STATE OF NORTH CAROLINA

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

COUNTY OF WAKE

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

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

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

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

Memorandum of Law on behalf of the State of North Carolina

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

JOSHUA H. STEIN
ATTORNEY GENERAL

/s/ Amar Majmundar
Amar Majmundar
Senior Deputy Attorney General
N.C. Bar No. 24668
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Phone: (919) 716-6820
Email: amajmundar@ncdoj.gov

CERTIFICATE OF SERVICE

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

Matthew Tulchin
Tiffany Lucas
NORTH CAROLINA DEPARTMENT OF JUSTICE
114 W. Edenton Street
Raleigh, North Carolina 27603
E-mail: MTulchin@ncdoj.gov
TLucas@ncdoj.gov

Thomas J. Ziko
Legal Specialist
STATE BOARD OF EDUCATION
6302 Mail Service Center
Raleigh, North Carolina 27699-6302
E-mail: Thomas.Ziko@dpi.nc.gov

Neal Ramee
David Nolan
THARRINGTON SMITH, LLP
P.O. Box 1151
Raleigh, North Carolina 27602
Email: NRamee@tharringtonsmith.com
dnoland@tharringtonsmith.com
Counsel for Charlotte-Mecklenburg Schools

Melanie Black Dubis
Scott E. Bayzle
PARKER POE ADAMS & BERNSTEIN LLP
P.O. Box 389
Raleigh, North Carolina 27602-0389
E-mail: melaniedubis@parkerpoe.com
scottbayzle@parkerpoe.com
Counsel for Plaintiffs

H. Lawrence Armstrong
Armstrong Law, PLLC
P.O. Box 187
Enfield, NC 27823
Email: hla@hlalaw.net
Counsel for Plaintiffs

Elizabeth Haddix
David Hinojosa
Lawyers Committee for Civil Rights
Under Law
1500 K Street NW, Suite 900
Washington, DC 20005
Email: ehaddix@lawyerscommittee.org
dhinojosa@lawyerscommittee.org
Attorneys for Penn-Intervenors

This the 8th day of November, 2021.

/s/ Amar Majmundar
Amar Majmundar
Senior Deputy Attorney General