is clear and not susceptible to a different interpretation, it is the paramount judicial duty of a court to abide by that clear pronouncement.' *City of Birmingham v. Bus. Realty Inv. Co.*, 722 So.2d 747, 751-52 (Ala. 1998); quoting *Parker v. Hilliard,* 567 So.2d 1343, 1346 (Ala.1990).

The evidence before Judge Brown in the CONSOLIDATE CASES shows he heard testimony from BICE and other SBOE witnesses. However, it is not clear to this Court if JUDGE BROWN'S ORDER reflects he gave significant deference to SBOE's interpretation of § 16-6B-4 as the administrative agency charged with its enforcement. As stated above, this Court **AGREES** with JUDGE BROWN'S ORDER regarding the general power of the SBOE to intervene in the financial control and management of BBOE's resources. However, by denying intervention to these PLAINTIFFS on the issues framed here, and, this Court's determination

this action is not a collateral attack on JUDGE BROWN'S ORDER, this Court declines to give deference to the STATE DEFENDANTS' interpretation of the authority granted the STATE SUPERINTENDENT via § 16-6B-4.

Thus, in the absence of any legislative record of committee and floor actions regarding passage of the INTERVENTION STATUTE and the SFA, and declining to give deference to the SBOE and BICE, the Court looks to the wording of these two statutes.

Act 2006-196, at Section 1, reads,

> *"The purposes of this act are to clarify the fiscal responsibilities of the State Superintendent of Education, local superintendents of education, boards of education, and chief school financial officers selected to carry out the fiscal management responsibilities of local boards of education, and to clarify the intent of the Legislature as to the powers of the State Superintendent of Education and the State Board of Education over local boards of education which are found to be in unsound fiscal condition. This act shall be known and may be cited as the School Fiscal Accountability Act."*

[Emphasis added]

Prior to the effective date of Act 2006-196, i.e., June 1, 1996[7], §16-6B-4 limited the power of the STATE SUPERINTENDENT to *review* of the financial condition of local school systems. For purposes of discussion, as well as convenience to the reader, the complete text of §16-6B-4 as of July 24, 2012, reads as follows; provided however, the Court ~~strikes through~~ pertinent language ~~deleted~~[8] by Act 2006-196, and underscores new language per Act 2006-196:

> "Following the analysis of the financial integrity of each local board of education as provided in subsection (a) or (b) of Section 16-13A-2, if a local board of education is determined to have submitted ~~a~~ fiscally unsound ~~budget~~ financial reports, the State Department of Education ~~will~~ shall provide assistance and advice ~~to complete and submit a revised budget~~. If during the assistance ~~in preparing a revised budget~~ the State Superintendent of Education determines that the local board of education is in an unsound fiscal position, a person or persons ~~will~~ shall be appointed by the State Superintendent of Education to advise the day-to-day financial operations of the local board of education. If after a reasonable period of time the State Superintendent of Education determines that the local board of education is still in an unsound fiscal condition, a request ~~will~~ shall be made to the State Board of Education for the direct control of the fiscal

[7] PLAINTIFFS and STATE DEFENDANTS each submit Attorney General 96-00198 supports their respective arguments. However, the Court does not consider this Opinion as very instructive and/or persuasive. Significantly, the Court **NOTES** the Opinion was rendered April 26, 1996. Thirty-five days later, a significantly revised § 16-6B-4 became law.

[8] The Court acknowledges Act 2006-196 deleted the first four sentences of the existing § 16-6B-4; however, they are not shown as deleted here.

> operation of the local board of education. If the request is granted, the State Superintendent of Education shall present to the State Board of Education a proposal for the implementation of management controls necessary to restore the local school system to a sound financial condition. Upon approval by the State Board of Education, the State Superintendent of Education ~~will~~ shall appoint an individual to be chief financial officer to manage the fiscal operation of the local board of education, until such time as the fiscal condition of the system is restored. The chief financial officer shall perform his or her duties in accordance with rules and regulations established by the State Board of Education in concert with applicable Alabama law. Any person appointed by the State Superintendent of Education to serve as chief financial officer to manage the fiscal operation of a local board of education shall be required to give bond with a surety company authorized to do business in Alabama and shall not be required to receive approval of the local superintendent to expend monies ~~as provided in Sections16-8-33 and 16-11-6. The State Superintendent of Education shall have the authority to review decisions of the chief financial officer and the local board of education pursuant to Section 16-4-8.~~ The chief financial officer shall serve at the pleasure and under the direction of the State Superintendent of Education. *The State Superintendent of Education, directly or indirectly through the chief financial officer, **may direct or approve such actions** as **may** in his or her judgment be necessary to: (1) Prevent further deterioration in the **financial condition** of the local board; (2) restore the local board of education to **financial stability**; and (3) enforce compliance with statutory, regulatory, or other binding legal standards or requirements relating to the **fiscal operation** of the local board of education. **Nothing in Chapter 13A or this section shall be construed to deprive any employee of any procedural or substantive right that would otherwise be guaranteed to the employee under the United States Constitution and the laws of the State of Alabama."***

[Emphasis by italics and **bold font** added]

The addition of the last three sentences to §16-6B-4 effectively converted the STATE SUPERINTENDENT's authority *to review* from a "shield" to a "sword" by giving him/her the authority *to "direct or approve such actions as may in his or her judgment be necessary . . ."* However, the rest of the context cannot be ignored; the next three clauses all refer to aspects of **finance** without express authority to take specific personnel changes, to-wit: *((1) prevent further deterioration in the **financial** condition of the local board; (2) restore the local board of education to **financial** stability; and (3) enforce compliance with statutory, regulatory, or other binding legal standards or requirements relating to the **fiscal** operation of the local board of education).* In other words, even recognizing Act 2006-196 gave the STATE SUPERINTENDENT this "sword" where he/she previously had a "shield", it remains uncertain whether this sword can strike down "other applicable authority" or "deprive any employee of any

procedural or substantive right that would otherwise be guaranteed to the employee under the United States Constitution and the laws of the State of Alabama."

Also of note to the Court is that at six instances, per Act 2006-196, the word *"shall"* is either substituted for the word "*will*" [three time] or inserted as new text [also three times] in this new § 16-6B-4. However, the word *"may"* rather than *"shall"* is used in the very sentence [post *Richardson*] STATE DEFENDANTS contend gives BICE the authority to implement the BBOE RIF in the manner he did. The final use of the word *"shall"* is most significant to this Court, to-wit: *"Nothing in Chapter 13A or this section **shall** be construed to deprive any employee of any procedural or substantive right that would otherwise be guaranteed to the employee under the United States Constitution and the laws of the State of Alabama."*

As stated above, PLAINTIFFS contend only "local boards," not the SBOE, can effect personnel decisions, especially terminations and transfers regarding tenured or classified or otherwise non-probationary employees such as themselves. And further, personnel actions are governed solely by procedures mandated in §§16-24C-1, *et. seq.*as enacted by Act 2011-270.

One of the purposes stated in the Synopsis of Act 2011-270 [as ENROLLED, SB 310] states:

> *"to provide rights, remedies, and obligations with respect to employment actions affecting or involving certain employees or categories of employees of city and county boards of education . . ."*

Act 2011-270, at Section 1 and Section 2, reads as follows:

> *Section 1. This act shall be known and may be, cited as the Students First Act of 2011.*
>
> *Section 2. The purpose of this act is to improve the quality of public education in the State of Alabama by doing all of the following:*
>
> *(1) Providing for fundamental fairness and due process to employees covered by this act.*
>
> *(2) Restoring primary authority and responsibility for maintaining a competent educational workforce to employers covered by this act.*
>
> *(3) Enhancing the ability of public educational agencies to increase student academic achievement and student performance through effective allocation of personnel resources.*

> *(4) Investing employers covered by this act with the discretion and flexibility necessary to make the most effective use of limited educational resources.*
>
> *(5) Eliminating costly, cumbersome, and counterproductive legal challenges to routine personnel decisions by simplifying administrative adjudication and review of contested personnel decisions.*

Therefore, PLAINTIFFS submit under the statutory mandates of the SFA only a local GOVERNING BOARD can decide [by majority vote] whether to enforce a RIF; and, the undisputed July 24, 2012, BBOE 2-2-2 vote was not a vote on the RIF; thus, BICE had no authority to impose a RIF.

PLAINTIFFS repeatedly emphasize [beginning with ¶ 126, AMENDED COMPLAINT, p.19] the definition of "*governing board*" found at §16-24C-3(5) for purposes of the SFA. However, ¶ 126 does not contain the entire text of § 16-24C-3(5). Other than specific wording applying only to two year colleges, § 16-24C-3(5) reads as follows, with the omitted words underlined, and the Court's **emphasis in bold text**:

> *"(5) GOVERNING BOARD. The body of elected or appointed officials that* ***is granted authority by law****, regulation, or policy* ***to make employment decisions on behalf of the employer.*** *If* ***final*** *decision-making authority with respect to employment decisions is* ***conferred by law****, regulation, or duly adopted policy* ***on an official****, administrator, or organizational unit* ***other than a separate governing board****, the decision or action of such official, administrator, or organizational unit, . . .* ***is*** *that of the governing board* ***for purposes of this chapter****, and* ***no additional*** *approval of such decision or action* ***shall*** *be required. Under* ***such circumstances****, the official, administrator, president, or organizational unit* ***shall*** *assume and* ***exercise the duties*** *of the governing board* ***established by this chapter.*** ***For purposes of this chapter****, the State Board of Education shall not be deemed to be or authorized to function as the employer or the governing board of any employer covered by this chapter."*

The requirement that the governing board, statutorily defined as a local board, "**vote on**" or "**approve**" personnel matters is clearly mandated in the SFA. These very words, or similar words, are used in the SFA, at significant places specifically addressing personnel decisions of tenured, non-probationary employees. *See*, §§16-24C-6(a), (b), (d) and (h)(2)(b); every sub-paragraph of § 16-24C-7; and, §16-24C-8. Such cannot be considered anything other than an expression of legislative intent. Therefore, to this Court the precise issue is to determine whether these very words from the INTERVENTION STATUTE [§ 16-6B-4]:

> *"... **may direct or approve such actions** ... **Nothing** in Chapter 13A or this section **shall be construed** to deprive any employee of any procedural or substantive right that would otherwise be guaranteed to the employee under the United States Constitution and the laws of the State of Alabama. "*

can be construed in *pari materia* in light of their application to the same general subject matter, with:

> the forgoing subparagraphs from the STUDENTS FIRST ACT §§ 16-24C-1, *et. seq.* that require "***local governing board vote on personnel actions*****"**

A Court's obligation is to construe the subject provisions "in favor of each other to form one harmonious plan," if it is possible to do so. *Opinion of the Justices No. 334,* 599 So.2d 1166, 1168 (Ala.1992), (quoting *Ex parte Coffee County Comm'n,* 583 So.2d 985, 988 (Ala.1991). It is this Court's opinion it is possible to do so.

The Court agrees with the argument of the STATE DEFENDANTS the Alabama Legislature could not have intended circumstances in which the STATE SUPERINTENDENT could not legally act in situations where he/she is vested with specific authority to act. In *Hamilton v. Smith,* 264 Ala. 199, 86 So.2d 283 (Ala.1956) the Court stated, "The courts will not ascribe to the legislature an intent to create an absurd or harsh consequence, and so *an interpretation avoiding absurdity is always to be preferred.*" (Quoting 1A C. Sands, *Sutherland Statutory Construction,* 23.06 (4th ed. 1972). But, it is also reasonable to presume that every word, sentence, or provision the Legislature used serves a useful purpose and therefore some effect is to be given to each, as well as the presumption that the Legislature did not use superfluous words or provisions. *Ex parte Holladay*, 466 So.2d 956, 960 (Ala.1985); *see also, McDonald v. State,* 32 Ala.App. 606, 28 So.2d 805 (1947) (the legislature will not be presumed to have used language without any meaning or application); and, *Ex parte Darnell,* 262 Ala. 71, 76 So.2d 770 (1954). Moreover, the Legislature, in enacting new legislation, is presumed to know the existing law. *Ex parte Fontaine Trailer Co.,* 854 So.2d 71 (Ala.2003); *Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen*, 714 So.2d 293, 297 (Ala.1998)."

While it is unclear whether the Alabama Legislature even contemplated the effect that the STATE SUPERINTENDENT's invocation of financial intervention authority under §16-6B-4 would have on the operation of §16-24C-1, et. seq., the Court must assume that it did. When it passed Act 2011-270, the Legislature was well aware of existing law concerning public schools,

especially as to personnel decisions made by local boards, and, more particularly as to tenured teachers, classified employees and otherwise non-probationary employees. In fact, Section 14 of the Act specifically repealed certain statutes, but not § 16-6B-4. But, Section 14 also repealed, by implication, "All laws or parts of laws that conflict with this act ..." Accordingly, one might argue 2011's SFA, containing the clear and unambiguous pronouncement of legislative intent of "**restoring primary** authority and responsibility for **maintaining** a competent educational **workforce** to **employers** covered by this act," preempts or voids any interpretation that the authority given the STATE SUPERINTENDENT in § 16-6B-4 to "*direct and approve*" includes not only financial matters, but personnel actions as well. But, this argument fails.

At this juncture, the statutes are clear the "employer" is the BBOE, not the SBOE nor the STATE SUPERINTENDENT. The plain meaning of "restore" is to return or put back something tangible where it was, as well as to put back or reinstate something intangible, like authority and responsibility. Also, the plain meaning of "maintain" includes doing what you have to do to keep a tangible item in place and working as intended, as well as doing what you have to do to keep competent education employees in place doing their jobs. In that context, the plain meaning of a reduction in force falls within the definition of "maintaining ... a workforce." But, again, a court's obligation is to construe the subject provisions "in favor of each other to form one harmonious plan," if it is possible to do so. *Opinion of the Justices No. 334, supra.*

In so doing, all words used must be examined for their plain meaning. In declaring the purposes of the SFA, the Legislature inserted the word "*primary*" before the words "*authority* and *responsibility*" therefore modifying these words. The plain meaning of the word "*primary*" necessarily implies there were other related decisions, but one is more important than the others, i.e., "*primary*." However, this plain meaning of "*primary*" does not conclusively eliminate the chance of "*subsequent*" decisions. The plain meaning of the word "*final*" in this context is, even if other decisions preceded it, there will be no more made after it. So, why is this significant? For two reasons.

First, for purposes of the SFA, the Legislature specifically defined "employer" to include:

> *"... If **final** decision-making authority with respect to employment decisions is conferred by law ... on an official ... other than a separate governing board, the decision or action of such official ... **is that of the governing board for purposes of this chapter...**"*

Thus, in the context of the INTERVENTION STATUTE, or at a minimum specifically as to §16-6B-4, the Alabama Legislature intended to distinguish "*final*" authority from "*primary*" authority as to personnel decisions.

Second, immediately preceding the word "*final*" is the word "***If***". The plain meaning of the word "*if*" is, something happens or doesn't happen depending on whether a defined condition precedent is satisfied. Again, all language of a statute under review must be read together and the determination of any ambiguity must be made on the basis of the entire statute; *Perry v. City of Birmingham,* 906 So.2d 174, 176 (Ala.2005); *Sheffield v. State, 708 So.2d 899* (Ala.Cr.App.1997); and, two or more statutes can be construed in *pari materia* in light of their application to the same general subject matter, *Darks Dairy, supra*.

Applying these and other maxims of statutory construction, the Court **DETERMINES** the STUDENTS FIRST ACT does not contain any language that expressly, or impliedly, establishes any condition precedent to trigger **removing** *"primary authority and responsibility for maintaining a competent educational workforce"* from the BBOE and then **vesting** *"final decision-making authority with respect to employment decisions ... on an official ... other than a separate governing board"*, i.e., the STATE SUPERINTENDENT. Rather, at § 16-24C-3 Definitions (5), the SFA specifically acknowledges a "condition precedent" is defined elsewhere that must be satisfied before "*final decision-making authority*" can be "*... conferred by law ... on an official ...*"

The Court further **DETERMINES** the Alabama Legislature, contemplating enactment of the SFA, intended satisfaction of § 16-6B-4 to be the "condition precedent." Section 14 of Act 2011-270 did not expressly repeal it; nor is it to be implied the STATE SUPERINTENDENT's intervention authority to act on a local public school system's personnel matters is repealed or diminished.

By the same reasoning, the Court does not agree with PLAINTIFFS' contention § 16-4-8 only grants the STATE SUPERINTENDENT "*... the authority to review actions and orders of county and city boards of education ...*" It appears § 16-4-8 has not been significantly modified since adopted in Alabama's School Code of 1927. But, Act 2006-196 expressly deleted the following sentence from § 16-6B-4, to-wit: *"The State Superintendent of Education shall have the authority to review decisions of the chief financial officer and the local board of education pursuant to Section 16-4-8.*" [emphasis added]. And why was this sentence struck? Because

leaving it in would completely conflict with specific new words, granting specific new authority to the STATE SUPERINTENDENT, to-wit: *"... may direct or approve such actions ..."* As such, leaving § 16-4-8 intact creates ambiguity between these two that cannot be made to work in *pari materia* in a harmonious fashion.

Act 2006-196 also contained Section 5 which reads:

> *"All laws or parts of laws which conflict with this act are repealed, and Sections 16-8-33, 16-9-3, 16-11-6, 16-11-7, 16-13-10, 16-13-11, and 16-13-12 of the Code of Alabama 1975, are specifically repealed."*

Thus, this Court **DETERMINES** ALA. CODE § 16-4-8 [1975] was **REPEALED** by implication by virtue of Act 2006-196, Section 5.

In that part of JUDGE BROWN's ORDER entitled CONCLUSIONS OF LAW, that Court **FOUND** "the STATE SUPERINTENDENT may direct or approve such actions as may be necessary in his judgment to (1) prevent deterioration of the financial condition of the local board; (2) restore the local school system to financial stability; and (3) ensure compliance with binding legal standards or requirements relating to the fiscal operation of the local board of education.[9]" As stated above, with respect generally to financial matters, this Court **AGREES**. However, upon the foregoing analysis, this Court **REJECTS** PLAINTIFFS' argument that the STUDENTS FIRST ACT [more specifically §§ 16-24C-3(5), 6 and 7] and the holding in *Richardson v. Terry, supra*, as a matter of law, preclude the STATE SUPERINTENDENT from exercising the authority vested in him by § 16-6B-4 to effect, or actually make, personnel decisions for local boards of education.

(2) DID BICE IMPLEMENT THE BBOE RIF ACCORDING TO LAW?

No, he **DID NOT.**

- STATE DEFENDANTS submit,

> "*Plaintiffs' procedural due process claim fails to state a claim upon which relief can be granted because due-process termination hearings, whether pre-termination, post-termination, or otherwise, are not required where employees are terminated pursuant to a RIF, as is the case here.*"

[STATE DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT, p.31]

[9] Judge Brown's CONCLUSIONS OF LAW, ¶ 6.

- PLAINTIFFS say,

> *"This action is not a scenario in which Plaintiffs are trying to assert the right to a hearing by virtue of a RIF determination. Instead, as the Court and the parties should be well aware, Plaintiffs in their First Amended Complaint repeatedly set forth the foundation basis of their claim – that it is the* ***local board*** [emphasis supplied] *and not the State Department of Education, that may act with respect to RIF decisions. This is the central challenge to the Defendants' action ..."*

PLAINTIFFS' SURREPLY, at II. p.3

- However, PLAINTIFFS further say at the footnote immediately after the word *'action',*

> *"Contrary to Defendants' recent assertions, Plaintiffs do not dispute the RIF policy itself; instead, the objection is to the failure to follow the law in implementing the RIF."*

PLAINTIFFS' SURREPLY, at II. p.3, ftn.1

The Court completely **DISAGREES** with the argument of the STATE DEFENDANTS that due process hearings are not required under these facts. But, although having concluded (above) PLAINTIFFS are incorrect regarding the *"foundation basis of their claim,"* the Court **DETERMINES** BICE and the STATE DEFENDANTS ***FAILED*** *to follow the law in implementing the RIF*.

The *legally protectable interest* of each tenured teacher, classified employee and otherwise non-probationary employee described above bears restating again. The public education statutes in Alabama contemplate and acknowledge this interest at, among other places, the following:

- §16-1-33(b): "Each board shall adopt a written reduction-in-force policy consistent with Section 16-1-30. The policy shall include, but shall not be limited to, layoffs, recalls, and ***notification*** of layoffs and recalls. The reduction-in-force policy of the board shall be based on objective criteria."

- BBOE RIF POLICY 3092, "… subject to any applicable statutory and constitutional limitations …"

- §16-6B-4: "… Nothing in Chapter 13A or this section shall be construed to deprive any employee of any ***procedural*** or ***substantive*** right that would otherwise be guaranteed to the employee under the United States Constitution and the laws of the State of Alabama."

PLAINTIFFS, of course, also rely on the relevant sections of the SFA, particularly §§ 16-24C(6) and (7). And, as PLAINTIFFS correctly remind the Court, this interest is also safeguarded by law other than Alabama's public education statutes, including but not limited to,

to-wit: the U. S. Constitution; the Constitution of Alabama of 1901, 42 U.S.C. § 1983, and, scores of cases from various jurisdictions following the opinion of the U. S. Supreme Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

Initially, the question arises why at § 16-1-33 the Legislature would mandate local boards of education adopt reduction in force plans with notice provisions "pursuant to Section 16-1-30"? The plain meaning of notice is precisely what a reasonable woman would think it is. And, as for "Section 16-1-30", it specifically, statutorily mandates, "*... Before adopting the written policies, the board shall, directly or indirectly though the chief executive officer, consult with the applicable local employees' professional organization."* With § 16-1-30 and § 16-1-33, the Legislature requires local boards establish a RIF policy containing significant notice provisions, but only after giving notice of the intent to adopt such policies not only to effected employees but also their "professional organization." There is nothing in the record before the Court suggesting in any way the RIF policy of the BBOE does not comply with § 16-1-33. Yet, the very Alabama agency charged with enforcing these very laws and policies argue PLAINTIFFS have no right to notice or a due process hearing.

STATE DEFENDANTS submit as support for the proposition that employees such as PLAINTIFFS who are RIF'd are not entitled, in any way at any time to due process hearings, relevant sections of the SFA as argued; as well as case law from no less than six jurisdictions. None of which, the Court **NOTES**, are from any Alabama court, any U. S. District Court within Alabama, or the 11th Circuit Court of Appeals. STATE DEFENDANTS' suggestion that, at footnote 6 of their opinion in *Ex parte Gordon Moulton*, referencing *Duffy v. Sarault,* 892 F.2d 139 (1st Cir.1989), the Alabama Supreme Court acknowledges no right to a hearing, is easily distinguished. Our Supreme Court stated, "... assuming the evidence supported Teplick's [similarly situated as PLAINTIFFS here] contention that he was a staff employee of USA, Teplick would still not be entitled to a due-process hearing, "*... under the terms of the staff-employee **handbook**...*". *Moulton*, p.1135. [Emphasis added] The due process rights of PLAINTIFFS do not spring from a "handbook."

If not, where do they spring, if not leap, from?

> *"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a*

> *purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.*
>
> *"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing **rules** or understandings that stem from an independent source such as **state law**—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."*

Moulton, p.1134, quoting *Board of Regents of State Colls. v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), at 408 U.S. at 577. [All emphasis added]

However, and most significantly, the Court **RELIES** on the SFA in declaring below PLAINTIFFS were unlawfully separated from their BBOE jobs. In so doing, the Court need not look beyond the plain, clear, unambiguous and simple wording found at different parts of the STUDENTS FIRST ACT. These are:[10]

§ 16-24C-6. Termination of employment -- Grounds for termination; procedures; appeals.

> *(a) Tenured teachers and nonprobationary classified employees may be terminated at any time because of a justifiable decrease in the number of positions or for incompetency, insubordination, neglect of duty, immorality, failure to perform duties in a satisfactory manner, or other good and just cause, **SUBJECT to** the rights and procedures hereinafter provided. ...*
>
> *(b) The termination of a tenured teacher or nonprobationary classified employee ... **SHALL be initiated** by the recommendation of the chief executive officer in the form of a written notice of proposed termination to the employee.... the notice **SHALL state** the reasons for the proposed termination, **SHALL contain** a short and plain statement of the facts showing that the termination is taken for one or more of the reasons listed in subsection (a), and **SHALL be issued in conformity with subsection (k)**.... The notice **SHALL inform** the employee... in order to request a hearing with the governing board, the employee must file a written request for such a hearing with the chief executive officer within 15 calendar days after issuance of the notice..."*
>
> *(c) At the hearing, the chief executive officer ... based solely on the information provided by the recommending senior supervisor, **SHALL bear the burden of proof** with regard to disputed issues of material fact...*
>
> *(d) Whether or not the employee requests a hearing before the governing board ... the **chief executive officer SHALL give written notice** to the employee of the decision regarding the proposed termination within 10 calendar days after the vote of the board ... . If the decision follows a hearing requested by the employee,*

[10] Only the pertinent language is set out.

*the **notice SHALL also inform** the employee of the right to contest the decision by filing an appeal as provided in this chapter.*

*(k) Unless otherwise provided, **notice for all purposes** under this chapter **SHALL** be **GIVEN** by United States mail, certified delivery, by private mail carrier for next business day delivery, or by physical delivery to the employee or the last known address of the employee ...*

§ 16-24C-7. Transfers and reassignments.

(b) A chief executive officer may reassign a teacher to any grade, position, or work location within the same school, campus, instructional facility ... as the needs of the employer require. For a tenured teacher ... written notice of the reassignment must be issued to the teacher...

*(c) ... In the notice of proposed transfer, and **PRIOR TO A FINAL decision** of ... the governing board, the teacher must be afforded an opportunity to meet with ... the governing board to demonstrate why the proposed transfer should not be approved.*

*(d) Nonprobationary classified employees may be transferred to any position for which they are qualified within the agency or system by which they are employed ... **IF** the transfer is without loss of or reduction in compensation, **WRITTEN notice** of the proposed transfer is **issued** to the employee ... the **CHIEF EXECUTIVE OFFICER** not less than 15 calendar days before a **FINAL** decision is made by ... or a vote thereon is taken by the governing board,*

*(f) A tenured teacher or nonprobationary classified employee may be involuntarily transferred ... **SUBJECT TO** the following terms and conditions: The notice of proposed transfer and subsequent proceedings, except for use of the term transfer, **SHALL conform and be subject to the SUBSTANTIVE AND PROCEDURAL STANDARDS and requirements that apply to termination of nonprobationary employees under Section 16-24C-6, and to appeals therefrom**. No vote or decision on such transfers shall be made for political or personal reasons. ...*

§ 16-24C-8. Hearings.

*Whenever this chapter affords an employee the right to be heard by the governing board ... before a decision on the recommendation of the chief executive officer ... the **merits** of the recommended employment action **SHALL not be deliberated or determined** by the governing board ... **before the hearing except** as provided for herein.*

The legislative intent regarding the issues discussed herein is clear, and the pertinent statutes from the SCHOOL FISCAL ACCOUNTABILITY ACT and the STUDENTS FIRST ACT can be read in harmony, in that for each and every time the words *"governing board"* are

used in §§ 16-24C- 6 and 7, they are synonymous, the very same, in every way, as the words *"STATE SUPERINTENDENT,"* and all the more so for ***"FINAL"*** decisions. However, the Court cannot find anywhere in these Acts, nor can this Court legislate by discernment and/or implication, any authority for the STATE SUPERINTENDENT to assume the role of a chief executive officer of an Alabama public school system and fail to discharge the legal obligations of the local superintendent regarding due process notice to teachers and/or otherwise non-probationary employees of that Alabama school system facing detrimental employment decisions as termination, transfer and/or reduction in compensation. There are numerous due process notice and hearing requirements that a local superintendent ***"SHALL"*** perform. And, a local governing board [here, STATE SUPERINTENDENT BICE] can only make final personnel decisions ***"IF"*** due process is provided. PLAINTIFFS' 42 U.S.C. §1983 claim is due to be GRANTED.

ORDER and PARTIAL SUMMARY DECLARATORY JUDGMENT

Accordingly, it is hereby **ORDERED, ADJUDGED**, and **DECLARED** as follows:

1. PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY is **GRANTED**; the Court has **CONSIDERED** same in this action;

2. In that DEFENDANT APRIL M. WILLIAMS was sued both personally and in her Official Capacity as President of DEFENDANT BIRMINGHAM BOARD OF EDUCATION, the Court takes **JUDICIAL NOTICE** that RANDALL WOODFIN is the current duly elected President of DEFENDANT BIRMINGHAM BOARD OF EDUCATION, therefore, RANDALL WOODFIN, in his Official Capacity only, is **SUBSTITUTED** for DEFENDANT APRIL M. WILLIAMS in her Official Capacity;

3. As to COUNT ONE of PLAINTIFFS' FIRST AMENDMENT TO THE COMPLAINT ["foundational claim"], under the law and undisputed material facts herein, PARTIAL SUMMARY JUDGMENT is **ENTERED** in favor of all DEFENDANTS as this Court **DETERMINES** and **DECLARES** the Alabama STATE SUPERINTENDENT of Education who has statutorily intervened in the management of a local school system, has statutory authority to make final personnel decisions that otherwise would be made by the governing board of a local school system[11];

[11] This aspect of this PARTIAL DECLARATORY JUDGMENT shall not be interpreted or understood to vacate or modify that part of JUDGE BROWN'S ORDER declaring that STATE SUPERINTENDENT BICE properly intervened in the management and policies of the Birmingham Board of Education.

4. As to COUNT TWO of PLAINTIFFS' FIRST AMENDMENT TO THE COMPLAINT ["42 U.S.C. §1983 claim], under the law and undisputed material facts herein, PARTIAL SUMMARY JUDGMENT is **ENTERED** in favor of PLAINTIFFS as this Court **DETERMINES** and **DECLARES** any adverse personnel decision as to any PLAINTIFF purportedly made July 24, 2012, by STATE SUPERINTENDENT BICE and/or his designee, unlawfully deprived, under color of state law, each PLAINTIFFS' protected property right in his/her job with the BIRMINGHAM BOARD OF EDUCATION by denying each PLAINTIFF substantive and procedural due process;

5. As to COUNT THREE of PLAINTIFFS' FIRST AMENDMENT TO THE COMPLAINT ["ADMINISTRATIVE PROCEDURES" claim], the Court **DETERMINES** and **DECLARES** PLAINTIFFS' have **WAIVED** said claim and it is **DISMISSED**, without prejudice;

6. The Court **UNDERSTANDS** the employment status [length of service, position held, salary, accumulated paid leave, etc.] of each PLAINTIFF was a matter of record as of July 24, 2012; as such, ***within twenty-one [21] days*** of this PARTIAL SUMMARY JUDGMENT, PLAINTIFFS shall **FILE**, in a suitable format [by narrative, table, spread sheet, etc.] a detailed summary of the remedy and damages each individual Plaintiff seeks as a result of the unlawful failure of the STATE SUPERINTENDENT to properly conduct the subject RIF according to BBOE RIF POLICIES 3092 and/or 3093 as of July 24, 2012; [essentially, the Court desires to know the individual employment status, as of this date, of each PLAINTIFF had the RIF been properly effected];

7. The STATE DEFENDANTS and BBOE DEFENDANTS are ENJOINED from failing to cooperate with PLAINTIFFS in preparing the filing described in ¶6, above;

8. Also ***within twenty-one [21] days*** of this PARTIAL SUMMARY JUDGMENT, PLAINTIFFS shall **FILE** their attorney fee petition pursuant to 42 U.S.C. §1988(b);

9. Within ***fourteen [14] days of PLAINTIFFS' filing*** per ¶6, DEFENDANTS shall FILE any response to any individual PLAINTIFF's filing, provided however, the RESPONSE shall not contain any substantive arguments regarding the rulings and declarations set forth above; the Court expects DEFENDANTS to cooperate with preparation of the ¶6 filing, and it is specifically **ORDERED** and **DIRECTED** any confirmation of or stipulation to job classification, salary/ back pay calculation of any PLAINTIFF by any DEFENDANT does not waive any legal right to appeal or otherwise timely challenge any aspect of the anticipated final declaratory judgment to be entered herein;

10. Within ***fourteen [14] days of PLAINTIFFS' filing*** their attorney fee petition per ¶8, DEFENDANTS shall FILE any response as desired;

11. Within ***seven [7] of days DEFENDANTS' filing*** per ¶9, PLAINTIFFS shall file any reply if desired;

12. Within ***seven [7] of days DEFENDANTS' filing*** per ¶10, PLAINTIFFS shall file any reply if desired;

13. A final evidentiary hearing pertaining to both PLAINTIFFS' rights and remedies, as well as PLAINTIFFS' fee request pursuant to 42 U.S. Code § 1988(b) is **SET Thursday, October 9, 2014, at 9:00 a.m.** in Courtroom 310, Jefferson County Courthouse, Birmingham.

***DONE** and **ORDERED** this date, August 25, 2014.*

s/Michael G. Graffeo
MICHAEL G. GRAFFEO
Circuit Judge