

STATE OF NORTH CAROLINA  
WAKE COUNTY

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.

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
No. 95 CVS 1158

STATE OF NORTH CAROLINA'S  
BRIEF

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NOW COMES Defendant, the State of North Carolina, by and through undersigned counsel, pursuant to this Court’s 24 March 2022 Scheduling Order and Notice of Hearing, and its Supplemental Briefing Order of 25 March 2022, (collectively “Briefing Orders”), the State of North Carolina hereby submits this brief regarding the North Carolina Supreme Court’s remand directives of 21 March 2022.

### **CASE CHRONOLOGY**

Twenty-four years ago, in 1997, the North Carolina Supreme Court held that the children of this State had been, and were being denied, a constitutionally guaranteed opportunity to “receive a sound basic education in our public schools.” *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 254 (1997). Seventeen years ago, the Court reaffirmed that opinion in *Leandro II. Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004).

With *Leandro II*, the Supreme Court warned that if the State consistently proved unable to satisfy its constitutional obligations, “a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.” *Hoke Cnty. Bd. of Educ.*, 358 N.C. at 642, 599 S.E.2d at 393. Since *Leandro II*, the trial court has found that the State is still failing to meet its constitutional obligation, ultimately resulting in the order at issue.

On 21 January 2020, after more than fifteen years of findings by this Court detailing failed remedial efforts, the Honorable W. David Lee entered an Order in this case directing the State defendants, in consultation with the other parties, to develop and submit a comprehensive remedial plan:

... to provide all public school children the opportunity for a sound basic education, including specific long-term actions that must be taken, a timeframe for implementation, an estimate of resources in addition to current funding, if any, necessary to complete those actions, and a proposal for monitoring implementation and assessing

the outcomes of the plan.

A copy of the 21 January 2020 Order attached is to State Defendant's April 8, 2022 Notice of Filing ("4/8/22 NOF") as **Ex. 1**. *See Id.* at 34.

The State and the parties developed the required comprehensive remedial plan ("CRP"), which encompasses seven years of actions, and on 7 June 2021, the Court entered an Order requiring the State Defendants to implement the CRP. A copy of the CPR is attached to the 4/8/22 NOF as **Ex. 2**. The Court held that the programs and resources delineated in the CRP "are necessary to remedy continuing constitutional violations," and that the CRP "shall be implemented in full." *See* 4/8/22 NOF **Ex. 2**, p 7. The Court further ordered that a failure to fully implement the CRP would compel the Court to enter "a judgment granting declaratory relief and such other relief as needed to correct the wrong." *Id.* at 6. No parties appealed the Court's 7 June 2021 Order. The State Defendants began to implement Year 1 of the CRP, in accordance with the 7 June 2021 Order.

Following entry of the 7 June 2021 Order, on 18 October 2021 the Court conducted a hearing to determine the status of the State budget and, specifically, whether a budget had been enacted to fully fund Years 2 and 3 of the CRP. During the hearing, it was reported to the Court that although the Governor and legislative leaders were engaged in negotiations, a budget agreement had not yet been reached. A copy of the 18 October 2021 Order is attached to the 4/8/22 NOF as **Ex. 3**. Accordingly, the Court set a hearing for 10 November 2021 for the entry of a remedial order. *Id.*

Following a hearing, on 10 November 2021, the Court entered an Order that directed three state officials — the Director of the Office of State Budget Management, the State Controller, and the State Treasurer — to take specific actions to ensure sufficient funding for Years 2 and 3 of the

Plan. A copy of the 10 November 2021 Order is attached to the 4/8/22 NOF as **Ex. 4**. The 10 November 2021 Order was entered in the absence of a State budget that fully funded Years 2 and 3. *Id.*

On 18 November 2021, the General Assembly enacted the Current Operation Appropriations Act of 2021 (Session Law 2021-180, SB 105) (“Appropriations Act” or “State Budget”). The Appropriations Act included partial funding of Years 2 and 3 of the CRP. A copy of Session Law 2021-180, SB 105 is attached to the 4/8/22 NOF as **Ex. 5**.

On 30 November 2021, the Court entered an order setting a hearing for 13 December 2021, during which the State was required “to inform the Court of the specific components of the Comprehensive Remedial Plan for years 2 & 3 that are funded by the Appropriations Act and those that are not.” A copy of the 30 November 2021 Order is attached to the 4/8/22 NOF as **Ex. 6**.

#### **The State Controller’s Appeal (P21-511-1)**

In the meantime, and in response to the Court’s 10 November Order, on 24 November 2021 the State Controller petitioned the Court of Appeals for a writ of prohibition. A copy of the State Controller petition’s a writ of prohibition (P21-511-1) is attached to the 4/8/22 NOF as **Ex. 7**. The State Controller argued that the Court’s 10 November 2021 Order was made despite a lack of appropriate jurisdiction; that the Order was “at variance with the rules prescribed by law;” and that the Order compelled the Controller to act in a way that purportedly defeated a legal right. *See Id.* at 2, 7.

On 30 November 2021 the Court of Appeals issued the writ of prohibition, to “restrain the trial court from enforcing the portion of its order requiring the petitioner to treat the \$1.7 billion in unappropriated school funding identified by the court ‘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.”<sup>1</sup> A copy of the issued the Writ of Prohibition is attached to the 4/8/22 NOF as **Ex. 8**. *See Id.* at 2.

Pursuant to N.C.G.S. § 7A-30(1) and (2), on 15 December 2021 Plaintiffs appealed the issuance of the writ of prohibition to the North Carolina Supreme Court. A copy of Plaintiffs’ Notice of Appeal of the Writ of Prohibition and Petition for Discretionary Review (425A21) is attached to the 4/8/22 NOF as **Ex. 9**. Pursuant to N.C.G.S. § 7A-31, Plaintiffs also contemporaneously filed a Petition for Discretionary Review with the Supreme Court. *Id.* Among the issues for which Plaintiffs sought Supreme Court review were:

4. Whether the “right to the privilege of education” and the “duty of the State to guard and maintain that right” set forth in Article I, Section 15 of the North Carolina Constitution, which is the express will of the people of this State, is an appropriation “made by law.”
5. Whether courts, under Article I, Section 18 of the North Carolina Constitution, have the express and inherent authority to order a remedy for established constitutional violations that have persisted for over seventeen (17) years, where the State has failed to act.
6. Whether the legislative authority to appropriate funds pursuant to Article V, Section 7 of the North Carolina Constitution overrides and renders meaningless the constitutional right to a sound basic education under Article I, Section 15, and Article IX, Section 2.

*Id.* at 4, 32.

On 28 December 2021, the Legislative-Intevenors responded to Plaintiffs’ appeal and Petition for Discretionary Review.<sup>2</sup> A copy of Legislative-Intevenors response to Plaintiffs’ appeal

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<sup>1</sup> In light of the writ of prohibition issued by the Court of Appeals, discussed *infra*, the Court, *ex mero motu*, vacated the Court’s 30 November 2021 Order that set the 13 December 2021 hearing. A copy of the 3 December 2021 Order attached to the 4/8/22 NOF as **Ex. 10**.

<sup>2</sup> The Legislative-Intervenors’ submission consisted of their Response to Plaintiffs’ Petition for Discretionary Review and Petitions for Writ of Certiorari, as well as a Motion to Dismiss Plaintiffs’ appeal and Petition for Discretionary Review.

and Petition for Discretionary Review (425A21) is attached to the 4/8/22 NOF as **Ex. 11**. As part of their response, the Legislative-Intervenors argued to the Supreme Court, *inter alia*, that Plaintiffs' appeal and Petition for Discretionary Review should be rejected as being premature, *see id.* at 7, 12, and because the adoption of the State budget on 18 November 2021 fundamentally subverted the predicate for the Court's 10 November 2021 Order. *See* 4/8/22 NOF **Ex 4**.

### **The State's Appeal (22-86-1)**

Parallel to the appellate filings from the State Controller and Plaintiffs, on 7 December 2021 the State noticed an appeal of the Court's 10 November 2021 Order. A copy of the State's Notice of Appeal (22-86-1) is attached to the 4/8/22 NOF as **Ex. 12**. On 8 December 2021, the Legislative-Intervenors also sought appellate review of the Court's 10 November 2021 Order when they separately noticed an appeal. A copy of the Legislative-Intervenors' Notice of Appeal (22-86-1) is attached to the 4/8/22 NOF as **Ex. 13**. The Legislative-Intervenors' Notice of Appeal was filed twenty days after the enactment of the Appropriations Act.

Pursuant to N.C.G.S. § 7A-31(b), on 14 February 2022 the State petitioned the Supreme Court for review of the Court's 10 November 2021 Order prior to determination by the Court of Appeals ("Bypass Petition"). A copy of the Bypass Petition (425A21-2) is attached to the 4/8/22 NOF as **Ex. 14**. With the Bypass Petition, the State sought the Supreme Court's review of two issues:

1. Under the particular circumstances of this case and the deference provided to the other branches of government to develop a remedy, did the trial court correctly hold that there is a constitutional appropriation to satisfy the State's obligation to provide a sound basic education and was the trial court correct to order the relevant state actors to comply?
2. If the trial court's order of 10 November 2021 was in error, what specific remedies may the trial court order to ensure compliance with Leandro I and Leandro II and ensure that the State provide all

children the opportunity to obtain a sound basic education?

*See id* at 28. As part of that filing, the State also moved the Supreme Court for an expedited schedule. *Id.* at 30.

On 28 February 2022, the Legislative-Intervenors filed their response to the State’s Bypass Petition. A copy of Legislative-Intervenors’ response is attached to the 4/8/22 NOF as **Ex. 15**. Echoing their response to Plaintiffs’ appeal and Petition for Discretionary Review, the Legislative-Intervenors again argued that the passage of the Appropriations Act rendered the Court’s 10 November 2021 Order moot. *See id.*

On 21 March 2022 the Supreme Court granted both the Plaintiffs’ and the State’s Petitions for Discretionary Review prior to determination by the Court of Appeals. [See D.E. 13] However, the Supreme Court’s 21 March 2022 Order first remanded the matter to this Court for a limited time and for the narrow purpose of determining “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 [sic] November 2021 order.”

Following remand, and pursuant to this Court’s Scheduling Order and Notice of Hearing, on 4 April 2022 the State filed a Notice of Filing that included the Affidavit of Ms. Kristen Walker who is the Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management. *See Walker Affidavit*, [D.E. 12]. Ms. Walker’s Affidavit was accompanied by four attachments that that set out the fiscal requirements of the CRP and the funding impact of the Appropriations Act.

### **DISCUSSION**

The Court’s Supplemental Briefing Order notes three issues. The first issue pertains to the funds in the Appropriations Act that flow directly to the various programs in the CRP. Next, the

Court seeks information pertaining to the General Fund, and specifically the sums remaining following enactment of the Appropriation Act. Finally, the Court sought briefing on the impact of the Appropriation Act on the “ability of the Court to order the Legislature to transfer funds” to the various State entities responsible for the provision of education to the State’s schoolchildren.

**I. THE IMPLICATIONS OF THE APPROPRIATIONS ACT ON THE COMPREHENSIVE REMEDIAL PLAN, AND ON THE GENERAL FUND.**

As previously noted, on 4 April 2022 the State filed with the Court the Affidavit of Ms. Kristen Walker, the Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management. That filing, including the various attachments, provides the Court with both a general and granular analysis of how funds in the Appropriations Act actually flow to specific components of the CRP.

Ms. Walker’s Affidavit also provides the Court with specific details associated with the General Fund, including the status of the fund following the adoption of the Appropriations Act. Ms. Walker’s Affidavit and the associated attachments are responsive to the first two inquiries posed by the Court in its Supplemental Briefing Order.

As a general matter, the analysis reveals that 63% of the funding required for Year 2 of the CRP was included in the Appropriations Act, leaving approximately \$257,418,175 of the CRP unfunded in Year 2. *See Walker Affidavit Ex. 3* p 2 [D.E. 12.3] Similarly, the Appropriations Act provided roughly 49% of the required funding for Year 3, leaving \$537,409,782 unfunded. *Id.*

Ms. Walker’s Affidavit also explained the impact of the Appropriations Act on the General Fund in terms of gross figures, as well as the sums remaining following the passage of the State Budget. With respect to fiscal year 2021-2022, and taking into account tax reductions and the reservation of certain funds, the gross amount of the General Fund was \$28.41 billion, from which the Appropriations Act designated \$26.03 billion, leaving \$2.38 billion in unappropriated funds.

*Id.* at 2-3. For fiscal year 2022-23, it is estimated that receipts will be approximately \$27 billion, with an appropriation of \$26.98 billion, leaving approximately \$22 million in unappropriated funds.<sup>3</sup> *Id.* at 2-3.

One of the predicates to the Court’s 10 November 2021 Order was the availability of unappropriated State funds that could fully pay for Years 2 and 3 of the CRP. *See* 4/8/22 NOF **Ex. 4**. At the time, it was estimated that there existed in excess of \$5 billion of unappropriated funds from which the CRP could be funded. As noted, following the passage of the Appropriations Act, the Court intended to convene another hearing to permit the State “acting through its executive and legislative branches -- to inform the Court of the specific components of the Comprehensive Remedial Plan for years 2 & 3 that are funded by the Appropriations Act and those that are not.” *See* 4/8/22 NOF **Ex. 6** at 3.

Following the Court of Appeals’ issuance of the writ of prohibition, the Court canceled the scheduled hearing. Consequently, the figures delineating the impact of the Appropriations Act on CRP funding were never provided to the Court. Nevertheless, Ms. Walker’s Affidavit makes it clear that after the enactment of the Appropriations Act, significant portions of Years 2 and 3 of the CRP remain unfunded and the State maintains sufficient funds to fully fund Years 2 and 3 of the CRP.

Specifically, while the current budget underfunds Years 2 and 3 by a total of nearly \$795 million, the analysis conducted by the Office of State Budget Management shows that as of 1 July 2022, the total of funds available in the Savings Reserve will equal approximately \$4.25 billion.

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<sup>3</sup> Ms. Walker’s Affidavit further notes that Appropriations Act directs \$1.134 billion in each fiscal year to the State’s Savings Reserve that raises the total amount of unappropriated money to \$4.25 billion as of 1 July 2022.

In addition, as of March 25, 2022, the Office of the State Controller reports that the State has a net unreserved cash balance of \$4.79 billion. As of 1 April 2022, that figure is \$1.44 billion.<sup>4</sup> Collectively, there currently exists approximately \$5.38 billion in available funds to comply with the Court’s 10 November 2021 Order.

**II. THE 2021 APPROPRIATIONS ACT DOES NOT AFFECT THE AUTHORITY UNDER WHICH THIS COURT ISSUED ITS 10 NOVEMBER 2021 ORDER.**

The third inquiry in the Court’s Supplemental Briefing Schedule relates to the ramifications of the Appropriations Act on the “ability of the Court to order the Legislature to transfer funds.” As a matter of clarification, the Court has not ordered the Legislature, or any particular legislators, to do anything. Rather, based on the fact that sufficient unspent funds were available in the State’s reserve, the Court directed certain officials within the executive branch of the State to take actions with those available funds.

As discussed above, the recent State Budget still leaves a sufficient balance of unspent funds in reserve to fund the remaining requirements of the CRP. As a result, this Court does not need to order the Legislature to take any actions, and therefore does not need to determine whether it has the ability to issue such an order.

Further, by granting discretionary review pursuant to N.C.G.S. 7A-31, the Supreme Court has taken jurisdiction over issues involving the propriety of the Court’s 10 November 2021 Order, and the corresponding issues raised on appeal by the State and Plaintiffs, subject to its limited remand order to this Court of 21 March 2022.

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<sup>4</sup> According to the Office of State Controller’s Cash Watch, which can be accessed at [www.osc.nc.gov](http://www.osc.nc.gov), the State’s Unreserved Cash Balance as of 1 April 2022 is actually \$3.8 billion. However, of the \$3.8 billion, S.L. 2021-180, as amended by S.L. 2021-189 and S.L. 2022-6, anticipates \$2.36 billion to be either reserved or appropriated in FY 2022-23.

The Court’s 10 November 2021 Order held, in essence, that the constitutional mandate that all children in the state be provided a sound, basic education constitutes an appropriation “made by law.” By granting the State’s petition for discretionary review, the Supreme Court has taken jurisdiction over the question of whether that conclusion is correct.

In any event, the enactment of the 2021 Appropriations Act does not change whether the Court of Appeals’ decision in *Richmond County* impacts this case. In *Richmond County*, the court held that the appropriations clause dictates that a court cannot “order the executive branch to pay out money that has not been appropriated.” *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017). *Richmond County* involved a claim by the Richmond County Board of Education that the State had impermissibly used “fees collected for certain criminal offenses” to “fund county jail programs,” rather than returning those fees to the Board for use by public schools as required by Article IX, § 7 of the North Carolina Constitution. *Id.* The funds accorded to the county jail program were expended, and the General Assembly did not appropriate additional funds to the Board. *Id.* at 424. The Superior Court ordered several state officials, including the State Treasurer and State Controller, to transfer funds from the State Treasury to the Board to make the Board whole. *Id.* at 425.

The Court of Appeals reversed. *Id.* at 425. Although the Court of Appeals agreed that a trial court could remedy the Board’s constitutional harm by ordering the State to return the money the Constitution committed to the Board, *id.* at 427–28, the Court of Appeals explained that courts could not order the State to give the Board “new money from the State Treasury.” *Id.* at 428 (emphasis added). The Court of Appeals further observed that Article V, Section 7 of the North Carolina Constitution permits state officials to draw money from the State Treasury only when an appropriation has been “made by law.” *Id.*

While assessing the lower court’s error and noting that that the funds designated for return were unavailable, the Court of Appeals acknowledged that where the Constitution mandates funds be used for a particular purpose, “it is well within the judicial branch’s power to order” that those funds be expended in accordance with constitutional dictates. *Id.* at 427–28. In light of *Richmond County*, any order entered by this Court directing state officials to draw money from the State Treasury must identify available funds and must be tied to an appropriation “made by law.”

As noted above, the Supreme Court now has jurisdiction over the question of whether the North Carolina Constitution’s mandate of a sound, basic education is such an appropriation “made by law.”

The State agrees with the Court’s suggestions made during the scheduling conference of 24 March 2022 that the constrained time period permitted by the Supreme Court’s 21 March 2022 remand order, among other things, indicates that the Supreme Court does not contemplate that this Court will conduct a *de novo* review of the CRP or the Court’s 10 November 2021 Order. Instead, it is the State’s understanding that the 21 March 2022 Remand Order is confined to the question of whether the budget as passed satisfied the Court’s order. As demonstrated above, it did not.

In short, the State respectfully submits that the Supreme Court’s grant of the petition for discretionary review, together with its subsequent remand order, directs this Court to evaluate the fiscal impact of the State Budget on the CRP, leaving the question of the constitutionality of the authority under which the 10 November 2021 Order was entered to the Supreme Court. Accepting the Legislative Defendants’ arguments to conduct a *de novo* review of the 10 November 2021 Order would undermine the Supreme Court’s jurisdiction to decide the issues on which it has

granted review.<sup>5</sup>

### CONCLUSION

The State has provided to the Court and the parties with a comprehensive accounting of the impact of the Appropriations Act on the funding for Years 2 and 3 of the CRP. For the reasons set forth herein, the State believes that the Supreme Court’s Remand Order directs this Court to enter an order amending the Court’s 10 November 2021 Order only to reflect those changed fiscal circumstances, as reflected in the State’s proposed amended order submitted concurrently with this filing. Consequently, this Court should enter such an amended order, which will then enable the Supreme Court to immediately exercise its appellate prerogative to consider the legal implications of the Court’s 10 November 2021 Order.

Respectfully submitted, this the 8<sup>th</sup> day of April, 2021.

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<sup>5</sup> During the scheduling conference, counsel for the Legislative-Intervenors suggest that the passage of the State Budget has had the effect of “changing the legal questions” before the Court. In making that assertion, counsel noted that the parties are unaware of what provisions of the CRP have been funded through the State Budget, thereby requiring a reexamination of the CRP. The Legislative-Intervenors’ concerns should be assuaged by Kristen Walker’s Affidavit, which provides a full and factual explanation of the impact of the State Budget on the funding for Years 2 and 3 of the CRP.

**CERTIFICATE OF SERVICE**

I do hereby certify that in accordance with BCR 3 the foregoing document has been electronically filed using the Court's electronic filing system, which will automatically send notification of such filing to the following counsel of record:

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This the 8<sup>th</sup> day of April, 2022.

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