

SUPREME COURT OF NORTH CAROLINA

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

and

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,
Plaintiff-Intervenor-Appellee,
and

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

STATE OF NORTH CAROLINA,
Defendant-Appellee,
and

THE STATE BOARD OF EDUCATION
Defendant-Appellee,
and

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION
Realigned Defendant-Appellee,
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-Appellants.

From Wake County
No. 95-CVS-1158
No. COA22-86

MOTION AND SUGGESTION OF RECUSAL

TO THE HONORABLE JUSTICE EARLS AND THE SUPREME COURT OF
NORTH CAROLINA:

NOW COME Legislative Intervenor-Defendants / Appellants, 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, on behalf of the General Assembly and as agents of the State (together, “Legislative Intervenor”), pursuant to N.C. R. App. P. 37, and hereby move the Honorable Justice Earls and this Honorable Court to consider the recusal of Justice Earls from participation in this matter, and, for the reasons stated herein, suggest that such recusal is warranted. In support of this Motion, Legislative Intervenor show the Court as follows:

1. Justice Earls participated in this case as an attorney representing Plaintiff-Intervenor Rafael Penn, *et al.* (“Plaintiff-Intervenor”).¹ Attached hereto as Exhibit A is the initial Intervening Complaint filed by Plaintiff-Intervenor on 9 February 2005. Justice Earls signed the Intervening Complaint on behalf of the Plaintiff-Intervenor as an attorney at the University of North Carolina School of

¹ Legislative-Intervenor only recently learned of Justice Earls’ representation of the Plaintiff-Intervenor when they reviewed the initial Intervening-Complaint in the course of preparing their Appellee brief, currently due on 1 August 2022.

Law Center for Civil Rights. (Ex. A at 22; R p 969). The Intervening Complaint identifies Justice Earls and others as “Attorneys for Plaintiff-Intervenors.”²

2. In addition to her representation of Plaintiff-Intervenors as a party in this matter, Justice Earls has previously participated in this case as *amici* before this Court.³ When this case was last before this Court, in *Leandro III*, 367 N.C. 156, 749 S.E.2d 451 (2013), Justice Earls and others filed a Brief of *Amici Curiae* on behalf of ten (10) organizations, advocating in support of Plaintiffs’ position on appeal in that stage of this case. A copy of that *amicus* brief is attached hereto as Exhibit B. Justice Earls signed that brief on behalf of the Southern Coalition for Social Justice. (Ex. B at 22).

3. The North Carolina Code of Judicial Conduct provides that a judge should disqualify himself or herself when they previously participated in the case as a lawyer for the parties. In relevant part, the Code of Judicial Conduct provides:

- (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge’s impartiality may reasonably be questioned, including but not limited to circumstances where:

. . .

² Justice Earls also signed at least the following additional filings in this case as an Attorney for Plaintiff-Intervenors, many of which were not included in the current record on appeal: Plaintiff-Intervenors’ Memorandum of Law in Support of Their Motion for Limited Intervention filed on 9 February 2005; Memorandum of Law in Support of Motion for Clarification by Counsel for Petitioning Intervenors filed on February 23, 2005; Plaintiff-Intervenors’ Reply to the Charlotte-Mecklenburg Board of Education’s Opposition to Intervention filed on 29 July 2005; and the First Amended Intervening Complaint filed on 29 July 2005.

³ Justice Earls also signed a Memorandum of Law as counsel for *Amicus Curiae* on behalf of the UNC School of Law Center for Civil Rights, which was filed in this matter on 3 December 2004.

(b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

North Carolina Code of Judicial Conduct Canon 3(C)(1)(b).

4. The United States Supreme Court has also noted that a judge presiding over a case in which he or she participated as counsel raises due process concerns. *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016) (“When a judge has served as an advocate . . . in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome.”).

5. Consistent with these authorities, Justice Earls has recused herself in similar cases where she previously participated as an attorney representing the parties. In *Bouvier v. Porter*, Case No. 403P21-1, the defendants filed a motion asking that Justice Earls be recused in a matter where she had previously participated as a lawyer representing the plaintiffs. Justice Earls recused herself from the case on her own initiative, rendering the motion for recusal moot. *See Order, Bouvier v. Porter*, Case No. 403P21-1 (entered 18 January 2022).

6. On 23 December 2021, the Court issued an Order setting forth a recusal process that follows a “motion . . . seeking recusal or disqualification[.]” Similarly, Canon 3(C)(1) of the Code of Judicial Conduct states that a judge should be disqualified “[o]n motion from any party[.]” Under the process set forth in the Court’s Order, a motion for recusal will be referred to the justice who is subject to the motion

for their determination. Alternatively, the Order permits the justice to “decline to decide the motion on their own and exercise the discretion to refer the motion to the full Court for disposition without their participation.” Legislative Intervenors accordingly submit this motion and respectfully suggest that recusal is warranted under the circumstances.

WHEREFORE, Legislative Intervenors move Justice Earls to consider their suggestion of recusal, and, in the event such motion is referred to the entire Court, move the Court to consider this suggestion of recusal.

[SIGNATURE APPEARS ON FOLLOWING PAGE]

Respectfully submitted, this the 13th day of July, 2022.

/s/ Matthew F. Tilley

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Pursuant to Rule 33(b) I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned certifies that on 13 July 2022 he caused a true and correct copy of the foregoing document to be served via Email upon the following:

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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 Lammie 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,

CASSANDRA INGRAM, individually and as
guardian *ad litem* of Darrie Ingram; CAROL
PENLAND, individually and as guardian *ad litem*
of Jeremy Penland; DARLENE HARRIS,
individually and as guardian *ad litem* of Shamek
Harris; NETTIE THOMPSON, individually and
as guardian *ad litem* of Annette Renee Thompson;
OPHELIA AIKEN, individually and as guardian
ad litem of Brandon Bell; ASHEVILLE CITY
BOARD OF EDUCATION; BUNCOMBE

INTERVENING COMPLAINT

COUNTY BOARD OF EDUCATION;
DURHAM PUBLIC SCHOOLS BOARD OF
EDUCATION; WAKE COUNTY BOARD OF
EDUCATION; WINSTON-SALEM/FORSYTH
COUNTY BOARD OF EDUCATION,

Plaintiff-Intervenors,

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,

vs.

CHARLOTTE-MECKLENBURG BOARD OF
EDUCATION,

Plaintiff-Intervenor and Realigned
Defendant,

and

STATE OF NORTH CAROLINA and the
STATE BOARD OF EDUCATION,

Defendants.

Plaintiff-Intervenors Rafael Penn, Clifton Jones, Clifton Matthew Jones, Donna
Jenkins Dawson, Neisha Shemay Dawson and Tyler Anthony Hough-Jenkins allege and
state the following against the defendants:

NATURE OF THIS ACTION

1. Plaintiffs are public school students in the Charlotte-Mecklenburg school district (hereafter, "the Charlotte district") some of whom who are represented by their parents and next friends. They seek a limited intervention in this lawsuit to enforce their constitutional rights to a sound basic education—which is guaranteed by North Carolina Constitution, art. I, § 15 and art. IX, § 2 (1), as clarified by the North Carolina Supreme Court in *Leandro v. State*, 346 N.C. 336 (1997), by *Hoke County Board of Education v. State*, 358 N.C. 605 (2004), and by the various prior orders and decisions of this Court—and to guarantee their right under the North Carolina Constitution art. I, § 19 to the equal protection of the laws.

2. Plaintiffs attend, or expect to attend, high schools within the Charlotte system that have undergone profound changes in their student assignment patterns during the past five years because of a series of resolutions adopted by defendant Charlotte-Mecklenburg Board of Education (hereafter, "the Charlotte Board"). These resolutions have created and implemented a new system of student assignments (hereafter, "the 2000 assignment plan").

3. The 2000 assignment plan succeeded 28 years of federal-court supervised assignment plans that were designed to bring about racial desegregation under the three-decades-long *Swann v. Charlotte-Mecklenburg Board of Education* lawsuit. The 2000 plan is built upon a policy foundation purportedly emphasizing parental choice. It announces as its highest priorities a "home school guarantee"—that all students can attend a school in proximity to their residences—and the maximization of stability—

assuring that these home school guarantees and other choices will be stable "to the fullest extent feasible."

4. The defendant Charlotte Board knows, and was cautioned by educational consultants, that the Charlotte-Mecklenburg district is characterized by residential neighborhoods that vary widely in their average socioeconomic circumstances. Some neighborhoods, especially in central city and west Charlotte, are predominantly lower-income. Others, especially in the northern and southern suburbs of Charlotte, are predominantly higher-income. The defendant Charlotte Board knew, therefore, that its adoption of the 2000 assignment plan with its "home school guarantee" would necessarily create public schools whose student populations would vary greatly in their overall average socioeconomic circumstances.

5. The 2000 plan has created many "high poverty" schools within the Charlotte system. These "high poverty" schools enroll disproportionately large concentrations of students who stand at risk of educational failure assessed by every known measure—poverty, parental unemployment or underemployment, low parental educational levels, single parent family status, inadequate or unstable housing, poor health, racial minority status, limited English proficiency, and status as exceptional children.

6. Recognizing the adverse educational impact of its chosen priorities, the Charlotte Board created special student assignment rules that purportedly would permit lower income students (calculated by the percentage of free and reduced price lunches (hereafter "FRPL," a common measure of lower-income status), and low-performing students, to transfer out of high poverty schools to higher-income schools. However,

Charlotte's home school guarantee remains the Charlotte system's first priority, and the effective use of transfer rights depends upon the availability of open seats in higher-income schools. Since many parents in the Charlotte system's higher income neighborhoods, including Charlotte's northern and southern suburbs, select a nearby home school, many higher income schools in these neighborhoods have student occupancy rates of well over 100% of capacity and few empty seats for would-be transfer students from high poverty schools. Transfer opportunities are further limited by a systemwide rule that provides bus transportation only to students who transfer to other schools within their defined "zones."

7. The Charlotte Board acknowledges that "some greater concentrations of low socioeconomic status . . . may not be reasonably avoidable under the Plan." To compensate for this educational disadvantage, it has declared that "schools with higher concentrations of low socioeconomic status and schools which qualify as Equity Plus II schools under the applicable criteria of the Board shall receive additional resources under the Equity Plan, including, but not limited to, family support services, teacher and administrator incentives to create and maintain stable balances of experience and qualification, reduced class sizes and curriculum enhancements to elevate and meet expectations of excellence." In effect, the 2000 plan accepts the certainty that Charlotte's central city schools will be economically and racially isolated, but with the promise that, in compensation, these "Equity Plus II" schools will receive sufficient additional inputs and resources to bring equity and high performance to every school.

8. These compensating inputs and resources have not been sufficient to offset the severe, crippling learning environments created within Charlotte's high poverty high

schools. Schools such as West Charlotte High School, E.E. Waddell High School, Garinger High School, West Mecklenburg High School, Zebulon B. Vance High School, and Olympic High School, suffer from levels of student achievement, graduation rates, and other measures of student and school performance that are far lower (and disciplinary rates and dropout rates that are far higher) than those in higher income schools throughout the Charlotte district. Similarly disappointing results have characterized Charlotte's high poverty middle and elementary schools.

9. The Charlotte Board has failed to assure a stable balance of experienced and qualified teachers in its high poverty schools. For example, 38% of all teachers who taught in Charlotte's Equity Plus II schools in 2003-04 have left these schools or transferred, as compared with only 16% of current teachers system wide. Although there are many remarkable and dedicated teachers in these Equity Plus II schools, the average levels of experience, retention, teachers who teach-in-field, and other recognized measures of teaching excellence are significantly lower in high poverty schools than in other schools within the Charlotte system. Although the Superintendent of the Charlotte System, Dr. James Pughsley, proposed a number of major steps in January of 2005 that might redirect experienced teachers toward Equity Plus II schools, none of those steps has yet become Charlotte Board policy. On information and belief, these efforts, even if fully implemented, cannot suffice to redress the difficult working conditions, the demoralization of staff and students, and other features that prompt teachers to resign from teaching altogether or to transfer from these schools.

10. Moreover, among principals, assistant principals, and other administrators in Charlotte's high poverty schools, experience levels are significantly lower and turnover rates significantly higher than in other schools within the Charlotte system.

11. These consequences were not unforeseen. Nearly 40 years of social scientific studies have found repeatedly that a school's socioeconomic composition has a strong impact on the quality of the education delivered inside their walls. These studies have demonstrated that the average socioeconomic background of fellow students is one of the most influential "inputs" affecting a student's own education, apart from his or her own family background, and that high poverty schools create significantly more difficult learning environments for all students who attend them.

12. Consistent with those findings, 82 percent of Charlotte lower-income students who attended low-poverty schools in 2003-04 performed at grade level on State ABC tests, while only 64 percent of similar lower-income students who attended Charlotte's high-poverty schools achieved at grade level — an 18 percentage point "poverty gap" among children, all from lower income families, that varies by whether they attended high-poverty or low-poverty schools in Charlotte.

13. Charlotte's present 2000 student assignment system, which consigns plaintiffs and fellow students to high poverty elementary, middle, and high schools, therefore deprives the plaintiffs of the opportunity for a sound basic education guaranteed by *Leandro*. These plaintiffs stand at grave risk of suffering permanent and irreparable injury to their prospects for post-secondary educational or vocational training, for competing on an equal basis with others in further formal education or gainful employment, and for functioning in a complex and rapidly changing society. Plaintiffs

seek limited intervention in this lawsuit to demonstrate these facts, and to obtain declaratory relief that the Charlotte Board's adoption and present maintenance of its 2000 student assignment system—

(a) despite clear evidence that this system would create many high poverty schools within the Charlotte system;

(b) despite clear evidence that most high poverty schools create significantly more adverse learning environments for their students;

(c) despite feasible, educationally sound alternative assignment plans that could significantly reduce disparities in the socioeconomic composition of Charlotte schools, and thereby reduce the attendant educational injuries to students such as the plaintiffs, who attend high poverty schools; and

(d) despite the actual experience under this system, which has not vindicated the Charlotte Board's crucial educational assumption that it could steer sufficient compensating resources to high poverty schools to overcome their social and educational disadvantages—therefore violates the North Carolina Constitution.

14. Plaintiffs also seek injunctive relief requiring the defendant Charlotte Board to develop forthwith, and the defendants State and State Board to oversee, a revised, systemwide student assignment plan that will end the large socioeconomic divisions that currently characterize the Charlotte system

15. Assuring a sound basic education to all Charlotte students will require many other improvements in Charlotte's current fiscal, administrative, and educational policies and practices. Unless Charlotte's school system is set on an equitable student assignment foundation, however, none of the other changes will suffice to redress the

educational deficiencies, inequities, and long-term instabilities created by the present assignment plan.

PARTIES

PLAINTIFFS

16. Plaintiff Rafael Penn is a resident of Mecklenburg County and is a student at Zebulon B. Vance High School in the Charlotte-Mecklenburg school system.

17. Plaintiff Clifton Jones is a resident of Mecklenburg County. Plaintiff Clifton M. Jones is a resident of Mecklenburg County and is a student at Phillip D. Berry Academy in the Charlotte-Mecklenburg school system. He is a minor and is represented in this case by his father, Clifton Jones.

18. Plaintiff Donna Jenkins Dawson is a resident of Mecklenburg County. Plaintiff Neisha Shemay Dawson is a resident of Mecklenburg County and is a student at Olympic High School in the Charlotte-Mecklenburg system. She is a minor and is represented in this case by her mother, Donna Jenkins Dawson.

19. Plaintiff Tyler Anthony Hough-Kenkins is a resident of Mecklenburg County and is a student at Southwest Middle School in the Charlotte-Mecklenburg system. He is a minor and is represented in this case by his mother, Donna Jenkins Dawson.

DEFENDANTS

20. Defendant Charlotte-Mecklenburg Board of Education is a corporate body granted powers pursuant to state law. It has the authority to sue or be sued under N.C. Gen. Stat. § 115C-40. The State has delegated to the Charlotte Board the "general control and supervision of all matters pertaining to the public schools in [its] respective local

school administrative unit[]," and the Board is charged with "execut[ing] the school laws in" its district, N.C. Gen. Stat. § 115C-40, so as "to provide adequate school systems within [its] respective local school administrative unit[], as directed by law." N.C. Gen. Stat. § 115C-47(1).

21. Defendant State of North Carolina (herein, "the State") is responsible under the North Carolina Constitution for public education. Art. I, § 15. It is the State's constitutional duty to guard and maintain the fundamental right to an adequate education. Consistent with this duty, the State must provide, through legislation enacted by the General Assembly, for a general and uniform system of free public schools wherein equal opportunities are provided for all students. Art. IX, § 2(1). The North Carolina Supreme Court has held that the State is ultimately responsible for the provision of a constitutionally adequate educational system, even when it delegates operational authority to local school boards. *Hoke County Board of Education v. State*, 358 N.C. 605, 635-36 (2004).

22. Defendant State Board of Education (herein, "the State Board") is an agency of the State of North Carolina, charged with the "general supervision and administration of the free public school system" of the State of North Carolina. N.C. Gen. Stat. § 115C.12 (1). Among its statutory powers is the "authority, in its discretion, to alter the boundaries of city school administrative units." N.C. Gen. Stat. § 115C-12 (7).

JURISDICTION AND VENUE

23. This Court has jurisdiction over the subject matter of this action under N.C. Gen. Stat. §§ 7A-245 (1), (3), & (4).

24. This Court has jurisdiction over the person of the defendants under N.C. Gen. Stat. § 1-75.4.

FACTUAL ALLEGATIONS

Background

25. For nearly 15 years, from the late 1970s until 1992, the Charlotte system operated under a federal desegregation plan approved by a federal district court, which formally oversaw student assignment policy as part of the *Swann v. Charlotte-Mecklenburg Board of Education* case. The assignment plan, based on the remedial needs under the Equal Protection Clause of the Fourteenth Amendment, required racial balance in virtually every elementary, middle, and high school. Because of the lower average incomes of African American families than of white families, this racial desegregation led indirectly toward the creation of schools with relatively similar socioeconomic compositions throughout the Charlotte system.

26. In 1992, the Charlotte Board, responding to the proposal of a new school superintendent, began to experiment with a more flexible system of student assignments, in which parents had the option to choose one of many magnet schools for their children.

27. In 1997, new litigation over Charlotte's assignment policy led to a declaration by the federal district court in 1999 that the Charlotte system had become "unitary" and no longer required federal judicial supervision. As part of its final order and judgment, the district court enjoined the Charlotte Board to cease any use of race as a criterion in making student assignments. The federal district court's finding that the Charlotte district had become "unitary" was affirmed on appeal to the United States

Court of Appeals for the Fourth Circuit; the portion of the district court's order enjoining the Charlotte Board's further use of race in making student assignments was reversed.

The Current Student Assignment Plan

28. In March of 1999, the Charlotte Board adopted a document entitled *Achieving the CMS Vision: Equity and Student Success*, which set forth the basic goals and strategies for a new student assignment system. On June 1, 2000, the Charlotte Board adopted a resolution committing itself to the new plan. In the June 1, 2000 resolution, the Charlotte Board instructed the superintendent to develop a student assignment plan for 2002-03 that would "maximize stability for students to the fullest extent feasible," "guarantee availability of a 'home' school assignment choice for every student in proximity to the student's home," and "guarantee[]s options for low performing students" and for "students of low socioeconomic status" . . . "who are assigned to home schools with high concentrations of low performing students, to choose assignment to schools with higher performance and lower concentrations of low socioeconomic status."

29. The entire Charlotte system is divided, under this plan, into four contiguous zones (designated the 'blue,' 'gold,' 'purple,' and 'green' zones). Each zone contains various elementary, middle, and high schools that are grouped to form separate "feeder systems." Students who enter particular elementary schools will flow into designated middle schools (designated as "continuation schools"), and students from middle schools will flow into designated high schools. Therefore, parents and students are assured that, if they are pleased with the feeder system attached to their home elementary school, they have an assured pathway through known continuation schools throughout their elementary, middle, and high school careers.

30. Students may, in theory, choose options other than their home school among an array of non-magnet and magnet schools within their residential zone, with the Charlotte system providing transportation (or may choose schools outside their assigned zone, though with no transportation provided). However, the Charlotte Board cautions that the available options, in reality, are far fewer. The Charlotte Board has informed parents that "[d]uring the 2004-05 school year the district grew by approximately 4,700 students. Our current overcrowding conditions at some schools will probably continue and thus limit the district's ability to provide families with their school of selection." Even in Charlotte's fifteen "Title I Choice Schools"—whose students are theoretically entitled under federal law to elect other schools since these schools failed to make "adequate yearly progress" under the federal No Child Left Behind Act for the past two years—the Charlotte Board has warned parents that "because so many of our schools are full, we cannot guarantee that we will be able to assign . . . students to one of their first three choices. The district may have to place them in another school that has space in their grade level." *Id.*

31. Apart from the Title I Choice schools, the Charlotte Board's priorities for transfer have shifted over time. Under the 2000 student assignment's initial priority design, highest priority was given (1) to those students who were eligible for free and reduced price lunch, so long as the student population of their home school averaged at least 30 percentage points higher in FRPL population than did the Charlotte systemwide. As of 2005-06, however, the transfer priority for transfers to non-magnet schools has shifted away from poverty deconcentration and toward assisting in moves from low-performing schools. Students who are themselves low-performing in reading have the

highest priority (if they attend home schools in which the reading performance is 15 percentage points below the Charlotte system's reading average). They may transfer to other, higher performing schools. The second priority is reserved for those students who are not themselves low-performing in reading, but who attend schools that are low-performing. These students have a priority to attend any school in the entire Charlotte district, whether or not it is in their assigned zone.

32. Only after students in low-performing schools have exercised their priorities are priorities honored for students who themselves qualify for FRPL, and only if they attend elementary or middle schools where the FRPL student populations are above 40 percent, or high schools where the FRPL populations are above 30 percent.

33. In sum, many students including the plaintiffs, who attend high poverty high schools in Charlotte system, are effectively locked into those schools by an assignment system that begins with an absolute home school guarantee, based upon a parent's residence at the elementary school level, and then links each elementary school to middle and high schools that likewise are "high poverty." The transfer options are broad in principle but restricted in practice, since the overwhelming majority of parents in higher income neighborhoods opt for home schools that quickly fill to 100 % capacity and beyond, foreclosing any new transfers into these schools. Moreover, students within many of the Charlotte systems schools are segregated by classroom according to their socioeconomic status, with lower income students grouped together in low-performing classes that often have less well-qualified teachers.

34. As a further result of this system, high poverty high schools (and elementary and secondary schools) tend to be disproportionately underutilized. The

Charlotte system's center city high schools — including West Mecklenburg and E.E. Waddell,—operated at 77% and 81% capacity respectively during the 2004-05 academic year, with West Charlotte, Berry Academy, and Vance high schools at 90%, 95% and 96% capacity respectively. During the same academic year, Charlotte High schools in the northern and southern suburbs are seriously overcrowded—Butler at 127%, North Mecklenburg at 120%, Providence at 119%, and South Mecklenburg at 118%.

35. Nor has the 2000 assignment system achieved significant transportation efficiencies. Approximately 65 percent of those Charlotte system students currently eligible for transportation are transported to their schools on public school buses. On information and belief, transportation costs are currently higher, on a real dollar basis, under the 2000 student assignment system, than they were under the desegregation assignment system.

The Educational Consequences of the Current Student Assignment Plan

36. Although the 2000 assignment plan has only been in effect for two academic years (2002-03 and 2003-04), very wide disparities in student performance have already emerged among the schools, grouped by their socioeconomic status. For example, the high school composite scores reported by the North Carolina Department of Public Instruction in 2003-04 at the five highest poverty schools among Charlotte's 15 regular high schools—West Charlotte (61.92% eligible for FRPL; 31% at or above grade level); Garinger (57.03 eligible for FRPL; 45% at or above grade level); West Mecklenburg (46.49% on FRPL; 48% at or above grade level); E.E. Waddell (45.56% eligible for FRPL; 41% at or above grade level); and Independence (35.67% eligible for FRPL; 49% at or above grade level)—are far lower than the high school composite scores

at Charlotte's six lowest poverty high schools—Providence (4.92% eligible for FRPL; 85% at or above grade level); Hopewell High (11.61% eligible for FRPL; 68% at or above grade level); North Mecklenburg (13.91 eligible for FRPL; 72% at or above grade level); David W. Butler (14.32% eligible for FRPL; 75% at or above grade level); South Mecklenburg (15.37% eligible for FRPL; 74% at or above grade level), Myers Park (17.78% eligible for FRPL; 75% at or above grade level). Similar disparities, closely tied to the socioeconomic composition of various schools, are also present in Charlotte's elementary and secondary schools.

37. These disparities in measured student performance are caused, in substantial part, by the high poverty concentrations. Lower income students who attend higher income schools significantly outperform, on average, lower income students who attend high poverty schools. In 2003-04, 82% of lower-income students who attended Charlotte's low poverty schools were performing at grade level. Only 64% of lower-income students who attended high poverty schools were at grade level.

38. On information and belief, students who attend high poverty schools are more likely to drop out of school before graduation than are students in the Charlotte system as a whole.

39. On information and belief, students who attend high poverty schools are less likely to graduate than are students in the Charlotte system as a whole.

40. On information and belief, students who attend high poverty schools are more likely to face both in-school and out-of-school suspensions than are students in Charlotte's higher income schools. Consequently, the academic atmosphere in high poverty schools is substantially more chaotic and less well-ordered than is the academic

atmosphere in Charlotte's higher income schools. At Phillip Berry Academy, for example, classes in automotive engineering attended by plaintiff Clifton Jones went for weeks without any teacher at all—neither a qualified, certified teacher teaching in field, nor even a substitute teacher.

41. Under the Charlotte Board's Equity Plus II plan, schools with higher proportions of low income children are entitled to compensating educational inputs, including financial incentives designed to draw competent and experienced teachers to these schools.

42. These inputs and incentives have failed to stem very high losses of teachers from Charlotte's high poverty schools—a 38 percent departure rate for teachers employed in such schools in 2003-04, compared with a 16 percent departure rate in the Charlotte system overall.

43. The Equity Plus II plan has not succeeded in lifting student performance and graduation rates to levels comparable to those of other schools in the Charlotte system, or in reducing dropout rates, disciplinary rates, and other indicia of academic distress and failure, to levels comparable to higher income schools in the Charlotte system.

The Defendants' Knowledge of Likely Adverse Educational Consequences

44. The adverse effects of high poverty schools have been widely reported for nearly forty years. In his magisterial study of student performance and school resources in the mid-1960s, *Equality of Educational Opportunity*, Dr. James S. Coleman and his colleagues, commissioned by the United States Congress to carry out a comprehensive analysis as part of the implementation of the Civil Rights Act of 1964, concluded that:

"a pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school," and that if a "minority pupil is put with schoolmates with strong educational backgrounds, his achievement is likely to increase." Coleman Report, at 22. Indeed, the Coleman Report found that "[a]ttributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff." *Id.* at 302.

45. Professor Coleman's findings have been replicated in dozens of highly reliable, meticulous scientific studies. Many distinguished scholars and researchers, including Christopher Jencks, Alison Wolf, Karl White, Mary M. Kennedy, Susan E. Mayer, Robert L. Crain, Rita E. Mahard, Judith Anderson, Eric Camburn, Luis Laosa, Russell Rumberger, Sheryll Cashin, Richard Kahlenberg, and Gary Orfield, have reached similar conclusions based upon their careful studies of empirical evidence. These findings are well known to the defendant Charlotte Board and to the defendants State and State Board.

46. Upon information and belief, Professor Gary Natriello of Columbia University Teacher's College was retained as an expert by the Charlotte Board as it conducted its revision of its student assignment policies in 2000 and thereafter. Professor Natriello told the Charlotte Board that "Once you get at least 50 percent concentrations of poor students, it becomes very difficult to be effective in helping disadvantaged kids achieve." He also told the Board that it would cost significantly more to educate students in high poverty settings.

FIRST CLAIM FOR RELIEF
DENIAL OF A SOUND BASIC EDUCATION

47. Plaintiffs incorporate by reference each of the allegations of paragraphs 1 through 46 of this complaint.

48. Plaintiff students have a fundamental right under Article I, § 15 and Article IX, § 9(2) of the North Carolina Constitution to the opportunity for a sound basic education. Defendants the State, the State Board of Education, and their local educational agent, the Charlotte Board of Education, have a duty to guard and protect that right.

49. The defendant Charlotte Board has denied the plaintiffs their constitutional opportunity for a sound basic education, because it has chosen and maintained a student assignment system that systematically deprives plaintiffs of many essential elements of a sound basic education.

50. Defendants have the available fiscal, administrative, and educational capacity to adopt and implement alternative student assignment plans, including, for example, a plan that would establish floor and ceiling caps on the percentage of free and reduced price lunch students in every Charlotte school, in order to eliminate the barrier to a sound basic education erected by the Charlotte's 2000 student assignment policy.

51. The failure of defendant Charlotte Board to adopt and implement, and of the defendants State and State Board to insist upon, some alternative assignment policy, despite their awareness of the adverse educational consequences of high poverty schools, despite their knowledge that Charlotte's high poverty schools have not responded sufficiently to the Equity Plus II strategy, and despite the fact that alternative remedies are available in this wealthy school district, violates the plaintiffs' constitutional rights under Article I, § 15 and Article IX, § 2(1) of the North Carolina Constitution.

SECOND CLAIM FOR RELIEF
DEFENDANTS' VIOLATION OF PLAINTIFFS' RIGHT TO
THE EQUAL PROTECTION OF THE LAWS

52. Plaintiffs incorporate by reference paragraphs 1 through 51 of this complaint.

53. Plaintiffs have a right under Article I, § 9 of the North Carolina Constitution to the equal protection of the laws.

54. Defendants' maintenance of a system for student assignments that relegates plaintiffs and many other lower-income students to high poverty schools, which are (1) disproportionately filled with students at serious risk of educational failure because of parental poverty, parental unemployment and underemployment, lower parental educational levels, single parent families, non-white students, students with poor health, students whose families have inadequate or unstable housing, limited English proficient students, and students who need exceptional services, and which are (2) characterized by high teacher turnover, more inexperienced teachers, more teachers who teach out-of-field, and more administrative turnover, deprives the plaintiffs of educational opportunities that are equal to those afforded to those Charlotte's students who attend lower-poverty schools with fewer at-risk students and greater teacher stability and quality.

55. Defendants chose and implemented the present Charlotte student assignment system despite their clear knowledge that it would create many of these adverse school socioeconomic conditions and would, therefore, create educational disadvantages for plaintiffs and other students in high poverty schools.

56. Charlotte's present student assignment system deprives plaintiffs of the equal protection of the laws.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request:

1. A declaration that Charlotte's present student assignment plan is unconstitutional on its face and/or in its application to plaintiffs and others students similarly situated, under Articles I, §§ 9 and 15 and Articles IX, § 2(1);
2. An order enjoining the defendants to design and implement an alternative student assignment plan to end high poverty concentrations in every Charlotte school by establishing reasonable floor and ceiling caps on the free and reduced price lunch population of every elementary, middle, and high school in the Charlotte system;
3. An order retaining jurisdiction over this case to ensure full compliance with the Court's decree;
4. An order granting to plaintiffs their attorneys' fees and reasonable costs to the extent permitted by law; and
5. An order granting such other and further relief as to the Court shall seem just and proper.

This 9th day of February, 2005

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EXHIBIT B

NORTH CAROLINA COURT OF APPEALS

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

Plaintiffs,

and

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

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and
STATE BOARD OF EDUCATION,

Defendants.

From Wake County

PROPOSED BRIEF OF AMICI CURIAE

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

IN SUPPORT OF APPELLEES

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NORTH CAROLINA COURT OF APPEALS

HOKE COUNTY BOARD OF
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and

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BOARD OF EDUCATION, *et al.*,

Plaintiff-Intervenors,

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IN SUPPORT OF APPELLEES

ISSUES PRESENTED

- I. DID THE TRIAL COURT HAVE THE AUTHORITY AND DUTY TO ORDER REMEDIAL RELIEF AFTER THE STATE LEGISLATURE REFUSED TO FULFILL ITS CONSTITUTIONAL OBLIGATION TO PROVIDE EVERY CHILD IN THE STATE WITH THE OPPORTUNITY TO OBTAIN A SOUND BASIC EDUCATION?
- II. IS PRE-KINDERGARTEN A PROVEN, EFFECTIVE, *LEANDRO II*-CONFORMING REMEDY FOR THE CONSTITUTIONAL VIOLATION FOUND TO HAVE OCCURRED?

INTRODUCTION

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

The N.C. Supreme Court, in its 2004 decision in this case, held that at-risk prospective enrollees had been denied their constitutional right to the opportunity to obtain a sound basic education. *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 642, 599 S.E.2d 365, 393 (2004) ("*Leandro II*"). Nevertheless, the Court held, *at that juncture of the case*, mandating pre-kindergarten for all at-risk prospective enrollees was premature. *Id.* at 644, 599 S.E.2d at 394. The Court

deferred to the legislative and executive branches to devise a remedy. *Id.* at 642-43, 599 S.E.2d 365 at 393.

In response to *Leandro II*, the Legislature and the State Board of Education expanded pre-kindergarten services, with the stated intent to ensure that “every at-risk four-year-old has access to a quality pre-kindergarten program.” (R pp 477, 483; R S pp 612, 615). Despite abundant evidence that this remedy has proven to be effective, the Legislature has failed to adequately implement the program or to prescribe an alternative remedy. Today, less than half of the state’s approximately 65,000 at-risk four-year-olds have access to the State’s pre-kindergarten program. (R p 666). The Legislature’s “Current Operations and Capital Improvements Appropriations Act of 2011,” N.C. Sess. Law 2011-145 (“Legislation”), would substantially decrease this number even further. *Id.*

The trial court had a duty to order remedial relief when it determined that the State Legislature failed to fulfill its constitutional obligation to provide each child in the State with the opportunity to obtain a sound basic education. The trial court’s order is no longer “premature.”

ARGUMENT

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

A. When Other Branches Of Government Fail To Fulfill Their Constitutional Obligation To Provide A Sound Basic Education, The Court Has The Authority And Duty To Order That The State Provide Such Remedial Relief.

The Legislature argues that the trial court exceeded its authority when it ordered the State to provide pre-kindergarten services to all at-risk four-year-olds in North Carolina and enjoined Section 10.7(f) of the Legislation. *See* Attorney General's Brief pp 11, 20. While courts generally defer to the legislative and executive branches on issues that fall within the province of those branches of government, this deference requires that the other branches of government fulfill their constitutional obligations.¹ When, as in the instant case, one of the other branches refuses to fulfill such obligations, our state courts are not only empowered, but are obligated, to act to ensure that the constitutional rights of North Carolinians are not compromised.

The judicial authority and obligation to protect such constitutionally declared fundamental rights, as asserted here, is as old as the United States. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Judicial action addressing a continued constitutional violation is rooted in the courts' equitable powers, and as long as such action is exercised after legislative noncompliance, as

¹ *See* Sonja Elder, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 773 (2007).

evident here, it is appropriate.²

During the school desegregation era, courts were often obligated to remedy constitutional violations after the other branches of government refused to do so. In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, the U.S. Supreme Court stated, “[o]nce a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is *broad*.” 402 U.S. 1, 15 (1971) (emphasis added) (affirming trial court’s order adopting desegregation plan developed by outside expert after school board failed to submit a plan that remedied violations). Courts have applied this broad remedial authority in many ways that government officials likely viewed as administratively burdensome. *See, e.g., Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (affirming district court’s order enjoining government officials from discriminating in schools and ordering submission of a desegregation plan); *Milliken v. Bradley*, 433 U.S. 267 (1977) (affirming district court’s order requiring compensatory or remedial educational programs partially funded by the State as part of desegregation decree); *Griffin v. County. Sch. Bd.*, 377 U.S. 218 (1964) (affirming district court’s order prohibiting county from paying tuition grants, giving tax credits, closing schools to avoid desegregation, and warning that court would remedy problem if

² *Montoy v. State*, 112 P.3d 923, 931 (Kan. 2005) (citing *Unfulfilled Promise: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1087–88 (1991)).

schools were not reopened).

In *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) (“*Leandro I*”), the N.C. Supreme Court grappled with the constitutional separation of powers doctrine, as it applies to the instant case, and gave clear guidance. The court acknowledged that it must grant “every reasonable deference” to the legislative and executive branches when considering whether they are fulfilling their constitutional obligation to provide a sound basic education. *Id.* at 357, 488 S.E.2d at 261. The issue of providing a sound basic education is, “initially at least,” within the province of the legislative and executive branches. *Id.* However, the court made it clear that if a branch of government is denying children this fundamental right, and such denial is not necessary to promote a compelling governmental interest, it is “the *duty* of the court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong.” *Id.* (emphasis added).

In *Leandro II*, the N.C. Supreme Court ordered the State to “address and correct” its deficiencies in providing at-risk prospective enrollees their constitutional opportunity to obtain a sound basic education. However, the Court, while stopping short of prescribing a remedy, made it clear that it was in the province of the judicial branch to do so when state actors became recalcitrant:

[W]hen the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

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

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

Almost eight years ago, the Court in *Leandro II* reversed the trial court's remedial order regarding the provision of pre-kindergarten services as part of the State's constitutional obligation to at-risk prospective enrollees. The Court found that "*at this juncture of the litigation,*" the suggestion that "pre-kindergarten is the sole vehicle or, for that matter, a proven effective vehicle by which the State can address the myriad problems associated with such 'at-risk' prospective enrollees is, at best, premature." *Id.* at 644-45, 599 S.E.2d at 394-95 (emphasis added).

Following *Leandro II*, the State Board of Education and the Legislature each took steps to "address and correct" existing constitutional deficiencies in affording at-risk prospective enrollees their guaranteed opportunity to obtain a sound basic education. In doing so, the State has consistently identified the North Carolina More at Four Pre-Kindergarten Program ("More at Four") (currently named the

North Carolina Pre-Kindergarten Program (“NC Pre-K”)) as its sole, chosen remedy to fulfill its constitutional obligation to provide at-risk prospective enrollees the opportunity to obtain a sound basic education. (R p 651). In a hearing conducted by the trial court in October 2004, the “State Defendants’ 2004 Action Plan to Court” committed to expanding More at Four to ensure “every at-risk four-year-old has access to a quality prekindergarten program.” (R pp 477, 483). In August 2005, the State made the exact same commitment to the trial court. (R S pp 612, 615). From 2005 through 2011, the State expanded More at Four from serving approximately 15,000 at-risk children to serving approximately 32,000 at-risk children. (R pp 653, 666). Significantly, in 2010, the State also lauded More at Four as an essential component of its successful *Race to the Top-Early Learning Challenge Grant* application.³ The State, through its own actions and statements during the past eight years, has committed to providing pre-kindergarten services to meet its constitutional obligation to at-risk prospective enrollees.

Despite clear evidence that the state’s NC Pre-K program was providing at-risk children with a sound basic education, the 2011 Legislature passed legislation to dismantle the State’s past remedial efforts. The Legislation reduced the number

³ Available at <http://www2.ed.gov/programs/racetothetop-earlylearningchallenge/applications/north-carolina.pdf>.

of NC Pre-K slots for at-risk four-year-olds by 80%, without providing any alternative high-quality pre-kindergarten options for those now-excluded children. (R pp 666, 668). The Legislature also failed to identify any alternative remedy for at-risk prospective enrollees.

The Legislature now attempts to justify the Legislation, which demonstrates its clear and deliberate refusal to fulfill its constitutional obligation, by arguing that legislation “reflecting economic realities is well within the stated powers of the legislative branch.” *See* Attorney General’s Brief pp 20-21. However, the U.S. Supreme Court has held that fiscal concerns and attempts to limit expenditures do not justify the violation of constitutional rights. *See, Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974) (citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)). State high courts have applied this principle to state constitutional provisions guaranteeing the right to education. *See e.g., Abbott v. Burke*, 20 A.3d 1018, 1024-25, 1049-50 (N.J. 2011) (holding that even during times of fiscal crisis, the State may not use its legislative power over appropriations to diminish students’ rights to a constitutionally-guaranteed education); *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 755 (N.H. 2002) (holding that financial constraints do not excuse the State from providing a constitutionally adequate education); *State v. Campbell County Sch. Dist.*, 19 P.3d 518, 565-66 (Wyo. 2001) (holding that even

in an environment of tax revenue shortfalls, lack of financial resources is not an acceptable reason for failing to provide a constitutionally-guaranteed education).

As a result of the Legislature's stark departure from correcting the existing constitutional deficiencies, as ordered by the Supreme Court in *Leandro II*, the trial court ordered a specific remedy. The court ordered the State to provide NC Pre-K to any eligible at-risk four-year-old who applies, enjoined Section 10.7(f) of the Legislation, and prohibited the State from implementing any other barriers to deny eligible, at-risk four-year-olds admission to NC Pre-K. (R p 669). Faced with such a clear and deliberate refusal to address the State's past constitutional violation regarding at-risk prospective enrollees, the trial court could no longer defer to the Legislature to remedy this constitutional violation. The trial court had not only the power, but the obligation to the children of North Carolina, to exercise its broad remedial authority to order a specific remedy to correct this wrong. More than seven years after *Leandro II*, the trial court's order was no longer "premature."

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

- A. Research Demonstrates That The North Carolina More At Four Pre-Kindergarten Program Is A High-Quality, Cost-Effective Program That Provides At-Risk Four-Year-Olds With An Opportunity To Obtain A Sound Basic Education.

Unlike the pre-kindergarten order that the N. C. Supreme Court determined to be “premature” in its 2004 *Leandro II* decision, the current trial court order is amply supported by strong and uncontested research-based evidence demonstrating the effectiveness of the State’s preschool program. Since *Leandro II*, significant social science research on More at Four shows conclusively that this state-funded, high-quality preschool program is a proven, effective remedy to address the State’s history of unconstitutional denial of a sound basic education to at-risk prospective enrollees.

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

As the State’s own witness testified and the trial court found, North Carolina’s pre-kindergarten program has been extremely successful in closing the achievement gap by providing at-risk children with the school readiness skills they need to succeed. Pruette Testimony, T pp 29-32; (R pp 654-55, 658-59). A series

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

In 2011, FPG researchers assessed the effect of More at Four on children's school readiness skills and found that the program improved language and literacy skills and math skills, resulting in improved school readiness for at-risk children. Rule 9(d) Exhibits, Frank Porter Graham Feb 2011, Defendant's Exhibit 4, pp 1-2.

A 2010 evaluation made it clear that participation in More at Four positively affects poor children's long-term academic achievement, reduces the achievement gap between poor students and non-poor students, and decreases the number of students identified as having learning disabilities. When FPG researchers studied the long-term effects of participation in More at Four by comparing the third-grade end of grade (EOG) math and reading scores of More at Four students to the scores of their peers, the gap in average test scores between economically-disadvantaged and non-economically-disadvantaged students was reduced by 31% in math and by 24%-37% in reading for economically-disadvantaged More at Four participants.

(R S p 821). Poor children who participated in More at Four had higher math and reading achievement levels than poor children who did not attend More at Four.

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

The State-funded evaluations have also shown that More at Four provides at-risk children with opportunities to gain critical foundational skills that persist through kindergarten. A 2008 FPG study, which assessed children's skills at entry into More at Four and their subsequent growth during pre-kindergarten and kindergarten, found that More at Four strengthens children's foundational skills. The study found that these skills persist through kindergarten, preparing participants to develop more advanced academic skills in elementary school, regardless of their risk level. FPG Child Development Institute, *Evaluation of the North Carolina More at Four Pre-kindergarten Program: A Look across Time at Children's Outcomes and Classroom Quality from Pre-K through Kindergarten*, at 7, 52, 103 (2009).⁴

In 2011, researchers at Duke University found positive effects of North Carolina's More at Four and Smart Start⁵ programs on third grade math and

⁴ Available at http://www.fpg.unc.edu/~mafeval/pdfs/year_8_report_final.pdf.

⁵ Smart Start is a statewide initiative focused on early childhood development. (R p 548).

reading test scores. (R p 563). The study further found that these programs later increased the probability that a child would be classified as academically or intellectually gifted, and decreased the probability that a child would be identified as a special education or limited English proficient student. (R p 564). Moreover, the program has proven to be cost-effective. Comparing the positive effects of More at Four to the cost of the program, the study concluded that the benefits of More at Four appear to be worth at least the state investment in the program. (R pp 569-70).

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

Evaluations of North Carolina's pre-kindergarten program are consistent with research findings at the national level: at-risk children who participate in high-quality pre-kindergarten programs are more successful in school and in life. At-risk children who participate in such programs have higher test scores on math and reading achievement tests, experience less grade retention, and have less need for special education.⁶ They are more likely to graduate from high school, attend a

⁶ R S p 1601; *Early Childhood Education Program Yields High Economic Returns*, SCIENCE DAILY, Feb. 4, 2011, at 1, available at <http://www.sciencedaily.com/releases/2011/02/110204091258.htm> [hereinafter *Early Childhood Returns*]; Arthur J. Reynolds et al., *Age 26 Cost-Benefit Analysis of the Child-Parent Center Early Education Program*, CHILD DEVELOPMENT, Jan.-

four-year college, and graduate from college.⁷ In adulthood, they are more likely to be employed, own a home, and have health insurance.⁸

The results of three prominent studies of the long-term effects of high-quality preschool programs on disadvantaged children are particularly compelling. All three of these studies, the Carolina Abecedarian Project, the Child-Parent Center Early Education Program, and the High/Scope Perry Preschool Program, demonstrated that preschool provides long-term educational, economic, social, and health benefits for at-risk students.⁹ Additionally, a study of five state-funded, high-quality pre-kindergarten programs for four-year-olds – in South Carolina, West Virginia, Oklahoma, Michigan, and New Jersey – found that preschool

Feb. 2011, at 389-90, available at <http://www.ncbi.nlm.nih.gov/pubmed/21291448>; Lawrence Schweinhart, *Benefits, Costs, and Explanation of the High/Scope Perry Preschool Program*, MEETING OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, April 26, 2003, at 4, available at http://www.highscope.org/file/Research/PerryProject/Perry-SRCD_2003.pdf.

⁷ W. Steven Barnett & Clive R. Belfield, *Early Childhood Development and Social Mobility*, 16 FUTURE OF CHILDREN 73, 83-86, available at http://futureofchildren.org/futureofchildren/publications/docs/16_02_05.pdf; F.A. Campbell et al., *Adult Outcomes as a Function of an Early Childhood Educational Program: An Abecedarian Project Follow-Up*, DEVELOPMENTAL PSYCHOLOGY, Jan. 16, 2012, at 8, available at <http://psycnet.apa.org/psycinfo/2012-00549-001/>; *Early Childhood Returns*, *supra* note 6, at 1; Julia Isaacs, *Research Brief #4: Model Early Childhood Programs*, IMPACTS OF EARLY CHILDHOOD PROGRAMS, BROOKINGS CENTER ON CHILDREN AND FAMILIES, Sept. 2008, 1-3, available at http://www.brookings.edu/~media/Files/rc/papers/2008/09_early_programs_isaacs/09_early_programs_brief4.pdf; Reynolds, *supra* note 6, at 389-90.

⁸ Campbell, *supra* note 7, at 8; Reynolds, *supra* note 6, at 389-90; Schweinhart, *supra* note 6, at 5.

⁹ Isaacs, *supra* note 7, at 1-3; Barnett, *supra* note 7, at 83-86.

produced broad gains in children's learning at kindergarten entry.¹⁰ The study found that preschool participants had improved vocabulary, math skills, and print awareness--skills that lay a foundation for school success, particularly in reading and math.¹¹

Studies have also demonstrated that high-quality preschool programs have substantially higher rates of economic return on taxpayer investments than school-level or job training interventions.¹² Researchers found that the High/Scope Perry Preschool Program had a rate of return of \$16.14 for every dollar invested. The Child-Parent Center Early Education Program had an average return of \$10.83 for every dollar invested.¹³

The New Jersey Supreme Court was persuaded by comparable research when it ordered high-quality preschool services for all three and four-year-olds in poor, urban school districts throughout the state. *See Abbott v. Burke*, 710 A.2d 450, 462-64 (N.J. 1998). The court relied on evidence demonstrating that

¹⁰ W. Steven Barnett, et al., *Effects of Five State Prekindergarten Programs on Early Learning*, INSTITUTE FOR EARLY EDUCATION RESEARCH AT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, (New Brunswick, N.J. 2007), at 2, 6, 20 available at <http://secure.highscope.org/file/Research/MultiState1007.pdf>.

¹¹ *Id.* at 2, 20.

¹² James J. Heckman, *The Case for Investing in Disadvantaged Young Children*, BIG IDEAS FOR CHILDREN: INVESTING IN OUR NATION'S FUTURE, 2008, at 50-53, available at <http://www.heckmanequation.org/content/resource/case-investing-disadvantaged-young-children>.

¹³ Reynolds, *supra* note 6, at 380, 391.

preschool has a substantial impact on academic achievement, poor children who attend preschool are better prepared for kindergarten, and the long-term benefits of preschool justify the investment. *Id.* at 462-64. The New Jersey court ordered this remedy after reaching the same conclusion that the trial court did in the instant case: the State was not providing at-risk children in poor, urban school districts with their constitutionally-guaranteed right to an education.¹⁴ *Id.* at 456-58.

This vast body of research makes it abundantly clear that high quality preschool programs, including North Carolina's pre-kindergarten program, effectively provide at-risk children the opportunity to obtain a sound basic education. The benefits of high-quality pre-kindergarten programs far outweigh the costs. The remedy ordered by the trial court is thus a proven and effective remedy, and it should be upheld by this Court.

¹⁴ The court found that preschool education has "strong constitutional underpinning," but because an existing N.J. statute required preschool services, the court did not need to determine whether preschool was a component of the constitutionally-guaranteed opportunity to obtain an adequate education. *Abbott v. Burke* 710 A.2d 450, 464 (N.J. 1998).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the ruling of the trial court.

Respectfully submitted this 25th day of April 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, I certify that the attached brief was prepared in proportionally spaced Times New Roman type in 14-point font, and that the brief, excluding the cover, index, table of authorities, certificate of service, and certificate of compliance contains less than 3,750 words, as reported by the word processing software used to prepare it.

s/Christine Bischoff

CERTIFICATE OF SERVICE

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

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