2011 WL 11028382 (N.C.Super.) (Trial Order)
Superior Court of North Carolina.
Wake County

HOKE COUNTY BOARD OF EDUCATION, et al., Plaintiffs,
and
ASHEVILLE CITY BOARD OF EDUCATION, et al., Plaintiff-Intervenors,
v.
STATE OF NORTH CAROLINA; State Board of Education, Defendants.

No. 95 CVS 1158.
September 2, 2011.

Order Re: Motion to Intervene and for Clarification or Relief from Order

Howard E. Manning, Jr., Judge.

***1** THIS MATTER is before the Court upon a Motion to Intervene and For Clarification or Relief from Order filed on Monday, August 15, 2011 by counsel on behalf of Senator Philip E. Berger, Speaker Pro Tempore of the North Carolina Senate and Representative Thom R. Tillis, Speaker of the North Carolina House of Representatives, in their official capacities.

The Motion seeks permission for the President Pro Tempore and the Speaker of the House ("Movants") to intervene in their official capacities and for the Court to "clarify" its Memorandum of Decision and Order ("MDO") of July 18, 2011, relating to Pre-Kindergarten Services for At-Rfsk Four Year Olds.

Reduced to essentials, the Motion requests that this Court enter an Order which: "(1) Permits the Movants to intervene in their official capacities; (2) Clarifying that the 20 percent cap in Section 10.7 of the Appropriations Act does not apply to financially at-risk four year olds; and (3) Clarifying that the Constitution does not require the State to implement a new program to provide Pre-K programs sufficient to provide Pre-K services to all at risk children in the State." [Motion to Intervene p. 8].

The Court has carefully considered the Motion. The Motion is self-explanatory. Since the Motion is solely directed to the Court, there will be no hearing. This matter is ripe for disposition.

Procedural Background

On May 10, 2011, the Plaintiffs' Hoke County Board of Education, et al. ("Plaintiffs") filed a Motion For Hearing on Curtailment of Pre-Kindergarten Services for At-Risk children, Elimination of EOC testing, and Defendants' (The State of North Carolina) compliance with North Carolina's Constitutional Requirements under Article I, Section 16 and Article IX, Section 2 of the North Carolina Constitution as defined by the North Carolina Supreme Court's decisions in ***Leandro I*** (346 N.C. 336) and ***Leandro II*** (358 N.C. 605).

In response to the motion, the Court entered a **Notice of Hearing and Order** on May 20, 2011, setting a hearing for June 22, 2011, which hearing, inter alia, was to include "an examination of plaintiffs' claim that pre-kindergarten

services for “at - risk” prospective enrollees are being curtailed and not adequately met under the proposed budget for the next biennium.” In the Notice of Hearing and Order, the Court also stated in pertinent part:

On this issue, ***Leandro II, Part V., 358 N.C. 640-645***, is relevant by way of background and because the Supreme Court recognized and confirmed that the State has” educational obligations for “at-risk” prospective enrollees (children not yet of age to go to kindergarten). “The evidence shows that the State recognizes the extent of the problem.....its deficiencies in affording “at-risk” prospective enrollees their guaranteed opportunity to obtain a sound basic education —- and its (the State's) obligation to address and correct it.” 358 N.C. 644.

One of the stated purposes of the hearing was to provide the parties, including the **State of North Carolina**, the opportunity to report to the Court, specifically, about Pre-Kindergarten services to “at-risk” prospective enrollees for the upcoming 2011-2012 school year.

***2** The Notice of the Hearing and Order was properly served on counsel for all parties, including the State of North Carolina, through the Attorney General, on May 20, 2011.

The 2011 Budget was adopted by the North Carolina General Assembly and enacted into law prior to the June 22,2011, hearing.

On June 22 and 23, 2011, this Court held a hearing which included an examination of the plaintiffs' claims that pre-kindergarten services for “at - risk” prospective enrollees are being curtailed and not adequately met under the proposed budget for the next biennium. The Court heard testimony and took evidence relating to this issue. The State of North Carolina presented evidence at this hearing on the issue of More at Four and Pre-Kindergarten as it was affected by the provisions of the 2011 Budget that had been enacted into law.

Thereafter, the Court took the matter under advisement and after receiving a copy of the transcript, reviewed the evidence presented at the hearing, including the pertinent portions of the budget relating to pre-kindergarten services for “at-risk” four year olds, specifically that provision of the 2011 Budget entitled **CONSOLIDATE MORE AT FOUR PROGRAM INTO DIVISION OF CHILD DEVELOPMENT**, Section 10.7(a) - 10.70), pages 92-94.

On July 18, 2011, the Court entered its ***Memorandum of Decision and Order Re: Pre-Kindergarten Services forAt-Risk Four Year Olds (“MOO”)***.

Following the entry of the MDO on July 18, 2011, the Court read in the media that members of the General Assembly, claimed that the Court's review of the foregoing budget provisions was incorrect and that the provision in the budget relating to a 20% cap on the number of at-risk four year olds served within the prekindergarten program did not mean what it said and the General Assembly did not intend the 20% cap to apply to financially “at-risk” children but to those who were at-risk for other reasons.

Here's what Section 10.7.(f) stated in pertinent part:

The prekindergarten program may continue to serve at-risk children identified through the existing “child find” methods in which at-risk children are currently served within the Division of Child Development. The Division of Child Development shall serve at-risk children regardless of income. **However, the total number of at-risk children shall constitute no more than 20% of the four year olds served within the prekindergarten programs**.

The Legislative Leadership's position as to what Section 10.7. (f) was intended to mean is clearly stated in their **Motion to Intervene**:

"Despite the **admittedly imprecise language** used in the Appropriations Act, the General Assembly intended the 20 percent **to limit only the services provided to children who are "at-risk" for reasons *other than financial hardship (e.g*** . children of certain military personnel, children with Individual Education Plans, children with chronic health conditions). Without the cap, the State could provide unlimited "slots" of Pre-K services to non-financially at-risk children at the expense of financially at-risk children. **The Movants, therefore, respectfully ask the Court to clarify its Order to permit the State to apply the 20 percent cap, consistent with the General Assembly's true intent**. "[Motion to Intervene, p. 4] (emphasis added).

***3** On August 10, 2011, Governor Perdue issued Executive Order 100 ("EO 100") which adopts rules regarding the NC Pre-K program for the Executive Branch of Government. EO 100 has apparently put the Legislative Branch at odds with the Executive Branch of Government over the administration of the NC Pre-K program and the Governor's interpretation of the State's constitutional obligations under *Leandro II*, the North Carolina Constitution and this Court's MDO of July 18, 2011. This Court has **no intention of putting itself, or the judiciary, in the middle of this political dispute**.

On August 15, 2011, the Motion to Intervene was filed. August 15 was 28 days from the date of the entry of this Court's MDO.

On August 17., 2011, the State of North Carolina filed Notice of Appeal of this Court's MDO to the North Carolina Court of Appeals.

DECISION

First, the Court is going to deny the Motion to Intervene. The State of North Carolina is the defendant in this case -- not the legislative branch -- nor the executive branch. The State of North Carolina's obligations to establish and maintain public schools is the "shared province of the executive and legislative branches." ***Leandro II***, 358 N.C. 643-645.

Second, the Movants want the Court to "clarify" its Order to "permit the State to apply the 20 percent cap, consistent with the General Assembly's true intent." [Motion to Intervene, p. 4] This Court is not authorized to enter an Order essentially revising an act of the General Assembly in the first place and secondly, the Court may not consider as evidence, statements made by members of the General Assembly, under oath or otherwise, about what the General Assembly intended a statute to mean. On this point, the law is absolutely crystal clear.

The admission of affidavits (or statements) of legislators to show the legislative purpose and intention of the legislature which passed a statute is not permitted and such evidence is not competent.

In ***D&W, Inc. v. Charlotte, 268 N.C. 577 (1966)*** , Chief Justice Sharp (then Justice Sharp) stated:

Defendant's first assignment of error challenges the admissibility of the affidavit of Mr. Frank Snepp, a member of the Legislature of 1959, to show the legislative purpose in enacting Chapter 745, Session Laws of 1959, which amended G.S. 18-78.1. **This evidence was incompetent**. More than a hundred years ago this Court held that "no evidence as to the motives of the Legislature can be heard to give operation to, or to take it from their acts...." *Drake v. Drake*, 15 N.C. 110, 117. The meaning of a statute and the intention of the legislature which passed it cannot be drawn from the testimony of a member of the legislature; it "must be drawn from the construction of the act itself." *Goins v. Indian Training School*, 169 N.C. 736, 739. ***268 N.C. 581***

See also ***Styers v. Phillips, 277 N.C. 460, at 472***, where the testimony of a former member of the General Assembly, Mr. Hamrick, was found to be incompetent and the Supreme Court again found that" The intention of the legislature cannot be shown by the testimony of a member; it must be drawn from the construction of its acts." *D & W, Inc. v. Charlotte, supra*.

This is still the law. ***Department of Corrections v. North Carolina Medical Board, 363 N.C. 189, 202, (2009)***.

Third, the Movants want the Court to "clarify" that the Constitution does not require the State to implement a new program to provide Pre-K programs sufficient to provide Pre-K services to all at risk children in the State. [Motion to Intervene, p 8]. This request is denied. The State of North Carolina's obligations to "at-risk" prospective enrollees under the North Carolina Constitution are clearly set forth in ***Leandro II*** and the State's efforts to comply with its obligations to "at-risk"' prospective enrollees utilizing Pre-K services since 2002 are part of the record in this case.

4** The Supreme Court in ***Leandro II clearly indicated that Pre-K is a proper way to address the State's obligation to "at risk" prospective enrollees so that they can be prepared to enter kindergarten with the opportunity to obtain a sound basic education as is their right under the North Carolina Constitution.

The budget provisions addressed by the MDO constituted an impermissible barrier to the ability of "at-risk" four year olds to take advantage of the opportunity to attend the Pre-K program and thereby have the opportunity to be prepared to obtain a sound basic education. Reduced to essentials, the MDO speaks for itself.

The Court remains confident that the State of North Carolina will discharge its constitutional duties to the children of North Carolina, including "at-risk" prospective enrollees, so that each child may have the equal opportunity to obtain a sound basic education as provided by ***Leandro I*** and ***Leandro II***.

Based on the foregoing, IT IS ORDERED:

1. That the Motion to Intervene is denied.

2. That the Motion to Clarify or Relief from Order is denied.

This he 2 nd day of September, 2011.

<<signature>>

Howard E. Manning, Jr.

Superior Court Judge

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