NO. 5PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION, *et al.*,	)	
Plaintiffs,	)	
and	)	
	)	From Wake County
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,	)	
Plaintiff-Intervenor,	)	
v.	)	
STATE OF NORTH CAROLINA, *et al.*,	)	
Defendants.	)	

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STATE-APPELLANT'S REPLY BRIEF

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Appellant, the State of North Carolina, pursuant to Rule 28(h) of the North Carolina Rules of Appellate Procedure, respectfully submits this brief in reply to certain arguments made in the various briefs of Appellees and their *amici*.

ARGUMENT

Appellees and their *amici* repeatedly assert that the Court's prior decision in *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004), establishes the State's obligation to correct constitutional deficiencies by providing all at-risk four-year-olds with pre-kindergarten services. Appellees' arguments have drifted far from the proper parameters of the case, shifting away from relief on behalf of the students of the Hoke County school system or the other parties to the case and instead advocating an entitlement to a judicially-imposed state-wide remedy requiring the provision of pre-kindergarten to all "at-risk" four-year-olds.

However, Appellees and their *amici* continue to conflate two separate legal concepts: the constitutional right of every child in North Carolina for an opportunity to obtain a sound basic education with the remedy necessary to compensate the parties to the action before the trial court for their proven injuries. Establishing an evidentiary basis for the trial court to order a remedy for certain named parties in a specific action does not authorize the judicial imposition of any remedy for others that do not share the parties' zone of protection. Here, this Court expressly defined the relevant "zone of interest" as being comprised of Hoke County students, examined

the evidence to determine whether plaintiffs made a clear showing that harm had been inflicted on Hoke County students, and reviewed the matter to determine "whether the trial court's imposed remedies serve as proper redress for such demonstrated harm." *Hoke County Bd. of Educ.*, 358 N.C. at 616, 599 S.E.2d at 377. For this reason, the broad remedial powers recognized in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 L. Ed. 2d 554 (1971), and other school desegregation cases referenced by Appellees are inapplicable to the judicially-imposed remedy of state-wide pre-kindergarten at issue here.

Nor do Appellees' assertions about the State's initiation of a state-wide pre-kindergarten program provide a proper basis for a judicial mandate requiring expansion of the program to include all at-risk four-year-olds in North Carolina. The State's policy decision to undertake the development of a state-wide pre-kindergarten program provided relief that was broader in scope than the minimum needed to address matters in Hoke County. Relief for "at-risk" four-year-olds in Hoke County necessarily was a part of the planned state-wide program envisioned by the State Defendants in 2004. However, by proposing a plan for a state-wide program, the State did not commit to its continuance and expansion in perpetuity. Nor did the promulgation of the State's policy and goals in the 2004 Action Plan provide the trial court with a jurisdictional basis to mandate a state-wide pre-kindergarten program as

a remedy. The trial court's power to impose a remedy necessarily is determined by the need to compensate the parties – the plaintiffs – for their proven injuries. Here, that established entitlement to relief relates to Hoke County students.

A proper reading of the *Hoke County* decision undercuts the Court of Appeals' affirmance of the judicial imposition of an expansive state-wide remedy. This Court specifically and expressly limited its holding to the issue of whether at-risk prospective enrollees in the Hoke County school system were entitled to relief. If, as a result of the legislative provisions at issue, the State would be providing inadequate relief, the trial court properly could, at most, impose a remedy to compensate the "at-risk" prospective enrollees in Hoke County for their proven injuries. This fundamental restriction is in accord with the established principle of the separation of powers for, as previously noted by this Court, "[t]he legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants." *Leandro v. State*, 346 N.C. 336, 355, 488 S.E.2d 249, 259 (1997).

1. <u>The Court of Appeals erroneously affirmed the trial court's order mandating the provision of pre-kindergarten services on a state-wide basis</u>.

The necessary starting point for review of the decision below is a proper recognition of the scope and meaning of the order affirmed by the Court of Appeals. The plain language of the trial court's order goes far beyond enjoining the

implementation and enforcement of certain provisions of the 2011 budget bill when it unequivocally declares that the State must provide pre-kindergarten services to "any eligible at-risk four year old that applies" and shall not deny admission to the North Carolina Pre-Kindergarten Program to "any eligible at-risk four year old." (R p 669)

Assertions that the mandated relief "was not a statewide remedy created and imposed by the trial court" (Pl. Br. at 32), and that "[t]he trial court's order does not require a particular remedy" (Sch. Bds. Assoc. Amici Br. at 8) cannot withstand analysis. Such claims ignore the fact that, for the first time since this Court's decision in *Hoke County*, the superior court has ordered the State to provide and expand a state-wide pre-kindergarten program. The Court of Appeals affirmed "the trial court's order mandating the State to not deny any eligible 'at-risk' four year old admission to the North Carolina Pre-Kindergarten Program." *Hoke County Bd. of Educ. v. State*, 731 S.E.2d 691, 698, 2012 N.C. App. LEXIS 1028, at *22 (N.C. Ct. App. 2012) (emphasis supplied). Additionally, the Court of Appeals held that "the trial court acted within its authority to mandate the unrestricted acceptance of all 'at-risk' four year old prospective enrollees who seek to enroll in existing pre-kindergarten programs across the State." *Id*. at 698, 2012 N.C. App. LEXIS 1028, at *22 (emphasis supplied).

The scope of this mandate is significant, for, as noted by the trial court, "[t]here are estimated to be between 65,000 and 67,000 eligible at-risk 4 year olds in North Carolina" while "[t]here were approximately 32,000 at risk 4 year olds served by MAF [More at Four] in 2010-2011." (R p 666) And, as argued in one amicus brief, "[t]he Court of Appeals' opinion did not curtail the scope of the trial court's order." (Group of 11 Amici Br. at 27 (advocating that the decision guarantees a pre-kindergarten slot to "every child in the State, including every at-risk child"))

The critical legal issue is not whether the State, as a matter of public policy, could or should implement a state-wide pre-kindergarten program focused on "at-risk" prospective enrollees. The legislative and executive branches have always had the authority and the discretion to fund state-wide pre-kindergarten at the level they deem appropriate and prudent. Instead, the appropriate judicial consideration is whether the superior court, as a proper remedy arising from the evidentiary record in the case, had the necessary jurisdictional basis to mandate the provision of such a state-wide program. This Court's prior decision established that there is no separate constitutional right to pre-kindergarten for "at-risk" prospective enrollees, *Hoke County*, 358 N.C. at 643 n.17, 599 S.E.2d at 393 n.17, and it reversed the trial court's prior "mandate requiring expanded pre-kindergarten programs" *id*. at 609, 599 S.E.2d at 373.

Appellees' asserted entitlement to a state-wide remedy ignores the express statement of this Court clearly declaring that it was "confining the parameters of our holding to the trial court's findings and conclusions concerning 'at-risk' students within the Hoke County school system." 358 N.C. at 634, 599 S.E.2d at 388 (emphasis supplied). This declaration followed a lengthy analysis of the procedural history of the case leading to the ruling that "our consideration of the case is properly limited to the issues relating solely to Hoke County as raised at trial" *id*. at 613, 599 S.E.2d at 375, and the statement that "our holding mandates cannot be construed to extend to the other four rural districts named in the complaint" *id*. at 613 n.5, 599 S.E.2d at 375 n.5.

These unequivocal statements expressly limiting the scope of the case to matters presented in Hoke County are countered in this appeal by reference to the Court's statement that it "recognizes the gravity of the situation for 'at-risk' prospective enrollees in Hoke County and elsewhere." *Id.* at 643, 599 S.E.2d at 394 (emphasis supplied). One appellee cites this language in support of its argument that the appropriate remedial structure must apply to the state as a whole (Penn Intervenors Br. at 19-21). And an *amicus* asserts that this part of the prior opinion "unquestionably declares the expanded focus and declaration of rights in the case beyond the provincial boundaries of Hoke County," characterizing the State's

contention that the Court's analysis and holding in the *Hoke County* decision was limited to matters occurring in Hoke County as "disingenuous." (Sch. Bds. Assoc. Amici Br. at 10) Again, these arguments ignore the critical limitations governing the proper jurisdiction of the trial court. Judicially mandated relief is appropriate only to the extent necessary to provide a remedy for the proper parties to the action – here, the "at-risk" prospective enrollees in the Hoke County public school system.

Nor can the appellees and their *amici* overcome the prudential limitations on the trial court's jurisdiction on the basis of the "broad" remedial authority to fashion an equitable remedy described in *Swann* and other school desegregation cases. *See* Pl. Br. at 25; Penn Intervenors Br. at 13; Group of 11 Amici Br. at 12. In *Swann*, the judicially-mandated remedy was not state-wide or even regional, but instead was limited to providing appropriate redress to the parties that brought the action and to whom the relevant evidence pertained. And in a subsequent decision explicitly referencing the holding in *Swann*, the United States Supreme Court expressly limited the territorial scope of any court-imposed remedy to the school district that was the subject of the action, describing "[t]he controlling principle consistently expounded in our holdings" concerning a mandated remedy as that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744, 41 L. Ed. 2d 1069, 1091 (1974) (citation omitted).

Milliken was a class action brought on behalf of the school children of the city of Detroit. Named defendants included the Governor, the Attorney General, and other officials of the State of Michigan. The Court reversed the district court's imposition of an expansive school desegregation plan as an appropriate remedy for proven constitutional violations occurring solely within the City of Detroit. The Court found that the record contained no evidence regarding constitutional violations in the suburban school districts outside of the city of Detroit school district, *id*. at 733, 41 L. Ed. 2d at 1084-85, and held that the trial court "went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy" *id*. at 745, 41 L. Ed. 2d at 1091. The Court observed that the scope of the mandated interdistrict remedy necessarily required the trial court to become "a *de facto* 'legislative authority' to resolve" complex operational questions, "and then the 'school superintendent' for the entire area." *Id*. at 743-44, 41 L. Ed. 2d at 1090. The Court concluded its analysis by reiterating that the trial evidence concerned only matters within a limited jurisdiction, and held that absent evidence of an interdistrict violation "there is no basis for an interdistrict remedy." *Id*. at 752, 41 L. Ed. 2d at 1095.

Here, the limited ambit of the pleadings was previously recognized in the discussion of the amendment to the complaint in 1998 which added paragraph 74(a)

alleging that in the "plaintiff districts" the lack of "prekindergarten services" resulted in many children not receiving an opportunity for a sound basic education. *Hoke County*, 358 N.C. at 618, 599 S.E.2d at 378 (emphasis supplied). This Court explicitly declared that even though the trial court took evidence on and made conclusions about student performance across the state,

> the issues of the instant case pertain only to evidence, findings, and conclusions that apply to Hoke County in particular. As a consequence, any findings or conclusions that were intended to apply to the state's school children beyond those of Hoke County are not relevant to the inquiries at issue.

Id. at 633 n.14, 599 S.E.2d at 387 n.14 (emphasis supplied).

2. The State has not changed its legal position that the trial court has no authority to mandate the provision of pre-kindergarten services on a state-wide basis.

Appellees and their *amici* assert that the State's appeal must be denied because the State has improperly changed its legal position. Plaintiffs argue that the State Defendants "repeatedly represented to the trial court" that they would remedy any constitutional deficiencies impacting at-risk prospective enrollees "by ensuring that 'every at-risk four-year-old has access to a quality pre-kindergarten program'" (Pl. Br. at 45), and that in 2004 "the State Defendants represented to the trial court that it would continue to 'expand the More at Four [prekindergarten] program' until eligible at-risk four year olds from across the State have access to that program, then

estimated to be approximately 40,000" (Pl. Br. at 18). The State Board of Education asserts that "[t]o further its Remedial Plan, the State represented that it would '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'" (State Bd. of Educ. Br. at 13, 24), and further that "the Court of Appeals properly affirmed the order that the State [may] not ignore the Supreme Court's mandate for a remedy by abandoning the remedy the State itself identified and the court adopted" (State Bd. of Educ. Br. at 31-32).

The State has consistently maintained that the trial court has no authority to mandate the provision of state-wide pre-kindergarten services. This fundamental jurisprudential concept was a foundation of the State's appeal from the trial court's orders from 2000 and 2002 imposing mandatory state-wide pre-kindergarten as a remedy, and it continues to be a primary basis for the State's appeal from the order entered by the superior court in 2011. Appellees' assertions about the State's "commitment" to "ensure" the provision of state-wide pre-kindergarten services do not withstand analysis nor do they provide a proper basis for a judicial mandate to expand the program to include all at-risk four-year-olds in North Carolina. The provision and expansion of a state-wide plan has never been subject to the trial court's jurisdiction. Nothing arising from the State's policy initiatives to implement

and ultimately expand pre-kindergarten on a state-wide basis created jurisdiction in the superior court such that it could mandate such a program as a court-imposed remedy in this litigation.

The identified source for the various claims and assertions concerning the State's "commitment" that it "would" continuously expand its pre-kindergarten program is the "2004 Action Plan" prepared by the State Board of Education and the Department of Public Instruction, which outlined goals for the eventual provision of pre-kindergarten services to "at-risk" four year-olds across the State. (R pp 476-87) Nothing in the 2004 Action Plan can properly be construed as a binding commitment, enforceable by a court of law against the executive and legislative branches of government, to create and maintain in perpetuity a state-wide pre-kindergarten program expansive enough to serve all at-risk four-year-olds that apply. Instead, as previously demonstrated (State Br. at 28-30), the Plan is properly characterized as an executive branch statement of policy requiring recurring action by the legislative branch in order to be implemented. The 2004 Action Plan itself so describes its purpose and content when it declares that "the State intends to take a budget and policy package including these programs to the 2005 session of the General Assembly." (R p 479) Indeed, the goal of providing at least 40,000 slots (R pp 477, 483) is identified as one component of a proposed legislative plan, qualified by the

explicit recognition that "the Legislature will need to appropriate additional resources to allow the State to expand" its pre-kindergarten services (R pp 482-83).

Nor does Plaintiffs' new-found reliance upon an earlier document, which predates this Court's decision in *Hoke County*, provide any support for the assertion of a change of position by the State concerning the trial court's jurisdiction to mandate state-wide pre-kindergarten as a proper judicially-imposed remedy in this case. The referenced July 2002 letter by the State Board of Education and the Department of Public Instruction is a response to the trial court's expressed concerns that a prior report did not document the specific actions taken "to assist the Hoke County School System or other plaintiff-party LEAs" as required by the trial court's April 2002 judgment. (Rule 9(b)(5) Supp. at 2) The 2002 letter was expressly premised upon the understanding by the State Board of Education and the Department of Public Instruction that the trial court had ordered the State to undertake certain remedial action on behalf of school children "whether they are in Hoke County, or another county within the State." (Rule 9(b)(5) Supp. at 3) As such, all comments within that document as to the necessity for the state-wide actions that were being undertaken were in the specific context of the then-existing trial court order imposing a state-wide remedy – a requirement which was subsequently overturned by this Court's decision in *Hoke County*. And the 23-page letter, while addressing various

topics including the State's duty to provide "a competent teacher," "a competent principal," and "an effective instructional program" (Rule 9(b)(5) Supp. at 3), does not once mention either the provision of pre-kindergarten services for "at-risk" prospective enrollees or the State's pre-kindergarten program.

Furthermore, Plaintiffs' assertion that the submitted supplemental material from 2002 is necessary to respond to the "surprising new contention that the State has 'consistently maintained throughout this case' that the 'pre-kindergarten remedy would necessarily address only . . . the students in Hoke County" (Pl. Br. at 34 n.5), plainly mischaracterizes the State's representation to this Court. The excerpted language omits the proper context of the quoted language:

> The State has consistently maintained throughout this case that the trial court's proper authority is defined by the parties to the action and that therefore any mandated pre-kindergarten remedy would necessarily address only what was needed to enable students in Hoke County to avail themselves of their opportunity to receive a sound basic education in their public schools.

(State Br. at 20 (emphasis supplied)) Nothing in the 2002 letter establishes an inconsistency or change of legal position by the State regarding the trial court's lack of authority to mandate a state-wide pre-kindergarten remedy.

The State Board of Education strays further from the proper meaning and effect of the 2004 Action Plan, asserting that "the State Board had the authority to commit

to a remedial plan." (State Bd. of Educ. Br. at 26) This declaration is made without explanation as to context of the claim or the consequences of such commitment. There is no offered precedent for such sweeping power, irrespective of the constitutional and statutory duties and authority of the State Board. And as applied to the circumstances presented in this case, the ramifications of the exercise of such authority would be staggering. As argued by Appellees and their *amici*, the State Board's preparation and submission of the 2004 Action Plan would thereby have committed the State – both the executive and legislative branches – to the provision and expansion of the More at Four pre-kindergarten program to serve at least 40,000 "at-risk" four-year-olds. This "commitment" would come at "an estimated annual cost of $160,000,000." (Easley Amici Br. at 8) And, even though the asserted "commitment" was made by specific officials holding office in 2004, it would bind both the executive and legislative branches of the State indefinitely into the future.

The declarations by the State Board that it "is committed to offering and expanding pre-kindergarten services" (State Bd. of Educ. Br. at 19), that it "refuses to retreat from its judicial admissions and commitments to meeting its constitutional obligations" (State Bd. of Educ. Br. at 20), and that "[t]he State Board complied with the remand order, committing to grow the More at Four program" (State Bd. of Educ. Br. at 27), cannot establish a jurisdictional basis for a judicially mandated state-wide

system of pre-kindergarten. The 2004 Action Plan set forth aspirational goals as part of a long-range plan and therefore did not (and could not) constitute an enforceable obligation to expand and maintain a state-wide pre-kindergarten program in perpetuity. Indeed, the then Governor describes the document as only a "formal communication [that] set out a plan that was followed and was considered by our Administration to have the impact of a judicial decree." (Easley Amicus Br. at 2) In proper context, the State Board's plan could, at most, "commit" the signatories to it to a course of action, consistent with the constitutional allocation of powers between the various branches of government.

Nor can the "commitments" made by the State Board bestow upon the trial court state-wide remedial jurisdiction on the basis of "litigation by consent." (State Bd. of Educ. Br. at 36) The State's implementation of a state-wide pre-kindergarten program reflected recurring policy decisions by the executive and legislative branches, and necessarily included within its scope matters addressing the needs of prospective students in Hoke County so that they could avail themselves of the opportunity for a sound basic education. The regular reporting by the State to the trial court of the status of the state-wide program did not and could not expand the proper jurisdiction of the superior court to mandate a remedy on a state-wide basis. Here, the judicially-imposed state-wide remedy exceeded the appropriate scope of the

court's powers even in the expansive context of this litigation, for "[p]arties cannot confer jurisdiction upon a court in declaratory judgment proceedings by consent, stipulation, or agreement." *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454, 464, 168 S.E.2d 389, 396 (1969).

The trial court's proper remedial jurisdiction was limited to providing appropriate redress to the parties that brought the action and to whom the relevant evidence pertained. The assertion that the "Court of Appeals is simply holding the State to its own remedy, the remedy the State Board remains committed to follow" (State Bd. of Educ. Br. at 33) does not comport with the scope of the trial court's mandate, affirmed by the Court of Appeals, that the State must provide pre-kindergarten services to "any eligible at-risk four year old that applies" and shall not deny admission to the North Carolina Pre-Kindergarten Program to "any eligible at-risk four year old." (R p 669) Mandating the provision of pre-kindergarten services for up to 67,000 prospective enrollees goes far beyond any prior undertaking by the State.

3. <u>The Court of Appeals' decision erroneously requires advance judicial approval of any changes in the State's pre-kindergarten program</u>.

The opinion below provides that changes in the state-wide pre-kindergarten program mandated by the trial court and affirmed by the Court of Appeals must be

accomplished "by means of a motion filed with the trial court setting forth the basis for and manner of any proposed modification." *Hoke County Bd. of Educ.*, 731 S.E.2d at 698, 2012 N.C. App. LEXIS 1028, at *22. The decision below plainly establishes a "pre-clearance" requirement in the literal sense of that term. As such, the Court of Appeals' decision goes far beyond "simply reiterat[ing] that the trial court retains jurisdiction in this case to monitor the State Defendants' compliance." (Pl. Br. at 43) The superior court has never had a proper jurisdictional basis for mandating a state-wide remedy and therefore cannot have the proper supervisory authority to review and approve any proposed modifications in the State's pre-kindergarten program.

The expansive and unjustified scope of the decision below bestows upon the trial court on-going control over the State's pre-kindergarten program. This error cannot be rectified by the State Board's request that "to read the sentence as requiring nothing more than notice to the trial court" which "would, as a practical matter, do no more than continue to give the trial court the opportunity to resume hearings or other proceedings as appropriate." (State Bd. of Educ. Br. at 41) The grant of on-going supervisory power over the State's pre-kindergarten program plainly infringes upon the realm of policy decisions properly reserved to the executive and legislative branches of government.

Respectfully submitted, this the 12th day of August, 2013.

ROY COOPER
Attorney General

Electronically Submitted
John F. Maddrey
Solicitor General
N.C. State Bar No. 8890
jmaddrey@ncdoj.gov
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

Counsel for Defendant-Appellant
State of North Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing STATE-APPELLANT'S REPLY BRIEF upon all parties to this cause by:

[X] Transmitting a copy hereof to each said party via email transmittal; and
[X] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed as follows:

Robert W. Spearman
Melanie Black Dubis
Scott E. Bayzle
Parker, Poe, Adams & Bernstein L.L.P.
150 Fayetteville Street, Suite 1400
Post Office Box 389
Raleigh, North Carolina 27602
bobspearman@parkerpoe.com
melaniedubis@parkerpoe.com
scottbayzle@parkerpoe.com

H. Lawrence Armstrong, Jr.
Armstrong Law, PLLC
119 Whitfield Street
Post Office Box 187
Enfield, North Carolina 27823
hla@hlalaw.net

Counsel for Plaintiffs

James G. Exum, Jr./
Matthew N. Leerberg
Smith Moore Leatherwood LLP
300 North Greene Street/Suite 1400
Greensboro, North Carolina 27401
jim.exum@smithmoorelaw.com;
matt.leerberg@smithmoorelaw.com
Counsel for Defendant State Board of Education

Deborah Stagner
Neal A. Ramee
Tharrington, Smith, L.L.P.
209 Fayetteville Street Mall (27601)
Post Office Box 1151
Raleigh, North Carolina 27602-1151
dstagner@tharringtonsmith.com

Counsel for Charlotte-Mecklenburg Board of Education Plaintiff-Intervenors

Mark Dorosin
Taiyyaba Qureshi
University of North Carolina
School of Law
Center for Civil Rights
CB 3382
Chapel Hill, North Carolina 27599-3382
dorosin@email.unc.edu
tqureshi@email.unc.edu

Counsel for Penn Intervenors

Further, the undersigned has this day served the foregoing STATE-APPELLANT'S REPLY BRIEF upon amici in this cause by:

[X] Transmitting a copy hereof to each said amici via email transmittal.

Counsel for Group of 11 Amici: Advocates for Children's Services of Legal Aid of NC; American Civil Liberties Union of NC Legal Foundation; Children's Law Center of Central NC; Children's Law Clinic at Duke Law School; Council for Children's Rights; Disability Rights of NC; NCCU School of Law Civil Litigation Clinic; NC Justice Center; NC Rural Education Working Group; Southern Coalition for Social Justice; and UNC Center on Poverty, Work and Opportunity

Christine Bischoff
christine@ncjustice.org
Carlene McNulty
carlene@ncjustice.org
Lewis Pitts
lewisp@legalaidnc.org
Jason Langberg
jasonl@legalaidnc.org
Christopher A. Brook
cbrook@acluofnc.org
Iris Sunshine
isunshinre@childrenslawcenternc.org
Jane Wettach
wettach@law.duke.edu
Robert E. McCarter
robert@cfcrights.org
Laurie Gallagher
laurie@cfcrights.org
John Rittelmeyer
john.rittelmeyer@disabilityrightsnc.org
Susan Pollitt
susan.pollitt@disabilityrightsnc.org
Scott Holmes
scott.holmes@nccu.edu
Gregory C. Malhoit
gcm3348@gmail.com
Anita S. Earls
anitaearls@southerncoalition.org
Clare Barnett
clarebarnett@southerncoalition.org
Mary Irvine
mirvine@email.unc.edu

Counsel for Amici North Carolina School Boards Association and National School Boards Association
Robert F. Orr
rorr@poynerspruill.com
Edwin M. Speas, Jr.
espeas@poynerspruill.com
John W. O'Hale
johale@poynerspruill.com
Allison Shafer
ashafer@ncsba.org

Counsel for Amicus Easley, Governor of North Carolina, 2001-2009
Michael Easley
mike.easley@easleylawgroup.com

Counsel for Amicus North Carolina Association of Educators
Ann McColl
ann.mccoll@ncae.org
Carrie B. Bumgardner
carrie.bumgardner@ncae.org
Jessica N. Holmes
jessica.holmes@ncae.org

This the 12th day of August, 2013.

Electronically Submitted
John F. Maddrey
Solicitor General