

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.

**PENN-INTERVENORS'
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

1. On remand from the Supreme Court of North Carolina, this Court was directed to: “determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its 10 November 2021 order.” 18 March 2022 Order at 2, ¶ 1. The following findings of fact and conclusions of law respond to that limited directive of the Supreme Court.

(a) **Procedural Background**

2. This task is simply the latest in an ongoing and extensively litigated case regarding the State of North Carolina’s constitutionally mandated obligation to provide a “sound basic education” for all its school children. *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 609, 599 S.E.2d 365, 373 (2004) (“*Leandro II*”); N.C. Const. Art. I, § 15. While the Court’s present task is limited in scope, it is nevertheless the product of, and reliant upon, the extensive work and analysis that has come before. A detailed articulation of that procedural history is set out in the Court’s 10 November 2021 Order (“November Order”). Nevertheless, the Court will briefly outline here, the procedural history relevant to its immediate task.

3. Eighteen years ago, the Supreme Court held in “*Leandro II*” that “an inordinate number” of students in the State 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.” 358 N.C. at 647, 599 S.E.2d at 396. Consequently, 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, 599 S.E. 2d at 396.

4. Subsequently, the trial court continued to annually review the academic performance of every school in the State, as well as teacher and population data, and the programmatic resources made available to at-risk students. Based upon this review, the trial court found that “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.” See November Order (citing 17 March 2015 Order); see also 13 March 2018 Order.

5. As a result of its findings, the trial 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, 488 S.E.2d 249 (1997) (“*Leandro I*”), and *Leandro II*. The State, along with the Plaintiffs and the Penn-Intervenors, recommended WestEd to serve in that capacity. After reviewing and scrutinizing its qualifications, the Court appointed WestEd to serve as the Court’s consultant. 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.

6. Following the creation of the WestEd report, the Plaintiffs, Penn-Intervenors and State Defendants 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 ordered the State Defendants to work “expeditiously and without delay” to create and fully implement a system of education and educational supports that will provide the opportunity for a sound basic education to all North Carolina children.

7. On 15 June 2020, the State Defendants submitted a Joint Report, which was agreed to by all the parties, that set out specific steps for the State to take in Fiscal Year 2021 (2020-21) to begin to address the constitutional deficiencies previously identified by the Court (the “Year One Plan”). The Court ordered the State Defendants to implement the actions outlined in the Year One Plan. 11 September 2020 Order. The Court also ordered the State Defendants, in consultation with the Plaintiff Parties, to develop and present a Comprehensive Remedial Plan (“CRP”) to be fully implemented by the end of 2028 with the objective of fully satisfying the State Defendants’ *Leandro* obligations by the end of 2030.

8. The State Defendants submitted their CRP on 15 March 2021, which addresses each of the findings in *Leandro I* and *II*, by setting forth specific actions to be implemented over the following eight years. The Appendix to the CRP also identified the monetary resources necessary, as determined by the State, to implement the specific action steps to provide the opportunity for a sound basic education.

9. On 7 June 2021, the Court held that the CRP shall be implemented in full and in accordance with the timelines set forth therein and further that:

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.

10. In the Court's CRP, it identifies seven key areas that must be addressed:

- 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 assess 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 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
- 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.

11. The Court further stated that, "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. . . .” 7 June 2021 Order at 6 (quoting *Leandro I*, 346 N.C. at 357). The Court’s holding, adopting the CRP and directing that it shall be implemented, was not appealed within thirty days of the entry of the order. *See* N.C. R. App. P. 3(c).

12. The Court held hearings with the parties on 8 September 2021, and again on 18 October 2021, to assess the State Defendants’ progress towards implementing the CRP. In its 6 August 2021 Report, submitted to the Court prior to the hearings, the State represented that more than sufficient funds are available to execute the current needs of the CRP. *See* State’s 5 August 2021 Report to Court. The State of North Carolina conceded in its August progress report to the Court that, at that time, the State’s reserve balance included \$8 billion and more than \$5 billion in forecasted revenues that exceeded the existing base budget.

13. Despite this substantial revenue surplus, the State failed to implement most actions in the CRP and failed to secure the resources to fully implement the CRP.

14. Therefore, on 10 November 2021, consistent with the admonishment contained in its 7 June 2021 Order, the Court directed the Office of State Budget and Management and the current State Budget Director, the Office of the State Controller and the current State Comptroller, and the Office of the State Treasurer and the current State Treasurer, to take the necessary actions to transfer the amount of funds required to effectuate years two and three of the CRP, from the unappropriated

balance within the General Fund to the respective state agents and actors with fiscal responsibility for implementing the CRP.

15. The Court stayed its Order for 30 days.

16. On 18 November 2021, North Carolina Governor Roy Cooper signed the Current Operations Appropriations Act of 2021 (the “State Budget”).

17. On 24 November 2021, the State Controller Linda Combs did not present herself before the Court to inquire about the potential conflict between the State Budget and the November Order, but instead directly petitioned the North Carolina Court of Appeals for a Writ of Prohibition, Writ of Supersedeas and a Temporary Stay of the trial court’s November Order.

18. On 30 November 2021, the Court of Appeals granted the Writ of Prohibition after providing the respondents only one day’s notice to respond to the State Controller’s petition. 30 November 2021 Order at 1-2, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. P-21-511 (N.C. App.) (“30 November 2021 Order”).

19. On 7 December 2021, the State of North Carolina filed its notice of appeal to the North Carolina Court of Appeals.

20. On 8 December 2021, 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, filed their notice of intervention in this matter (the “Intervenor-Defendants”) and, then their notice of appeal to the North Carolina Court of Appeals. The right to intervene

has been contested by the State of North Carolina, but that issue is not before the Court.

21. Plaintiffs and Penn-Intervenors appealed the granting of the Writ of Prohibition by the Court of Appeals and filed separate petitions for discretionary reviews and petitions for certiorari review.

(b) **The Supreme Court of North Carolina's Limited Remand**

22. On 14 February 2022, the State of North Carolina filed with the Supreme Court its Petition for Discretionary Review without prior review of the Court of Appeals, pursuant to N.C.G.S. § 7A-31 (a “bypass petition”).

23. On 18 March 2022, the Supreme Court granted the State’s bypass petition and Plaintiffs’ petition for discretionary review, but partially remanded the case to the Superior Court, Wake County, for a period of no more than thirty days, “for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its November 11 /sic/, 2021 order.”

24. Pursuant to the Supreme Court’s 18 March 2022 Order, this Court held a status hearing with counsel for all parties on 24 March 2022. During the hearing, the Intervenor-Defendants represented that, in their briefing, they intended to raise several arguments beyond the scope of the limited remand. Counsel for the Plaintiffs and Penn-Intervenors vigorously opposed the expanded scope of the remand proposed by Intervenor-Defendants and represented that their understanding of the Supreme Court’s mandate did not include a re-evaluation of whether the Court properly adopted the CRP. The State Defendants and Charlotte Mecklenburg Schools

Intervenors (“CMS-Intervenors”) agreed. The Court agreed with the State Defendants, Plaintiffs, Penn-Intervenors and CMS-Intervenors that the scope of its review should be limited to the effect the enactment of the State Budget had on the “nature and extent” of the relief the trial court granted on 11 November 2021, and stated it would not revisit the trial court’s 7 June 2021 Order adopting the CRP.

25. During the status hearing, the Court directed the State to submit its analysis of the impact of the State Budget on the items in the CRP by 4 April 2022. The Court then directed the parties to submit briefing, responding to the contents of the State’s analysis, by 8 April 2022. Any reply to other parties’ briefs was due by 11 April 2022. The Court also scheduled another hearing, to address the State’s analysis of the State Budget, along with the parties’ briefing, on April 13, 2022.

26. Following the hearing on 24 March 2022, this Court entered a Supplemental Briefing Order on 25 March 2022, specifically directing the parties to provide to the Court in their filings, information (in the form of admissible evidence) and legal argument regarding the following subjects:

- a. The amount of the funds appropriated in the 2021 Appropriations Act, 2021 N.C. Sess. Laws 180, that directly fund the various programs and initiatives called for in the CRP;
- b. The amount of funds remaining in the General Fund currently both in gross and net of appropriations in the 2021 Appropriations Act;
- c. The effect of the appropriations in the 2021 Appropriations Act on the ability of the Court to order the Legislature to transfer funds to the

Department of Health and Human Services, Department of Public Instruction, and the University of North Carolina System. See *Richmond Cnty. Board of Education v. Cowell*, 254 N.C. App. 422 (2017).

(c) **The Effect of the State Budget upon the November Order**

27. On 4 April 2022, the State of North Carolina submitted the Affidavit of Kristin L. Walker, Chief Deputy Director of the State Budget for the North Carolina Office of State Budget and Management, along with four exhibits (“Walker Affidavit”). These exhibits address (1) the funding requirements identified in the CRP for each action item for years two and three, by both year and total; (2) a comparison of how much funding each action item in the CRP for year two and year three received in related items in the State Budget; (3) a report summarizing Ms. Walker and her team’s findings; and (4) the 25 March 2022 Estimated Cash Flow report for the State (collectively, the “State Budget Analysis”).

28. The State Budget Analysis identifies the amount of money that has been allocated in the State Budget for each item of the CRP. The amounts allocated are drawn from both state funds and nonrecurring Federal Elementary and Secondary School Emergency Relief (“ESSER”) funds.

29. The Court thoroughly examined the State Budget Analysis, as well as all of the evidence, briefing, and arguments presented by the parties.

30. The Court finds the State Budget Analysis to be fair and reasonable and adopts and incorporates, as if set forth herein, the State Budget Analysis.

31. Based on the Court’s thorough review of the State Budget Analysis and the arguments of the parties, the evidence demonstrates that significant necessary

services for students, as identified in the Court’s CRP, remain unfunded and underfunded by the State Budget.

32. In the November Order, the Superior Court determined that it would cost approximately \$1.75 billion to fund years two and three of the CRP. Having reviewed the State’s Budget Analysis, the 2021-2023 State Budget fails to provide nearly one-half of those total necessary funds. Specifically, the State Budget funds 63% of year two and 49% of year three.¹

33. The Court finds that the transfer necessary to comply with the CRP should be reduced from \$1.75 billion, as set out in the November Order, to \$794,827,957. The Court further finds that the specific transfers to the individual departments are reduced as follows:

- The amount directed to be transferred to the Department of Health and Human Services should be reduced from \$189,800,000 to \$168,441,761.
- The amount directed to be transferred to the Department of Public Instruction should be reduced from \$1,522,053,000 to \$593,628,196.
- The amount directed to be transferred to the University of North Carolina System should be reduced from \$41,300,000 to \$32,758,000.

¹ As referenced in the November Order, the Court cautions against relying on one-time, nonrecurring federal funds: 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 are non-recurring 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. November Order at 6, n.2.

34. In particular, the State Budget Analysis shows that the State Budget has failed to adequately fund several programs and initiatives in the CRP, including those serving the needs of at-risk students. According to the State Budget Analysis (Walker Affidavit, Ex. 3), only 24 out of the 44 funding priorities in year two are funded, and only 22 out of 42 funding priorities in year three are funded through the State Budget.

35. While the State Budget Analysis speaks for itself, it is worth noting that among the several items in the CRP *not funded* by the State Budget are several programs and initiatives intended to help address the needs of at-risk students in attaining a sound basic education, as conceded by the State Defendants. These programs and initiatives include, but are not limited to, the following:²

- Combining the Disadvantaged Student Supplemental Funding and at-risk allotments and increasing funding such that the combined allotment provides an equivalent supplemental weight of 0.4 on behalf of all economically-disadvantaged students (III.B.ii.2);
- Increasing low-wealth funding to provide eligible counties supplemental funding equal to 110% of the statewide local revenue per student (III.B.ii.3);
- Eliminating the limited English proficiency funding cap, simplifying the formula, and increasing funding to provide per-student support equivalent to a weight of 0.5 (III.B.ii.4);

² Additional programs and initiatives that are only partially funded include but are not limited to: (1) remove children with disabilities funding cap and increase supplemental funding to provide funding for students with disabilities equivalent to 2.3 times the cost of an average student (III.B.ii.1) (funded at 24%); (2) provide funding for Specialized Instructional Support Personnel to meet national guidelines (III.D.ii.1) (funded at 16%); (3) expand NC Pre-K through incremental rate and slot increases (VI.A.ii.1) (funded at 7%); and (4) incrementally increase Smart Start funding annually (VI.D.ii.1) (funded at 50%). Walker Affidavit, Ex. 2.

- Simplifying teacher assistant formula and increasing funding until funding will provide approximately one teacher assistant for every 27 K-3 students (III.C.iii.2);
- Providing resources and support to high-poverty schools to adopt a community schools or other evidence-based model to address out-of-school barriers (V.C.ii.1);
- Providing funding to cover the reduced-price lunch co-pays for all students who qualify for reduced-price meals so that those students would receive free lunches (V.C.iii.1);
- Revising the funding approach for North Carolina Virtual Public School to remove barriers that prevent students in low-wealth districts from participating (VII.B.iii.1);
- Providing funding to increase recruitment and support for up to 1,500 Teaching fellows (I.B.iii.1), which are intended to help schools increase the pipeline of diverse, well-prepared teachers to better support students, especially at-risk students; and funding for high quality teacher preparation programs in high-need rural and urban districts (I.C.ii.1), both of which can create long-term benefits for all of the schools, employees, and most importantly, the at-risk students of a particular school district;
- Providing funding for comprehensive induction services through the NC New Teacher Support Program to beginning teachers in low-performing, high-poverty schools (I.G.ii.1.);
- Providing funding for the North Carolina Principal Fellows Program, which will help prepare 300 new principals annually; and
- Providing funding to address staffing, interpreter services, a centralized provider network system, professional development, and salary inequities for the NC Infant Toddler Program (VI.C.ii.1.). As described in the CRP, “Expanding eligibility will reach children who are “at risk” of developmental delays with these quality services. Early intervention helps prevent more severe developmental delays for children and more costly interventions later in school.”

(d) **The General Fund Has More Than Sufficient Unallocated Funds to Fully Fund Years Two and Three of the CRP**

36. “Consistent with the Court’s 25 March 2022 Order,” the Chief Deputy Director of State Budget and her staff calculated “the amount of funds remaining in the General Fund currently both in gross and net of appropriations in the 2021 Appropriations Act.” Walker Affidavit ¶ 7 (quoting 25 March 2022 Order at 2). They determined “total unappropriated funds in the Savings Reserve” to be \$4.25 billion, and “the net unreserved cash balance” to be \$4.79 billion. *Id.*

37. The General Fund has sufficient, unallocated funds to fully fund years two and three of the CRP.

PROPOSED CONCLUSIONS OF LAW

38. The North Carolina judiciary and state and local entities have already expended significant resources on this litigation. As the Supreme Court observed, “The time and financial resources devoted to litigating these issues over the past ten years undoubtedly have cost the taxpayers of this state an incalculable sum of money.” *Leandro II*, 358 N.C. at 610, 599 S.E.2d at 374. That was eighteen years ago. At this point, this case will not benefit from unnecessary re-litigation at the trial court and such is beyond the partial, limited remand.

39. The Supreme Court issued a narrow remand to address a limited factual question, namely, the effect of the State Budget on the CRP. Further emphasizing the narrow scope of the task at hand, the Court provided only an abbreviated period of 30 days in which to do this work. There is no need for this Court to venture outside the scope of the Supreme Court’s limited remand to reconsider any other issues.

Consequently, this Court will only address the limited factual issues it has been directed to consider. It will not reopen other questions, which the trial court already decided with the benefit of a complete factual record.

40. Further, the Court considers the 7 June 2021 Order to be law of the case. *See State ex rel. Regan v. WASCO, LLC*, 269 N.C. App. 292, 302, 837 S.E.2d 565, 571 (2020) (“[W]hen a fact has been agreed on or decided in a court of record, [no party] shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed[.]”).

(a) **Impact of the State Budget on the November Order**

41. The State has acknowledged and the Court has held that full funding of the CRP is required to satisfy the constitutional requirement for a sound basic education. *See* June 7, 2021 Order; November Order at 9, 16.

42. In the November Order, the Superior Court determined that it would cost approximately \$1.75 billion to fund years two and three of the CRP. Having reviewed the State’s Budget Analysis, the 2021-2023 State Budget provides just over half of those necessary funds. Specifically, the State Budget funds 63% of year two and 49% of year three.

43. The Court finds that, while the State Budget has fully funded a portion of the items outlined in the CRP, numerous other constitutionally mandated items have either only been partially funded, or not funded at all.

44. The General Fund has sufficient, unallocated funds to fully fund years two and three of the CRP.

45. The Court finds that the transfer necessary to comply with the CRP is reduced from \$1.75 billion, as set out in the November Order, to \$794,827,957. The Court further finds that the specific transfers to the individual departments are reduced as follows:

- The amount directed to be transferred to the Department of Health and Human Services should be reduced from \$189,800,000 to \$168,441,761.
- The amount directed to be transferred to the Department of Public Instruction should be reduced from \$1,522,053,000 to \$593,628,196.
- The amount directed to be transferred to the University of North Carolina System should be reduced from \$41,300,000 to \$32,758,000.

(b) **The Court of Appeals Decision in *Richmond* does not Control the Trial Court's Analysis Here**

46. “[T]he conservation of judicial manpower and the prompt disposition of cases are strong legal arguments against allowing repeated hearings on the same legal issues. The same considerations require that alleged errors of one judge be corrected by appellate review and not by resort to re-litigation of the same issues before a different trial judge.” *Harco Nat’l Ins. Co. v. Grant Thornton LLP*, No. COA09-906, 2010 N.C. App. LEXIS 1773, at *11-12 (Ct. App. Sep. 7, 2010) (quoting *Huffaker v. Holley*, 111 N.C. App. 914, 925-16, 433 S.E. 2d 474, 475 (1993)).

47. At this point, this case will not benefit from unnecessary re-litigation at the trial court. Both the November Order and the subsequent order from the Court of Appeals addressed the applicability of *Richmond* to the Court’s authority to transfer the funds. See 10 November 2021 Order at 14; 30 November 2021 Order at

1. The Supreme Court will have the benefit of those orders in the record, as well as full briefing from the parties on that issue.

48. The Court also concludes that the reasoning outlined in *Richmond* is not implicated here. *Richmond* concerned a court's attempt to order the State to transfer funds, based on a money judgment, to one entity when those funds had already been allocated to, and spent by, another entity. Here, as noted above, the unreserved funds in the General Fund have not been allocated to any entity and those funds exceed the amounts needed for disbursement to fulfill the remaining obligations owed for years two and three of the CRP. Therefore, the State Budget does not implicate *Richmond*, among other reasons not before the Court.

Respectfully Submitted on 8 April 2022,

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CERTIFICATE OF SERVICE

Pursuant to BCR 3.9, the foregoing filing has been served on all parties upon its filing. In addition, the foregoing foregoing filing has been served on the following via electronic mail:

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This the 8th day of April, 2022. /s/ Christopher A. Brook _____
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