No. 425A21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HOKE COUNTY BOARD OF EDUCATION et al,
Plaintiffs-Appellants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Plaintiff-Intervenor,

and

RAFAEL PENN, CHARLOTTE-MECKLENBURG BRANCH OF THE STATE CONFERENCE OF THE NAACP *et al.*,
Plaintiffs-Intervenors,

v.

STATE OF NORTH CAROLINA and THE STATE BOARD OF EDUCATION
Defendants-Appellees,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
Realigned Defendant.

From the Court of Appeals
No. P21-511

****

LEGISLATIVE-INTERVENORS' RESPONSE TO PLAINTIFFS' AND PLAINTIFFS-INTERVENORS' PETITIONS FOR DISCRETIONARY REVIEW AND PETITIONS FOR WRIT OF *CERTIORARI*

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****

LEGISLATIVE-INTERVENORS' RESPONSE TO PLAINTIFFS' AND PLAINTIFFS-INTERVENORS' PETITIONS FOR DISCRETIONARY REVIEW AND PETITIONS FOR WRIT OF CERTIORARI

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME Respondents and Intervenor-Defendants, Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, (the "Legislative Intervenors"), on behalf of the General Assembly and agents of the State, and file this Response in Opposition to the Petitions for Discretionary Review and Petitions for Writ of *Certiorari* filed by the Plaintiffs[1] and Plaintiffs-Intervenors[2] (together, "Plaintiffs").

INTRODUCTION

Despite the strident tone of Plaintiffs' Petitions, the Court of Appeals' writ of prohibition was a measured and limited action to ensure that the Controller could safely perform her duties—without risking contempt of the trial court's 10 November 2021 Order (the "November 10 Order")—in accordance with this Court's long-

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[1] Plaintiffs Hoke County Board of Education; Halifax County Board of Education; Robeson County Board of Education; Cumberland County Board of Education; Vance County Board of Education; Randy L. Hasty, individually and as guardian *ad litem* of Randell B. Hasty; Steven R. Sunkel, individually and as guardian *ad litem* of Andrew J. Sunkel; Lionel Whidbee, individually and as guardian *ad litem* of Jeremy L. Whidbee; Tyrone T. Williams, individually and as guardian *ad litem* of Trevel Yn L.Williams; D.E. Locklear, Jr., individually and as guardian *ad litem* of Jason E. Locklear; Angus B. Thompson Ii, individually and as guardian *ad litem* of Vandaliah J. Thompson; Mary Elizabeth Lowery, individually and as guardian *ad litem* of Lannie Rae Lovvery, Jennie G.Pearson, individually and as guardian *ad litem* of Sharese D. Pearson; Benita B. Tipton, individually and as guardian *ad litem* of Whitney B. Tipton; Dana Holton Jenkins, individually and as guardian *ad litem* of Rachel M. Jenkins; Leon R. Robinson, individually and as guardian *ad litem* of Justin A. Robinson.

[2] Plaintiffs-Intervenors Charlotte-Mecklenburg Branch of the North Carolina State Conference of the NCAAP, Rafael Penn, Clifton Jones, Donna Jenkins Dawson, and Tyler Anthony Hough-Jenkins.

established authority holding that the judiciary can establish the validity of a claim against the state but cannot enforce the execution of a monetary award. *State v. Smith,* 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976)*; Able Outdoor v. Harrelson,* 341 N.C. 167, 172, 459 S.E.2d 626, 629 (1995) (holding that "the Judicial Branch of our State government [does not have] the power to enforce an execution [of a judgment] against the Executive Branch"); *see* N.C. Const. Art V, § 7 ("No money shall be drawn from the State treasury but in consequence of appropriation made by law."); *Cooper v. Berger*, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020) (Ervin, J.) (holding that "appropriating money from the State treasury is a power vested *exclusively in the legislative branch*" and the judicial branch "lack[s] the authority to 'order State officials to draw money from the State treasury.'") (quoting *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017)) (emphasis added).

Prohibiting the judicial branch from enforcing a monetary award against the State is hardly a novel or controversial proposition. North Carolina law is unambiguous that "the Separation of Powers clause prevents the judicial branch from reaching into the public purse on its own" even if to remedy the violation of another constitutional provision directing how those funds must be used. *Richmond Cty. Bd. of Educ.*, 254 N.C. App. at 426, 803 S.E.2d at 31; *see also In re Alamance Cty. Court Facilities,* 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) (holding that the Separation of Powers Clause "prohibits the judiciary from taking public monies without statutory authorization); *State v. Davis,* 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967) ("[T]he appropriations clause "states in language no man can misunderstand that the

legislative power is supreme over the public purse"). This bedrock principle stems from the framers' desire "to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures." *Cooper*, 376 N.C. at 37, 852 S.E.2d at 58. Indeed, the framers intended the legislative branch's exclusive power over the purse to be one of the principal checks over the judiciary. *See* Hamilton, A., THE FEDERALIST, No. 78 ("The judiciary, on the contrary, has no influence over the sword or the purse."); John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION at 154 (2d ed. 2013) (noting that early Americans were "acutely aware of the long struggle between the English Parliament and the Crown over the control of public finance and were determined to secure the power of the purse for their elected representatives").

As the Court of Appeals noted in granting the writ of prohibition, the writ is properly used to restrain trial courts from "proceeding in a matter not within their jurisdiction" or from taking judicial action at variance with the rules prescribed by law. *State v. Allen,* 24 N.C. 183, 189 (1841). It is inherently prospective in nature, aimed only at restricting future action by the trial courts. In accordance with these constraints, the writ of prohibition at issue here restrains only the court's *enforcement* of its directive ordering the State Controller, Treasurer and Office of State Budget and Management ("OSBM") to transfer $1.7 billion to fund a "Comprehensive Remedial Plan" for public education. The Court of Appeals' order issuing its writ expressly "does not impact the trial court's finding that these funds are

necessary . . . ." Despite the explicit limitation on the scope of the writ itself, Plaintiffs attempt to convince this Court that the writ had a much broader effect and that it instead decided the "merits" of this case.

Specifically, Plaintiffs argue the Court of Appeals improperly issued the writ when it should have issued a writ of *supersedeas* instead. The Court of Appeals, however, issued a writ of prohibition, rather than *supersedeas*, not because it was motivated by any desire to reach the merits of the case, but because the writ of prohibition was the only procedural mechanism available to the Controller, as a non-party, to seek relief from the trial court's order. *See Virmani v. Presbyterian Health Services Corp.,* 350 N.C. 449, 515 S.E.2d 675 (1999). Unlike the writ of prohibition, a writ of *supersedeas* is an ancillary writ that does not provide an independent basis for an appellate court to exercise jurisdiction, and thus "may be issued only by [a] court in which *an appeal is otherwise pending*." *Bern v. Walker,* 255 N.C. 355,356 (1961); *Craver v. Craver*, 298 N.C. 231, 237-38 (1979) ("The writ of *supersedeas* may issue only in the exercise of, and as ancillary to, the revising power of an appellate court . . . .").

Plaintiffs further contend that the Court of Appeals should not have issued the writ, and likewise should not have shortened the briefing schedule, because there was no threat of immediate, irreparable harm because the trial court's order was stayed until December 10. But that ignores the impossible dilemma the Controller faced following the passage of the Budget Act, which the Governor signed into law only days after the trial court entered its Order. While the trial court's Order might have

been stayed, the Budget Act was not. This meant that the Controller had to determine whether to transfer funds in accordance with the Budget Act, or to disregard the Budget Act in anticipation of the trial court's Order becoming effective. Resolving the Controller's dilemma was thus far more urgent than Plaintiffs acknowledge.

Finally, despite the writ's explicit disclaimer that it does *not* impact the trial court's award against the State, Plaintiffs claim the Court of Appeals issued the writ of prohibition as part of an effort to "decide a matter on the merits using the shadow docket." (Pls' Pet 31). They then use this flawed premise as a justification for asking the Supreme Court to grant a writ of *certiorari* on the writ of prohibition as an apparent proxy for seeking review on the merits of the trial court's underlying Order, as if the Court of Appeals had already issued a decision reversing the trial court's order on the merits.

This Court should resist Plaintiffs' attempt to convert a straightforward supervisory writ applying well-established separation of powers principles into a springboard to skip past the usual appellate process. The writ of prohibition does nothing more than properly resolve the Controller's dilemma in favor of this Court's decisions on the limitations of the judicial branch's authority to enforce monetary awards against the State, and therefore does not constitute a viable basis for appeal, discretionary review, or a writ of *certiorari*. The current proceedings in the Court of Appeals will afford Plaintiffs a full opportunity to raise all of the arguments set forth in their petitions. And once that process has concluded, Plaintiffs will be free to seek

review of the writ of prohibition *along with* the Court of Appeals' ultimate decision. Plaintiffs attempt to petition the court now is premature.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Although Plaintiffs attempt to paint the trial court's November 10 Order as the product of more than 17 years of patient proceedings and alleged "inaction" by the State following the Court's decisions in *Leandro v. State*, 346 N.C. 336, 354, 488 S.E.2d 249, 259 (1997) ("*Leandro I*") and *Hoke County Board of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*"), the proceedings that led to the trial court's order occurred only over the last 2-3 years.

Following Judge Howard Manning's retirement in 2016, the case was reassigned to Superior Court Judge David Lee. In 2018, the Department of Justice, together with the Plaintiffs, recommended that the Court appoint a private consultant, WestEd, to work with the Governor's newly-appointed Commission on Access to a Sound Basic Education to develop proposals to correct deficiencies in the educational offerings in the Plaintiffs' school districts. (13 March 2018 Order at fn 1 (App 7); *see also* 10 November 2021 Order at p 5 (App 53)). In January 2020, after the WestEd report was finally released to the public, the trial court signed a jointly-prepared consent order directing the State to create a plan to implement WestEd's recommendations. (App 8).

On 15 March 2021, the Department of Justice submitted a "Comprehensive Remedial Plan" to the trial court, which largely mirrored the Governor and State Board of Education's legislative agendas. In its submission, the Department of

Justice represented that each of the more than 147 proposed actions items in the Plan were "necessary and appropriate actions that must be implemented to address continuing constitutional violations" (*See* 10 November 2021 Order (App 57) (quoting State's March 20 Submission at 3, 4 (emphasis added by court))). The Plaintiffs consented to the Plan and in June 2021 the Court then issued an order, again drafted by the parties, approving the Plan and requiring the State to implement the Plan. In subsequent status conferences, the Department of Justice represented to the Court that it could not implement the plan, because no budget had yet been adopted for the FY 2021-22 and 22-23 biennium.

In November 2021, the Plaintiffs and Department of Justice submitted briefs and a proposed order to Judge Lee that would, in the absence of a budget, purport to require the State Controller and Treasurer to transfer funds to certain executive-branch agencies to fund implementation of the plan. On 10 November 2021, Judge Lee entered the parties' proposed order, directing as follows:

> The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller [sic] ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:
>
> (a) Department of Health and Human Services ("DHHS"): $189,800,000.00;
>
> (b) Department of Public Instruction ("DPI"): $1,522,053,000.00; and
>
> (c) University of North Carolina System: $41,300,000.00.

> OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;
>
> Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order.

At the conclusion of the Order, Judge Lee stayed its implementation for 30 days to provide the parties time to prepare to comply with its directives.

On 18 November 2021, while Judge Lee's order was stayed, the General Assembly enacted the Current Operations and Appropriations Act of 2021, N.C. Sess. Law. 2021-180 (the "Budget Act"), which the Governor signed into law the same day. Among other things, the Budget Act appropriated $21.5 billion in net General Funds over the biennium for K-12 public education—approximately 41% of the total biennial budget. The Budget Act, however, does not contain allocations identical to the Court's Order.

On 24 November 2021, Linda Combs, Controller for the State of North Carolina and a non-party, petitioned the North Carolina Court of Appeals to issue a writ of prohibition restraining implementation of the trial court's Order, noting that the Budget and trial court's Order now created conflicting directives with which it would be impossible to comply. (App 70). On 29 November 2021, the Court of Appeals entered an order, *sua sponte*, in accordance with North Carolina Rule of Appellate Procedure 22, shortening the time for responses and briefing and ordering any such responses be filed by 9:00 a.m. on 30 November 2021.

In accordance with the Court of Appeals' directions, Plaintiffs and the Plaintiffs-Intervenors filed a joint response, and the Department of Justice filed its own response the next day. The Plaintiffs' joint response included 33-pages of briefing. The court issued its Order granting the writ of prohibition the same day. (App 135). In its order, the Court of Appeals specifically noted that it was issuing the writ only to restrain "the trial court from enforcing the portion of its order requiring the petitioner to treat the $1.7 billion . . . identified by the court 'as an appropriation from the General Fund.'" (App 136). The Court of Appeals further specified that it was leaving the rest of the trial court's Order intact, explaining: "Our issuance of this writ of prohibition does not impact the trial court's finding that these funds are necessary, and that portion of the judgment remains." (App 134).

Judge Arrowood dissented from the Court of Appeals' order, noting that he disagreed with the decision to shorten the briefing schedule because he did not believe there was good cause to do so, and stating that he would have instead issued a temporary stay without deciding whether a writ of prohibition should issue. (App 136-37).

On 7 December 2021, the Department of Justice appealed Judge Lee's November 10 Order. (App 138). The next day, the General Assembly, by and through the Legislative Intervenors, intervened as of right in the trial court and noticed an appeal of the appropriation order. (App 142, 149). Those appeals are now proceeding, although the record on appeal has not yet been settled or docketed.

On 15 December 2021, Plaintiffs filed their "Notice of Appeal, Petition for Discretionary Review and, Alternatively, Petition for Writ of Certiorari" (hereinafter, "Pls.' Petition") with this Court. The Plaintiffs-Intervenors likewise filed a "Notice of Appeal and Petition for Discretionary Review" (hereinafter the "Pls-Intervenors' Petition")[3] the same day.

REASONS WHY PLAINTIFFS' PETITIONS FOR DISCRETIONARY REVIEW AND *CERTIORARI* SHOULD BE DENIED

I. PLAINTIFFS' PURPORTED NOTICES OF APPEAL AND PETITIONS FOR DISCRETIONARY REVIEW ARE NOT THE PROPER PROCEDURAL VEHICLES TO REVIEW THE COURT OF APPEALS' ORDER.

As discussed more fully in the motion dismiss filed contemporaneously with this response, the statutes governing this Court's appellate jurisdiction do not allow Plaintiffs to appeal directly the Court of Appeals' order issuing its writ of prohibition, nor petition for discretionary review, because *orders* of the Court of Appeals—as opposed to *decisions* on the merits—are not immediately reviewable through appeals as of right or petitions for discretionary review. *See* Elizabeth Brooks Scherer & Matthew Nis Leerberg, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 21.03 (2018) ("With limited exception, all Court of Appeals *opinions* may be reviewed by the Supreme Court either by appeal of right or by granting a petition for discretionary review. In contrast, the prevailing view is that Court of Appeals *orders*

[3] The Plaintiffs-Intervenors' Petition also purports to include a petition for writ of *certiorari*, although it is not delineated as such in its caption. *See* Pls-Intervenors'-Petition at 9.

are neither appealable as of right or under section 7A-30 nor subject to discretionary review under section 7A-31. Instead, a party seeking Supreme Court review of a Court of Appeals *order* must utilize Appellate Rule 21(a)(2) to request a writ of certiorari." (emphasis in original)).

Thus, the only vehicle available to Plaintiffs to have their procedural grievances heard by this Court is by way of *certiorari*. *See, e.g.*, Leerberg at § 16.04 ("[I]t is generally understood that an order of the Court of Appeals is subject to further review in the Supreme Court by way of a petition for writ of certiorari." (cleaned up)); *accord Sandhill Amusements, Inc. v. State ex rel. Cooper*, 370 N.C. 689, 814 S.E.2d 830 (2018) (petition for writ of *certiorari* filed in response to Court of Appeals' issuance of writ of prohibition against petitioners).

Yet, for the reasons discussed below, *certiorari* should not issue at this stage. The pending appeals filed by the Department of Justice and the Legislative Intervenors will provide an opportunity for Plaintiffs to present all of their arguments, and to raise those arguments to this Court, if appropriate, in due course. Moreover, review at this premature stage would require the Court to review the trial court's Order on an incomplete, unsettled record, without the benefit of any intermediate review, and without any facts in the record showing what portions of the Comprehensive Remedial Plan have already been funded.

II. THE COURT SHOULD DENY THE PETITION FOR A WRIT OF *CERTIORARI*.

A. The Writ of Prohibition Does Not Have the Effect of Vacating or Reversing the Trial Court's Order.

The writ of prohibition, by definition and according to its express terms, has only a prospective effect. It serves to prevent the trial court from taking actions *in the future* to enforce the November 10 Order. It does not, however, vacate the order. Yet, in their attempt to bypass the usual appellate process and convince this Court to review the merits of the trial court's November 10 Order now, Plaintiffs contend that the writ of prohibition also represented a decision "on the merits." The order granting the writ of prohibition, on its face, refutes that proposition. Specifically, as Plaintiffs acknowledge in passing and then promptly ignore, the Court of appeals specifically and expressly left the order in place, stating: "*Our issuance of this writ of prohibition does not impact the trial court's finding that these funds are necessary, and that portion of the judgment remains*." (App 136 (emphasis added)). Even in the face of this express language, Plaintiffs contend that the writ of prohibition "effectively vacated the trial court's 10 November 2021 order." (Pls' Pet at p 22). Indeed, Plaintiffs' entire petition for *certiorari* stands precariously on this fictitious premise. And it should be denied for that reason.

Plaintiffs' position implies that restraining *the future enforcement* of a portion of the trial court's Order is somehow indistinguishable from a decision vacating the Order itself and in its entirety. This Court's decisions, however, reveal the constitutional prohibition that bars courts from *enforcing* monetary judgments

against the State does not bar them deciding claims against the State in the first place. Indeed, the Supreme Court decisions the Court of Appeals cited in its order granting the writ of prohibition hold that while the judicial branch has the authority to enter a money judgment against the State or another branch, it has no power to order state officials to draw money from the State treasury to satisfy it. *See State v. Smith,* 289 N.C. 303, 222 S.E.2d 303 (1976); *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 459 S.E.2d 626 (1995). This is because "appropriating money from the State treasury is a power vested *exclusively in the legislative branch*" and the judicial branch "lack[s] the authority to 'order State officials to draw money from the State treasury.'" *Cooper v. Berger*, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020) (Ervin, J.) (quoting *Richmond Cty. Bd. of Educ.*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29); *see also* N.C. Const. Art V, § 7 ("No money shall be drawn from the State treasury but in consequence of appropriations made by law.")

Put another way, the Separation of Powers Clause[4] prevents the judicial branch from reaching into the public purse on its own" even if to remedy the violation of another constitutional provision that directs how certain funds must be used. *Richmond Cty. Bd. of Educ.*, 254 N.C. App. at 423, 803 S.E.2d at 29 (holding that the judiciary cannot require the State to use unappropriated funds to pay judgments resulting from its failure to comply with Article V, Section 7(b), which requires penal fines and forfeitures to be used for the benefit of public schools); *see*

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[4] *See* N.C. Const. Art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.")

also In re Alamance Cty. Court Facilities, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) (holding that the Separation of Powers Clause "prohibits the judiciary from taking public monies without statutory authorization); *State v. Davis,* 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967) ("[T]he appropriations clause "states in language no man can misunderstand that the legislative power is supreme over the public purse").

By Plaintiffs' reasoning, however, *Smith, Able Outdoor,* and our Courts' other decisions enforcing these principles would effectively nullify any claim for monetary relief against the State because the court cannot *enforce* an award in a plaintiff's favor by ordering the State to disburse unappropriated funds from the treasury. That, of course, is not the case. To the contrary, this Court rejected that exact reasoning in *Smith*.

In *Smith*, the Court cited at length a decision from the Missouri Supreme Court, which rejected the argument that "'suit[s] should not be maintainable'" against the state because "'any judgment would be unenforceable.'" 222 S.E.2d at 423, quoting *Dicarlo Const. Co. v. State*, 485 S.W.2d 52, 57-58 (1972), which cited and quoted with approval *P., T & L Const. Co. v. Commissioner, Dept. of Transportation*, 55 NJ 341, 346, 262 A.2d 195, 198 (1970). As the Court in *Smith* noted, further citing *Dicarlo*, "'If a cause of action is stated and all necessary prerequisites to maintenance of such suit exist, the case is heard. Only if and when a judgment is rendered is attention given as to whether the judgment is collectible. The same should be true here.'" *Id.*

Contrary to the premise on which Plaintiffs base their petitions for a writ of *certiorari,* the Court of Appeals' determination that the trial court is prohibited from taking further action to enforce its November 10 Order therefore does not "effectively vacate" the order. Determining the merits of the plaintiffs' claims and the scope of the court's authority to enforce its decision through an order directing the disbursement of money from the treasury are fundamentally distinct. As this Court explained in *Smith*, "The courts are a proper forum in which claims against the state may be presented and decided upon known principles." 222 S.E.2d at 423. However:

> In the event plaintiff is successful in establishing his claim against the state, he cannot, of course, obtain execution to enforce the judgment. . . . The judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties.

Id. at 424; *see also Richmond County Board of Education*, 254 N.C. App. at 424, 803 S.E.2d at 30 ("As our Supreme Court explained in a similar case, having entered a money judgment against the State, the judiciary has 'performed its function to the limit of its constitutional powers.'")

In short, the writ of prohibition does not present a platform from which this Court can review the *substance* of the trial court's November 10 Order. Despite Plaintiffs' best efforts to characterize it otherwise, the writ of prohibition means what it says— the trial court's order has not been "vacated" or "reversed," instead it remains in effect, and accordingly there is no adverse decision on the merits of that order from which Plaintiffs can seek *certiorari.*

B. Even if There Were an Adverse Decision on the Merits of the Trial Court's Order, *Certiorari* Would Not Be Warranted.

As explained in Section III.A., *supra*, the writ of prohibition is purely prospective in nature and therefore does not constitute an adverse ruling on the *merits* of the underlying trial court order subject to review by this Court. In any case, *certiorari* would not be warranted under the present circumstances and procedural status.

1. Plaintiffs Can Present All of Their Arguments Through the Underlying Appeal of the Trial Court's November 10 Order.

While the Court's power to issue *certiorari* comes from the State Constitution, the standards used to govern its exercise are set forth in Rule 21(a)(2) of the Rules of Appellate Procedure, which provides:

> **Review of the Judgments and Orders of the Court of Appeals**. The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action, or for review of orders of the Court of Appeals when no right of appeal exists.

N.C. R. App. Proc. 21(a)(2). Plaintiffs, however, have not lost an opportunity to assert an appeal as of right, nor petition this court to grant discretionary review, since neither are proper procedural mechanisms to challenge the Court of Appeals' 30 November 2021 Order in the first place.

Plaintiffs also fail to explain why they cannot wait to seek review of the Court of Appeals' Order and issuance of the writ of prohibition in the usual course. The

Department of Justice and General Assembly have both filed appeals from the trial court's November 10 Order. Proceedings on those appeals thus will provide Plaintiffs an opportunity to argue *all* of the issues they are now asking the Supreme Court to review through their petitions. Indeed, Plaintiffs do not cite any authority explaining why—if the Court of Appeals reaches a decision in Plaintiffs' favor—the merits panel hearing the State's and General Assembly's appeals could not dissolve or modify the writ of prohibition (which of course constitutes an equitable remedy), just as it would a writ of *supersedeas* issued to stay execution of an order during the pendency of an appeal. Similarly, Plaintiffs do not explain why they cannot not wait to petition the Supreme Court to review the writ of prohibition along with a decision from the Court of Appeals on the merits of the Order itself.

Reserving all questions arising out of the writ of prohibition for determination in conjunction with the pending appeals will also permit the Court of Appeals the opportunity to consider the issues in the proper sequence and determine first whether the trial court's November 10 Order should be vacated or reversed *before* addressing the scope and extent (if any) to which that order can be enforced by requiring transfers out of the State treasury.

Put simply, Plaintiffs' request that this Court review the writ of prohibition now would put the proverbial cart before the horse, forcing a determination on the *enforceability* of an order before the *validity* of the order has even been decided. Plaintiffs have not, and will, not lose anything by following the usual appellate process. Nor have they shown any reason why this Court should take the

extraordinary step of granting *certiorari* to review the issuance of a supervisory writ, *before* the Court of Appeals has a chance to decide the merits of the underlying appeal itself.

2. Granting *Certiorari* Would Require Review on an Incomplete, and Unsettled, Record.

In addition to the fact the writ of prohibition does not constitute a decision on the merits, Plaintiffs' petitions for *certiorari* also should be denied for the practical reason granting them would require the Supreme Court to review the trial court's November 10 Order on an incomplete and unsettled record. The State and General Assembly filed their notices of appeals on 7 December and 8 December, respectively. Accordingly, the Record on Appeal in this matter has not been settled by the parties or filed or docketed in the Court of Appeals. *See* N.C. R. App. Proc. 11.

This is not a mere technicality. Review of the trial court's Order would require the Court to determine whether the measures set forth in the Comprehensive Remedial Plan are, in fact, necessary to remediate the alleged violation of Plaintiffs' right to a sound basic education, and, more to the point, whether the Court had any alternatives other than seizing the power of the purse and directing the controller to transfer $1.7 billion to fund the Plan. Yet, the record, as currently assembled through the appendixes to the parties' petitions, does not include any transcripts from the hearings on the WestEd Report, the Comprehensive Remedial Plan, or the trial court's November 10 Order. Indeed, the record currently before the Court does not even include the WestEd report itself. It also does not contain any of the materials the parties submitted to show *why* each of the measures in the Comprehensive

Remedial Report was supposedly necessary to satisfy the requirements of the Constitution.

In short, granting review on the merits of the trial court's Order at this stage will require the Supreme Court to review the case in the abstract, on a partial, unsettled record that is insufficient to permit full and fair review of the trial court's Order.

3. The Adoption of the Budget Act Means this Case No Longer Presents the Questions Plaintiffs Ask the Court to Decide.

Plaintiffs ignore the adoption of the Budget Act in their Petitions. Indeed, even though the Governor signed the Budget Act into law *just eight days after* the trial court issued its November 10 Order, Plaintiffs do not mention its existence—not even once. The adoption of the Budget Act, however, radically changed the posture of the case and rendered many, if not most, of the facts and assumptions underlying the trial court's Order invalid. This makes the November 10 Order an exceptionally poor vehicle to reach the constitutional questions Plaintiffs ask the Court to decide. It also highlights the need for intermediate review by the Court of Appeals, since it is almost certain further factual development will be needed before the appellate courts can reach the constitutionality of the trial court's proposed remedy.

This Court has long held that "appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.'" *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) (quoting *Anderson v. Assimos,* 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)); *see also Union*

Carbide Corp. v. Davis, 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960) ("Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue."); *State v. Muse,* 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941) (an appellate court will not decide a constitutional question "unless it is properly presented, and will not decide such a question even then when the appeal may be properly determined on a question of less moment."). This policy is, in itself, an exercise of judicial restraint and reflects a desire to respect the separation of powers. Thus, appellate courts will not decide constitutional questions "in friendly, non-adversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied." *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 569, (1947); *see also Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.,* 376 N.C. 558, 595, 853 S.E.2d 698, 725 (2021) (explaining that the prohibition against advisory opinions helps to ensure "concrete adverseness" between the parties necessary to "sharpen [] the presentation of the issues" and is itself an exercise in "self-restraint in the exercise of our judicial powers").

Here, there are numerous reasons why intermediate review by the Court of Appeals will likely eliminate, or greatly narrow, any constitutional questions the Court must ultimately decide about the full extent of the judiciary's power.

First, the trial court's Order was premised on the assumption that, at the time it was entered, there was *no budget*, and thus the Court would only be ordering the transfer of *unappropriated funds.* (*See* 10 November 2021 Order at p 11, ¶ 30 (App

59) (citing the fact "no budget has passed despite significant unspent funds" and that, "with the exception of . . . enhancement[s] to teacher allotment funding, no stand-alone funding measures have been enacted" to fund the Executive Branch's Plan)). To that end, the Order directed the Controller, Treasurer, and OSBM to transfer approximately $1.753 billion to various executive-branch agencies "from the *unappropriated balance within the General Fund* . . . ," and to treat the Order itself "as an appropriation from the General Fund." (*See* 10 November 2021 Order (App 66-67) (emphasis added)). Plaintiffs similarly rest their position on the (erroneous) notion that *Richmond County Board of Education*, 254 N.C. App. 422, 803 S.E.2d 27 recognizes a constitutional exception under which the judiciary can order transfers out of the treasury so long as the funds at issue are "available"—meaning that they are not subject to a validly-enacted legislative appropriation. (*See* Pls' Pet at p 25; *see also* Pls-Intervenors' Pet at p 27 (arguing that the State Constitution and this Court's cases allow courts to order "that *unappropriated* funding be made available" to various executive-branch agencies (emphasis added)).

But now that the Governor has signed the Budget Act, the central premise of the trial court's Order—and the theory Plaintiffs hope to invoke to support it—no longer hold true. There is no evidence in the record to determine whether there are sufficient, unappropriated moneys in the General Fund to meet the trial court's $1.7 billion-dollar directive.[5] The only available authority subject to judicial notice is

[5] Although the trial court accepted the Department of Justice's representations that there "are more than sufficient funds" to fund the executive branch's Plan (*see* 10 November 2021 Order at p 9, ¶ 22), its Order recites that the Department made

the Budget Act itself, which shows that all but $128 million of the revenue the State is anticipated to receive over the next two years (according to the Consensus Forecast prepared by OSBM and the Fiscal Research Division)[6] has been appropriated. *See* Budget Act, N.C. Sess. L. 2021-180, § 2.2(a) (General Fund Availability).

Second, the record as it currently sits does not include *any* evidence to identify *which* of the Remedial Plan's initiatives have already been funded, which have not, and which have been addressed through alternative means. The Budget Act appropriates roughly $21.5 billion—or 41% of the total biennial budget—to K-12 education. Among other things, it provides for an average 5% pay raise for teachers over the biennium; raises the minimum wage for non-certified personnel to $15 per hour; and provides significant performance and retention bonuses to teachers, with most receiving at least $2,800 in FY 2021. Outside analysts estimate that the Budget Act funds anywhere from $700 million to $900 million of the proposals in the Remedial Plan. It also funds measures not included in the Comprehensive Remedial Plan, such as providing $100 million in *new*, *recurring funding* to school districts in low-wealth counties in order to attract and retain high-quality teachers and

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those representations in connections with status conferences held in August 2021—*months before* the budget was adopted. (*Id.*)

[6] The revenue forecasts used in the Budget Act are drawn from the Consensus Forecast, which is developed jointly by OSBM, an executive-branch agency, and the nonpartisan staff within the Fiscal Research Division, which serves the General Assembly. *See, e.g., February 2021 North Carolina General Fund Revenue Consensus Forecast*, Fiscal Research Division, available at, https://tinyurl.com/2p89vbst (last visited Dec. 26, 2021).

administrators, *see* N.C. Sess. L. 2021-180, § 7.3, as well as paying $1,000 signing bonuses to recruit teachers in small and low-wealth counties. *See id.* § 7A.5.

Without evidence showing what portions of the Comprehensive Remedial Plan have already been funded, the Court would be left with no way to assess whether the remaining portions of the Plan are, in fact, so necessary that they warrant an unprecedented judicial intrusion into a core legislative function. *See In re Alamance County Ct. Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991) (holding that the judiciary's inherent power "may not arrogate a duty reserved by the constitution exclusively to another body" and "doing what is 'reasonably necessary for the proper administration of justice' means doing *no more* that is reasonably necessary" (emphasis in original)).

Plaintiffs no doubt recognize this and hope that, by petitioning for *certiorari* now, they can get the Court to review the Comprehensive Remedial Plan in the abstract. Thus in their Petitions, Plaintiffs repeatedly invite the Court to assume that *each of the 147 items* in the Remedial Plan are constitutionally necessary and must receive exactly the level of funding requested by the executive agencies that prepared the Plan. Yet, in more than sixty-pages of briefing on their Petitions, Plaintiffs do not identify *a single measure* that the Remedial Plan would implement, much less *how* it would ensure that children in the Plaintiffs' school districts would receive a sound, basic education. Instead, they offer only the conclusory assertion that "[t]here is no question as to what must be done" and cite the Department of

Justice's supposed "concessions" that that the Plan—which merely reflects the executive branch's opening budget requests—is "necessary." (Pls' Pet at 7).

It appears that—unlike Plaintiffs—Judge Lee believed he needed to determine what portions of the Remedial Plan were funded under the budget before allowing his Order to go into effect. On 30 November 2021—the same day the Court of Appeals issued its writ of prohibition—Judge Lee issued a scheduling order, *sua sponte*, noting the passage of the Budget Act and setting a hearing for the parties "to inform the Court of the specific components of the Comprehensive Remedial Plan for years 2 &3 that are funded by the [Budget] and those that are not." (App 131, 133). Judge Lee also directed that his November 10 order would continue to be stayed until at least 10 days after the hearing, through at least 23 December 2021. (App 133). However, once the Department of Justice filed a notice of appeal, Judge Lee cancelled the hearing. It is thus entirely likely that, *before* addressing the Plaintiffs' constitutional questions, a remand may be necessary to conduct the very analysis that Judge Lee proposed.

Third, there is no evidence the trial court considered whether it had any less intrusive alternatives before concluding that it had no choice but to order the Controller and Treasurer to transfer $1.7 billion to fund the executive branches' remedial plan. As Plaintiffs acknowledge, this Court's precedent requires that, when fashioning a remedy, the court must consider *alternatives* to ensure that it *minimizes* the extent of any encroachment in the powers delegated to the political branches. (*See* Pls-Intervenors Pet at 25 (citing *Alamance*, 329 N.C. at 100-01, 405 S.E.2d at

133)); *see also Leandro II,* 358 N.C. at 643, 599 S.E.2d at 393 (overturning trial court's order requiring the State to provide pre-kindergarten services to "at-risk" children because there was no evidence that such a "narrow" remedy was necessary, when compared to other alternatives available to the political branches).

Once again, Plaintiffs hope their rhetoric will lull the Court into assuming the trial court had no other choice but to issue its Order by claiming they have been "waiting seventeen years for a remedy." (Pls' Pet at 2). But their arguments ignore that proceedings leading up to the trial court's 10 November 2021 Order only occurred within the past 2-3 years and have lacked the level of adverseness "'which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *See Comm. to Elect Dan Forest*, 376 N.C. at 594–95, 853 S.E.2d at 725 (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)). Indeed, the record shows that the Department of Justice and the Plaintiffs *worked together* to recommend that the Court appoint WestEd to serve as an educational consultant, for the express purpose of working with the Governor's newly-appointed Commission on Access to a Sound Basic Education. (13 March 2018 Order at fn 1 (App 7); *see also* 10 November 2021 Order at p 5). The Department of Justice then continued to work with Plaintiffs to draft and submit a series of consent orders. Rather than advocate for, or seek to protect, the General Assembly's powers under the Appropriations Clause (or, for that matter, the autonomy of executive branch agencies involved in K-12 education), the

Department of Justice worked with Plaintiffs to draft the 10 November 2021 Order and submitted a brief advocating that the Court enter it.

There are certainly lesser alternatives the trial court could have considered before issuing an unprecedented judicial directive ordering the transfer of $1.7 billion out of the State treasury. This Court has already warned that money alone is not the answer and that "[c]ourts should not rely upon the single factor of school funding levels in determining whether a state is failing in its constitutional obligation to provide a sound basic education to its children." *Leandro I*, 346 N.C. at 356, 488 S.E.2d at 260. Instead, the "very complexity of financing and managing" public school systems requires the Court to review numerous factors in order to determine whether the State has met its Constitutional obligation and that available evidence suggests that substantial increases in funding produce only modest gains in most schools." *Id.* Judge Manning likewise concluded on numerous occasions that additional funding was not, by itself, an answer and instead advocated a much more practical approach, stating in one 2002 order:

> The State must step in with an iron hand and get the mess straight. If it takes removing an ineffective Superintendent, Principal, teacher, or group of teachers and putting effective, competent ones in their place, so be it. If the deficiencies are due to a lack of effective management practices, then it is the State's responsibility to see that effective management practices are put in place.

Hoke Cnty. Bd. of Educ. v. State, No. 95 CVS 1158, 2002 WL 34165636 (N.C. Super. Ct. April 4, 2002) (Manning, J.)). There is no evidence that Judge Lee ever considered, or was ever presented with, the type of practical suggestions Judge Manning

advocated before being presented with an Order purporting to "require" the State to fund the executive branch's education-related budget requests.

Answering the constitutional questions Plaintiffs ask the Court to decide would require the Supreme Court to determine the outer limits of the judiciary's power under our State Constitution, in the abstract, based on a partial, undeveloped record, and at a juncture where doing so is unnecessary and would lead only to an advisory opinion as to whether the trial court's Order would have been valid in the absence of a budget. Efficiency and judicial restraint therefore call on the Court to allow for intermediate review by the Court of Appeals, and potentially further factual development by the trial court, to ensure that any constitutional issues that must be decided are squarely presented to this Court.

CONCLUSION

As set forth above, Plaintiffs have attempted to bootstrap the Court of Appeals' decision to stay the trial court's unprecedented and unconstitutional order directing $1.7 billion in appropriations from the State's treasury without legislative approval into a basis to *skip over even more steps* in the appellate process. There is no reason to grant their petitions for *certiorari* at this time.

Respectfully submitted, this the 28th day of December, 2021.

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No. 425A21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HOKE COUNTY BOARD OF EDUCATION et al,
Plaintiffs-Appellants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Plaintiff-Intervenor,

and

RAFAEL PENN, CHARLOTTE-MECKLENBURG BRANCH OF THE STATE CONFERENCE OF THE NAACP *et al.*,
Plaintiffs-Intervenors,

v.

STATE OF NORTH CAROLINA and THE STATE BOARD OF EDUCATION
Defendants-Appellees,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
Realigned Defendant.

From the Court of Appeals
No. P21-511

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APPENDIX TO MOTION TO DISMISS PLAINTIFFS' AND PLAINTIFFS-INTERVENORS' NOTICES OF APPEAL AND PETITIONS FOR DISCRETIONARY REVIEW

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95 CVS 1158

HOKE COUNTY BOARD OF EDUCATION, et al.,

Plaintiffs

and

ASHEVILLE CITY BOARD OF EDUCATION, et al.,

Plaintiff-Intervenors

v.

STATE OF NORTH CAROLINA, et al.,

Defendants

This cause coming on before the Honorable W. David Lee, Judge Presiding pursuant to Rule 2.1 of the General Rules of Practice at the February 15, 2018 special session of Wake County Superior Court upon motion of the North Carolina State Board of Education (hereinafter "SBE") pursuant to Rule 12 and Rule 60 of the Rules of Civil Procedure for relief from the judgment dated April 4, 2002 "and any other applicable remedial Superior Court Orders." The SBE seeks through this unusual request to be released "from the remedial jurisdiction of this Court."

Based upon the evidence, arguments and contentions presently before the Court, the Court makes the following findings of fact by at least a preponderance of the evidence:

1. The matters before this court are justiciable matters of a civil nature and this court exercises the subject-matter jurisdiction conferred by N.C.Gen.Stat. 7A-240. The Superior Court division is the proper division

where, as here, the principal relief prayed for is the enforcement or declaration of any claim of constitutional right. See N.C.Gen.Stat. 7A-245(a)(4). Moreover, personal jurisdiction over the person of the SBE has existed and has been exercised over the movant, with its active participation in these proceedings for more than twenty years.

2. The law of this case includes, *inter alia*, our Supreme Court's holding in *Leandro I* that there is a constitutional requirement that every child in this state have equal access to a sound basic education and that the state is required to provide children a qualitatively adequate education, i.e. an education that meets some minimum standard of quality.

3. The SBE is constitutionally empowered under Article IX, Section 5 of the North Carolina Constitution to supervise and administer the public school system and the educational funds referenced therein for the system's support. The SBE is also charged with making all needed rules and regulations related thereto. The Defendant State of North Carolina has the ultimate constitutional obligation to insure that every child has the opportunity to receive a sound basic education. Together, the actions and decisions of these defendants are indispensable in undertaking to deliver the *Leandro* right to every child.

4. At the commencement of this litigation the SBE, together with the State moved pursuant to 12 to dismiss the claims now before the court, which motion was denied by the trial court. This denial was affirmed on appeal. Principles of *res judicata* and collateral estoppel preclude a reexamination of the current motion strictly on Rule 12 grounds. This court is constrained, however, to consider the merits of the instant motion within the context of Rule 60 based upon the SBE's contentions that the circumstances have changed and that the claim to enforce the *Leandro* right is now moot.

5. Rule 60(b)(5) affords relief where the court's judgment has been satisfied, released or discharged or where it is no longer equitable that the judgment should have prospective application. There has been no final non-appealable judgment relating to the remediation and enforcement of the

Leandro constitutional right. The last Supreme Court pronouncement in this case (*Leandro II*) remanded the proceedings to the trial court and "ultimately into the hands of the legislature and executive branches" for remedial action, noting in the decision that "(W)hether the State meets this challenge remains to be determined." As to binding force of this right, the SBE acknowledged in July of 2013 in its brief to the North Carolina Supreme Court that it is "bound by its judicially mandated constitutional obligations." *New Brief of Defendant-Appellee State Board of Education* (N.C. Supreme Court, July 24, 2013). As to remediation and enforcement, Judge Manning's last order of March 17, 2015 concluded that "a definite plan of action is still necessary to meet the requirements and duties of the State of North Carolina with regard to its children having equal opportunity to obtain a sound basic education." Again, the SBE is constitutionally bound to administer and supervise the execution of such a plan.

6. *Leandro I* cautions that...."the 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...with a sound basic education." In *Leandro II* the trial court determined that such a showing had been made against the state defendants. The liability judgment then entered against the state defendants was affirmed in *Leandro II* and the defendants were ordered to address and correct the constitutional violations.

7. The SBE contends that the present circumstances of the educational system in Hoke County have so changed since the 2002 judgment that there is no longer a justiciable controversy before the court. The SBE supports this contention by summarizing changes and reforms, both legislative and executive in nature, that have occurred since 2002. However, the SBE has failed to present convincing evidence that either the *impact or effect* of these changes and reforms have moved the State nearer to providing children the fundamental right guaranteed by our State Constitution.

8. The statewide implications and applications of this case have been established throughout the course of this proceeding, as perhaps best

evidenced by the Judge Manning's comprehensive review as well as by the SBE's comprehensive list of statewide changes and reforms that SBE contends has eliminated a justiciable controversy with respect to *Leandro* compliance.

9. In terms of assessing compliance with *Leandro*, our Supreme Court has recognized that one metric for evaluation is education "outputs," i.e. test scores. Rather than demonstrating the absence of a justiciable controversy, a review of these outputs reveal an ebb and flow that at no time has demonstrated even remote compliance with the tenants of *Leandro*. As Judge Manning noted in his last order dated March 17, 2015, the results of the 2013-14 EOC, EOG, and ACT tests from the public schools indicate that "in way too many school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining a sound basic education as defined by and required by the *Leandro* decision." Judge Manning's order reviews in detail reading, math and biology results, generally within the 2012-2014 time frame, reflecting in each and every category that more than half of the students tested below grade level. Additional hard facts in evidence before this court in include the SBE admission in 2015 that the demand for new teachers is not being met; that there were then more schools rated "D" or "F" than can be served; that the federal funding ("Race to the Top") ended in 2014-15, resulting in (1) the State Department of Public Instruction losing over half the staff-from 147 to 57-dedicated to serving those low performing schools and (2) loss of critical funding used to develop and implement effective teaching. In Hoke County, the LSA has been forced to hire lateral entry candidates-people with no formal training to work with this most at-risk population-to fill these positions. Earlier submissions to this court also indicate that in 2014 North Carolina ranked 49th out of 50 states in terms of percentage of its eleventh graders meeting the ACT reading benchmark. These are but a few examples revealing that the SBE is not supervising and administering a public school system that is *Leandro* compliant. The court record is replete with evidence that the *Leandro* right continues to be denied to hundreds of thousands of North Carolina children.

10. Rule 60(b)(6) affords relief "for any other reason justifying relief from the operation of a judgment." Our appellate courts have called this provision of the Rule "a grand reservoir of equitable power to do justice in a particular case." Norton v. Sawyer, 30 N.C.App 420, 426 (1976). Further, a determination under Rule 60 rests in the sound discretion of the trial judge. Harris v. Harris, 307 N.C. 684 (1983).

11. The SBE argues that legislation enacted by both Congress and our General Assembly now adequately address those criteria that our Supreme Court has decreed constitute a "sound basic education" (See *Leandro I*) and that the legislation also addresses the educational resources to which every child has the right of access-competent, certified, well-trained teachers, a well-trained competent Principal, and resources necessary the effective instructional program (See *Leandro II*). The SBE further argues that these enactments must be presumed by this court to be constitutional.

12. This court indeed indulges in the presumption of constitutionality with respect to each and every one of the legislative enactments cited by the SBE. That these enactments are constitutional and seek to make available to children in this State better educational opportunities is not the issue before the court. The issue is whether the court should continue to exercise such remedial jurisdiction as may be necessary to safeguard and enforce the much more fundamental *constitutional right* of every child to have the opportunity to receive a sound basic education. Again, the evidence before this court upon the SBE motion is wholly inadequate to demonstrate that these enactments translate into substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards.

13. The SBE's motion was filed in July, 2017 and to the extent that it is based on changed circumstances is untimely, the SBE's brief hearkening to changes made in 2012, some five years before the filing of its motion.

Based on the foregoing findings of fact the Court makes the following conclusions of law:

1. The changes in the factual landscape that have occurred during the pendency of this litigation do not serve to divest the court of its jurisdiction to address the constitutional right at issue in this cause. The court has jurisdiction over the subject matter and over the person of the defendant. To the extent that the SBE seeks dismissal pursuant to Rule 12(b)(1) or (2) the motion should be denied. To the extent that the SBE seeks dismissal pursuant to Rule 12(b)(6), the trial court's previous denial of that motion having been affirmed on appeal in *Leandro I*, the re-assertion of that motion should be denied.

2. There is an ongoing constitutional violation of every child's right to receive the opportunity for a sound basic education. This court not only has the *power* to hear and enter appropriate orders declaratory and remedial in nature, but also has a *duty* to address this violation. This court retains both subject matter jurisdiction and jurisdiction over the parties as it undertakes this duty. Both state defendants have been proper parties to this litigation since its inception and each remain so.

3. The State recognizes its continuing constitutional obligations and has most recently joined with the plaintiffs in an effort to adopt a comprehensive approach to address those obligations. The successful delivery of the *Leandro* right necessarily requires the active participation of the SBE in the discharge of its constitutional duty to supervise and administer the school system and its funding. The SBE has a significant non-delegable role in affording the constitutional entitlements of *Leandro* to every child. The SBE has been and continues to be in the better position than the court to identify in detail those curricula best designed to ensure that a child receives a sound basic education.[i]

4. These state defendants have the burden of proving that remedial efforts have afforded substantial compliance with the constitutional directives of our Supreme Court. To date, neither defendant has met this burden. Both

law and equity demand the prospective application of the constitutional guarantee of *Leandro* to every child in this State.

5. The Rule 60 motion is untimely, the same not having been filed within a reasonable time as required by Rule 60(b) (6). Further, the movant has failed to demonstrate that such extraordinary circumstances exists that justice demands relief from the previous rulings of the court or from the burden of the movant to establish that it has presented a remedial plan of action that addresses the liability of the movant established by the law of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, in the Court's discretion, that the motion of the defendant SBE should be and the same is hereby DENIED.

This the 7th day of March, 2018.

W. David Lee, Judge Presiding

[1] In *Leandro I*, the Supreme Court recognized that "judges are not experts in education and are not particularly able to identity in detail those curricula best designed to ensure that a child receives a sound basic education." *Leandro I* reminded the trial court that judicial intrusion into the area of expertise as to what course of action will lead to a sound basic education is justified only upon a showing that the right is being denied, it initially being the province of the legislative and executive branches of government to take appropriate action. This court notes that both branches have had more than a decade since the Supreme Court remand in *Leandro II* to chart a course that would adequately address this continuing constitutional violation. The clear import of the *Leandro* decisions is that if the defendants are unable to do so, it will be the *duty* (emphasis mine) of the court to enter a judgment "granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government." (*Leandro I*)

This trial court has held status conference after status conference and continues to exercise tremendous judicial restraint. This court is encouraged by Governor Cooper's creation of the Governor's Commission on Access to Sound Basic Education. Concurrent with the entry of this Order, this court has also appointed, with the consent of the plaintiffs, the Penn Intervenors and the State of North Carolina a consultant. This consultant has court approval to work with the Commission with a view toward submitting recommendations to the parties, the Commission and this Court of specific actions to achieve *Leandro* compliance. The time is drawing nigh, however, when due deference to both the legislative and executive branches of government must yield to the court's duty to adequately safeguard and actively enforce the constitutional mandate on which this case is premised. It is the sincere desire of this court that the legislative and executive branches heed the call.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

2020 JAN 21 A 11:19

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON, individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS, DENISE

HOLLIS JORDAN, individually and as guardian ad litem of SHAUNDRA DOROTHEA JORDAN and BURRELL JORDAN, V; TERRY DARNELL BELK, individually and as guardian ad litem of KIMBERLY SHANALLE SMITH; SUSAN JANNETTE STRONG, individually as guardian ad litem of TRACEY ANNETTE STRONG and ASHLEY CATHERINE STRONG; CHARLOTTE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

CONSENT ORDER REGARDING NEED FOR REMEDIAL, SYSTEMIC ACTIONS FOR THE ACHIEVEMENT OF *LEANDRO* COMPLIANCE

At issue in this long-running matter is one of the most important rights enumerated in our State Constitution: the fundamental right of every child in North Carolina to have the opportunity to receive a sound basic education in a public school. As this Court has found, this constitutional right has been denied to many North Carolina children.

The State of North Carolina, North Carolina State Board of Education, and other actors have taken significant steps over time in an effort to improve student achievement and students' opportunity to access a sound basic education. Many of these efforts have made a positive impact on the lives of public school students and improved public schooling in the State.

However, historic and current data before the Court show that considerable, systemic work is necessary to deliver fully the *Leandro* right to all children in the State. In short, North Carolina's PreK-12 public education system leaves too many students behind — especially students of color and economically disadvantaged students. As a result, thousands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens. The costs to those students, individually, and to the State are considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

The educational obstacles facing the State's at-risk students are real, steep, and require urgency. The Court is encouraged that the parties to this case — Defendants State of North Carolina ("State") and the State Board of Education ("State Board") (collectively, the "State Defendants"), as well as the Plaintiffs and Plaintiff-Intervenors (collectively, "Plaintiffs") — are in agreement that the time has come to take decisive and concrete action (*i.e.*, immediate, short term actions and the implementation of a mid-term and long-term remedial action plan) to bring North Carolina into constitutional compliance so that all students have access to the opportunity to a obtain a sound basic education.

The Court is also encouraged by Governor Cooper's creation of the Governor's Commission on Access to Sound Basic Education and the Commission's work thus far and is hopeful that the parties, with the help of the Governor, can obtain the support necessary from the General Assembly and other public institutions to implement and sustain the necessary changes to the State's educational system and deliver the constitutional guarantee of *Leandro* to every child in the State.

At this critical moment and in years ahead, the Parties and the Court shall proceed with benefit of the detailed findings, research, and recommendations of the Court's independent non-party consultant, WestEd. These findings are collected in WestEd's comprehensive report entitled, "*Sound Basic Education for All: An Action Plan for North Carolina*" and its underlying studies (collectively, the "WestEd Report"). The WestEd Report confirms what this Court has previously made clear: that the State Defendants have not yet ensured the provision of education that meets the required constitutional standard to all school children in North Carolina. *See* March 18, 2018 Order ("The court record is replete with evidence that the *Leandro* right continues to be denied to hundreds of thousands of North Carolina children [and that the actions the State has taken so far are] wholly inadequate to demonstrate substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards.").

The WestEd Report offers detailed findings about the current state of *Leandro* compliance in North Carolina, as well as important, comprehensive short- and long-term recommendations for a path forward to achieve constitutional compliance. These findings and recommendations are rooted in an unprecedented body of research and analysis, which will inform decision-making and this Court's approach to this case.

Our Supreme Court recognized that a sound basic education is one that, among other things, "enable[s] the student to function in a complex and rapidly changing society . . . and compete on an equal basis with others in further formal education or gainful employment in contemporary society." North Carolina continuously changes and a *Leandro*-conforming educational system must take this into account. North Carolina continues to grow. Our student body is larger, more diverse, and more economically disadvantaged today than it was 25 years ago. Advances in science and technology have re-set expectations for the skills and competencies our students must have in order to be ready for the future. The Parties agree that brain science and research show that new approaches are required for the provision of early learning and pre-K education with broader access for young children's participation. Our education system must adjust to and keep pace with the major ongoing technological, social, and economic changes in our society.

To prepare its schoolchildren to compete in the future, the Parties have agreed that North Carolina must do more to meet these changes and challenges. As the original *Leandro* decision affirmed, "[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate" *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997).

In his final order issued on March 17, 2015 before retiring, The Honorable Howard Manning concluded that "a definite plan of action is still necessary to meet the requirements and duties of the state of North Carolina with regard to its children having equal opportunity to obtain a sound basic education." *See* 3/17/2015 Order ("in way too many school districts across the state, thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined by and required by the *Leandro* decision."). That remains true today. As outlined in greater detail below and in accordance with the Court's prior rulings, the Court orders the Defendants, in consultation with each other and the Plaintiffs, to work expeditiously and without delay to create and fully implement a definite plan of action to achieve *Leandro* compliance.

Based upon WestEd's findings, research, and recommendations and the evidence of record in this case, the Court and the Parties conclude that a definite plan of action for the provision of the constitutional *Leandro* rights must ensure a system of education that at its base includes seven components as described below. The Parties stipulate that the following components are required to implement the *Leandro* tenants as set forth in prior holdings of the Supreme Court and this Court's prior orders. The Parties further stipulate that these components are necessary to address critical needs in public education and to ensure that the State is providing the opportunity for a sound basic education to ***each*** North Carolina child, and further holds itself accountable for doing so:

1. A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;

2. A system of principal development and recruitment that ensures each school is led by a high-quality principal who is supported with early and ongoing professional learning and provided competitive pay;

3. A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk-students as defined by the *Leandro* decisions;

4. An assessment and accountability system that reliably assesses multiple measures of student performance against the *Leandro* standard and provides accountability consistent with the *Leandro* standard;

5. An assistance and turnaround function that provides necessary support to low-performing schools and districts;

6. A system of early education that provides access to high-quality pre-kindergarten and other early childhood learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and

7. An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

It is the State's duty to implement the fiscal, programmatic, and strategic steps necessary to ensure these seven components are in place and, ultimately, to achieve the outcomes for students required by the Constitution.

The Parties agree that the constitutional rights at issue implicate the mission and require the work of the State's numerous institutions and agencies, which all share in the responsibility for ensuring that every child receives the opportunity for a sound basic education. As a constitutional actor, however, the State Board of Education must play a significant role in delivering the *Leandro* right to all students. N.C. Const. art. IX, § 5 ("The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.")

This Court will issue a subsequent order or orders regarding the definite plan of action and its critical components, including the identification of specific concrete, definitive actions (preliminary short-term actions and mid-term and long-term action plans) that will be taken to implement the above seven components and to correct the constitutional deficiencies, so that the State may finally meet its constitutional obligations to North Carolina's children.

At the outset, the Court reviews its previous rulings, the *Leandro* tenets and recent procedural history.

The Court's Rulings and *Leandro's* Tenets

Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997) (*Leandro I*)

More than twenty-five (25) years ago, in May of 1994, Plaintiffs initiated this action and alleged that certain guaranteed educational rights conferred by the North Carolina Constitution were being denied to North Carolina's school-aged children. The Court denied the State Defendants' motion to dismiss and a unanimous Supreme Court affirmed these constitutional obligations. *Leandro I,* 346 N.C. 336, 488 S.E.2d 249 (1997).

Leandro I contained three principal holdings: (1) the State Constitution does not require equal funding of public school systems, and consequently the challenged system of funding was not unconstitutional, *id.* at 349, 488 S.E.2d at 256; (2) the State Constitution does not require students in every school system to receive the same educational opportunities, *id.* at 350, 488

S.E.2d at 256; but (3) the State Constitution does require that each student in all school systems have the "opportunity to receive a sound basic education in our public schools," *id.* at 347, 488 S.E.2d at 255. The Supreme Court defined a sound basic education as:

> one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic or vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

346 N.C. at 347, 488 S.E.2d at 255 (internal citations omitted).

The Supreme Court also held that the Constitution requires the State to ensure that each and every child, regardless of age, need, or district, has access to a sound basic education in a public school. 346 N.C. at 345, 488 S.E.2d at 254 (holding that "an education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate").

The Supreme Court indicated that there were at least three potentially relevant, but not dispositive, factors that may be weighed by a trial court in determining whether the opportunity offered students was constitutionally sufficient. These were: (1) educational goals and standards established by the General Assembly, *id.* at 355, 488 S.E.2d at 259, which were presumably sufficient to provide students an opportunity to obtain a sound basic education; (2) student performance on standardized achievement tests, *id.* at 355, 488 S.E.2d at 260; and (3) the level of State educational expenditures to support the public school system, *id.* at 355, 488 S.E.2d at 260. The Court recognized "that the value of standardized tests [was] the subject of much debate. Therefore, they may not be treated as absolutely authoritative" on the issue of the opportunity for a sound basic education. *Id.* at 355, 488 S.E.2d at 260. Stated differently, test scores are only one of several factors to be weighed in determining whether the State is meeting its constitutional obligations to North Carolina children.

Finally, the Supreme Court held that educational standards established by the State were presumptively sufficient to provide students the opportunity for a sound basic education and expressly imposed on plaintiffs the burden to prove their claims by "[a] clear showing," *id.* at 357, 488 S.E.2d at 261, for only such a showing "will justify a judicial intrusion into an area so clearly the province . . . of the legislative and executive branches." *Id.* The Supreme Court remanded the case for a determination as to whether the State was, in fact, denying this fundamental constitutional right to the children:

> If on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that [the State Defendants] are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent upon [the State] to establish that their actions denying this fundamental right are "necessary to promote a compelling governmental interest." If [the State Defendants] are unable to do so, it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government.

346 N.C. at 357, 488 S.E.2d at 261 (internal citations omitted).

The Supreme Court recognized that, while making such determinations, "the 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." *Id.*

Liability Judgment and *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Leandro II*)

The trial proceedings continued for over a year, involved more than 40 witnesses, and included hundreds of exhibits. The trial court issued four memoranda of decision collectively totaling over 400 pages of findings of fact and conclusions of law.

On April 4, 2002, the trial court found that the Plaintiffs had met their burden of demonstrating constitutional non-compliance and entered a liability judgment against the State (incorporating the previous memoranda of decision) (collectively, the "Liability Judgment") finding continuing constitutional violations. With some modifications, the Liability Judgment was unanimously affirmed by the Supreme Court in *Leandro II.*

The Court found, and the Supreme Court unanimously affirmed, that the State was constitutionally obligated to provide each and every child the opportunity to attend a public school with access to the following:

> First, that every classroom be staffed with a competent, certified, well-trained teacher who is teaching the standard course of study by implementing effective educational methods that provide differentiated, individualized instruction, assessment and remediation to the students in that classroom.
>
> Second, that every school be led by a well-trained competent Principal with the leadership skills and the ability to hire and retain competent, certified and well-trained teachers who can implement an effective and cost-effective instructional program that meets the needs of at-risk children so that they can have the opportunity to obtain a sound basic education by achieving grade level or above academic performance.

> Third, that every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including at-risk children, to have the equal opportunity to obtain a sound basic education, can be met.

Liability Judgment, pp. 109-10; *Leandro II*, 358 N.C. at 636, 599 S.E.2d at 389.

The trial court also found, and the Supreme Court unanimously affirmed, that the State had not provided, and was not providing, competent certified teachers, well-trained competent principals, and the resources necessary to afford all children, including those at-risk, an equal opportunity to obtain a sound basic education, and that State Defendants were responsible for these constitutional violations. *See* Liability Judgment, p. 110, *Leandro II*, 358 N.C. at 647-48, 599 S.E.2d at 396.

Further, the Court found, and the Supreme Court unanimously affirmed, that at-risk children[1] require more resources, time, and focused attention in order to receive a sound basic education. *Leandro II*, 358 N.C. 641, 599 S.E.2d at 392. Specifically,

(a) "At-risk children need adequately targeted remediation services." Liability Judgment at p. 50.

(b) "Enabling at-risk children to perform well in school requires more time and more resources." Memorandum of Decision, Sect. Two, p. 10.

(c) "From this review, it became crystal clear to the Court that there are two distinct groups attending the public schools in North Carolina – those children at risk of academic failure that are not obtaining a sound basic education and those children who are not at risk of academic failure and who are obtaining a sound basic education. The major factors which can be used to identify ... those children at-risk and those not at-risk, are (1) socio-economic status (2) level of parental education and (3) free and reduced price lunch participation, all of which are inextricably intertwined with each other." Memorandum of Decision, Sect. Three, p. 64.

(d) "[A]n 'at-risk' student is generally described as one who holds or demonstrates one or more of the following characteristics: (1) member of low-income family; (2) participate in free or reduced-cost lunch programs; (3) have parents with a low-level education; (4) show limited proficiency in English; (5) are a member of a racial or ethnic minority group; (6) live in a home headed by a single parent or guardian." *Leandro II*, 358 N.C. at 389, 599 S.E.2d at 635, n. 16.

Regarding early childhood education, the Supreme Court affirmed the trial court's findings that the "State was providing inadequate resources" to "'at-risk' prospective enrollees" ("pre-k" children), "that the State's failings were contributing to the 'at-risk' prospective enrollees'

[1] Children who are "at-risk" of academic failure are discussed at length in this Court's Memorandum of Decision, Sect. Two of October 26, 2000.

subsequent failure to avail themselves of the opportunity to obtain a sound basic education," and that "State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 641-42, 599 S.E.2d at 392-33. While the Supreme Court did not uphold the trial court's specific remedy of pre-K at that time, the Court affirmed the findings that (i) "there was an inordinate number of 'at-risk' children who were entering the Hoke County school district" each year, (ii) "such 'at-risk' children were starting behind their non 'at-risk' counterparts," and (iii) "such 'at-risk' children were likely to stay behind, or fall further behind, their non 'at-risk' counterparts as they continued their education." *Id.* at 641, 599 S.E.2d at 392.

In addition, the trial court found, and the Supreme Court unanimously affirmed, that "the State of North Carolina is ultimately responsible for providing each child with access to a sound basic education and that this responsibility cannot be abdicated by transferring responsibility to local boards of education." Liability Judgment, p. 110; *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389. It is ultimately the State's responsibility to ensure that each child has the opportunity to a *Leandro*-conforming education.[2] The Supreme Court has held that the State may not shift responsibility for constitutional violations onto the local districts. *Id.*

The Supreme Court remanded the case for the trial court to oversee the implementation of a remedial framework to correct and address the constitutional deficiencies. From 2004-2015, more than 20 hearings were held on this issue, the nature and scope of which are set out in the previous orders of this Court, all of which are in the record.

In 2013, the Supreme Court confirmed that the Liability Judgment and the mandates of *Leandro I* and *Leandro II* remain "in full force and effect." On November 8, 2013, the Supreme Court dismissed an appeal by the State concerning legislative enactments about pre-kindergarten programming on mootness grounds. In the dismissal order, the Supreme Court held, "Our mandates in *Leandro* and *Hoke County* [*Leandro II*] remain in full force and effect." *Hoke County Bd. of Ed. v. State*, 367 N.C. 156, 160, 749 S.E.2d 451, 455 (2013).

Recent Procedural History and Appointment of the Court's Non-party, Independent Consultant WestEd

In July 2017, the State Board filed a Motion for Relief pursuant to Rule 60 and Rule 12, requesting that the Court relinquish jurisdiction in this case. The State Board asserted that programs implemented in the State, changes in factual circumstances, and changes in state and federal law had resulted in an education system wholly different than the one that was the subject of the original action such that these circumstances support relief under Rule 60. The Court denied the State Board's motion on March 7, 2018.

In its March 2018 Order, the Court reiterated the "evidence before this Court upon the SBE [State Board] Motion is wholly inadequate to demonstrate that [enactments by the State Defendants] translate into substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards." *See* Order, p. 5, ¶ 12.

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[2] *See also Silver v. Halifax Cty. Bd. of Comm'rs*, 371 N.C. 855, 821 S.E.2d 755 (2018) (affirming that the constitutional responsibility of providing the opportunity to a sound basic education resides with the State – specifically the legislative and executive branches – rather than with a local governmental unit).

In January 2018, the State and the Plaintiffs filed a joint motion for case management and scheduling order in which the parties proposed to nominate, for this Court's consideration and appointment, an independent, non-party consultant to assess the current status of *Leandro* compliance in North Carolina for the Court and to make detailed, comprehensive, written recommendations for specific actions necessary to achieve sustained compliance with the constitutional mandates articulated in the *Leandro* case.

On February 1, 2018, the Court issued a *Case Management and Scheduling Order* setting forth, among other things, the parameters for the consultant's work and a detailed timeline for completion of such work should the Court choose to appoint the nominated non-party as the Court's consultant. In the *Case Management and Scheduling Order*, this Court took judicial notice of Executive Order No. 10 dated July 21, 2017, superseded and replaced by Executive Order No. 27 dated November 15, 2017, which created the Governor's Commission on Access to Sound Basic Education ("Commission").

Thereafter, on March 13, 2018, this Court issued an Order appointing WestEd to serve as the Court's independent, non-party consultant pursuant to the terms of the *Case Management Order* issued on February 1, 2018. Prior to the appointment, the Court thoroughly reviewed WestEd's extensive qualifications, experience, expertise, and background information (including the resumes of the WestEd team members to lead this project) regarding educational research and innovation, as well as WestEd's submission regarding their proposed scope of work.

The Court charged WestEd with submitting final recommendations to the Parties, the Commission, and the Court within twelve months from the date of appointment[3]. WestEd's recommendations were to "consist of the consultant's conclusions as to detailed and comprehensive actions that the State should take to achieve sustained compliance" with constitutional mandates to provide every child with an equal opportunity to a sound basic education in North Carolina.

All Parties agree that WestEd is, and was, qualified to serve in this capacity.

WestEd's Process and a *Sound Basic Education for All: An Action Plan for North Carolina*

WestEd is a non-profit, non-partisan, educational research, development, and service organization with more than 650 employees in 17 offices across the nation and more than 50 years of experience. WestEd's work centers around providing research, recommendations and sustained professional services to improve public education systems, student achievement, educator effectiveness, and educational leadership. WestEd has extensive experience in working with numerous states and state education agencies ("SEA") in multiple areas, including: developing and evaluating assessments and standards, development of educator evaluation systems, providing quality professional development to a wide range of education professionals, developing strong school turnaround leaders to close the achievement gap, and researching and advising on school finance policy. In addition, WestEd leads the U.S. Department of Education's National Center on

[3] This deadline was subsequently extended for, among other reasons, the devastation wrought by Hurricanes Matthew and Florence, which delayed WestEd's data collection and visits to certain districts.

School Turnaround whose work addresses a number of factors relevant in this case, including: developing SEA staff capacity and SEA organizational structures, building school and district capacity by providing leadership training to ensure leaders have the skills to produce positive outcomes for all students, and creating policies and practices to ensure a pipeline of turnaround leaders.

In support of its work, WestEd also engaged the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute (LPI), a national education policy and research organization with extensive experience in North Carolina.

Under WestEd's leadership, these three organizations also collaborated to conduct 13 studies[4] to better identify, define, and understand key issues and challenges related to North Carolina's education system and to offer a framework of change for the State. The researchers developed and carried out a comprehensive research agenda to investigate the current state and major needs of North Carolina public education, including in the following overarching areas: (1) access to effective educators, (2) access to effective school leaders, (3) adequate and equitable school funding and other resources, and (4) adequate accountability and assessment systems.

After more than a year of extensive research, evaluation, and analysis, WestEd's work on behalf of the Court culminated in its submission of its draft report to the Court on June 18, 2019, and a final report on October 4, 2019 ("WestEd Report").

A detailed description of WestEd's work and analysis is set out in the WestEd Report. Among other things, WestEd:

- Analyzed educational data at the North Carolina Education Research Data Center at Duke University, which includes data on students, teachers, schools and districts in the state.

- Analyzed data from Education Policy Initiative at the University of North Carolina.

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[4] The study report titles are: (1) *Best Practices to Recruit and Retain Well-Prepared Teachers in All Classrooms* (Darling-Hammon et al., 2019); (2) *Developing and Supporting North Carolina's Teachers* (Minnici, Beatson, Berg-Jacobson, & Ennis, 2019); (3) *Educator Supply, Demand, and Quality in North Carolina: Current Status and Recommendations* (Darling-Hammond et al., 2019); (4) *How Teaching and Learning Conditions Affect Teacher Retention and School Performance in North Carolina* (Berry, Bastian, Darling-Hammond, & Kini, 2019); (5) *Retaining and Extending the Reach of Excellent Educators: Current Practices, Educator Perceptions, and Future Directions* (Smith & Hassel, 2019); (6) *Attracting, Preparing, Supporting, and Retaining Education Leaders in North Carolina* (Koehler, Peterson & Agnew, 2019); (7) *A Study of Cost Adequacy, Distribution, and Alignment of Funding for North Carolina's K-12 Public Education System* (Willis et al., 2019); (8) *Addressing Leandro: Supporting Student Learning by Mitigating Student Hunger* (Bowden & Davis, 2019); (9) *High-Quality Early Childhood Education in North Carolina: A Fundamental Step to Ensure a Sound Basic Education* (Agnew, Brooks, Browning, & Westervelt, 2019); (10) *Leandro Action Plan: Ensuring a Sound Basic Education for All North Carolina Students Success Factors Study* (Townsend, Mullennix, Tyrone, & Samberg, 2019); (11) *Providing an Equal Opportunity for a Sound Basic Education in North Carolina's High-Poverty Schools: Assessing Needs and Opportunities* (Oakes et al., 2019); (12) *North Carolina's Statewide Accountability System: How to Effectively Measure Progress Toward Meeting the Leandro Tenets* (Cardichon, Darling-Hammond, Espinoza, & Kostyo, 2019); and (13) *North Carolina's Statewide Assessment System: How Does the Statewide Assessment System Support Progress Toward Meeting the Leandro Tenets?* (Brunetti, Hemberg, Brandt, & McNeilly, 2019).

- Analyzed demographic, economic, social and other North Carolina data from the American Community Survey of the United States Census Bureau.
- Analyzed data regarding North Carolina principals obtained from surveys administered to all principals statewide in the fall of 2018.
- Analyzed data from the North Carolina Teacher Working Conditions Survey.
- Analyzed data on teacher effectiveness and experience from the National Center for Education Statistics.
- Analyzed the State's Every Student Succeeds (ESSA) Consolidated Plan.
- Conducted site visits across North Carolina.
- Conducted interviews and focus groups with teachers, principals, superintendents, other district and state professionals across North Carolina.
- Conducted interviews and focus groups with public-sector leaders, as well as interviews with and local school board members.
- Conducted interviews with several State Board of Education members and North Carolina Department of Public Instruction staff.
- Facilitated in-person professional judgment panels to collect data on the effective allocation of resources to meet student needs in North Carolina.
- Conducted a cost-function analysis using data housed at Duke University's NCERDC, National Center for Education Statistics, U.S. Bureau of Labor Statistics, U.S. Department of Housing and Urban Development, and the U.S. Census Bureau.
- Analyzed data from a variety of other sources, including: an independent operational assessment of NCDPI commissioned by the General Assembly; the North Carolina Plan to Ensure Equitable Access to Excellent Educators; Outcomes for Beginning Teachers in a University-Based Support Program in Low-Performing Schools; Race-to-the-Top Professional Development Evaluation Report; valuation reports on teacher and leader preparation programs and educational innovations; presentations made to the North Carolina Governor's Commission on Access to a Sound Basic Education; manuals and reports published by NCDPI; multi-year data from the NCDPI on district allotments, expenditures, student demographics, and school characteristics; and North Carolina education legislation.

Findings of Fact and Conclusions of Law: The Current State of *Leandro* Compliance

Based on a thorough review and consideration of WestEd's Report, of the evidence of record in this case, items for which the Court has properly taken judicial notice, and the consent of all Parties, this Court hereby makes the following findings of fact and conclusions of law regarding the current status of *Leandro* compliance and the challenges and barriers to the State Defendants achieving constitutional compliance.

A. North Carolina Has Substantial Assets To Draw Upon To Develop A Successful PreK-12 Education System That Meets The *Leandro* Tenets.

The State Defendants recognize there is a moral and constitutional imperative for North Carolina to fulfill the promise of its Constitution and provide a *Leandro*-compliant PreK-12 public education system that provides *every* child with the opportunity for a sound basic education.

Throughout the State's history, North Carolina leaders have recognized that a strong public education system serves both the economic and the social progress of the State. WestEd presented research studies supporting the wisdom of a commitment to and investment in public education. For each high school graduate, society gains a number of economic benefits, including higher tax revenue and lower government spending on health, crime, and welfare costs. For example, one cost analysis estimated that each new high school graduate yielded a public benefit of $209,000 in higher government revenues and lower spending, compared with an investment of $82,000 to help each student achieve graduation. According to this analysis, the net economic benefit is 2.5 times greater than the cost. [WestEd Report, p. 12 (citing Belfield & Levin, 2007)].

North Carolina has tremendous assets to draw upon in undertaking the systemic work of educating its school children, including a strong state economy, a deep and long-standing commitment to public education to support the social and economic welfare of its citizens, and an engaged business community that sees the value and economic benefits of the public education system. The State Defendants can leverage many of these assets and build on North Carolina's strong history of leadership for education to transform the public education system to ensure access to a sound basic education for all students. [WestEd Report, pp. 167-68].

Historically, the State and the State Board of Education have shown leadership in public education and made wise investments in strategies and initiatives. For example, during the 1980s and 1990s, North Carolina moved its education system forward in many ways. Advancements included establishing a new system of curriculum standards and assessments, strengthening the teaching profession, increasing funding for education, and implementing other initiatives that led to substantial increases in students' achievement. [WestEd Report, pp. 11-12].

During the 1990s, North Carolina posted the largest student achievement gains of any state in mathematics, and it realized substantial progress in reading, becoming the first southern state to score above the national average in fourth grade reading and math, although it had entered the decade near the bottom of the state rankings. [WestEd Report, pp. 12-13]. Of all states during the 1990s, it was also the most successful in narrowing the minority-White achievement gap. [*Id.* (citing National Education Goals Panel, 1999)]. As a result, North Carolina became widely recognized nationally as a leading state for educational innovation and effectiveness. [*Id.*]

In the early 2000s, North Carolina continued its efforts to improve educational outcomes after the *Leandro* rulings. [WestEd Report, pp. 14-15]. For example, the State launched a statewide expansion of its Pre-K program (More at Four) and reduced class sizes in grades K through 3. The State developed 125 Cooperative Innovative High Schools and numerous early college highs schools, which were designed to make college possible for young adults who otherwise have few opportunities to continue with higher education. During this time, the State expanded the services of the North Carolina Teacher Academy and increased North Carolina Teaching Fellows from 400 to 500 students annually. The State also revised standards for reading and math to better align with college and career readiness on multiple occasions and implemented new statewide systems of teacher and principal evaluations to align with improving student outcomes in the classroom. [WestEd Report, p. 17]. Further, during that time, the Department of Public Instruction developed its Division of District and School Transformation and provided significant support and assistance in 135 school and six districts, including support in the State Board's intervention in Halifax County Schools within the context of this case. [WestEd Report, p. 16].

During this time, North Carolina implemented statewide efforts in an attempt to support the public education system. Those efforts included deployment of the "Home Base" and PowerSchool technology platforms; creation of the North Carolina Virtual Public School ("NCVPS"); implementation of the Read to Achieve program; implementation of the Race to the Top grant programs; and the Whole Child framework; and supporting the North Carolina Teacher Working Conditions Survey.

More recently, the State Board approved a new Strategic Plan setting forth the agency's mission "to use its constitutional authority to guard and maintain the right to a sound, basic education for every child in North Carolina Public Schools." The Strategic Plan describes three overarching goals that the State Board has determined will be its focus for the period August 8, 2019 through September 30, 2025. Those goals are: (1) eliminating opportunity gaps by 2025; (2) improving school and district performance by 2025; and (3) increasing educator preparedness to meet the needs of every student. For each of those goals, the State Board has developed strategies and initiatives to achieve success.

Although education improvement efforts have continued, resources committed to education decreased during the Great Recession and some valuable programs were discontinued. As a result, the challenges of providing every student with a sound basic education increased. Cutbacks that began during the recession after 2008, along with much deeper legislative cuts over the last few years, have eliminated or greatly reduced many of the programs that were put in place and have begun to undermine the quality and equity gains that were previously made. Declines in achievement have occurred since 2013 in mathematics and reading on the National Assessment of Educational Progress (NAEP), and achievement gaps have widened. [WestEd Report, pp. 12-14, 22-29].

As the WestEd Report discusses, other promising initiatives, along with many other statewide, regional, district, community, and school efforts, were put in place. Many of these efforts, however, were neither sustained nor scaled up to make a sustained impact. Accordingly, these efforts were insufficient to adequately address the *Leandro* requirements. [WestEd Report,

p. 17]. The Defendants have not yet met their constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education.

B. Despite Numerous Initiatives, Many Children Are Not Receiving A *Leandro*-Conforming Education; Systemic Changes And Investments Are Required To Deliver the Constitutional Right To All Children.

As the WestEd Report and the record in this case demonstrate, the State Defendants have implemented numerous ambitious programs and initiatives over the last 20 years, but the *Leandro* mandate remains unmet. Many of these programs, however, have not endured or have not been expanded statewide as needs dictated. The Court finds and concludes that North Carolina faces greater challenges than ever in meeting its constitutional obligations, many children across North Carolina are still not receiving the constitutionally-required opportunity for a sound basic education, and systemic changes and investments are required for the State Defendants to deliver each of the *Leandro* tenets.

1. The State Defendants Face Greater Challenges Than Ever.

WestEd found, and the Parties do not dispute, that many children across North Carolina, especially at-risk and economically-disadvantaged students, are not now receiving a *Leandro*-conforming education.

The State faces greater challenges than ever in meeting its constitutional obligation to provide every student with the opportunity to obtain a sound basic education. [WestEd Report, p. 17].

In the last two decades, North Carolina's public school student population has grown by about 25% overall, and the number of children with higher needs, who require additional supports to meet high standards, has increased by 88% in the last 15 years. [WestEd Report, p. 20].

North Carolina has 807 high-poverty district schools and 36 high-poverty charter schools; this represents one third of all the State's districts and slightly more than 20% of the State's charter schools.[5] [WestEd Report, p. 246]. More than 400,000 students—over a quarter of the students in North Carolina—attend a high-poverty school. [*Id.* at 245]. This is significant because, among other things:

- HPSs serve a disproportionate number of students with other academic risk factors, including students who have parents with low education levels, who have limited proficiency in English, who are members of a racial or ethnic minority group, and who have families headed by a single parent. [WestEd Report, pp. 96-97, 246].

- There is a strong negative relationship between at-risk students attending HPSs and the attainment of a sound basic education. [WestEd Report, p. 97, 247-48]. This is in large

[5] High-poverty schools ("HPS") are schools in which 75% or more of the students are eligible for federally subsidized free or reduced-cost school meals because of their families' low income.

part due to less access to qualified teachers, qualified principals, and sufficient educational resources. [WestEd Report, pp. 98-100; 248-52].

- Students of color comprise 77% of students attending district HPSs and 93% of those attending charter HPSs – far greater percentages than their 52% representation statewide. White students – 49% of the student population statewide – comprise only 23% of students in district HPSs and 7% in charter HPSs. The communities in which HPSs and low-poverty schools ("LPSs") are located display racial patterns with nearly all LPSs in majority-White communities and with HPSs in majority-minority communities at twice the rate one would expect given residential patterns. [WestEd Report, p. 246].

- Students' opportunity for a sound basic education is limited in high-poverty schools by a lack of supports and services to help mitigate barriers to learning associated with adverse out-of-school conditions in communities of concentrated poverty. [WestEd Report, pp. 252-54].

The number of economically-disadvantaged students (those eligible for free or reduced-price lunch programs) in public schools has grown from 470,316 in 2000–01 to 885,934 in 2015–16, an 88% increase over 15 years. [WestEd Report, p. 20]. In fact, more than 475,000 children in North Carolina, or 21% of all the state's children, are in families below the federal poverty level (*i.e.*, $24,600 for a family of four). About one third of those families are at the deep poverty level, with family incomes of less than half of the poverty level. Child poverty is most concentrated in the counties in the northeast, north central, and Sandhills regions of the state. [WestEd Report, p. 96]. However, even in higher wealth counties, low-wealth students are concentrated in high poverty schools, and recommendations to address the challenges these students face must focus on high poverty schools, not only high poverty school districts. [WestEd Report pp. 103-106]. In 2016-17, approximately 60% of North Carolina's public school students were eligible for free or reduced-price lunch. [WestEd Report, p. 96].

The proportion of economically-disadvantaged students is especially high in many of the economically-distressed rural districts. [WestEd Report, p. 20]. Over half of the high poverty schools in the state are in rural communities; the next highest concentration, nearly a third, are in urban communities. [WestEd Report p. 96]

Large achievement gaps between subgroups of students continue unabated, with, on average, the achievement of black, Hispanic, and Native American students lagging far behind that of white and Asian students and the achievement of economically-disadvantaged students lagging far behind that of their more advantaged peers. [WestEd Report, pp. 21-31].

The proficiency gap between black and white students was 29.9% in 2013, the first year the current standards were implemented, and was at 30.2% in 2018. The proficiency gap between Hispanic and white students has also increased (rather than decreased) during this period, from 22.8% in 2013 to 24.6% in 2018. [WestEd Report, p. 23].

Presently, only 32% of EDS students meet college-and-career-readiness benchmarks on North Carolina's end-of-course tests, compared to 61% of non-EDS students. Similarly, only 39%

of EDS students meet the UNC system's minimal standard on the ACT college-readiness exam, compared to 69% of non-EDS students. [WestEd Report, pp. 27-28].

In addition, the number of students who are English learners more than doubled over 15 years, increasing from 44,165 (3% of all students) in 2000 to 102,090 (7% of all students) in 2015 [WestEd Report, p. 20 (National Center for Education Statistics, 2017)]. The increased diversity of the student population and the increased number of English learners drive the need to invest further in developing an educator workforce that is racially and ethnically diverse and employs culturally responsive teaching approaches in order to successfully educate all of the state's students. [WestEd Report, pp. 20, 64, 141, 203].

State funding for education has not kept pace with the growth and needs of the preK-12 student body. The State does not currently provide adequate resources to ensure that all students have the opportunity to obtain a sound basic education, as well as to meet higher standards and become college-and-career ready. [WestEd Report, p. 21]. There is inadequate funding to meet student needs, especially among economically-disadvantaged students and students in high-poverty schools. [WestEd Report, p. 41].

As of fiscal year (FY) 2016, the most recent year for which national rankings are available, North Carolina's per-pupil spending was the sixth lowest in the nation [WestEd Report, p. 21 (U.S. Census Bureau, 2018)]. When adjusted to 2018 dollars, per-pupil spending in North Carolina has *declined* by about 6% since 2009–10. [WestEd Report, p. 21].

The result confirmed by WestEd for each *Leandro* tenet (discussed below)– across multiple data sets and after extensive research and analysis – is that the State of North Carolina and the State Board of Education are not providing and administering a *Leandro*-compliant PreK-12 public education system.[6]

In sum, the State and the State Board of Education have yet to achieve the promise of our Constitution and provide all with the opportunity for a sound basic education. For the State and State Board of Education to make necessary progress in the provision of the *Leandro* right, the Parties agree that three significant areas require immediate attention:

(1) the initiatives and infrastructure for PreK-12 education supplied by the Defendants must be bolstered in order to address the expanding educational needs of a growing, increasingly diverse North Carolina student body;

(2) important additional state-level investments in education are needed to assure students' constitutional rights; and

[6] Herein, the Court has not articulated every finding or conclusion that could be made based upon the data and reporting provided by WestEd. As a general matter, the Court takes full notice of the WestEd Report, including its satellite studies and accepts the data presented as true and correct. The Parties have consented to the entry of this Order and stipulate to the findings and conclusions expressly set forth herein. With regard to matters addressed in the WestEd Report not expressly set forth herein, the Parties have reserved the right to challenge those as needed, in future proceedings and/or in connection with the submission of subsequent filings that will follow in this matter.

(3) the implementation of a comprehensive, definite plan – supported by coordinated governance systems – that addresses the critical needs that must be met in order to serve every North Carolina student and, in particular, economically-disadvantaged and minority students.

2. Systemic, Synchronous Action And Investments Are Necessary to Successfully Deliver the *Leandro* Tenets

Systemic, sustained approaches deployed by the State and the State Board of Education to increase the capacity of North Carolina's Pre-K–12 public education system are necessary to ensure every child receives the opportunity for a sound basic education. Across numerous areas, the present (sometimes piecemeal) approaches utilized by the State are insufficient to address the critical needs of all students and growing challenges across North Carolina. The WestEd Report and the record evidence in this case illuminate North Carolina's systemic deficiencies and identify critical needs across a number of interrelated areas. These are addressed below in turn.

Teacher Quality and Supply

North Carolina can never succeed in providing the opportunity for a sound basic education to all children without vastly improved systems and approaches for recruiting, preparing, supporting, developing, and retaining teachers. A framework for placing and retaining highly-effective teachers where they are most needed to foster the academic growth of at-risk students must be created and sustained. The current teacher shortages and high turnover — particularly in high-poverty schools and districts — are a function of uneven preparation and mentoring, inadequate compensation, and poor working conditions. [WestEd Report, p. 62].

North Carolina has invested in building a strong core of teacher-leaders, piloted models to leverage teacher leadership, and launched innovative programs for preparing teachers and principals. [WestEd Report p. 168]. However, North Carolina has gone from having a highly-qualified teacher force as recently as a decade ago to having one that is uneven in terms of the number of candidates, the quality of teacher preparation (particularly in high-poverty schools and districts), the extent to which teachers have met standards before they enter teaching, and teachers' growth and development once they enter the classroom. [WestEd Report, p. 53].

Social and economic changes are impacting the education workforce, leading both to fewer young people choosing teaching as a profession and to fewer of those who do enter teaching remaining in the profession past the first few years. For example, enrollment in traditional teacher education programs declined by more than 50% between 2008–09 and 2015–16. Likewise, the number of teacher credentials issued between 2011 and 2016 declined by 30%. [WestEd Report, pp. 17-18].

The North Carolina teacher supply is shrinking, and teacher shortages are widespread. [WestEd Report, p. 53].

The total number of teachers employed in North Carolina has decreased by 5% from 2009 to 2018, even as student enrollments have increased. [WestEd Report, pp. 18, 53]. The annual teacher attrition rate in North Carolina is 8.1%, which is higher than the national average. [WestEd Report, p. 47].

Salaries and working conditions influence both retention and school effectiveness of teachers. Even after years of increases in teacher salaries, North Carolina lags behind numerous other states in average pay and is not paying salaries at a competitive level. [WestEd Report, pp. 56-57].

Multivariate statistical analyses of the predictors of teacher retention show that the size of the teacher salary supplement (*i.e.*, additional funds provided by some local education agencies to account for variances such as geographic location, market conditions, and school demographics) is a significant predictor of retention. Low-wealth districts have limited, if any, means to offer significant salary supplements to retain effective teachers. [WestEd Report, p. 58].

The proportion of teachers in North Carolina who are not fully licensed has doubled since 2011, from 4% to 8%, and in high-poverty schools, as many as 20% of teachers are unlicensed. [WestEd Report, pp. 54, 98]. WestEd found that attrition, vacancies, and the hiring of unqualified teachers are significantly higher in high-poverty communities. [WestEd Report, p. 54].

Enrollment in traditional teacher education programs declined by more than 50% between 2008-09 and 2015-16. [WestEd Report, pp. 17-18].

The source of teacher supply has dramatically shifted in recent years, with 25% of candidates now entering through alternative routes (*i.e.*, lateral entry) without pre-service preparation. Presently, only about 35% of the state's teachers are entering through North Carolina colleges and universities—a share that was as high as 60% in 2001 and 50% in 2010. Changes in the sources of teacher supply are important because researchers have found that teachers prepared at North Carolina schools of education are generally significantly more effective than those prepared out of state and they stay in North Carolina schools at much higher rates than their peers who enter teaching through other pathways. [WestEd Report, p. 54].

Professional development programs enhance the professional skills of educators, including the New Teacher Support Program for teachers during their first three years in the profession; the many programs for experienced teachers provided by the North Carolina Center for the Advancement of Teaching, the Distinguished Leadership Practice, and the Future-Ready Leadership programs for current and future principals provided by North Carolina Principals and Assistant Principals' Association ("NCPAPA"); and other statewide, regional, and district programs. However, existing professional development programs operate on a small scale.[7] The New Teacher Support Program, for example, supports fewer than 10% of beginning teachers, a much smaller proportion than the statewide mentoring program that reached all beginning teachers in the 1990s. [WestEd Report, pp. 15, 66]. Likewise, the effective Teaching Fellows program, which recruits and prepares talented individuals to teach in content areas and in geographic parts

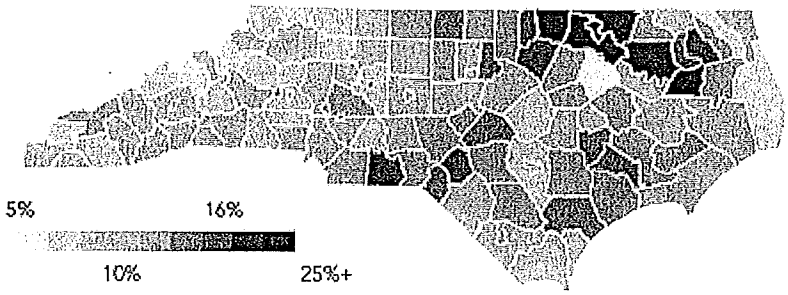
[7] NCPAPA, not the NCDPI, has developed and delivers many of these professional learning opportunities. Since Race to the Top (RttT), North Carolina has not taken a leadership role in providing professional development to school administrators as the NCPAPA has. Researchers suggest that North Carolina would be wise to study its current priorities and better allocate resources, information, and models to give principals more access to high-quality professional development. [WestEd sub-report, *Attracting, preparing, supporting and retaining educational leaders in North Carolina* (Koehler, P., & Peterson, M. (2019)), pp. 15-16].

of the state in which there are shortages of qualified teachers, is operational again, but not as large as it once was. [WestEd Report, p. 56].

Access to effective, diverse, and experienced teachers is critical for students' academic success and well-being, especially for economically-disadvantaged students and students of color. [WestEd Report, pp. 59-60]

Recruiting and retaining qualified teachers in high-poverty schools is a significant challenge, with some of the rural districts losing more than 20% of their teachers in a single year.

Exhibit 5. Teacher turnover in K–12 traditional public schools, by district (2016–17)



13.5% State Average Teacher Turnover in 2016–17

Source: North Carolina Department of Public Instruction (2018c)

[WestEd Report, pp. 17-18, Exh. 5].

Teachers of color are an important resource, as recent research — much of it conducted in North Carolina — has found a positive impact of having a same-race teacher on the long-term education achievement and attainment of students of color, particularly for African American students [WestEd Report, p. 59 (*e.g.*, Dee, 2004; Gershenson, Hart, Lindsay, & Papageorge, 2017)]. North Carolina's current teacher workforce, however, has only about 20% teachers of color, although more than half of the state's students are students of color. [WestEd Report, p. 59]. Between 2011 and 2016, teacher education enrollments in minority-serving institutions, including historically black colleges and universities, declined by more than 60%. [WestEd Report, pp. 51-52].

There is an inequitable distribution of qualified teachers in North Carolina public schools. High-poverty schools have far more beginning teachers and far more lateral-entry teachers. [WestEd Report, pp. 18-19 (Exhibits 6-7)]. Teachers who are insufficiently prepared are more likely to leave teaching, and more of these teachers are hired into high-poverty schools, which most need a stable, experienced workforce. [WestEd Report, pp. 17-18]. This inequitable distribution negatively impacts students in high-poverty schools. [WestEd Report, p. 18]. High-poverty schools have nearly double the one-year teacher turnover rates of low-poverty schools [WestEd Report, p. 99]. The proportion of teachers in North Carolina who are not fully licensed has doubled since 2011, from 4% to 8%, and in high-poverty schools, as many as 20% of teachers are unlicensed. [WestEd Report, p. 47].

Access to, and the quality of, professional learning opportunities vary across schools and districts, and state-level efforts to support teacher growth and development are inadequate and inequitable. The once-extensive infrastructure and funding for professional learning in North Carolina has been greatly reduced. There has been a significant decrease in funding and support for professional learning for teachers over the last decade. This has resulted in a reduced capacity to provide adequate professional development for teachers in recent years, especially in low-wealth districts. Low-wealth districts especially have few resources to find substitute teachers so that teachers can attend any professional development sessions that are provided, and they have limited money to pay for teachers' time outside of school hours or for travel to conferences. [WestEd Report, p. 60].

The North Carolina educator workforce is highly committed and working diligently every day to meet the needs of at-risk children, even contributing their own resources whenever they can to fill needs. [WestEd Report, p. 168] Unfortunately, their effort and commitment is not enough to address the issue. In order to improve the quality of the teaching workforce, North Carolina must implement wide-scale infrastructure for professional learning at the State, district, and school levels. [WestEd Report, pp. 68-69].

Principal Quality and Supply

School leadership is the second most important factor influencing student learning, after teacher effectiveness. [WestEd Report, p. 70 (Leithwood, Seashore Louis, Anderson, & Wahlstrom, 2004)]. Since effective principals are critical for recruiting and retaining excellent teachers and ensuring they have supportive working conditions and opportunities for professional growth, the importance of the principal to students' success goes well beyond what is found in the statistical analyses. [WestEd Report, p. 70].

In 2018–19, North Carolina had 2,389 state-funded principal positions, 1,987 assistant principal positions, and 226 charter school principals, for a total of 4,602 school administrators [WestEd Report, p. 70 (North Carolina Department of Public Instruction, 2019a)].

While North Carolina has developed effective programs to recruit and retain effective principals, these programs are far too limited in scale. Consequently, many districts, especially low-wealth districts, lack meaningful resources to recruit and retain qualified and well-trained principals. [WestEd Report, pp. 72, 78].

There has been a significant reduction in the numbers of candidates entering principal preparation programs over the past decade; many schools are led by inexperienced principals with fewer than three years of experience; and the current principal compensation structure may be a disincentive to becoming a principal, particularly for becoming a principal in a low-performing school. In addition, changes to the context within which schools operate (*e.g.*, advances in technology, changes in the conditions and characteristics of children, and higher levels of accountability for student achievement) have increased demands on what principals need to know and be able to do. [WestEd Report, p. 72].

While North Carolina has adopted appropriate standards for principals (North Carolina Standards for School Executives) and evaluation procedures that reflect those standards, models

of high-quality pre-service training in the Northeast Leadership Academy ("NELA") and Transforming Principal Preparation ("TPP") programs, these programs need to be scaled to reach aspiring principals in *all* regions and schools of the State, especially those in high-poverty areas. [WestEd Report, pp. 78-80].

In North Carolina, principals of high-poverty schools, on average, do not have the longevity in their schools necessary to make sustainable changes. A survey of the state's principals conducted by WestEd showed that 64% of respondents who are principals in high-poverty schools have been the principal in their current school for three or fewer years and only 5% have been in place for 11 or more years. Data from 2016 and 2017 show that about 30% of principals in the highest-poverty schools left their school each year, as compared with about 17% in other schools, resulting in many high-need schools having a new principal each year. [WestEd Report, pp. 70-71]

For principals to become more effective and grow in their profession, they need ongoing professional learning opportunities. Even the most effective administrator preparation programs cannot prepare principals for all the necessary knowledge typically obtained over time at different schools throughout their careers. [WestEd Report, p. 79 (Matlach, 2015)]. Ensuring that principals have access to job-embedded, ongoing, and customized professional development and coaching can increase their competence and improve retention. [WestEd Report, p. 79 (Goldring & Taie, 2014)].

The need for effective leaders is especially important in persistently low-performing schools and high-poverty schools. Compared with other schools, these schools tend to have less-prepared and less-experienced teachers, much higher teacher turnover rates, students with additional needs, and fewer resources while also being faced with pressure to show increased student growth and proficiency each year. Research indicates that only with strong, talented leadership are these schools able to make the fundamental shifts in practice needed to increase positive outcomes for all students. [WestEd Report, p. 70 (Grissom, 2011)].

Resources and School Funding

North Carolina does not presently provide adequate resources and funding to ensure that all students, especially those at-risk, have the opportunity to receive a sound basic education. [WestEd Report, p. 41]. There is inadequate funding to meet student needs, especially among economically-disadvantaged students and students in high-poverty schools. [WestEd Report, pp. 35-49].

Educating today's students to meet high standards and to be successful in this century requires new investments in, among other things, infrastructure, instructional tools, technology, and the educator workforce. [WestEd Report, p. 20].

In the last two decades, North Carolina's public school student population has grown by approximately 25% overall, and the number of children with higher needs, who require additional supports to meet high standards, has increased significantly. [WestEd Report, p. 20].

The number of economically-disadvantaged students (those eligible for free or reduced-price lunch programs) in public schools has grown from 470,316 in 2000–01 to 885,934 in 2015–

16, an 88% increase over 15 years. [WestEd Report, p. 20]. The increase of economically-disadvantaged students by more than 400,000 is the result of the overall growth in the student population, combined with the significant increase in the proportion of students who are economically disadvantaged, from 39% in 2000–01 to 57% in 2015–16. [WestEd Report, p. 20 (National Center for Education Statistics, 2018)].

The proportion of economically disadvantaged students is especially high in many of the economically-distressed rural districts, followed by urban districts. The high per-pupil costs associated with serving high concentrations of economically disadvantaged students affects a substantial proportion of North Carolina schools; approximately 31% of schools in the State are serving student populations in which more than 90% of students are economically disadvantaged. [WestEd Report, p. 36].

State funding for education has not kept pace with this growth, and the State does not currently provide adequate resources to ensure that all students have the opportunity to obtain a sound basic education. As of fiscal year (FY) 2017, the most recent year for which national rankings are available, North Carolina's per-pupil spending was the sixth lowest in the nation (U.S. Census Bureau, 2019). When adjusted to 2018 dollars, per-pupil spending in North Carolina has declined about 6% since 2009–10. [WestEd Report, pp. 21, 35].

Compared with the nationwide average and with neighboring states, North Carolina's public education system receives a significantly higher proportion of its funding from state-level appropriations. [WestEd Report, p. 34 (Ex. 22)]. Consequently, the State plays the most critical role in determining the level and distribution of funding for K–12 education, and the State must implement the funding structures that attend to adequacy, equity, and alignment.

Exhibit 22 (WestEd Report): Public Education Funding by Source, FY 2016

	Federal	State	Local
North Carolina	12%	62%	26%
South Carolina	10%	48%	43%
Tennessee	12%	46%	42%
Georgia	10%	46%	45%
U.S. Average	8%	47%	45%

[WestEd Report, p. 34].

In North Carolina, the need – and opportunity – to address inequity is particularly significant because the State has an above-average proportion of high-need students. As of fiscal year (FY) 2017, the most recent year for which national data are available, 53.1% of North Carolina's enrolled K–12 students were eligible for free lunch, which is a federal definition for the most economically-disadvantaged student population. Compared with other states with reportable data, North Carolina has the ninth-highest proportion of this student population in the country. [WestEd Study, *"A Study of Cost Adequacy, Distribution, and Alignment of Funding for North Carolina K-12 Public Education System"* (Willis, J., Krausen, K., Berg-Jacobson, A., Taylor, L., Caparas, R., Lewis, R., & Jaquet, K. (2019) ("WestEd Cost Study")), p. 5]. Moreover, these students are frequently, though not always, concentrated in communities with less ability to

provide local supplemental funding. [WestEd Cost Study (citing Public School Forum of North Carolina, 2018)]. Even in better resourced and urban districts these students are also concentrated in high poverty schools, and face the same challenges.

Higher levels of funding are required to meet the needs of at-risk student populations, including English learners, economically-disadvantaged students, and exceptional children. Many school districts, including many rural districts, lack the funding necessary to meet the educational needs of historically underserved student populations and economically-disadvantaged students. [WestEd Report, pp. 35-49].

Lack of spending flexibility at the district level is an obstacle to aligning funding with student needs. Restrictions on the allowable uses of allotments, including new restrictions around the Classroom Teacher allotment, hamper districts' ability to align funding to student needs. When funds are restricted to a particular use and cannot be transferred, it restricts district leaders' ability to make decisions about how to allocate resources to make the greatest impact on student outcomes given their local circumstances. [WestEd Report, pp. 40, 187].

For example, recent legislated restrictions on the transfer of funds from the Classroom Teacher allotment presented a particularly significant challenge, reducing districts' funding flexibility, creating inequities, and reducing some districts' overall funding. Prior to the 2012–13 school year, districts could transfer Classroom Teacher allotment funds to another area at the statewide average teacher salary level. Now, districts can only transfer these funds at a starting teacher salary level, rather than the average salary level. [WestEd Report, p. 40].

Over the past two decades the number of students enrolled in charter schools in North Carolina has increased, similar to the rate of growth in charter enrollment nationally. [WestEd Cost Study, p. 8 (citing National Center for Education Statistics, 2018)]. When a student exits a traditional public school district to enroll in a charter school, the per-pupil funding follows the student, which district financial officers identify as an administrative burden that obstructs districts' budget forecasting and planning processes. The proportion of North Carolina public school students attending charter schools has risen from 0.3% in FY 1998 to 6.6% in FY 2018.[8] [WestEd Cost Study, p. 8].

[8] Data indicate that the growth of charter school enrollment impacts where and how the State's public schools serve high-need students. WestEd found that in 2016–17, 807 (33%) of the state's traditional public schools and 36 (21%) of the state's charter schools qualified as high-poverty schools, with 389,204 (26%) of traditional public school students and 15,301 (17%) of charter school students attending these schools. Using the same data, WestEd also found that only 162 (7%) of traditional public schools in North Carolina were low-poverty schools — defined as having less than 25% of their students being economically disadvantaged — with 10% (147,901) of the state's traditional public school students attending these schools. Thus, a much higher percentage of charter schools, 46% (77 schools), qualify as low poverty, with 55% (51,073) of charter school students attending these schools. [WestEd Report, p. 96]. Recent data from the Department of Public Instruction indicate that high-need students (i.e., students receiving free and reduced price lunch, English language learners, and students with disabilities) are less-concentrated in North Carolina charter schools than in traditional public schools:

Charter schools are exempt from the state's allotment system requirements and are afforded a great deal of financial and educational flexibility. For example, each charter school receives a single allotment of flexible funds, is not required to use statewide salary schedules to determine staff compensation, and is not subject to the class size maximums for grades K–3 [WestEd Cost Study, p. 8].

Assessment and Accountability System

North Carolina continues to revise its core curriculum standards and assessments several times. The State updated the mathematics standards prior to the 2005–06 school year and the English language arts standards prior to 2007–08 and then updated both again for 2013–14. Each of these updates aimed to make the standards more rigorous, to reflect what is required to prepare students for success in the increasingly technological and complex society, and to make North Carolina's standards more comparable with those of other states and countries whose students perform well on national and international assessments. As a result, the bar for meeting proficiency has been raised in ways that are necessary and appropriate, but that also increase the challenges for schools in preparing students to achieve proficiency. [WestEd Report, p. 17].

While the State has adopted more rigorous standards, there has not been adequate State investment in, and leadership for, implementing the standards and providing the professional learning, instructional materials, and other supports needed to change practice in schools and classrooms. [WestEd Report, p. 17].

Charter School Student Demographics
2017-2018 School Year

	Charter Schools		Traditional Public Schools		All	
Race/Ethnicity	Students		Students		Students	
Total White	55,401	54.9%	686,652	47.9%	742,053	48.4%
Total Black	26,349	26.1%	361,746	25.2%	388,095	25.3%
Total Hispanic	10,040	9.9%	256,848	17.9%	266,888	17.4%
Other	9,196	9.1%	128,000	8.9%	137,196	8.9%
Male	50,443	50.0%	736,972	51.4%	787,415	51.3%
Female	50,543	50.0%	696,274	48.6%	746,817	48.7%
Total Enrollment	100,986	100.0%	1,433,246	100.0%	1,534,232	100.0%

	Charter		LEA		Charter + LEA	
Special Populations	Students		Students		Students	Percent
FRPL	28,199	33.2%	841,089	59.4%	869,288	57.3%
ELL	3,607	3.6%	112,575	7.9%	116,182	7.6%
SWD	10,154	10.3%	173,102	12.2%	183,256	12.0%

*FRPL: Free and Reduced-Price Lunch
*ELL: English Language Learners
*SWD: Students with Disabilities

Charter Schools Annual Report to the North Carolina General Assembly, at 4 (February 15, 2019), https://legislative.ncpublicschools.gov/legislative-reports/charterschoolsannualreport2019.pdf/view; *see also* WestEd Report, p. 96.

The student achievement goals in North Carolina's approved plan under the federal Every Student Succeeds Act provide further reason for concern. As shown in Exhibit 21 to WestEd's report, this plan sets goals for the year 2027 in reading and math for grade 3–8 students and for high school students on the state's EOG and EOC tests. Even if these goals are met, which would require an ambitious average annual increase of 2% to 3% in the number of students proficient in each area, more than one third of grade 3–8 students and more than one fourth of high school students would remain below proficient in reading, and more than one fourth of students from grade 3 through high school would remain below proficient in mathematics. That is, even if the ESSA plan's goals for 2027 are all met, North Carolina would continue to leave far too many students behind and would still be far from achieving success for every student. [WestEd Report, pp. 30-31].

The State's accountability system presently does not address all measures necessary to measure Defendants' progress toward providing all students with access to a sound basic education, even though North Carolina currently collects data that could be used for that purpose. [WestEd Report, pp. 119-23]. The State has developed high-quality data systems to track the progress of students; measure the effectiveness of teachers, schools, and districts; assess staffing and working conditions within schools; analyze the impact of programs and legislation; and identify needs that must be addressed. The data systems must be better updated and utilized to track indicators pertaining to the extent to which the state is meeting its requirement to provide every student with the opportunity to obtain a sound basic education. [WestEd Report, p. 16].

As presently configured, North Carolina's data system does not produce consolidated reports that would inform the evaluation and continuous improvement of educational programs. Revisions to the accountability systems are necessary to provide more robust information to educators, parents, policymakers, and others about the educational effectiveness of each school and about the learning and progress of individual children and of subgroups of children. [WestEd Report, p. 32]. Similarly, data presently available is not fully utilized to inform instructions in districts and in classrooms. NCDPI should provide stronger guidance and resources to LEAs on the use of data from the NC Check-Ins, end-of-year assessments, and the Education Value-Added Assessment System (EVAAS) to inform student and school improvement and close educational opportunity and achievement gaps. [WestEd Report, p. 111].

Low-Performing and High-Poverty Schools

High-poverty schools are those in which at least 75% of the students are economically disadvantaged. North Carolina has 807 high-poverty traditional public schools (33% of public schools) and 36 high-poverty charter schools (21% of charter schools), located in urban, rural, and suburban communities and in every region in the state. These schools serve higher proportions than other schools of students with additional risk factors, including students of color, students who have disabilities, and English learners. [WestEd Report, p. 128].

In 2016–17, 807 (33%) of the state's traditional public schools and 36 (21%) of the state's charter schools qualified as high-poverty schools, with 389,204 (26%) of traditional public school students and 15,301 (17%) of charter school students attending these schools. [WestEd Report, p. 96].

In contrast, only 162 (7%) of traditional public schools in North Carolina were low-poverty schools — defined as having less than 25% of their students being economically disadvantaged — with 10% (147,901) of the state's traditional public school students attending these schools. A much higher percentage of charter schools, 46% (77 schools), qualify as low poverty, with 55% (51,073) of charter school students attending these schools. [WestEd Report, p. 96].

The highest poverty rates are among African American, Hispanic, and American Indian families, and larger percentages of students of color attend high-poverty schools. Across all traditional public schools, enrollment is 52% students of color; in high-poverty schools, enrollment is 77% students of color. In charter schools overall, enrollment is 44% students of color; in high-poverty charter schools, enrollment is 93% students of color. A total of 567 (70%) of the state's high-poverty traditional public schools enroll 75% or more students of color; 694 (86%) enroll at least 50% students of color. [WestEd Report, p. 97].

Data shows that students attending HPSs in North Carolina are far less likely to receive a sound basic education. These schools serve disproportionate numbers of students with other academic risk factors, including students who have parents with low education levels, who have limited proficiency in English, who are members of a racial or ethnic minority group, and who have families headed by a single parent. [WestEd Report, p. 97].

Students in high-poverty schools have significantly less access to career and technical education courses, participation in online virtual learning, and participation in sports, music, theater, academic competitions, community service, business internships, and other activities. [WestEd Report, pp. 100-01].

North Carolina's high-poverty schools have fewer fully licensed teachers, fewer teachers with advanced degrees, and fewer teachers with National Board of Professional Teaching Standards certification. High-poverty schools have more lateral-entry teachers and more early-career teachers (teachers without certification and with fewer than three years of experience, respectively), who have been shown, on average, to be less effective in improving student achievement than teachers with more preparation and experience. These schools also have much higher rates of teacher and principal turnover than other schools, and the constant influx of new teachers contributes to the challenges of improving these schools. In addition, the principals in high-poverty schools tend to be less-experienced school leaders, and the principal turnover rate is higher than that of other schools. [WestEd Report, p. 130].

Policies related to charter schools and opportunity scholarships contribute to the effects of cumulative disadvantage in high-poverty schools because these policies attract more-advantaged students and fewer students with disabilities to charter schools than those left behind. [WestEd Report, p. 254 (North Carolina Department of Public Instruction, 2018)]. Students enrolling in charters take with them the average cost per student in the district where the charter is located, but the loss of a student to a charter does not diminish districts' and schools' fixed costs, such as costs related to buildings and transportation. In effect, charter schools can reduce the amount of funds available to HPSs through a loss of per-pupil allocations and district expenses for their operations.

Early Childhood Learning and PreK

Judge Manning noted in his October 25, 2000 Order that ". . . the most common sense and practical approach to the problem of providing at-risk children with an equal opportunity to obtain a sound basic education is for them to begin their opportunity to receive that education earlier than age (5) five so that those children can reach the end of third grade able to read, do math, or achieve academic performance at or above grade level ..." *Hoke Cty. Bd. Educ. v. State*, No. 95 CVS 1158 (Oct. 25, 2000). Too many children in North Carolina are not reaching the end of third grade able to read or do math at grade level and there are vast differences in outcomes between racial and socioeconomic groups. A robust early learning continuum from birth through third grade supports the academic, social-emotional, and physical development essential to the State's obligation to provide a sound basic education.

Recent efforts by the State Defendants are encouraging. In 2017, the North Carolina General Assembly affirmed the importance of this early learning continuum by establishing a B-3 Interagency Council that "... shall have as its charge establishing a vision and accountability for a birth through grade three system of early education ...." [Session Law 2017-57, N.C. Gen. Statute § 116C-64.25]. In August 2018, Governor Cooper, through Executive Order 49, directed the Department of Health and Human Services and the Early Childhood Advisory Council to develop an Early Childhood Action Plan. The plan, released in February 2019, provides goals, measures, and strategies to improve outcomes for children from birth through third grade.[9] In March 2019, the State Board endorsed the Early Childhood Action Plan.

The Early Childhood Action Plan includes many components, including goals that by 2025, all North Carolina young children from birth to age eight will be:

1. Healthy: Children are healthy at birth and thrive in environments that support their optimal health and well-being.

2. Safe and Nurtured: Children grow confident, resilient, and independent in safe, stable, and nurturing families, schools, and communities.

3. Learning and Ready to Succeed: Children experience the conditions they need to build strong brain architecture and skills that support their success in school and life.

NC Early Childhood Action Plan, p.10.

Moreover, a high-quality early foundation for learning is critical for later success in school and beyond and can significantly improve life outcomes for children from low-income families. [WestEd Report, p. 87]. Early childhood programs, including Head Start, Smart Start, NC Pre-K, childcare programs and subsidies for low-income families, and services for preschool children who have disabilities, support families in preparing young at-risk children to be ready to begin formal schooling successfully when they enter kindergarten. [WestEd Report, p. 15].

All the record evidence supports the conclusion that high-quality preschool can improve child health in three ways:

[9] North Carolina Early Childhood Action Plan, available at https://files.nc.gov/ncdhhs/ECAP-Report-FINAL-WEB-f.pdf.

1. High-quality preschool can directly improve children's physical and mental health through the establishment of such positive habits as eating heart-healthy foods, having balanced diets, and exercising through active play.

2. High-quality preschool has positive effects on parents, including on their mental health, their parenting skills, and their health knowledge.

3. High-quality preschool can significantly improve children's socio-emotional skills and cognitive skills in the short term, particularly for low-income and dual-language children, which can lead to improved health as adults.

[WestEd Report, pp. 236-37 (summarizing studies and data)].

Not only does high-quality preschool improve child health, it results in long-term financial benefits. [WestEd Report, p. 237]. The research studies that follow children through adolescence demonstrate that preschool participation can positively impact grade retention and special education placement, which not only benefit children, but also can produce cost savings for schools. [*Id.* at 237]. In addition, skill development at an early age is critical. [*Id.*, citing Heckman, Pinto, & Savelyev, 2013]. Children who enter school without the skills learned in early education settings get tracked into lower-quality classes and skills and may receive fewer learning resources, contributing to their falling further behind. [*Id.*, citing Belfield, 2019].

Further, preschool participation generates cost savings for society as a whole due to increased graduation rates and educational attainment. [WestEd Report, p. 237 (Meloy, Gardner, & Darling-Hammond, 2019)]. Economic studies conducted over the past 12 years find that the economic benefits of investing in early childhood education are at least double the economic costs. [*Id.*, citing Barnett & Masse, 2007; Karoly, 2016]. Results from these studies have shown specifically that providing early childhood education for disadvantaged students has even higher economic returns than doing so for the general population. [WestEd Report, p. 237].

High-quality pre-kindergarten programs have a sustainable positive impact on learning and can close the learning gaps among young children from economically advantaged and disadvantaged backgrounds.

The NC Early Action Plan echoes elements of Judge Manning's October 2000 Order and seeks to address many of the challenges WestEd identified in its research regarding early learning and PreK. By adopting the Early Childhood Action Plan, the State and the State Board of Education have acknowledged and admitted the centrality of services for children from birth through age eight for the provision of the *Leandro* mandate and the opportunity for a sound basic education as children progress through the state's public education system.

Indeed, the State Defendants have explicitly recognized that:

> The first years of a child's life are a critical period. During this time, children undergo tremendous brain growth that impacts multiple areas of cognitive, physical, social, emotional, and behavioral development. This brain growth and development is significantly impacted by the interplay between children's relationships with the people and environments around them. Early positive relationships with caring adults allow children to feel safe to explore and interact

> with their surrounding world and can have a lasting impact – positive or negative – on later outcomes in school and life. Early experiences in a child's life can impact brain structure and development down to the cellular level. As a child's brain architecture is being built in those early years, positive experience support healthy growth and development, while Adverse Childhood Experiences (ACES), such as experiences of abuse and neglect, can have a detrimental long-term impact.

NC Early Action Plan, p. 4 (citations omitted). Further, the State Defendants recognize the value of early childhood interventions to improve outcomes. See id. (noting that investments in early childhood programs and interventions "produce long-lasting impacts," result in a $2 to $4 return for every $1 invested, and improve academic scores).

However, access to early childhood education remains out of reach for many low-income families in North Carolina. There is a shortage of available Pre-K slots across North Carolina, and only about half of eligible children are served. [WestEd Report, p. 89].

Two statewide early childhood education programs, NC Pre-K and Smart Start, provide high-quality programs that have been shown to have a strong positive impact on participating children's readiness for and future success in school. [WestEd Report, p. 87].

NC Pre-K is the state's pre-kindergarten program that serves 4-year-olds, primarily from low-income families. This state-supported part-day program currently enrolls just over 29,500 children during the traditional school year in a mixed-delivery system of public schools, private centers, and Head Start centers. The NC Pre-K program has consistently had high standards, a strong record of quality, and extensive evidence of effectiveness. It has been found to have produced both short- and long-term benefits through grade 8. [WestEd Report, p. 88].

There is a shortage, however, of available Pre-K slots across North Carolina, and only about half of eligible children are served. Approximately 25 out of North Carolina's 100 counties are reaching the target participation rate of 75% or more of eligible children in their county. The limited participation is most severe for children from low-income families and for students of color. This pattern in lack of participation holds in both urban and rural areas; however, rural counties have the most inconsistency regarding percentage of eligible children served by NC Pre-K compared with urban or suburban counties. [WestEd Report, p. 89].

Access to the high-quality early childhood education programs in the state varies dramatically, with lower-wealth counties lacking an adequate supply of high-quality early childhood programs. Based on estimates of the total number of children eligible for NC Pre-K, the unmet need is almost 33,000 children per year across North Carolina. [WestEd Report, p. 89].

There are funding barriers to the expansion of high-quality early childhood education that need to be addressed. [WestEd Report, p. 89-90]. The overriding, systemic barrier to expanding NC Pre-K is that revenues and other resources available to NC Pre-K providers are too often inadequate to cover the costs of expansion. [WestEd Report, pp. 89-90].

Lower-resourced counties need greater support to expand early childhood services, beyond just funding. Despite state attempts to expand financial support for NC Pre-K in the 2017–2019 budget, 44 out of 100 counties declined the NC Pre-K expansion funding. Specifically, 17 counties declined expansion funds in both 2017 and 2018 that are also not meeting the target of 75% of

eligible children enrolled in the county. [WestEd Report, pp. 89-90]. A number of barriers slowed or prevented expansion of early childhood services in lower wealth counties, including: (i) obtaining the necessary number of qualified teachers to fill teaching slots, (ii) having access to eligible/high-quality private programs to meet the need, (iii) having the ability to meet local funding match requirements, and (iv) providing transportation to enable families and program staff to get to centers. [WestEd Report, p. 89-90]

The State only covers about 60% of the cost for an NC Pre-K slot, leaving individual counties to cover the remaining 40%. The State's current NC Pre-K contribution is $5,200 per child. The North Carolina Pre-Kindergarten Cost Study conducted by North Carolina State University found that the average cost per child for those already in the program is approximately $9,100. [WestEd Report, p. 89].

Smart Start is a network of 75 nonprofit agencies that offer a "one-stop shop" of coordination for early education services for families with children from birth to age 5 – including parenting classes, child care program consulting, and case management or referral services for families – as well as ensuring early childhood programs are high-quality, child-focused, and family friendly. Research studies have found that children who participated in Smart Start–supported programs entered elementary school with better math and language skills, as well as fewer with behavioral problems compared with their peers. Both Smart Start and NC Pre-K programs have been found to significantly reduce the likelihood of special education placement in third grade. [WestEd Report, p. 88].

As of 2017–18, the Smart Start program supports 1,974 centers serving approximately 79,292 children and their families. The program was designed to meet 25% of the defined need for children aged 0-5. In 2018–19, Smart Start local partnerships spent $147 million to meet approximately just 5% of the defined need in early childhood learning. Smart Start is a significant funding source for NC Pre-K. Income-eligible families receive a child care subsidy, an average payment of about $6,200 a year. [WestEd Report, p. 88].

In 2011, the state legislature imposed a 20% budget cut on Smart Start, bringing the annual funding levels to less than $150 million, which is the lowest amount of funding for the program since the 1998 fiscal year. [WestEd Report, p. 89].

In addition, the volume and quality of the early childhood educator pipeline in North Carolina is insufficient. As of 2015, 64% of lead child care teachers in North Carolina did not have an associate's or bachelor's degree in early childhood education. In fact, 38% of lead child care teachers did not have an associate's or bachelor's degree at all. [WestEd Report, p. 90].

Most early childhood education services in North Carolina have limited education requirements for teachers; however, NC Pre-K has been shown to have the most stringent policies related to teacher qualification. [WestEd Report, p. 90]. Turnover in the early childhood workforce is quite high. [WestEd Report, p. 91].

Elementary school environments are often not equipped to support the developmental transition of young children into K–12 environments, including through appropriate and proportional staffing of school support staff such as nurses, social workers, and counselors. Better alignment is needed between the early childhood programs and the schools that children from these programs will attend. [WestEd Report, p. 91].

Alignment and Preparation for Post-Secondary Opportunities

Systemic efforts at all levels of the education system are necessary to create the conditions for all of North Carolina's students to achieve a sound basic education, which includes preparation for some level of post-secondary success. Likewise, the State's goal and obligation to provide all students with a sound basic education that prepares them for future success necessitates a systemic approach to education improvement.

The recent call to action issued by the MYFUTURENC COMMISSION (2019) further highlights the ways that the State's talent supply is not keeping pace with current changes in the job market. For example, the State has experienced significant declines in blue collar work and an increased need for employees to fill skilled-service jobs. However, the State is not producing sufficient talent with the technical skills and education to fill these skilled roles. Further, educational opportunities are not equitably distributed across the State, as far fewer students from more economically-disadvantaged backgrounds are earning postsecondary credentials than are their more economically-advantaged peers. [WestEd Report, p. 12 (myFutureNC Commission, 2019)]. The commission's ambitious goal, to enable two million 25- through 44-year-olds to obtain a high-quality postsecondary credential or degree by 2030, will not be possible without systemic efforts at all levels of the public education system. Likewise, the State's goal and obligation to provide all students with a sound basic education that prepares them for future success also necessitates a systemic approach to education improvement. [WestEd Report, p. 12].

The State established 125 Early College High Schools and other Cooperative Innovative High Schools that provide small schools on college campuses that enable students to complete high school and earn college credits, with no tuition or other costs. [WestEd Report, p. 16].

The Career and College Promise legislation enables high school students throughout North Carolina to attend college courses and obtain both high school and college credits, with the state providing funding for college tuition. [WestEd Report, p. 16].

This program is widely used: In 2016–17, 61% of high school students earned college credit prior to their high school graduation, with 86% earning a grade of C or higher. [WestEd Report, p. 101 (Coltrane & Eads, 2018)]. However, barriers exist that prevent some students participating in and benefiting from the program. Many economically-disadvantaged students cannot afford the cost of college textbooks, lab fees, and other college fees, and they also struggle to find transportation to and from the college. In addition, high school schedules are often not aligned with schedules at the local community college. Misaligned schedules present barriers for students who must work after school and for those who depend on school busing for transportation and on food lunch programs for meals. [WestEd Report, p. 101].

Career and technical education (CTE) programs provide many high school students with professional skills and credentials that lead to opportunities in the workplace. [WestEd Report, p. 16]. Unfortunately, many students across North Carolina, especially those at-risk, are not prepared for postsecondary success. [WestEd Report, pp. 21-30].

It is hereby **ORDERED, ADJUDGED**, and **DECREED** as follows:

A. The findings and conclusions set forth herein are hereby entered by this Court and incorporated into the record of this case;

B. The time has come for the State Defendants to work expeditiously and without delay to take all necessary actions to create and fully implement the following:

1. A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;

2. A system of principal development and recruitment that ensures each school is led by a high-quality principal who is supported with early and ongoing professional learning and provided competitive pay;

3. A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk students as defined by the *Leandro* decisions;

4. An assessment and accountability system that reliably assesses multiple measures of student performance against the *Leandro* standard and provides accountability consistent with the *Leandro* standard;

5. An assistance and turnaround function that provides necessary support to low-performing schools and districts;

6. A system of early education that provides access to high-quality prekindergarten and other early childhood learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and

7. An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

C. To keep the Court fully informed as to the remedial progress, the Parties are hereby ordered to submit a status report to the Court (a joint report if all Parties agree, and individual reports if the Parties do not) no later than 60 days from the date of this Order setting out the following:

1. Specific actions that the State Defendants must implement in 2020 to begin to address the issues identified by WestEd and described herein and the seven components set forth above;

2. A date by which the State Defendants, in consultation with each other and the Plaintiffs, will submit to the Court additional, mid-range actions that should be implemented, including specific actions that must be taken, a timeframe for implementation, and an estimate of resources in addition to current funding, if any, necessary to complete those actions.

3. A date by which the State Defendants, in consultation with each other and the Plaintiffs, will submit to the Court a comprehensive remedial plan ("the Plan") to provide all public school children the opportunity for a sound basic education, including specific long-term actions that must be taken, a timeframe for implementation, an estimate of resources in addition to current funding, if any, necessary to complete those actions, and a proposal for monitoring implementation and assessing the outcomes of the plan.

D. The State Defendants shall identify the State actors and institutions responsible for implementing specific actions and components of the proposed Plan.

E. The Parties may consult with WestEd and each other in the development of the short and longer-term remedial measures, as may be needed.

F. This Order may not be modified except by further Order of this Court.

G. The Court retains jurisdiction over this matter and the Parties.

This the 21st day of January, 2020

The Honorable W. David Lee
North Carolina Superior Court Judge

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON, individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

ORDER ON COMPREHENSIVE REMEDIAL PLAN

This matter, coming before the Court pursuant to the January 21, 2020 Consent Order ("January 2020 Order") and the September 11, 2020 Consent Order ("September 2020 Order") entered in this case; and

The Court, having received from the State of North Carolina ("State") and the State Board of Education ("State Board") (collectively, "State Defendants") on March 15, 2021, a Comprehensive Remedial Plan and Appendix which are attached to this Order as "Exhibit A" and "Exhibit B" respectively (collectively, the "Comprehensive Remedial Plan"), and incorporated herein by reference, and having held a status

conference in this matter on April 13, 2021 to review the Comprehensive Remedial Plan and hear from the Parties, finds as follows:

In its unanimous opinion in *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 647 (2004) ("*Leandro II*"), the North Carolina Supreme Court held, "an inordinate number" of students had failed to obtain a sound basic education and that the State had "failed in [its] constitutional duty to provide such students with the opportunity to obtain a sound basic education." In light of that finding, the Supreme Court ordered that "the State must act to correct those deficiencies that were deemed by the trial court as contributing to the State's failure of providing a *Leandro*-comporting educational opportunity." *Id.* at 647-48. After eleven years and more than 20 evidentiary hearings, the nature and scope of which are set out in the record, this Court concluded that "in way too many school districts across this state, thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined and required by the *Leandro* decision." March 17, 2015 Order.

This Court examined the record again in 2018 and found that "the evidence before this court . . . is wholly inadequate to demonstrate . . . substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards." March 13, 2018 Order. The Court and the Parties then embarked on a process of identifying an independent, third-party consultant to assess the status of *Leandro* compliance in North Carolina and to make detailed, comprehensive, written recommendations for specific actions necessary to achieve sustained compliance with the constitutional mandates articulated in the holdings of *Leandro v. State*, 346 N.C. 336, 357 (1997) ("*Leandro I*") and *Leandro II*. The Governor also created the Commission on Access to a Sound Basic Education (the "Commission") at that time.

The Court appointed WestEd to serve as the Court's consultant, and all Parties agreed that WestEd was qualified to serve in that capacity. *See* January 2020 Order at 10. WestEd presented its findings and recommendations to the Court in December 2019 in a report entitled, "*Sound Basic Education for All: An Action Plan for North Carolina,*" along with 13 underlying studies (collectively, the "WestEd Report"). The WestEd Report represents an unprecedented body of independent research and analysis that has informed the Court's approach in this case.

The WestEd Report concluded, and this Court found, that considerable, systematic work is still required to deliver fully the *Leandro* right to all children in our State. *See* January 2020 Order at 2-3. Based on the WestEd Report, the Court specifically found that due to the increase in the number of children with higher needs, who require additional supports to meet high standards, the State faces greater challenges than ever before in meeting its constitutional obligations. *Id.* at 15. For example, North Carolina has 807 high-poverty districts schools and 36 high-poverty charter schools, attended by over 400,000 students (more than a quarter of all North Carolina students). *Id.* The Court also found that state funding for

education has not kept pace with the growth and needs of the PreK-12 student body. *Id.* at 17. While the Defendants have implemented a number of promising initiatives since the *Leandro II* decision, this Court found that many of them were neither sustained nor scaled up to make a substantial impact. *Id.*

Based on the WestEd Report and the findings and recommendations of the Governor's Commission, Plaintiffs and Penn Intervenors (collectively, "Plaintiffs") as well as State Defendants all agreed that "the time has come to take decisive and concrete action . . . to bring North Carolina into constitutional compliance so that all students have access to the opportunity to obtain a sound basic education." January 2020 Order at 3. The Court agreed with the Parties' decisions. The Court, therefore, ordered State Defendants to work "expeditiously and without delay" to create and fully implement a system of education and educational reforms that will meet the *Leandro* requirement of providing the opportunity for a sound basic education to all North Carolina children. The Court specifically ordered the Parties to submit a Joint Report outlining the specific actions that State Defendants must implement in 2020 to begin to address the issues identified by WestEd and described in the January 2020 Order.

The Parties submitted the Joint Report on June 15, 2020. The Joint Report acknowledged that the COVID-19 pandemic has exacerbated many of the inequities and challenges that are the focus of this case, particularly for students of color, English Language Learners, and economically-disadvantaged students. And while the Joint Report detailed one-time funding targeted by the Governor, the General Assembly, and the State Board to address the impact of COVID-19, the Parties recognized that these funds are not intended to address the historical and unmet needs of children who are being denied the opportunity for a sound basic education. The Joint Report set forth specific action steps that "the State can and will take in Fiscal Year 2021 (2020-21) to begin to address to constitutional deficiencies previously identified by this Court" (the "Year One Plan"). The Parties all agreed that the actions specified in the Year One Plan were necessary and appropriate to remedy the constitutional deficiencies in North Carolina public schools.

On September 11, 2020, the Court ordered State Defendants to implement the actions identified in the Year One Plan. September 2020 Order, Appendix A. The Court further ordered State Defendants, in consultation with Plaintiffs, to develop and present a Comprehensive Remedial Plan to be fully implemented by the end of 2028 with the objective of fully satisfying State Defendants' *Leandro* obligations by the end of 2030. Lastly, to assist the Court in entering this order and to promote transparency, the Court ordered State Defendants to submit quarterly status reports of progress made toward achieving each of the actions identified in the Year One Plan.

Defendants submitted their First Status Report on December 15, 2020. The Court was encouraged to see that some of the initial action items were successfully implemented. For example, House Bill 1096 (SL 2020-56) was signed into law by the

Governor on June 30, 2020 and implemented the identified action of expanding the number of eligible teacher preparation programs for the NC Teaching Fellows Program from 5 to 8. Increased funding to support additional Teaching Fellows for the 2021-22 academic year, however, was not appropriated. Similarly, Senate Bill 681 (SL 2020-78) was signed into law by the Governor on July 1, 2020 to create a permanent Advanced Teaching Roles program that will provide grants and policy flexibility to districts seeking to implement a differentiated staffing model. The bill, however, did not provide any new funding to provide additional grants to school districts, as required by the Year One Plan.

The First Status Report also detailed the federal CARES Act funds that the Governor, the State Board, and the General Assembly directed to beginning implementation of certain Year One Plan actions. The Court notes, however, that the CARES ACT funding and subsequent federal COVID-related funding is non-recurring and cannot be relied upon by the State to sustain ongoing programs that are necessary to fulfill the State's constitutional obligation to provide a sound basic education to all North Carolina children. The Court did not receive another status report prior to State Defendants' submission of the Comprehensive Remedial Plan on March 15, 2021.

As represented by State Defendants, the Comprehensive Remedial Plan identifies the programs, policies, and resources that "are necessary and appropriate actions that must be implemented to address the continuing constitutional violations and to provide the opportunity for a sound basic education to all children in North Carolina." WestEd has advised the Parties and the Court that the recommendations contained in its Report are not a "menu" of options, but a comprehensive set of fiscal, programmatic, and strategic steps necessary to achieve the outcomes for students required by our State Constitution. WestEd has reviewed the Comprehensive Remedial Plan and has advised the Court that the actions set forth in the Plan are necessary and appropriate for implementing the recommendations contained in WestEd Report. The Court concurs with WestEd's opinion.

The Court understands that those items required by the Year One Plan that have not yet been implemented as ordered in the September 2020 Order have been included in, or "rolled over" to, the Comprehensive Remedial Plan. The Court notes that the WestEd Report contemplated that its recommendations would be implemented gradually over eight years, with later implementation building upon actions to be taken in the short term. Failure to implement all of the actions in the Year One Plan will necessarily make it more difficult for State Defendants to implement all the actions described in the Comprehensive Remedial Plan in a timely manner. The urgency of implementing the Comprehensive Remedial Plan on the timeline currently set forth by State Defendants cannot be overstated. As this Court previously found:

> [T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they live, work and engage as citizens. The costs to those students, individually, and to the State are considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

January 2020 Order. Time is of the essence.

The Supreme Court held in 1997 that if this Court finds "from competent evidence" that the State is "denying children of the state a sound basic education, a denial of a fundamental right will have been established." *Leandro I,* 346 N.C. at 357. This Court's finding was upheld in *Leandro II* and has been restated in this Court's Orders in 2015 and 2018. It is, therefore, "incumbent upon [the State] to establish that their actions denying this fundamental right are 'necessary to promote a compelling government interest.'" *Id.* The State has not done so. To the contrary, State Defendants have acknowledged that additional State actions are required to remedy the denial of this fundamental right.

State Defendants have presented a Comprehensive Remedial Plan outlining those necessary actions. Moreover, the Governor's proposed 2021-2023 biennium budget, and the accompanying bill, Senate Bill 622, presents a balanced budget that includes funding to implement the remedial measures identified in the first two years of the Comprehensive Remedial Plan. The Court further understands that House Bill 946 (filed May 11, 2021), if passed, will fund and implement the first two years of the Comprehensive Remedial Plan. The Court has granted "every reasonable deference" to the legislative and executive branches to "establish" and "administer[] a system that provides the children of the various school districts of the state a sound basic education," 346 N.C. at 357, including deferring to the Defendants' leadership in the collaborative development of the Comprehensive Remedial Plan over the past three years.

If the State fails to implement the actions described in the Comprehensive Remedial Plan—actions which it admits are necessary and which, over the next biennium, the Governor's proposed budget and Senate Bill 622 confirm are attainable—"it will then be the duty of this Court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong." 346 N.C. at 357.

In light of the foregoing, and having reviewed and considered the Comprehensive Remedial Plan, the North Carolina Supreme Court's decisions in *Leandro I and Leandro II,* the arguments and submission of Counsel for all parties, this Court's prior orders, the findings of which are incorporated herein, and the representations of State Defendants, it is hereby **ORDERED** that:

A. the actions, programs, policies, and resources propounded by and agreed to State Defendants, and described in the Comprehensive Remedial Plan, are necessary to remedy continuing constitutional violations and to provide the opportunity for a sound basic education to all public school children in North Carolina;

B. the Comprehensive Remedial Plan shall be implemented in full and in accordance with the timelines set forth therein;

C. the State shall inform and engage its actors, agencies, divisions, and/or departments as necessary to ensure the State's compliance with this Order, including without limitation seeking and securing such funding and resources as are needed and required to implement in a sustainable manner the programs and policies set forth in the Comprehensive Remedial Plan;

D. State Defendants shall submit a report to the Court regarding their progress toward fulfilling the terms and conditions of this Order no later than August 6, 2021, and Plaintiffs may submit a response to that report no later than August 20, 2021;

E. the Court will hold a hearing on or about September 8, 2021 at 11:00 a.m. to address issues raised in that report and any response from Plaintiffs; and

F. before October 31, 2021, and at the end of each quarter thereafter until further notice from the Court, State Defendants shall submit status reports to the Court that shall, at minimum, describe the progress they have made toward achieving each of the benchmarks identified in the Comprehensive Remedial Plan, including an explanation and identification of specific barriers to implementing each benchmark not achieved in a timely fashion. Plaintiffs shall have fourteen (14) days to submit a response to any of State Defendants' reports.

This Order may not be modified except by further Order of this Court. The Court shall retain jurisdiction over this matter.

This the 7th day of June, 2021.

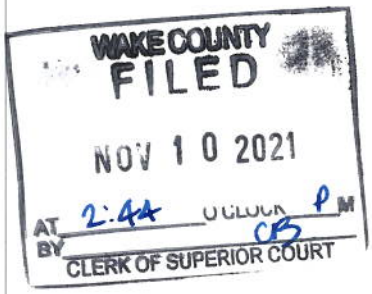
The Honorable W. David Lee
North Carolina Superior Court Judge

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON, individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,



Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

ORDER

Over seventeen years ago, Justice Orr, on behalf of a unanimous Supreme Court, wrote:

> The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, *boldly and decisively*, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our

> state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. *Whether the State meets this challenge remains to be determined.*

Hoke County Bd. of Educ. v. State, 358 N.C. 605, 649 (2004) *("Leandro II")* (emphasis added). As of the date of this Order, the State has not met this challenge and, therefore, has not met its constitutional obligation to the children of North Carolina.

The orders of our Supreme Court are not advisory. This Court can no longer ignore the State's constitutional violation. To do so would render both the North Carolina State Constitution and the rulings of the Supreme Court meaningless.

This Court, having held a hearing on October 18, 2021 at which it ordered Plaintiffs and Plaintiff-Intervenors to submit proposed order(s) and supporting legal authorities by November 1, 2021 and Defendants State of North Carolina ("State") and State Board of Education ("State Board," and collectively with the State, "State Defendants") to respond by November 8, 2021, finds and concludes as follows[1]:

I. Findings of Fact

1. In its unanimous opinion in *Leandro II*, the Supreme Court held, "an inordinate number" of students had failed to obtain a sound basic education and that the State had "failed in [its] constitutional duty to provide such students with the opportunity to obtain a sound basic education." In light of that holding, the Supreme Court ordered that "the State must act to correct those deficiencies that were deemed by the trial court as contributing to the State's failure of providing a Leandro-comporting educational opportunity." *Id.* at 647-48.

2. Since 2004, this Court has given the State countless opportunities, and unfettered discretion, to develop, present, and implement a *Leandro*-compliant remedial plan. For over eleven (11) years and in over twenty (20) compliance hearings, the State demonstrated its inability, and repeated failure, to develop, implement, and maintain any kind of substantive structural initiative designed to remedy the established constitutional deficiencies.

3. For more than a decade, the Court annually reviewed the academic performance of every school in the State, teacher and principal population data, and the programmatic resources made available to at-risk students. This Court concluded from over a decade of undisputed evidence that "in way too many school

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[1] The findings and conclusions of the Court's prior Orders—including the January 21, 2020 Consent Order ("January 2020 Order"), September 11, 2020 Consent Order ("September 2020 Order"), June 7, 2021 Order on Comprehensive Remedial Plan ("June 2021 Order"), September 22, 2021 Order ("September 2021 Order"), and October 22, 2021 Order ("October 2021 Order")—are incorporated herein.

districts across this state, thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined and required by the *Leandro* decision." March 17, 2015 Order.

4. At that time, North Carolina was replete with classrooms unstaffed by qualified, certified teachers and schools that were not led by well-trained principals. Districts across the State continued to lack the resources necessary to ensure that all students, especially those at-risk, have an equal opportunity to receive a *Leandro*-conforming education. In fact, the decade after *Leandro II* made plain that the State's actions regarding education not only failed to address its *Leandro* obligations, but exacerbated the constitutional harms experienced by another generation of students across North Carolina, who moved from kindergarten to 12th grade since the Supreme Court's 2004 decision.

5. This Court examined the record again and in 2018 found that "the evidence before this court . . . is wholly inadequate to demonstrate . . . substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards." *See* March 13, 2018 Order. The State Board did not appeal the ruling. Consequently, the Court ordered the parties to identify an independent, third-party consultant to make detailed comprehensive written recommendations for specific actions necessary to achieve sustained compliance with the constitutional mandates articulated in the holdings of *Leandro v. State*, 346 N.C. 336, 357 (1997) *("Leandro I")* and *Leandro II*. The State, along with the Plaintiffs and Penn Intervenors, recommended WestEd to serve in that capacity. The Governor also created the Commission on Access to a Sound Basic Education (the "Commission") at that time "to gather information and evidence to assist in the development of a comprehensive plan to address compliance with the constitutional mandates." Governor Roy Cooper Exec. Order No. 27 (Nov. 15, 2017).

6. By Order dated March 13, 2018, the Court appointed WestEd to serve as the Court's consultant, and all parties agreed that WestEd was qualified to serve in that capacity. *See* January 2020 Order at 10. In support of its work, WestEd also engaged the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute (LPI), a national education policy and research organization with extensive experience in North Carolina. WestEd presented its findings and recommendations to the Court in December 2019 in an extensive report entitled, *"Sound Basic Education for All: An Action Plan for North Carolina,"* along with 13 underlying studies (collectively, the "WestEd Report"). The WestEd Report represents an unprecedented body of independent research and analysis of the North Carolina educational system that has further informed the Court's approach in this case.

7. The WestEd Report concluded, and this Court found, that the State must complete considerable, systematic work to deliver fully the opportunity to obtain a sound basic education to all children in North Carolina. *See* January 2020 Order at 2-3. The WestEd Report found, for example, that hundreds of thousands of North Carolina

children continue to be denied the opportunity for a sound basic education. Indeed, the State is in many ways further away from constitutional compliance than it was when the Supreme Court issued its *Leandro I* decision almost 20 years ago. (WestEd Report, p. 31). Minimal progress has been made, as evidenced by multiple data sources on two of the primary educational outputs identified in *Leandro*: (i) the proficiency rates of North Carolina's students, especially at-risk students, in core curriculum areas, and (ii) the preparation of students, especially at-risk students, for success in postsecondary degree and credential programs. (Report, p. 31).

8. Based on the WestEd Report, the Court found that due to the increase in the number of children with higher needs, who require additional supports to meet high standards, the State faces greater challenges than ever before in meeting its constitutional obligations. January 2020 Order at 15. For example, North Carolina has 807 high-poverty districts schools and 36 high-poverty charter schools, attended by over 400,000 students (more than a quarter of all North Carolina students). *Id.* The Court also found that state funding for education has not kept pace with the growth and needs of the PreK-12 student body. *Id.* at 17. And promising initiatives since the *Leandro II* decision were neither sustained nor scaled up to make a substantial impact. *Id.*

9. Plaintiffs and Penn Intervenors (collectively, "Plaintiffs") as well as State Defendants all agreed that "the time has come to take decisive and concrete action . . . to bring North Carolina into constitutional compliance so that all students have access to the opportunity to obtain a sound basic education." January 2020 Order at 3. The Court agreed and, therefore, ordered State Defendants to work "expeditiously and without delay" to create and fully implement a system of education and educational reforms that will provide the opportunity for a sound basic education to all North Carolina children.

10. The parties submitted a Joint Report to the Court on June 15, 2020 that acknowledged that the COVID-19 pandemic has exacerbated many of the inequities and challenges that are the focus of this case, particularly for students of color, English Language Learners, and economically-disadvantaged students. The Joint Report set forth specific action steps that "the State *can and will* take in Fiscal Year 2021 (2020-21) to begin to address the constitutional deficiencies previously identified by this Court" (the "Year One Plan"). The parties all agreed that the actions specified in the Year One Plan were necessary and appropriate to remedy the constitutional deficiencies in North Carolina public schools.

11. On September 11, 2020, the Court ordered State Defendants to implement the actions identified in the Year One Plan. September 2020 Order, Appendix A. The Court further ordered State Defendants, in consultation with Plaintiff parties, to develop and present a Comprehensive Remedial Plan to be fully implemented by the end of 2028 with the objective of fully satisfying State Defendants' *Leandro* obligations by the end of 2030. Lastly, to assist the Court in entering this order and to promote transparency, the Court

ordered State Defendants to submit quarterly status reports of progress made toward achieving each of the actions identified in the Year One Plan.

12. State Defendants submitted their First Status Report on December 15, 2020. The Court was encouraged to see that some of the initial action items were successfully implemented and that the SBE had fulfilled its obligations. However, the Court noted many shortcomings in the State's accomplishments and the State admitted that the Report showed that it had failed to implement the Year One Plan as ordered. For example, House Bill 1096 (SL 2020-56), which was enacted by the General Assembly and signed into law by the Governor on June 30, 2020, implemented the identified action of expanding the number of eligible teacher preparation programs for the NC Teaching Fellows Program from 5 to 8. Increased funding to support additional Teaching Fellows for the 2021-22 academic year, however, was not provided. Similarly, Senate Bill 681 (SL 2020-78) was enacted by the General Assembly and signed into law by the Governor on July 1, 2020 to create a permanent Advanced Teaching Roles program that would provide grants and policy flexibility to districts seeking to implement a differentiated staffing model. Senate Bill 681, however, did not provide any new funding to provide additional grants to school districts, as required by the Year One Plan.[2]

13. The State Defendants submitted their Comprehensive Remedial Plan (which includes the Appendix) on March 15, 2021. As represented by State Defendants, the Comprehensive Remedial Plan identifies the programs, policies, and resources that "are necessary and appropriate actions that must be implemented to address the continuing constitutional violations and to provide the opportunity for a sound basic education to all children in North Carolina." Specifically, in *Leandro II*, the Supreme Court unanimously affirmed the trial court's finding that the State had not provided, and was not providing, competent certified teachers, well-trained competent principals, and the resources necessary to afford all children, including those at-risk, an equal opportunity to obtain a sound basic education, and that the State was responsible for these constitutional violations. *See* January 2020 Order at 8; 358 N.C. at 647-48. Further, the trial court found, and the Supreme Court unanimously affirmed, that at-risk children require more resources, time, and focused attention in order to receive a sound basic education. *Id.*; *Leandro II*, 358 N.C. at 641. Regarding early childhood education, the Supreme Court affirmed the trial court's findings that the "State was providing inadequate resources" to "'at-risk' prospective enrollees" ("pre-k" children), "that the State's failings were contributing to the 'at-risk' prospective enrollees' subsequent failure to avail themselves of the opportunity to obtain a sound basic education," and that "State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 69, *Leandro II*. 358 N.C. at 641-42.

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[2] The First Status Report also detailed the federal CARES Act funds that the Governor, the State Board, and the General Assembly directed to begin implementation of certain Year One Plan actions. The Court notes, however, that the CARES Act funding and subsequent federal COVID-related funding is nonrecurring and cannot be relied upon to sustain ongoing programs that are necessary to fulfill the State's constitutional obligation to provide a sound basic education to all North Carolina children.

Consequently, the Comprehensive Remedial Plan addresses each of the "*Leandro* tenets" by setting forth specific actions to be implemented over the next eight years to achieve the following:

- A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;
- A system of principal development and recruitment that ensures each school is led by a high-quality principal who is supported with early and ongoing professional learning and provided competitive pay;
- A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk-students as defined by the *Leandro* decisions;
- An assessment and accountability system that reliably assesses multiple measures of student performance against the *Leandro* standard and provides accountability consistent with the *Leandro* standard;
- An assistance and turnaround function that provides necessary support to low-performing schools and districts;
- A system of early education that provides access to high-quality pre-kindergarten and other early childhood learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and
- An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

January 2020 Order at 4-5.

14. The Appendix to the Comprehensive Remedial Plan identifies the resources necessary, as determined by the State, to implement the specific action steps to provide the opportunity for a sound basic education. This Court has previously observed "that money matters provided the money is spent in a way that is logical and the results of the expenditures measured to see if the expected goals are achieved." Memorandum of Decision, Section One, p. 116. The Court finds that the State Defendants' Comprehensive Remedial Plan sets forth specific, comprehensive, research-based and logical actions, including creating an assessment and accountability system to measure the expected goals for constitutional compliance.

15. WestEd advised the parties and the Court that the recommendations contained in its Report are not a "menu" of options, but a comprehensive set of fiscal, programmatic, and strategic steps necessary to achieve the outcomes for students required by our State Constitution. WestEd has reviewed the Comprehensive Remedial Plan and has advised the Court that the actions set forth in the Plan are necessary and appropriate for implementing the recommendations contained in WestEd Report. The Court concurs with WestEd's opinion and also independently reaches this conclusion based on the entire record in this case.

16. The Supreme Court held in 1997 that if this Court finds "from competent evidence" that the State is "denying children of the state a sound basic education, a denial of a fundamental right will have been established." *Leandro I*, 346 N.C. at 357. This Court's finding was upheld in *Leandro II* and has been restated in this Court's Orders in 2015 and 2018. It is, therefore, "incumbent upon [the State] to establish that their actions denying this fundamental right are 'necessary to promote a compelling government interest.'" *Id.* The State has not done so.

17. To the contrary, the State has repeatedly acknowledged to the Court that additional State actions are required to remedy the ongoing denial of this fundamental right. *See, e.g.*, State's March 15, 2021 Submission to Court at 1 (State acknowledging that "this constitutional right has been and continues to be denied to many North Carolina children"); *id.* ("North Carolina's PreK-12 education system leaves too many students behind, especially students of color and economically disadvantaged students."); *id.* ("[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens."); State's August 16, 2021 Submission to Court at 1 (acknowledging that additional State actions are required to remedy the denial of the constitutional right). *See also, e.g.*, January 2020 Order at 15 (noting State's acknowledgment that it has failed to meet its "constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education."); *id.* ("[T]he Parties do not dispute [] that many children across North Carolina, especially at-risk and economically-disadvantaged students, are not now receiving a *Leandro*-conforming education."); *id.* at 17 (State has "yet to achieve the promise of our Constitution and provide all with the opportunity for a sound basic education"); June 2021 Order at 6 ("State Defendants have acknowledged that additional State actions are required to remedy the denial of this fundamental right.").

18. After seventeen years, State Defendants presented to the Court a Comprehensive Remedial Plan outlining those additional State actions necessary to comply with the mandates of the State Constitution.

19. The Comprehensive Remedial Plan sets out the "nuts and bolts" for how the State will remedy its continuing constitutional failings to North Carolina's children. It sets out (1) the specific actions identified by the State that must be

implemented to remedy the continuing constitutional violations, (2) the timeline developed by the State required for successful implementation, and (3) the necessary resources and funding, as determined by the State, for implementation.

20. The Comprehensive Remedial Plan is the *only* remedial plan that the State Defendants have presented to the Court in response its January 2020, September 2020, and June 2021 Orders. The State Defendants have presented no alternative remedial plan.

21. With regard to the Comprehensive Remedial Plan, the State has represented to this Court that the actions outlined in the Plan are the "necessary and appropriate actions that must be implemented to address the continuing constitutional violations." *See* State's March 2021 Submission at 3, 4 (emphasis added). The State further represented to the Court that the full implementation of each year of the Remedial Plan was required to "provide the opportunity for a sound basic education to all children in North Carolina." *Id.* at 3. The State assured the Court that it was "committed" to fully implementing its Comprehensive Remedial Plan and within the time frames set forth therein. *Id.*

22. The State has represented to the Court that more than sufficient funds are available to execute the current needs of the Comprehensive Remedial Plan. *See, e.g.,* State's August 6, 2021 Report to Court. The State of North Carolina concedes in its August progress report to the Court that the State's reserve balance included $8 billion and more than ***$5 billion*** in forecasted revenues at that time that exceed the existing base budget. Yet, the State has not provided the necessary funding to execute the Comprehensive Remedial Plan.

23. The Court understands that those items required by the Year One Plan that were not implemented as ordered in the September 2020 Order have been included in, or "rolled over" to, the Comprehensive Remedial Plan. The Court notes that the WestEd Report contemplated that its recommendations would be implemented gradually over eight years, with later implementation building upon actions to be taken in the short term. Failure to implement all of the actions in the Year One Plan will necessarily make it more difficult for State Defendants to implement all the actions described in the Comprehensive Remedial Plan in a timely manner. The urgency of implementing the Comprehensive Remedial Plan on the timeline currently set forth by State Defendants cannot be overstated. As this Court previously found:

> [T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they live, work and engage as citizens. The costs to those students, individually, and to the State are considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

January 2020 Order.

24. Despite the urgency, the State has failed to implement most actions in the Comprehensive Remedial Plan and has failed to secure the resources to fully implement the Comprehensive Remedial Plan.

25. The Comprehensive Remedial Plan would provide critical supports for at-risk students, such as:

- comprehensive induction services for beginning teachers in low performing, high poverty schools;
- costs of National Board certification for educators in high need, low-performing schools;
- critical supports for children with disabilities that could result from increasing supplemental funding to more adequate levels and removing the funding cap;
- ensuring greater access to key programs for at-risk students by combining the DSSF and at-risk allotments for all economically disadvantaged students; and
- assisting English learner students by eliminating the funding cap, simplifying the formula and increasing funding to more adequate levels.

26. As of the date of this Order, therefore, the State's implementation of the Comprehensive Remedial Plan is already behind the contemplated timeline, and the State has failed yet another class of students. Time is of the essence.

27. The Court has granted "every reasonable deference" to the legislative and executive branches to "establish" and "administer a system that provides the children of the various school districts of the state a sound basic education," 346 N.C. at 357, including, most recently, deferring to State Defendants' leadership in the collaborative development of the Comprehensive Remedial Plan over the past three years.

28. Indeed, in the seventeen years since the *Leandro II* decision, this Court has afforded the State (through its executive and legislative branches) discretion to develop its chosen *Leandro* remedial plan. The Court went to extraordinary lengths in granting these co-equal branches of government time, deference, and opportunity to use their informed judgment as to the "nuts and bolts" of the remedy, including the identification of the specific remedial actions that required implementation, the time frame for such implementation, the resources necessary for the implementation, and the manner in which to obtain those resources.

29. On June 7, 2021, this Court issued an Order cautioning: "If the State fails to implement the actions described in the Comprehensive Remedial Plan—actions which it admits are necessary and which, over the next biennium, the Governor's proposed budget and Senate Bill 622 confirm are attainable—'it will then be the duty of this Court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong . . . .'" June 2021 Order (quoting *Leandro I*, 346 N.C. at 357).

30. The 2021 North Carolina legislative session began on January 13, 2021 and, as of the date of this Order, no budget has passed despite significant unspent funds and known constitutional violations. In addition, with the exception of N.C.G.S. § 115C-201(c2) related to enhancement teacher allotment funding, no stand-alone funding measures have been enacted to address the known constitutional violations, despite significant unspent funds.

31. The failure of the State to provide the funding necessary to effectuate North Carolina's constitutional right to a sound basic education is consistent with the antagonism demonstrated by legislative leaders towards these proceedings, the constitutional rights of North Carolina children, and this Court's authority.

32. This Court has provided the State with ample time and every opportunity to make meaningful progress towards remedying the ongoing constitutional violations that persist within our public education system. The State has repeatedly failed to act to fulfill its constitutional obligations.

33. In the seventeen years since the *Leandro II* decision, a new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education. Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue. As Justice Orr stated, on behalf of a unanimous Supreme Court, "the children of North Carolina are our state's most valuable renewable resource." *Leandro II*, 358 N.C. at 616. "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. . . ." *Id.* (emphasis added).

II. Conclusions of Law

1. The people of North Carolina have a constitutional right to an opportunity to a sound basic education. It is the duty of the State to guard and

maintain that right. N.C. Const. art. 1, sec. 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); *id.* art. IX, sec. 2(1) ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students."); 346 N.C. at 345 (1997) (holding that the Constitution guarantees the "right to a sound basic education").

2. The "State" consists of each branch of our tripartite government, each with a distinctive purpose. *State v. Berger*, 368 N.C. 633, 635 (2016) (citations and internal quotation marks omitted) ("The General Assembly, which comprises the legislative branch, enacts laws that protect or promote the health, morals, order, safety, and general welfare of society. The executive branch, which the Governor leads, faithfully executes, or gives effect to, these laws. The judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution."). Here the judicial branch, by constitutional necessity, exercises its inherent power to ensure remedies for constitutional wrongs and compels action by the two other components of the "State"—the legislative and executive branches of government. *See Leandro II*, 358 N.C. at 635 ("[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education . . . .").

3. Our constitution and laws recognize that the executive branch is comprised of many public offices and officials. The Treasurer and State Superintendent of Public Instruction are two such officials. See N.C. Const. art. III, §7 and Cooper v. Berger, 371 N.C. 799,800 (2018). The Office of State Budget and Management , the Office of the State Controller, and the Department of Health and Human Services are also within the executive branch. See generally, N.C. Const. art. III, §§ 5(10), 11; N.C. Gen. Stat. § 143C-2-1; N.C. Gen. Stat. § 143B-426.35 – 426.39B; and N.C. Gen. Stat. § 143-B-136.1 – 139.7. The University of North Carolina System is also constitutionally responsible for public education. See N.C. Const. art. IX, § 8.

4. The Court concludes that the State continues to fail to meet the minimum standards for effectuating the constitutional rights set forth in article I, section 15 and article IX, section 2 of our State constitution and recognized by our Supreme Court in *Leandro I* and *II*. The constitutional violations identified in *Leandro I* and *II* are ongoing and persist to this day.

5. The General Assembly has a duty to guard and maintain the right to sound basic education secured by our state constitution. *See* N.C. Const. art. 1, sec. 15. As the arm of the State responsible for legislation, taxation, and appropriation,

the General Assembly's principal duty involves adequately funding the minimum requirements for a sound basic education. While the General Assembly could also choose to enact new legislation to support a sound basic education, the General Assembly has opted to largely ignore this litigation.

6. Thus, the General Assembly, despite having a duty to participate in guarding and maintaining the right to an opportunity for a sound basic education, has failed to fulfill that duty. This failure by one branch of our tripartite government has contributed to the overall failure of the State to meet the minimum standards for effectuating the fundamental constitutional rights at issue.

7. "[W]hen inaction by those exercising legislative authority threatens fiscally to undermine" the constitutional right to a sound basic education "a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice." *See In re Alamance County Court Facilities*, 329 N.C. 84, 99 (1991) (citation and internal quotation marks omitted).

8. Indeed, in *Leandro II* a unanimous Supreme Court held that "[c]ertainly, 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." 358 N.C. at 642.

9. Article I, section 18 of the North Carolina Constitution's Declaration of Rights—which has its origins in the Magna Carta—states that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18; *see Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 61 (1989) (explaining that article I, section 18 "guarantees a remedy for legally cognizable claims"); *cf. Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342 (2009) (noting the Supreme Court of North Carolina's "long-standing emphasis on ensuring redress for every constitutional injury").

10. Article I, section 18 of the North Carolina Constitution recognizes the core judicial function to ensure that right and justice—including the constitutional right to the opportunity to a sound basic education—are not delayed or denied.

11. Because the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this Court must provide a remedy through the exercise of its constitutional role. Otherwise, the State's

repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education will threaten the integrity and viability of the North Carolina Constitution by:

a. nullifying the Constitution's language without the people's consent, making the right to a sound basic education merely aspirational and not enforceable;

b. ignoring rulings of the Supreme Court of North Carolina setting forth authoritative and binding interpretations of our Constitution; and

c. violating separation of powers by preventing the judiciary from performing its core duty of interpreting our Constitution. *State v. Berger*, 368 N.C. 633, 638 (2016) ("This Court construes and applies the provisions of the Constitution of North Carolina with finality.").

12. It appears that the General Assembly believes the Appropriations Clause, N.C. Const. art. V, section 7, prevents any court-ordered remedy to obtain the minimum amount of State funds necessary to ensure the constitutionally-required opportunity to obtain a sound basic education.

13. Our Supreme Court has recognized that the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Cooper v. Berger*, 376 N.C. 22, 37 (2020). In *Richmond County Board of Education v. Cowell*, 254 NC App 422 (2017) our Court of Appeals articulated that Article 5 Section 7 of the North Carolina Constitution permits state officials to draw money from the State Treasury only when an appropriation has been "made by law." This court concludes that Article 1 Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may therefore be deemed an appropriation "made by law."

14. In *Cooper v Berger*, 376 N.C. 22 (2020) our Supreme Court noted that the General Assembly's authority over appropriations was grounded in its function as the voice of the people. *See* 376 N.C. at 37. It must also be noted, however, that the Constitution itself "expresses the will of the people in this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299 (1978); *see also Gannon v. Kansas*, 368 P.3d 1024, 1057 (Kan. 2016) (explaining that "[t]he constitution is the direct mandate of the people themselves"). Accordingly, the Court concludes that

Article I, § 15 represents a constitutional appropriation, such an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating Article I, § 15's constitutional appropriation is fully consistent with the framers desire to give the people ultimate control over the state's expenditures. *Cooper*, 376 N.C. at 37.

15. If the State's repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education goes unchecked, then this matter would merely be a political question not subject to judicial enforcement. Such a contention has been previously considered—and rejected—by our Supreme Court. *Leandro I*, 346 N.C. at 345. Accordingly, it is the Court's constitutional duty to ensure that the ongoing constitutional violation in this case is remedied. N.C. Const. art. I, § 18.

16. Indeed, the State Budget Act itself recognizes that it should not be construed in a manner to "abrogate[] or diminish[] the inherent power" of any branch of government. N.C. Gen. Stat. § 143C-1-1(b). The inherent power of the judicial branch to ensure and effectuate constitutional rights cannot be disputed. *Cf. Ex Parte McCown*, 139 N.C. 95 (1905) ("[L]aws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory.").

17. "It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself." *Leandro I*, 346 N.C. at 352; *accord Stephenson v. Bartlett*, 355 N.C. 354, 397 (2002). As a result, the appropriations clause cannot be read to override the people's right to a sound basic education.

18. This Court cannot permit the State to continue failing to effectuate the right to a sound basic education guaranteed to the people of North Carolina, nor can it indefinitely wait for the State to act. Seventeen years have passed since *Leandro II* and, in that time, too many children have been denied their fundamental constitutional rights. Years have elapsed since this Court's first remedial order. And nearly a year has elapsed since the adoption of the Comprehensive Remedial Plan. This has more than satisfied our Supreme Court's direction to provide "every reasonable deference to the legislative and executive branches," *Leandro I*, 346 N.C. at 357, and allow "unimpeded chance, 'initially at least,' to correct constitutional deficiencies revealed at trial," *Leandro II*, 358 N.C. at 638 (citation omitted).

19. To allow the State to indefinitely delay funding for a *Leandro* remedy when adequate revenues exist would effectively deny the existence of a constitutional right to a sound basic education and effectively render the Constitution and the Supreme Court's *Leandro* decisions meaningless. The North Carolina Constitution, however, guarantees that right and empowers this Court to ensure its enforcement. The legislative and executive branches of the State, as creations of that Constitution, are subject to its mandates.

20. Accordingly, this Court recognizes, as a matter of constitutional law, a continuing appropriation from the State Treasury to effectuate the people's right to a sound basic education. The North Carolina Constitution repeatedly makes school funding a matter of constitutional—not merely statutory—law. Our Constitution not only recognizes the fundamental right to the privilege of education in the Declaration of Rights, but also devotes an entire article to the State's education system. Despite the General Assembly's general authority over appropriations of State funds, article IX specifically directs that proceeds of State swamp land sales; grants, gifts, and devises made to the State; and penalties, fines, and forfeitures collected by the State shall be used for maintaining public education. N.C. Const. art. IX, §§ 6, 7. Multiple provisions of article IX also expressly require the General Assembly to adequately fund a sound basic education. *See* N.C. Const. art. IX, §§ 2, 6, 7. When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. As the foregoing findings of fact make plain, however, this Court must fulfill its constitutional duty to effect a remedy at this time.

21. The right to a sound basic education is one of a very few affirmative constitutional rights that, to be realized, requires the State to supply adequate funding. The State's duty to carry out its obligation of ensuring this right has been described by the Supreme Court as both "paramount" (*Leandro II*, 358 N.C. at 649 and "sacred." *Mebane Graded Sch. Dist. v. Alamance Cty.*, 211 N.C. 213-(1937). The State's ability to meet this constitutional obligation is not in question. The unappropriated funds in the State Treasury greatly exceed the funds needed to implement the Comprehensive Remedial Plan. Consequently, there is no need to make impossible choices among competing constitutional priorities.

22. The Court further concludes that in addition to the aforementioned constitutional appropriation power and mandate, the Court has inherent and equitable powers that allow it to enter this Order. The North Carolina Constitution provides, "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation *shall have remedy by due course of law*; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. I, § 18

(emphasis added). The North Carolina Supreme Court has declared that "[o]bedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations." *State v. Harris*, 216 N.C. 746, 764 (1940). Further, "the courts have power to fashion an appropriate remedy 'depending upon the right violated and the facts of the particular case.'" *Simeon v. Hardin*, 339 N.C. 358, 373 (1994) (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 784, *cert. denied*, 506 U.S. 985 (1992)).

23. As noted above, the Court's inherent powers are derived from being one of three separate, coordinate branches of the government. *Ex Parte McCown*, 139 N.C. 95, 105-06 (1905) (citing N.C. Const. art. I, § 4)). The constitution expressly restricts the General Assembly's intrusion into judicial powers. *See* N.C. Const. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government...."); *see also Beard v. N. Carolina State Bar*, 320 N.C. 126, 129 (1987) ("The inherent power of the Court has not been limited by our constitution; to the contrary, the constitution protects such power."). These inherent powers give courts their "authority to do all things that are reasonably necessary for the proper administration of justice." *State v. Buckner*, 351 N.C. 401, 411 (2000); *Beard*, 320 N.C. 126, 129.

24. In fact, it is the separation of powers doctrine itself which undergirds the judicial branch's authority to enforce its order here. "Inherent powers are critical to the court's autonomy and to its functional existence: 'If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.'" *Matter of Alamance Cty. Ct. Facilities*, 329 N.C. 84, 93–94 (1991) ("*Alamance*") (citing *Ex Parte Schenck*, 65 N.C. 353, 355 (1871)). The Supreme Court's analysis of the doctrine in *Alamance* is instructive:

> An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. "Unless these [three branches of government] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."

Id. at 97 (quoting *The Federalist* No. 48, at 308 (J. Madison) (Arlington House ed. 1966)).

25. The Supreme Court has recognized that courts should ensure when considering remedies that may encroach upon the powers of the other branches, alternative remedies should be explored as well as minimizing the encroachment to the extent possible. *Alamance*, 329 N.C. at 100-01. The relief proposed here carefully balances these interests with the Court's constitutional obligation of affording relief to injured parties. First, there is no alternative or adequate remedy available to the children of North Carolina that affords them the relief to which they are so entitled. State Defendants have conceded that the Comprehensive Remedial Plan's full implementation is necessary to provide a sound basic education to students and there is nothing else on the table. *See, e.g.*, March 2021 Order.

26. Second, this Court will have minimized its encroachment on legislative authority through the least intrusive remedy. Evidence of the Court's deference over seventeen years and its careful balancing of the interests at stake includes but is not limited to:

a. The Court has given the State seventeen years to arrive at a proper remedy and numerous opportunities proposed by the State have failed to live up to their promise. Seventeen classes of students have since gone through schooling without a sound basic education;

b. The Court deferred to State Defendants and the other parties to recommend to the Court an independent, outside consultant to provide comprehensive, specific recommendations to remedy the existing constitutional violations;

c. The Court deferred to State Defendants and the other parties to recommend a remedial plan and the proposed duration of the plan, including recommendations from the Governor's Commission on Access to Sound Basic Education;

d. The Court deferred to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;

e. The Court deferred to State Defendants to propose the long-term comprehensive remedial plan, and to determine the resources necessary for full implementation. (*See* March 2021 Order);

f. The Court also gave the State discretion to seek and secure the resources identified to fully implement the Comprehensive Remedial Plan. (*See* June 2021 Order);

g. The Court has further allowed for extended deliberations between the executive and legislative branches over several months to give the State an additional opportunity to implement the Comprehensive Remedial Plan;

h. The status conferences, including more recent ones held in September and October 2021, have provided the State with additional notice and opportunities to implement the Comprehensive Remedial Plan, to no avail. The Court has further put State on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education.

The Court acknowledges and does not take lightly the important role of the separation of powers. In light of the foregoing, and having reviewed and considered all arguments and submissions of Counsel for all parties and all of this Court's prior orders, the findings and conclusions of which are incorporated herein, it is hereby **ORDERED** that:

1. The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:

(a) Department of Health and Human Services ("DHHS"): $189,800,000.00;

(b) Department of Public Instruction ("DPI"): $1,522,053,000.00; and

(c) University of North Carolina System: $41,300,000.00.

2. OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;

3. Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order;

4. DHHS, the University of North Carolina System, the State Superintendent of Public Instruction, and all other State agents or State actors

receiving funds under the Comprehensive Remedial Plan are directed to administer those funds to guarantee and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto;

5. In accordance with its constitutional obligations, the State Board of Education is directed to allocate the funds transferred to DPI to the programs and objectives specified in the Action Steps in the Comprehensive Remedial Plan and the Superintendent of Public Instruction is directed to administer the funds so allocated in accordance with the policies, rules or and regulations of the State Board of Education so that all funds are allocated and administered to guard and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto, and

6. OSBM, the Controller, and the Treasurer are directed to take all actions necessary to facilitate and authorize those expenditures;

7. To the extent any other actions are necessary to effectuate the year 2 & 3 actions in the Comprehensive Remedial Plan, any and all other State actors and their officers, agents, servants, and employees are authorized and directed to do what is necessary to fully effectuate years 2 and 3 of the Comprehensive Remedial Plan;

8. The funds transferred under this Order are for maximum amounts necessary to provide the services and accomplish the purposes described in years 2 and 3 of the Comprehensive Remedial Plan. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these purposes and the savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability; and

9. This Order, except the consultation period set forth in paragraph 3, is hereby stayed for a period of thirty (30) days to preserve the *status quo,* including maintaining the funds outlined in Paragraph 1 (a)-(c) above in the State Treasury, to permit the other branches of government to take further action consistent with the findings and conclusions of this Order.

This Order may not be modified except by further Order of this Court upon proper motion presented. The Court shall retain jurisdiction over this matter.

This the 10th day of November, 2021.

The Honorable W. David Lee
North Carolina Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on the persons indicated below by hand delivery:

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This the 10th day of November, 2021.

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No. 21-_____ TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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IN RE: The 10 November 2021 Order in Hoke County Board of Education et al. vs. State of North Carolina and W. David Lee (Wake County File 95 CVS 1158)

****

PETITION FOR WRIT OF PROHIBITION, TEMPORARY STAY AND WRIT OF SUPERSEDEAS

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N.C. Const. Art. III .....*passim*
N.C. Const. Art. IV.....5, 7

N.C. Const. Art. V 11, 15

5 Am. Jur. 2D Appellate Review § 370 6

63C Am. Jur. 2d *Prohibition* § 8 (2017) 7

BLACK'S LAW DICTIONARY (11th Ed. 2019).....6

ELIZABETH BROOKS SCHERER & MATTHEW NIS Leerbert, *North Carolina Appellate Practice and Procedure* § 20 5

SHUFORD *North Carolina Civil Practice and Procedure*, 6th Ed. 10

The North Carolina State Constitution, ORTH AND NEWBY 2nd Ed.....12

No. 21-_____ TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

IN RE. The 10 November 2021 Order in Hoke County Board of Education et al. vs. State of North Carolina and W. DAVID LEE (Wake County File 95 CVS 1158)

****

PETITION FOR WRIT OF PROHIBITION, TEMPORARY STAY AND WRIT OF SUPERSEDEAS

****

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

NOW COMES Linda Combs, Controller of the State of North Carolina and a taxpayer, pursuant to Rules 22 and 23 of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-32(b) and (c), and respectfully petitions this Court to issue a writ of prohibition, temporary stay and writ of supersedeas. In support thereof, Petitioner shows the following:

INTRODUCTION

On 10 November 2021, the Honorable Superior Court Judge W. David Lee entered an order in the 10th Judicial District in "Hoke County Board of Education vs State of North Carolina" (95 CVS 1158). (A certified copy of this order is attached to this Petition as Exhibit A and incorporated as if fully set out herein). The Order followed a Memorandum of Law dated 8

November 2021 supplied to Judge Lee by the Attorney General of North Carolina, a copy of which is attached to this Petition as Exhibit B and incorporated as if fully set out herein.

The Order requires the Petitioner to do the following:

> "The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller [sic] ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:
>
> (a) Department of Health and Human Services ("DHHS"): $189,800,000.00;
>
> (b) Department of Public Instruction ("DPI"): $1,522,053,000.00; and
>
> (c) University of North Carolina System: $41,300,000.00.
>
> OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;
>
> Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order"

Petitioner and her counsel seek this writ on three independent grounds: (1) Ordering the Controller to take actions provided for in the Order is not within the court's jurisdiction, (2) the Order is at variance with the rules prescribed by law, or (3) or the Order requires the Petitioner to act in "a

manner which will defeat a legal right." *State v. Allen*, 24 N.C. 183, 189 (1841).

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs in the *Leandro* case filed their complaint on 25 May 1994. The relevant historical facts and procedural history are contained in the following appellate division cases; *Leandro vs State*, 122 N.C. App. 1, 468 S.E.2d 543 (1996); aff'd in part, rev. in part, and remanded by *Leandro vs State*, 346 N.C. 336, 488 S.E.2d 249 (1996); *Hoke County Bd. of Educ v State*, 358 N.C. 605, 399 S.E.2d 355 (2004). Ho*ke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 679 S.E.2d 512 (2009) *Hoke Cty. Bd. of Educ. v. State*, 222 N.C. App. 406, 731 S.E.2d 691 (2012); *Hoke Cty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013). The 10 November 2021 Order contains the recent procedural history of the case. (¶ 1 to 17 Exhibit A.)

During the history of the *Leandro* case, Petitioner has never been served with any legal process involving either *Leandro vs State* or *Hoke Cty Bd. Of Educ. v. State.* Petitioner is not a party to either case. Petitioner has not been served with the Order attached as Exhibit A. Petitioner has not been made aware of any enactment by the General Assembly which would authorize her to legally distribute funds from the Treasury to comply with the Court's order in any amount. Petitioner is aware the Current Operation Appropriations Act for

Fiscal Years 2021-23 (SB-105) has been recently ratified and signed by the Governor on November 18, 2021, but she is unsure how the funds required to be distributed by the Order should be credited in the recently ratified Appropriations Act. It is unclear from the Order what credit, if any, should be given for the funds recently appropriated by the General Assembly and how the funds would be accounted for in the current operation budget.

ISSUES PRESENTED

Whether the 10 November, 2021 Order is a proper exercise of the trial Court's authority, where the Court mandated non-parties to withdraw funds from the North Carolina Treasury without any notice or opportunity to be heard?

Whether a Writ of Prohibition should issue from this Court with regard to such Order?

Whether the 10 November, 2021 Order is a proper exercise of that Court's authority, given the Constitutional, Statutory and Precedential authorities to the contrary?

REASONS WHY THE WRITS SHOULD ISSUE

N.C. Gen Stat. § 7A-32(b) and (c) grants this court statutory jurisdiction to grant extraordinary writs – including writs for prohibition.

Article IV, section 12(1) of the N.C. Constitution confers jurisdiction on the N.C. Supreme Court to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts." See also G.S. 7A-32(b) (same). The General Assembly exercised its authority under article IV, section 12(2) to confer jurisdiction on the N.C. Court of Appeals "to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts . . . ." See G.S. 7A-32(c). For further discussion of the history and origins of these four writs, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERT, *North Carolina Appellate Practice and Procedure* § 20 (Remedial, Prerogative, and Extraordinary Writs of the Appellate Courts) (2018).

The petition for the writ should be directed to the appellate court to which an appeal of right might lie from a final judgment entered in the cause. N.C. R. App. P. 22(a).

The Supreme Court of North Carolina has held a nonparty can seek to protect its rights by "extraordinary writ practice". *Virmani v. Presbyterian Health Services Corp.,* 350 N.C. 449, 515 S.E.2d 675 (1999).

A writ of supersedeas and temporary stay are an extraordinary writ that issues from an appellate court to a lower court "to preserve the status

quo pending the exercise of the appellate court's jurisdiction." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961). The literal translation of the Latin word "supersedeas" is "you shall desist." BLACK'S LAW DICTIONARY (11th Ed. 2019). Supersedeas suspends the power of the lower court to issue an execution on the judgment or decree appealed from. See 5 Am. Jur. 2D Appellate Review § 370; see also *State v. Dorton*, 182 N.C. App. 34 (2007) (trial judge properly held hearing after N.C. Court of Appeals remanded the case for resentencing; fact that defendant had filed a petition for discretionary review in the N.C. Supreme Court did not divest the trial court of jurisdiction where defendant failed to file a petition for writ of supersedeas to stay enforcement of the remand order). The writ "is issued only to hold the matter in abeyance pending review and may be issued only by the court in which an appeal is pending." *Walker*, 255 N.C. 355, 356; see also N.C. R. App. P. 23(a) (an appeal or a petition for mandamus, prohibition, or certiorari must be pending in the appellate court where the application for writ of supersedeas is filed); *Craver v. Craver*, 298 N.C. 231, 237–38 (1979) ("The writ of supersedeas may issue only in the exercise of, and as ancillary to, the revising power of an appellate court . . . ."). The N.C. Supreme Court and the N.C. Court of Appeals have jurisdiction, exercisable by one or more judges or justices, to issue a writ of supersedeas "to supervise and control the

proceedings" of inferior courts. G.S. 7A-32(b), (c); see also N.C. Const. Art. IV, § 12(1), (2). A petition for the writ should be made in the N.C. Court of Appeals in all cases except those originally docketed in the N.C. Supreme Court. N.C. R. App. P. 23(a)(2)

A writ of prohibition lies most appropriately to prohibit the impending exercise of jurisdiction not possessed by the judge to whom issuance of the writ has been sought. Thus, an appellate court may use a writ of prohibition to restrain lower court judges (1) "from proceeding in a matter not within their jurisdiction," (2) from taking judicial action at variance with the rules prescribed by law, or (3) or from proceeding in "a manner which will defeat a legal right." *State v. Allen*, 24 N.C. 183, 189 (1841). In these situations, the petitioner should demonstrate that (1) an official "is about to exercise judicial or quasi-judicial power," (2) that the power is not authorized by law, and (3) if the power is exercised, the petitioner will suffer an injury, and (4) no other adequate remedy exists to address that injury. 63C Am. Jur. 2d *Prohibition* § 8 (2017). The 10 November Order shows clearly Judge Lee is about to use judicial power without personal jurisdiction or legal authority to do so which will harm the Petitioner, and Petitioner not being a named party to the lawsuit, has no other practical adequate remedy to address her injury.

I. Lack of Jurisdiction Over the Controller

Based upon the caption headings, the certificate of service in the Order and this petition sworn to by the Petitioner, it is clear Petitioner is not a party to *Hoke County Board of Education vs State*. The trial court therefore lacks jurisdiction to order the Controller to take any action. Binding precedent from the North Carolina Supreme Court in *In Re Alamance Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991), a case cited in the Order holds as follows:

> "[I]n order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to assert his defense, and he *must be a party to such proceeding*." *In re Wilson*, 13 N.C. App. 151, 153, 185 S.E.2d 323, 325 (1971) (*emphasis* added) (quoting 2 Strong's N.C. Index 2d, *Constitutional Law* § 24). "[A]ny judgment which may be rendered in . . . [an] action will be wholly ineffectual as against [one] who is not a party to such action." *Scott v. Jordan*, 235 N.C. 244, 249, 69 S.E.2d 557, 561 (1952). The exercise of the court's inherent power to do what is reasonably necessary for the proper administration of justice must stop where constitutional guarantees of justice and fair play begin. "The law of the land clause . . . guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree." *In re Custody of Gupton*, 238 N.C. 303, 304, 77 S.E.2d 716, 717 (1953). "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity." *Burroughs v. McNeill*, 22 N.C. at 301. Such was the effect of the superior court order here.
>
> Because the commissioners were not parties to the action from which the order issued, they are not bound by its mandates. Having so held, this Court need not address additional issues raised by petitioners.

> "In order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to assert his defense, and he must be a party to such proceeding. Any judgment which may be rendered in an action will be wholly ineffectual as against one who is not a party to such action. The law of the land clause guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree. *Id.* at 108

This case is factually distinct from the *Alamance Facilities* case. In *Alamance Facilities*, Judge Height had served the Commissioners with his order, a consideration missing in this case. When the Alamance Commissioners presented themselves to him to defend themselves, the Judge then ruled they were not parties and therefore had no standing to present a defense. Here the 10 November order was never served on the Controller or the other State Executive Branch Officials charged with distributing treasury funds.

Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *In Re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d. 787, 789 (2006) (internal citations omitted). A court must have personal jurisdiction over the parties to "bring [them] into its adjudicative process." *Id.* at 14 590, 636 S.E.2d. at 790 (internal citations omitted). It is also well-established that "[t] he court may not grant a restraining order unless it has proper jurisdiction of the matter."

SHUFORD *North Carolina Civil Practice and Procedure*, 6th Ed., p. 1195. When a court lacks jurisdiction, it is "without authority to enter any order granting any relief." *Swenson v. All American Assurance Co.*, 33 N.C. App. 458, 465, 235 S.E.2d 793, 797 (1977) (finding the court was without authority to enter a temporary restraining order when it had no jurisdiction over the defendant). When a court lacks authority to act, its acts are void. *Russell v. Bea Staple Manufacturing Co.*, 266 N.C. 531, 534, 146 S.E.2d 459, 461 (1966). As the Supreme Court stated in *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987): "If the court was without authority, its judgment ... is void and of no effect. A lack of jurisdiction or power in the court entering a judgment always voids the judgment [citations omitted] and a void judgment may be attacked whenever and wherever it is asserted." (citations omitted)

In this case, the Court did not have personal jurisdiction over the Petitioners for several reasons, including: 1) they were not parties to the litigation; 2) they received no notice of any hearing; and consequently 3) they were denied the opportunity to be heard in violation of due process.

Our legal system is predicated on lawful notice and the opportunity to be heard prior to being forced to comply with court orders. The Petitioners were not given the same basic legal rights like notice and an opportunity to be heard which are given to litigants across the State. As a result of being denied this

right, the Petitioners are now faced with Hobson's choice. Either neglect to perform their sworn duties to enforce the law, or be subject to criminal charges or motions to show cause for contempt of court for performing their sworn duties. This double bind stems from Orders which were never served on them, and on which they were never given an opportunity to be heard, issuing from a proceeding in which they were never parties. Without a Writ being granted, the Petitioners are confronted with either neglecting to enforce the laws of North Carolina or being held in contempt.

This court in strikingly similar circumstances has issued a Writ of Prohibition to prevent a trial court from acting without jurisdiction. No. P17-693 *Sandhill Amusements, Inc et al. v. North Carolina*, (2017). This Writ was appealed and certiorari was denied by the Supreme Court.

While the jurisdictional issue is sufficient in and of itself, to decide this order, even if, the Court did have jurisdiction over the Controller, the acts which the order mandates the Controller undertake are beyond the Court's authority as discussed hereinafter.

II. Order is Contrary to the Express Language of the Constitution

> North Carolina's Constitution in Article V, Section 7, reads as follows: "**Drawing public money**. (1) State treasury. No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

As noted in the leading treatise on the North Carolina Constitution, *The North Carolina State Constitution*, ORTH AND NEWBY 2nd Ed., pg. 154,

> "The power of the purse is the exclusive power of the General Assembly. Colonial Americans were acutely aware of the long struggle between the English Parliament and the Crown over public finance and were determined to secure the power of the purse for their elected representatives. Subsection 1 dates from the 1776 Constitution."

The duties of the Legislative and Judicial Branches with regard to appropriations are clear, explicit and binding. The constitution does not provide the judicial department with the authority to appropriate funds. The plain language of the constitution is clear. There was no reason for the trial court to interpret or find within the penumbra of other more general sections of the Constitution the power to appropriate money in the Judicial Branch. [1]

III. Order is Contrary to the Express Language of the General Statutes

The architecture for the state budget process is set out in the constitution and detailed in the statute. Under the separation of powers doctrine, the judicial branch has no role in that budget process. The North Carolina Constitution sets out a specific, multi-step budget process. The key constitutional budget provision is Article III, § 5(3), which states in pertinent

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[1] A court's declaration its judgment is an appropriation or legislative enactment lacks a basis in fact over law. (See Exhibit A, ¶ 2, page 19).

part: "(3) *Budget.* The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. **The budget as enacted by the General Assembly shall be administered by the Governor.**" N.C. Const. Art. III, § 5(3) (*emphasis* added).

Every word of constitutional provisions must be given effect and, as a result, the plain language of Article III, § 5(3) limits the creation and execution of the budget to the legislative and executive branches respectively. Article III, § 5(3) contains 5 key provisions: (1) the Governor is required to propose a budget; (2) the General Assembly enacts the State budget; (3) the Governor is required to administer the budget as actually enacted by the General Assembly; (4) the State is compelled to operate on a balanced budget; and (5) the Governor is empowered to effect the necessary economies in State expenditures to prevent a budget deficit. This architecture has been explained in an advisory opinion explaining the process by which the state budget is developed, enacted and executed, the North Carolina Supreme Court has articulated the steps of the budget process thusly:

> "Our Constitution mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the 'Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period.' (2) Article II vests in the General Assembly the power to enact a budget [one recommended by the Governor or one of its own

> making]. (3) After the General Assembly *enacts* a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget "as enacted by the General Assembly." In re Separation of Powers, 305 N.C. 767, 776, 295 S.E.2d. 589, 594 (1982, as corrected May 11, 2000) (quoting N.C. Const. art. III, § 5(3)).

After a budget for a specific "fiscal period" is enacted into law, the Governor as *ex officio* Director of the Budget administers it, *i.e.*, he is responsible for disbursing the tax revenue in accordance with legislative directives. N.C. Const. Art. III, § 5(3).

At no point does the North Carolina Constitution give the judicial branch the authority to either enact or execute the state budget. The legislative and executive branches must ensure that their respective roles in creating the budget and executing the budget as enacted are carried out.

The General Assembly established a statutory mechanism to distribute and allocate funds from the Treasury. N. C. Gen. Stat. § 143C-1-2. (a) reads as follows:

> "In accordance with Section 7 of Article V of the North Carolina Constitution, no money shall be drawn from the State treasury but in consequence of appropriations made by law. **A law enacted by the General Assembly that expressly appropriates funds from the State treasury is an appropriation;** however, an enactment by the General Assembly that describes the purpose of a fund, authorizes the use of funds, allows the use of funds, or specifies how funds may be expended, is not an appropriation. (*emphasis* added)."

This defines the word "appropriations." A judgment or order by a judge is definitionally not an appropriation.

The General Assembly and the Constitution have established a budgetary process, including the provision for the Governor to delegate Budgetary authority to the Office of State Budget and Management. By N.C. Gen. Stat. 143C-2-1 (a), the Governor administers "the Budget as enacted by the General Assembly", furthermore "The ***Governor shall ensure that appropriations are expended in strict accordance with the budget enacted*** **by the General Assembly.**" (*emphasis* added). N.C. Gen. Stat §143C-6.1(a). There is an extraordinary events provision which provides for the Governor to comply with a court order, G.S. 143C-6-4(b)(2)a. The amount transferred may not "**cause General Fund expenditures, excluding expenditures from General Fund receipts, to exceed General Fund appropriations for a department**. (*emphasis* added)." G.S. 143C-6-4(b2) The order either ignores the Statute or seems to confuse subsection (b)(2) with section (b2). Section (b2) renders subsection (b)(2) as inapplicable.

The General Assembly's statutory mechanism for enforcement of these acts includes penalty provisions. These include a requirement the Budget Director report the spending of any unauthorized funds in apparent violation of a penal law to the Attorney General. See 143C-6-7. Furthermore, to

"withdraw funds from the State treasury for any purpose not authorized by an act of appropriation" or to "fail or refuse to perform a duty" in violation of this Chapter is a Class 1 misdemeanor which subjects the wrongdoer to a criminal liability, forfeiture of office or impeachment. § 143C-10-1(a)(1) and (4) and 143C-10-3.

The Petitioner or her staff would be subject to these penalties in the event she were compelled by the Order to comply with its term. Compliance with the court's order would violate the Controller's oath of office. See G.S. 11-7.[2]

IV. Order is Contrary to Controlling Precedents of the Appellate Division.

Controlling precedents of the Supreme Court of North Carolina support Petitioner's view a withdrawal of funds from the Treasury cannot be made without an appropriation enacted by the General Assembly. *In Re Alamance*

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[2] Article VIII of the Articles of Impeachment of Governor Holden "charges that the accused, as Governor, made his warrants for large sums of money on the public treasurer for the unlawful purpose of paying the armed men before mentioned -- caused and procured said Treasurer to deliver to one A. D. Jenkins, appointed by the accused to be paymaster, the sum of forty thousand dollars; that the Honorable Anderson Mitchell, one of the superior court judges, on application to him made, issued writs of injunction which were served upon the said treasurer and paymaster, restraining them from paying said money to the said troops; that thereupon the accused incited and procured the said A. D. Jenkins paymaster, to disobey the injunction of the court and to deliver the money to another agent of the accused, to-wit: one John B. Neathery ; and thereupon the accused ordered and caused the said John B. Neathery to disburse and pay out the money so delivered to him, for the illegal purpose of paying the expenses of, and keeping on foot the illegal military force aforesaid." *Holden, Impeachment Proceedings*, I, 110-112. A complete text of the Articles of Impeachment can be found in the Impeachment Proceedings, I, 9-17. See also *Articles Against W. W. Holden (Raleigh*: James H. Moore, State Printer and Binder), 1871.

County Court Facilities, *Id.* and *Cooper vs Berger*, 376 N.C. 22, 37 (2020). *White v. Hill*, 125 N.C. 194, 34 S.E. 432 (1899), *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898) *Gardner v. Board of Trustees*, 226 N.C. 465, 38 S.E.2d 314 (1946); *State v. Davis*, 270 N.C. 1, 153 S.E.2d 749, *cert. denied*, 389 U.S. 828, 88 S. Ct. 87, 19 L. Ed. 2d 84 (1967), *State v. Davis,* 270 N.C. 1, 153 S.E.2d 749, *Martin v. Clark*, 135 N.C. 178, 47 S.E. 397 (1904), *Cooper v. Berger*, 268 N.C. App. 468, 837 S.E.2d 7 (2019), aff'd, 376 N.C. 22, 852 S.E.2d 46, 2020 N.C. LEXIS 1133 (2020).

RELIEF REQUESTED

For the foregoing reasons, Petitioner respectfully requests that this Court issue its writ of prohibition (1) vacating the 10 November 2021 and/or (2) enjoining Judge Lee from compelling the Petitioner, in her official capacity as Controller of the State of North Carolina, and those serving under her supervision, from performing any action required by the trial court's 10 November 2021 order attached hereto. Petitioner also requests the Court issue a temporary stay and writ of supersedes to prevent the time for appeal from expiring for aggrieved parties.

Additionally, should the Court desire briefing and argument on these issues, then Petitioners request the Court order a temporary stay and writ of supersedeas of the 10 November 2021 Order until this Writ of Prohibition has

been finally determined, and time for review to the North Carolina Supreme Court of any such determination has expired.

Respectfully submitted this 24th day of November, 2021.

HIGGINS BENJAMIN, PLLC

Electronically Submitted
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Attorney for Petitioner

ATTACHMENTS

Attached to this Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas are copies of the following documents from the court records:

Exhibit A	Order entered by the Honorable Superior Court Judge W. David Lee in the 10th Judicial District in "Hoke County Board of Education vs State of North Carolina" (Wake County File No. 95 CVS 1158) dated 10 November 2021.
Exhibit B	Memorandum of Law dated 8 November 2021 supplied to Judge Lee by the Attorney General of North Carolina

VERIFICATION OF COUNSEL AND PETITIONER

Robert N. Hunter, Jr. and Linda Combs., being first duly sworn, deposes and says that he has read the foregoing Petition for Writ of Certiorari and that the same is true to his own knowledge except as to matters alleged upon information and belief, and as to these matters, we believe them to be true.

ROBERT N. HUNTER, JR.

Sworn to and subscribed before me,
this 24th day of November 2021.

Marjorie Patricia Julian, Notary Public

MARJORIE PATRICIA JULIAN NOTARY My Commission Expires 10-20-2025 PUBLIC GUILFORD COUNTY, NC

My commission expires: October 20, 2025

LINDA COMBS

Sworn to and subscribed before me,
this 24th day of November 2021.

Kourtney Batot, Notary Public
(Print Name)

KOURTNEY BATOT NOTARY PUBLIC DAVIDSON COUNTY, NC

My commission expires: July 19, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas was served on counsel for the parties via email and U.S. Mail, postage prepaid, addressed as follows:

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This 24th day of November, 2021.

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Attorney for Petitioner

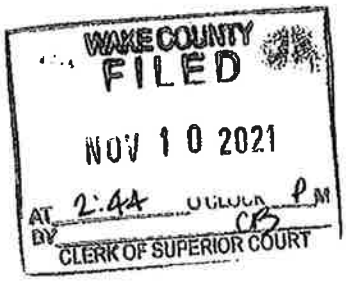
EXHIBIT A

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON, individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,



Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

ORDER

Over seventeen years ago, Justice Orr, on behalf of a unanimous Supreme Court, wrote:

> The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, *boldly and decisively*, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our

> state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. *Whether the State meets this challenge remains to be determined.*

Hoke County Bd. of Educ. v. State, 358 N.C. 605, 649 (2004) *("Leandro II")* (emphasis added). As of the date of this Order, the State has not met this challenge and, therefore, has not met its constitutional obligation to the children of North Carolina.

The orders of our Supreme Court are not advisory. This Court can no longer ignore the State's constitutional violation. To do so would render both the North Carolina State Constitution and the rulings of the Supreme Court meaningless.

This Court, having held a hearing on October 18, 2021 at which it ordered Plaintiffs and Plaintiff-Intervenors to submit proposed order(s) and supporting legal authorities by November 1, 2021 and Defendants State of North Carolina ("State") and State Board of Education ("State Board," and collectively with the State, "State Defendants") to respond by November 8, 2021, finds and concludes as follows[1]:

I. Findings of Fact

1. In its unanimous opinion in *Leandro II*, the Supreme Court held, "an inordinate number" of students had failed to obtain a sound basic education and that the State had "failed in [its] constitutional duty to provide such students with the opportunity to obtain a sound basic education." In light of that holding, the Supreme Court ordered that "the State must act to correct those deficiencies that were deemed by the trial court as contributing to the State's failure of providing a Leandro-comporting educational opportunity." *Id.* at 647-48.

2. Since 2004, this Court has given the State countless opportunities, and unfettered discretion, to develop, present, and implement a *Leandro*-compliant remedial plan. For over eleven (11) years and in over twenty (20) compliance hearings, the State demonstrated its inability, and repeated failure, to develop, implement, and maintain any kind of substantive structural initiative designed to remedy the established constitutional deficiencies.

3. For more than a decade, the Court annually reviewed the academic performance of every school in the State, teacher and principal population data, and the programmatic resources made available to at-risk students. This Court concluded from over a decade of undisputed evidence that "in way too many school

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[1] The findings and conclusions of the Court's prior Orders—including the January 21, 2020 Consent Order ("January 2020 Order"), September 11, 2020 Consent Order ("September 2020 Order"), June 7, 2021 Order on Comprehensive Remedial Plan ("June 2021 Order"), September 22, 2021 Order ("September 2021 Order"), and October 22, 2021 Order ("October 2021 Order")—are incorporated herein.

districts across this state, thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined and required by the *Leandro* decision." March 17, 2015 Order.

4. At that time, North Carolina was replete with classrooms unstaffed by qualified, certified teachers and schools that were not led by well-trained principals. Districts across the State continued to lack the resources necessary to ensure that all students, especially those at-risk, have an equal opportunity to receive a *Leandro*-conforming education. In fact, the decade after *Leandro II* made plain that the State's actions regarding education not only failed to address its *Leandro* obligations, but exacerbated the constitutional harms experienced by another generation of students across North Carolina, who moved from kindergarten to 12th grade since the Supreme Court's 2004 decision.

5. This Court examined the record again and in 2018 found that "the evidence before this court . . . is wholly inadequate to demonstrate . . . substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards." *See* March 13, 2018 Order. The State Board did not appeal the ruling. Consequently, the Court ordered the parties to identify an independent, third-party consultant to make detailed comprehensive written recommendations for specific actions necessary to achieve sustained compliance with the constitutional mandates articulated in the holdings of *Leandro v. State*, 346 N.C. 336, 357 (1997) *("Leandro I")* and *Leandro II*. The State, along with the Plaintiffs and Penn Intervenors, recommended WestEd to serve in that capacity. The Governor also created the Commission on Access to a Sound Basic Education (the "Commission") at that time "to gather information and evidence to assist in the development of a comprehensive plan to address compliance with the constitutional mandates." Governor Roy Cooper Exec. Order No. 27 (Nov. 15, 2017).

6. By Order dated March 13, 2018, the Court appointed WestEd to serve as the Court's consultant, and all parties agreed that WestEd was qualified to serve in that capacity. *See* January 2020 Order at 10. In support of its work, WestEd also engaged the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute (LPI), a national education policy and research organization with extensive experience in North Carolina. WestEd presented its findings and recommendations to the Court in December 2019 in an extensive report entitled, *"Sound Basic Education for All: An Action Plan for North Carolina,"* along with 13 underlying studies (collectively, the "WestEd Report"). The WestEd Report represents an unprecedented body of independent research and analysis of the North Carolina educational system that has further informed the Court's approach in this case.

7. The WestEd Report concluded, and this Court found, that the State must complete considerable, systematic work to deliver fully the opportunity to obtain a sound basic education to all children in North Carolina. *See* January 2020 Order at 2-3. The WestEd Report found, for example, that hundreds of thousands of North Carolina

children continue to be denied the opportunity for a sound basic education. Indeed, the State is in many ways further away from constitutional compliance than it was when the Supreme Court issued its *Leandro I* decision almost 20 years ago. (WestEd Report, p. 31). Minimal progress has been made, as evidenced by multiple data sources on two of the primary educational outputs identified in *Leandro*: (i) the proficiency rates of North Carolina's students, especially at-risk students, in core curriculum areas, and (ii) the preparation of students, especially at-risk students, for success in postsecondary degree and credential programs. (Report, p. 31).

8. Based on the WestEd Report, the Court found that due to the increase in the number of children with higher needs, who require additional supports to meet high standards, the State faces greater challenges than ever before in meeting its constitutional obligations. January 2020 Order at 15. For example, North Carolina has 807 high-poverty districts schools and 36 high-poverty charter schools, attended by over 400,000 students (more than a quarter of all North Carolina students). *Id.* The Court also found that state funding for education has not kept pace with the growth and needs of the PreK-12 student body. *Id.* at 17. And promising initiatives since the *Leandro II* decision were neither sustained nor scaled up to make a substantial impact. *Id.*

9. Plaintiffs and Penn Intervenors (collectively, "Plaintiffs") as well as State Defendants all agreed that "the time has come to take decisive and concrete action . . . to bring North Carolina into constitutional compliance so that all students have access to the opportunity to obtain a sound basic education." January 2020 Order at 3. The Court agreed and, therefore, ordered State Defendants to work "expeditiously and without delay" to create and fully implement a system of education and educational reforms that will provide the opportunity for a sound basic education to all North Carolina children.

10. The parties submitted a Joint Report to the Court on June 15, 2020 that acknowledged that the COVID-19 pandemic has exacerbated many of the inequities and challenges that are the focus of this case, particularly for students of color, English Language Learners, and economically-disadvantaged students. The Joint Report set forth specific action steps that "the State *can and will* take in Fiscal Year 2021 (2020-21) to begin to address the constitutional deficiencies previously identified by this Court" (the "Year One Plan"). The parties all agreed that the actions specified in the Year One Plan were necessary and appropriate to remedy the constitutional deficiencies in North Carolina public schools.

11. On September 11, 2020, the Court ordered State Defendants to implement the actions identified in the Year One Plan. September 2020 Order, Appendix A. The Court further ordered State Defendants, in consultation with Plaintiff parties, to develop and present a Comprehensive Remedial Plan to be fully implemented by the end of 2028 with the objective of fully satisfying State Defendants' *Leandro* obligations by the end of 2030. Lastly, to assist the Court in entering this order and to promote transparency, the Court

ordered State Defendants to submit quarterly status reports of progress made toward achieving each of the actions identified in the Year One Plan.

12. State Defendants submitted their First Status Report on December 15, 2020. The Court was encouraged to see that some of the initial action items were successfully implemented and that the SBE had fulfilled its obligations. However, the Court noted many shortcomings in the State's accomplishments and the State admitted that the Report showed that it had failed to implement the Year One Plan as ordered. For example, House Bill 1096 (SL 2020-56), which was enacted by the General Assembly and signed into law by the Governor on June 30, 2020, implemented the identified action of expanding the number of eligible teacher preparation programs for the NC Teaching Fellows Program from 5 to 8. Increased funding to support additional Teaching Fellows for the 2021-22 academic year, however, was not provided. Similarly, Senate Bill 681 (SL 2020-78) was enacted by the General Assembly and signed into law by the Governor on July 1, 2020 to create a permanent Advanced Teaching Roles program that would provide grants and policy flexibility to districts seeking to implement a differentiated staffing model. Senate Bill 681, however, did not provide any new funding to provide additional grants to school districts, as required by the Year One Plan.[2]

13. The State Defendants submitted their Comprehensive Remedial Plan (which includes the Appendix) on March 15, 2021. As represented by State Defendants, the Comprehensive Remedial Plan identifies the programs, policies, and resources that "are necessary and appropriate actions that must be implemented to address the continuing constitutional violations and to provide the opportunity for a sound basic education to all children in North Carolina." Specifically, in *Leandro II,* the Supreme Court unanimously affirmed the trial court's finding that the State had not provided, and was not providing, competent certified teachers, well-trained competent principals, and the resources necessary to afford all children, including those at-risk, an equal opportunity to obtain a sound basic education, and that the State was responsible for these constitutional violations. *See* January 2020 Order at 8; 358 N.C. at 647-48. Further, the trial court found, and the Supreme Court unanimously affirmed, that at-risk children require more resources, time, and focused attention in order to receive a sound basic education. *Id.*; *Leandro II,* 358 N.C. at 641. Regarding early childhood education, the Supreme Court affirmed the trial court's findings that the "State was providing inadequate resources" to "'at-risk' prospective enrollees" ("pre-k" children), "that the State's failings were contributing to the 'at-risk' prospective enrollees' subsequent failure to avail themselves of the opportunity to obtain a sound basic education," and that "State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 69, *Leandro II.* 358 N.C. at 641-42.

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[2] The First Status Report also detailed the federal CARES Act funds that the Governor, the State Board, and the General Assembly directed to begin implementation of certain Year One Plan actions. The Court notes, however, that the CARES Act funding and subsequent federal COVID-related funding is nonrecurring and cannot be relied upon to sustain ongoing programs that are necessary to fulfill the State's constitutional obligation to provide a sound basic education to all North Carolina children.

Consequently, the Comprehensive Remedial Plan addresses each of the "*Leandro* tenets" by setting forth specific actions to be implemented over the next eight years to achieve the following:

- A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;
- A system of principal development and recruitment that ensures each school is led by a high-quality principal who is supported with early and ongoing professional learning and provided competitive pay;
- A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk-students as defined by the *Leandro* decisions;
- An assessment and accountability system that reliably assesses multiple measures of student performance against the *Leandro* standard and provides accountability consistent with the *Leandro* standard;
- An assistance and turnaround function that provides necessary support to low-performing schools and districts;
- A system of early education that provides access to high-quality pre-kindergarten and other early childhood learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and
- An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

January 2020 Order at 4-5.

14. The Appendix to the Comprehensive Remedial Plan identifies the resources necessary, as determined by the State, to implement the specific action steps to provide the opportunity for a sound basic education. This Court has previously observed "that money matters provided the money is spent in a way that is logical and the results of the expenditures measured to see if the expected goals are achieved." Memorandum of Decision, Section One, p. 116. The Court finds that the State Defendants' Comprehensive Remedial Plan sets forth specific, comprehensive, research-based and logical actions, including creating an assessment and accountability system to measure the expected goals for constitutional compliance.

15. WestEd advised the parties and the Court that the recommendations contained in its Report are not a "menu" of options, but a comprehensive set of fiscal, programmatic, and strategic steps necessary to achieve the outcomes for students required by our State Constitution. WestEd has reviewed the Comprehensive Remedial Plan and has advised the Court that the actions set forth in the Plan are necessary and appropriate for implementing the recommendations contained in WestEd Report. The Court concurs with WestEd's opinion and also independently reaches this conclusion based on the entire record in this case.

16. The Supreme Court held in 1997 that if this Court finds "from competent evidence" that the State is "denying children of the state a sound basic education, a denial of a fundamental right will have been established." *Leandro I*, 346 N.C. at 357. This Court's finding was upheld in *Leandro II* and has been restated in this Court's Orders in 2015 and 2018. It is, therefore, "incumbent upon [the State] to establish that their actions denying this fundamental right are 'necessary to promote a compelling government interest.'" *Id.* The State has not done so.

17. To the contrary, the State has repeatedly acknowledged to the Court that additional State actions are required to remedy the ongoing denial of this fundamental right. *See, e.g.*, State's March 15, 2021 Submission to Court at 1 (State acknowledging that "this constitutional right has been and continues to be denied to many North Carolina children"); *id.* ("North Carolina's PreK-12 education system leaves too many students behind, especially students of color and economically disadvantaged students."); *id.* ("[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens."); State's August 16, 2021 Submission to Court at 1 (acknowledging that additional State actions are required to remedy the denial of the constitutional right). *See also, e.g.*, January 2020 Order at 15 (noting State's acknowledgment that it has failed to meet its "constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education."); *id.* ("[T]he Parties do not dispute [] that many children across North Carolina, especially at-risk and economically-disadvantaged students, are not now receiving a *Leandro*-conforming education."); *id.* at 17 (State has "yet to achieve the promise of our Constitution and provide all with the opportunity for a sound basic education"); June 2021 Order at 6 ("State Defendants have acknowledged that additional State actions are required to remedy the denial of this fundamental right.").

18. After seventeen years, State Defendants presented to the Court a Comprehensive Remedial Plan outlining those additional State actions necessary to comply with the mandates of the State Constitution.

19. The Comprehensive Remedial Plan sets out the "nuts and bolts" for how the State will remedy its continuing constitutional failings to North Carolina's children. It sets out (1) the specific actions identified by the State that must be

implemented to remedy the continuing constitutional violations, (2) the timeline developed by the State required for successful implementation, and (3) the necessary resources and funding, as determined by the State, for implementation.

20. The Comprehensive Remedial Plan is the *only* remedial plan that the State Defendants have presented to the Court in response its January 2020, September 2020, and June 2021 Orders. The State Defendants have presented no alternative remedial plan.

21. With regard to the Comprehensive Remedial Plan, the State has represented to this Court that the actions outlined in the Plan are the "necessary and appropriate actions that must be implemented to address the continuing constitutional violations." *See* State's March 2021 Submission at 3, 4 (emphasis added). The State further represented to the Court that the full implementation of each year of the Remedial Plan was required to "provide the opportunity for a sound basic education to all children in North Carolina." *Id.* at 3. The State assured the Court that it was "committed" to fully implementing its Comprehensive Remedial Plan and within the time frames set forth therein. *Id.*

22. The State has represented to the Court that more than sufficient funds are available to execute the current needs of the Comprehensive Remedial Plan. *See, e.g.,* State's August 6, 2021 Report to Court. The State of North Carolina concedes in its August progress report to the Court that the State's reserve balance included $8 billion and more than ***$5 billion*** in forecasted revenues at that time that exceed the existing base budget. Yet, the State has not provided the necessary funding to execute the Comprehensive Remedial Plan.

23. The Court understands that those items required by the Year One Plan that were not implemented as ordered in the September 2020 Order have been included in, or "rolled over" to, the Comprehensive Remedial Plan. The Court notes that the WestEd Report contemplated that its recommendations would be implemented gradually over eight years, with later implementation building upon actions to be taken in the short term. Failure to implement all of the actions in the Year One Plan will necessarily make it more difficult for State Defendants to implement all the actions described in the Comprehensive Remedial Plan in a timely manner. The urgency of implementing the Comprehensive Remedial Plan on the timeline currently set forth by State Defendants cannot be overstated. As this Court previously found:

> [T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they live, work and engage as citizens. The costs to those students, individually, and to the State are considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

January 2020 Order.

24. Despite the urgency, the State has failed to implement most actions in the Comprehensive Remedial Plan and has failed to secure the resources to fully implement the Comprehensive Remedial Plan.

25. The Comprehensive Remedial Plan would provide critical supports for at-risk students, such as:

- comprehensive induction services for beginning teachers in low performing, high poverty schools;
- costs of National Board certification for educators in high need, low-performing schools;
- critical supports for children with disabilities that could result from increasing supplemental funding to more adequate levels and removing the funding cap;
- ensuring greater access to key programs for at-risk students by combining the DSSF and at-risk allotments for all economically disadvantaged students; and
- assisting English learner students by eliminating the funding cap, simplifying the formula and increasing funding to more adequate levels.

26. As of the date of this Order, therefore, the State's implementation of the Comprehensive Remedial Plan is already behind the contemplated timeline, and the State has failed yet another class of students. Time is of the essence.

27. The Court has granted "every reasonable deference" to the legislative and executive branches to "establish" and "administer a system that provides the children of the various school districts of the state a sound basic education," 346 N.C. at 357, including, most recently, deferring to State Defendants' leadership in the collaborative development of the Comprehensive Remedial Plan over the past three years.

28. Indeed, in the seventeen years since the *Leandro II* decision, this Court has afforded the State (through its executive and legislative branches) discretion to develop its chosen *Leandro* remedial plan. The Court went to extraordinary lengths in granting these co-equal branches of government time, deference, and opportunity to use their informed judgment as to the "nuts and bolts" of the remedy, including the identification of the specific remedial actions that required implementation, the time frame for such implementation, the resources necessary for the implementation, and the manner in which to obtain those resources.

29. On June 7, 2021, this Court issued an Order cautioning: "If the State fails to implement the actions described in the Comprehensive Remedial Plan—actions which it admits are necessary and which, over the next biennium, the Governor's proposed budget and Senate Bill 622 confirm are attainable—it will then be the duty of this Court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong . . . ." June 2021 Order (quoting *Leandro I*, 346 N.C. at 357).

30. The 2021 North Carolina legislative session began on January 13, 2021 and, as of the date of this Order, no budget has passed despite significant unspent funds and known constitutional violations. In addition, with the exception of N.C.G.S. § 115C-201(c2) related to enhancement teacher allotment funding, no stand-alone funding measures have been enacted to address the known constitutional violations, despite significant unspent funds.

31. The failure of the State to provide the funding necessary to effectuate North Carolina's constitutional right to a sound basic education is consistent with the antagonism demonstrated by legislative leaders towards these proceedings, the constitutional rights of North Carolina children, and this Court's authority.

32. This Court has provided the State with ample time and every opportunity to make meaningful progress towards remedying the ongoing constitutional violations that persist within our public education system. The State has repeatedly failed to act to fulfill its constitutional obligations.

33. In the seventeen years since the *Leandro II* decision, a new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education. Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue. As Justice Orr stated, on behalf of a unanimous Supreme Court, "the children of North Carolina are our state's most valuable renewable resource." *Leandro II,* 358 N.C. at 616. "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. . . ." *Id.* (emphasis added).

II. Conclusions of Law

1. The people of North Carolina have a constitutional right to an opportunity to a sound basic education. It is the duty of the State to guard and

maintain that right. N.C. Const. art. 1, sec. 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); *id.* art. IX, sec. 2(1) ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students."); 346 N.C. at 345 (1997) (holding that the Constitution guarantees the "right to a sound basic education").

2. The "State" consists of each branch of our tripartite government, each with a distinctive purpose. *State v. Berger*, 368 N.C. 633, 635 (2016) (citations and internal quotation marks omitted) ("The General Assembly, which comprises the legislative branch, enacts laws that protect or promote the health, morals, order, safety, and general welfare of society. The executive branch, which the Governor leads, faithfully executes, or gives effect to, these laws. The judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution."). Here the judicial branch, by constitutional necessity, exercises its inherent power to ensure remedies for constitutional wrongs and compels action by the two other components of the "State"—the legislative and executive branches of government. *See Leandro II*, 358 N.C. at 635 ("[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education . . . .").

3. Our constitution and laws recognize that the executive branch is comprised of many public offices and officials. The Treasurer and State Superintendent of Public Instruction are two such officials. See N.C. Const. art. III, §7 and Cooper v. Berger, 371 N.C. 799,800 (2018). The Office of State Budget and Management , the Office of the State Controller, and the Department of Health and Human Services are also within the executive branch. See generally, N.C. Const. art. III, §§ 5(10), 11; N.C. Gen. Stat. § 143C-2-1; N.C. Gen. Stat. § 143B-426.35 – 426.39B; and N.C. Gen. Stat. § 143-B-136.1 – 139.7. The University of North Carolina System is also constitutionally responsible for public education. See N.C. Const. art. IX, § 8.

4. The Court concludes that the State continues to fail to meet the minimum standards for effectuating the constitutional rights set forth in article I, section 15 and article IX, section 2 of our State constitution and recognized by our Supreme Court in *Leandro I* and *II*. The constitutional violations identified in *Leandro I* and *II* are ongoing and persist to this day.

5. The General Assembly has a duty to guard and maintain the right to sound basic education secured by our state constitution. *See* N.C. Const. art. 1, sec. 15. As the arm of the State responsible for legislation, taxation, and appropriation,

the General Assembly's principal duty involves adequately funding the minimum requirements for a sound basic education. While the General Assembly could also choose to enact new legislation to support a sound basic education, the General Assembly has opted to largely ignore this litigation.

6. Thus, the General Assembly, despite having a duty to participate in guarding and maintaining the right to an opportunity for a sound basic education, has failed to fulfill that duty. This failure by one branch of our tripartite government has contributed to the overall failure of the State to meet the minimum standards for effectuating the fundamental constitutional rights at issue.

7. "[W]hen inaction by those exercising legislative authority threatens fiscally to undermine" the constitutional right to a sound basic education "a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice." *See In re Alamance County Court Facilities*, 329 N.C. 84, 99 (1991) (citation and internal quotation marks omitted).

8. Indeed, in *Leandro II* a unanimous Supreme Court held that "[c]ertainly, 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." 358 N.C. at 642.

9. Article I, section 18 of the North Carolina Constitution's Declaration of Rights—which has its origins in the Magna Carta—states that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18; *see Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 61 (1989) (explaining that article I, section 18 "guarantees a remedy for legally cognizable claims"); *cf. Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342 (2009) (noting the Supreme Court of North Carolina's "long-standing emphasis on ensuring redress for every constitutional injury").

10. Article I, section 18 of the North Carolina Constitution recognizes the core judicial function to ensure that right and justice—including the constitutional right to the opportunity to a sound basic education—are not delayed or denied.

11. Because the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this Court must provide a remedy through the exercise of its constitutional role. Otherwise, the State's

repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education will threaten the integrity and viability of the North Carolina Constitution by:

a. nullifying the Constitution's language without the people's consent, making the right to a sound basic education merely aspirational and not enforceable;

b. ignoring rulings of the Supreme Court of North Carolina setting forth authoritative and binding interpretations of our Constitution; and

c. violating separation of powers by preventing the judiciary from performing its core duty of interpreting our Constitution. *State v. Berger*, 368 N.C. 633, 638 (2016) ("This Court construes and applies the provisions of the Constitution of North Carolina with finality.").

12. It appears that the General Assembly believes the Appropriations Clause, N.C. Const. art. V, section 7, prevents any court-ordered remedy to obtain the minimum amount of State funds necessary to ensure the constitutionally-required opportunity to obtain a sound basic education.

13. Our Supreme Court has recognized that the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Cooper v. Berger*, 376 N.C. 22, 37 (2020). In *Richmond County Board of Education v. Cowell*, 254 NC App 422 (2017) our Court of Appeals articulated that Article 5 Section 7 of the North Carolina Constitution permits state officials to draw money from the State Treasury only when an appropriation has been "made by law." This court concludes that Article 1 Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may therefore be deemed an appropriation "made by law."

14. In *Cooper v Berger*, 376 N.C. 22 (2020) our Supreme Court noted that the General Assembly's authority over appropriations was grounded in its function as the voice of the people. *See* 376 N.C. at 37. It must also be noted, however, that the Constitution itself "expresses the will of the people in this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299 (1978); *see also Gannon v. Kansas*, 368 P.3d 1024, 1057 (Kan. 2016) (explaining that "[t]he constitution is the direct mandate of the people themselves"). Accordingly, the Court concludes that

Article I, § 15 represents a constitutional appropriation, such an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating Article I, § 15's constitutional appropriation is fully consistent with the framers desire to give the people ultimate control over the state's expenditures. *Cooper*, 376 N.C. at 37.

15. If the State's repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education goes unchecked, then this matter would merely be a political question not subject to judicial enforcement. Such a contention has been previously considered—and rejected—by our Supreme Court. *Leandro I*, 346 N.C. at 345. Accordingly, it is the Court's constitutional duty to ensure that the ongoing constitutional violation in this case is remedied. N.C. Const. art. I, § 18.

16. Indeed, the State Budget Act itself recognizes that it should not be construed in a manner to "abrogate[] or diminish[] the inherent power" of any branch of government. N.C. Gen. Stat. § 143C-1-1(b). The inherent power of the judicial branch to ensure and effectuate constitutional rights cannot be disputed. *Cf. Ex Parte McCown*, 139 N.C. 95 (1905) ("[L]aws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory.").

17. "It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself." *Leandro I*, 346 N.C. at 352; *accord Stephenson v. Bartlett*, 355 N.C. 354, 397 (2002). As a result, the appropriations clause cannot be read to override the people's right to a sound basic education.

18. This Court cannot permit the State to continue failing to effectuate the right to a sound basic education guaranteed to the people of North Carolina, nor can it indefinitely wait for the State to act. Seventeen years have passed since *Leandro II* and, in that time, too many children have been denied their fundamental constitutional rights. Years have elapsed since this Court's first remedial order. And nearly a year has elapsed since the adoption of the Comprehensive Remedial Plan. This has more than satisfied our Supreme Court's direction to provide "every reasonable deference to the legislative and executive branches," *Leandro I*, 346 N.C. at 357, and allow "unimpeded chance, 'initially at least,' to correct constitutional deficiencies revealed at trial," *Leandro II*, 358 N.C. at 638 (citation omitted).

19. To allow the State to indefinitely delay funding for a *Leandro* remedy when adequate revenues exist would effectively deny the existence of a constitutional right to a sound basic education and effectively render the Constitution and the Supreme Court's *Leandro* decisions meaningless. The North Carolina Constitution, however, guarantees that right and empowers this Court to ensure its enforcement. The legislative and executive branches of the State, as creations of that Constitution, are subject to its mandates.

20. Accordingly, this Court recognizes, as a matter of constitutional law, a continuing appropriation from the State Treasury to effectuate the people's right to a sound basic education. The North Carolina Constitution repeatedly makes school funding a matter of constitutional—not merely statutory—law. Our Constitution not only recognizes the fundamental right to the privilege of education in the Declaration of Rights, but also devotes an entire article to the State's education system. Despite the General Assembly's general authority over appropriations of State funds, article IX specifically directs that proceeds of State swamp land sales; grants, gifts, and devises made to the State; and penalties, fines, and forfeitures collected by the State shall be used for maintaining public education. N.C. Const. art. IX, §§ 6, 7. Multiple provisions of article IX also expressly require the General Assembly to adequately fund a sound basic education. *See* N.C. Const. art. IX, §§ 2, 6, 7. When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. As the foregoing findings of fact make plain, however, this Court must fulfill its constitutional duty to effect a remedy at this time.

21. The right to a sound basic education is one of a very few affirmative constitutional rights that, to be realized, requires the State to supply adequate funding. The State's duty to carry out its obligation of ensuring this right has been described by the Supreme Court as both "paramount" (*Leandro II*, 358 N.C. at 649 and "sacred." *Mebane Graded Sch. Dist. v. Alamance Cty.*, 211 N.C. 213-(1937). The State's ability to meet this constitutional obligation is not in question. The unappropriated funds in the State Treasury greatly exceed the funds needed to implement the Comprehensive Remedial Plan. Consequently, there is no need to make impossible choices among competing constitutional priorities.

22. The Court further concludes that in addition to the aforementioned constitutional appropriation power and mandate, the Court has inherent and equitable powers that allow it to enter this Order. The North Carolina Constitution provides, "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation *shall have remedy by due course of law*; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. I, § 18

(emphasis added). The North Carolina Supreme Court has declared that "[o]bedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations." *State v. Harris*, 216 N.C. 746, 764 (1940). Further, "the courts have power to fashion an appropriate remedy 'depending upon the right violated and the facts of the particular case.'" *Simeon v. Hardin*, 339 N.C. 358, 373 (1994) (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 784, *cert. denied*, 506 U.S. 985 (1992)).

23. As noted above, the Court's inherent powers are derived from being one of three separate, coordinate branches of the government. *Ex Parte McCown*, 139 N.C. 95, 105-06 (1905) (citing N.C. Const. art. I, § 4)). The constitution expressly restricts the General Assembly's intrusion into judicial powers. *See* N.C. Const. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government...."); *see also Beard v. N. Carolina State Bar*, 320 N.C. 126, 129 (1987) ("The inherent power of the Court has not been limited by our constitution; to the contrary, the constitution protects such power."). These inherent powers give courts their "authority to do all things that are reasonably necessary for the proper administration of justice." *State v. Buckner*, 351 N.C. 401, 411 (2000); *Beard*, 320 N.C. 126, 129.

24. In fact, it is the separation of powers doctrine itself which undergirds the judicial branch's authority to enforce its order here. "Inherent powers are critical to the court's autonomy and to its functional existence: 'If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.'" *Matter of Alamance Cty. Ct. Facilities*, 329 N.C. 84, 93–94 (1991) ("*Alamance*") (citing *Ex Parte Schenck*, 65 N.C. 353, 355 (1871)). The Supreme Court's analysis of the doctrine in *Alamance* is instructive:

> An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. "Unless these [three branches of government] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."

Id. at 97 (quoting *The Federalist* No. 48, at 308 (J. Madison) (Arlington House ed. 1966)).

25. The Supreme Court has recognized that courts should ensure when considering remedies that may encroach upon the powers of the other branches, alternative remedies should be explored as well as minimizing the encroachment to the extent possible. *Alamance*, 329 N.C. at 100-01. The relief proposed here carefully balances these interests with the Court's constitutional obligation of affording relief to injured parties. First, there is no alternative or adequate remedy available to the children of North Carolina that affords them the relief to which they are so entitled. State Defendants have conceded that the Comprehensive Remedial Plan's full implementation is necessary to provide a sound basic education to students and there is nothing else on the table. *See, e.g.*, March 2021 Order.

26. Second, this Court will have minimized its encroachment on legislative authority through the least intrusive remedy. Evidence of the Court's deference over seventeen years and its careful balancing of the interests at stake includes but is not limited to:

a. The Court has given the State seventeen years to arrive at a proper remedy and numerous opportunities proposed by the State have failed to live up to their promise. Seventeen classes of students have since gone through schooling without a sound basic education;

b. The Court deferred to State Defendants and the other parties to recommend to the Court an independent, outside consultant to provide comprehensive, specific recommendations to remedy the existing constitutional violations;

c. The Court deferred to State Defendants and the other parties to recommend a remedial plan and the proposed duration of the plan, including recommendations from the Governor's Commission on Access to Sound Basic Education;

d. The Court deferred to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;

e. The Court deferred to State Defendants to propose the long-term comprehensive remedial plan, and to determine the resources necessary for full implementation. (*See* March 2021 Order);

f. The Court also gave the State discretion to seek and secure the resources identified to fully implement the Comprehensive Remedial Plan. (*See* June 2021 Order);

g. The Court has further allowed for extended deliberations between the executive and legislative branches over several months to give the State an additional opportunity to implement the Comprehensive Remedial Plan;

h. The status conferences, including more recent ones held in September and October 2021, have provided the State with additional notice and opportunities to implement the Comprehensive Remedial Plan, to no avail. The Court has further put State on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education.

The Court acknowledges and does not take lightly the important role of the separation of powers. In light of the foregoing, and having reviewed and considered all arguments and submissions of Counsel for all parties and all of this Court's prior orders, the findings and conclusions of which are incorporated herein, it is hereby **ORDERED** that:

1. The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:

(a) Department of Health and Human Services ("DHHS"): $189,800,000.00;

(b) Department of Public Instruction ("DPI"): $1,522,053,000.00; and

(c) University of North Carolina System: $41,300,000.00.

2. OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;

3. Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order;

4. DHHS, the University of North Carolina System, the State Superintendent of Public Instruction, and all other State agents or State actors

receiving funds under the Comprehensive Remedial Plan are directed to administer those funds to guarantee and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto;

5. In accordance with its constitutional obligations, the State Board of Education is directed to allocate the funds transferred to DPI to the programs and objectives specified in the Action Steps in the Comprehensive Remedial Plan and the Superintendent of Public Instruction is directed to administer the funds so allocated in accordance with the policies, rules or and regulations of the State Board of Education so that all funds are allocated and administered to guard and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto, and

6. OSBM, the Controller, and the Treasurer are directed to take all actions necessary to facilitate and authorize those expenditures;

7. To the extent any other actions are necessary to effectuate the year 2 & 3 actions in the Comprehensive Remedial Plan, any and all other State actors and their officers, agents, servants, and employees are authorized and directed to do what is necessary to fully effectuate years 2 and 3 of the Comprehensive Remedial Plan;

8. The funds transferred under this Order are for maximum amounts necessary to provide the services and accomplish the purposes described in years 2 and 3 of the Comprehensive Remedial Plan. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these purposes and the savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability; and

9. This Order, except the consultation period set forth in paragraph 3, is hereby stayed for a period of thirty (30) days to preserve the *status quo,* including maintaining the funds outlined in Paragraph 1 (a)-(c) above in the State Treasury, to permit the other branches of government to take further action consistent with the findings and conclusions of this Order.

This Order may not be modified except by further Order of this Court upon proper motion presented. The Court shall retain jurisdiction over this matter.

This the 10th day of November, 2021.

W. David Lee

The Honorable W. David Lee
North Carolina Superior Court Judge

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, Wake County

Assistant Deputy Clerk of Superior Court
11/15/2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on the persons indicated below by hand delivery:

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This the 10th day of November, 2021.

Caitlin E. Beal

Caitlin E. Beal
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EXHIBIT B

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON, individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

Memorandum of Law on behalf of the State of North Carolina

Twenty-four years ago, in 1997, the North Carolina Supreme Court held that the children of this State have been, and are being denied, "a constitutionally guaranteed sound basic education." *Leandro v. State,* 346 N.C. 336, 347 (1997). Seventeen years ago, the Court reaffirmed that opinion in *Leandro II. Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605 (2004). As the court

of last resort, the Supreme Court has opined with finality on the issue of the constitutional status of public education in North Carolina, which "concern[s] the proper construction and application of North Carolina laws and the Constitution of North Carolina." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989).

This Court has concluded that the State, despite these rulings, continues to fail to meet that constitutional requirement. This Court has also made clear that the current reason for this ongoing constitutional violation is that the necessary and sufficient funding has not been provided to satisfy the State's obligations. The State of North Carolina and State Board of Education (collectively, "State Defendants") have acknowledged that additional measures must be taken to satisfy the constitutional mandate. This Court has indicated that it intends to fashion a remedy.

Consequently, the question before this Court now is the appropriate remedy for the State's ongoing failure to meet the constitutional requirement. In fashioning a remedy, the court should take note of two important features of the current situation. First, an appropriate remedy does not require generating additional revenue. That is because the State Treasury currently contains, in unspent funds, amounts well in excess of what is required to fulfill the State's constitutional obligation for Years 2 and 3 of the Comprehensive Remedial Plan.

Second, compliance with this Court's order to fulfill the constitutional mandate does not require new legislative action. That is because the people of North Carolina, through their Constitution, have already established that requirement. The General Assembly's ongoing failure to heed that constitutional command leaves it to this Court to give force to it. The Court can do that by recognizing that the constitutional mandate of Article I, § 15 is, itself, an appropriation made by law.

In fashioning a remedy, the State urges the Court to give due consideration to three relevant precedents that may serve as a guide to the Court's consideration of the Proposed Order. When understood together, these precedents note that the duty and obligation of ensuring sufficient appropriations usually falls to the legislature. At the same time, however, these cases reveal that there exist limited—and perhaps unique—circumstances where the people of North Carolina, through the North Carolina Constitution, can be said to have required certain appropriations despite the General Assembly's repeated defiance of a Constitutional mandate. As a separate and coequal branch of government, this Court has inherent authority to order that the State abide by the Constitution's commands to meet its constitutional obligations. In doing so, the Court's Order will enable the State to meet its obligations to students, while also avoiding encroachment upon the proper role of the legislature.

***Richmond County Board of Education v. Cowell*, 254 N.C. App. 422 (2017)**

In *Richmond County*, the North Carolina Court of Appeals held that the appropriations clause dictates that a court cannot "order the executive branch to pay out money that *has not been appropriated*." 254 N.C. App. at 423 (emphasis added). *Richmond County* involved a claim by the Richmond County Board of Education that the State had impermissibly used "fees collected for certain criminal offenses" to "fund county jail programs," rather than returning those fees to the Board for use by public schools as required by Article IX, § 7 of the North Carolina Constitution. *Id.* The funds accorded to the county jail program were expended, and the General Assembly did not appropriate additional funds to the Board. *Id.* at 424. The Superior Court ordered several state officials, including the State Treasurer and State Controller, to transfer funds from the State Treasury to the Board to make the Board whole. *Id.* at 425.

The Court of Appeals reversed. *Id.* at 425. Although the Court of Appeals agreed that a trial court could remedy the Board's constitutional harm by ordering the State to *return* the money the Constitution committed to the Board, *id.* at 427–28, the Court of Appeals explained that courts could not order the State to give the Board "*new* money from the State Treasury," *id.* at 428 (emphasis added). The Court of Appeals further articulated that Article V, Section 7 of the North Carolina Constitution permits state officials to draw money from the State Treasury only when an appropriation has been "made by law." *Id.*

While assessing the lower court's error, and noting that that the funds designated for return were unavailable, the Court of Appeals acknowledged that where the Constitution mandates funds be used for a particular purpose, "it is well within the judicial branch's power to order" that those funds be expended in accordance with constitutional dictates. *Id.* at 427–28.

In light of *Richmond County*, any order entered by this Court directing state officials to draw money from the State Treasury must identify available funds, and must be tied to an appropriation "made by law." In most instances, the General Assembly is the body that passes appropriations laws and thereby, subject to the Governor's veto, sets "appropriation[s] made by law." But the Constitution is the supreme law of the land, and any appropriation by the Constitution also constitutes an appropriation made by law.

If this Court concludes that Article I, § 15 represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound, basic education, then it may be deemed an appropriation "made by law."

***Cooper v. Berger*, 376 N.C. 22 (2020)**

In *Cooper*, the Supreme Court addressed the limits of constitutional authority of state actors, other than the General Assembly, to make new appropriations. In that case, the Supreme Court rejected the Governor's argument that the General Assembly "overstep[ped] its constitutional authority by appropriating the relevant federal block grant money in a manner that differs from the Governor's preferred method for distributing the funds." *Cooper*, 376 N.C. at 23.

After concluding that the use of Federal Block Grants "'is largely left to the discretion of the recipient state' as long as that use falls within the broad statutory requirements of each grant," *Cooper*, 376 N.C. at 33–34 (quoting *Legis. Rsch. Comm'n ex rel. Prather v. Brown*, 664 S.W. 907, 928 (Ky. 1984)), the Supreme Court held that the General Assembly properly exercised its constitutional authority by deciding how to appropriate the federal funds. *Cooper*, 376 N.C. at 36–38. The appropriations clause, the Supreme Court reasoned, supplied the General Assembly's broad authority to decide how to appropriate funds in the State Treasury because the appropriations clause represents the framers' intent "to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures." *Id.* at 37.

Cooper noted that the General Assembly's authority over appropriations was grounded in its function as the voice of the people. *See* 376 N.C. at 37. It must also be noted, however, that the Constitution itself "expresses the will of the people of this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299 (1978); *see also Gannon v. Kansas*, 368 P.3d 1024, 1057 (Kan. 2016) (explaining that "[t]he constitution is the direct mandate of the people themselves"). Accordingly, if the Court concludes that Article I, § 15 represents a

constitutional appropriation, such an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating Article I, § 15's constitutional appropriation is fully consistent with the framers desire to give the people ultimate control over the state's expenditures. *Cooper*, 376 N.C. at 37.

***In re Alamance County Court Facilities*, 329 N.C. 84 (1991)**

In *Alamance County*, the Supreme Court held that although the judicial branch may invoke its inherent power and "seize purse strings otherwise held exclusively by the legislative branch" where the integrity of the judiciary is threatened, the employment of that inherent power is subject to certain limitations. Namely, the judiciary may infringe on the legislature's traditional authority to appropriate state funds "*no more* than reasonably necessary" and in a way that is "no more forceful or invasive than the exigency of the circumstances requires." *Alamance Cnty. Ct. Facilities*, 329 N.C. at 99–100.[1] In addition, the Supreme Court held that a court using "its inherent power to reach toward the public purse," "must recognize two critical limitations: first, it must bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power. Second, . . . the court in exercising that power must minimize the encroachment upon those with legislative authority in appearance and in fact." *Id.* at 100–01. When considering the Proposed Order in light of the limitations designed to

[1] Although the Supreme Court held that a court could invoke its inherent authority to require the spending of state funds, it reversed the Superior Court's order directing county commissioners to provide adequate court facilities after concluding that the Superior Court's order exceeded what "was reasonably necessary to administer justice" because it failed to include necessary parties, was entered *ex parte*, and too specifically defined what constituted "adequate facilities" without seeking parties' input. *Alamance Cnty. Ct. Facilities*, 329 N.C. at 89.

"minimize the encroachment" on the legislative branch, this Court should consider the unique role education was given in our Constitution.

The Constitution's Declaration of Rights—which the State Supreme Court has recognized as having "primacy . . . in the minds of the framers," *Corum v. University of North Carolina*, 330 N.C. 761, 782 (1992)—includes the "right to the privilege of education." N.C. Const. art. I, § 15. The Constitution later devotes an entire section to education. *See generally* N.C. Const. art. IX. This section commands the General Assembly to "provide by taxation and otherwise for a general uniform system of free public schools," N.C. Const. art. IX, § 2(1); and requires the General Assembly to appropriate certain state funds, N.C. Const. art. IX, § 6, or county funds "exclusively for maintaining free public schools," N.C. Const. art. IX, § 7(1). These prescriptions may provide the Court with further guidance about the framers' intent to cabin the legislature's discretion with respect to funding.

Throughout this litigation's 27-year history, the Court has granted exceptional deference to the General Assembly's determinations about how to satisfy the State's constitutional obligation to provide North Carolina's children a sound basic education. Because the Court has determined that the State remains noncompliant, ordering state officials to effectuate Article I, § 15's constitutional appropriation would be "no more forceful or invasive than the exigency of the circumstances requires." *Alamance Cnty. Ct. Facilities*, 329 N.C. at 99–100.

* * *

The State understands that this Court intends to fashion an equitable remedy to bring the State Defendants into compliance with the constitutional mandate of providing North Carolina's schoolchildren with the constitutionally required sound, basic education. The State further understands that the Courts and the Legislature are coordinate branches of the State government

and neither is superior to the other. *Nicholson v. Educ. Assistance Auth.*, 275 N.C. 439 (1969). Likewise, if there exists a conflict between legislation and the Constitution, it is acknowledged that the Court "must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." *Green v. Eure*, 27 N.C. App. 605, 608 (1975).

Respectfully submitted, this the 8th day of November, 2021.

JOSHUA H. STEIN
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Memorandum of Law of Law on behalf of the State of North Carolina was delivered to the Court and the following parties on this day by email (agreed-to form of service):

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This the 8th day of November, 2021.

/s/ Amar Majmundar
Amar Majmundar
Senior Deputy Attorney General

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON, individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

NOTICE OF HEARING AND ORDER CONTINUING STAY OF COURT'S NOVEMBER 10, 2021 ORDER

THIS MATTER comes before the Court pursuant to the previously-entered January 21, 2020 Consent Order, September 11, 2020 Consent Order, June 7, 2021 Order on Comprehensive Remedial Plan, September 22, 2021 Order on First Progress Reports for Implementation of Comprehensive Remedial Plan, October 22, 2021 Order, and Order dated November 10, 2021.

In its Order dated November 10, 2021 (the "November 10 Order"), the Court ordered the State of North Carolina—through its Office of State Budget and Management, the Office of the State Controller, and the Office of the State Treasurer—to take the actions necessary to transfer the funds necessary to effectuate

years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan. The Court stayed the November 10 Order for thirty (30) days, or until December 10, 2021, to permit the State to take further actions consistent with its terms.

Subsequently, on November 18, 2021, the State enacted the *Current Operation Appropriations Act of 2021* (Session Law 2021-180, SB 105 ("Appropriations Act"). The Appropriations Act appears to provide for some—but not all—the resources and funds required to implement years 2 & 3 fo the Comprehensive Remedial Plan, which may necessitate a modification of the November 10 Order.

NOW, THEREFORE, take notice that this Court will hold a hearing on December 13, 2021 at 10:00 a.m. The purpose of the hearing will be for the State—acting through its executive and legislative branches—to inform the Court of the specific components of the Comprehensive Remedial Plan for years 2 & 3 that are funded by the Appropriations Act and those that are not.

All parties will be afforded the opportunity to be heard at the hearing. The Court will determine what, if any, modifications may be required to its November 10 Order in light of the Appropriations Act and/or other matters properly before the Court.

NOW, THEREFORE, it is also **ORDERED** that the Court's November 10 Order is stayed until ten (10) days following the conclusion of the December 13, 2021 hearing. To the extent the November 10 Order is modified by this Court, the modified order will address the length of a stay, if any.

This Order may not be modified except by further Order of this Court upon proper motion presented. The Court shall retain jurisdiction over this matter.

This the 30th day of November, 2021.

The Honorable W. David Lee
North Carolina Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on the persons indicated below by electronic mail transmission, addressed as follows:

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This the 30th day of November 2021.

Kellie Z. Myers
Trial Court Administrator – Tenth Judicial District
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Kellie.Z.Myers@nccourts.org

North Carolina Court of Appeals
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No. P21-511

IN RE. THE 10 NOVEMBER 2021 ORDER IN HOKE COUNTY BOARD OF EDUCATION ET AL. VS. STATE OF NORTH CAROLINA AND W. DAVID LEE (WAKE COUNTY FILE 95 CVS 1158)

From Wake
(95CVS1158)

O R D E R

The following order was entered:

The petition for a writ of prohibition is decided as follows: we allow the petition and issue a writ of prohibition as described below.

This Court has the power to issue a writ of prohibition to restrain trial courts "from proceeding in a matter not within their jurisdiction, or from acting in a matter, whereof they have jurisdiction, by rules at variance with those which the law of the land prescribes." State v. Allen, 24 N.C. 183, 189 (1841); N.C. Gen. Stat. s. 7A-32.

Here, the trial court recognized this Court's holding in Richmond County Board of Education v. Cowell that "[a]ppropriating money from the State treasury is a power vested exclusively in the legislative branch" and that the judicial branch lacked the authority to "order State officials to draw money from the State treasury." 254 N.C. App. 422, 803 S.E.2d 27 (2017). Our Supreme Court quoted and relied on this language from our holding in Cooper v. Berger, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020).

The trial court, however, held that those cases do not bar the court's chosen remedy, by reasoning that the Education Clause in "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds."

We conclude that the trial court erred for several reasons.

First, the trial court's interpretation of Article I would render another provision of our Constitution, where the Framers specifically provided for the appropriation of certain funds, meaningless. The Framers of our Constitution dedicated an entire Article--Article IX--to education. And that Article provides specific means of raising funds for public education and for the appropriation of certain monies for that purpose, including the proceeds of certain land sales, the clear proceeds of all penalties, forfeitures, and fines imposed by the State, and various grants, gifts, and devises to the State. N.C. Const. Art. IX, Sec 6, 7. Article IX also permits, but does not require, the General Assembly to supplement these sources of funding. Specifically, the Article provides that the monies expressly appropriated by our Constitution for education may be supplemented by "so much of the revenue of the State as may be set apart for that purpose." Id. Article IX then provides that all such funds "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." Id. If, as the trial court reasoned, Article I, Section 15 is, itself, "an ongoing constitutional appropriation of funds"--and thus, there is no need for the General Assembly to faithfully appropriate the funds--it would render these provisions of Article IX unnecessary and meaningless.

Second, and more fundamental, the trial court's reasoning would result in a host of ongoing constitutional appropriations, enforceable through court order, that would devastate the clear separation of powers between the Legislative and Judicial branches and threaten to wreck the carefully crafted checks and balances that are the genius of our system of government. Indeed, in addition to the right to education, the Declaration of Rights in our Constitution contains many other, equally vital protections, such as the right to open courts. There is no principled reason to treat the Education Clause as "an ongoing constitutional appropriation of funds" but to deny that treatment to these other, vital protections in our Constitution's Declaration of Rights. Simply put, the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court.

We note that our Supreme Court has long held that, while our judicial branch has the authority to enter a money judgment against the State or another branch, it had no authority to order the appropriation of monies to satisfy any execution of that judgment. See State v. Smith, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976) (stating that once the judiciary has established the validity of a claim against the State, "[t]he judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties."); Able Outdoor v. Harrelson, 341 N.C. 167, 172, 459 S.E.2d 626, 629 (1995) (holding that "the Judicial Branch of our State government [does not have] the power to enforce an execution [of a judgment] against the Executive Branch").

We therefore issue the writ of prohibition and restrain the trial court from enforcing the portion of its order requiring the petitioner to treat the $1.7 billion in unappropriated school funding identified by the court "as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. s. 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers." Under our Constitutional system, that trial court lacks the power to impose that judicial order.

Our issuance of this writ of prohibition does not impact the trial court's finding that these funds are necessary, and that portion of the judgment remains. As we explained in Richmond County, "[t]he State must honor that judgment. But it is now up to the legislative and executive branches, in the discharge of their constitutional duties, to do so. The Separation of Powers Clause prevents the courts from stepping into the shoes of the other branches of government and assuming their constitutional duties. We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box." 254 N.C. App. 422, 429, 803 S.E.2d 27, 32.

Panel consisting of Judge DILLON, Judge ARROWOOD, and Judge GRIFFIN.

ARROWOOD, Judge, dissenting.

I dissent from the majority's order granting a Writ of Prohibition. I vote to allow the Motion for Temporary Stay which is the only matter that I believe is properly before the panel at this time. This matter came to the panel for consideration of a non-emergency Motion for Temporary Stay that was ancillary to petitions for a Writ of Prohibition under Rule 22 of the Rules of Appellate Procedure and for Writ of Supersedeas under Rule 23 of the Rules of Appellate Procedure on 29 November 2021. The trial court had stayed the order at issue until 10 December 2021, the date when the time to appeal from the order would expire. Thus, there are no immediate consequences to the petitioner about to occur.

Under Rules 22 and 23 of the Rules of Appellate Procedure, a respondent has ten days (plus three for service by email) to respond to a petition. This time period runs by my calculation through 7 December 2021, before the trial court's stay of the order expires. However, the majority of this panel--ex meru motu--caused an order to be entered unreasonably shortening the time for respondents to file a response until only 9:00 a.m. today. While the rules allow the Court to shorten a response time for "good cause shown[,]" in my opinion such action in this case was arbitrary, capricious and lacked good cause and instead designed to allow this panel to rule on this petition during the month of November.

Rather, as the majority's order shows shortening the time for a response was a mechanism to permit the majority to hastily decide this matter on the merits, with only one day for a response, without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments and on the last day this panel is constituted. This is a classic case of deciding a matter on the merits using a shadow docket of the courts.

I believe this action is incorrect for several reasons. The Rules of Appellate Procedure are in place to allow parties to fully and fairly present their arguments to the Court and for the Court to fully and fairly consider those arguments. In my opinion, in the absence of any real time pressure or immediate prejudice to the parties, giving a party in essence one day to respond, following a holiday weekend, and then deciding the matter on the merits the day the response is filed violates these principles. My concerns are exacerbated in this case by the fact that no adverse actions would occur to the petitioner during the regular response time

as the trial court had already stayed its own order until several days after responses were due. In addition, this Court also has the tools through the issuance of a temporary stay to keep any adverse actions from occurring until it rules on the matter on the merits.

Therefore, I dissent from the majority's shortening the time for a response and issuing an order that decides the the merits of the entire appeal without adequately allowing for briefing or argument. My vote is to issue a temporary stay of the trial court's order.

By order of the Court this the 30th of November 2021.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 30th day of November 2021.

Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:
Hon. Robert Neal Hunter, Jr., Attorney at Law, For Combs, Linda, State Controller
Hon. W. David Lee, Senior Resident Judge
Mr. Amar Majmundar, Senior Deputy Attorney General
Mr. Matthew Tulchin, Special Deputy Attorney General
Ms. Tiffany Y. Lucas, Deputy General Counsel
Mr. Thomas J. Ziko
Mr. Neal A. Ramee, Attorney at Law
Mr. David Nolan, Attorney at Law
H. Lawrence Armstrong
Ms. Melanie Black Dubis, Attorney at Law
Mr. Scott B. Bayzle
Ms. Elizabeth M. Haddix, Attorney at Law
Hon. Frank Blair Williams, Clerk of Superior Court

STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

COUNTY OF WAKE

2021 DEC -7 P 1:39

WAKE CO., C.S.C.

BY

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON, individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,

THE STATE OF NORTH CAROLINA'S NOTICE OF APPEAL

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

NOW COMES Defendant, the State of North Carolina, pursuant to N.C. Gen. Stat. § 7A-27 and N.C. Gen. Stat. § 1-277, and hereby gives notice of appeal to the North Carolina Court of Appeals from the order entered in the above-styled matter on 10 November 2021 by the Honorable W. David Lee, Superior Court, Wake County.

Respectfully submitted, this the 7th day of December, 2021.

JOSHUA H. STEIN
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing Notice of Appeal was served on the parties to this action by depositing a copy of same on the date shown below with the United States Mail, first-class postage prepaid, and email, addressed as follows:

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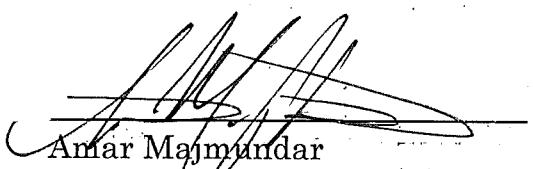
Attorneys for Penn-Intervenors

This the 7th day of December, 2021.



Amar Majmundar
Senior Deputy Attorney General

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

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,

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

NOTICE OF INTERVENTION

Pursuant to N.C. Gen. Stat. § 1-72.2(b), Legislative Intervenor-Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (the "Legislative Intervenors") hereby give notice of their intervention, as of right, as agents of the State on behalf of the General Assembly in this matter. In support of this notice, Legislative Intervenors show the Court the following:

1. "It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina." N.C. Gen. Stat. § 1-72.2(a).

2. Thus, "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C. Gen. Stat. § 1-72.2(b). "Intervention pursuant to this section shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding." *Id.*

3. At issue here are challenges to both the General Assembly's legislation and provisions of the North Carolina Constitution.

4. The Appropriations Clause of the North Carolina State Constitution provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually." N.C. Const. Art. V, § 7(1). As a result, the North Carolina Supreme Court has held "the power of the purse is the exclusive prerogative of the General Assembly." *Cooper v. Berger*, 376 N.C. 22, 37 (2020).

5. Further, while the North Carolina Constitution requires the Governor to prepare and recommend a budget to the General Assembly, only the General Assembly can enact the budget. N.C. Const. Art. III, § 5.

6. On November 10, 2021, this Court issued an Order compelling the State Controller and the State Treasurer, along with the Office of State Budget and Management, to transfer funds to certain State agencies to be used for purposes ordered by the Court. *Id.* The Order did so despite acknowledging the North Carolina Supreme Court's recent holding that the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Id.* at 14 (quoting *Cooper v. Berger*, 376 N.C. at 37). The Court stayed implementation of its Order for 30 days. *Id.*

7. On November 18, 2021, while the Court's Order was stayed, the General Assembly, in accordance with the constitutional powers described above, enacted the Current Operations and Appropriations Act of 2021, N.C. Sess. Law. 2021-180 (the "State Budget"), which the Governor signed into law the same day. Among other things, the State Budget appropriated in Net General Funds over the biennium $21.5 billion for K-12 public education—approximately 41% of the total biennial budget. The State Budget, however, does not contain allocations identical to the Court's Order.

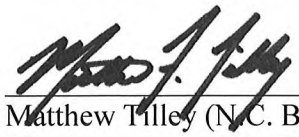
8. The Court's Order seeks to direct State officials to pay money from the State treasury in a manner contrary appropriations made in the State Budget. In doing so, the Order contravenes the doctrine of Separation of Powers reflected in Article I, Section 6 of the State Constitution, which provides that, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." As our Courts have held, "[b]ecause the State constitution vests the authority to appropriate money solely in the legislative branch, the Separation of Powers Clause 'prohibits the judiciary from taking public monies without statutory authorization.'" *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 427 (2017) (quoting *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991)). To do otherwise would cause the judiciary to impermissibly "arrogate [to itself] a duty reserved by the constitution exclusively to another body." *Id.*

9. Because the Order now effectively challenges the both the State Budget—which constitutes an act of the General Assembly—as well as the General Assembly's authority under the State Constitution, including the Appropriations Clause as well as the doctrine of Separation of Powers, Legislative Intervenors are entitled to intervene as of right on behalf of pursuant to N.C. Gen. Stat. § 1-72.2(b).

WHEREFORE, Legislative Intervenors, as agents of the state and on behalf of the General Assembly, provide notice of their intervention as of right in this case, through the counsel listed below, pursuant to N.C. Gen. Stat. § 1-72.2(b), for the purposes of responding to the Court's November 10, 2021, Order and associated proceedings challenging act(s) of the General Assembly and provisions of the North Carolina State Constitution.

This the 8th day of December, 2021.

WOMBLE BOND DICKINSON (US) LLP



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The undersigned certifies that on December 8, 2021, he caused a true and correct copy of the foregoing document to be served via U.S. Mail upon the following:

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Matthew F. Tilley

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

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,

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

NOTICE OF APPEAL BY INTERVENOR-DEFENDANTS

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Intervenor-Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, hereby give notice of appeal to the Court of Appeals of North Carolina from the Order entered in this action on November 10, 2011 by the Honorable W. David Lee.

This the 8th day of December, 2021.

WOMBLE BOND DICKINSON (US) LLP

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Russ Ferguson (N.C. Bar No. 39671)
W. Clark Goodman (N.C. Bar No. 19927)

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Attorneys for Intervenor-Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that on December 8, 2021, he caused a true and correct copy of the foregoing document to be served via U.S. Mail upon the following:

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Matthew F. Tilley