

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)
and TIMOTHY K. MOORE, in his)
official capacity as Speaker of the)
North Carolina House of)
Representatives,)

Intervenor-Defendants.)

**MEMORANDUM OF LAW RESPONDING TO THE COURTS' REQUEST FOR
INFORMATION FROM THE OFFICE OF THE STATE CONTROLLER**

Petitioner Linda Combs, Controller of the State of North Carolina (hereinafter “Controller”), by and through undersigned counsel, files this Memorandum of Law and Affidavit in support thereof pursuant to the *Order of North Carolina Supreme Court dated 21 March 2022*, ECF No. 13, *Scheduling Order and Notice of Hearing* entered by this Court on March 24, 2022, ECF No. 5, (the “Scheduling Order”), and the *Supplemental Briefing Order* entered by this Court on March 25, 2022, ECF No. 6.

SUMMARY OF ARGUMENT

The enactment and certification of the State Budget allows the Controller to expend funds that have been appropriated for specified uses in the budget, but does not allow the Controller to use or transfer any funds that have *not* been appropriated. Consistent with the well-established law of this state, while this Court may enter a money judgment against the State of North Carolina and/or its agencies, the Court lacks the authority to command the Controller to transfer unappropriated funds to another state agency to satisfy the judgment of the Court. *See Richmond Cty. Bd of Educ. v. Cowell*, 254 N.C. App 422, 426-27 (2017). To the extent that the Current Operations Appropriations Act of 2021 (the “State Budget”), enacted November 18, 2021, appropriates funds for the various programs and initiatives called for in the Comprehensive Remedial Plan, the Controller may transfer those funds to the agencies identified in this Court’s Order of 10 November 2021, ECF No. 10.1, pp 30-50 (the “November 10th Order”) using the regular accounting process prescribed by our general statutes. However, where the relief prescribed by the November

10th Order requires the Controller to transfer unappropriated funds to the specified agencies, the Order contravenes the Separation of Powers Clause of the North Carolina Constitution and is, therefore, unenforceable.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Recent Procedural History

Twenty-five years after Plaintiffs in the *Leandro* case filed their action in 1994, the trial court concluded, *inter alia*, that the State of North Carolina had failed to satisfy its constitutional mandate of providing a sound, basic education to North Carolina students.¹ Having so concluded, on 10 November 2021, the Honorable Superior Court Judge W. David Lee entered an order in the above captioned matter (the “November 10th Order”) requiring the Controller, as well as other specified state agencies and officials, to

take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:

- (a) Department of Health and Human Services (“DHHS”): \$189,800,000.⁰⁰;
- (b) Department of Public Instruction (“DPI”): \$1,522,053,000.⁰⁰; and
- (c) University of North Carolina System: \$41,300,000.⁰⁰.

¹ For efficiency, this brief omits the extensive historical facts and procedural history and includes only the recent procedural history immediately preceding the Controller’s Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas. The relevant historical facts and procedural history are contained in the following appellate division cases; *Leandro vs State*, 122 N.C. App. 1, 468 S.E.2d 543 (1996); *aff’d in part, rev. in part, and remanded by Leandro vs State*, 346 N.C. 336, 488 S.E.2d 249 (1996) (*Leandro I*); *Hoke County Bd. of Educ v State*, 358 N.C. 605, 399 S.E.2d 355 (2004). *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 679 S.E.2d 512 (2009); *Hoke Cty. Bd. of Educ. v. State*, 222 N.C. App. 406, 731 S.E.2d 691 (2012); *Hoke Cty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013). The November 10th Order contains the recent procedural history of the case. (¶ 1 to 17)

Hoke Cty. Bd. of Educ. v. State of North Carolina, ECF No. 10.1, p 48 (95 CVS 1158, Wake Cty.). The November 10th Order further directed the Controller to “treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C.G.S. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers[,]” and further to “take all actions necessary to facilitate and authorize those expenditures[.]” *Id.* The November 10th Order contained a partial stay delaying its implementation for thirty days “to permit the other branches of government to take further action consistent with [its] findings and conclusions” *Id.* at 49.

On 24 November 2021, the Controller, who is not a named party to the underlying action and was neither served nor given an opportunity to be heard prior to the entry of the November 10th Order, filed her Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas arguing, among other things, that the November 10th Order contravenes the North Carolina Constitution, and General Statutes. *See* Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas, *In re: The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.1 (Wake County File 95CVS1158).

On 29 November 2022, the Court of Appeals entered an Order directing all parties to the underlying action who wished to file a response to the Controller’s petition to do so by 9:00 a.m. on 30 November 2021. Order Directing Response, *In re: The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511 (Wake County File 95CVS1158).

The State of North Carolina, and the Plaintiffs and Penn-Intervenors filed their respective responses to the Controller’s petition on 30 November 2021. *See* Response of Plaintiffs and Penn-Intervenors in Opposition to Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas, *In re: The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.2 (Wake County File 95CVS1158), and The State of north

Carolina's Response to the Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas, *In re: The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.3 (Wake County File 95CVS1158).

On 30 November 2022, the North Carolina Court of Appeals granted the Controller's Petition for Writ of Prohibition, *see Order Allowing Writ of Prohibition, In re: The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.4 (Wake County File 95CVS1158), and dismissed the Controller's Petitions Writ of Supersedeas and Motion for Temporary Stay as moot. *See Order Dismissing Petition for Writ of Supersedeas and Motion for Temporary Stay, In re: The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511 (Wake County File 95CVS1158).

Following the entry of the Court of Appeals order granting the Controller's Petition for Writ of Prohibition, Plaintiffs and Plaintiff-Intervenors gave notice of appeal to the North Carolina Supreme Court, and a number of petitions and motions were also filed by the parties. The State of North Carolina's Petition for Discretionary Review Prior to Determination by the Court of Appeals, filed February 14, 2022, ECF No. 9.1, and Plaintiff's Petition for Discretionary Review Prior to Determination by the Court of appeals, were allowed by Order of the Supreme Court of North Carolina entered 21 March 2022. *Hoke Cty. Bd. of Educ. v. State*, No. 425A21-2, 2022 N.C. LEXIS 311, at *2 (Mar. 18, 2022). The Court remanded the matter to this court "for the purpose of allowing [this court] to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 order." *Id.* And instructed this court "to make any necessary findings of fact and conclusions of law and to certify any amend order that it chooses to enter" within thirty days of entry of the Order granting the parties' Petitions for Discretionary Review. *Id.*

On 24 March 2022, this Court entered the Scheduling Order and Notice of Hearing requiring that the parties' briefs be filed before 5:00 p.m. on Friday, 8 April 2022. Scheduling Order and Notice of Hearing, *Hoke Cty. Bd. of Educ. v. State*, ECF No. 5, p 2 (95 CVS 1158, Wake Cty.). Subsequently, in its Supplemental Briefing Order entered 25 March 2022, this Court requested that the parties provide to the Court information and legal argument regarding the following:

- a. The amount of the funds appropriated in the 2021 Appropriations Act, 2021 N.C. Sess. Laws 180, that directly fund the various programs and initiatives called for in the Comprehensive Remedial Plan;
- b. The amount of funds remaining in the General Fund currently both in gross and net of appropriations in the 2021 Appropriations Act;
- c. The effect of the appropriations in the 2021 Appropriations Act on the ability of the Court to order the Legislature to transfer funds to the Department of Health and Human Services, Department of Public Instruction, and the University of North Carolina System. *See Richmond Cty. Board of Education v. Cowell*, 254 N.C. App. 422 (2017).

Supplemental Briefing Order, *Hoke Cty. Bd. of Educ. v. State*, ECF No. 6, p 2 (95 CVS 1158, Wake Cty.).

Current Operation Appropriations Act for 2021

The Current Operation Appropriations Act for 2021, which includes appropriations from the General Fund for fiscal years 2021-23, was ratified and signed by the Governor on 18 November 2021, S.L. 2021-180, but was not certified until 28 January 2021. *See* Controller's Aff. ¶ 8(c).² Upon certification of the budget appropriated funds were available and budget requests from the affected agencies could be submitted to the Office of State Budget Management. After that, the Office of State Budget Management submitted the data file to the Office of the State Controller so that funds could be assessed by the agencies. *See* Controller's Aff. ¶¶ 8(c) and 9, and Ex. 5-9.

² The Controller's Affidavit has not yet been filed and there is no ECF number available.

Responsibility for tracking finances at the program level is the responsibility of each agency and the Office of Statement Budget Management, therefore the Controller has no direct knowledge regarding the amount of the funds appropriated in the 2021 Appropriations Act, 2021 N.C. Sess. Laws 180, that directly fund the various programs and initiatives called for in the Comprehensive Remedial Plan. Controller's Aff. ¶ 8(a). The Affidavits, supplied by Kristen Walker, Chief Deputy Director of the State Budget for the North Carolina Office of State Budget and Management (OSBM), ECF No. 12, and Mark Trogdon, Director of the Fiscal Research Division (FRD), provide detailed reports of the amounts and percentages of the various programs and initiatives called for in the Comprehensive Remedial Plan that are funded by the 2021 Appropriations Act. *See* OSBM Aff. ¶ 6 and Ex. 3, ECF No. 12, and FRD Aff. ¶¶ 53-61.³

As of March 31, 2022, the total cash balance (gross) was \$8,920,192,187 and the unreserved cash balance (net) was \$3,845,896,284. Controller's Aff. ¶ 8(b)(iii), and Ex. 2. These amounts differ from the balances provided by the OSBM and FRD in their respective affidavits. The discrepancy in amounts provided in the Controller's Affidavit and the OSBM and FRD Affidavits is generated by a fluctuating cash balance and the fact that each of the affiants used data gathered on different dates. *See* Controller's Aff. ¶ 8(b)(v); OSBM Aff. ¶¶ 7-9; and FRD Aff. ¶¶ 44-52. Whatever the proper amount of the total cash balance gross and net in the "unreserved cash balance" is, as explained in the Controller's Affidavit ¶ 8(b), it has already been reserved for future emergency appropriation and is not available for the Controller to expend without an appropriation.⁴

³ The FRD Affidavit has not yet been filed and there is no ECF number available.

⁴ The cash reports issued by the Controller state the amount of total reserved and unreserved cash on hand at a single point in time. The Controller's office does not prognosticate on the amount of unappropriated revenue which may be received at a future time. The cash reports include the "Total Cash balance" which is the gross amount of all cash held in the General Fund, including both reserved and unreserved funds; Reserved cash balance is the portion of the cash set aside by the legislature for a specific purpose (i.e. a statutory reserve established under the State Budget Act) and is generally unavailable to finance or pay for other appropriated expenditures. The "Unreserved cash balance is the cash available to finance or pay

Office of State Controller

The Office of the State Controller was created pursuant to Section 143B-426.36 of the Executive Organization Act of 1973 and is an agency within the Executive Branch of the State of North Carolina. N.C.G.S. §§ 143B-6 and 143B-426.36.

The Office of the State Controller has three primary roles in the appropriation/budget/cash flow for the state of North Carolina, as follows:

- (1) First - OSC is the maintainer and custodian and the system of record of cash; NCGS 143B-426.37.
- (2) Second - OSC only moves money to various accounts when directed by general statute. NCGS 143C-1-1(b) and Article V, Section 7(1) of the N.C. Constitution.
- (3) Third - OSC checks funds availability at the budget code level within the North Carolina Financial System (NCFS) to ensure adequate budget prior to paying vendors. (OSC Statewide Accounting Division, Central Compliance EPay Process).

Controller Aff. ¶ 8(a)(i); *see also* N.C.G.S. § § 143B-426.38 to 426.39.

The Controller has no legal authority to transfer funds from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan, and is, in fact, expressly prohibited from doing so by the North Carolina Constitution, and our General Statutes. N.C. CONST. art. V, § 7(1); N.C.G.S. § 143C-1-1(b). Furthermore, the Controller has no ability to answer the court's questions regarding the issue of which funds in the budget fund which of the agencies benefited by the November 10th Order. The Controller has to defer to the other agencies tasked with this responsibility. The Controller's Affidavit filed in support of this Memorandum discusses in detail

for appropriated expenditures. Because the unreserved cash balance indicates the amount of cash on hand to finance or pay for appropriations, this number is not "net of appropriations" in the 2021 Appropriations Act.

the procedures used by the Controller and, to the extent the Court has questions at the hearing on this matter, the affiants will be on hand to answer any questions the Court may have.

ARGUMENT

I. THE EFFECT OF THE PASSAGE AND CERTIFICATION OF THE BUDGET DOES NOT CONFER UPON THIS COURT THE ABILITY TO ORDER THE CONTROLLER TO TRANSFER FUNDS AS SET OUT IN THE NOVEMBER 10TH ORDER.

“The separation of powers clause declares that ‘[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.’” *State ex rel. McCrory v. Berger*, 368 N.C. 633, 644 (2016) (quoting N.C. CONST. art. I, § 6). “The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch.” *Id.* at 645. “Appropriating money from the State treasury is a power vested exclusively in the legislative branch and ‘[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law.’” *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 426 (2017) (quoting N.C. Const. art. V, § 7). “Because the State constitution vests the authority to appropriate money solely in the legislative branch, the Separation of Powers Clause ‘prohibits the judiciary from taking public monies without statutory authorization.’” *Id.* at 427 (quoting N.C. Const. art. V, § 7). “Thus, when the courts enter a judgement against the State, and no funds already are available to satisfy that judgment, the judicial branch has no power to order State officials to draw money from the State treasure to satisfy it.” *Id.* at 427.

In its Supplemental Briefing Order entered 25 March 2022, this Court requested that the parties provide to the Court information and legal argument regarding “[t]he effect of the appropriations in the 2021 Appropriations Act on the ability of the Court to order the Legislature to transfer funds to the Department of Health and Human Services, Department of

Public Instruction, and the University of North Carolina System” in light of the Court of Appeals’ decision in *Richmond Cty. Board of Education v. Cowell*, 254 N.C. App. 422 (2017). Supplemental Briefing Order, *Hoke Cty. Bd. of Educ. v. State*, ECF No. 6, p 2 (95 CVS 1158, Wake Cty.). In *Cowell*, the State Treasurer, State Controller, and other state officials appealed after the trial court issued a Writ of Mandamus requiring that they pay unappropriated funds from the state treasury to satisfy a judgment against the state. *Id.* at 423.

In that case, the Richmond County Board of Education obtained a judgment for \$272,300.00 based upon its claim that a statute requiring that fees collected from defendants convicted of improper equipment offenses be remitted to the Statewide Misdemeanant Confinement fund was unconstitutional. *Id.* at 424. The trial court’s order required that the funds collected by the State be “‘paid back to the clerk’s office in Richmond County’ to then be paid to the school system as the State constitution requires.” *Id.* at 423-24. On appeal, the Court of Appeals affirmed the judgment, holding that “the remittance of the \$50.00 surcharges collected in Richmond County to the State Confinement Fund [was] unconstitutional” and that the return of the funds to Richmond County was appropriate. *Id.* at 425. Despite the Court of Appeals’ affirmance of the trial court’s order, the State did not pay back to Richmond County the statutory fees because the money had been spent. *Id.* at 425.

Following the State’s failure to “pay back” the fees, the school board moved the court to enter a show cause order against the officials. *Id.* The court declined to do so and dismissed the school board’s motion without prejudice, noting that the State could appropriate the funds necessary to pay the judgment in the coming legislative session. *Id.* When the General Assembly did not appropriate the needed funds, the trial court issued a writ of mandamus ordering the State Controller and other officials to effectuate a transfer of funds from the State treasury. *Id.*

The state officials appealed. Noting that “in many ways the judicial branch poses the greatest risk to the [Separation of Powers] doctrine[,]” *Id.* at 426, and that “our Supreme Court repeatedly has acknowledged that “[e]ven in the name of its inherent power, the judiciary may not arrogate duty reserved by the constitution exclusively to another body[,]” *Id.* (first alteration in original), the Court of Appeals reversed the writ of mandamus. *Id.* at 429.

In this case, as was the case in *Cowell*, the trial court’s November 10th Order would enforce a judgment against the state by requiring state officials to pay funds that have not been appropriated by the General Assembly. It is well-established that the judiciary lacks the authority to order the General Assembly to appropriate funds, as that power is vested exclusively in the legislative branch. Likewise, this court cannot require the Controller to transfer funds that have not been appropriated by the legislature.

Consistent with the Court of Appeals’ decision in *Cowell*, the appropriations in the 2021 Appropriations Act in no way alter or enhance the ability of the Court to order the Controller to transfer funds to the Department of Health and Human Services, Department of Public Instruction, and the University of North Carolina System. While *Cowell* suggests that a trial court *may* require the state to pay or repay funds that *have* been appropriated for a specific use, it also makes clear that a trial court may not enforce a judgment against the state by requiring state officials to pay funds that have not been appropriated by the General Assembly. *Id.* at 423-24. This is true, even where, as in *Cowell*, funds that had been appropriated for a specific purpose were expended before they could be repaid. *Id.* at 423-25. Pursuant to *Cowell*, a trial court could order a state official to transfer *appropriated* funds in satisfaction of judgement, but such measures are not necessary in this case. With the passage and certification of the budget, the Controller may transfer funds to the state agencies specified in the November 10th Order

consistent with the prescribed processes and procedures set out in her affidavit and the attachments thereto. The Controller’s objection to the trial court’s November 10th Order is not that it requires her to transfer *appropriated* funds to the specified agencies, but that it requires her to transfer funds that have not been appropriated—an act that is expressly prohibited by the North Carolina Constitution and our General Statutes. N.C. Const. art. V, § 7(1); N.C.G.S. § 143C-1-1(b).

II. UNTIL THE SUPREME COURT RULES OTHERWISE, THE ORDER OF THE COURT OF APPEALS IN GRANTING THE WRIT OF PROHIBITION, ALONG WITH *RICHMOND CTY. BOARD OF EDUC. V. COWELL*, 254 N.C. APP. 422 (2017), AND *COOPER V. BERGER*, 376 N.C. 22 (2020) REMAIN THE LAW OF THE CASE.

As explained in the Petition for Writ of Prohibition, the November 10th Order placed the Controller in an untenable position in which she would have had to choose between conflicting directives in the Court’s Order and the statute enacted by the General Assembly implementing the 2021 Appropriations Act. In its Order Granting the Controller’s Writ of Prohibition, the Court of Appeals noted that, “while our judicial branch has the authority to enter a money judgment against the State or another branch, it has no authority to order the appropriation of monies to satisfy any execution of that judgment.” Order Granting Writ of Prohibition, *In re: The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.4, p 2 (Wake County File 95CVS1158) (citing *State v. Smith*, 289 N.C. 303, 321 (1976)). Indeed, it is well established that “ ‘[a]ppropriating money from the State treasury is a power vested exclusively in the legislative branch’ and that the judicial branch lack[s] the authority to ‘order State officials to draw money from the State treasury.’” Order Granting Writ of Prohibition, *In re: The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.4, p 1 (Wake County File 95CVS1158) (quoting *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 426 (2017)). The Court of Appeals makes clear that *Cowell* remains

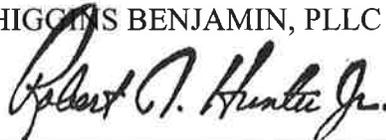
the prevailing law, and is the law of this case, noting further “[o]ur Supreme Court quoted and relied on this language from our holding in *Cooper v. Berger*, 376, NC. 22, 47, 852 S.E.2d 46, 64 (2020). *Id.*

CONCLUSION

As is made clear by our case law “the role of the courts in this constitutional dispute is over.” *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 429 (2017). This court has concluded that the State has failed in its constitutional obligation to provide for the education of the children of this state and has mandated the establishment of a remedial plan intended to remedy the shortcoming. This court is without the authority to require the Controller to transfer unappropriated funds as set out in the November 10th Order. Further, with the passage and certification of the budget, the Controller is now able to transfer appropriated funds to the designated agencies without the need for an order from this court. Consistent with the law, and the facts of this case, this court should certify to the North Carolina Supreme Court an amended order removing its mandate that the Controller transfer unappropriated funds in violation of state law.

Respectfully submitted this 8th day of April, 2022.

HIGGINS BENJAMIN, PLLC



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CERTIFICATE OF SERVICE

The undersigned certifies that on April 8, 2022, a copy of the foregoing was served electronically and will be served upon the following in compliance with BCR 3.9:

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This 8th day of April, 2022.



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Attorney for Linda Combs