

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 TREVLYN L. WILLIAMS;
D.E. LOCKLEAR, JR., individually and
as Guardian Ad Litem of JASON E.
LOCKLEAR; ANGUS B. THOMPSON
II, individually and as Guardian Ad Litem
of VANDALIAH J. THOMPSON;
MARY ELIZABETH LOWERY,
individually and as Guardian Ad Litem of
LANNIE RAE LOWERY, JENNIE G.
PEARSON, individually and as Guardian
Ad Litem of SHARESE D. PEARSON;
BENITA B. TIPTON, individually and as
Guardian Ad Litem of WHITNEY B.
TIPTON; DANA HOLTON JENKINS,
individually and as Guardian Ad Litem of
RACHEL M. JENKINS; LEON R.
ROBINSON, individually and as Guardian
Ad Litem of JUSTIN A. ROBINSON,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

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RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS, DENISE HOLLIS JORDAN, individually and as guardian ad litem of SHAUNDRA DOROTHEA JORDAN and BURRELL JORDAN, V; TERRY DARNELL BELK, individually and as guardian ad litem of KIMBERLY SHANALLE SMITH; SUSAN JANNETTE STRONG, individually as guardian ad litem of TRACEY ANNETTE STRONG and ASHLEY CATHERINE STRONG; CHARLOTTE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

MOTION TO DISMISS CHARLOTTE-MECKLENBURG BOARD OF EDUCATION AS REALIGNED DEFENDANT

NOW COMES Realigned Defendant Charlotte-Mecklenburg Board of Education ("CMS Board"), by and through counsel, and moves this Court to dismiss it as Realigned Defendant in the above-captioned matter pursuant to Rules 12(b)(1), 12(b)(6), 12(c), and 41(b). In support of its motion, the Board shows the Court the following:

FACTUAL AND PROCEDURAL BACKGROUND

1. On February 9, 2005, a group of students in Charlotte-Mecklenburg Schools (“CMS”) sought to intervene in this long-running litigation, filing an intervening complaint naming as defendants the CMS Board,¹ the State of North Carolina (“State”), and the State Board of Education (“State Board”). The intervening complaint alleged two claims, each against all defendants—one alleging the denial of a sound basic education, and one alleging the denial of equal protection of the laws.
2. On August 1, 2005, an amended intervening complaint was filed, adding the Charlotte-Mecklenburg NAACP as an additional plaintiff-intervenor, as well as additional individual plaintiff-intervenors (collectively, the “Penn Intervenors”). The amended complaint also added a third claim against the CMS Board and the State, alleging that CMS was not providing sufficient human, fiscal, and educational resources to its central city and high poverty schools, such that those schools were not providing students with an opportunity for a sound basic education.
3. On August 19, 2005, the court granted in part the motion to intervene. Exhibit A. The court granted permissive intervention pursuant to Rule 24(b), but limited the intervention to the third claim for relief. The court also bifurcated the claim regarding the CMS Board from the other pending matters in the litigation.

¹ The CMS Board had already been involved in the litigation as a Plaintiff-Intervenor, along with several other large urban districts. CMS is the only remaining Plaintiff-Intervenor among the group of large urban districts. CMS anticipates withdrawing its claims as a Plaintiff-Intervenor pending resolution of this Motion.

4. Following additional motion practice, on September 30, 2005, the Penn Intervenors filed a second amended intervening complaint, limited to the single claim the court allowed in its order—the allegation that the CMS Board, the State, and the State Board “violated their duty to provide sufficient human, fiscal and educational resources to CMS’s high poverty and low-performing high schools in order to assure that all students in those schools receive a sound basic education.” Exhibit B.
5. At the time of the second amended intervening complaint, seven of the individual Penn Intervenors were in high school, one was in middle school, and one had withdrawn from CMS and enrolled in a GED program. Exhibit B, ¶¶ 8-16.
6. On November 15, 2005, the court issued a consent order, agreed to by the Penn Intervenors and the defendants. Exhibit C. The order was entered following a submission by the State to the court of a “Proposed Framework for Charlotte Mecklenburg Schools Improvement Plan.” This State framework “describe[d] a process of information gathering and analysis concerning ten Priority Schools” in CMS, and provided that by late-November 2005 the State would complete a report on each of the identified schools, propose an action plan for needed improvements, and identify CMS resources needed to address those improvements. Exhibit C, ¶ 3.
7. In light of the State framework, the Consent order stayed the proceedings as to the CMS Board, allowing for the parties to engage in “informal information-sharing conducive to the development of a consensus concerning necessary improvements in the CMS Priority High Schools.” Exhibit C, ¶ 5. The order further provided that

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each party has the right to end the “collaborative relationship” on thirty days written notice to the other parties. *Id.*

8. Following the entry of the consent order, CMS undertook a number of significant reforms, which were reported to and discussed approvingly by the court. *See, e.g.,* Exhibit D, at 4 (March 3, 2006, letter from Judge Manning to State Superintendent Atkinson and State Board Chairman Lee, indicating that the court was “pleased” that CMS was working with the State to set substantial target scores for its Priority High Schools, and that CMS had created Ninth Grade Academics in the majority of the Priority High Schools); Exhibit E (September 28, 2006, letter from counsel for CMS to Judge Manning, providing an update on high school reform efforts in CMS); Exhibit F (December 12, 2006, letter from counsel for CMS to Judge Manning, enclosing the CMS Strategic Plan 2010).
9. Other than the referenced reports to the court in the year following entry of the consent order, there has been no action in the subsequent thirteen years regarding the claim against the CMS Board, despite significant activity during that time period in the broader litigation.
10. No party has elected to end the collaborative relationship described in the consent order.
11. At this time, fourteen years following the second amended intervening complaint, each of the individual Penn Intervenors has either graduated from CMS, or aged out and otherwise left CMS.

MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

12. The Penn Intervenors' claim should be dismissed as to the CMS Board for failure to state a claim upon which relief may be granted. *See Silver v. Halifax Cty. Bd. of Comm'rs*, 371 N.C. 855, 856, 869, 821 S.E.2d 755 (N.C. 2018) (holding that the State of North Carolina is "solely responsible for guarding and preserving the right of every child in North Carolina to receive a sound basic education pursuant to the North Carolina Constitution" and that "the duty to remedy . . . harms [caused by Leandro violations] rests with the State, and the State alone"); *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 635-36, 599 S.E.2d 365, 389-90 (2004) (rejecting the argument that the Hoke County Board of Education was partially responsible for the failure to meet the Leandro guarantee for students in Hoke County and upholding the trial court's conclusion that "the State bore ultimate responsibility for the actions and/or inactions of the local school board, and that it was the State that must act to correct those actions and/or inactions of the school board that fail to provide a *Leandro*-conforming educational opportunity to students").

MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

13. Based on the foregoing, the Penn Intervenors' claim as to the CMS Board may also be dismissed on the ground that the claim has become moot.

MOTION TO DISMISS PURSUANT TO RULE 41(b)

14. Based on the foregoing, the Penn Intervenors' claim as to the CMS Board may also be dismissed on the ground that the Penn Intervenors have failed to prosecute this claim.

MOTION TO DISMISS PURSUANT TO RULE 12(c)

15. Based on the foregoing, the Penn Intervenors' claim as to the CMS Board may also be dismissed based on the doctrine of laches.

WHEREFORE, Realigned Defendant Charlotte-Mecklenburg Board of Education respectfully requests that its Motion to Dismiss be granted by this Court.

Respectfully submitted, this the 10th day of December, 2019.

THARRINGTON SMITH, L.L.P.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion to Dismiss by depositing a copy with the United States Postal Service, first class mail, postage pre-paid, addressed as follows:

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This the 10th day of December, 2019.



THARRINGTON SMITH, L.L.P.