No. 5PA12-2 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,

From Wake County
95 CVS 1158
COA11-1545

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.

****

BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ASSOCIATION OF EDUCATORS IN SUPPORT OF DEFENDANT-APPELLEE STATE BOARD OF EDUCATION

****

INDEX

TABLE OF CASES AND AUTHORITIES iv

QUESTION PRESENTED 3

INTRODUCTION 3

ARGUMENT 4

I. CONTRARY TO THE ASSERTIONS BY THE ATTORNEY GENERAL, THIS LATEST STAGE OF LITIGATION HAS PROCEEDED WITHIN REASONABLE PARAMETERS FOR A DECLARATORY ACTION TO ENFORCE STATE CONSTITUTIONAL RIGHTS. 4

II. THE JUDICIARY HAS A CRUCIAL ROLE OF ENFORCING THE RIGHTS OF AT-RISK PROSPECTIVE ENROLLEES WHEN THE GENERAL ASSEMBLY TAKES THE STATE BACKWARDS IN ITS IMPLEMENTATION OF THE STATE'S PLAN FOR CONSTITUTIONAL COMPLIANCE 8

III. AT THE HEART OF THIS LITIGATION IS THE FOUNDATIONAL PRINCIPLE OF OUR CONSTITUTION THAT AT-RISK PROSPECTIVE ENROLLEES, WHEREVER THEY LIVE IN THIS STATE, ARE ENTITLED TO A SYSTEM OF PUBLIC EDUCATION THAT IS GENERAL AND UNIFORM IN ADDRESSING THEIR NEEDS. 10

IV. WHILE THE ATTORNEY GENERAL WAITS FOR ANOTHER ROUND OF LITIGATION, POVERTY HAS GOTTEN WORSE AND MORE CHILDREN ARE BEING DEPRIVED OF THEIR OPPORTUNITY TO A SOUND BASIC EDUCATION. 12

V. THE STATE BOARD OF EDUCATION IS READY TO PROCEED WITH IMPLEMENTATION OF THE STATE'S PLAN FOR CONSTITUTIONAL COMPLIANCE 15

VI. THE STATE'S PLAN FOR COMPLIANCE IS WELL SUPPORTED BY RESEARCH AS AN EFFECTIVE MEANS FOR ADDRESSING THE NEEDS OF AT-RISK PROSPECTIVE ENROLLEES 17

CONCLUSION 19

CERTIFICATE OF SERVICE 21

TABLE OF CASES AND AUTHORITIES

CASES

City of Greensboro v. Hodgin, 106 N.C. 182, 11 S.E. 586 (1890) 11

Freeman v. Pitts, 503 U.S. 467 (1992) 7

Hoke County Bd. of Educ. v. State, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*") 8, 12

Hoke County Bd. of Educ. v. State, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*") 5, 6, 7, 15

Hoke County Bd. of Educ. v. State, No. 95 CVS 1158 (N.C. Super. Ct. Oct. 25, 2000) ("*Memorandum II*") 7

Hoke County Bd. of Educ. v. State, No. 95 CVS 1158, 2000 WL 1639686 (N.C. Super. Ct. Oct. 12, 2000) ("*Memorandum I*") 4, 6

Hoke County Bd. of Educ. v. State, No. 95 CVS 1158, 2002 WL 34165636 (N.C. Super. Ct. Apr. 4, 2002) ("*Memorandum IV*") 4

Hoke County Bd. of Educ. v. State, No. COA11-1545 (Aug. 21, 2012) 15

Lane v. Stanly, 65 N.C. 153 (1871) 11

Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970) 9

CONSTITUTIONAL PROVISIONS

N.C. Const. art. I, § 2 ..... 5, 10

N.C. Const. art. I, § 15 3

N.C. Const. art. IX 10

N.C. Const. art. IX, § 2(1) 6

N.C. Const. art. IX, § 4 16

N.C. Const. art. IX, § 5 16

OTHER AUTHORITIES

Anthony Rolle, Eric A. Houck, Ann McColl, *And Poor Children Continue to Wait: An Analysis of Horizontal and Vertical Equity among North Carolina School Districts in the Face of Judicially Mandated Policy Restraints 1996-2006*, 34 J. of Educ. Fin. 75 (2008) 14

Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. Rev. 2049 (1999) 8

John L. Sanders, *A General and Uniform System of Public Schools* (1959), *available at* http://archive.org/stream/generaluniformsy00sand#page/n1/mode/2up 12

John V. Orth & Paul M. Newby, *The North Carolina State Constitution* (2d ed. 2013) 8, 10

Joint Conference Committee Report on the Continuation, Expansion, and Capital Budgets, S.B. 402, Section F, 2013 N.C. Sess. Laws ____, (July 24, 2013) 18

N.C. State Bd. of Educ., *Vision of Public Education in North Carolina: A Great Public Education System for a Great State* (2012), *available at* http://stateboard.ncpublicschools.gov/resources/north-carolina-ambassador-resources/vision-north-carolina-ambassador-resources%20/vision-report.pdf 17, 19

NEA Educ. Policy & Practice Dept., *Early Childhood Education and School Readiness* (2008) 18

Sonja Ralston Elder, Note, *Standing up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 Duke L.J. 755 (2007). .. 10

U.S. Census Bureau, Small Area Income and Poverty Estimates, http://www.census.gov/did/www/saipe/data/statecounty/data/index.html 13, 14

No. 5PA12-2 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 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.

****

BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ASSOCIATION OF EDUCATORS IN SUPPORT OF DEFENDANT-APPELLEE STATE BOARD OF EDUCATION

****

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Association of Educators submits this brief as *amicus curiae*, along with its *Motion for Leave to File Amicus Curiae Brief*, in support of Defendant-Appellee State Board of Education.

QUESTION PRESENTED

I. WHETHER THE NORTH CAROLINA COURT OF APPEALS' AFFIRMATION OF THE ORDER PROHIBITING THE STATE FROM VIOLATING ITS OWN PLAN FOR CONSTITUTIONAL COMPLIANCE FOR AT-RISK PROSPECTIVE ENROLLEES, WITHOUT HAVING SUBSTITUTED ANY ALTERNATIVE, WAS CONSISTENT WITH PRIOR RULINGS OF THIS COURT AND THE NORTH CAROLINA CONSTITUTION.

INTRODUCTION

Young children in North Carolina who live in poverty or other conditions that place them at risk rely on the State to meet its constitutional duty to "guard and maintain" their right to the opportunity to a sound basic education. N.C. Const. art. I, § 15. This Court, in its landmark 1997 decision, recognized the responsibility of the legislative and executive branches to provide all children the right to a sound basic education. And in its 2004 unanimous opinion, this Court clarified that the right requires the state to have a means by which to address the needs of at-risk prospective enrollees. After having developed its own plan to be constitutionally compliant in meeting the needs of this vulnerable population, the

Attorney General wants this Court to allow the State to go backwards in meeting their needs – to provide less access to needed pre-kindergarten programs - with no consequence. The fundamental right to an education was purposefully placed in our state constitution to ensure this right and prevent such actions. The State Board of Education stands ready to administer and supervise a system of public education that includes educational services needed by these young children. This Court is urged to affirm the North Carolina Court of Appeals' ruling so that the trial court can continue to safeguard these children's constitutionally guaranteed education.

ARGUMENT

I. CONTRARY TO THE ASSERTIONS BY THE ATTORNEY GENERAL, THIS LATEST STAGE OF LITIGATION HAS PROCEEDED WITHIN REASONABLE PARAMETERS FOR A DECLARATORY ACTION TO ENFORCE STATE CONSTITUTIONAL RIGHTS.

Throughout the long course of this litigation, the Attorney General consistently has sought to minimize the constitutional right, even asserting that the right is akin to a "moped." *Hoke County Bd. of Educ. v. State*, No. 95 CVS 1158, 2002 WL 34165636 (N.C. Super. Ct. Apr. 4, 2002) ("*Memorandum IV*") (R S 349); *Hoke County Bd. of Educ. v. State*, No. 95 CVS 1158, 2000 WL 1639686, at *10 (N.C. Super. Ct. Oct. 12, 2000) ("*Memorandum I*").

And now it suggests that this is no more than an ordinary civil action,

perhaps the kind that might occur between a mechanic and owner of a moped. This is not a conventional civil action. This is a declaratory action pursuant to section 1-253 of the General Statutes involving an issue of "significant if not paramount public interest": the fundamental right to education, which is vested in every single child in North Carolina. *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 614, 599 S.E.2d 365, 376 (2004) ("*Leandro II*"). The actions or inaction of the State in carrying out its constitutional duty affect not just the parties to this litigation, but each and every child in this state. The importance of the State's responsibility cannot be understated; when the State shirks its duty, the resulting constitutional deprivations are numerous, severe, and long-lasting.

The State erroneously argues that the issue before the Court is "analytically identical" to *Leandro II*. Attorney General's New Brief at pp. 19-20. The case has evolved since *Leandro II* and the question before the court is distinct. In *Leandro II*, the analysis was centered on the establishment of a constitutional violation in Hoke County and in further clarification of the contours of the State's duty. Now, in contrast, the analysis is centered on one action of the State that is contrary to its responsibility to remedy proven constitutional deficiencies in its educational delivery system. Our constitution makes clear that a State plan must be for the good of the whole (N.C. Const. art. I, § 2); must provide equal opportunities across the state; and must be a part of a general and uniform system (N.C. Const. art. IX,

§ 2(1)). It is undisputed that *Leandro II* established that "'at-risk' children require additional assistance and the State is obligated to provide such assistance." *Leandro II*, 358 N.C. at 643, 599 S.E.2d at 393. The plan as submitted by the State did this – as it must. The legislation passed by the General Assembly affects more than Hoke County students; it has statewide implications. Due to the nature of the statewide applicability of the legislation and its impact on the State's plan, the scope of the remedy must apply statewide.

Rather than the Attorney General's narrowly drawn window, the rulings on the rights of at-risk prospective enrollees are properly understood within the framework initially established by the trial court for assessing whether the State had met its constitutional obligations. In the first ruling, the trial court identified the following components of the North Carolina Educational Delivery System: I. Curriculum and Standard Course of Study; II. Teacher Licensure and Certification Standards; III. Funding Delivery System; IV. ABCs Accountability System; V. Student Performance Standards and VI. Educational Needs—At Risk Students. *Memorandum I*, 2000 WL 1639686, at *12.

As the court accepted evidence in these various areas, it was not simply to collect evidence on Hoke County – it was to assess the educational delivery system. In this way, the court operated in a manner similar to a trial court in a desegregation lawsuit that assessed the "Green factors" in determining whether

partial or full unitary status of a school district was warranted. *See Freeman v. Pitts*, 503 U.S. 467, 496-97 (1992). Here, the trial court found the State to be constitutional in its educational delivery system in the first five areas: it was only in the assessment of the sixth area of educational needs of at risk students that the trial court found it lacking. The State did not challenge this approach on appeal to this Court in *Leandro II* and this Court acknowledged the process and did not disagree with the trial court's approach. *Leandro II*, 358 N.C. at 632-33, 599 S.E.2d at 387.

The State attempts to treat the judicial enforcement against the State's erection of artificial barriers as if it were a new judicial concept. It is nothing of the sort. The trial court was allowing the State to proceed at a "reasoned and deliberate pace" in developing a plan that would address the needs of at-risk pre-enrollees. *Hoke County Bd. of Educ. v. State*, No. 95 CVS 1158 (N.C. Super. Ct. Oct. 25, 2000) ("*Memorandum II*") (R S 238).

The court has not placed rash, impossible timelines on the State for developing its plan for at-risk prospective enrollees as a part of the educational delivery system. Indeed some would consider the trial court to have been exceedingly patient in the method by which it has set up hearings, received evidence, and agreed to the State's plan. Every day, educators witness and seek to ameliorate the crushing impact of poverty on children's lives and they are eager for

the State to meet its obligations. In their classrooms and in their schools that want in place today what *Leandro* demands: quality principals, quality teachers, adequate instructional resources and a State plan to address the needs of children who are at risk. But this trial court order does not go that far. It simply provides that the General Assembly cannot enact legislation that clearly creates barriers to the implementation of its own plan for constitutional compliance and must continue to implement its own plan unless and until the State brings forward another means of meeting the needs of at-risk prospective enrollees.

II. THE JUDICIARY HAS A CRUCIAL ROLE OF ENFORCING THE RIGHTS OF AT-RISK PROSPECTIVE ENROLLEES WHEN THE GENERAL ASSEMBLY TAKES THE STATE BACKWARDS IN ITS IMPLEMENTATION OF THE STATE'S PLAN FOR CONSTITUTIONAL COMPLIANCE.

North Carolina has long recognized the importance of separation of powers since its first constitution of 1776. *See* John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 35 (2d ed. 2013); Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. Rev. 2049, 2050-52 (1999). This Court has made clear that while it will exercise its role to grant declaratory and other relief, it will do so in a way to minimize encroachment on the executive and legislative branches. *Hoke County Bd. of Educ. v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997) ("*Leandro I*"). This Court was unwilling to dictate a remedy for at-risk prospective enrollees until the other

branches had the opportunity to propose a plan.

This respect for separation of powers does not, however, make the State immune to judicial intervention. The Attorney General has made the cry that the court of appeals' affirmation of the trial court order will set up impossible demands upon the State of preclearance requirements and immediate fulfillment of the State's plan. It does not: it takes a reasonable approach of requiring the State to continue to make progress in implementing its own constitutionally compliant plan. As reasoned in the school desegregation context,

> [r]easonable remedies should always be sought. Practical rather than burdensome methods are properly required. . . . However, if a constitutional right has been denied, this court believes that it is the constitutional right that should prevail against the cry of "unreasonableness." . . . If, as this court and the Circuit Court have held, the rights of children are being denied, the cost and inconvenience of restoring those rights is no reason under the Constitution for continuing to deny them.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786, 800-01 (W.D.N.C. 1970).

This assessment of reasonableness was within the context of negative rights, the right under the federal constitution to not be subject to discrimination. Rights are even more compelling when they are substantive rights afforded by the state constitution. This distinction is drawn well in the Duke Law Journal:

> [W]hen enforcing negative rights, deference to the legislature is more easily justified because the court's action in striking down the

> offending law ends the constitutional violation; no further legislative action is needed to remedy the situation. With positive rights, on the other hand, the legislature's inaction is the very source of the constitutional violation and deference allows that violation to persist. Thus judicial deference should be most limited in cases that concern positive rights.

Sonja Ralston Elder, Note, *Standing up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 Duke L.J. 755, 767-68 (2007).

In this case, it is the legislature's conduct that causes the constitutional violation. It has set up barriers to its own plan. In such a situation, while recognizing the separation of powers, the judicial branch not only has the authority but the essential role of intervening. The political process will not work. Poor, young children cannot vote. They rely on the court to enforce their rights.

III. AT THE HEART OF THIS LITIGATION IS THE FOUNDATIONAL PRINCIPLE OF OUR CONSTITUTION THAT AT-RISK PROSPECTIVE ENROLLEES, WHEREVER THEY LIVE IN THIS STATE, ARE ENTITLED TO A SYSTEM OF PUBLIC EDUCATION THAT IS GENERAL AND UNIFORM IN ADDRESSING THEIR NEEDS.

The North Carolina Constitution demands that "all government of right . . . is instituted solely for the good of the whole." N.C. Const. art. I, § 2. This abstract principle is given the "details of democracy" in the later provisions. Orth & Newby, *supra*, at 48. In Article IX, the good of the whole is expressed as a general and uniform system. It is a concept that originates in our 1868 constitution and which, as dictated by this Court, "is not to be subject to the caprice of localities,

but every locality, yea, every child, is to have the same advantage, and be subject to the same rules and regulations." *Lane v. Stanly*, 65 N.C. 153, 157-58 (1871). Pertinent to the State's compliance plan and the statewide legislation, this Court has further said that "the system cannot be so regulated by statute as that it will apply and operate as a whole in some places, localities, and sections of the state, and not in the same, but in different ways, in other places, localities, and sections. *City of Greensboro v. Hodgin*, 106 N.C. 182, 11 S.E. 586, 587 (1890). The State cannot provide a constitutional plan only for children in Hoke County: It must address all sections of the State.

This requirement would not be in place if the General Assembly and the people had accepted the recommendation of the Constitutional Commission in 1959 to eliminate the general and uniform provision. John Sanders, recognized scholar of the North Carolina Constitution and then assistant director of the Institute of Government (now School of Government), analyzed the provision and the potential impact of this recommendation.

> Suppose the General Assembly and the people of the State should accept the recommendation of the Constitutional Commission and vote to eliminate from the Constitution the "general and uniform system" standard for the public schools, and the requirement that "one or more Public Schools shall be maintained [in each school district], at least six months in every year . . . ." What might be the effect of that action upon the range of the legislature's authority and discretion with respect to the public schools?

. . . .

> To raise the questions is not to imply that any legislature would ever attempt to take any of the indicated actions. They are raised merely to point up the potential range of unrestrained authority which the proposed amendments may very well confer upon the General Assembly. And it is appropriate to recall the reasons why the mandates for a "general and uniform system of Public Schools," with "one or more Public Schools" being maintained in every school district "at least six months in every year", are in the Constitution. What Mr. Justice Seawell wrote in *Bridges v. Charlotte*, 221 N.C. 472, 482 (1942) with special reference to the requirement for a "general and uniform system of Public Schools" may be said for all:
>
> "It is no doubt written into the fundamental law so that it may survive political indifference and so that the humblest citizen, speaking for himself and those in like right, may demand its performance."

John L. Sanders, *A General and Uniform System of Public Schools* 11-13 (1959) (citing *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825, 832 (1942)), *available at* http://archive.org/stream/generaluniformsy00sand#page/n1/mode/2up.

Here, the Attorney General acts as if this repeal occurred. But instead of repealing this provision, the General Assembly and the people strengthened it. As noted by this Court, "[t]he 1970 amendment adding the equal opportunities clause ensured that all the children of this state would enjoy this right." *Leandro I*, 346 N.C. at 348, 488 S.E.2d at 255-56. This Court has made clear that the right extends to at-risk prospective enrollees.

IV. WHILE THE ATTORNEY GENERAL WAITS FOR ANOTHER ROUND OF LITIGATION, POVERTY HAS GOTTEN WORSE AND MORE

CHILDREN ARE BEING DEPRIVED OF THEIR OPPORTUNITY TO A SOUND BASIC EDUCATION.

The Attorney General wants this Court to ignore young, poor children in all of the State other than Hoke County. The Attorney General seems to suggest that in order to move forward, the trial court must identify conditions of poverty or other at-risk conditions in each school community and must specifically find the failure of the State to establish a plan to address their needs. But this is not necessary when it is the State that has the responsibility for providing for a general and uniform system of public education.

When this Court issued its first decision in 1997, 18.6 percent of children under the age of 18 in North Carolina lived in poverty. This did not abate by the time of the second opinion with 18.7 percent remaining in poverty in 2004. By 2011 – six years into the time for the State to implement a plan based on standards set by this Court for at-risk youth – the level of poverty shot up to one in four children (25.4 percent) under the age of 18 living in poverty. U.S. Census Bureau, Small Area Income and Poverty Estimates, http://www.census.gov/did/www/saipe/data/statecounty/data/index.html (last visited July 24, 2013).

Although Hoke County is above this state average with 28.8 percent of its children in poverty in 2011, other communities suffer even more. In the

mountains, child poverty levels rise to 37.7 percent in the far west in Clay County and 33.5 percent in the mid-mountain region of McDowell County. The Piedmont reaches child poverty rates of 37.7 percent in Montgomery County. The Northeast suffers some of the highest, persistent poverty with four of ten children living in these conditions (such as the counties of Vance at 39.0 percent, Halifax at 39.1 percent, North Hampton at 38.8 percent, and Edgecombe at 39.9 percent). Child poverty climbs to its worst in the Southeast with poverty rates soaring to 44.4 percent in Scotland County. *Id.*

These are the poverty rates for all children under the age of 18. They are even higher for children under the age of five. At the time of the first opinion in 1997, two of every ten of these children lived in poverty (20.5 percent). It is now three of every ten young children (29.8 percent). *Id.*

This is a snapshot of how conditions that place children at risk have gotten worse through the lens of poverty. Analyses also show that during the time of this litigation, equity of opportunity has worsened rather than improved. *See generally* Anthony Rolle, Eric A. Houck, Ann McColl, *And Poor Children Continue to Wait: An Analysis of Horizontal and Vertical Equity among North Carolina School Districts in the Face of Judicially Mandated Policy Restraints 1996-2006*, 34 J. of Educ. Fin. 75 (2008).

How much longer must these at-risk prospective enrollees wait for their

opportunity? As stated by this Court, "[t]he children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive." *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377. The court of appeals stated that "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." *Hoke County Bd. of Educ. v. State*, No. COA11-1545 (Aug. 21, 2012), Slip Op. at 19-20. While we as a people hope that one day poverty and other conditions that place children at risk will be eradicated, it will not be soon. Until then, the State must continue with the plan it has in place – until another approach is adopted and is approved by the court – to meet the needs of these children.

V. THE STATE BOARD OF EDUCATION IS READY TO PROCEED WITH IMPLEMENTATION OF THE STATE'S PLAN FOR CONSTITUTIONAL COMPLIANCE.

This Court has acknowledged the shared responsibility of the legislative and executive branch for public education and deference to those branches to avoid a narrow remedy. *Leandro II*, 358 N.C. at 643, 599 S.E.2d at 393. More specifically, the State Board of Education has the constitutional authority to administer and supervise the free public school system subject to laws enacted by

the General Assembly. N.C. Const. art. IX, § 5. In its brief to this Court as well as to the North Carolina Court of Appeals, the State Board affirms its judicial admissions and commits to meeting its constitutional obligations to at-risk pre-kindergarten children. State Board's New Brief p. 20; State Board's Brief to Court of Appeals p. 17. This commitment continues after a significant shift in the composition of the Board in 2013 with recent gubernatorial appointments and changes in officers in ex officio positions. *See* N.C. Const. art. IX, § 4.

As has been done for years now, the State Board and its administrative agency can continue to give notice to the trial court as it implements a constitutionally compliant plan. (There is no preclearance requirement. If necessary, this Court could clarify the language of the court of appeals.)

The State Board of Education's commitment is clear in the voluminous record of the appearances of the Department of Public Instruction before the trial court. It also has made clear its commitment through formal actions of the Board. In June of 2011, the State Board adopted a resolution raising concern about the legislative plan to transfer the nationally recognized pre-kindergarten program out of the Department of Public Instruction and to restrict access through budget reductions. (R pp 467-69). Further, in October of 2012, the State Board adopted a two-page vision based upon a more than year-long public engagement process and a paper submitted to the State Board by Dr. Helen F. Ladd and Mr. Edward B.

Fiske. That statement declares, "[t]he State Board of Education's vision of a public education system builds on the state's constitutional commitment to education and emphasizes the state's responsibility for assuring a strong and coherent system that serves all students and that is geared toward the promotion of the public interest." N.C. State Bd. of Educ., *Vision of Public Education in North Carolina: A Great Public Education System for a Great State* 3 (2012) [hereinafter *State Bd. Vision*], *available at* http://stateboard.ncpublicschools.gov/resources/north-carolina-ambassador-resources/vision-north-carolina-ambassador-resources%20/vision-report.pdf.

Just as this Court has steered away from a narrowly-prescribed remedy, the State Board embraces innovation in the means by which the State establishes the educational delivery system: "[t]he State Board's vision encourages diverse and innovative means of delivering education while assuring that each element of the system shares a commitment to the broad purposes of public education, including the maximizing of opportunity for all students." *Id.*at 4.

VI. THE STATE'S PLAN FOR COMPLIANCE IS WELL SUPPORTED BY RESEARCH AS AN EFFECTIVE MEANS FOR ADDRESSING THE NEEDS OF AT-RISK PROSPECTIVE ENROLLEES.

Educators know through experience how pre-kindergarten brings education success within the reach of young at-risk children. Licensed pre-kindergarten teachers in public schools work daily with these children to equip them for school.

As these children progress through grade levels, educators in our public schools see the results of these children being better prepared, both for their own continued success and in regard to the impact on other students in the classrooms. This impact also is well supported by evidence already presented to this Court. In addition, two well-known longitudinal studies provide further evidence of the benefits to students enrolled in quality preschool programs. The Carolina Abecedarian Project determined that pre-kindergarten graduates are "less likely to repeat grades, need special education, or get into trouble with the law." The HighScope Perry Preschool Project determined that students who have participated in early learning opportunities increase their earning potential by up to $2,000 more per month than those who do not. NEA Education Policy and Practice Department, *Early Childhood Education and School Readiness* (2008).

Providing pre-kindergarten to these at-risk young children will be even more important since K-3 public classrooms will have fewer resources available: the State budget passed by the General Assembly in 2013 shrinks funds for public education, eliminates thousands of teacher positions – which inevitably will lead to larger classes, eliminates teacher assistant positions, and cuts even further the meager funds for instructional supplies. J. Conf. Comm. Rep. on the Continuation, Expansion, and Capital Budgets, S.B. 402, Section F, B(8)-(10), 2013 N.C. Sess. Laws ____, (July 24, 2013).

CONCLUSION

This latest litigation is sparked by state action that reverses the remedy and the progress for the last eight years. As stated by Mr. Fiske and Dr. Ladd in the paper accepted by the State Board of Education:

> Education is an investment in the future of our children and in the future of our state. If we underinvest in education or fail to assure fair access to quality education for all students today, we cannot hope to have the great public education system required for a great state in the future. Great public education systems take years to build, but they can be quickly destroyed. If we underinvest in education today, North Carolina will eventually face the daunting and perhaps impossible task of reinventing a system that has served the state so well in the past.

Edward B. Fiske & Helen F. Ladd, *Vision of Public Education in North Carolina* 5, 12, *in State Bd. Vision*. The North Carolina Court of Appeals has affirmed the role of the trial court to require the State to stay the course in meeting constitutional mandates. While this Court might choose to clarify terminology or processes, for the reasons set forth above, the decision of the court of appeals should be affirmed.

Respectfully submitted this 24th day of July, 2013.

NORTH CAROLINA ASSOCIATION OF EDUCATORS

Ann McColl, General Counsel
N.C. Bar No. 18304
ann.mccoll@ncae.org

Carrie B. Bumgardner, Staff Attorney
N.C. Bar No. 40117
carrie.bumgardner@ncae.org

Jessica N. Holmes, Staff Attorney
N.C. Bar No. 40719
jessica.holmes@ncae.org

North Carolina Association of Educators
P.O. Box 27347
Raleigh, NC 27611
Telephone: (919) 755-5553
ann.mccoll@ncae.org

Attorneys for Amicus North Carolina Association of Educators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing on all counsel and parties of record by depositing a copy, contained in a first-class envelope, postage pre-paid, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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

Melanie Black Dubis
Robert W. Spearman
Scott E. Bayzle
Parker Poe Adams & Bernstein LLP
Post Office Box 389
Raleigh, North Carolina 27602
Counsel for Appellee Hoke County Board of Education, et al.

H. Lawrence Armstrong, Jr.
Armstrong Law, PLLC
P.O. Box 187
Enfield, North Carolina 27823
Counsel for Appellee Hoke County Board of Education, et al.

Deborah R. Stagner
Neal A. Ramee
Ann L. Majestic
Tharrington Smith LLP
209 Fayetteville Street (27601)
Post Office Box 1151
Raleigh, North Carolina 27602
Counsel for Appellee Plaintiff-Intervenor Charlotte-Mecklenburg

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

Julius L. Chambers
Ferguson, Stein, Chambers, Wallace, Adkins, Gresham & Sumter, P.A.
Post Office Box 36486
Charlotte, North Carolina 28204
Counsel for Penn Intervenors

Mark Dorosin
Taiyyabi Qureshi
UNC School of Law Center of Civil Rights
CB 3382
Chapel Hill, North Carolina 27599
Counsel for Penn Intervenors

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

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

Robert F. Orr
Edwin M. Speas, Jr.
John W. O'Hale
Poyner & Spruill LLP
301 Fayetteville Street, Suite 1900
Raleigh, North Carolina 27602

Counsel for North Carolina School Boards Association

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

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

Christopher Brook
P.O. Box 28004
Raleigh, North Carolina 27611
Counsel for American Civil Liberties Union of North Carolina Legal Foundation

Iris A. Sunshine
Children's Law Center of Central NC
8 West Third Street, Suite M-6
Winston-Salem, NC 27101
Counsel for Children's Law Center of Central North Carolina

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

Robert McCarter
Laurie Gallagher
601 E. Fifth Street, Suite 510
Charlotte, North Carolina 28202
Counsel for Council for Children's Rights

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

Scott Holmes
640 Nelson Street
Durham, North Carolina 27707
Counsel for North Carolina Central University School of Law Civil Litigation Clinic

Gregory Malhoit
123 Forest Road
Raleigh, North Carolina 27605
Counsel for North Carolina Rural Education Working Group

Anita S. Earls
Clare Barnett
1415 West Highway 54, Suite 101
Durham, North Carolina 27707
Counsel for Southern Coalition for Social Justice

Mary Irvine
UNC School of Law Annex
23 W. Barbee Chapel Road
Chapel Hill, North Carolina 27599-3382
Counsel for UNC Center on Poverty, Work and Opportunity

This the 24th day of July, 2013.

Ann McColl, General Counsel
N.C. Bar No. 18304
North Carolina Association of Educators
P.O. Box 27347

Raleigh, NC 27611
Telephone: (919) 755-5553
ann.mccoll@ncae.org

Attorney for Amicus North Carolina Association of Educators