

NORTH CAROLINA COURT OF APPEALS

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.

From Wake County

BRIEF OF PENN PLAINTIFF-INTERVENORS-APPELLEES

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BRIEF OF THE PENN PLAINTIFF-INTERVENORS-APPELLEES

ISSUES PRESENTED

- I. DID THE TRIAL COURT APPROPRIATELY EXERCISE ITS
CONSTITUTIONAL AUTHORITY IN ORDERING THE STATE TO COMPLY

WITH ITS REMEDIAL OBLIGATIONS UNDER THE CONTROLLING LAW OF THE CASE?

- II. DID THE TRIAL COURT PROPERLY EXERCISE ITS AUTHORITY TO OVERSEE AND SUPERVISE THE IMPLEMENTATION OF THE REMEDIES PROFFERED TO ADDRESS THE CONSTITUTIONAL LIABILITIES IN THE CASE?
- III. IS THE TRIAL COURT'S ORDER BASED ON CLEAR FINDINGS OF FACT AND DOES IT SHOW APPROPRIATE DEFERENCE TO THE LEGISLATIVE AND EXECUTIVE BRANCHES AND THE CONTROLLING LAW OF THE CASE?

STATEMENT OF THE CASE

In 1997, the North Carolina Supreme Court held that the North Carolina Constitution ensures every child a "right to a sound basic education," *Leandro v. State of North Carolina*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997) ("*Leandro I*") and that "the General Assembly has the duty of providing the children of every school district with access to a sound basic education." *Id.*, at 353, 488 S.E.2d at 258. The court remanded the matter for a "determination as to whether any of the state's children are being denied their right to a sound basic education." *Id.*, at 355, 488 S.E.2d at 259. Judge Howard Manning, Jr., presided over this case following remand. (R p 232)

In October 2000, the trial court held that the constitutional right included "the equal opportunity of an at-risk child to receive early childhood pre-kindergarten education" and ordered the State to address pre-kindergarten programs for at-risk children. (R S p 327)

In March 2001, the court found that there were at-risk children throughout the State who were not achieving a sound basic education, but refrained from fashioning its own remedy to allow the executive and legislative "initially at least, to use their informed judgment." (R S p 326) The State appealed from that order, but a motion for stay was denied and hearings in the superior court continued. In April 2002, the court issued an opinion incorporating its four previous decisions and held that the State had violated the constitutional right of North Carolina children to a sound basic education. The ruling also held that the State's proffered pre-kindergarten programs for at risk youth did not comport with its constitutional obligations. (R S pp 337-448)

On appeal, the North Carolina Supreme Court upheld the lower court's substantive liability ruling that the State was derelict in its constitutional duty to provide a sound basic education, and further held that "State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Hoke County Board of Education v. State of North Carolina*, 358 N.C 605, 642, 599 S.E.2d 365, 393 (2004) ("*Leandro II*"). The Supreme Court commended the trial court for its "admirable restraint [in] refusing to dictate how existing problems should be approached and resolved" by other branches. *Id.*, at 638, 599 S.E.2d at 391. However, the Court found that

the proposed remedy - mandatory pre-kindergarten for all at-risk prospective enrollees - was "inappropriate at this juncture" in part because of the lack of evidence [at that time] that pre-kindergarten was "a single or definitive means for achieving constitutional compliance." *Id.*, at 644, 599 S.E.2d at 394. The Court then provided additional guidance for analyzing any proffered remedies, and remanded the case to the trial court for its continued oversight, monitoring, and if necessary, enforcement. *Id.*, at 649, 599 S.E.2d at 397.

In 2005, a group of students in the Charlotte-Mecklenburg School system ("CMS") and the Charlotte-Mecklenburg Branch of the NAACP, with the support of the North Carolina State Conference and the National NAACP, filed a Motion to Intervene in the case alleging: (1) that CMS denied them the opportunity for a sound basic education by maintaining a student assignment system concentrating lower-income students in under-resourced high schools and (2) that the system violated Plaintiff-Intervenors' equal protection rights under the North Carolina Constitution. (R pp. 254-275) The court allowed intervention on the second claim only. (R pp 276-304) This claim is still pending.

This appeal began with Plaintiffs' request for a hearing on "the reduction of pre-kindergarten services for at-risk children" as reflected in the 2011-2012 Budget adopted by the

House of Representatives on May 4, 2011. (R. 308-18, S.L. 2011-145 ("Budget")) After a June 22, 2011 hearing, the court found that clear evidence established that the North Carolina Pre-K model was effectively addressing the needs of at-risk children. The court held that the relevant Budget sections could not be enacted if they "den[ied] any eligible at-risk four year old admission" to the program. The court specifically found that the Budget cap on the number of at-risk students would eliminate approximately 25,000 at-risk children from participating in the program. (R p 669) The State appealed on August 17, 2011. (R p 686)

STATEMENT OF THE FACTS

This appeal concerns the authority of the trial court supervising this landmark litigation to enjoin state action to displace 80% of the at-risk children currently being served in More at Four ("MAF"), a program the State enacted with judicial approval to address a fundamental problem the North Carolina Supreme Court identified in the State's educational system.

The General Assembly created MAF, the State's academic pre-kindergarten program, in 2001, and in its first year the program served 1,500 at-risk four year olds in 34 counties. (R p 480-481, 652-653) The program moved in 2005 from the Office of the Governor to the Department of Public Instruction ("DPI") Office

of School Readiness, which coordinated state and federal funding. (R 653, T pp 32-3)

In 2010, the program evolved to the Office of Early Learning ("OEL") with added goals of reforming the Pre-K to Grade 3 curriculum and educator recruitment and development. (R p 653, T p 34) Annual evaluations began in 2002 and the General Assembly reinforced these in 2009 with legislation ordering annual longitudinal studies of MAF. (R p 652)¹ The total Pre-K services offered before the 2011-2012 Budget included the MAF programs, Smart Start, Title I PreK, Exceptional Children Preschool, Even Start Family Literacy, and Head Start. Together, these served 47,000 students. (T pp 17-9) Need continues to exceed resources: out of 126,000 total four-year-olds in this state, about 68,000 are at-risk by socioeconomic status alone. (T p 21)

Since 2004, the trial court has held hearings on the State's implementation of remedies for its constitutional violations of the right to a sound basic education, including the provisions of Pre-K programs. Refraining from fashioning its own remedy, the court repeatedly asked the State for its plans for *Leandro* compliance. On October 25, 2004, the State Superintendent and Board of Education jointly submitted an

¹ N.C. Gen. Stat. 115C-12 (25b).

action plan summarizing the State's current and future commitments to serve at-risk students. That plan promised to expand the existing MAF program to "ensure every at risk four-year-old has access to a quality prekindergarten program." (R S p 478) In August 2005, the Governor and the State Board of Education submitted a plan with the same commitment, strengthening a July 2005 Executive Order allocating \$16.6 million to open 3,200 more at-risk Pre-K slots and calling for more teacher recruitment for the program. (R S pp 612-627) The State also submitted three reports in November 2010 evaluating MAF and its short and long-term impacts on student performance. (RS 815-834) The General Assembly affirmed its commitment with legislation in 2008: "the goal of the program (MAF) is to provide quality prekindergarten services to a greater number of at-risk children in order to enhance kindergarten readiness for those children." (R p 653)²

The Budget adopted by the State, which is the focus of this appeal, includes changes to the Pre-K program's structure and funding that will eliminate access to approximately 25,000 at-risk children who are currently enrolled. (R p 666)

² 2008 N.C. Sess. Laws 110, Sec. 7.24(a).

ARGUMENT

I. THE TRIAL COURT APPROPRIATELY EXERCISED ITS CONSTITUTIONAL AUTHORITY IN ORDERING THE STATE TO COMPLY WITH ITS REMEDIAL OBLIGATIONS UNDER THE CONTROLLING LAW OF THE CASE.

The State argues that the trial court's ruling breaches the separation of powers and "constitutes an unfounded intrusion" into powers that belong exclusively to the legislative and executive branches. (Appellant's Brief p 20) This argument was considered and rejected by the North Carolina Supreme Court in its previous *Leandro* decisions, and has been similarly rejected by courts considering school financing litigation in states across the country. The State should not be permitted to re-litigate this issue, particularly at this stage of the process, where liability has already been established and the question before this Court is the adequacy or effectiveness of the remedy.

In its first *Leandro* ruling, our Supreme Court stated that if the State is found to have violated the constitutional right to a sound basic education and then fails to craft an appropriate remedy, "the judicial branch has its duty under the North Carolina Constitution . . . to enter a judgment granting . . . relief as needed to correct the wrong. . . ." *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261. Seven years later, the Court clarified the critical role of the judiciary in defending the

constitutional rights of the people against transgressions by the other branches. In *Leandro II*, the Court acknowledged the primacy of the legislature and the executive in making educational policy, but also recognized that constitutional obligations cannot be ignored or avoided by those branches' reluctance or unwillingness to act. "Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied." *Leandro II*, 358 N.C. at 642, 599 S.E.2d at 393.

In North Carolina, the nature of separation of powers and the judiciary's authority to check unconstitutional actions by the other branches of government predates even Chief Justice John Marshall's seminal ruling in *Marbury v. Madison*, 5 U.S. 137 (1803). Sixteen years earlier, the North Carolina Supreme Court struck down a statute authorizing the confiscation of property owned by British loyalists. *Bayard v. Singleton*, 3 N.C. 42 (1787). Like its decision in *Leandro II*, the Court acknowledged its general deference to the policy making power of the legislature, but eloquently asserted the judiciary's constitutional authority:

Notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come into competition or authorize them to dispense with the duty they owed the public, in

consequence of the trust they were invested with under the solemnity of their oaths.

Id., at 44. Chief Justice Marshall later elaborated:

If two laws conflict with each other, the courts must decide the operation of each. . . .If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern them to which they both apply.

Marbury v. Madison, 5 U.S. at 177.

The separation of powers argument has been raised – unsuccessfully – by state legislatures facing liability in school finance litigation cases across the country. In 1998, the Supreme Court of Ohio held that state’s school financing system violated the state constitution. After also citing *Marbury*, the court noted:

In reaching this conclusion, we dismiss as unfounded any suggestion that the problems presented by this case should be left for the General Assembly to resolve. . . . The judiciary was created as part of a system of checks and balances. We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable. We refuse to undermine our role as judicial arbiters and to pass our responsibilities onto the lap of the General Assembly.

DeRolph v. State, 78 Ohio St. 3d 193, 197-98, 677 N.E.2d 733 (1997), opinion clarified, 78 Ohio St. 3d 419, 678 N.E.2d 886 (1997), order clarified, 83 Ohio St. 3d 1212, 699 N.E.2d 518 (1998).

Similarly, in *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989), the Supreme Court of Texas ruled that the school financing system violated the state constitution. In response to the argument that its involvement was encroaching on the province of the legislature, the court held:

[W]e have not been unmindful of the magnitude of the principles involved, and the respect due to the popular branch of the government.... Fortunately, however, for the people, the function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline.... [We] cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; [we] cannot pass it by because it is doubtful; with whatever doubt, with whatever difficulties a case may be attended, [we] must decide it, when it arises in judgment.

Id. at 394 (quoting *Morton v. Gordon*, Dallam 396, 397-398 (Tex.1841)).

The Arkansas Supreme Court was no less eloquent or adamant. In response to the argument that the issue of school funding adequacy was a "nonjusticiable political question," the court held:

We reject the State's argument. This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.

Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee, 364 Ark. 398, 410-11, 220 S.W.3d 645, 654 (2005), quoting *Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee*, 351 Ark. 31, 54, 91 S.W.3d 472, 484 (2005). See also *Montoy v. State*, 279 Kan. 817, 112 P.3d 923 (Kan. 2005) (court compelled legislature to provide adequate funding and adopt statutory changes to ensure equity).

These cases make clear what our own Supreme Court reaffirmed in its definitive ruling on this issue in *Leandro II*. While the separation of powers doctrine requires the judiciary to recognize that the legislative and executive branches have primary responsibility for developing and implementing education policy, that responsibility must be exercised in accordance with the state constitution. If the court finds its coordinate branches in violation of their constitutional obligations, it must give those branches the opportunity to devise and adopt an effective remedy for such violations. At that point – with liability established and a remedy put into place – it becomes incumbent on the court to monitor and oversee that remedy, and ensure that it continues to address the underlying constitutional violation. Such is the current procedural posture in this case. The court’s authority to act on the State’s constitutional failures is well-established and this

Court should not allow the State to attempt to re-litigate this issue.

II. THE TRIAL COURT PROPERLY EXERCISED ITS AUTHORITY TO OVERSEE AND SUPERVISE THE IMPLEMENTATION OF THE REMEDIES PROFFERED TO ADDRESS THE CONSTITUTIONAL LIABILITIES IN THIS CASE

In reviewing the scope of the trial court's authority in this case, this Court should be guided by the well-developed analogous precedents established in the most heavily litigated area of American education: school integration. The long line of school desegregation cases provides the model for analyzing cases like this one, in which constitutional liability has already been established and any continuing litigation centers on the implementation and effectiveness of the defendant's remedial actions.

These cases also demonstrate that when a defendant for whom liability has already been established seeks to alter its proffered remedies, 1) the defendant bears the burden of proving that the proposed changes will satisfy its remedial obligations, and 2) the court has an ongoing duty to oversee the progress towards remedying the constitutional harm and to intervene if that progress is impeded or abandoned. When viewed through this procedural prism, it becomes clear that the court below did not exceed its authority, but in fact appropriately fulfilled its historic and fundamental role in ensuring that legal and

constitutional violations are adequately and meaningfully remedied.

A. School Desegregation Cases Provide the Model for Analyzing the Judiciary's Role in Monitoring the Effective Implementation of Constitutional Remedies.

The discussion of the courts' role in remedying constitutional violations in schools begins with *Brown v. Board of Education*, 349 U.S. 294 (1955), which established the guiding remedial principles:

These cases call for the exercise of the traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory manner basis. *To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with constitutional principles. . . .* Courts. . . may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

Id., at 299-300(emphasis added).

After thirteen years of minimal progress in schools across the county, the U.S. Supreme Court affirmed and clarified the role of the lower courts to direct and monitor school officials as they fashion and implement remedies of their constitutional violations.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. . . . It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as more feasible and more promising in their effectiveness. . . . Of course, the availability . . . of other more promising courses of action may indicate a lack of good faith; and at the very least places a heavy burden on the board to explain its preference for an apparently less effective method. *Moreover, whatever plan is adopted will require evaluation in practice and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.*

Green et al. v. County School Board of New Kent County, 391 U.S. 430, 439 (1968) (emphasis added). The Court was even more explicit in the landmark case, *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). While acknowledging that the affirmative duty (and political authority) to address constitutional violations rested with the defendant school officials, judicial intervention was appropriate when those officials defaulted.

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. . . . The task is to correct, by a balancing of the

individual and collective interests, the condition that offends the Constitution.

Id., at 15-16.

Following the Court's guidance in *Green* and *Swann*, school desegregation cases tracked a procedural path that the ongoing *Leandro* case naturally and appropriately parallels. Typically, offending school authorities were given the opportunity to develop and implement remedial policies and practices, subject to the controlling court's regular monitoring and approval, and when necessary, intervention. See, e.g., *Belk v. Charlotte Mecklenburg Bd. of Ed.*, 269 F.3d 305, 315-16 (4th Cir. 2001) (summarizing court hearings on proposed school remedies in 1973, 1974, 1978, and 1980); *Bd. of Ed. v. Dowell*, 498 U.S. 237 (1991) (describing the history of court oversight of school desegregation in Oklahoma); *Vaughns v. Bd. of Ed. of Prince George's County*, 758 F.2d 983 (4th Cir. 1985) (judicial oversight and review hearings held in 1973, 1974, 1975, and 1981); *Bradley v. Baliles*, 829 F.2d 1308, 1310 (4th Cir. 1987) (the district court "approved fifteen plan modifications between 1972 and 1979.").

The specific remedies put forth by the defendants varied according to the constitutional violations, resources and demographics of the districts involved, but additional government spending was a common feature of many remedial plans.

If defendants' plans failed to address fiscal inequities or allocate needed resources to achieve integration, courts entered orders specifically requiring funding for transportation, new school construction, facility improvements and faculty and staff recruitment. *See, e.g., Milliken v. Bradley*, 433 U.S. 267 (1977) (affirming desegregation remedy requiring state defendants to fund additional educational programs); *Griffin v. County School Board*, 377 U.S. 218, 233 (1964)("[T]he District Court may . . . require the [Defendants] to . . . raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system. . ."); *Pa. Human Rels. Comm'n v. Sch. Dist.*, 681 A.2d 1366 (Pa. Commw. Ct. 1996)(requiring Commonwealth and Governor to fund remedial programs addressing racial disparities in fulfillment of state constitutional right to equal educational opportunity).

Once a remedial plan is adopted and approved, this judicial oversight structure allows for future modification to ensure that adequate progress is being made in addressing the underlying constitutional violation. In seeking to make changes to its remedial plan however, defendants bear a substantial burden. School authorities are prohibited from taking actions that would impede or otherwise delay the process of addressing the underlying constitutional violation. *Pleasant v. Stanly County Bd. of Educ.*, 690 F. Supp. 1478, 1481 (M.D.N.C. 1988).

The Fourth Circuit analyzed a school board's burden in seeking to revise its remedy in *Riddick v. Sch. Bd.*, 784 F.2d 521 (4th Cir. 1986). Reviewing the school board's changes to its previously approved student assignment plan, the court acknowledged that modifications to a successful remedial plan should be scrutinized particularly closely in a system that is still working to remedy the underlying constitutional violation, like the State under *Leandro*. While school authorities are permitted to make policy changes, they must demonstrate to the court "that the proposed changes are consistent with its continuing affirmative duty" to remedy the underlying unconstitutional conduct. *Id.* Finally, while school administrators may not be compelled to select a particular remedial scheme, courts should give greater scrutiny to a refusal to adopt a more effective available means to achieve the desired remedy. *See Green*, supra at 14.

The remedial paradigm developed in these cases respects both the school authorities' responsibility to develop and administer education policies, and the judiciary's responsibility to "assess the effectiveness" of those policies in complying with the mandates of the Constitution. *Green*, 391 U.S. at 439. Only after finding that school authorities have wholly remedied the constitutional violation is it proper for the court to withdraw its jurisdiction.

The procedural liability/remedy model developed in the school desegregation cases directly applies in this case and should inform the Court's analysis. In *Leandro I*, the North Carolina Supreme Court recognized that the children of this state enjoy a cognizable and legally enforceable constitutional right to a sound basic education, and authorized the trial court to proceed with litigation alleging violations of that right. *Leandro I*, 346 N.C. at 355, 488 S.E.2d at 254-5. The Court also provided initial guidance on the nature and standards for the lower court's consideration of evidence on such claims. *Id.* Seven years later, following a trial on the merits, the Supreme Court affirmed that the State Defendants had violated the state constitution.

. . . we affirm . . . that there has been a clear showing of a denial of the established right of . . . a sound basic education and those portions of the order that require the State to . . . correct any deficiencies that presently prevent the . . . opportunity to obtain a *Leandro*-conforming education.

Leandro II, 358 N.C. at 638, 599 S.E.2d at 391.

Having found liability for the constitutional violation, the Court went on to expressly affirm the courts' continuing remedial and equitable oversight role.

Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific

remedy and instructing the recalcitrant state actors to implement it.

Id., at 642, 599 S.E.2d at 393.

Even though the Court then struck down the trial court's particular proposed remedy, it did so based on evidentiary concerns and not on a conclusion that the court lacked the power or authority to oversee the implementation of the remedies for the constitutional violation. *Id.*, at 643, 599 S.E.2d at 394.

In the years following *Leandro II*, the trial court conducted regular, frequent hearings on Defendants' progress in addressing the failures to provide a sound basic education. (R pp 309-11, 708-11) When Plaintiffs challenged the State's ability, in light of the 2011-2012 Budget, to meet its continuing obligations under *Leandro II*, the court exercised its oversight authority to evaluate the potential impacts on the Pre-K program, a core constitutional remedy established in response to the Supreme Court's 2004 ruling. The superior court recognized that the changes, which would reduce by 80% the percentage of at-risk children served by the (revised) program, would undermine the effectiveness of the State's previous remedial plan. The court also recognized that new Pre-K proposal could not be reconciled with the State's ongoing liability or the court's constitutional duty to ensure that any changes to the remedies adequately address the original liability. (R p

665, 668) Moreover, the evidence overwhelmingly demonstrated that the proposed changes constituted an abandonment of the previously adopted and available program, which has been proven effective in achieving the required constitutional remedy. See *Riddick, supra* at 17.

The court, explicitly recognizing that primary responsibility for and authority over school administration belonged to the legislative and executive branches, concluded that the revisions were not consistent with the State's ongoing obligations. (R pp 663-68) The court properly exercised its historic and equitable oversight duty, as established in dozens of school integration cases and specifically embraced in *Leandro II*, in determining that the proposed changes to the Pre-K program cannot adequately address the State's constitutional liabilities or remedial obligations.

B. In Upholding the Decision and the Trial Court's Fundamental Role in Overseeing the Implementation of the Constitutional Remedies, the Court Should Re-Affirm the Trial Court's Equitable Power and Authority over the Remaining Aspects of This Litigation.

Judicial guidance regarding "next steps" towards achieving the required constitutional remedy constitutes a vital part of proper judicial oversight in these cases. In evaluating New Kent County school districts' so-called "freedom of choice" plan to achieve integration, Justice Brennan specifically identified six factors that lower courts should evaluate in determining

whether school authorities were effectively addressing their constitutional liability for maintaining racially segregated schools.³ *Green*, 391 U.S. at 435.

The “*Green Factors*” subsequently became the benchmark for all school desegregation cases, and provided a basic framework for lower courts to review and analyze districts’ progress in remedying their constitutional violations. Perhaps most significantly, *Green* also pointed to an end point for a court’s continued oversight, mandating that a reviewing court “should retain jurisdiction until it is clear that state-imposed segregation has been completely removed” and that the school system is converted to a “unitary, nonracial system.” *Id.*, at 439-40.

In *Leandro II*, the North Carolina Supreme Court gave similar guidance to the lower court in assessing the State’s responses to its violations of the constitutional right to a sound basic education. Specifically, the Court validated the lower court’s consideration of evidence related to educational “inputs,” including qualified faculty and administrators; and “outputs,” including test scores; and lauded the court’s restraint and respect for the expertise and authority of the other branches in making educational policy. “In our view, the

³ The six criteria included student assignment, faculty, staff, transportation, extracurricular activities, and facilities.

trial court's approach to the issue was sound and its order reflects both findings of fact that were supported by evidence and conclusions that were supported by ample and adequate findings of fact." *Leandro II*, 358 N.C. at 638, 599 S.E.2d. at 391.

A major challenge for both the parties and the trial court in the years since the ruling in *Leandro II* results from the absence of clear benchmarks or guidance from the court in measuring the effectiveness of the State's remedial measures. This appeal provides an opportunity for this Court to affirm its proper oversight role not only with regard to the pre-kindergarten issue, but also with regard to the State's ongoing liability for the other aspects of a sound basic education, unlike the Pre-K arena, very little substantive progress has been made. In affirming the decision below and the procedural model of effective judicial oversight and intervention it reflects, this Court can send a clear and powerful signal to the parties and the court below that engaged and active involvement is appropriate and necessary to at long last effectively address the State's obligation to provide all elements of a sound basic education.

The pre-kindergarten question is straightforward. The State was found liable, established an effective remedial program to address its liability, and then undermined that

remedy and its constitutional obligations with the adoption of the Budget. Upholding the trial court's ruling will acknowledge the judiciary's traditional role in protecting the rights of citizens and ensuring the effective implementation of remedies for the violation of those rights.

Similarly effective remedies have not been proposed regarding the other aspects of the State's *Leandro II* liability. In affirming the decision below, this Court should also explicitly recognize that the State has "consistently shown an inability" to remedy the other constitutional harms identified in its prior rulings. *Leandro II*, at 642, 599 S.E.2d at 393. In 2009, five years after the mandate of *Leandro II*, the trial court decried:

children are suffering from a breakdown in system leadership, school leadership and a breakdown in classroom instruction by and large from elementary school through high school. The Court cannot ignore this any longer. The State is responsible for ensuring that these schools are *Leandro* compliant. The economic cost of continuing to permit this academic disaster of a school district inflict academic genocide on 60% of its students in math and on 70% of its students in reading in grades 3-8 is an additional concern.

(R.S. 670)

This is an opportunity for the Court to further clarify the proper scope of its authority, both to require the State to preserve the remedy it created regarding Pre-K and to finally

establish meaningful remedies for the remaining aspects of its liability.

III. THE TRIAL COURT'S ORDER IS BASED ON CLEAR FINDINGS OF FACT AND SHOWS APPROPRIATE DEFERENCE TO THE LEGISLATIVE AND EXECUTIVE BRANCHES AND THE CONTROLLING LAW OF THE CASE

A. *Leandro II* Provided Evidentiary Guidelines Regarding a Pre-K Remedy for the State's Constitutional Liability.

In *Leandro II*, the North Carolina Supreme Court upheld the trial court's finding that at-risk children were likely to start and stay or fall further behind their non at-risk counterparts without remedial aid, and that the State's failure to provide adequate Pre-K resources denied these students their opportunity to obtain a sound basic education. *Leandro II*, 358 NC at 641-642, 599 S.E.2d at 392-393. However, the Court disagreed with the trial court's order requiring statewide pre-kindergarten classes for all 'at-risk' prospective enrollees. The Court found that portion of the trial court's order inappropriate, not because of its statewide scope, but because "a single or definitive means for achieving constitutional compliance has yet to surface from the depths of the evidentiary sea" and because "neither side has demonstrated that [pre-kindergarten] is the only qualifying means or even the only known qualifying means." *Leandro II*, 358 NC at 644. The Court's primary concern, in light of the evidence at the time, was that the proposed remedy was

premature. The Court then laid out clear evidentiary guidelines for when such an order would be appropriate.

The Court also highlighted a second concern with the trial court's order: because education is the "shared province" of the legislative and executive branches, a court faces limits "in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain." *Id.*, at 645, 599 S.E.2d at 395. The ruling reaffirmed the judiciary's proper role, as it had done in *Leandro I*: "we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgements and infringements of its provisions." *Id.*

B. The Trial Court Made Clear Findings of Fact on the Administrative and Substantive Effectiveness of the State's Pre-Kindergarten Program.

The trial court was tasked with determining whether the Pre-K program created and enhanced by the executive and legislature since 2001 was a "definitive," "qualifying," and "proven effective vehicle" by which the State could "address the myriad problems" faced by at-risk children. To that end, the court since 2004 held a series of hearings, and based its recent ruling on the administrative strength and impacts on short and long-term student performance of the program. The court correctly concluded that not only had Pre-K been shown to be a

clear success for at-risk children in North Carolina, but that the State's model had made it a "nationally recognized leader in providing quality pre-kindergarten educational opportunities for at-risk four year olds." (R pp 601-610, 655; T pp 33, 37, 71-74)

The court noted that since founding legislation was passed in 2001, the legislature and executive steadily expanded Pre-K until services extended statewide and the program had positive impacts through Grade 3. (R pp 652-653; T 17-18, 32-36) The court found that the State also successfully intertwined various Pre-K services to comply with legislative mandates, optimize federal, state, local, and private funding, and lengthen the services into early childhood. (R pp 655-658) In addition to maintaining its own public school pre-k offerings, the State coordinates students in private Pre-K and federally-funded Head Start classrooms. (R p 655)

The court, citing independent research studies, found that in the short-term, "the More at Four Program has beneficial effects on children's language/literacy and math skills at entry into kindergarten." (R p 654) Regarding the long-term benefits for at-risk students, there was "a significant impact of pre-kindergarten on student achievement at the third grade and a narrowing of the achievement gap," and participation resulted in higher third grade reading and math standardized test scores, equivalent to about two months of additional instruction. (R p

653, 658) Additionally, the court found that "poor children in MAF classrooms had higher third-grade math and reading EOG scores than poor children who did not attend MAF classrooms." (R p 654-55)

The court also cited evidence that the program lowered by 10% the probability of special education placement by third grade, and that the positive short and long-term effects were consistent among different categories of at-risk students. These advances, the court found, held stable for families with low and high maternal education, with larger positive results for families with low maternal education. (R p 658-659) The court also specifically cited the State's expansion of services to support the social and emotional development of at-risk children. (R p 653) The order being appealed is, in effect, a veritable summary of evidentiary findings that the *Leandro II* identified as necessary to support a statewide Pre-K remedy.

The trial court was also mindful of the *Leandro II*'s counsel of constraint in considering the separation of powers. Its order takes issue only with those provisions of the Budget which "appear intentionally designed to effectively eliminate and/or severely reduce the required at-risk pre-kindergarten services that had been provided by MAF." (R p 644) The court specifically criticizes Section 10.7(f), a "deliberate and material" change that displaces approximately 25,000 at-risk

children who are currently being served or would otherwise be eligible for services, and this is the only section barred outright in the court's Order: "The State of North Carolina shall not implement or enforce that portion of the 2011 Budget Bill. . . that limits, restricts, bars or otherwise interferes, in any manner, with the admission of all eligible at-risk four year olds that apply to the prekindergarten program." (R p 669)

While other portions of the budget come under scrutiny for the likely potential of at-risk children to be excluded from the Pre-K program, the court is circumspect, noting it is an "unsettled issue at this time" and "is presently a work in progress." (R p 667) As to both the evidentiary burden and restraint, the court's ruling comports with the Supreme Court's mandate and the controlling law of this case.

C. The Trial Court's Order Fulfills the Duty of Deference to the Roles of the Other Branches and the Remedy Initially Established by the State.

Even as it overturns a portion of the Budget, the court notes that the State retains the power to make substantial changes to its proffered remedies, as long it provides an alternate system, equal in quality and scope, to ensure all students' rights are upheld. (R p 688) The implication is that the court - as it has done over the past decade - will support the State as it works out the parameters of the Pre-K program.

The only limitation on an alternative remedy is that it be at least as effective at addressing the constitutional violations as the current remedy. To the extent that the *Leandro II* court was concerned about finding a "single," "sole," or "only" model for assisting "at-risk" prospective enrollees, the trial court correctly refrained from reading this language in a way that would tightly bind its executive and legislative partners. Instead of forcing the State to find and maintain in perpetuity a single manifestation of the remedy, which could overstep its capacity and authority, the court limits its order to requiring that the State not erect "actual and artificial" barriers on its existing capacity and that it maintain the high-quality services it already provides.

The court's order reflects nearly a decade of deference to and respect for the legislative and executive's expertise in developing education policy. *Leandro II*, having affirmed the State's liability, sent the questions of remedy back to the trial court for further proceedings, and the court properly allowed the other branches to initially identify and implement a constitutionally sound remedy.

Before undertaking its detailed factual and legal analysis, the trial court notes that the existing Pre-K program was created and maintained by the legislative and executive branches themselves, and not a creation of the judiciary. (R p 651)

Since 2001, the State has had complete and unfettered control over the parameters of this program, without judicial intervention during the program's repeated restructuring or funding changes. (R pp 652-653) Moreover, when asked for its plan for constitutional compliance after *Leandro II*, the State responded that the remedy for its violations of the constitutional rights of at-risk children "was to ensure that 'every at-risk four year old has access to a quality pre-kindergarten program,' specifically by expanding the More at Four Pre-K program." (R pp 652-653)(emphasis added)

The court has, as the *Leandro II* opinion advised, again shown great restraint, giving the legislature and executive ample time and broad authority to fashion a remedy for its constitutional violations. But at the moment the State chose to displace 80% of the at-risk children currently being served, it erected an "actual and artificial" barrier to the constitutional remedy, and thus the court properly acted to fulfill its duty to uphold the constitution and the rights of the people against encroachments by the State. The argument that the court's statewide remedial order exceeds its authority is disingenuous and contrary to the State's creation and maintenance of this statewide program and its representations to the court that this program is its plan for *Leandro* compliance. To conclude otherwise would mean that our constitutional rights are subject

to the prevailing political will of the majority currently in power.

Finally, even though the evidence in *Leandro II* was limited to Hoke County as a representative of other low-wealth counties, the Supreme Court's decision established that remedial services for at-risk preschool age children are a core component of the state constitutional right to a sound basic education. Such a right cannot, by its very nature, be limited by geographical scope. Nor would it serve the effective administration of justice to require piecemeal extension of the right through individual claims brought by potential preschool students in every county. The trial court's order to maintain pre-kindergarten services for at-risk children properly reflects the nature of the right itself, and the legislative and executive authority in initially fashioning the constitutional remedy.

CONCLUSION

The trial court's order succinctly summarized the core issue in this appeal: "This case is not about numbers and slots. This case has always been about the rights of children." This case is also about the State's continuing duty to remedy the constitutional violations that were unequivocally proven in *Leandro I*. The Pre-K remedy developed by the State has since been proven to be an effective means to ensure, for a portion of the at-risk children in North Carolina, a sound basic education.

Indeed, if *Leandro II* were decided today, we believe the Supreme Court would find overwhelming evidentiary support for the nationally acclaimed Pre-K program and uphold the State's proffered constitutional remedy for the 40,000 at-risk children the program serves. The State's decision to abandon this remedy by displacing the most vulnerable students violates the controlling law of this case from *Leandro I* and *Leandro II*. That action takes the State backwards and further away from its constitutional obligation to provide each child a sound basic education, and therefore the trial court's decision must be affirmed.

Respectfully submitted this the 25th day of April 2012.

UNC CENTER FOR CIVIL RIGHTS

Electronically Submitted

Mark Dorosin
N.C. State Bar No. 20935
dorosin@email.unc.edu
Office: 919-843-7896

Electronically Submitted

Taiyyaba A. Qureshi
N.C. State Bar No. 41537
tqureshi@email.unc.edu
Office: 919-962-0226
Fax: 919-843-8784
UNC School of Law
CB 3382
Chapel Hill, North Carolina, 27599

Counsel for Penn
Plaintiff-Intervenors-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **BRIEF OF PENN PLAINTIFF-INTERVENOR-APPELLEES** by depositing a copy with the United States Postal Service, first class mail, postage pre-paid, addressed as follows:

John F. Maddrey
Solicitor General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Counsel for Defendant-Appellants

Robert W. Spearman
Melanie Black Dubis
Scott E. Bayzle
Parker Poe Adams & Bernstein, L.L.P.
P.O. Box 389
Raleigh, NC 27602
Counsel for Plaintiff-Appellees

H. Lawrence Armstrong, Jr., Esquire
Armstrong Law, PLLC
119 Whitfield St.
P.O. Box 187
Enfield, NC 27823
Counsel for Plaintiff-Appellees

Ann L. Majestic, Esquire
Tharrington, Smith L.L.P.
209 Fayetteville Street Mall
P.O. Box 1151
Raleigh, NC 27602
Counsel for Plaintiff-Intervenors/Realigned Defendant

James G. Exum
Matthew N. Leerberg
Smith Moore Leatherwood LLP
300 North Greene St., Suite 1400
Greensboro, NC 27401
Counsel for Defendant-Appellee State Bd. of Education

Amicii Counsel:

Susan Pollitt
Post Office Box 2446
2626 Glenwood Avenue (27608)
Raleigh, North Carolina 27602
Counsel for Disability Rights North Carolina

Thomas M. Stern
400 W. Main Street, # 501
Post Office Box 2206
Durham, North Carolina (27702)
Counsel for North Carolina Association of Educators

Gregory C. Malhoit
123 Forest Road
Raleigh, North Carolina 27605
Counsel for the Rural School and Community Trust

Christine Bischoff
Carlene McNulty
N.C. Justice Center
Post Office Box 28068
Raleigh North Carolina 27611
*Counsel for North Carolina Justice and Community
Development Center*

Erwin Byrd
Lewis Pitts
Advocates for Children Services
Legal Aid of North Carolina, Inc.
Post Office Box 2101
Durham, North Carolina 27702
*Counsel for Advocates for Children's Services of Legal
Aid of North Carolina*

Allison Schafer
Scott Murray
P.O. Box 97877
Raleigh, North Carolina 27642
Counsel for North Carolina School Boards Assn.

This the 25th day of April, 2012.

Electronically Submitted
Mark Dorosin