No. 5PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION, et al., Plaintiffs	)	
and	)	
ASHEVILLE CITY BOARD OF EDUCATION, et al., Plaintiff-Intervenors,	)	From Wake County No. 95CVS1158 No. COA11-1545
v	)	
STATE OF NORTH CAROLINA; STATE BOARD OF EDUCATION, Defendants	)	

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PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 25 September 2012)
(Allowed 7 March 2013)

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PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 25 September 2012)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant, the State of North Carolina, pursuant to N.C.G.S. § 7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure, respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals filed on 21 August 2012 in this cause on the basis that: (1) the subject matter of the appeal has significant public interest, (2) the cause involves legal

principles of major significance to the jurisprudence of the State, and (3) the decision of the Court of Appeals appears likely to be in conflict with decisions of this Court. In support of this Petition, the State shows the following:

Facts

This action was commenced in 1994 seeking declaratory and other relief for alleged violations of the educational provisions of the North Carolina Constitution and the North Carolina General Statutes. The matter has been before this Court on two prior occasions. *See Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) (*Leandro I*); *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Hoke County* or *Leandro II*). On 5 January 2012, both the Plaintiffs and the State petitioned for discretionary review prior to a determination by the Court of Appeals [Docket No. 5P12]. This Court denied both petitions in Orders issued on 8 March 2012. Oral argument was held in the Court of Appeals on 5 June 2012.

This appeal arises from the rulings set forth in the "Memorandum Of Decision And Order Re: Pre-Kindergarten Services For At-Risk Four Year Olds" entered by the Honorable Howard E. Manning, Jr. on 18 July 2011. In pertinent part, Judge Manning's order provides that the State "shall not deny any eligible at-risk four year old admission to the North Carolina Pre-Kindergarten Program;" that it "shall provide" the services of the Pre-Kindergarten Program "to any eligible at risk four

year old that applies;" and that the State "shall not implement, apply, or enforce any other artificial rule, barrier, or regulation to deny any eligible at-risk four year old admission to the prekindergarten [program]." (Slip Op. at 6)

In a published opinion by Judge Elmore and joined in by Chief Judge Martin and Judge Steelman, the Court of Appeals affirmed "the trial court's order mandating the State to not deny any eligible 'at-risk' four year old admission to the North Carolina Pre-Kindergarten Program." (Slip Op. at 20) The Court of Appeals held that "the trial court acted within its authority to mandate the unrestricted acceptance of all 'at-risk' four year old prospective enrollees who seek to enroll in existing pre-kindergarten programs across the State." (Slip Op. at 16) Additionally, the Court of Appeals opined that while it "would be unwise for the courts to attempt to lock the legislative and executive branches into a solution to a problem" (Slip Op. at 19-20), the State should only be allowed to modify its pre-kindergarten program "by means of a motion filed with the trial court setting forth the basis for and manner of any proposed modification" (Slip Op. at 20).

Reasons Why Certification Should Issue

The trial court order affirmed by the Court of Appeals requires the State to provide pre-kindergarten services on a state-wide basis to any eligible at-risk four year old that applies and to not deny any eligible at-risk four year old admission to the

North Carolina Pre-Kindergarten Program.[1] The potential scope of this mandate is significant, as the trial court found that "[t]here are estimated to be between 65,000 and 67,000 eligible at-risk 4 year olds in North Carolina" while "[t]here were approximately 32,000 at risk 4 year olds served by MAF [More At Four] in 2010-2011." (R p 666)

The decision below further provides that any modification in the State's pre-kindergarten program proposed by the legislative or executive branches must be "pre-cleared" with the trial court. The mandate for state-wide pre-kindergarten as well as the judicial pre-approval requirement are unprecedented and inconsistent with this Court's prior decisions in this case. The Court of Appeals' decision squarely concerns matters of significant public interest and involves legal principles of major significance to the jurisprudence of the State.

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[1] "[M]ost educators seem in agreement that an 'at-risk' student is generally described as one who holds or demonstrates one or more of the following characteristics: (1) member of low-income family; (2) participate in free or reduced-cost lunch programs; (3) have parents with a low-level education; (4) show limited proficiency in English; (5) are a member of a racial or ethnic minority group; (6) live in a home headed by a single parent or guardian." *Hoke County*, 358 N.C. at 637 n.16, 599 S.E.2d at 390 n.16. The General Assembly has specified that up to 20% of enrollees in the State's pre-kindergarten program may have non-financial risk factors, which includes children of active duty members of the armed forces. *See* N.C. Sess. Law 2012-13 sec. 2(a).

I. The decision conflicts with this Court's decisions in *Leandro I* and *Hoke County*.

The decision of the Court of Appeals does not provide any established basis for its mandate requiring the provision of a state-wide pre-kindergarten program for all "at-risk" four year olds. Such a requirement does not arise under our Constitution and has been previously rejected as an appropriate remedy in this case.

The 2004 decision in *Hoke County* explicitly considered and rejected the argument that the prior ruling in *Leandro I* "established a separate constitutional right to pre-kindergarten for 'at-risk' prospective enrollees in Hoke County schools." 358 N.C. at 643 n.17, 599 S.E.2d at 393 n.17. This Court unambiguously declared that "no such attendant right was established within the parameters of *Leandro [I]*."[2]

Furthermore, the imposition of a state-wide remedy ignores the express language of this Court in *Hoke County* clearly declaring that it was "confining the parameters of our holding to the trial court's findings and conclusions concerning 'at-

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[2] The fact that this holding is set out in a footnote does not diminish in any way its precedential force and effect. As Chief Justice Roberts has observed, "footnotes are part of an opinion, too, even if not the most likely place to look for a key jurisdictional ruling." *United States v. Denedo*, 556 U.S. 904, 921, 173 L. Ed. 2d 1235, 1251 (2009) (Roberts, CJ, concurring in part and dissenting in part). Numerous opinions by this Court demonstrate that jurisprudential matters addressed in footnotes are treated as relevant and controlling. *See Andrews v. Haygood*, 362 N.C. 599, 603, 669 S.E.2d 310, 313 (2008), *cert. denied sub nom Brown v. N.C. HHS*, 577 U.S. 904, 174 L. Ed. 2d 291 (2009); *State v. Garner*, 331 N.C. 491, 501-02, 417 S.E.2d 502, 507-08 (1992); *Dep't of Corr. v. Gibson*, 308 N.C. 131, 138, 301 S.E.2d 78, 83 (1983).

risk' students within the Hoke County school system." 358 N.C. at 634, 599 S.E.2d at 388 (emphasis supplied). That decision set forth a lengthy procedural history analysis leading to the ruling that "our consideration of the case is properly limited to the issues relating solely to Hoke County as raised at trial" *id.* at 613, 599 S.E.2d at 375, and the statement that "our holding mandates cannot be construed to extend to the other four rural districts named in the complaint" *id.* at 613 n.5, 599 S.E.2d at 375 n.5. This Court further emphasized that even though the trial court took evidence on and made conclusions about student performance across the state, "the issues of the instant case pertain only to evidence, findings, and conclusions that apply to Hoke County in particular. As a consequence, any findings or conclusions that were intended to apply to the state's school children beyond those of Hoke County are not relevant to the inquiries at issue." *Id.* at 633 n.14, 599 S.E.2d at 387 n.14 (emphasis supplied).

The Court of Appeals did not and cannot explain how evidence presented in the trial court justifying a judicial remedy to compensate specific named parties for their proven injuries authorizes the trial court to impose a state-wide mandate for the provision of pre-kindergarten services to any eligible "at-risk" four year old that applies.

Nor does the Court of Appeals decision offer any jurisprudential basis for its imposition of a judicial "pre-clearance" requirement before any modification of the State's pre-kindergarten program may be undertaken by the legislative and executive branches of government. In *Hoke County* this Court was expressly mindful of the separation of powers concerns presented by the matters at issue in this case, citing *Leandro I* for the proposition that "[t]he courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education." 358 N.C. at 622-23, 599 S.E.2d at 381 (citing *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261). This Court further ruled that "[o]nly . . . a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education." *Id.* at 623, 599 S.E.2d at 381 (citing *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261).

The decree by the Court of Appeals that the State can only modify its pre-kindergarten program "by means of a motion filed with the trial court setting forth the basis for and manner of any proposed modification" (Slip Op. at 20) appears to insert the judiciary far into the realm of policy choices and value determinations that the

Constitution commits to the legislative and executive branches. *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854, *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804 (2001).

II. The subject matter of this appeal has significant public interest.

Issues concerning public education in general and the State's obligation to provide pre-kindergarten programs in particular are matters of fundamental importance to most if not all citizens of the State. Indeed, this Court has previously declared that this "case concerns an issue of significant, if not paramount, public interest" and that the case is "one of great public interest." 358 N.C. at 615, 616, 599 S.E.2d at 377. And plaintiffs recently represented to this Court that "[t]he public significance of the subject matter of this appeal cannot be overstated." *Pls. Petition for Discretionary Review Prior to a Determination by the Court of Appeals* (No. 5P12) at 4.

III. The present appeal involves principles of major significance to the jurisprudence of the State.

Among the issues presented by this appeal is whether the State has the duty to provide a pre-kindergarten program on a state-wide basis to any eligible at-risk four year old that applies, and whether, in the context of the lawsuit before it, a Superior Court Judge must "pre-clear" prior to implementation any proposed modification to the State's pre-kindergarten program.

This Court has described it prior ruling in this case as a "landmark decision" regarding the State's duties under the North Carolina Constitution to provide its children the opportunity for a sound basic education. *Hoke County*, 358 N.C. at 609, 599 S.E.2d at 395. Additionally, this Court has declared that "there is a marked difference between the State's recognizing a need to assist 'at-risk' students prior to enrollment in the public schools and a court order compelling the legislative and executive branches to address that need in a singular fashion." *Id.* at 642, 599 S.E.2d at 393.

The issues presented in this appeal arise from a "trial court order that may be construed to the effect of requiring the State to provide pre-kindergarten services," circumstances which led this Court to reverse a prior ruling in this case. *Id.* at 645, 599 S.E.2d 395. A determination of whether the decision by the Court of Appeals affirming the trial court's order is correct necessarily depends upon whether, on the evidentiary record before it, the court-imposed remedy is within the proper scope of the judiciary's "limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain." *Id.*

WHEREFORE, the State of North Carolina respectfully requests that this Court accept these issues for review pursuant to North Carolina General Statutes Section 7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure.

Issues to be Briefed

In the event the Court allows this petition for discretionary review, the State intends to present the following issues in its brief for review:

1. Did the Court of Appeals erroneously require the State to obtain prior trial court approval before making any modifications to the "More at Four" pre-kindergarten program?

2. Did the Court of Appeals erroneously affirm the trial court's mandate that the State provide pre-kindergarten services "to any eligible at-risk four year old that applies?"

3. Did the Court of Appeals erroneously hold that the trial court acted within its authority to mandate the unrestricted acceptance into the pre-kindergarten program of all "at-risk" prospective enrollees across the State?

Respectfully submitted, this the 25th day of September, 2012.

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Attorney General

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31** upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;
[ ] Transmitting a copy hereof to each said party via facsimile transmittal; or
[X] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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This the 25th day of September, 2012.

Electronically Submitted
John F. Maddrey
Solicitor General

No. 5P12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON, individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,

Plaintiffs,

From Wake County
No. 95 CVS 1158
COA11-1545

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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Plaintiffs,

From Wake County
No. 95 CVS 1158
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and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

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Realigned Defendant.

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs-Respondents Hoke County Board of Education, *et al.*, Plaintiff Intervenor-Respondent Charlotte-Mecklenburg Board of Education, and Plaintiff Intervenors-Respondents Rafael Penn *et al.* (collectively, "Plaintiffs") respectfully request the Supreme Court of North Carolina to deny the petition for discretionary review (the "Petition") filed by the Attorney General in this case.

INTRODUCTION AND FACTS

The unanimous Court of Appeals' decision for which discretionary review is sought was rendered by Judge Elmore, Chief Judge Martin, and Judge Steelman. The decision expressly follows North Carolina Supreme Court precedent in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*") and *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*"). Nothing in the unanimous opinion signals a departure from, or is inconsistent with, that precedent.

In 2004, this Court unanimously held that the State had failed to afford "at-risk" prospective enrollees (four year olds) with their constitutionally "guaranteed opportunity to obtain a sound basic education" and that the State had an "obligation to address and correct" this constitutional violation by providing

remedial aid to these children. *Leandro II*, 358 N.C. at 644, 599 S.E.2d at 394.[1] This Court further held that, at least initially, the trial court, during the compliance phase of this litigation, should afford discretion to the State to choose an effective, *Leandro II* conforming remedy for these children. *Id.* at 642-44, 599 S.E.2d at 393-94. The Attorney General's appeal concerns nothing more than the application of this Court's unanimous holding to the eight-year factual record developed in the trial court since *Leandro II*.

Remarkably, the Attorney General's Petition glosses over nearly everything that has happened in the eight years since *Leandro II*. During the last eight years, the trial court held nearly twenty compliance hearings and afforded the State an opportunity to present its chosen *Leandro II* compliance plan for at-risk prospective enrollees. The Attorney General's Petition ignores the plain, undisputed fact that statewide prekindergarten programming is the sole remedy chosen by the State to meet its *Leandro II* constitutional obligations to at-risk prospective enrollees.

The Court of Appeals' decision is based upon a review of the substantial evidence taken at numerous compliance proceedings before the trial court in the eight years since *Leandro II*, all of which is ignored in the Attorney General's

[1] *Leandro II* was the appeal of a 22-day trial involving 43 witnesses and 670 documentary exhibits. Voluminous evidence was introduced, including evidence on the effectiveness and importance of prekindergarten programming.

Petition. The decision is not, as the Attorney General contends, "inconsistent" with *Leandro II.* To the contrary, the Court of Appeals' opinion simply holds that the State cannot disregard *Leandro II,* which directed the State to remedy the constitutional deprivations impacting at-risk prospective enrollees, by barring such children from the only *Leandro II* remedy chosen by the State to help them.

While the subject matter of the *Leandro* litigation – the right of every child in North Carolina to have an opportunity to obtain a sound basic education – is undoubtedly of great significance, the issues raised in the Petition do not warrant the exercise of discretionary review by this Court. The Petition, in essence, only restates to this Court the same arguments that were made to, and properly rejected by, the trial court and the Court of Appeals. The Attorney General's flawed contentions ignore the substantial evidentiary record compiled since *Leandro II* and are, themselves, inconsistent with the holdings of this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *LEANDRO I* AND *LEANDRO II.*

The Court of Appeals' analysis of the issues raised in the underlying appeal is in complete harmony with this Court's decisions in *Leandro I* and *Leandro II.* The contentions raised by the Attorney General both misconstrue this Court's prior holdings and turn a blind eye to nearly *everything* that has happened in this case in the eight years since *Leandro II.*

A. The Court of Appeals' Decision Expressly Follows *Leandro II* and Is Supported By Eight Years Worth of Testimonial and Documentary Evidence.

Contrary to the Attorney General's argument, the trial court's order is not based on some "separate constitutional right to pre-kindergarten." *See* Petition at 5. Rather, the trial court's order, and its affirmation by the Court of Appeals, are based on (i) the unanimous holding in *Leandro II* that the State is obligated to correct its constitutional failings to at-risk children by providing some type of remedy, (ii) the State's choice of prekindergarten as its sole remedy for these children, and (iii) the State's subsequent attempt to bar these at-risk children from this remedy without providing them any substitute remedy.

In *Leandro II*, this Court affirmed the trial court's findings that: (i) an inordinate number of at-risk children enter the public school system each year, (ii) such at-risk children were starting significantly behind their non at-risk counterparts, and (iii) such at-risk children were likely to stay behind, or fall further behind, their non at-risk counterparts as they continued their education. *Id.* at 641, 599 S.E.2d at 392. The Court further affirmed the trial court's findings that the "State was providing inadequate resources for such 'at-risk' prospective enrollees, and that the State's failings were contributing to the 'at-risk' prospective enrollees' subsequent failure to avail themselves of the opportunity to obtain a sound basic education." *Id.*, 599 S.E.2d at 392-93. This Court affirmed the trial

court's conclusion that the State's "efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate" and held that the State was obligated to "address and correct" this constitutional violation by providing remedial aid to these children. *Id.* at 642, 644, 599 S.E.2d at 393, 395. *See also* Slip Op. at 8.

As to the means for providing such remedial aid, this Court held that it was up to the State, at least initially, to devise a solution to put at-risk prospective enrollees in a position to take advantage of the equal opportunity to a sound basic education when those children reach kindergarten. *Id.* at 645, 599 S.E.2d at 395. Any specific remedy ordered by the trial court at that time, in 2004, was "premature" then because it could "undermine the State's ability to meet its educational obligations for 'at-risk' prospective enrollees by alternative means." *Id.* While the State was to be afforded discretion in devising an effective means for providing at-risk four year olds with remedial aid, the State has no discretion in whether or not remedial aid is to be provided. This Court stated:

> when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

Id. See also Leandro I, 346 N.C. at 357, 488 S.E.2d at 261 (noting that if the State fails to effectuate a proper remedy, then it is the duty of the trial court to order such relief as needed to correct the constitutional wrong). *See also* Slip Op. at 9.

Subsequent to *Leandro II*, the trial court in fact afforded the State discretion to choose an effective remedy to address the constitutional deficiencies impacting at-risk prospective enrollees. In response, the State repeatedly represented to the trial court that its chosen remedy to address those constitutional deficiencies was to ensure that "every at-risk four-year-old has access to a quality prekindergarten program." *See, e.g.*, R S p 578. The State repeatedly committed to the trial court that it would comply with *Leandro II* by expanding the prekindergarten program across "the state" to ensure that every at-risk four year old would have access to the program. *See, e.g.*, R S p 584. Moreover, the State presented both testimonial and documentary evidence demonstrating the statewide effectiveness and soundness of its chosen remedy. *See, e.g.*, R pp 539-71; R S pp 823-45; T p 31. *See also Defendant-Respondent State Board of Education's Response to Petition for Discretionary Review* at p. 5 (a "statewide pre-kindergarten program" was the State's chosen remedial plan for at-risk prospective enrollees).

Contrary to the contentions raised in its Petition, **the State**, not the trial court, chose statewide prekindergarten programming as the State's *Leandro II* remedy. The voluminous evidence of record in this matter, taken in the eight years since *Leandro II*, unambiguously shows that statewide prekindergarten was not judicially-created or judicially-imposed. It was the *Leandro II* remedy chosen by the State to meet its constitutional obligations to at-risk prekindergarten children.

As noted by the Court of Appeals below:

> Now, it has been approximately eight years since the Supreme Court's ruling in *Leandro II*. During this time, the State has had ample opportunity to develop a program that would meet the needs of "at-risk" students approaching and/or attaining school-age eligibility. The only program, evidenced in the record, that was developed by the State since *Leandro II* to address the needs of those students was MAF, a pre-kindergarten program. Thus, unlike the Supreme Court in *Leandro II*, we are not faced with the decision of selecting for the State which method would best satisfy their [constitutional] duty. ... Rather, the State made that determination for itself ....

Slip Op. at 9-10 (emphasis added).

The trial court did not create from thin air a specific remedy to impose upon the State. It ordered that the State could not bar at-risk four year olds from the only remedy that the State chose to meet its constitutional obligations. As the Court of Appeals properly held based on the extensive eight-year evidentiary record before it, "[p]re-kindergarten is the method in which the State has decided to effectuate its duty, and the State has not produced or developed any alternative plan or method." Slip Op. at 10.

The Attorney General's contention that the trial court imposed its own judicially-crafted statewide remedy in this matter is both baseless and belied by the undisputed eight-year evidentiary record. For the last eight years, the State has repeatedly represented that statewide prekindergarten was its chosen remedy to comply with *Leandro II*'s mandate. The trial court's order, unanimously

upheld by the Court of Appeals, is consistent with this Court's prior rulings, and the Petition should be denied.

B. The Attorney General's Petition Misrepresents the Court of Appeals' Decision as Creating a "Preclearance" Requirement[2].

The Court of Appeals decision does not create any "preclearance" requirement. The Attorney General's description misconstrues the posture of this case and the Court of Appeals' decision. The decision below simply reiterates that the trial court retains jurisdiction in this case to monitor the State's compliance with *Leandro II*. This is in accordance with this Court's direction in *Leandro II* which remanded the case to the trial court to oversee the remedial phase of this litigation.

The jurisprudential basis for this oversight is nothing less than the judiciary's well-established constitutional authority to review other branches of government and to supervise a remedy to an established constitutional violation. *See, e.g., Marbury v. Madison*, 5 U.S. 137 (1803); *Griffin v. County School Board*, 377 U.S. 218, 232-34 (1964). In calling for judicial review before the elimination or significant modification of the State's only proffered remedy, the Court of Appeals' decision parallels well-established precedents in, for example, school desegregation case law. Once a remedy is offered by school officials that

[2] "Preclearance" is a term used to describe the procedure in Section 5 of the Voting Rights Act of 1965 whereby certain jurisdictions with a history of voting discrimination must seek federal "preclearance" prior to implementing changes to the voting process.

adequately addresses the constitutional liability, officials may not take actions that would impede, undermine or retract the remedy without first demonstrating to the court "that the proposed changes are consistent with [their] continuing affirmative duty" to remedy the underlying unconstitutional conduct. *Riddick v. Sch. Bd. of City of Norfolk,* 784 F.2d 521, 535 (4th Cir. 1986).

The Court of Appeals here held:

> It would be unwise for the courts to attempt to lock the legislative and executive branches into a solution to a problem that no longer works, or addresses a problem that no longer exists. Therefore, should the problem at hand cease to exist or should its solution be superseded by another approach, the State should be allowed to modify or eliminate MAF [prekindergarten]. This should be done by means of a motion filed with the trial court setting forth the basis for and manner of any proposed modification.

See Slip Op. at 19-20. The Court of Appeals is certainly not attempting to usurp the role of the legislative and executive branches in the field of education. The decision acknowledges that the State may, of course, implement a new or revised remedial plan to meet its constitutional obligations. The fact that the trial court retains jurisdiction to monitor the State's compliance with *Leandro II* is not a new development, and is not a Voting Rights Act (Section 5) "preclearance" requirement. It is merely the affirmation of the procedure put in place by this Court in *Leandro II.*

II. THE ISSUES RAISED IN THE PETITION LACK SIGNIFICANT PUBLIC INTEREST AND ARE NOT OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE.

While a public interest in education undoubtedly exists[3], that interest is not directly implicated here by the limited nature of the Attorney General's challenge. The subject matter of the issues raised by the Attorney General lacks significant public interest and is not of major significance to the jurisprudence of this State.

Stripped of the rhetoric contained in the Petition, the issues raised by the Attorney General lack significance because they are easily resolved by both this Court's unanimous holdings in *Leandro II* and the undisputed record. It is the well-settled law of this case that the State has an obligation to correct its constitutional failings to at-risk prospective enrollees by providing some form of remedial service. *Leandro II, 358* N.C. at 643-44, 599 S.E.2d at 394. It is undisputed that the trial court, in accordance with *Leandro II*, afforded the State discretion to choose a *Leandro II* conforming remedy for these children. It is further undisputed that the State, in exercising this discretion, chose statewide quality prekindergarten services as its *Leandro II* remedy. The trial court's order, and its affirmation by the Court of Appeals, is grounded upon this well-settled law and this uncontroverted evidence. The Court of Appeals' decision itself

[3] *See Leandro II*, 358 N.C. at 615, 599 S.E.2d at 377 (noting that the issue of education is "of significant, if not paramount, public interest").

demonstrates that this appeal concerns only a straightforward application of undisputed evidence to the unambiguous mandate set forth in *Leandro II.*

This appeal and the Attorney General's Petition do not raise a substantial constitutional question. The State, in fact, did not even attempt to assert an entitlement to an appeal, under N.C. Gen. Stat. § 7A-30(1), as a matter of right based upon any substantial constitutional question. Rather, this appeal involves the straightforward application of well-established precedent to an undisputed evidentiary record. As held by the Court of Appeals below, its decision is grounded on the simple facts that: (i) "[u]nder *Leandro II,* the State has a duty to prepare all 'at-risk' students to avail themselves of an opportunity to obtain a sound basic education", (ii) "[p]re-kindergarten is the method in which the State has decided to effectuate its duty", and (iii) "the State has not produced or developed any alternative plan or method." Slip Op. at 10.

CONCLUSION

As demonstrated by the well-reasoned and thorough opinion of a unanimous panel of the Court of Appeals, the legal contentions advanced by the Attorney General in its Petition are meritless and do not warrant this Court's exercise of discretionary review. Plaintiffs respectfully request that the Petition be denied.

Respectively submitted, this the 8th day of October, 2012.

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NO. 5P12-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON,

From Wake County
95 CVS 1158
COA11-1545

individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

****

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

****

Defendant-Respondent the State Board of Education (the "State Board") respectfully submits this response to the Attorney General's Petition for Discretionary Review pursuant to Rule 15(d) of the North Carolina Rules of Appellate Procedure.

After eighteen years of litigation and two decisions by this Court, the essential constitutional principles applicable in this case are now well-established: all children have a constitutional right to the opportunity to receive a sound basic education (*Leandro I*)[1] and the State violated that right for at-risk pre-kindergartners (*Leandro II*)[2]. The Attorney General's appeal involves nothing more than a challenge to an *application* of those settled principles to the eight-year factual record developed since *Leandro II* and the trial court's unchallenged findings of fact based on that record. Therefore, while it is of course true that this *Leandro* litigation has, on the whole, generated significant public interest, it cannot be said that the current appeal is of constitutional significance warranting a hearing by this Court.

The Attorney General implicitly recognized this fact by choosing not to file a Notice of Appeal from the Court of Appeals' unanimous decision affirming Judge Manning's order applying *Leandro II*. As the Attorney General knows, "an

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[1] *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) ("*Leandro I*").
[2] *Hoke County Board of Education v. State*, 358 N.C. 605, 644, 599 S.E.2d 365, 394 (2004) ("*Leandro II*").

appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case: (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State . . . ." N.C. Gen. Stat. § 7A-30. The Attorney General's decision to pursue *discretionary* review and forego an appeal *as of right* confirms that this appeal does not involve a "substantial constitutional question," N.C. R. App. P. 14(b)(2), but rather a straightforward application of settled constitutional principles. In short, the settled law as applied to the unchallenged factual record presented in this appeal makes this a particularly inappropriate matter for consideration by this Court.

Substantively, the Petition for Discretionary Review does no more than rehash the same flawed argument rejected by the Court of Appeals: that the trial court's order, read in a vacuum as though it were still 2004, wrongly wrested control from the legislature and dictated Defendants' response to the mandate of *Leandro II*. The Attorney General has it precisely backwards. On remand from this Court after *Leandro II*, it was the *State's* burden to come forward with a remedial plan and demonstrate to the court that the plan would adequately address the previously determined constitutional violation. The State and the State Board, with the full backing of the Legislature, did just that in an unbroken series of hearings from 2004 through 2011, repeatedly committing to a pre-kindergarten program as their selected remedy. At frequent intervals, the trial court received

reports from Defendants on their progress in implementing their plan, with the ultimate test always being whether Defendants were adequately remedying the constitutional violation identified in *Leandro II*. The trial court simply held the State to its own proffered remedy, the remedy the State Board remains committed to follow despite being a named Defendant in this action.

On the basis of numerous unchallenged findings of fact supported in large part by the State's own evidence, the trial court concluded that the State's remedial plan—implementing a statewide pre-kindergarten program—had been remarkably successful in addressing the State's constitutional deficiencies as identified in *Leandro II*. Nevertheless, as the Court of Appeals recognized,

> the trial court ***did not*** order the State to provide pre-kindergarten programs for all "at-risk" four-year-old prospective enrollees in North Carolina; rather, the trial court's decree rejected those parts of the proposed 2011 legislation that sought to erect "artificial barrier[s] or any other barrier[s]" that would deny any "at-risk" four year old prospective enrollee throughout the State his or her constitutional right to an opportunity to obtain a sound basic education by denying that child admission to an existing pre-kindergarten program in his or her county.

Hoke County Bd. of Educ. v. State, No. 11-1545, slip op. at 11 (emphasis added) (attached to Petition for Discretionary Review). This is not a case in which the trial court imposed its own remedy, nor is this a case in which the trial court has denied the legislative or executive branches the flexibility to propose and implement a new remedy for Defendants' constitutional violations. The State has

never proposed any alternative remedy to pre-kindergarten. Thus, the trial court merely forbade the State from abandoning its own plan in the absence of any suggested alternative.

Finally, the Attorney General's characterization of the Court of Appeals decision as creating a "preclearance" requirement is misleading at best. Defendants may of course develop a new or revised plan to address the constitutional deficiencies identified by this Court in *Leandro II*. To date, however, Defendants have not done so. Instead, pre-kindergarten is the only remedy Defendants have put forth to address Defendants' constitutional failings to prospective students, and it is the only remedy so far shown to be effective.

Contrary to the Attorney General's arguments, the Court of Appeals did nothing to upset the primacy of the legislative and executive branches in the field of education. As the Court of Appeals put it:

> Additionally, we would like to emphasize that while MAF [More at Four, the former name of the pre-kindergarten program] was the remedy chosen by the legislative and executive branches in 2001 to deal with the problems presented by "at risk" four year olds, it is not necessarily a permanent or everlasting solution to the problem. What is required of the State to provide as "a sound basic education" in the 21st century was not the same as it was in the 19th century, nor will it be the same as it will be in the 22nd century. It would be unwise for the courts to attempt to lock the legislative and executive branches into a solution to a problem that no longer works, or addresses a problem that no longer exists. Therefore, should the problem at hand cease to exist or should its solution be superseded by another approach, the State should be allowed

> to modify or eliminate MAF. This should be done by means of a motion filed with the trial court setting forth the basis for and manner of any proposed modification.

Id., slip op. at 19-20. This is no "preclearance" edict. Instead, the Court of Appeals simply acknowledged that the trial court retains jurisdiction in this case to monitor the State's compliance with *Leandro I* and *Leandro II*, in accordance with this Court's express instructions on remand. The balanced and modest opinion of the Court of Appeals should be allowed to stand.

Respectfully submitted, this the 8th day of October 2012.

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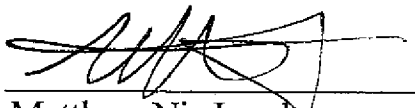
This the 8th day of October 2012.



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NO. COA11-1545

NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

HOKE COUNTY BOARD OF EDUCATION, et al.,
Plaintiffs,

and

Wake County
No. 95 CVS 1158

ASHEVILLE CITY BOARD OF EDUCATION, et al.,
Plaintiff-Intervenors,

vs.

STATE OF NORTH CAROLINA; STATE BOARD OF EDUCTION,
Defendants.

Appeal by the State from order entered 18 July 2011 by Judge Howard E. Manning, Jr., in Wake County Superior Court.

Heard in the Court of Appeals 5 June 2012.

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ELMORE, Judge.

The State appeals from an order titled "Memorandum of Decision and Order Re: Pre-Kindergarten Services of At-Risk Four Year Olds" which mandates, in sum, that the State 1) not deny any eligible at-risk four year old admission to the North Carolina Pre-Kindergarten Program and 2) not enforce specific provisions of the 2011 Budget Bill. We affirm in part, and dismiss in part.

I. Background

The dispute between the parties of this appeal began in 1994, when plaintiffs sought a declaratory judgment regarding the state constitutional requirements of "all North Carolina children to receive adequate and equitable educational opportunities[.]" Since that time, the parties have debated the scope of such constitutional requirements, and the dispute between them has fluctuated through the many levels of our court system.

However, the primary dispute relevant to this appeal began on 4 May 2011, when the North Carolina House of Representatives adopted a budget bill titled "Current Operations and Capital Improvements Appropriations Act of 2011" (the bill). The bill provided "[a]ppropriations from the General Fund of the State for the maintenance of the State departments, institutions, and

agencies, and for other purposes as enumerated . . . for the fiscal biennium ending June 30, 2013." *See* 2011 N.C. Sess. Laws 145 § 2.1.

A section of the bill addressed a program called "More at Four (MAF)." MAF was established by the General Assembly in 2001, to provide pre-kindergarten services to at-risk children in order to enhance their kindergarten readiness. The program was established, in part, as a reaction to a pair of rulings by our Supreme Court, *Leandro I* and *Leandro II*. In *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (*Leandro I*), the Supreme Court held that "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." Article I is the "Declaration of Rights." Section 15 of that article states: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I § 15. The Supreme Court then went on to set forth four minimum criteria for "a sound basic education." These criteria were not static or set in stone for all time, but rather were qualified by phrases such as "to enable the student to function in a complex and rapidly changing society[;]"

"successfully engage in post-secondary education or vocational training[;]" to be able to obtain "gainful employment in contemporary society." *Leandro*, 346 N.C at 347, 488 S.E.2d at 255.

Later, in *Hoke Cty. Bd. of Educ. v. State* (*Leandro II*), the Supreme Court established that "the State must help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education." 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004). The Supreme Court recognized that "a sound basic education" required the State to address the problem of "at-risk" prospective enrollees in the public schools, but reversed the portion of the of the trial court's order mandating a "pre-kindergarten" program. *Hoke Cty. Bd. of Educ.*, 358 N.C. at 645, 599 S.E.2d at 395. The Supreme Court left it to the legislative and executive branches of government to fashion an appropriate remedy. *Hoke Cty. Bd. of Educ.*, 358 N.C. at 644-45, 599 S.E.2d at 395. Thereafter, MAF was enacted in 2001.

The bill called for MAF to be consolidated into the Division of Child Development, and for that division to be renamed "the Division of Child Development and Early Education (DCDEE)." The bill then directed DCDEE to "maintain the More At

Four program's high programmatic standards." *See* 2011 N.C. Sess. Laws 145 § 10.7(a). Specifically, the bill mandated DCDEE to "continue to serve at-risk children identified through . . . methods in which at-risk children are currently served" and to "serve at-risk children regardless of income." *See* 2011 N.C. Sess. Laws 145 § 10.7(f). However, the bill also mandated that "the total number of at-risk children served shall constitute no more than twenty percent (20%) of the four-year-olds served within the prekindergarten program." *Id.*

On 10 May 2011, before the bill became law, plaintiffs filed a motion in Wake County Superior Court requesting a hearing, in relevant part, to address how "the reduction in pre-kindergarten services for at-risk children in the House Budget" would affect the children's rights under the State constitution to "a sound basic education." On 20 May 2011, the trial court sent notice that it would hold a hearing on 22 June 2011 to assess whether certain provisions of the bill complied with *Leandro II*. Specifically, the trial court stated that the subject matter of the hearing would be, in relevant part, the pre-kindergarten services to "at-risk" children and "the obligation of the State of North Carolina, as set forth in

Leandro II, Section V, to afford 'at-risk' prospective enrollees their guaranteed opportunity to obtain a sound basic education."

On 15 June 2011, the bill became law; however, the trial court proceeded with the hearing. Following the conclusion of evidence, the trial court issued an order on 18 July 2011 titled "Memorandum of Decision and Order Re: Pre-Kindergarten Services of At-Risk Four Year Olds." In that order, the trial court mandated that

> 1) The State of North Carolina shall not deny any eligible at-risk four year old admission to the North Carolina Pre-Kindergarten Program (NCPK) and shall provide the quality services of the NCPK to any eligible at risk four year old that applies.
>
> 2) The State of North Carolina shall not implement or enforce that portion of the 2011 Budget Bill, section 10.7.(f) that limits, restricts, bars, or otherwise interferes, in any manner, with the admission of all eligible at-risk four year olds that apply to the prekindergarten program, including but not limited to the 20% cap restriction, or for that matter any percentage cap, of the four year olds served within the prekindergarten program, NCPK.
>
> 3) Further, the State of North Carolina shall not implement, apply, or enforce any other artificial rule, barrier, or regulation to deny any eligible at-risk four year old admission to the prekindergarten, NCPK.
>
> 4) The Court is confident that the State of

> North Carolina will honor and discharge its constitutional duties in connection with this manner.

The State appeals from this order.

II. Analysis

The State presents three arguments on appeal: 1) that the trial court exceeded its authority when it ordered the State to provide pre-kindergarten services to all at-risk four year olds in North Carolina; 2) that the trial court erroneously enjoined the implementation or enforcement of properly enacted legislative provisions regarding North Carolina's Pre-Kindergarten Program; 3) that the trial court's order cannot be upheld because it contains no appropriate findings of fact or conclusions of law. The State Board of Education, co-defendants, do not join the State in its appeal.

A. Authority of order

The State first argues that the trial court exceeded its authority when it ordered the State to "not deny any eligible at-risk four year old admission to the North Carolina Pre-Kindergarten Program." Specifically, the State contends that 1) there is no constitutional requirement for the State to provide pre-kindergarten services, 2) pre-kindergarten services are not a necessary remedy required to provide a sound basic education, and 3) the trial court lacked jurisdiction to mandate pre-

kindergarten services on a state-wide basis. We will address the State's constitutional arguments together, as they relate to the Supreme Court's ruling in *Leandro II*. We will then address the State's jurisdictional argument.

i. Leandro II

In *Leandro II* the Supreme Court addressed, in part, the issue of "'at-risk' children approaching and/or attaining school-age eligibility" and "whether the State must help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education." 358 N.C. at 639-40, 599 S.E.2d at 391-92. There, the trial court had concluded that "[i]t was ultimately the State's responsibility to meet the needs of 'at-risk' students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education[]" and "that State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 640, 642, 599 S.E.2d at 392, 393.

On appeal, the Supreme Court concluded "[t]o that point in the proceedings, we agree with the trial court[.]" *Id.* at 642, 599 S.E.2d at 393. However, the Supreme Court reversed the portion of the trial court's order "requiring the State to

provide pre-kindergarten classes for either all of the State's 'at-risk' prospective enrollees or all of Hoke County's 'at-risk' prospective enrollees." *Id.* The Supreme Court reasoned that "such specific court-imposed remedies are rare, and strike this Court as inappropriate at this juncture" because "the suggestion that pre-kindergarten is the sole vehicle or, for that matter, a proven effective vehicle by which the State can address the myriad problems associated with such 'at-risk' prospective enrollees is, at best, premature." Id. at 643, 644, 599 S.E.2d at 393, 394. However, the Supreme Court noted that it

> recognizes the gravity of the situation for "at-risk" prospective enrollees in Hoke County and elsewhere, and acknowledges the imperative need for a solution that will prevent existing circumstances from remaining static or spiraling further, we are equally convinced that the evidence indicates that the State shares our concerns and, more importantly, that the State has already begun to assume its responsibilities for implementing corrective measures.

358 N.C. at 643, 599 S.E.2d at 394.

Now, it has been approximately eight years since the Supreme Court's ruling in *Leandro II*. During this time, the State has had ample opportunity to develop a program that would meet the needs of "at-risk" students approaching and/or attaining school-age eligibility. The only program, evidenced

in the record, that was developed by the State since *Leandro II* to address the needs of those students was MAF, a pre-kindergarten program. Thus, unlike the Supreme Court in *Leandro II*, we are not faced with the decision of selecting for the State which method would best satisfy their duty to help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education. Rather, the State made that determination for itself when in 2001 it developed the pre-kindergarten program, MAF.

Thus, we do not deem it inappropriate or premature at this time to uphold an order mandating the State to not deny any eligible "at-risk" four year old admission to the North Carolina Pre-Kindergarten Program. Under *Leandro II*, the State has a duty to prepare all "at-risk" students to avail themselves of an opportunity to obtain a sound basic education. Pre-kindergarten is the method in which the State has decided to effectuate its duty, and the State has not produced or developed any alternative plan or method. Accordingly, we affirm the trial court's order.

ii. Jurisdiction

Although the State next contends "[t]here is no jurisdictional basis in this case to mandate the provision of

pre-kindergarten services on a state-wide basis," the State mischaracterizes the mandate of Paragraph 1 of the July 2011 Order. The trial court did not order the State to provide pre-kindergarten programs for all "at-risk" four-year-old prospective enrollees in North Carolina; rather, the trial court's decree rejected those parts of the proposed 2011 legislation that sought to erect "artificial barrier[s] or any other barrier[s]" that would deny any "at-risk" four year old prospective enrollee throughout the State his or her constitutional right to an opportunity to obtain a sound basic education by denying that child admission to an existing pre-kindergarten program in his or her county. With this clarification in mind, we now examine whether the trial court acted within its authority to mandate the unrestricted acceptance of all "at-risk" four-year-old prospective enrollees who seek to enroll in existing pre-kindergarten programs in his or her respective county.

In *Leandro II*, 358 N.C. 605, 599 S.E.2d 365 (2004), the Supreme Court agreed with the trial court's conclusion that the State's efforts to provide remedial aid to Hoke County's "at-risk" prospective enrollees were inadequate to assist such students in availing themselves of their respective rights to an

opportunity to obtain a sound basic education. *See Leandro II*, 358 N.C. at 642, 599 S.E.2d at 393. However, the Supreme Court could not ascertain foundational support for the trial court's order "compelling the legislative and executive branches to address that need in a singular fashion" by "requiring the State to provide pre-kindergarten classes for either all of the State's 'at-risk' prospective enrollees or all of Hoke County's 'at-risk' prospective enrollees." *Id.* Although the Supreme Court recognized that, "when the State fails to live up to its constitutional duties," and "if the offending branch of government or its agents either fail to [remedy the deficiency] or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it," the Supreme Court also recognized that "such specific court-imposed remedies are rare." *Id.* at 642-43, 599 S.E.2d at 393. Consequently, the Supreme Court determined that the trial court's remedy was "inappropriate at this juncture" for two related reasons: 1) "[t]he subject matter of the instant case—public school education—is clearly designated in our state Constitution as the shared province of the legislative and executive branches"; and 2) "[t]he evidence and findings of the

trial court, while supporting a conclusion that 'at-risk'[1] children require additional assistance and that the State is obligated to provide such assistance, do not support the imposition of a narrow remedy that would effectively undermine the authority and autonomy of the government's other branches." *Id.* at 643, 599 S.E.2d at 393.

Nonetheless, in sharp contrast to the record that was before the Supreme Court in *Leandro II*, the record that was developed in the trial court and is now before this Court is replete with evidence, much of which was presented by the State, of the State's preferred—and, incidentally, only proposed—remedial aid to "at-risk" prospective enrollees, as reflected in the following unchallenged finding by the trial court:

> The bottom line, seven years after Leandro, II, is that the State, using the combination of Smart Start and the More at Four Pre-Kindergarten Programs, have [sic] indeed selected pre-kindergarten combined with the early childhood benefits of Smart Start and its infrastructure with respect to pre-kindergarten programs, as the means to

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[1] "[M]ost educators seem in agreement that an 'at-risk' student is generally described as one who holds or demonstrates one or more of the following characteristics: 1) member of low-income family; 2) participate in free or reduced-cost lunch programs; 3) have parents with a low-level education; 4) show limited proficiency in English; 5) are a member of a racial or ethnic minority group; 6) live in a home headed by a single parent or guardian." *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 637 n.16, 599 S.E.2d 365, 389-90 n.16 (2004).

> "achieve constitutional compliance" for at-risk prospective enrollees.

Moreover, the trial court found, and the State does not deny, that the State has touted the measurable statewide success and national recognition of its pre-kindergarten program, and has demonstrated the commitment of both the executive and legislative branches to increasing the availability of *Leandro*-compliant pre-kindergarten programs. For instance, the chairman of the State Board of Education and the state superintendent of the Department of Public Instruction submitted extensive action plans to the trial court chronicling the pre-kindergarten program's to-date and proposed future growth and expansion in order to fulfill the State's obligation to comply with the mandates first articulated in *Leandro I*. Additionally, the General Assembly enacted session laws that sought to standardize pre-kindergarten program requirements statewide and allocated State funds to facilitate the continued success of pre-kindergarten programs available to "at-risk" prospective enrollees across the State. In other words, based on the present record, it cannot be said that the trial court's order requiring the State to allow the unrestricted enrollment of "at-risk" prospective enrollees to pre-kindergarten programs "effectively undermine[d] the authority and autonomy of the

government's other branches," *see Leandro II*, 358 N.C. at 643, 599 S.E.2d at 393, since both the executive and legislative branches have evidenced their selection and endorsement of this--and only this--remedy to address the State's constitutional failings identified in *Leandro II*.

Finally, the State urges that, if the trial court is authorized to order the unrestricted admission of "at-risk" prospective enrollees to existing pre-kindergarten programs, such authority should only extend to those "at-risk" four-year-old prospective enrollees who seek to enroll in programs in Hoke County. In light of the Supreme Court's footnotes 5 and 14 in *Leandro II*, we recognize that the State's assertion is not entirely without basis. *See id.* at 613 n.5, 633 n.14, 599 S.E.2d at 375-76 n.5, 388 n.14. Nevertheless, as the State concedes, it offered evidence to the trial court through its own witnesses attesting to the implementation and efficacy of the pre-kindergarten programs made available to "at-risk" prospective enrollees *statewide*. Although the State opines that it chose to provide a broader remedy than that which was required to meet the needs of the parties at issue and urges this Court to limit the trial court's mandate to the "at-risk" prospective enrollees of Hoke County, we are not persuaded that

the record necessitates such restraint of the trial court's order. Accordingly, based on the record before us, we hold that the trial court acted within its authority to mandate the unrestricted acceptance of all "at-risk" four year old prospective enrollees who seek to enroll in existing pre-kindergarten programs across the State.

B. Enjoinment of legislation

The State next argues that the trial court's order improperly enjoins the enforcement of section 10.7.(f) of the bill. We dismiss this argument.

On 17 May 2012, the House of Representatives introduced a bill titled "AN ACT TO REPEAL THE PROHIBITION ON TEACHER PREPAYMENT, CLARIFY ELIGIBILITY FOR THE NC PRE-K PROGRAM, AND ENACT 2012-2013 SALARY SCHEDULES FOR TEACHERS AND SCHOOL ADMINISTRATORS." That bill, in part, entirely rewrote the language of section 10.7.(f) at issue here. On 11 June 2012, that bill was signed into law. As such, section 10.7.(f) is no longer in effect, and we need not address the State's issue regarding its enforcement. *See Southwood Assn., LTD. v. Wallace*, 89 N.C. App. 327, 328, 365 S.E.2d 700, 701 (1988) (If the issues before the court or administrative body become moot at anytime during the course of the proceedings, the usual

response should be to dismiss the action.) (citations omitted). Accordingly, we dismiss this issue.

C. Sufficiency of findings of fact/conclusions of law

Finally, the State argues that trial court's order must be vacated and remanded because it lacks findings of fact and conclusions of law as required by our Rules of Civil Procedure. We disagree.

According to our Rules of Civil Procedure, "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52 (2012). "The requirement for appropriately detailed findings is . . . not a mere formality or a rule of empty ritual[.]" *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). The rule exists because "[e]ffective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated." *Id.* at 714, 268 S.E.2d at 190. "Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself." *Id.*

Here, the trial court issued a detailed, twenty-four page order which very clearly articulates its chain of reasoning. The order begins by addressing the scope of the issues addressed at the hearing. It states that, "the major issue before the Court is whether or not the General Assembly's 2011 Budget Bill, Section 10.7 (a) through (j) . . . is in conformity with the Supreme Court's decision in *Leandro II*." The order then summarizes the decision of the Supreme Court in *Leandro II*. Then, after discussing procedural history and precedent, the order describes the history of the MAF program and summarizes the research of the effects of the program. Next, the order focuses on the issues raised by plaintiffs, specifically the allegations regarding Sections 10.7 (a)-(j) of the bill.

Further, in a separate section labeled "Discussion and Decision," the order contains the trial court's conclusions. Specifically, the trial court concluded that

> [based] on the record now before the Court, it appears that the State . . . has taken the prekindergarten program (formerly MAF) established for at-risk 4 year olds and reduced the number of slots available to at-risk 4 year old upwards of 80% without providing any alternative high quality prekindergarten option for at-risk 4 year olds at all.

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> [T]his artificial barrier, or any other barrier, to access to prekindergarten for at-risk 4 year olds may not be enforced.
>
> ***
>
> Simply put, it is the duty of the State of North Carolina to protect each and every one of these at-risk and defenseless children, and to provide them their lawful opportunity, through a quality pre-kindergarten program, to take advantage of their equal opportunity to obtain a sound basic education as guaranteed by the North Carolina constitution.

Thus, we conclude that the trial court's rationale in reaching its decision is specifically articulated in the order. The order provides a detailed summary or findings section, followed by a separate section of conclusions. As such, we are unable to agree with the State's argument with regards to this issue.

Additionally, we would like to emphasize that while MAF was the remedy chosen by the legislative and executive branches in 2001 to deal with the problems presented by "at risk" four year olds, it is not necessarily a permanent or everlasting solution to the problem. What is required of the State to provide as "a sound basic education" in the 21st century was not the same as it was in the 19th century, nor will it be the same as it will be in the 22nd century. It would be unwise for the courts to

attempt to lock the legislative and executive branches into a solution to a problem that no longer works, or addresses a problem that no longer exists. Therefore, should the problem at hand cease to exist or should its solution be superseded by another approach, the State should be allowed to modify or eliminate MAF. This should be done by means of a motion filed with the trial court setting forth the basis for and manner of any proposed modification.

III. Conclusion

In sum, we affirm the trial court's order mandating the State to not deny any eligible "at-risk" four year old admission to the North Carolina Pre-Kindergarten Program. Further, we dismiss the State's argument with regards to the enjoinment of legislation that has been repealed. Lastly, we conclude that the trial court's order contains sufficient findings of fact and conclusions of law.

Affirmed in part, dismissed in part.

Chief Judge MARTIN and Judge STEELMAN concur.

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[1] **Additional attorneys of record:** Ann L. Majestic of THARRINGTON SMITH, LLP; Julius L. Chambers of FERGUSON, STEIN, CHAMBERS, WALLAS, ADKINS, GRESHAM, & SUMPTER, P.A.; John Charles Boger of University of North Carolina School of Law center; Victor Goode of NAACP; Mark Dorosin of UNC CENTER FOR CIVIL RIGHTS; Taiyyaba

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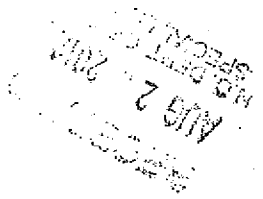

Supreme Court of North Carolina

HOKE COUNTY BOARD OF EDUCATION, et al., Plaintiffs

and

ASHEVILLE CITY BOARD OF EDUCATION, et al., Plaintiff-Intervenors,

v

STATE OF NORTH CAROLINA; STATE BOARD OF EDUCATION, Defendants

From N.C. Court of Appeals
(11-1545)
From Wake
(95CVS1158)

ORDER

Upon consideration of the petition filed on the 25th of September 2012 by State of NC in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 7th of March 2013."

s/ Jackson, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of March 2013.

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. John F. Maddrey, Solicitor General, For State of North Carolina - (By Email)
Mr. Robert W. Spearman, Attorney at Law, For Hoke County Board of Education, et al - (By Email)
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