STATE OF NORTH CAROLINA

WAKE COUNTY

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.

PLAINTIFFS' REPLY

INTRODUCTION

Plaintiffs and Defendant – the State of North Carolina – agree regarding the Court's three questions and the limited scope on remand. Furthermore, ***all*** parties that submitted briefs do not dispute:

(1) that the State has failed to fully fund *every* component of Years 2 & 3 of the Comprehensive Remedial Plan (the "Plan"); (*see* ECF No. 20 at 1-2 (Plaintiffs' Response); ECF No. 12.2 (Defendant's Accounting); ECF No. 25 at 2 (Penn-Intervenors' Response); ECF No. 27.4 (Defendant-Intervenor's Response));

(2) the *amount* (calculated by the State) needed to fund components of the Plan that were *not* funded;[1] (*see* ECF No. 20 at 2 (Plaintiffs' Response); ECF No. 25 at 17 (Penn-Intervenors' Response); ECF No. 18 at 7 (State Controller's Response); ECF No. 26 at 25-27 (Defendant-Intervenor Response arguing the State should get "credit" for programs that were "over-funded"));

(3) the State's accounting of anticipated unappropriated, unreserved funds at the end of Fiscal Year 2021-22; (*see* ECF No. 20 at 9 (Plaintiffs' Response); ECF No.

[1] Plaintiffs were able to determine only one exception from Intervenor-Defendants' filing. Intervenor-Defendants argue that the State's accounting should have included federal COVID-relief program funds. (*See* ECF No. 27 at 27 (citing $5.8 billion in COVID-relief funding).) After considering COVID-relief funds when implementing Year One of the Plan, the trial court determined CARES Act funds "are not intended to address the historical and unmet needs of children who are being denied the opportunity for a sound basic education," but to address the manner in which the pandemic "exacerbated many of the inequities and challenges that are the focus on this case…." (ECF No. 20.3 at 4 (June 2021 Order).) Thus, it is inappropriate to include any sums previously received from COVID-19 relief funds (which are also non-recurring) when determining how the 2021 Appropriations Act has funded the Plan for Years 2 & 3.

25 at 15-16 (Penn-Intervenors' Response); ECF No. 19 at 7 ¶ 8(b)(iv) (Controller's Response) (ECF No. 27 at 12-13 ¶ 40-44 (Defendant-Intervenor's Response)); and

(4) the State's cash balance as of 25 March 2022 was $4.79 billion; (*see* ECF No. 20 at 3 (Plaintiffs' Response); ECF NO.25 at 15 (Penn-Intervenors' Response); ECF No. 19 at 7 ¶ 8(b)(iii) (Penn-Intervenors' Response providing as of 31 March 2022); ECF No. 27 at 12-13 ¶ 44 (Defendant-Intervenor's Response)).

Intervenor-Defendants raise arguments questioning the trial court's authority to have entered the 10 November 2021 (the "Nov. 10 Order"), which are not at issue in this remand. First, there is no dispute that *every* component of the Plan is necessary, including the time frame to implement, and the dollar amount needed to fund, the Plan. Second, the main arguments raised regarding the State's accounting – whether funds are *available for transfer* – are legal arguments not at issue on remand. Third, arguments concerning the trial court's authority to issue the Nov. 10 Order were considered at that time, and those issues remain pending before the Supreme Court.

In raising these arguments, the Intervenor-Defendants are attempting to circumvent twenty-seven years of the law of this case and relitigate issues pending before the Supreme Court.

1. *Intervenor-Defendants cannot dispute the necessity of the Plan or any component, or that any alternative remedy exists.*

The law of this case is that the State must implement *every* component of the Plan to remedy the State's constitutional violation.

Intervenor-Defendants argue that, with the 2021 Appropriations Act (the "Act"), the Court must hear (and Plaintiffs bear the burden of proving) evidence that the budget is insufficient to provide children with a sound basic education and that the Plan remains necessary. (ECF No. 26 at 20.) Plaintiffs have already done so, and those orders were never appealed.

First, there is no question that the State has violated—and continues to violate—the Constitution by denying a fundamental right to at-risk children across North Carolina. *See Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 638, 599 S.E.2d 365, 390-91 (2004) (*Leandro II*). After eleven years and more than twenty (20) evidentiary hearings, the trial court concluded 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* ECF No. 20.3 at 3 (citing 17 March 2015 Order).) Intervenor-Defendants did not intervene, and did not appeal, that order.

The trial court examined the record again in 2018 and found that "the evidence before this court…is wholly inadequate to demonstrate…substantial compliance with the constitutional mandate of *Leandro*". (*Id.* (citing 13 March 2018 Order).)[2] Intervenor-Defendants did not intervene, and did not appeal that order.

[2] Judge Howard Manning rejected Senator Berger's prior attempt to intervene in this case in 2011. *See Hoke County Board of Education v. North Carolina*, No. 95 CVS 1158, 2011 WL 11028382, at *3 (N.C. Super. Sep. 02, 2011) (the State of North Carolina is the defendant in this case –not the legislative branch—nor the executive branch.") Defendant-Intervenors, therefore, purport to intervene now pursuant to N.C.G.S. § 1-72.2, effective in 2017. At no point during this Court's lengthy process that led to the 10 Nov. Order did Defendant-Intervenors attempt to intervene to make the arguments they make now.

The Court—not "a political effort to secure funding for [] preferred policies outside the legislative process" (*see* ECF No. 26 at 24)—then began the process of identifying an independent, third-party consultant to assess the status of *Leandro* compliance and make comprehensive recommendations for specific actions necessary to achieve compliance. (*Id.*)

The Court appointed WestEd as the independent, third-party consultant, and all Parties agreed to WestEd's qualifications. (*Id.* (citing January 2020 Order).) Intervenor-Defendants did not intervene, and did not appeal that order.

WestEd submitted its findings and recommendations—an "unprecedented body of independent research and analysis"—to the Court in December 2019, along with thirteen (13) underlying studies. (*Id.*)

Based on the WestEd report, the Court ordered the State Defendants to create and fully implement a system of education and educational reforms that would meet the *Leandro* requirements of providing the opportunity for a sound basic education to all North Carolina's children. (*Id.*) Intervenor-Defendants did not intervene, and did not appeal that order.

The State —acting in this case through its legislative and executive branches, *see Leandro* II, 358 N.C. at 638, 599 S.E.2d at 390-91—submitted to the trial court a comprehensive remedial plan to remedy those ongoing violations. (*See* ECF No. 20.2 (the Plan with appendix).) On 11 June 2021, the trial court ordered the State to implement the Plan. (*See* ECF No. 20.3 at 7.) Intervenor-Defendants did not intervene, and did not appeal, that order.

The Court found that "the actions, programs, policies, and resources propounded by and agreed to [by] State Defendants, and described in the Remedial Plan [CRP], are necessary to remedy continuing constitutional violations". (*See id*.) No party appealed that order. It is the law of the case.

Finally, it is the power of the court, not the General Assembly, to determine whether there has been a constitutional violation and whether the remedy provided is appropriate. *See Leandro II*, 358 N.C. at 620, 599 S.E.2d at 379. Moreover, it is the State's burden to prove *Leandro* compliance, not the Plaintiffs' burden to show the violation continues. (*See* **Exhibit 1** (17 March 2015 Order rejecting the State's attempt to change the metrics defined by the court for determining *Leandro* compliance).)

2. No party disputes the State's accounting of unreserved, unappropriated funds anticipated at the end of FY 2021-2022 or the State's estimation of cash on hand as of 25 March 2022.

There can be no dispute that the money held by the State is vastly greater than the money needed to comply with the Nov. 10 Order.

All parties agree with the State's accounting of unreserved, unappropriated funds anticipated at the end of FY 2021-2022. Although they raise several issues about the legal availability of those funds, Intervenor-Defendants' evidence agrees with the State's accounting. Specifically, the Affidavit of Mark Trogdon (the "Trogdon Affidavit") "concur[s] that the fiscal amounts cited in Sections 8 and 9 of Exhibit A [net unappropriated and unreserved funds anticipated at the end of FY 2022 and FY 2023, and net unreserved cash balance available as of March 25, 2022] are factual."

(ECF No. 27 at 12 ¶ 40.) The Trogdon Affidavit also "concur[s] in the amounts noted in Ms. Walker's affidavit" of unappropriated funds in the Savings Reserve at the end of FY 2022-23, anticipated to be $4.25 billion. (*Id.* at 13 ¶ 42 (citing Walker Aff. ii 8).) The Trogdon Affidavit also does not dispute that, as of 25 March 2022, the net unreserved cash balance was $4.79 billion. (ECF No. 27 at 14 ¶ 46.)[3]

Instead, Intervenor-Defendants argue the money – the amount of which is not disputed – is not *available*. Specifically, the Trogdon Affidavit asserts there is no money to comply with the Nov. 10 Order – not because the State's accounting is incorrect – but because the trial court does not have the authority to order any funds be used for such purposes. (*See* ECF No. 27 at 12 ¶ 40.) ("I concur that the fiscal amounts cited…are factual. However, due to subsequently enacted legislation, the numbers cited…would not currently be accurate for determining the amount of funds available for future appropriations). In essence, Intervenor-Defendants argue that the State's accounting is incorrect *not* because the amounts cited are incorrect but because "[t]he amount of money held in reserve…is not available for transfer ***without an act of the General Assembly***." (ECF No. 27 at 13 ¶¶ 42 (emphasis added).)

This is a legal argument based on the holding in *Richmond County Board of Education v. Cowell*, 254 N.C. App. 422 (2017). That argument concerns the trial court's authority to order that money be transferred from unappropriated, unreserved funds based on a constitutional appropriation and not an appropriation by the

[3] The only variation between the evidence presented to the Court regarding the amount of unreserved, unappropriated cash concerns the amount that will remain at the end of the fiscal year 2022-2023. (*See* ECF No. 19 ¶ 8(v) ($3.6 Million); ECF No. 27 ¶ 39 ($104,638); ECF No.12.3 at 3 ($22 Million).)

General Assembly. Those are the exact arguments pending before the Supreme Court, not evidence about the ***amount*** of unreserved, unappropriated money held by the State. Moreover, this Court should disregard such arguments because "[s]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect." *In re Goddard & Peterson, PLLC*, 248 N.C. App. 190, 201, 789 S.E.2d 835, 844 (2016).

Thus, no party disputes the State's accounting that there will be approximately $2.38 billion unappropriated and unreserved in Fiscal Year 2021-2022, and $1.134 billion reserved in both Fiscal Year 2021-2022 and in Fiscal Year 2022-2023, bringing the total unappropriated funds in the Savings Reserve to $4.25 billion. (*See* ECF No. 12 ¶ 8.)

3. *All arguments concerning the authority to issue the Nov. 10 Order were the same as those considered at the time of the Order and, thus, are before our Supreme Court.*

Intervenor-Defendants are attempting to relitigate arguments concerning the Court's power to enter the Nov. 10 Order. That is not what the Supreme Court tasked this Court to do on remand. Specifically, Intervenor-Defendants' argue that the trial court had no authority to transfer the funds because the Court of Appeals held in *Richmond* that an appropriation can only be made by the General Assembly. Intervenor-Defendants also argue that the Act created a change in assumptions upon which the trial court made its Nov. 10 Order.

The trial court heard and considered arguments about its authority, including the impact of *Richmond*, before it entered the Nov. 10 Order, and those are the issues on appeal pending before the Supreme Court. Before issuing its order, the trial court

considered that it "appear[ed] that the General Assembly believes the Appropriations Clause, N.C. Const. art. Section 7, prevents ***any*** court-ordered remedy to obtain the minimum amount of State funds necessary to ensure the constitutionally-required opportunity to obtain a sound basic education." (Nov. 10 Order ¶ 12.) The trial court also considered the holding in *Richmond*, (*Id.* at 14 ¶ 13.) and determined that *Richmond* did not prevent the court from issuing its order because, unlike in *Richmond*, "Article 1 Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds," that may "therefore be deemed an appropriation 'made by law.'" (*Id.* at 12 ¶ 3.)

Thus, the Intervenor-Defendants' arguments that the trial court had no authority to order a transfer of funds is an argument that the trial court was incorrect when it applied and distinguished *Richmond*. It is not this Court's role to relitigate, review, or vacate that issue. That issue is pending before the Supreme Court.

Moreover, because sufficient money remains to fund the Plan, the Act did not change any factual or legal circumstance that would require this Court to review any other findings or conclusions in the Nov. 10 Order.

Defendant-Intervenors argue the Nov. 10 Order was passed based on the assumption that judicial action was necessary because ***no*** budget had been passed. (*See* ECF No. 26 at 9.) That is incorrect. The order was based on State's representations that a budget would not fund the plan in full. (*See* ECF No. 20.5 at 1.) If Defendant-Intervenors disagreed with these representations, they should have sought to intervene then.

Intervenor-Defendants also argue that once the Act was passed, the General Assembly had fulfilled its constitutional duty and the court no longer needed to invoke its inherent power to remedy the General Assembly's inaction. (*See* ECF No. 26 at 10.) That is also incorrect. The Nov. 10 Order was issued to remedy the General Assembly's anticipated failure to fund the Plan, Years 2 & 3, in full. (*See* ECF No. 20.5 at 1.) The fact that the Act failed to do so is undisputed.

When the trial court was considering its Nov. 10 Order, the State operated under the continuation of the 2018 budget, with certain provisions amended through legislative action. There is no difference in the impact that budget had on the Court's authority from the Act's impact. The only ***facts*** that have changed since the trial court entered the Nov. 10 Order are facts concerning the amount of the Plan that was funded through the Act. Based on the evidence and arguments presented by all parties, it appears that the facts relevant to this remand are not in dispute.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request the Court enter Plaintiffs' proposed findings of fact and conclusions of law submitted 8 April 2022 and certify those amendments to the North Carolina Supreme Court as directed.

This 11th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with BCR 7.8 and this Court's Order dated March 24, 2022 and contains fewer than 2,500 words exclusive of the caption, index, table of contents, table of authorities, signature blocks, or any required certificates. The brief was typed in 12-point Century Schoolbook font, and the undersigned relied on the word count feature of the software, Microsoft Word 365 Pro Plus.

This 11th day of April, 2022.

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CERTIFICATE OF SERVICE

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