No. 5PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

Plaintiffs,

And

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and STATE BOARD OF EDUCATION,

Defendants.

From Wake County

FILED
JUL 24 2013
SUPREME COURT OF NORTH CAROLINA

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NEW BRIEF OF *AMICI CURIAE*

ADVOCATES FOR CHILDREN'S SERVICES OF LEGAL AID OF NORTH CAROLINA; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION; CHILDREN'S LAW CENTER OF CENTRAL NORTH CAROLINA; CHILDREN'S LAW CLINIC AT DUKE LAW SCHOOL; COUNCIL FOR CHILDREN'S RIGHTS; DISABILITY RIGHTS NORTH CAROLINA; NORTH CAROLINA CENTRAL UNIVERSITY SCHOOL OF LAW CIVIL LITIGATION CLINIC; NORTH CAROLINA JUSTICE CENTER; NORTH CAROLINA RURAL EDUCATION WORKING GROUP; SOUTHERN COALITION FOR SOCIAL JUSTICE; AND UNC CENTER ON POVERTY, WORK AND OPPORTUNITY

IN SUPPORT OF APPELLEES

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IN SUPPORT OF APPELLEES

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ISSUES PRESENTED

I. IS PRE-KINDERGARTEN, THE STATE'S CHOSEN REMEDY FOR THE CONSTITUTIONAL VIOLATION FOUND TO HAVE OCCURRED, A PROVEN, EFFECTIVE, *LEANDRO II*-CONFORMING REMEDY?

II. DID THE TRIAL COURT HAVE THE CONSTITUTIONAL AUTHORITY AND DUTY TO ORDER REMEDIAL RELIEF AFTER THE STATE REFUSED TO FULFILL ITS CONSTITUTIONAL OBLIGATION TO PROVIDE EVERY CHILD IN THE STATE WITH THE OPPORTUNITY TO OBTAIN A SOUND BASIC EDUCATION?

III. DOES THE CONSTITUTIONAL RIGHT TO A SOUND BASIC EDUCATION INCLUDE ADDITIONAL ASSISTANCE FOR ALL AT-RISK PROSPECTIVE ENROLLEES IN THE STATE?

INTRODUCTION

North Carolina's school children were the supposed victors in the landmark rulings in *Leandro I* and *Leandro II*. Yet, nineteen years after the lawsuit was filed and nine years after the second N.C. Supreme Court decision, tens of thousands of children across the State – particularly at-risk children – are only marginally closer to obtaining a sound basic education.

This Court, in its 1997 *Leandro I* ruling, declared that all children residing in North Carolina have a fundamental state constitutional right to the "opportunity to receive a sound basic education." *Leandro v. State,* 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) ("*Leandro I*"). In its 2004 *Leandro II* decision, this Court held that at-risk prospective enrollees had been denied that right. *Hoke County Bd. of*

Educ. v. State, 358 N.C. 605, 642, 599 S.E.2d 365, 393 (2004) *("Leandro II)*. While making it clear that at-risk prospective enrollees were entitled to additional assistance, the Court stopped short of mandating the State to provide pre-kindergarten to all at-risk prospective enrollees. The Court stated that, *at that juncture of the case*, mandating pre-kindergarten for all at-risk prospective enrollees was premature. *Id.* at 644, 599 S.E.2d at 394. The Court deferred to the legislative and executive branches to devise a remedy of their own choice. *Id.* at 642-43, 599 S.E.2d at 393.

In response to *Leandro II*, the State selected pre-kindergarten as its chosen remedy and expanded pre-kindergarten services with the stated intent of ensuring that "every at-risk four-year-old has access to a quality pre-kindergarten program." (R pp 477, 483; R S pp 612, 615). In 2011, the case came back before the trial court to assess, among other issues, the State's progress towards meeting its stated goal. Despite abundant evidence that pre-kindergarten is an effective remedy, it was made clear that the State has failed to adequately implement its pre-kindergarten program. As of 2011, less than half of the state's then-approximately 65,000 at-risk four-year-olds had access to the State's pre-kindergarten program. (R p 666). The Legislature's "Current Operations and Capital Improvements Appropriations Act of 2011," N.C. Sess. Law 2011-145 ("Legislation"), would substantially decrease access to this program even further. *Id.*

When confronted with the clear and uncontroverted evidence that the State had failed to fulfill its constitutional obligation, and in the absence of a State-proposed alternative remedy, the trial court had not only the power, but the duty, to order remedial relief. The trial court's order was no longer "premature."

ARGUMENT

I. PRE-KINDERGARTEN, THE STATE'S CHOSEN REMEDY FOR THE CONSTITUTIONAL VIOLATION FOUND TO HAVE OCCURRED, IS A PROVEN, EFFECTIVE, *LEANDRO II*-CONFORMING REMEDY.

A. Research Demonstrates That The North Carolina Pre-Kindergarten Program Is A High-Quality, Cost-Effective Program.

The current trial court order is amply supported by strong and uncontested research-based evidence demonstrating the effectiveness of the State's preschool program. As the State's own witness testified and the trial court found, North Carolina More at Four Pre-Kindergarten Program ("More at Four") (currently named the North Carolina Pre-Kindergarten Program ("NC Pre-K")), has been extremely successful in closing the achievement gap by providing at-risk children with the school readiness skills they need to succeed. (*See* Pruette Testimony, T pp 29-32; R pp 654-55, 658-59). Since *Leandro II*, significant social science research on More at Four shows conclusively that this state-funded, high-quality

preschool program is a proven, effective remedy to address the State's history of unconstitutional denial of a sound basic education to at-risk prospective enrollees.

More at Four was designed to help prepare at-risk four-year-olds for kindergarten and to eliminate achievement gaps for at-risk students before they arise. (R p 520). Since 2002, it has served over 167,000 four-year-olds. Rule 9(d) Exhibits, Frank Porter Graham Feb 2011, Defendant's Exhibit 4, p 1. Eligibility is determined by a family's economic status, as well as other risk factors, including identified disability, chronic health condition, educational or developmental need, family's military status, and limited English proficiency. (R p 520).

A series of evaluations conducted on behalf of the State, by the Frank Porter Graham Child Development Institute ("FPG"), has consistently demonstrated that More at Four participants are better prepared for school, having established critical foundation skills that positively impact long-term academic achievement. Such evaluations also demonstrate that More at Four substantially narrows the achievement gap between economically-disadvantaged and middle class students. Rule 9(d) Exhibits, Frank Porter Graham Feb 2011, Defendant's Exhibit 4, pp 1-2; (R S pp 819-21). Additionally, FPG researchers found that More at Four improved language, literacy, and math skills, resulting in improved school readiness for at-risk children. Rule 9(d) Exhibits, Frank Porter Graham Feb 2011, Defendant's Exhibit 4, pp 1-2.

The State-funded FPG evaluations have shown that More at Four provides at-risk children with opportunities to gain critical foundational skills that persist through kindergarten. A 2008 FPG study, which assessed children's skills at entry into More at Four and their subsequent growth during pre-kindergarten and kindergarten, found that More at Four strengthens children's foundational skills. The study found that these skills persist through kindergarten, preparing participants to develop more advanced academic skills in elementary school, regardless of their risk level. FPG Child Development Institute, *Evaluation of the North Carolina More at Four Pre-kindergarten Program: A Look across Time at Children's Outcomes and Classroom Quality from Pre-K through Kindergarten*, at 7, 52, 103 (2009).[1]

These positive effects continue for years. When FPG researchers studied the long-term effects of participation in More at Four by comparing the third-grade end of grade ("EOG") math and reading scores of More at Four students to the scores of their peers, the gap in average test scores between economically-disadvantaged and non-economically-disadvantaged students was reduced by 31% in math and 24%-37% in reading for economically-disadvantaged More at Four participants. (R S p 821). Poor children who participated in More at Four had higher math and reading achievement levels than poor children who did not attend

[1] *Available at* http://www.fpg.unc.edu/~mafeval/pdfs/year_8_report_final.pdf.

More at Four. (R p 525). Additionally, the percentage of children identified as having a learning disability by the end of third grade was substantially lower among children who attended More at Four. (R p 526).

Researchers at Duke University confirm the benefits of More at Four and Smart Start.[2] In 2011, Duke University researchers found positive effects from these programs on third grade math and reading test scores. (R p 563). The study also found that these programs later increased the probability that a child would be classified as academically or intellectually gifted, and decreased the probability that a child would be identified as a special education or limited English proficient student. (R p 564). Moreover, the program has proven to be cost-effective. Comparing the positive effects of More at Four to the cost of the program, the study concluded that the benefits of More at Four appear to be worth at least the State's investment in the program. (R pp 569-70).

B. National Research Demonstrates That Pre-Kindergarten Is A Cost-Effective Way To Improve Educational Outcomes For At-Risk Students While Providing Long-Term Economic, Social, And Health Benefits.

Evaluations of North Carolina's pre-kindergarten program are consistent with research findings at the national level: at-risk children who participate in

[2] Smart Start is a statewide initiative focused on early childhood development. (R p 548).

high-quality pre-kindergarten programs are more successful in school and in life. At-risk children who participate in such programs have higher test scores on math and reading achievement tests, experience less grade retention, and have less need for special education.[3] They are more likely to graduate from high school, attend a four-year college, and graduate from college.[4] In adulthood, they are more likely to be employed, own a home, and have health insurance.[5]

The results of three prominent studies of the long-term effects of high-quality preschool programs on disadvantaged children are particularly compelling.

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[3] R S p 1601; *Early Childhood Education Program Yields High Economic Returns*, SCIENCEDAILY, Feb. 4, 2011, at 1, *available at* http://www.sciencedaily.com/releases/2011/02/110204091258.htm [hereinafter *Early Childhood Returns*]; Arthur J. Reynolds et al., *Age 26 Cost-Benefit Analysis of the Child-Parent Center Early Education Program*, CHILD DEVELOPMENT, Jan.-Feb. 2011, at 389-90, a*vailable at* http://www.ncbi.nlm.nih.gov/pubmed/21291448; Lawrence Schweinhart, *Benefits, Costs, and Explanation of the High/Scope Perry Preschool Program*, MEETING OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, April 26, 2003, at 4, *available at* http://www.highscope.org/file/Research/PerryProject/Perry-SRCD_2003.pdf.

[4] W. Steven Barnett & Clive R. Belfield, *Early Childhood Development and Social Mobility*, 16 FUTURE OF CHILDREN 73, at 83-86, *available at* http://futureofchildren.org/futureofchildren/publications/docs/16_02_05.pdf; F.A. Campbell et al., *Adult Outcomes as a Function of an Early Childhood Educational Program: An Abecedarian Project Follow-Up*, DEVELOPMENTAL PSYCHOLOGY, Jan. 16, 2012, at 8, *available at* http://psycnet.apa.org/psycinfo/2012-00549-001/; *Early Childhood Returns, supra* note 3, at 1; Julia Isaacs, *Research Brief #4: Model Early Childhood Programs*, IMPACTS OF EARLY CHILDHOOD PROGRAMS, BROOKINGS CENTER ON CHILDREN AND FAMILIES, Sept. 2008, at 1-3, *available at* http://www.brookings.edu/~/media/Files/rc/papers/2008/09_early_programs_isaacs/09_early_programs_brief4.pdf; Reynolds, *supra* note 3, at 389-90.

[5] Campbell, *supra* note 4, at 8; Reynolds, *supra* note 3, at 389-90; Schweinhart, *supra* note 3, at 5.

All three of these studies, the Carolina Abecedarian Project, the Child-Parent Center Early Education Program, and the High/Scope Perry Preschool Program, demonstrated that preschool provides long-term educational, economic, social, and health benefits for at-risk students.[6] Additionally, a study of five state-funded, high-quality pre-kindergarten programs for four-year-olds – in South Carolina, West Virginia, Oklahoma, Michigan, and New Jersey – found that preschool produced broad gains in children's learning at kindergarten entry.[7] The study found that preschool participants had improved vocabulary, math skills, and print awareness – all skills that lay a foundation for school success, particularly in reading and math.[8]

Studies have also demonstrated that high-quality preschool programs have substantially higher rates of economic return on taxpayer investments than school-level or job training interventions.[9] Researchers found that the High/Scope Perry Preschool Program had a rate of return of $16.14 for every dollar invested. The

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[6] Isaacs, *supra* note 4, at 1-3; Barnett, *supra* note 4, at 83-86.
[7] W. Steven Barnett, et al., *Effects of Five State Prekindergarten Programs on Early Learning,* INSTITUTE FOR EARLY EDUCATION RESEARCH AT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, 2007, at 2, 6, 20, *available at* http://secure.highscope.org/file/Research/MultiState1007.pdf.
[8] *Id.* at 2, 20.
[9] James J. Heckman, *The Case for Investing in Disadvantaged Young Children,* BIG IDEAS FOR CHILDREN: INVESTING IN OUR NATION'S FUTURE, 2008, at 50-53, *available at* http://www.heckmanequation.org/content/resource/case-investing-disadvantaged-young-children.

Child-Parent Center Early Education Program had an average return of $10.83 for every dollar invested.[10]

The New Jersey Supreme Court was persuaded by comparable research when it ordered high-quality preschool services for all three and four-year-olds in poor, urban school districts throughout the state. *See Abbott v. Burke*, 710 A.2d 450, 462-64 (N.J. 1998). The court relied on evidence demonstrating: preschool has a substantial impact on academic achievement, poor children who attend preschool are better prepared for kindergarten, and the long-term benefits of preschool justify the investment. *Id.* at 462-64. The New Jersey court ordered this remedy after reaching the same conclusion that the trial court did in the instant case: the State was not providing at-risk children in poor school districts with their constitutionally-guaranteed right to an education.[11] *Id.* at 456-58.

This vast body of research makes it abundantly clear that high quality preschool programs, including North Carolina's pre-kindergarten program, effectively provide at-risk children the opportunity to obtain a sound basic education. The benefits of high-quality pre-kindergarten programs far outweigh

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[10] Reynolds, *supra* note 3, at 380, 391.

[11] The court found that preschool education has "strong constitutional underpinning," but because an existing N.J. statute required preschool services, the court did not need to determine whether preschool was a component of the state's constitutionally-guaranteed opportunity to obtain an adequate education. *Abbott v. Burke*, 710 A.2d 450, 464 (N.J. 1998).

the costs. The remedy chosen by the State is a proven and effective remedy for the constitutional violation found to have occurred.

II. THE TRIAL COURT HAD THE CONSTITUTIONAL AUTHORITY AND DUTY TO ORDER REMEDIAL RELIEF FOR THE CHILDREN OF NORTH CAROLINA.

A. Courts Have The Authority To Order Remedial Relief To Remedy Constitutional Violations.

The State argues 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. *See* Attorney General's Brief at 15-23. While courts generally defer to the legislative and executive branches on issues that fall within the province of those branches of government, this deference depends on the other branches of government fulfilling their constitutional obligations.[12] When, as in the instant case, the other branches refuse to fulfill such obligations, our state courts are not only empowered, but are obligated, to act to ensure that the constitutional rights of North Carolinians are not compromised.

The judicial authority and obligation to protect constitutionally declared fundamental rights is as old as the United States. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Judicial action addressing a continued constitutional

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[12] *See* Sonja Elder, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 773 (2007).

violation is rooted in the courts' equitable powers, and as long as such action is exercised in response to legislative noncompliance, as evident here, it is appropriate.[13]

During the school desegregation era, courts were often obligated to remedy constitutional violations after the other branches of government refused to do so. When issuing these remedies, the U.S. Supreme Court instructed lower federal courts to "be guided by equitable principles." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955). The Court explained, "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies . . . [I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Id.*

In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, the U.S. Supreme Court stated, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is *broad*." 402 U.S. 1, 15 (1971) (emphasis added) (affirming trial court's order adopting desegregation plan developed by outside expert after school board failed to submit a plan that remedied violations). The Court explained, "[i]f school authorities fail in their affirmative obligations [to desegregate] judicial authority may be invoked," and

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[13] *Montoy v. State*, 112 P.3d 923, 931 (Kan. 2005) (citing *Unfulfilled Promise: School Finance Remedies and State Courts,* 104 HARV. L. REV. 1072, 1087–88 (1991)).

court-ordered remedies for segregation may be "administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some." *Id.* at 15, 28.

Courts have applied this broad remedial authority in many ways that government officials likely viewed as administratively burdensome and inconvenient. *See, e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (affirming district court's order enjoining government officials from discriminating in schools and ordering submission of a desegregation plan); *Milliken v. Bradley*, 433 U.S. 267 (1977) (affirming district court's order requiring compensatory or remedial educational programs partially funded by the State as part of desegregation decree); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 441-42 (1968) (finding school district's "freedom of choice" plan insufficient to dismantle dual system and ordering school district to develop new desegregation plan that includes realistic strategies, such as zoning, to desegregate schools); *Griffin v. County. Sch. Bd.*, 377 U.S. 218 (1964) (affirming district court's order prohibiting county from paying tuition grants, giving tax credits, closing schools to avoid desegregation, and warning that court would remedy problem if schools were not reopened); *Arthur v. Nyquist*, 712 F.2d 809 (2nd Cir. 1983) (upholding district court's order requiring additional appropriation of funds to implement desegregation remedy); *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976)

(affirming district court's order transferring school's leadership out of the school as part of desegregation plan).

In school finance cases, like the present case, high courts in other states have also recognized that their function as the ultimate protector of citizens' rights is not merely discretionary, but obligatory.[14] For example, the Kentucky Supreme Court held, "the judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it . . . [and t]his duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public." *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989). Similarly, the Wyoming Supreme Court held, "as the final authority on constitutional questions the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution," and "[w]hen the legislature's transgression is a failure to act, our duty to protect individual rights includes compelling legislative action required by the constitution." *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995). Additionally, the New Jersey Supreme Court held that "as the designated last-resort guarantor of the Constitution's command, [the Court] possesses and

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[14] Elder, *supra* note 12, at 766-67.

must use power equal to its responsibility . . . and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government." *Robinson v. Cahill*, 69 N.J. 133, 154-55, 351 A.2d 713, 724 (1975).[15]

In *Leandro I*, this Court grappled with the constitutional separation of powers doctrine and gave clear guidance. The court acknowledged that it must grant "every reasonable deference" to the legislative and executive branches when considering whether they are fulfilling their constitutional obligation to provide a sound basic education. 346 N.C. at 357, 488 S.E.2d at 261. The issue of providing a sound basic education is, "initially at least," within the province of the legislative and executive branches. *Id.* However, the Court made it clear that if a branch of government is denying children this fundamental right, and such denial is not necessary to promote a compelling governmental interest, then it is "the *duty* of the court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong." *Id.* (emphasis added).

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[15] *See also Londonderry Sch. Dist. SAU No. 12 v. State*, 154 N.H. 153, 163, 907 A.2d 988, 966 (2006) ("[T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential."); *Lake View Sch. Dist. No. 25 v. Huckabee*, 364 Ark. 398, 416, 220 S.W.3d 645, 657 (2005) ("[I]t is also the duty of this court to assure constitutional compliance when compliance is challenged and to assure that the will of the people of our state as expressed in our constitution is fulfilled.").

In *Leandro II*, this Court ordered the State to "address and correct" its deficiencies in providing at-risk prospective enrollees their constitutional opportunity to obtain a sound basic education. While the Court stopped short of prescribing a remedy, it made clear that the judicial branch has the authority to do so if state actors became recalcitrant:

> [W]hen 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.

Leandro II, 358 N.C. at 642, 599 S.E.2d at 393.

B. By Prohibiting At-Risk Prospective Enrollees From Participating In The North Carolina Pre-Kindergarten Program, The State Failed To Fulfill Its Constitutional Duty, Necessitating Remedial Action By The Trial Court.

In *Leandro II*, almost nine years ago, the Court reversed the trial court's remedial order regarding the provision of pre-kindergarten services as part of the State's constitutional obligation to at-risk prospective enrollees. The Court found that "*at this juncture of the litigation*," 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 644-45, 599 S.E.2d at 394-95 (emphasis added).

Following *Leandro II*, the State Board of Education and the Legislature each took steps to "address and correct" existing constitutional deficiencies in affording at-risk prospective enrollees their guaranteed opportunity to obtain a sound basic education. In doing so, the State consistently identified the More at Four Program as its sole, chosen remedy to fulfill its constitutional obligation to provide at-risk prospective enrollees the opportunity to obtain a sound basic education. (R p 651). In a hearing conducted by the trial court in October 2004, the "State Defendants' 2004 Action Plan to Court" committed to expanding More at Four to ensure "every at-risk four-year-old has access to a quality prekindergarten program." (R pp 477, 483). In August 2005, the State made the exact same commitment to the trial court. (R S pp 612, 615). From 2005 through 2011, the State expanded More at Four from serving approximately 15,000 at-risk children to serving approximately 32,000 at-risk children. (R pp 653, 666). Significantly, in 2010, the State also lauded More at Four as an essential component of its successful *Race to the Top-Early Learning Challenge Grant* application.[16] Since 2004, through its own actions and statements, the State has repeatedly committed to providing pre-kindergarten services to meet its constitutional obligation to at-risk prospective enrollees.

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[16] A*vailable at* http://www2.ed.gov/programs/racetothetop-earlylearningchallenge/applications/north-carolina.pdf.

Despite clear evidence that the state's NC Pre-K program was providing participating at-risk children with the opportunity to obtain a sound basic education, as discussed in Section I of this Brief, the 2011 Legislature passed legislation to dismantle the State's past remedial efforts. The Legislation reduced the number of NC Pre-K slots for at-risk four-year-olds by 80%, without providing any alternative high-quality pre-kindergarten options for those now-excluded children. (R pp 666, 668).

At the hearing before the trial court, the State offered no evidence to the court of any substituted remedy for at-risk prospective enrollees. The State now argues that the Legislation to reduce Pre-K slots is justified because "reflecting economic realities is well within the stated powers of the legislative branch." *See* Attorney General's Brief at 32. The State, however, has broad power to raise revenue. *See* N.C. Const. art. IX, § 2(1) ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools."). Moreover, as the U.S. Supreme Court has made clear, fiscal concerns and attempts to limit expenditures do not enable the State to violate constitutional rights. *See, Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974) (citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)). State high courts have applied this principle to state constitutional provisions guaranteeing the right to education. *See e.g., Abbott v. Burke*, 20 A.3d 1018, 1024-25, 1049-50 (N.J. 2011) (holding that

even during times of fiscal crisis, the State may not use its legislative power over appropriations to diminish students' rights to a constitutionally-guaranteed education); *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 755 (N.H. 2002) (holding that financial constraints do not excuse the State from providing a constitutionally adequate education); *State v. Campbell County Sch. Dist.*, 19 P.3d 518, 565-66 (Wyo. 2001) (holding that, even in an environment of tax revenue shortfalls, lack of financial resources is not an acceptable reason for failing to provide a constitutionally-guaranteed education).

As a result of the State's stark retreat from efforts to correct the constitutional deficiency, the trial court ordered a specific remedy based on the sole, chosen remedy selected by the State after *Leandro II*. The court ordered the State to provide NC Pre-K to any eligible at-risk four-year-old who applies, enjoined Section 10.7(f) of the Legislation, and prohibited the State from implementing any other barriers to deny eligible, at-risk four-year-olds admission to NC Pre-K. (R p 669). Faced with such a clear and deliberate evisceration of the State's only identified means of addressing its past constitutional violation regarding at-risk prospective enrollees, the trial court could no longer defer to the other branches to remedy this constitutional violation. The trial court had not only the power, but the obligation to the children of North Carolina, to exercise its broad remedial authority to order a specific remedy to correct this wrong. More

than seven years after *Leandro II*, the trial court's 2011 order was no longer "premature."

III. THE CONSTITUTIONAL RIGHT TO A SOUND BASIC EDUCATION INCLUDES ADDITIONAL ASSISTANCE FOR ALL AT-RISK PROSPECTIVE ENROLLEES IN THE STATE.

A. All Children in the State Have The Same Constitutional Right, Including Children Outside of Hoke County.

> 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 General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students.

N.C. Const. art. IX, § 2(1) (emphasis added).

In *Leandro I*, this Court concluded that the two constitutional provisions quoted above combine to "guarantee *every child in this state* an opportunity to receive a sound basic education in our public schools." 346 N.C. at 347, 488 S.E.2d at 255 (emphasis added). The Court stated, "the intent of the framers was that *every child* have a fundamental right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime." *Id.* at 348, 488 S.E.2d at 255 (emphasis added). The Court explained that the General Assembly has a duty to provide "the children of *every school district* with

access to a sound basic education." *Id.* at 353, 488 S.E.2d at 258 (emphasis added).

In 2004, this Court addressed the state-wide constitutional right to a sound basic education in the context of at-risk prospective enrollees, explaining that the Court "recognizes the gravity of the situation for 'at-risk' prospective enrollees in Hoke County *and elsewhere*." *Leandro II*, 358 N.C. at 643, 599 S.E.2d at 394 (emphasis added). The Court stated that under *Leandro I* and our state Constitution, regardless of a child's needs or whether the child is at-risk, "the constitutional right articulated in *Leandro* [*I*] is vested in them all." *Id.* at 620, 599 S.E.2d at 379. Affirming the trial court's conclusion that at-risk prospective enrollees "require additional assistance and that the State is obligated to provide such assistance," the Court explained, "the State recognizes the extent of the problem – its deficiencies in affording 'at-risk' prospective enrollees their guaranteed opportunity to obtain a sound basic education – and its obligation to address and correct it." *Id.* at 643-44, 599 S.E.2d at 393-94.

Intrinsic in the application of a fundamental constitutional right is the principle that each right vests equally, and cannot be arbitrarily denied, weakened, or revoked. To ensure that all rights vest equally, the Equal Protection Clause of the State Constitution "prohibits the State from denying any person the equal protection of the laws." *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377,

393 (2002). Additionally, the United States Supreme Court has provided helpful guidance on this issue, explaining:

> [t]he very enumeration of the [constitutional] right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

D.C. v. Heller, 554 U.S. 570, 634 (2008). Specifically addressing the right to an education, the United States Supreme Court stated:

> it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, *where the state has undertaken to provide it*, is a right which *must be made available to all on equal terms*."

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (emphasis added).

The State's argument that the trial court lacked jurisdiction to mandate the provision of pre-kindergarten services on a state-wide basis, *See* Attorney General's Brief at 20-23, is without merit. In *Leandro I* and *Leandro II,* this Court made it abundantly clear that all children in the state are afforded the same constitutional right to a sound basic education, irrespective of whether they reside in Hoke County or another school district. Since each child's right is the same, relitigating this issue in the remaining 114 school districts across the state to

achieve the same result would be nonsensical and redundant. Additionally, requiring district-by-district litigation would be an extraordinary drain on judicial resources and state funds. The *Leandro II Court* recognized the enormous cost already expended on this litigation:

> [T]he ensuing trial lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that exceeds 400 pages. The time and financial resources devoted to litigating these issues over the past ten years undoubtably have cost the taxpayers of this state an incalculable sum of money. While obtaining judicial interpretation of our Constitution in this matter and applying it to the context of the facts in this case is a critical process, one can only wonder how many additional teachers, books, classrooms, and programs could have been provided by that money in furtherance of the requirement to provide the school children of North Carolina with the opportunity for a sound basic education.

Leandro II, 358 N.C. at 610, 599 S.E.2d at 373. At this point in the case, it is unnecessary to expend additional resources to determine which children are entitled to this fundamental constitutional right because this Court has already answered the question: *all* children in the state have the right.

B. The State Cannot Arbitrarily Deny At-Risk Children Access To Its Pre-Kindergarten Program.

Consistent with *Leandro I* and *Leandro II*, the trial court's order, affirmed by the Court of Appeals in this case, required that the State "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." (R p 669). Under the court's order, the State cannot, as it has done in the past, provide this remedy to some, but not all, eligible at-risk children based solely on the number of NC Pre-K slots that the State arbitrarily decides to fund in a given year. (R pp 471, 652-54, 666-668); Rule 9(d) Exhibits, More at Four Graphs, Defendant's Exhibit 1; Rule 9(d) Exhibits, More at Four Pre-K Funding 2007-2010, Defendant's Exhibit 2; Rule 9(d) Exhibits, More at Four Pre-K Milestones, Defendant's Exhibit 3.

The State argues that the Court of Appeals' opinion "curtailed" the scope of the trial court's order. This is a misreading of the court's opinion. Moreover, under the State's interpretation of the order, the practice of denying a sound basic education to thousands of eligible at-risk four-year-olds every year, a practice that is arbitrary and unconstitutional, would be impermissibly sanctioned. The State argues that because the Court of Appeals used the phrase "existing pre-kindergarten programs" when discussing the authority of the trial court to mandate a remedy, the court meant to curtail the scope of the trial court's order by "injecting a limiting pre-condition not found in the order." *See* Attorney General's Brief at 16. This is an incorrect interpretation of the Court of Appeals' opinion for several reasons.

First, the phrase must be read in context with other parts of the opinion. The Court of Appeals described the state's "pre-existing" program earlier in the opinion as:

> [t]he only program, evidenced in the record, that was developed by the State since *Leandro II* to address the needs of [at-risk prospective enrollees] was MAF [More at Four], 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 . . . it developed the pre-kindergarten program, MAF.

Hoke County Bd. of Educ. v. State, 731 S.E.2d 691, 694-95 (N.C. App. 2012). In light of this explanation, the phrase "existing pre-kindergarten programs in his or her respective county" merely refers to the existing NC Pre-K program, which was funded and implemented by the State in every county in North Carolina as the State's sole, chosen remedy to fulfill its constitutional obligation to at-risk prospective enrollees (R pp 651-52). Now that the State has chosen this particular remedy, the trial court held, and the Court of Appeals affirmed, the State must provide its chosen remedy to all at-risk four-year-olds who apply as opposed to allowing the State to arbitrarily exclude thousands of prospective enrollees every year.

Second, the State's interpretation that "existing pre-kindergarten programs" refers to the existing number of currently funded pre-kindergarten "slots" – thus

curtailing the number of at-risk prospective enrollees the State is obligated to serve – is an inaccurate interpretation of the word "programs" in the education context. In the education context, an educational "program" is entirely unrelated to the number of funded "slots," or the number of children served by a particular program. For example, school districts must develop and implement a variety of programs, including: the Basic Education Program for all students in the district,[17] a program for academically or intellectually gifted students,[18] individualized education programs for students with disabilities,[19] and an English-as-a-second-language program for students with limited English proficiency.[20] In each of these contexts, "program" refers to the educational components of instruction; it does not in any way refer to, or limit, the number of children served by these programs. The Court of Appeals was not curtailing the scope of the trial court's order by including the phrase "existing pre-kindergarten programs" because in the context in which this phrase was used, the word "programs" is entirely unrelated to the number of funded "slots" or the number of children currently served by NC Pre-K.

This Court's opinion in *Leandro II* guarantees all at-risk prospective enrollees in the state the right to additional assistance to ensure that these children

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[17] N.C. Gen. Stat. §§ 115C-81, 115C-47(12).
[18] N.C. Gen. Stat. § 115C-150.7(b)(2).
[19] N.C. Gen. Stat. § 115C-106.3(8).
[20] N.C. State Bd. of Educ. Policy Manual, 16 NCAC 6D .0106, June 1, 1996, *available at* http://sbepolicy.dpi.state.nc.us/policies/GCS-K-000.asp?pri=01&cat=K&pol=000&acr=GCS.

are provided their constitutional right to the opportunity to obtain a sound basic education. It is illogical and inconsistent with *Leandro I* and *Leandro II* to suggest that this constitutional right only applies to at-risk children in Hoke County or to certain at-risk children in the state who are lucky enough to obtain a coveted slot. The Court of Appeals' opinion did not curtail the scope of the trial court's order. If the opinion can be interpreted in a way that fails to guarantee every child in the state, including every at-risk child, the opportunity to obtain a sound basic education, then the opinion must be clarified by this Court.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the decision of the Court of Appeals.

Respectfully submitted this 24th day of July 2013.

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Pursuant to N.C. R. App. P. 33(b), I, Christine Bischoff, certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed.

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