

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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.

[proposed]
ORDER

THIS MATTER IS BEFORE THE COURT upon remand from the Supreme Court of North Carolina. This Court has been instructed 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.”¹ (ECF No. 1.) The Supreme Court further instructed this Court to make any necessary findings of fact and conclusions of law and enter an amended order. This Order, therefore, **AMENDS AND SUPERSEDES** the previous Order dated 10 November 2021, from this Court.

I. PROCEDURAL HISTORY

This case has a long history. For now, the Court focuses only on the relevant background and the procedural history that led to this Order.

On 10 November 2021, the Honorable W. David Lee ordered what the Court referred to as a “constitutional appropriation” of moneys from the “unappropriated balance within the General Fund” as a remedy for previous findings that certain students in the state were receiving less than a sound basic education. *Hoke County v. North Carolina*, No. 95-CVS-1158 (Wake Co. 10 Nov. 2021) (“10 November Order”).

These sums were intended to finance a Comprehensive Remedial Plan meant to remedy the constitutional violation. *Id.* By its own terms, that Order was stayed thirty (30) days “to permit the other branches of government to take further action consistent with the findings and conclusions of this Order.” (*Id.* at 20.)

During the stay, on 18 November 2021, the General Assembly passed, and the Governor signed, the Current Operations and Appropriations Act of 2021, 2021 N.C. Sess. L. 180 (the

¹ The parties agree that the order issued by the Honorable W. David Lee which is the subject of this matter on remand was dated 10 November 2021.

“Budget Act”), which is subject to two Technical Corrections bills, 2021 N.C. Sess. L. 189 and 2022 N.C. Sess. L. 6.

In light of the passage of the Budget Act, on 30 November 2021, the Court issued, *sua sponte*, a “Notice of Hearing and Order Continuing Stay of Court’s November 10, 2021 Order,” setting a status conference for the Court to “determine what, if any, modifications may be required to its November 10 Order in light of the Appropriations Act and/or other matters properly before the Court.” (30 November 2021 Order at 2.) The Court also extended the stay set by the 10 November Order so the Order did not become effective.

However, also on 30 November 2021, and prior to the status conference being held, a Writ of Prohibition was secured by Controller of North Carolina, then a non-party. (ECF No. 10.4.) After that, both the State of North Carolina (through the Department of Justice) and Legislative-Intervenors Phillip E. Berger, President Pro Tempore of the North Carolina Senate, and Timothy Moore, Speaker of the North Carolina House of Representatives, together on behalf of the North Carolina General Assembly, appealed the 10 November Order.

On 14 February 2022, the Department of Justice filed a Petition for Discretionary Review in the Supreme Court seeking to bypass the Court of Appeals. *Hoke County v. North Carolina*, No. 425A21-2 (14 February 2022) (“Bypass Petition”). The Supreme Court granted the Bypass Petition, but simultaneously remanded the case to this Court. *Hoke County v. North Carolina*, No. 425A21-2 (N.C. 21 March, 2022) (“Remand Order”).

In the Remand Order, the Supreme Court instructed this Court to consider “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 the 10 November Order. (ECF No. 1.)

The Court received briefs from all parties in this matter, including newly-intervened parties. On 13 April 2022, the Court also held a hearing and is satisfied it has fully heard all the issues presented. Based on the arguments presented by counsel in briefing and at oral argument, as well as review of the relevant facts and case law, the Court hereby makes the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. The 10 November Order was issued in the absence of a duly enacted budget. (10 November Order at 11.)

2. While the 10 November Order was stayed, the General Assembly, with the Governor's signature, passed the Budget Act. Therefore, the circumstances giving rise to the 10 November Order changed while its enforcement was suspended by the Court.

3. The moneys in the General Fund are used to support the State's general, day-to-day operating expenses. The General Fund includes all cash inflows and outflows that are not otherwise associated with a special purpose fund. *See* N.C. Gen. Stat. § 143C-1-3(3)(a).

4. The General Fund includes both appropriated and unappropriated moneys. Moneys are "appropriated" when the General Assembly enacts a law authorizing a withdrawal of money from the State Treasury. Moneys that have been appropriated or transferred to a reserve are referred to as "reserved" funds. Moneys that have not been appropriated or reserved are referred to as the "unappropriated balance remaining" on the availability statement and remain available for future appropriation.

5. The Budget Act establishes several reserves, including the Savings Reserve, N.C. Gen. Stat. § 143C-4-2; the State Capital and Infrastructure Fund, N.C. Gen. Stat. § 143C-4-3.1;

the Contingency and Emergency Fund, N.C. Gen. Stat. § 143C-4-4; and the Pay Plan Reserve, N.C. Gen. Stat. § 143C-4-9, among others.

6. Pursuant to the Budget Act, moneys that the General Assembly appropriates into a reserve “may be expended only for the purpose or purposes for which the reserve was established.” See N.C. Gen. Stat. § 143C-4-8 (use of funds appropriated to a reserve).

7. In fashioning the 10 November Order, the Court relied upon the Department of Justice’s representation that the State’s reserve balance as of August 2021 included \$8 billion. (10 November Order at 9.) The Department of Justice’s representation to this effect was based upon the cash balance for the State at the time.

8. The daily cash balance varies day-to-day and fluctuates dramatically over the course of any given fiscal year. (Affidavit of Mark Trogdon (“Trogdon Aff.”), ¶ 45.) Additionally, and importantly, the daily cash balance shows only the money that has *been allocated to the State’s statutory reserves*, and thus is not the appropriate vehicle for determining how much unreserved, unappropriated General Fund revenue remains available to pay current expenses. (Trogdon Aff., ¶¶ 44-47 & Ex. B.)

9. The Department of Justice also represented that the State was projected to have “more than \$5 billion in forecasts revenues.” (10 November Order at 9). However, that representation ignores that those moneys were already included in the revenue that was to be appropriated, and eventually was appropriated, under the Budget Act. (Trogdon Aff. Ex.B).

10. While the current Budget Act reserves \$1.134 billion to the State’s Savings Reserve, which would bring the total of unappropriated funds in the Savings Reserve to \$4.25 billion (Affidavit of Kristin L. Walker (“Walker Aff.”), ¶ 8). This \$4.25 billion of unappropriated funds will exist in the Savings Reserve *at the end of FY 2022-23*, and only absent legislative action,

which cannot be predicted at this time. (Trogon Aff., ¶ 42.) Therefore, this number cannot dependably be relied upon in determining whether sufficient unappropriated, unreserved General Fund revenues exist sufficient to fund the Comprehensive Remedial Plan for FY 2021-22 and FY 2022-23.

11. The Budget Act anticipates a net of \$2.38 billion unappropriated and unreserved funds at the end of FY 2021-22. (Walker Aff. ¶ 8). However, the Budget Act also anticipates that the fund balance left at the end of FY 2021-22 will remain available to fund appropriations in FY 2022-23 fiscal year.

12. The biennial budget uses the unappropriated fund balance remaining at the end of FY 2021-22 to support appropriations in FY 2022-23 and serves as the starting point to fund appropriations for that year.

13. The State is currently projected to have an unappropriated, unreserved general fund balance of only \$104,638, at the end of FY 2022-23.

14. Consequently, there is no longer available unreserved General Fund moneys to make the transfer anticipated by the Court's 10 November Order.

15. Since the COVID-19 pandemic began, North Carolina school districts have been provided more than \$5.8 billion in additional federal and State funding. *See COVID Funds, North Carolina Department of Public Instruction, Financial and Business Services*, available at <https://tinyurl.com/35tb83ns> (last visited April 8, 2022). Yet, across the State, sixty-four percent (64%) of the COVID relief funds allocated to local school districts still remain unspent. Hoke County Public Schools alone has received more than \$37.5 million in additional funding, with 57% (approximately \$21.7 million) still unspent as of January 31, 2022. *Id.*

16. With respect to determining which Comprehensive Remedial Plan action items are currently funded, in whole or part, by the enacted budget, the parties submitted competing numbers. After a thorough review, the Court finds that the conclusions of the General Assembly's nonpartisan fiscal staff within the Fiscal Research Division are the most accurate and adopts Exhibit D to Mr. Trogdon's Affidavit as the most accurate and complete representation of the Comprehensive Remedial Plan action items funded by the enacted budget.

17. The enacted budget currently funds approximately \$1.17 billion of the action items proffered by the Comprehensive Remedial Plan. This includes the appropriation of moneys derived from federal funds and grants, such as the Elementary and Secondary School Emergency Relief (ESSER) III Fund under the federal American Rescue Plan Act of 2021 ("ARPA"), Public Law 117-2, 50 Stat. 664 (March 11, 2021), as well as the ARPA Child Care and Development Block Grant, which should be included for the purpose of evaluating which action items are funded and which are not.

18. In addition to the Fiscal Research Division's calculations, (Trogdon Aff. at Ex. D), the enacted budget includes the following sums which also satisfy action items in the Comprehensive Remedial Plan:

- a. \$2.5 million in nonrecurring funds for computer science in FY 2021-22 for several purposes, including for providing training to K-12 teachers, as well as \$1,411,256 that were appropriated in FY 2021-22 to the North Carolina Center for the Advancement of Teaching. These amounts fund the professional development requirement of action item III.C.iii.1 in excess.

- b. \$305,000 that the enacted budget appropriated in FY 2021-22 and FY 2022-23 for salary increases for teachers at the three residential schools for students who are deaf or blind. This amount funds a portion of CRP action item III.E.ii.2.
- c. \$139,748,398 in recurring funds appropriated by 2018 N.C. Sess. L. 2, § 5(d), which remains as part of the base budget. This amount funds action item III.C.ii.1 in excess.

19. Additionally, the General Assembly has appropriated to measures that were not included in the Comprehensive Remedial Plan. (Trodden Aff. ¶¶ 51-54.) The Court notes that these education-related appropriations are significant in terms of dollar value even though they are outside the ambit of the Comprehensive Remedial Plan.

20. As of the date of this Order, no party has presented evidence showing that the appropriations in the Budget Act are somehow insufficient to comply with the State's obligation to provide a sound basic education.

III. CONCLUSIONS OF LAW

1. The State of North Carolina is constitutionally obligated to provide its citizens the opportunity for a sound basic education. The Supreme Court has defined a sound basic education as

one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.”

Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (“*Leandro I*”).

2. In the 10 November Order, the Court posited that judicial action was necessary to appropriate funds for education because “as of the date of [that] Order, no budget ha[d] passed.” (10 November Order at 11.) Indeed, the Court made clear that legislative inaction was a prerequisite to what it believed was its authority to inherent power to order funding for constitutionally mandated institutions:

‘When inaction by those exercising authority threatens fiscally to undermine’ the constitutional right to a sound basic education ‘a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice.’

(November Order at 13.)²

3. However, as the court also observed in the 10 November Order, when the legislature fulfills its constitutional duty by passing a budget through the statutory budget process, “there is no need for judicial intervention to effectuate the constitutional right.” (*Id.* at 16.) Thus, as the Court’s 10 November Order emphasized, this Court no longer has the legal authority to act where the legislative branch has passed a budget.

² For this holding, the Court cited *Alamance County*. Some clarification regarding that case is necessary, however, to avoid presenting a misleading notion. In *Alamance County*, the Supreme Court noted courts have inherent authority to do what is reasonably necessary in the face of “inaction by those exercising legislative authority,” *Alamance County*, 329 N.C. at 99. In that case, however, the legislature’s inaction threatened the operation of another co-equal branch of state government, thereby implicating separation of powers principles. Specifically, separation of powers requires that the judiciary be adequately funded and failure by the legislature to act “fiscally undermine[s] the integrity of the judiciary.” In other words, the legislature cannot fail to act and deprive the judiciary of the funds it needs to operate. The issue and analysis is different where the integrity of the judiciary is not at issue. Here, public education is at issue. Education is explicitly within the Constitutional purview of the General Assembly. N.C. Const. Art. IX(2)(i) (“The *General Assembly* shall provide by taxation and otherwise for a general and uniform system of free public schools”) (emphasis added); *Leandro v. North Carolina*, 346 N.C. 336, 353 (1997) (“*Leandro I*”) (“[W]e conclude that the General Assembly . . . has the duty of providing the children of every school district with access to a sound basic education.”). This distinction, however, is not relevant to this Order because the legislature has now acted.

4. The Court’s November Order thus sought to remedy a circumstance—*i.e.*, the absence of a budget and alleged “inaction” by the General Assembly—that no longer exists. Consequently, the 10 November Order is superseded and nullified by the passage of the Budget Act and must be vacated.

5. Importantly, this Court has conducted an independent analysis of the law, considering that the issues were somewhat different prior to passage of the budget. In doing so, this Court has confirmed that in the face of a budget passed by the legislature and signed by the Governor, the judiciary is without power to order the transfer of funds from the Treasury, even if to remedy an alleged constitutional violation.

6. As recently as 2020, the Supreme Court held that “the power of the purse is the exclusive prerogative of the General Assembly.” *Cooper v. Berger*, 376 N.C. 22, 37, 852 S.E.2d 46, 58 (2020) (Ervin, J.) (quoting John V. Orth & Paul Martin Newby, *The North Carolina State Constitution*, 154 (2d Ed. 2013) (Orth)).

7. The Appropriations Clause of our State Constitution, N.C. CONST. art. V, § 7(1), ‘states in language that no man can misunderstand that the legislative power is supreme over the public purse.’” *Cooper*, 376 N.C. at 37, 852 S.E.2d at 58 (quoting *North Carolina v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967)).

8. As a result, “the money in the Treasury is within the exclusive control of the General Assembly. No court can undertake to administer it.” *Shaffer v. Jenkins*, 72 N.C. 275 (1875); *see also Wilson v. Jenkins*, 72 N.C. 5 (1875) (“The General Assembly has absolute control over the finances of the State.”).

9. In other words, the judicial branch “lack[s] the authority to ‘order state officials to draw money from the State treasury.’” *Id.* at 47, 852 S.E.2d at 64 (quoting *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. app. 422, 423, 803 S.E.2d 27, 29 (2017)).

10. The reason the judiciary is without power to act when the legislature has made the decision is because “[o]ur founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty.” *North Carolina v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016) (Newby, J.); *Cooper*, 376 N.C. at 37, 852 S.E.2d at 59 (“In drafting the appropriations clause, the framers sought to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state’s expenditures.”) (Ervin, J.). Therefore, under the doctrine of separation of powers, “[t]he General Assembly has absolute control over the finances of the State.” *Wilson v. Jenkins*, 72 N.C. 5 (1875); *Cooper v. Berger*, 376 N.C. at 46, 852 S.E.2d at 64 (“[T]he North Carolina State Constitution provides that the appropriation authority lies with the General Assembly.”).

11. In fact, the very issues before this Court were previously addressed in *Richmond County Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017), a case that has been cited by the Supreme Court. As characterized by the Supreme Court, in *Richmond County*, “the Court of Appeals stated that ‘appropriating money from the State treasury is a power vested exclusively in the legislative branch’ and that the judicial branch lacked the authority to ‘order State officials to draw money from the State treasury.’” *Cooper*, 376 N.C. at 47, 852 S.E.2d at 64. Therefore, relying on Supreme Court precedent, that case found that while this Court can find a constitutional violation—which it has done—it cannot order the transfer of funds:

Under long-standing precedent from our Supreme Court, the judicial branch cannot order the State to pay money from the treasury to satisfy this judgment. . . . As our

Supreme Court explained in a similar case, having entered a money judgment against the State, the judiciary has ‘performed its function to the limit of its constitutional powers.’ From here, satisfaction of that money judgment ‘will depend upon the manner in which the General Assembly discharges its constitutional duties.’

Richmond Cty., 254 N.C. App. at 424, 803 S.E.2d at 30 (quoting *Smith v. North Carolina*, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976)); *see also id.* at 429, 803 S.E.2d at 32 (“We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box.”); *Smith*, 289 N.C. at 321, 222 S.E.2d at 424 (“In the event plaintiff is successful in establishing his claim against the State, he cannot, of course, obtain execution to enforce the judgment.”); *North Carolina v. Davis*, 270 N.C. 1, 13, 153 S.E.2d 749, 757 (1967) (“Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible and may be disbursed only in accordance with legislative authority.”); *Robinson v. Barfield*, 6 N.C. 391, 411, 2 Mur. 391 (1818) (“The Legislature acts because the judicial power is incompetent to give relief.”)

12. This Court today makes no decision as to whether the Court had the authority on 10 November 2021 to order the transfer of funds to the North Carolina Department of Health and Human Services, Department of Public Instruction, and the University of North Carolina System. (10 November Order at 19.) While it would appear from the language of the Appropriations Clause, as well as precedent of this State, including *Richmond County* and its progeny, that the Court did not have such power, this Court makes no proclamation as to whether it had the constitutional authority to do so prior to the passage of the Budget Act. However, the Court does find that in the face of duly enacted legislation establishing a budget, any order from this Court enforcing the mandates of the 10 November Order, whether in whole, in part, or otherwise

modified, would amount to an unconstitutional invasion of the General Assembly’s exclusive power to make appropriations.

13. The fact there are no longer sufficient revenues to comply with both the Budget Act and the 10 November Order means enforcing the Order would cause an even greater intrusion into legislative power. The Constitution requires the State to maintain a balanced budget, N.C. CONST. art. III, §5(3), and prohibits the State from engaging in deficit spending during any fiscal year. *Id.* Implementing the Order would thus require the courts, or executive-branch officials, to pick-and-choose which appropriations in the Budget to honor and which ones to disregard—essentially nullifying the Budget Act passed by the Legislature and displacing its role within our democratic system entirely.

14. As the Supreme Court has explained, “[t]he clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch.” *McCrorry v. Berger*, 368 N.C. 633, 645 (2016). Ordering the State to transfer funds in manner despite a duly enacted budget would involve such a violation, as it would require the Court to undertake for itself the whole of the legislative power of the purse.

15. Although Plaintiffs contend that the Savings Reserve established under the State Budget Act constitutes available, unappropriated revenue, that conclusion misunderstands the law and ignores governing precedent.

16. Under the Budget Act, moneys held in reserve can be expended “only for the purposes for which the reserve is established” and can only be released pursuant to the procedures set forth in its governing statute. N.C. Gen. Stat. § 143C-4-8. Indeed, the statute governing the Savings Reserve expressly requires a further vote of the General Assembly (and in some cases a two-thirds majority) to approve expenditures. N.C. Gen. Stat. §143C-4-2(b)-(b1).

17. The Court of Appeals already rejected the notion that courts can order transfers out of the State's emergency reserves in *Richmond County*. There, plaintiffs argued the court should order the State to transfer money out of the Contingency and Emergency Reserve to repay fines and forfeitures that should have flowed to them under the State Constitution. *See* N.C. CONST. art. IX, § 7 (requiring the proceeds of penalties and forfeitures to be used exclusively for public schools). Unlike the Savings Reserve, expenditures from the Contingency Reserve can be approved by the Council of State. N.C. Gen. Stat. § 143-4-4. The court nevertheless rejected and hold that an order “[C]ommanding members of the Council of State and other executive branch officials to approve payment from this type of discretionary emergency fund is no less offensive to the Separation of Powers Clause than commanding the legislature to appropriate the money.” *Richmond Cty.*, 254 N.C. App. at 428–29.

18. The statutes governing the Savings Reserve expressly require a further vote of the General Assembly (and in some cases a two-thirds majority) to approve expenditures. N.C. Gen. Stat. § 143C-4-2(b)-(b1). Further, the State Budget Act limits the use of the Savings Reserve to emergency situations, such revenue shortfalls and natural disasters. N.C. Gen. Stat. § 143C-4-2(b). While those statutes also permit the General Assembly to expend funds to “pay costs imposed by a court or administrative order,” N.C. Gen. Stat. § 143C-4-2(b), the same was true of the Contingency Reserve at issue in *Richmond County*. *See* 254 N.C. App. at 429 (observing that N.C. Gen. Stat. § 143C-4-4 permits the Council of State to use the contingency reserve for expenditures required by a court). The Court nevertheless held that the decision to use those funds constituted a nonjusticiable political question. *Id.* The outcome should be the same here.

19. The Court, on this limited issue on remand, is thus without power to act. Having found a constitutional violation, the Court cannot order an appropriation from the Treasury without

violating the separation of powers. The “inaction by those exercising authority,” (10 November Order at 13), upon which the November Order was predicated, is no longer the current state of affairs. To the contrary, the Legislature has spoken and adopted a duly enacted Budget. And “[w]hen the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right.” (*Id.* at 16.) Therefore, by its own terms, as well as long-standing law, the 10 November Order is **VACATED**.

20. In any event, and in the alternative, the Court finds that it would be inappropriate, at this juncture at least, to conclude that the Budget Act is insufficient to provide children in this State with a sound basic education, or that it requiring the State to fund the remaining items in the Comprehensive Remedial Plan is necessary to remedy a violation of the right established under *Leandro*.

21. The Supreme Court has repeatedly admonished in the course of this very litigation that, when fashioning a remedy, the Court must do “*no more than is reasonably necessary*” to correct the alleged constitutional violation. *See Leandro I.*, 358 N.C. at 610 (holding that any relief granted must “correct the failure with minimal encroachment on the other branches of government”); *see also Alamance County*, 329 N.C. at 99 (holding that, in remedying an alleged constitutional violation, the court must “do *no more than is reasonably necessary*” (emphasis in original)).

22. Moreover, when assessing legislation such as the Budget Act, courts must “begin with a presumption that the laws duly enacted by the General Assembly are valid” and can only reach a contrary conclusion if a law’s “unconstitutionality is demonstrated beyond a reasonable doubt.” *Cooper*, 376 N.C. at 33; *Leandro II*, 358 N.C. at 622-23 (“The courts of the state must grant every reasonable deference to the legislative and executive branches when considering

whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education.”)

23. Despite this, Plaintiffs insist that the CRP represents the *only* way to provide a sound basic education to children in the Plaintiff school districts, and that anything other than their chosen remedy simply will not do.

24. The Supreme Court, however, rejected that exact argument at the outset of this case. In *Leandro I*, the Court explained that “[t]he very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them.” 346 N.C. at 354, 488 S.E.2d at 260 (1997). Therefore, “within the limits of rationality, the legislature’s efforts to tackle the problems should be entitled to respect,” *id.*, because the legislature is in a better position to make such determinations:

We acknowledge that ***the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education.*** The members of the General Assembly are popularly elected to represent the public for the purpose of making such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearing and committee meetings at which it can hear and consider the views of the general public as well as education experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education.

Id. at 354-55, 488 S.E.2d at 260 (emphasis added).

25. The Supreme Court’s holding in *Leandro I* comports with other holdings of the Supreme Court as well. See *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.3d 1, 8 (2004) (noting that “the legislative branch of government is without question ‘the policy making agency of our government’” and, as such, “it is a far more appropriate forum than the courts for

implementing policy-based changes to our laws.”); *id.* at 169-70, 594 S.E.3d at 8-9 (“This Court has continually acknowledged that, unlike the judiciary, the General Assembly is well equipped to weigh all the factors surrounding a particular problem, balance competing interests, provide an appropriate forum for a full and open debate, and address all issues at one time.”); *Hart v. North Carolina*, 368 N.C. 122, 126, 774 S.E.2d 281, 285 (2015) (“But the role of judges is distinguishable, as we neither participate in this dialogue nor assess the wisdom of legislation. Just as the legislative and executive branches of government are expected to operate within their constitutionally defined spheres, so must the courts.”). Thus, in this case, the Supreme Court recognized “the fact that the administration of public schools of the state is best left to the legislative and executive branches of government.” *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261.

26. This Court thus “must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of various school districts of the state a sound basic education, and a clear showing to the contrary must be made before the courts may conclude that they have not.” *Hoke Cty. Bd. of Educ. v. North Carolina*, 358 N.C. 605, 622-23, 599 S.E.2d 365, 381 (2004) (“*Leandro II*”).

27. Indeed, every time the trial court has attempted to dictate a specific remedy in this case, the Supreme Court has rejected it. Following the trial in this matter, Judge Manning entered orders directing that the State to (1) expand the provision of pre-kindergarten services to at-risk children in Hoke County; and (2) lower the age of compulsory education. The Court in *Leandro II* held that both of those orders were in error both because (1) decisions over education constituted nonjusticiable political questions that are committed to the General Assembly; and (2) there was

insufficient evidence to show that such remedies were “either the only qualifying means or even the only known qualifying means” to ensure children receive a sound basic education. *Leandro II*, 358 N.C. at 639-44.

28. In contrast to the limited remedies the Court rejected in *Leandro II*, the CRP purports to dictate virtually every aspect of educational policy (and spending), over an 8-year period—prescribing measures that address everything from teacher recruitment and training, to educational performance measures, curriculum content, staffing models, teacher compensation, revision of the State’s educational finance system and funding formulas, expansion of pre-K programs, and early college courses. According to OSBM, the CRP includes more than 40 action items that require funding in Years 2 and 3 of the plan alone.

29. At present, because Plaintiffs have never challenged the Budget Act—which as an act of the General Assembly is presumptively valid—they have never offered any evidence to show that the Budget Act is somehow insufficient to provide a sound basic education or that the remaining items under the CRP are the “only qualifying means” to do so. They also have not presented the Court with any evidence to assess whether there are less intrusive alternatives to remedy their claims before it takes the extraordinary (and potentially unconstitutional) step of ordering funds out of the treasury.

30. In *Leandro II*, the Supreme Court noted the trial court “demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved.” *Id.* at 638, 599 S.E.2d at 390-91. Recognizing its “limitations 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 Supreme Court remanded the case there “ultimately into the hands of the legislative and executive

branches.” *Id.* at 649, 599 S.E.2d at 397. Today, this Court exercises the same restraint in yielding to the legislature—who has now passed a budget with this Court’s rulings in this case in mind—and not substituting the judiciary’s judgment for that of the legislature. *Rhyme*, 358 N.C. at 190, 594 S.E.3d at 21 (“We assume that when the General Assembly acts, it does so . . . with full knowledge of relevant decisions by this Court.”).

31. Plaintiffs have not established, and the Court is not convinced, that any action items from the Comprehensive Remedial Plan that are not currently or projected to be funded by the enacted budget are necessary to provide the opportunity for a sound basic education in North Carolina. This is especially true given that the General Assembly, made up of elected representatives of the citizens of this State, has made legislative decisions, compromises, and conclusions with respect to which areas of educational need General Fund appropriations should be made. The Governor endorsed these decisions by affixing his signature to the Budget Act on 18 November 2022. Therefore, it appears that the branches of government tasked with establishing a balanced budget for the State—the legislative and executive—have agreed that the educational needs funded and those not funded are the most necessary for the current citizens of North Carolina. *Leandro I*, 346 N.C. at 348, 488 S.E.2d at 255-56 (“We conclude that at the time this provision was originally written in 1868 providing for a ‘general and uniform’ system but without the equal opportunities clause, the intent of the framers was that every child have a fundamental right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime. The 1970 amendment adding the equal opportunities clause ensured that all the children of this state would enjoy this right.” (internal citations omitted)). This act of the General Assembly is presumed valid, *Cooper*, 376 N.C. at 33, 852 S.E.2d at 56, and, as it has not been challenged, the Court makes no finding today otherwise.

IT IS THEREFORE ORDERED THAT, in accordance with the above findings of fact and conclusions of law, the 10 November 2021 Order is **HEREBY VACATED**. In the alternative, the Court finds that Plaintiffs have not met their burden of proving the current Budget Act fails to provide what is necessary for a sound basic education, and thus, for this alternative reason, the 10 November 2021 Order is **HEREBY AMENDED** to include the following findings of fact and conclusions of law:

- (a) a Budget Act has been passed by the legislature;
- (b) the Court is without the authority to order any appropriation from the General Fund in light of a passed Budget Act;
- (c) the passage of the Budget Act does not leave available funds in the General Fund for appropriation by the Court;
- (d) if moneys were transferred out of the Treasury, as originally directed by the November Order, it would likely cause a revenue shortfall in FY 2022-23;
- (e) a judicially-ordered transfer of moneys out of the General Fund at this stage would infringe upon the separation of powers between the State's branches of government, and specifically the legislature's constitutional power to make appropriations;
- (f) the Budget Act funds approximately \$1.1 billion of Years Two and Three of the Comprehensive Remedial Plan;
- (g) the Budget Act funds educational initiatives from sources other than the General Fund;
- (h) the Budget Act contains funding for educational initiatives found important by the General Assembly that are not in the Comprehensive Remedial Plan.

IT IS THEREFORE ALTERNATIVELY ORDERED THAT the 10 November 2021 Order be **AMENDED** as specified above, and, with those amendments, be **VACATED** in its entirety.

The Honorable Michael L. Robinson
Special Superior Court Judge for Complex Business Cases