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	)	**PENN-INTERVENORS' REPLY TO INTERVENOR-DEFENDANTS' AND CONTROLLER COMBS' BRIEFS IN RESPONSE TO SUPPLEMENTAL BRIEFING ORDER**
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*.	)	

Introduction

Buried within a 30-page brief that largely departs from the Courts' specific direction to the parties in its supplemental briefing order, the Defendant-Intervenors Timothy Moore and Philip Berger make two dispositive admissions: (1) the 2021-23 Budget did not cover at least one-third of the costs required to implement years two and three of the Comprehensive Remedial Plan ("CRP"); and (2) State budget projections show an estimated unappropriated, unreserved fund balance of well over $2 billion that will more than cover the costs of the outstanding educational programs and initiatives in the CRP.[1] Given the narrow scope of the remand, the Court's analysis should stop there, and it should modify the transfer amounts listed in the November Order, as described in the Penn-Intervenors' opening brief.

In an attempt to draw this Court into deciding issues well beyond its mandate, however, the Defendant-Intervenors also make several irrelevant and unconvincing arguments about the constitutionality of the CRP, the scope of the November Order, and the nature of the State Budget. But, as the Court has noted, time is short, and the need to engage with these arguments is nonexistent. The Defendant-Intervenors will have their chance to make their arguments on appeal, but this is not the forum.

[1] The Penn-Intervenors' reply brief uses the same defined terms as its initial brief in response to the Court's supplemental briefing order.

Argument

I. The Court Should Not Address Issues Beyond the Supreme Court's Narrow Remand

The Supreme Court's directive to this Court was simply 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" the November Order. 18 March 2022 Order. It did not direct this Court to reevaluate the constitutionality for the November Order, nor did it ask the Court to revisit or reconsider the need for the CRP itself. The bulk of the Defendant-Intervenors' arguments are misleading and are directed to these ancillary points, and the Court can easily dispose of them. *See* Defendant-Intervenors Br. at 20-28.

In a brief containing many misrepresentations, one misrepresentation stands out among the rest: the Defendant-Intervenors' claim that the State Budget negates the November Order, because it goes *beyond* the State's constitutionally mandated obligations to provide a sound basic education. *See* Defendant-Intervenors Br. at 25. In particular, in an effort to inflate their CRP funding figures, the Defendant-Intervenors claim that they have spent more money on certain CRP initiatives than the CRP requires. They claim, for instance, that *$50,000,000* budgeted for a "workforce grant" should be applied to the CRP for an expense related to updating the Workforce Data System that was estimated to cost *only $1.7 million,* over years two and three of the CRP. Defendant-Intervenors Br., Ex. D at 3. Similarly, the Defendant-Intervenors claim a credit of *$206 million* from a federal American Rescue

Plan Act childcare block grant, toward CRP-mandated child-subsidy costs estimated to cost *only $20 million* for years two and three. *Id.* at 3.

Fortunately, litigating the accuracy and effect of these inflationary tactics is not relevant to the question at hand. The Court has already held that funding the entirety of the CRP is constitutionally mandated. The Defendant-Intervenors cannot meet their constitutional obligation by picking and choosing what components of the CRP they will fund, or by claiming that overages for some CRP initiatives eliminate the need to fund others. *See* November Order at 8. The relevant inquiry here is whether the State Budget has *fully funded* the CRP, and the State Budget Analysis has definitively shown that it has not. Walker Aff. ¶ 6; State of North Carolina Br. at 8.

Unsurprisingly, the Defendant-Intervenors want to shift the focus away from the many obligations the legislature has failed to fund, especially several essential CRP programs for at-risk students. Their own analysis shows several such programs funded at $0, including but not limited to additional funding for low-income students (III.B.ii.2), English-learner students (III.B.ii.4), and low-wealth school districts (III.B.ii.5). Trogdon Aff., Ex. D at 2. Similarly, they concede the State Budget underfunds numerous items, including admitting that the Budget only provides $26 million of the total $110 million required by the CRP for children with disabilities (III.B.ii.1). *Id.* Certainly, the legislature is welcome to address additional issues related to the State's education system beyond the CRP. Under the law of the case,

though, such actions do not alter the constitutional necessity of the CRP and the obligation to fund *all* aspects of it. *See* Penn Intervenors' Br. at 16 (collecting cases).

Similarly, the Defendant-Intervenors' assertion that their voices have not been heard on the underlying constitutionality of the CRP is also unpersuasive. *See* Defendant-Intervenors Br. at 24. At no point over the past decade have the Defendant-Intervenors attempted to raise the concerns they express now. Certainly, *Leandro II*, which was decided in 2004, contemplated the possibility that the trial court would need to fashion a remedy to this constitutional violation, which would implicate all the concerns they raise now. *See Hoke Cnty. Bd. of Educ. v. State (Leandro II)*, 358 N.C. 605, 642, 599 S.E.2d 365, 393 (2004). The Defendant-Intervenors have chosen to ignore this case and their constitutional duty for years. Their eleventh-hour effort to distract the Court with a grossly deficient, piecemeal approach to resolving a systemic constitutional violation must not be heeded.

II. The Defendant-Intervenors Mischaracterize the November Order

In large part, the Defendant-Intervenors' arguments fail because they are based upon a false reading of the November Order. *See* Defendant-Intervenors Br. at 9. They contend that the State Budget renders the November Order "moot," because it was the legislature's failure to pass a budget that the November Order sought to remedy. That is wrong. The "inaction" the November Order sought to remedy was not the State's failure to pass *any* budget that includes education spending. Rather, that order sought to address the State's failure to pass a budget or otherwise provide the funding that would allow the State to "implement the actions described *in the Comprehensive Remedial Plan*," which are the "necessary and

appropriate actions that *must* be implemented to address the continuing constitutional violations." November Order at 9-11 (emphasis added).

The CRP represents the *only* proposal from the State that remedies the constitutional deficiencies recognized by the Court following several hearings. November Order at 9. That order aimed to encourage the legislature to pass a budget that implemented *all* of the items in the CRP. *Id.* The State Budget thus is relevant to the November Order *only* to the extent that it funds those specific items. Based upon the State Budget Analysis, it has funded some, but not all, of the relevant items (Walker Aff at ¶ 6), and the Defendant-Intervenors fail to refute that fact. Therefore, the State's obligation to remedy that violation by fully funding the CRP remains.

III. The Defendant-Intervenors Mischaracterize the Amount of Available Money Left in the General Fund for the CRP

The Defendant-Intervenors also mischaracterize the amount of funds left in the General Fund. *See* Defendant-Intervenors Br. at 15. The Court requested that the parties brief the amount of funds in the General Fund and whether there is sufficient unappropriated money available to fund the CRP. And, just as it is undisputed that the State Budget did not fully fund the CRP, it is similarly beyond dispute that there are sufficient, unappropriated funds to finance that shortfall. As the State concisely acknowledged in its brief, "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." State Br. at 9.

The Defendant-Intervenors make two contrary arguments; neither is persuasive. They first argue that, while there will be more than $2 billion in

unappropriated, unreserved funds at the conclusion of FY 2021-22, those funds may be directed to appropriations and reservations in FY 2022-23. *See* Defendant-Intervenors Br. at 16. However, that the State *might* appropriate money in the General Fund to other items at a later date is irrelevant. Those funds are not yet appropriated, and, thus, available to fund the CRP.

The Defendant-Intervenors next argue that the $4.25 billion in unappropriated funds in the State's Savings Reserve is not available for transfer without an act of the legislature. *See* Defendant-Intervenors Br. at 18; Trogdon Aff. at ¶ 42. That argument also fails. The November Order held that the Court could transfer these funds as a constitutional appropriation and in light of the Court's inherent and equitable powers. November Order at 16-17. Whether that ruling was correct—that is, whether the North Carolina Constitution and statutes that the Defendant-Intervenors cite permit the transfer—will be decided on appeal. That question is not before this Court. The scope of the remand was intentionally narrow. It is enough, at this stage, to find that the unappropriated funds greatly exceed the funds needed to fully implement the CRP.

IV. The Court has the Constitutional Authority to Order the Transfer under *Alamance* and *Richmond*

The Defendant-Intervenors and Controller Linda Combs also argue that this Court should revisit the basis for the transfer ordered in the November Order. *See* Defendant-Intervenors Br. at 11; Controller Combs' Br. at 9. As discussed above and more fully in Penn-Intervenors' opening brief (at 17-20), this issue is beyond the scope of the Supreme Court's remand. The Court should not revisit the November Order's

detailed rationale on this point. *See* November Order at 11-18. And, even assuming the Court does have authority on this remand to weigh the implications of the State Budget in light of *Richmond Cnty. Board of Education v. Cowell*, 254 N.C. App. 422 (2017), that case is not applicable, because the State has unappropriated money in the General Fund that exceeds the balance necessary to fully fund the CRP.

Nevertheless, and without waiving any objections, Penn-Intervenors will respond briefly to the Defendant-Intervenors' efforts to incorrectly cabin and misrepresent the holding of the Supreme Court's decision in *In re Alamance County Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991). *Alamance* addressed the legislature's failure to provide adequate funding to operate certain court facilities. 329 N.C. at 88, 405 S.E.2d at 126. In resolving that case, the Supreme Court undertook a deep examination of the Separation of Powers Clause. *Id.* at 96-101, 405 S.E.2d at 130-33. The Court recognized that the "very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent Branches." *Id.* at 99-100, 405 S.E.2d at 133. When this "cooperation breaks down," however, the judiciary may cautiously exercise its incidental powers—"whereby one branch exercises some activities usually belonging to one of the other two branches in order to fully and properly discharge its duties." *Id.* at 97, 100, 405 S.E.2d at 131, 133.

The Court cited to a handful of cases at the turn of last century that "presented the dilemma of challenges to commissioners in whose counties public facilities were in need of construction or repair." *Id.* at 101, 405 S.E.2d at 134. The Supreme Court

had held that it was powerless to remedy these violations, concluding that the only remedies available for the "commissioner recalcitrance" were "the ballot box" and the commissioners' indictment for neglecting their statutory duties. The *Alamance* Court characterized those earlier decisions as erroneous and based on "its impracticable perception of the absoluteness of the separation of powers." *Id.*.

As the *Alamance* Court noted, the dated reasoning in these earlier cases was specifically rejected in later cases addressing the constitutional duty to maintain a public school system.[2] Citing *Hickory v. Catawba Cnty. & Sch. Dist.*, 206 N.C. 165 (1934), the *Alamance* Court noted that the Supreme Court had previously rejected the argument that remedy by indictment was sufficient for such a violation. Instead, "a party must not only have an adequate legal remedy but one competent to afford relief on the particular subject-matter of his complaint." *Alamance*, 329 N.C. at 102, 405 S.E.2d at 134 (quoting *Hickory*, 206 N.C. at 174). Notably, in *Hickory*, the Supreme Court affirmed a lower court order directing the State defendants to assume the debt that the city and school district had incurred to properly fund the schools and to levy taxes necessary to pay that debt. Hickory, 206 N.C. at 173, 173 S.E. at 61; *Hickory*, 1934 N.C. LEXIS 134, at ***8.

The *Alamance* Court likewise cited *Mebane Graded Sch. Dist. v. Alamance Cnty.*, 211 N.C. 213, 189 S.E. 873 (1937), which rejected indictment as an adequate

[2] During the time of these earlier cases cited by *Alamance*, Article IX, section 3 of the Constitution stated: "Each county in the State shall be divided into a convenient number of districts in which one or more public schools shall be maintained at least six months every year, and if the commissioners of any county shall fail to comply with the aforesaid requirement of this section, they shall be liable to indictment."

remedy for a failure to maintain public schools, instead holding "mandamus would lie to compel the county, acting as an administrative agency of the legislature, to assume the indebtedness of a school district within its jurisdiction." *Alamance*, 329 N.C. at 102, 405 S.E.2d at 134 (citing *Mebane*, 211 N.C. 213). Importantly, in addition to ordering this assumption of debt, the Supreme Court stated that the "county commissioners could have been compelled to have provided the school buildings . . . as a county-wide charge, and could have been compelled to have provided the money therefor by the issue of county-wide bonds." *Mebane*, 211 N.C. at 214, 189 S.E. at 880 (quoting *Reeves v. Board of Education*, 204 N.C. 74, 77 167 S.E. 454, 455 (1933)). Relying on *Hickory* and *Mebane*, the *Alamance* Court concluded: "These school district cases implicitly overruled holdings in the earlier cases that restricted remedies under similar circumstances to elections and indictments; we now reverse those earlier holdings explicitly." *Alamance*, 329 N.C. at 102, 405 S.E.2d at 134.

Thus, nearly a century ago, the Supreme Court rejected *Richmond*'s conclusion that the only remedy for recalcitrant state officials lies "at the ballot box," 254 N.C. at 429. And, it reaffirmed that principle in *Alamance*, by endorsing *Hickory* and *Mebane*, cases in which the Supreme Court affirmed orders directing the State to expend funds necessary to maintain the constitutionally required school system. Pursuant to this controlling Supreme Court authority, this Court should order the transfer of money necessary to fully fund years two and three of the CRP.

V. Conclusion

For the reasons stated above and in the Penn-Intervenors' opening brief, the Court should find and conclude: that the State Budget failed to fully fund years two and three of the CRP; that adequate unallocated funds remain in the General Fund to fund these items, and that *Richmond* is not implicated in this case. It should further revise the transfer amounts in the November Order as set forth in the Penn-Intervenors' opening brief.

Respectfully Submitted on 11 April 2022,

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Pursuant to BCR 7.8, counsel for Penn-Intervenors certifies that the foregoing brief, which is prepared using a proportional 12-font, is less than 2,500 words (excusing cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 11th Day of April, 2022

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