No. 5PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN, *et al.*,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

From Wake County

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BRIEF OF THE PENN PLAINTIFF-INTERVENORS-APPELLEES

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BRIEF OF THE PENN PLAINTIFF-INTERVENORS-APPELLEES

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ISSUES PRESENTED

I. **DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S ORDER PROHIBITING THE STATE FROM ABANDONING THE STATE'S CHOSEN REMEDY WITHOUT PROVIDING AN ALTERNATIVE REMEDY?**

II. **DID THE COURT OF APPEALS ERR IN AFFIRMING THE APPLICATION OF A STATEWIDE REMEDY?**

III. **DID THE COURT OF APPEALS ERR IN AFFIRMING THE JUDICIARY'S PROPER ROLE IN MONITORING AND OVERSEEING THE ADEQUACY OF A PARTICULAR CONSITUTIONAL REMEDY DEVELOPED BY THE STATE LEGISLATIVE AND EXECUTIVE BRANCHES?**

STATEMENT OF THE CASE

In 1997, the North Carolina Supreme Court held that the North Carolina Constitution ensures every child a "right to a sound basic education," *Hoke County Board of Education v. State of North Carolina*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997) ("*Leandro I*"), and that "the General Assembly has the duty of providing the children of every school district with access to a sound basic education." *Id.* at 353, 488 S.E.2d at 258.

Judge Howard Manning, Jr., presided over this case following this Court's remand. (R. at 232.) In October of 2000, the trial court held that the constitutional right included the equal opportunity of at-risk children to receive early childhood prekindergarten education and ordered the State to address the need for at-risk prospective enrollees. *Hoke County Bd. of Educ. v. State*, No. 95CVS1158, 2000 WL 1639686, *113 (N.C. Super. Ct. Oct. 12, 2000) aff'd in part as modified,

rev'd in part sub nom. *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("Early childhood intervention is critical for at-risk children so they may have an equal opportunity to participate in obtaining a sound basic education."). *See Hoke County Bd. of Educ. v. State*, 358 N.C 605, 632 n.13, 599 S.E.2d 365, 387 n.13 (2004) ("*Leandro II*") (defining "at-risk" to include students with "an unstable home life," "poor socio-economic background," and other factors identified by education experts). In March of 2001, the court found that there were at-risk children throughout the State who were not achieving a sound basic education, but refrained from fashioning its own remedy to allow the executive and legislative branches, "initially at least, to use their informed judgment." *Hoke County Bd. of Educ. v. State*, No. 95CVS1158, 2001 WL 35975830 (N.C. Super. Ct. Mar. 26, 2001). In April of 2002, the court reaffirmed that the State lacked sufficient prekindergarten programs to meet the educational needs of the State's at-risk youth and that prekindergarten programs "must be expanded to serve all of the at-risk children in North Carolina that qualify for such programs." *Hoke County Bd. of Educ. v. State*, No. 95CVS1158, 2002 WL 34165636 (N.C. Super. Ct. Apr. 4, 2002). The State appealed the multiple trial court orders. *Leandro II* at 607, 599 S.E.2d at 372 (appeal included multiple orders from 1997-2002).

On appeal, the North Carolina Supreme Court upheld the lower court's substantive ruling that the State was derelict in its constitutional duty to provide a sound basic education, and further held that "State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Leandro II* at 642, 599 S.E.2d at 393. The Supreme Court commended the trial court for "refusing to dictate how existing problems should be approached and resolved" by other branches. *Id.* at 638, 599 S.E.2d at 391. However, the Court found the trial court's proposed remedy, mandatory prekindergarten for all at-risk prospective enrollees, was "inappropriate at this juncture" in part because of the lack of evidence at that time that prekindergarten was "a single or definitive means for achieving constitutional compliance." *Id.* at 644, 599 S.E.2d at 394. This Court provided additional guidance for analyzing any proffered remedies, and remanded the case to the trial court for its continued oversight, monitoring, and enforcement. *Id.* at 649, 599 S.E.2d at 397. Following the decision in *Leandro II*, the State did in fact develop and implement a statewide prekindergarten program for at-risk children. (R. at 476-77; R. Supplement at 450-52.)

This appeal began with Plaintiffs' request for a hearing on "the reduction of pre-kindergarten services for at-risk children" as reflected in the House of Representatives' 2011-

2012 Budget. (R. at 407-441 (2011 N.C. Session Law 145).) After a 22 June 2011 hearing, the court found that clear evidence established that the North Carolina Pre-Kindergarten Program was effectively addressing the needs of "at-risk" prospective enrollees and that the proposed changes to the program would significantly limit its effectiveness as well as the number of eligible at-risk children. (R. at 654-55, 658.) The court held that relevant budget sections could not be enacted if they "den[ied] any eligible at-risk four year old admission" to the program. (R. at 669.) The court specifically found that the budget's cap on the number of at-risk students in one prekindergarten classroom would limit the number of prekindergarten slots to 6,400, with an additional 25,600 spaces only open to non-at-risk children. (R. at 666.) The State appealed on 17 August 2011. (R. at 686.)

In a unanimous decision, the North Carolina Court of Appeals affirmed the trial court's order, noting that in *Leandro II*, this Court held "[i]t was ultimately the State's responsibility to meet the needs of 'at-risk' students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education." *Hoke County Bd. of Educ. v. State*, __ N.C.App. __, 731 S.E.2d 691, 694 (2012) (citing *Leandro II* at 640, 599 S.E.2d at 392-93). The court of appeals held that although a court-ordered prekindergarten

remedy had been inappropriate or premature in *Leandro II*, over the subsequent eight years the State had "made [the] determination for itself" that the More at Four prekindergarten program "would best satisfy their [constitutional] duty" to at risk-students and had not now produced an alternative plan. 731 S.E.2d at 695.

In upholding the trial court's remedy prohibiting implementation of specific portions of the budget, the court of appeals reaffirmed the judiciary's traditional power of review over the State-created remedy to a constitutional violation. "Thus, we do not deem it inappropriate or premature at this time to uphold an order mandating the State not to deny any eligible 'at-risk' four year old admission to the North Carolina Pre-Kindergarten Program." *Id.* at 695. The trial court's order did not "undermine[] the authority and autonomy of the government's other branches, since both the executive and legislative branches [] evidenced their selection and endorsement of this [the statewide More at Four program] – and only this – remedy to address the State's constitutional failings identified in *Leandro II*." *Id.* at 696. The court of appeals also held that the trial court did not exceed its authority in preserving prekindergarten on a statewide basis. *Id.* The State's own (and only) remedy was offered on a statewide basis. *Id.* Thus, the trial court did not exceed its authority in enforcing upon the

State the remedy in the form and scope the State itself proffered to meet its duty to remedy its constitutional violation. *Id.*

Statement of Facts

This appeal concerns the authority of the trial court supervising this litigation to enjoin Defendants' actions "that sought to erect artificial barriers or any other barriers that would deny at-risk four year old prospective enrollee throughout the State his or her constitutional right to an opportunity to obtain a sound basic education by denying that child admission to an existing pre-kindergarten program." 731 S.E.2d at 695.

After this Court's remand in 2004, the trial court held multiple hearings. (R. at 332.) Having found a constitutional violation of the right to a sound basic education, the court did not impose its own remedy, but acknowledged the State's Executive and Legislative branches full freedom to devise an appropriate remedial strategy. (R. Supplement at 577-88 (the plan that the State Board of Education and Department of Public Instruction created in response to the holding in Leandro II).) The General Assembly expanded and enhanced the State's More at Four Pre-Kindergarten Program, following this Court's instruction in *Leandro II* that the State "must help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education." 731 S.E.2d at

693 (citing *Leandro II* at 605, 599 S.E.2d at 391). From 2004 to 2010, the Board of Education, the State Superintendent, the Governor, and the General Assembly continued to expand the program, regularly reporting on its effectiveness at improving student performance and repeatedly affirming its own commitment to the program. (R. at 477 (promising to expand the existing More at Four program to "ensure every at-risk four-year-old has access to a quality prekindergarten program."); R. Supplement at 612-627 (allocating $16.6 million to open 3,200 more at-risk prekindergarten slots and calling for more teacher recruitment). R. Supplement at 815-834 (evaluating the More at Four program including short and long term impacts on student performance.); R. at 653 ("The goal of the program (MAF) is to provide quality prekindergarten services to a greater number of at-risk children in order to enhance kindergarten readiness for those children.").) In addition to these stated facts, those facts presented in the brief of Plaintiffs-Appellees are adopted and incorporated by reference. (Br. Pl.'s Appellees.)

ARGUMENT

I. The Judiciary's Authority to Implement and Monitor Remedies for Violations of the Constitutional Right to a Sound Basic Education Mirrors its Authority Over Remedies for Equal Protection Violations in Schools.

The protection and enforcement of constitutional rights concerning education requires a particular approach because of

the unique and fundamental role public education plays in ensuring that our citizens are able to thrive in society and in maintaining the effective functioning of our democratic system. As established in *Brown v. Board of Education*, constitutional violations that undermine the equitable provision of education may require courts to limit traditional local or state control of schools, and to exercise broad continuing authority and flexibility in fashioning appropriate remedies. *Brown v. Bd. of Educ. of Topeka,* 347 U.S. 483, 493 (1954) (*Brown I*). Modern education law, including judicial supervision of remedial programs, began with the recognition in *Brown I* that:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

Id.

The primacy of public education heightens constitutional implications, justifies innovative remedies, and creates "greater evidentiary leeway than in a conventional civil

action." *Leandro II* at 615, 599 S.E.2d at 376. Public education is a "significant, if not paramount, public interest;" and its significance should be reflected in broad remedies in *Leandro* as it has in broad remedies in desegregation cases. *Id*. "The 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." *Id.* at 616, 599 S.E.2d at 377.

The difficult question of remedies required the U.S. Supreme Court to return to *Brown* in 1955 to deal specifically with this issue. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 298 (1955) (*Brown II*). The Court noted that because of the particular local circumstances, including massive government resistance to integration, direct supervision by the trial court would be necessary to implement meaningful remedies:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

> Accordingly, we believe it appropriate to remand the cases to those courts.

Brown II at 299.

In this ongoing *Leandro* litigation, this Court similarly returned to review remedies after the initial opinion recognizing a constitutional right to an opportunity for a sound basic education. In *Leandro II* this Court held that once a violation has been found, structuring an appropriate remedy requires "the analysis of the qualitative educational services provided to the respective plaintiffs." *Leandro II* at 609, 599 S.E.2d at 373.

Even before the creation of an appropriate remedial structure, *Brown*, like the first *Leandro* case, recognized that the "wide applicability of this decision" and the "great variety of local conditions" "present[] problems of considerable complexity" in crafting remedies, and therefore held the case open for further consideration on that question. *Brown I* at 495.

The most effective remedial structure to address constitutional violations particular to education has been carefully developed through decades of desegregation jurisprudence. Rather than reinvent some other remedial superstructure, North Carolina courts should continue to apply similar procedures in the *Leandro* litigation to those that

courts have historically applied in the desegregation context. "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971).

A. The *Leandro* litigation has already adopted a remedial model similar to school desegregation litigation.

The *Leandro* litigation up to this point has followed the existing model of school desegregation litigation and should continue to do so.

The first step of the model is the finding of a constitutional violation. In the desegregation context a particular school district is found to be maintaining a segregated or dual school system, in violation of students' equal protection rights. *See e.g.*, *Everett v. Pitt County Bd. of Educ.*, 678 F.3d 281, 289 (4th Cir. 2012); *Swann v. Charlotte-Mecklenburg Bd. of Educ.* 300 F.Supp. 1358, 1362-63 (W.D.N.C. 1969). Defendants have the opportunity to challenge that determination in appellate courts. Once liability is established there is no need a plaintiff to continue to prove the violation; the burden shifts to the defendant to demonstrate that its subsequent actions will move toward remedying the violation. *Everett* at 289 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

Following a determination that there has been a constitutional violation, the state or school district found to be liable then has the opportunity to propose the remedy to the violation. *See, e.g.*, *Belk v. Charlotte Mecklenburg Bd. of Ed.*, 269 F.3d 305, 315-16 (4th Cir. 2001) (summarizing court hearings on proposed school remedies in 1973, 1974, 1978, and 1980). In recognition of and deference to the educational policymaking responsibility and expertise of school administrators, the courts refrain from developing their own remedy unless the defendant either proposes one unlikely to address the constitutional violation or fails to implement one entirely. "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a [constitutional] right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann*, 402 U.S. at 15. A meaningful remedy brought forth by the education defendant will be accepted and adopted by the trial court. In *Swann*, "[t]he board procrastinated, but eventually submitted an enervated desegregation plan that the district court approved 'with great reluctance' on a temporary basis." *Belk* at 314 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F.Supp. 1291, 1298 (W.D.N.C. 1969)). Plaintiffs may challenge the remedy as not

adequately progressing toward fulfillment of the constitutional obligation. *Id*. (outlining the long history of the *Swann* case with repeated challenges to remedies).

Once a remedy is accepted by the trial court, Defendants retain the right to alter the accepted remedy, either in response to changed circumstances or in pursuit of alternative effective remedial schemes. *Everett* at 289. *See also School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1310 (4th Cir. 1987) (the district court "approved fifteen plan modifications between 1972 and 1979"). In the long line of Charlotte desegregation cases, for example, the Charlotte-Mecklenburg school district unilaterally adopted a magnet program to achieve desegregation, with no court intervention or challenge by plaintiffs. *Belk* at 316. If challenged, however, the defendant must prove "that the proposed changes are consistent with its continuing affirmative duty to eliminate discrimination." *Everett* at 289 (quoting *Riddick v. Sch. Bd.*, 784 F.2d 521, 535 (4th Cir. 1986)).

The history of *Leandro* litigation thus far has followed this same process. Plaintiffs sought declaratory and injunctive relief alleging that the right to public education had a substantive qualitative component which had been denied to them by the state under the funding system at that time. *Leandro I* at 342, 488 S.E.2d at 252. This Court held that such a right

existed and remanded to the trial court to determine whether the state had violated that right. *Id.* at 357, 488 S.E.2d at 261. On remand the trial court found students performing below grade level were not receiving a sound basic education in violation of their constitutional right. *Hoke County Bd. of Educ. v. State*, No. 95CVS1158, 2000 WL 1639686 (N.C. Super. Ct. Oct. 12, 2000). "[T]here has been a clear showing of a denial of the established right of Hoke County students to gain their opportunity for a sound basic education." *Leandro II* at 638, 599 S.E.2d at 391. In addition, the trial court also found that prekindergarten intervention could be necessary for at-risk prospective students. *Hoke County Bd. of Educ. v. State*, No. 95CVS1158, 2000 WL 1639686, *101 (N.C. Super. Ct. Oct. 12, 2000). Specifically, "The at-risk, pre-kindergarten age children *of North Carolina* are not being provided with an equal opportunity to obtain a sound basic education from the start unless, and until, they are provided with an appropriate pre-kindergarten educational opportunity." *Id.* at *112 (*emphasis added*). Defendants unsuccessfully challenged that determination in *Leandro II*.

The State subsequently developed and implemented a plan to create and then expand prekindergarten education. (R. at 476 (presenting the research-driven plan to expand the More at Four program to Judge Manning); R. at 477 ("The State intends to

continue to expand the More at Four program until at least 40,000 at risk four-year-olds are assured access to quality pre-kindergarten programs."); R. Supplement at 550-52 (enhancing the More at Four program with a focus on recruiting necessary teachers); R. at 576 (creating More at Four Committees in each county or region in order to expand capacity); R. Supplement at 612-24 (describing the Governor's and State Board of Education's strategic focus for Leandro compliance and the recent actions taken to implement the October 25, 2004 plan); R. at 652-54 (discussing the growth and expansion of the More at Four program from 2001-2011); R. at 653 ("The goal of the program (MAF) is to provide quality prekindergarten services to a greater number of at-risk children in order to enhance kindergarten readiness for these children. 2008 N.C. Sess. Laws 110, Sec. 7.24(a)."); R. at 659 ("The bottom line . . . is that the State, using the combination of Smart Start and the More at Four Pre-Kindergarten Programs, have indeed selected pre-kindergarten . . . as the means to 'achieve constitutional compliance' for at-risk prospective enrollees.").)

Again, like the courts overseeing desegregation cases, *Leandro II* explicitly recognized the need for deference to the legislative and executive branches of the state in crafting remedies, while simultaneously retaining ultimate constitutional

authority. *Leandro II* at 642-45, 599 S.E.2d at 393-95. Indeed this Court held that:

> [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.

Id. at 642, 599 S.E.2d at 393.

As in a desegregation case, Plaintiffs in this case retain the right to challenge a remedy implemented by Defendants or imposed by the court if they believe the remedy fails to adequately correct the constitutional deficiency. In the present case, after hearing evidence that the State's cuts and changes to the prekindergarten program would move the state away from fulfilling its constitutional obligation, the trial court entered the order at issue now before the Court. *Hoke County Bd. of Educ. v. State*, No. 95CVS1158, 2011 WL 7769952 (N.C. Super. Ct. July 18, 2011).

This scheme for adopting remedies, used both in desegregation cases and up to this point in *Leandro* litigation is the opposite of what the state melodramatically calls "preclearance." The State is not only given every opportunity to come up with and adopt its own remedies before court intervention and is charged with the primary constitutional duty

to do so. *Leandro II* at 644, 599 S.E.2d at 394. As the history of desegregation litigation demonstrates, the State may also change remedies, but it must show that the new proposal works as well or better than the previous plan and any alternative remedy is subject to court review. In this case no alternative remedy has been proposed. (R. at 668.)

The State's own witnesses testified that the challenged legislation not only fails to remedy the constitutional deficiency, but moves backwards, hampering the State's ability to fulfill its duty. In his direct examination, John Pruette, Executive Director of the Office of Early Learning, spoke repeatedly about the problems with cutting funding, capping enrollment, and requiring a co-payment. (T 38 ("What you're getting in this move is retro 1989. That's where the state is heading with lack of coordination and lack of funds, a lack of any sort of coordinated effort that leverages what is the best of all programs."); T 41 ("that's further evidence of the unraveling of what's occurred over a decade").)

The suggestion by the Court of Appeals that the State seek the trial court's guidance before making a change is consistent with the history of this case and desegregation cases, especially given the nature of the constitutional harms and the State's continuing obligation. *Hoke County Bd. of Educ. v.*

State, __ N.C.App. __, 731 S.E.2d 691, 698 (2012) review allowed, 738 S.E.2d 362 (N.C. 2013).

B. In *Leandro* litigation the remedial structure must apply to both local districts and the state as a whole.

While this case is directly comparable to desegregation cases with respect to the remedial structure, the remedies may be applied more broadly. The decisions that affect a student's constitutional rights to equal education under *Brown* are generally controlled by an individual school district. Those factors which determine whether a school district is unitary or retains the vestiges of racial segregation include the physical condition of the school, transportation, student assignment, and personnel, all of which are traditionally the province of individual school districts. *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 436 (1968). *Cf. United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972) (holding the state responsible in a desegregation case by barring the implementation of a state statute). The constitutional right to an opportunity for a sound basic education, however, can be infringed upon by decisions made either by local school districts or the State, or by both.

In *Leandro II* this Court made clear that the state is ultimately responsible even for failings in a particular district. *Leandro II* at 615-16, 599 S.E.2d at 376.

Under this system of dual responsibility, the State has ultimate responsibility for providing the opportunity for education to all North Carolina children, even where the class of students identified as having their rights violated resides in a particular district, such as the underfunded districts in the original litigation. This Court specifically upheld this approach taken by the superior court in *Leandro II*:

> By holding the State accountable for the failings of local school boards, the trial court did not limit either: (1) the State's authority to create and empower local school boards through legislative or administrative enactments, or (2) the extent of any powers granted to such local school boards by the State. Thus, the power of the State to create local agencies to administer educational functions is unaffected by the trial court's ruling, and any powers bestowed on such agencies are similarly unaffected. In short, the trial court's ruling simply placed responsibility for the school board's actions on the entity—the State—that created the school board and that authorized the school board to act on the State's behalf. In our view, such a conclusion bears no effect whatsoever on the local school board's ability to continue in administering those functions it currently oversees or to be given broader and/or more independent authority. As a consequence, we hold that the State's argument concerning a diminished role for local school boards as a result of the trial court's ruling is without merit.

Leandro II at 635-36, 599 S.E.2d at 389.

However, the class of students alleging deprivation of their *Leandro* rights may not reside in a single district. As this Court first recognized in *Leandro I*, “the General Assembly,

under Article IX, Section 2(1), has the duty of providing the children of *every school district* with access to a sound basic education." *Leandro I* at 353, 488 S.E.2d at 258. Specifically with respect to prekindergarten, *Leandro II* found the issue extended statewide, "recogniz[ing] 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).

Additionally, this Court has held that individual districts may also be liable for deprivation of the right to a sound basic education. In *King v. Beaufort County*, a student sued the local school district, not the State, alleging a violation of her right to a sound basic education under *Leandro*. *King v. Beaufort County*, 364 N.C. 368, 704 S.E.2d 259 (2010). The student had been suspended and denied alternative education. *Id.* at 371, 704 S.E.2d at 261. While this Court "decline[d] plaintiff's invitation to create a constitutional right to alternative education," it did recognize that the board's decision to exclude the student from any educational opportunity implicated her *Leandro* rights. *Id*. at 371-72, 704 S.E.2d at 261. This Court therefore has recognized that the state constitutional right to a sound basic education may be violated by an individual school district. *Id.*

C. As in desegregation cases, court supervision in education adequacy litigation continues until Defendants file and win a motion declaring that they are meeting their constitutional obligations to provide the opportunity for a sound basic education.

Desegregation cases also provide a model for ultimate resolution of the litigation. "[W]hatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." *Green*, 391 U.S. at 439. Similarly here, when the State or other parties with standing believe that the State has fulfilled its remedial obligation under *Leandro* and has ensured that every child in the relevant group is receiving the opportunity for a sound basic education, they may petition the court to close the litigation, just as a party may seek a declaration of "unitary status" and end court supervision in a desegregation case. The State or district that had previously been found to have violated the constitution would bear the burden of proof in making the showing the students have the opportunity for a sound basic education, as determined by the relevant standards already established by the courts. *Leandro II* at 625, 599 S.E.2d at 382 (setting Level III proficiency as "the proper standard for demonstrating compliance with the Leandro decision."). Plaintiffs or other interested parties would have opportunity to challenge State's motion

before the court. *See e.g., Belk,* 269 F.3d 305 (motion for declaration of unitary status by white school children opposed by plaintiffs and school board but granted by trial court and upheld by the 4th Circuit Court of Appeals). Unless and until a court approves such a motion and determines the State's remedial obligation has been met, it retains the affirmative duty to address its constitutional liabilities. *Everett* at 290 ("the School Board has yet to discharge this obligation and demonstrate to the district court its attainment of unitary status").

D. Prior holdings, which establish the controlling law of this case, require upholding the Court of Appeals.

This Court established the law of this case in *Leandro I* and *II*. "The decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974). The law of the case doctrine "generally prohibits reconsideration of issues which have been decided by the same court, or a higher court, in a prior appeal in the same case," "provided that there was a hearing on the merits and that there have been no material changes in the facts since the prior appeal." *Goetz v. N.C. Dept. of Health & Human Services*, 203 N.C.App. 421, 692 S.E.2d 395 (2010). *See also, Weston v.*

Carolina Medicorp, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994) ("once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal"); *Lawton v. George A. Yancey Trucking Co.*, 84 N.C. App. 522, 526, 353 S.E.2d 267, 269 (1987). The law of the case doctrine applies in a subsequent appeals that involve "the same facts and the same questions" *Tennessee—Carolina Transp.* at 239, 210 S.E.2d at 183.

Leandro I clearly established that courts must first defer to the other branches to remedy the constitutional deficiency, but may intervene if they fail in that duty:

> [T]he courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. A clear showing to the contrary must be made before the courts may conclude that they have not. Only such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.

Leandro I at 357, 488 S.E.2d at 261. It established the controlling law of this case, reaffirmed by this court seven years later in *Leandro II*:

> Certainly, 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.

Leandro II at 642, 599 S.E.2d at 393. This remains the law of the case and therefore the general issue of whether a court must mandate relief under certain circumstances, should not be reconsidered.

Defendants continue to cite the holding in *Leandro II* (denying the trial court's statewide prekindergarten remedy as premature) for the conclusion that it has no obligation to provide prekindergarten programs. (Br. Def. Appellant at 17-18.) While the prior case did strike the imposition of the prekindergarten remedy "at this juncture," that is not now binding as the law of the case. *Leandro II* at 643, 599 S.E.2d at 393. In this particular issue there are not "the same facts and the same questions" as required for the law of the case doctrine to apply. *Tennessee—Carolina Transp.* at 239, 210 S.E.2d at 183. The trial court has held multiple hearings for multiple years and repeatedly found the effectiveness of the State's proffered prekindergarten programs as a remedy. (*See, e.g.*, R. Supplement at 821 (Frank Porter Graham Child Development Institute study demonstrates that testing disparities between at risk and non-at-risk students decreased

31 percent in math and between 24 and 37 percent in reading as a result of More at Four); R. at 525 (same study indicates that low income individuals who participated in More at Four performed better in mathematics and reading than low income individuals who did not participate in More at Four); R. at 534 (Duke University study demonstrates that More at Four participants were more likely to be categorized as intellectually gifted and less likely to be categorized as having learning disabilities).) Even more importantly, the imposition of prekindergarten programs as a remedy in *Leandro II* took place before the State had an opportunity to propose or implement its own plan, whereas in this posture, the North Carolina Pre-Kindergarten Program was the remedy chosen by the State and proven to be effective. *Leandro II* at 645, 599 S.E.2d at 395.

The dramatically expanded factual record and changed procedural posture of the case nullify the prior rejection by this Court of prekindergarten as a court-imposed remedy. Put simply, we are at a different juncture.

Indeed the law, not only of this case but historically, allows for judicial review of constitutional issues. The judicial branch is obligated by the constitution to enter judgment to correct the violation of a fundamental right if the other branches fail to correct it. *Leandro I*, 346 N.C. at 357,

488 S.E.2d at 261. Judical review, rather than being contrary to the separation of powers, is essential to it. "Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied." *Leandro II*, 358 N.C. at 642, 599 S.E.2d at 393.

CONCLUSION

This appeal provides an opportunity for the Court to reaffirm the trial court's authority over the remedial phase of litigation, specifically regarding prekindergarten, and to expressly reaffirm the remedial structure effectively in place in this matter and that has proven to be effective in the public education context for over almost 60 years. Any decision that undermines the trial court's authority to ensure that the State finally and completely fulfill its constitutional obligation to the children of North Carolina guarantees further delay to the great detriment of our entire state. "Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount." *Leandro II* at 649, 599 S.E.2d at 397. Further delay would "undoubtably . . . cost the taxpayers of this state an incalculable sum of money," which "could have been [used] in furtherance of the requirement to provide the school children of North Carolina with the opportunity for a sound basic education." *Leandro II* at 610, 599 S.E.2d at 373.

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UNC CENTER FOR CIVIL RIGHTS

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **BRIEF OF PENN PLAINTIFF-INTERVENOR-APPELLEES** by depositing a copy with the United States Postal Service, first class mail, postage pre-paid, addressed as follows:

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