No. 5P12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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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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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.

PARKER POE ADAMS & BERNSTEIN LLP

Electronically Submitted
Robert W. Spearman
N.C. Bar No. 4108
bobspearman@parkerpoe.com

Electronically Submitted
Melanie Black Dubis
N.C. Bar No. 22027
melaniedubis@parkerpoe.com

Electronically Submitted
Scott E. Bayzle
N.C. Bar No. 33811
scottbayzle@parkerpoe.com
150 Fayetteville Street, Suite 1400
P.O. Box 389
Raleigh, North Carolina 27602
Telephone: (919) 828-0564
Facsimile: (919) 834-4564

ARMSTRONG LAW, PLLC

Electronically Submitted
H. Lawrence Armstrong, Jr.
N.C. Bar No. 6485
hla@hlalaw.net
P.O. Box 187
119 Whitfield Street
Enfield, North Carolina 27823
Telephone: (252) 445-5656

Attorneys for Plaintiffs-Respondents Hoke County Board of Educ. *et al.*

THARRINGTON SMITH, L.L.P.

Electronically Submitted
Ann L. Majestic
N.C. Bar No. 10414
amajestic@tharringtonsmith.com
209 Fayetteville Street
P.O. Box 1151
Raleigh, North Carolina 27602
Telephone: (919) 821-4711
Facsimile: (919) 829-1583

Attorney for Plaintiff Intervenor-Respondent Charlotte-Mecklenburg Board of Educ.

UNC CENTER FOR CIVIL RIGHTS

Electronically Submitted
Mark Dorosin
N.C. Bar No. 20935
dorosin@email.unc.edu

Electronically Submitted
Taiyyaba A. Qureshi
N.C. Bar No. 41537
tqureshi@email.unc.edu
UNC School of Law
CB 3382
Chapel Hill, North Carolina 27599
Telephone: (919) 445-0174
Facsimile: (919) 445-0195

Attorneys for Plaintiff Intervenors-Respondents Rafael Penn *et al.*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief by depositing a copy with the United States Postal Service, first class mail, postage pre-paid, addressed as follows:

John F. Maddrey
Solicitor General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
Counsel for Appellant State of North Carolina

James G. Exum, Jr.
Matthew N. Leerberg
Smith Moore Leatherwood LLP
300 North Greene Street, Suite 1400
Greensboro, NC 27401
Counsel for Appellee State Board of Education

Julius L. Chambers
P.O. Box 36486
Charlotte, NC 28204
Counsel for Penn Intervenors

John Charles Boger
UNC School of Law Center for Civil Rights
CB 3380
Chapel Hill, NC 27599
Counsel for Penn Intervenors

Victor Goode
Legal Department, NAACP
4805 Mount Hope Drive
Baltimore, MD 21215
Counsel for Penn Intervenors

Amici Counsel:

Robert F. Orr
Edwin M. Speas, Jr.
Poyner & Spruill LLP
P.O. Box 1801
Raleigh, NC 27602
Counsel for North Carolina School Boards Association

Carlene McNulty
Christine Bischoff
Matthew Ellinwood
224 S. Dawson Street
Raleigh, NC 27611
Counsel for NC Justice Center and the NC Rural Education Working Group

Lewis Pitts
Erwin Byrd
P.O. Box 2101
Durham, NC 27702
Counsel for Advocates for Children's Services of Legal Aid of North Carolina

Katherine Lewis Parker
P.O. Box 28004
Raleigh, NC 27611
Counsel for American Civil Liberties Union of North Carolina Legal Foundation

Jane Wettach
Duke University Law School
Box 90360
Durham, NC 27708-0360
Counsel for Children's Law Clinic at Duke Law School

John Rittelmeyer
Susan Pollitt
2626 Glenwood Avenue, Suite 550
Raleigh, NC 27608
Counsel for Disability Rights North Carolina

Thomas Stern
700 South Salisbury Street
Raleigh, NC 27601-2264
Counsel for NC Association of Educators

Gregory Malhoit
640 Nelson Street
Durham, NC 27707
Counsel for NCCU School of Law Civil Litigation Clinic

Anita S. Earls
1415 West Highway 54, Suite 101
Durham, NC 27707
Counsel for Southern Coalition for Social Justice

Heather Hunt
UNC School of Law Annex
101 E. Weaver Street
Campus Box #3382
Chapel Hill, NC 27599-3382
Counsel for UNC Center on Poverty, Work and Opportunity

This the 8th day of October, 2012.

PARKER POE ADAMS & BERNSTEIN LLP

Electronically Submitted
Melanie Black Dubis
N.C. Bar No. 22027
melaniedubis@parkerpoe.com
150 Fayetteville St., Suite 1400
P.O. Box 389
Raleigh, North Carolina 27602
Telephone: (919) 828-0564
Facsimile: (919) 834-4564