

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.

ORDER FOLLOWING REMAND

STATE OF NORTH CAROLINA and
the STATE BOARD OF
EDUCATION,

Defendant

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.

1. **THIS MATTER** is before the Court following the issuance by the Superior Court on 10 November 2021 of an order (hereinafter the “10 November Order”)

directing the Office of State Budget and Management and the current State Budget Director, the Office of the State Controller and the current State Comptroller, and the Office of the State Treasurer and the current State Treasurer to transfer a total of \$1,753,153,000.00 in three separate payments: (1) to the Department of Health and Human Services (“DHHS”) (\$189,800,000.00), (2) to the Department of Public Instruction (“DPI”) (\$1,522,053,000.00), and (3) to the University of North Carolina System (“UNC System”) (\$41,300,000.00). (*See* Or. 19, ECF No. 23.4. [“10 Nov. Or.”].)

I.

PROCEDURAL BACKGROUND

2. This case has a history spanning nearly 27 years. Because the 10 November Order details much of the extensive procedural history of this case, the Court recites here only the factual and procedural background which may provide helpful context for this Order.

3. On 15 March 2021, the State Defendants submitted to the Court a Comprehensive Remedial Plan and Appendix (hereinafter the “CRP”). (Comprehensive Remedial Plan, ECF No. 20.2 [“CRP”].) The CRP was developed by experts retained to assist certain of the parties to determine what concrete steps were necessary and advisable to ensure that children in the State’s K-12 grades obtain a “sound basic education” as mandated by the North Carolina State Constitution. The CRP was agreed to by the Plaintiffs and the State Defendants.¹

¹ While elemental to our system of government, this case demonstrates the fact that there are three co-equal branches of government — the judicial branch, the executive branch, and the legislative branch. The record before this Court demonstrates that, until very recently, the “State Defendants” actively participating in this action were comprised of the executive

4. On 7 June 2021, the trial court ordered that the CRP be implemented in full and in accordance with the timelines set forth therein² and directed the State Defendants to secure such funding and resources necessary to implement in a sustainable manner the programs and policies set forth in the CRP. (7 June 2021 Or. 7.)

5. Between 7 June 2021 and 10 November 2021, the North Carolina General Assembly did not pass, and the Governor did not sign, any legislation providing funding and resources necessary to implement the CRP as ordered by the trial court.

6. On 10 November 2021, the trial court entered the 10 November Order directing the transfer of funds totaling \$1,753,153,000. The payments ordered by the trial court were to fully fund years 2 and 3 of the CRP. The trial court stayed the effect of the 10 November Order for thirty days.

7. In the 10 November Order, the trial court determined which of three entities (DPI, DHHS, UNC System) received funding for each of the programs to be undertaken or continued during years 2 and 3 of the CRP based on the CRP's designation of the "responsible party" for that program. (State of N.C.'s 4/14/22 NOF

branch (the Governor's office, the State Department of Education, the State Department of Public Instruction, and the State Department of Health and Human Services) but not the Legislative Branch. In fact, the record discloses that in 2011 the Legislature sought to intervene in this proceeding but its motion was denied by the trial court in its discretion.

² The CRP was a detailed document providing for a host of specific programs to be implemented over an eight-year period with costs associated for each year for each program. By virtue of the level of detail within the CRP, parties involved in the implementation of the CRP had a roadmap for the amount of money necessary to fund each of the programs each year as well as being able to determine the total cost for the CRP each year.

Ex. 1., ECF No. 37.1; *see, e.g.*, CRP I.A.ii.1.(a) (listing DPI as the administrative agency responsible for implementation of the program in question).

8. Eight days after the issuance of the 10 November Order, 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 “Budget Act”). (ECF No. 23.5.) The Budget Act provided significant funding for the State’s education programs.

9. Following the issuance of the 10 November Order, appeals were taken by certain parties — including the State of North Carolina — to the North Carolina Court of Appeals.

10. In addition to the initial notices of appeal to the Court of Appeals, on 24 November 2021, Ms. Linda Combs, a non-party to this action and the Comptroller of the State of North Carolina, through counsel petitioned the Court of Appeals for a Writ of Prohibition, Temporary Stay, and Writ of Supersedeas (“the Petition”). (ECF No. 10.) The Petition sought an order preventing Ms. Combs from being required to comply with the provisions of the 10 November Order directing her to transfer funds to DHHS, DPI, and the UNC System on the bases that: (1) the Superior Court lacked jurisdiction to order Ms. Combs to take the actions set forth in the 10 November Order, (2) the 10 November Order “is at variance with the rules prescribed by law,” and (3) the 10 November Order requires Ms. Combs to act in a manner which will defeat a legal right. On 30 November 2021, a panel of the North Carolina Court of

Appeals issued its Order granting the Petition.³ The Court of Appeals expressly ruled that “the trial court’s conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court.” (*In re. The 10 Nov. 2021 Or. in Hoke Cnty. Bd. Ed. et al. vs. State of North Carolina and W. David Lee (Wake County File 95 CVS 1158)*, No. P21-511, ECF No. 23.8.)

11. Also on 30 November 2021, the trial court separately issued *sua sponte* a Notice of Hearing and Order Continuing Stay of Court’s November 10, 2021 Order, (ECF No. 23.6), 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 Nov. Or. 2, ECF No. 23.6.) The trial court also extended the stay set by the 10 November Order so the order did not become effective.

12. Following issuance by the Court of Appeals of its Order of Prohibition, a number of parties filed petitions and notices of appeal with the North Carolina Supreme Court seeking “by-pass” review by the Supreme Court of the issues arising from both the 10 November Order and the Court of Appeals panel’s entry of a writ of prohibition. Other parties sought dismissal of the appeal to the Supreme Court and denial of the request for by-pass review.

³ The Court of Appeals panel’s Order states in relevant part: “We therefore issue the writ of prohibition and 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.’ Under our Constitutional system, that trial court lacks the power to impose that judicial order.”

13. On 8 December 2021, the Honorable Philip E. Berger, in his official capacity as the President *Pro Tempore* of the North Carolina Senate, and, the Honorable Timothy K. Moore, in his official capacity as the Speaker of the North Carolina House of Representatives (collectively the “Legislative Intervenors”), intervened as a matter of right in the trial court proceeding pursuant to N.C.G.S. § 1-72.2(b). (App. R. 142–48.) Following intervention, the Legislative Intervenors on 8 December 2021 filed a Motion to Dismiss Plaintiffs’ and Plaintiffs-Intervenors’ Notices of Appeal and Petitions for Discretionary Review in the Supreme Court.

14. On 21 March 2022, the North Carolina Supreme Court issued three orders. In its first order, the Supreme Court ruled that the various petitions and notices seeking to appeal to that Court would be held in abeyance, with no action, pending further order of the Supreme Court. In its second order, the Supreme Court allowed the State of North Carolina’s Petition for Discretionary Review Prior to Determination by the Court of Appeals and Plaintiff’s Petition for Discretionary Review Prior to Determination by the Court of Appeals. The second order also remanded this case to the Superior Court “for the purpose of allowing the trial 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” (the “Remand Order”). (ECF No. 13 [“Remand Or.”].) In its third order, Supreme Court Chief Justice Paul M. Newby assigned the task identified in the Remand Order to the undersigned Special Superior Court Judge. (Designation Or., ECF No. 1.) The Remand Order permitted the undersigned to make findings of fact

and conclusions of law and to certify any amended order to the Supreme Court within thirty days, meaning on or before 20 April 2022. (Remand Or. 2.)

15. Pursuant to the Supreme Court's directives, the undersigned on 22 March 2022 issued a Notice of Conference for Purposes of Developing a Schedule for Further Briefing and Argument, (ECF No. 2), and conducted an initial conference with the parties on 24 March 2022. Following the initial conference, the Court entered its order of 24 March 2022 noticing a hearing for 13 April 2022 and providing a schedule for briefing, submission of affidavits and other evidence to be considered. (Scheduling Or. and Notice of Hearing, ECF No. 5.) The next day, the undersigned entered a Supplemental Briefing Order, (ECF No. 6), directing the parties to provide information to the Court, among other issues, directly related to:

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).

(Supp. Br. Or. 2.)

16. In accordance with the Court's scheduling directives, on 4 April 2022, the State of North Carolina filed the Affidavit of Kristin L. Walker, Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management, (ECF No. 12), along with attachments to her affidavit, (ECF Nos. 12.1–12.4), explaining, in Ms. Walker's opinion, based on her review and the review of assistants under her supervision, what portions of years 2 and 3 of the CRP were funded by the Budget Act.

17. In summary, Ms. Walker testified that, by her calculation, the Budget Act funded approximately 63 percent of year 2 CRP programs and 49 percent of year three programs. (Walker Aff. ¶ 6.) Further, Ms. Walker testified that the North Carolina treasury would contain \$2.38 billion unappropriated and unreserved in fiscal year 2021–22, \$22 million unappropriated and unreserved in fiscal year 2022–23, and that the State's Savings Reserve would contain \$4.25 billion in unappropriated funds at the end of the two-year budget cycle. (Walker Aff. ¶ 8.)

18. On 8 April 2022, the parties filed briefs and supporting documents including affidavits and proposed findings of fact and conclusions of law. (ECF Nos. 20–27.)

19. On 13 April 2022, the Court heard oral argument in this matter.

20. Following the 13 April hearing, the parties submitted further position statements, charts, and information regarding their respective positions.

21. The original deadline for the trial court to provide the Supreme Court with its certified order was 20 April 2022. On 19 April 2022, the trial court filed a Request

for Extension of Time to File Order on Remand, (ECF No. 42), seeking a seven-day extension of time to comply with the Supreme Court’s Remand Order. On 20 April 2022, the Supreme Court granted the trial court’s extension request. (ECF No. 44.)

22. Also on 20 April 2022, the trial court issued a Notice of Hearing for a follow-up conference on 22 April 2022 with counsel regarding disagreements between them as to the amount of funding provided in the Budget Act for specific programs in the CRP. (ECF No. 43.) On 22 April 2022, the undersigned conducted the follow-up conference with counsel. On 25 April 2022, the Legislative Intervenors provided the Court with information regarding their position on issues raised during the 22 April 2022 hearing. (Leg. Intervenors’ Supp. Resp. to Court’s Question at Apr. 22, 2022 Hearing, ECF No. 47 [“Leg. Supp. Resp.”].) The matter is now ripe for ruling.

II.

SCOPE OF ISSUES ON REMAND

23. The parties have spent considerable time arguing the scope of the issues to be addressed by the trial court on remand. Specifically, the parties disagree on the proper interpretation of the Supreme Court’s Remand Order and the directive by the Supreme Court that this Court 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 10 November Order.]” (Remand Or. 2.)

24. The Legislative Intervenors urge, pursuant to their interpretation of the Remand Order, that the Court make a *de novo* legal determination on the legality and enforceability of the 10 November Order — claiming that, as concluded by the

panel of the Court of Appeals, the trial court lacked legal authority to order funds transferred from the North Carolina treasury to fund specific educational programs. Additionally and alternatively, the Legislative Intervenors ask the trial court to re-examine the evidence in the record, including an examination of the programs funded by the Budget Act and determine that the Budget Act as passed fully satisfies the State's obligation to provide K-12 students with a sound basic education as established by the Supreme Court in *Leandro v. State*, 346 N.C. 336 (1997).

25. By comparison, Plaintiffs and the State Defendants contend that the trial court's task is simply to examine the Budget Act as passed and determine the amount of funding provided therein for each of the CRP programs during years 2 and 3 of the CRP – thereby permitting the trial court to mathematically determine the amount of underfunding of the CRP by the Budget Act. Based on these determinations, the Plaintiffs and State Defendants contend that the 10 November Order should be amended to provide for the transfer of the revised amounts of funding necessary to comply with the CRP.

26. As to the Legislative Intervenor's first argument, the Court acknowledges that the Court of Appeals has already ruled on the enforceability of the 10 November Order. As noted above, on 30 November 2021, a panel of the Court of Appeals ruled that "the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court." *In re. the 10 November 2021 Order in Hoke County Bd. Ed. et al. v. State of N.C. and W. David Lee*, at 2. The Court of Appeals' 30 November

Order has not been overruled or modified and the undersigned concludes that it is binding on the trial court. Accordingly, this court cannot and shall not consider the legal issue of the trial court's authority to order State officers to transfer funds from the State treasury to fund the CRP. Rather, the undersigned believes that this court should, by an amended order, comply with the Court of Appeals' determination.

27. The Court also declines to determine, as Legislative Intervenors urge, that the Budget Act as passed presumptively comports with the constitutional guarantee for a sound basic education. To make a determination on the compliance of the Budget Act with the constitutional right to a sound basic education would involve extensive expert discovery and evidentiary hearings. This Court does not believe that the Supreme Court's Remand Order intended the undersigned, in a period of 30 days, or, as extended, 37 days, to perform such a massive undertaking.

28. Rather, the Court understands its mandate from the Supreme Court to require the trial court to enter a reasoned order which includes findings of fact and conclusions of law in two distinct categories. First, this Court is directed to determine whether the Budget Act as passed by the Legislature and signed by the Governor eight days after the 10 November Order, funds to any extent (and if so, to what extent), programs in years 2 and 3 of the CRP. Logically, if the Budget Act fully funds all of the programs and priorities during years 2 and 3 of the CRP, the 10 November Order, to the extent it orders State officials to transfer a total of \$1,753,153,000.00 to DHHS, DPI, and the UNC System would arguably be mooted or made unnecessary by events transpiring subsequent to the entry of the 10 November Order.

29. Second, the Court understands that the Supreme Court's mandate implicitly requires this Court to inquire into the current status of the State budget and how appropriations in the Budget Act affect the amount of unappropriated funds in the State treasury. In this regard, the undersigned interprets the 10 November Order to have been based or supported, at least in substantial part, on the trial court's finding that there were sufficient unappropriated funds in the North Carolina treasury to fund years 2 and 3 of the CRP.

30. Finally, this Court understands that, depending on the outcome of the first two evaluations, if this Court concludes that the relief provided in the decretal provisions of the 10 November Order should be modified or amended, this Court is to enter an order so amending the trial court's earlier order. To the extent this Court may have misinterpreted its task in the Remand Order, it stands ready to comply to the best of its ability to any further orders and instructions of the Supreme Court.

III.

FINDINGS OF FACT⁴

31. Pursuant to the Supreme Court's directive, the Court makes the following findings of fact.

32. The Court requested and was provided information by all parties regarding the provisions of the Budget Act as they relate to the specific programs to be

⁴ To the extent any finding contained in this section of the Court's order is more properly considered a conclusion of law, the undersigned intends it to be so considered. Similarly, to the extent any conclusion of law made hereinafter is more properly considered a finding of fact, the undersigned intends it to be so considered.

undertaken during years 2 and 3 of the CRP.⁵ (*See* Scheduling Or. and Supplemental Br. Or., ECF Nos. 5–6.)

33. Based on the Court’s review of analyses provided to it by the North Carolina Office of State Budget and Management (“OSBM”) and the General Assembly’s Fiscal Research Division (“FRD”), and the arguments and submissions of the parties, the evidence demonstrates that significant necessary services for students, as identified in the CRP, remain unfunded and/or underfunded by the Budget Act.⁶

34. In the 10 November Order, the trial court determined that it would cost approximately \$1.75 billion to fund years 2 and 3 of the CRP. (*See* 10 Nov. Or. 19.) Based on the materials and evidence before it, the Court finds that the Budget Act fails to provide nearly one-half of those total necessary funds. Specifically, the Budget Act funds approximately 63% of the total cost of the programs to be conducted during year 2 and approximately 50% of the total cost of the programs to be conducted during year 3.

35. The parties submitted to the Court two competing spreadsheets purporting to show the funding status of each CRP program during years 2 and 3. (*See* Trogdon

⁵ The CRP covers a period of eight years during which a host of different educational programs and initiatives are to be initiated and conducted. The CRP is broken down by year and initiative or program and provides an anticipated annual cost for each of the initiatives and programs during any given year.

⁶ While the focus of the Court’s inquiry pursuant to the Remand Order is on appropriations in the Budget Act to fund the programs in years 2 and 3 of the CRP, that funding is but a portion of the overall investment made by the State of North Carolina, in its legislative appropriations every two years, to educate its children.

Aff. Ex. D, ECF No. 27.4 [“FRD Chart”]; Walker Aff. Ex. 2, ECF No. 12.2 [“OSBM Chart”].)

36. The chart submitted by the State of North Carolina (the “OSBM Chart”) was prepared by Kristen L. Walker, Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management. The data and conclusions within the OSBM Chart are endorsed for the most part⁷ by the State, Plaintiffs, and the Penn Intervenors.

37. The chart submitted by the Legislative Intervenors (the “FRD Chart”) was prepared under the supervision of Mark Trogon, Director of Fiscal Research at the nonpartisan Fiscal Research Division (“FRD”), a division of the North Carolina General Assembly. (Trogon Aff. ¶¶ 1, 49, ECF No. 27.)

38. The OSBM Chart and the FRD Chart are largely in agreement on the funding status of the CRP programs for years 2 and 3. Areas of disagreement between the two charts are as follows:

- a. The Budget Act appropriated funds to several CRP programs where such funds were provided by the federal American Rescue Plan Act (ARPA) and the Elementary and Secondary Schools Emergency Relief (“ESSER III”) Fund.⁸ (ARPA, Public Law 117-2, 50 Stat. 664 (March 11, 2021). The FRD Chart credits CRP programs as funded to the extent the General Assembly has appropriated federal ARPA

⁷ Based on supplemental filings by the parties, Ms. Walker’s numbers for certain program expenses were modified to account for federal funding and program grants that were not included in her original calculations. *See infra* n.9.

⁸ *See* FRD Chart rows 18, 27, 30, 39, 44, 52, 59, 61.

and ESSER III monies to fund those programs. The OSBM Chart treats some of those programs as unfunded.⁹

- b. The FRD Chart includes \$59,750,575 included in the Budget Act which would fund CRP programs which do not begin or require funding until year 4 of the CRP. (FRD Chart rows 35–37.) The OSBM Chart does not include this funding.
- c. The OSBM Chart acknowledges, in addition to \$18,750,000 each year for years 2 and 3 in federal funds from ESSER III, additional funding in two different appropriations for professional development in the Budget Act in the amounts of \$2,500,000 and \$1,411,256, for year 2 of the CRP. (OSBM Chart row 31.) The FRD Chart does not include these funds as the Budget Act does not specifically earmark any of these funds for professional development and thus there is no certainty the funds will be put to such use. (Trogon Aff. ¶ 50(d)(i).)
- d. The OSBM Chart credits \$305,000 in each of CRP years 2 and 3 toward CRP program III.E.ii.2. where the Budget Act appropriates that sum to support salary increases for personnel at three residential schools for the deaf and blind. (See OSBM Chart row 33.) The FRD Chart does not include this funding due to the specialized

⁹ On 14 April 2022, the State of North Carolina filed a chart containing partial revisions to the OSBM Chart, (ECF No. 37.4 [“State’s Ex. 4”]). The revised chart acknowledges funding from the ARPA childcare block grant for CRP programs VI.B.iv.1 and VI.G.ii.1, and thus the revised chart changes those programs from unfunded, (*see* OSBM Chart rows 51, 59), to fully funded, bringing it in agreement with the FRD Chart regarding those programs. (State’s Ex. 4 rows 6, 14.)

nature of these schools and because the CRP does not specifically mention them. (*See* Trogdon Aff. ¶ 50(d)(ii).)

- e. The OSBM Chart included funds which were appropriated for the “enhancement teacher allotment,” CRP program III.C.ii.1. (OSBM Chart row 30.) The FRD Chart does not include these funds because they were not appropriated by the Budget Act, but instead were previously appropriated by the General Assembly in 2018 N.C. Sess. Laws 2, § 5(d).

39. The FRD Chart notes that the General Assembly appropriated additional funds to K-12 and early education which are not contemplated by the CRP. (Trogdon Aff. ¶ 51.) These appropriations include capital funding for school business systems modernization, public school building repair and renovations, and needs-based capital projects. (Trogdon Aff. ¶¶ 52–53.)

40. After careful consideration of the materials and oral argument presented by all parties to this matter, and because the Court finds that neither of the parties has fully and accurately presented the amount of year 2 and 3 CRP funding provided by the Budget Act, the Court, based upon its own calculations, finds the figures shown in the chart appended to this Order as Exhibit A.

41. The Court started its analysis by use of the FRD chart.¹⁰ (*See* FRD Chart 1–4.) The Court then adjusted the chart in accordance with the following principles:

¹⁰ The decision to use the FRD Chart as a starting point was based on the fact that the Court agrees with the FRD Chart’s inclusion of federal monies from ESSER III and ARPA which the General Assembly appropriated for years 2 and 3 CRP programs, and the OSBM Chart did not include such federal monies for several programs. The Court considers those funds

- a. Where the Budget Act has appropriated *federal* funding, via ARPA or ESSER III, for an item in year 2 and/or year 3, the Court considers such funding to be available to the responsible party during either year 2 or year 3. In those cases, funding is split such that it is allocated first to year 2, with any excess funding allocated to year 3.
- b. Where the Budget Act has appropriated *state* funding to CRP programs, such funding is available to the responsible party only during the year in which it was appropriated. In those cases, funds appropriated for CRP year 2 are not available for year 3, or vice versa, even if there are excess funds available.
- c. Where the Budget Act has provided more funds for a program than the CRP requires for that year, the Court considers the program to be overfunded.
- d. To the extent that the Budget Act appropriates funds for CRP programs *outside* of years 2 and 3 or overfunds a CRP program during years 2 and 3, the Court does not credit those appropriations. (See FRD Chart rows 35–37.) The 10 November Order dealt solely with funding for years 2 and 3 of the CRP and only determined that the CRP programs during those two years should be fully funded — not

properly included in a calculation of the extent to which the CRP may be underfunded, notwithstanding the fact that the funds in question originate from sources outside the State treasury or State revenue. Therefore, the Court has credited those items as funded up to the amount of funding required for the CRP program in question.

overfunded. Accordingly, funding in subsequent years or funding in excess of the amount required by the CRP is not relevant to the Court's present inquiry.

42. The Court has reviewed the sums and calculations contained in the OSBM Chart and FRD Chart and resolving the disagreements between the two finds as follows:

- a. Where the Budget Act appropriates sufficient federal monies from ESSER III and ARPA grants for years 2 and 3 CRP programs, the Court considers those programs to be fully funded for years 2 and 3 notwithstanding the fact that the funds in question originate from sources outside the State treasury or State revenue. Therefore, the Court has credited those items¹¹ as funded up to the amount of funding required for the CRP program in question.
- b. The CRP program for professional development, (CRP III.C.iii.1.), is fully funded for years 2 and 3 of the CRP via federal ESSER III funds, (*see* FRD Chart row 27; OSBM Chart row 31), and accordingly, the Court need not determine whether the two allotments in the amounts of \$2,500,000 and \$1,411,256, (*see* OSBM chart rows 32–33) are properly credited to CRP program III.C.iii.1.
- c. The Budget Act's appropriation of \$305,000 in each of CRP years 2 and 3, which the state has directed be spent on salary supplements

¹¹ *See* rows 18, 27, 30, 39, 44, 52, and 61 of the FRD Chart.

for licensed personnel at the State’s residential schools for the deaf and blind, is not properly credited to CRP program III.E.ii.2. (*See* OSBM Chart row 32.) As acknowledged by the legislative intervenors, this appropriation applies only to residential schools, and is not available to fund teacher salaries in local school systems as contemplated by program III.E.ii.2. (Leg. Supp. Resp. ¶ 2.) The Court agrees, and accordingly does not include the appropriation of \$305,000 for each of years 2 and 3 in its calculation.

d. Although the Program Enhancement Teachers program, (CRP program III.C.ii.1), was fully funded by 2018 N.C. Sess. Laws 2, § 5(d), prior to the passage of the Budget Act, the Court nonetheless credits such funding, as to do otherwise would indicate that a CRP program remains unfunded when it is, in fact, fully funded.

43. The Budget Act reserves during each year of the two-year budget cycle \$1.134 billion to the State’s Savings Reserve, which brings the total of unappropriated funds in the State’s Savings Reserve to \$4.25 billion after the fiscal year 2022–23 legislatively-mandated transfer. (Walker Aff. ¶ 8; Trogdon Aff. ¶ 42.) The Savings Reserve “is established as a reserve in the General Fund and is a component of the unappropriated General Fund balance.” N.C.G.S. § 143C-4-2.

44. Under North Carolina law,

[e]ach Current Operations Appropriations Act enacted by the General Assembly shall include a transfer to the Savings Reserve of *fifteen percent (15%) of each fiscal year’s estimated growth in State tax revenues* that are deposited in the General Fund, except that if that transfer

would cause the balance of the Reserve to exceed the recommended Savings Reserve balance developed pursuant to subsection (f) of this section then the amount transferred pursuant to this subsection shall be reduced accordingly.

N.C.G.S. § 143C-4-2(d) (emphasis added).

45. The Budget Act includes significant reductions in the rates of certain personal income and corporate taxes such that the projected tax revenue to be received by the State during the Budget Act's two-year cycle is reduced from current levels by over \$2.3 billion. Due to the fact that there is no estimated growth in State tax revenues during the budget cycle, the \$1.134 billion transferred into the Savings Reserve each of the next two budget years are not required pursuant to the fifteen percent (15%) statutory transfer, but are instead a transfer made in the discretion of the General Assembly. In addition to the discretionary Savings Reserve transfers provided for in the Budget Act, the Budget Act also provides for the discretionary transfer of over \$2 billion into the State's Capital and Infrastructure Reserve.

46. As a matter of mathematical calculation, the funds transferred on a discretionary basis to the State's Savings Reserve and the State's Capital and Infrastructure Reserve during the two-year budget cycle is substantially in excess of the amount necessary to fully fund the CRP during years 2 and 3 of the CRP.

IV.

CONCLUSIONS OF LAW

47. Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

48. Based on the Supreme Court’s Remand Order, and the express directive contained therein, this Court has authority to reconsider the trial court’s 10 November Order. Further, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, a trial court can reconsider any interlocutory ruling, like the 10 November Order, at any time prior to entry of final judgment and adjudication of the rights and liabilities of all parties to the proceeding. *See Pender Farm Dev., LLC v. NDCO, LLC*, 2020 NCBC LEXIS 110, at *4 (N.C. Super. Ct. Sep. 25, 2020). Reconsideration is within the trial court’s discretion, *W4 Farms, Inc. v. Tyson Farms, Inc.*, 2017 NCBC LEXIS 99, at *5 (N.C. Super. Ct. Oct. 19, 2017), and may be especially appropriate where an intervening development or change in controlling law has occurred. *See e.g. Pender v. Bank of Am. Corp.*, No. 3:05-CV-238-MU, 2011 U.S. Dist. LEXIS 1838, at *7 (W.D.N.C. Jan. 7, 2011) (citation omitted).

49. In this regard, the Court notes that, as noted previously herein, (*see supra* ¶ 11), even prior to assumption of jurisdiction of this matter by the Supreme Court and entry of its Remand Order, the trial court had, on 30 November 2021 issued a notice of hearing to allow the trial 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.”

50. The Budget Act, as passed and enacted, when combined with other funds properly considered and included, partially but not totally funds years 2 and 3 of the CRP. Specifically, of a total cost of \$1,753,153,000 necessary to fund the programs called for in the CRP during the two years in question, the Budget Act, when

combined with other funds properly considered and included, provides funding for CRP programs during years 2 and 3 in the amount of \$968,046,752. As a result, the total underfunding of CRP programs during years 2 and 3 of the CRP is \$785,106,248 in the aggregate.

51. The underfunding of years 2 and 3 of the CRP, on a per-entity basis is as follows:

- a. Underfunding of programs for which DHHS is responsible:
\$142,900,000;
- b. Underfunding of programs for which DPI is responsible: \$608,006,248;
- c. Underfunding of programs for which the UNC System is responsible:
\$34,200,000.¹²

52. At the time the 10 November Order was entered, the State's reserve balance included \$ 8 billion and \$ 5 billion in forecasted revenues at that time exceeding the existing base budget. (10 Nov. Or. ¶ 22.)

53. The Budget Act anticipates a net of \$2.38 billion unappropriated and unreserved funds at the end of Fiscal Year 2021–22, the first year of the two-year budget cycle in the Budget Act. (Walker Aff ¶ 8.) The Budget Act also anticipates that the unappropriated balance remaining at the conclusion of fiscal year 2021–22 will remain available to fund appropriations and reservations in fiscal year 2022–23.

¹² Attached as Exhibit A hereto is a chart listing CRP programs to be conducted during years 2 and 3, the amount of funding required for each CRP program during each year of years 2 and 3, the amount of funding by the Budget Act and other funds properly included in determining aggregate funding of the CRP programs during years 2 and 3, and the amount of underfunding of the same.

(Trogon Aff. ¶ 41.) The Budget Act thus projects that the State will have an unappropriated, *unreserved* balance of \$104,638 at the conclusion of fiscal year 2022–23. (Trogon Aff. ¶ 41 (emphasis added).) But because funds in the Savings Reserve are defined by N.C.G.S. § 143C-4-2(a) as being “a component of the unappropriated General Fund balance[,]” the funds transferred by the Budget Act, totaling \$1.134 billion in each of fiscal years 2021–22 and 2022–23 remain part of the General Fund balance. Accordingly, the unappropriated (but not “unreserved”) balance in the General Fund at the conclusion of fiscal year 2022-2023 will be in excess of \$4.25 billion.

54. Taking the two-year budget as a whole, the General Fund does contain sufficient unappropriated monies to make the transfer anticipated by the 10 November Order and the lesser amount of underfunding identified above.

55. The Court of Appeals has determined that the trial court had no proper basis in law to direct the transfer by State officers or departments of funds to DHHS, DPI, and the UNC System. As such, this Court concludes that the 10 November Order should be amended to remove a directive that State officers or employees transfer funds from the State Treasury to fully fund the CRP but should amend the 10 November Order to determine that the State of North Carolina has failed to comply with the trial court’s prior order to fully fund years 2 and 3 of the CRP.

56. The Order should be further amended to determine specifically that the additional amounts that are due to DHHS, DPI, and the UNC System for undertaking

the programs called for in years 2 and 3 of the CRP should be modified and amended as follows:

- a. The amount to be provided to DHHS should be reduced from \$189,800,000 to \$142,900,000
- b. The amount to be provided to DPI should be reduced from \$1,522,053,000 to 608,006,248.
- c. The amount to be provided to the UNC System should be reduced from \$41,300,000 to \$34,200,000.

57. The Order should be amended to include a judgment that the DHHS, DPI, and UNC System have and recover from the State the sums set forth in paragraph 56 immediately above.

V.

ORDER

58. It is THEREFORE ORDERED that decretal paragraphs 1–9 on pages 19–20 of the trial court’s 10 November Order are stricken and are amended as follows:

1. It is hereby ORDERED, ADJUDGED AND DECREED that the Department of Health and Human Services; the Department of Public Instruction, and the University of North Carolina System have and recover from the State of North Carolina to properly fund years 2 and 3 of the Comprehensive Remedial Plan the following sums in addition to those sums otherwise provided for the Comprehensive Remedial Plan by the Budget Act and federal or other funds made available:

- a. The Department of Health and Human Services recover from the State of North Carolina the sum of \$142,900,000;
- b. The Department of Public Instruction recover from the State of North Carolina the sum of \$608,006,248; and
- c. The University of North Carolina System recover from the State of North Carolina the sum of \$34,200,000.
- d. The DHHS, DPI, UNC System, and all other State agents or State actors receiving funds under the Comprehensive Remedial Plan, are directed to administer those funds consistent with, and under the time frames set out in the Comprehensive Remedial Plan, including the Appendix thereto.

2. To the extent any other actions are necessary to effectuate the year 2 and 3 programs in the Comprehensive Remedial Plan, any and all other State actors and their officers, agents, servants, and employees are authorized and directed to do what is necessary to fully effect years 2 and 3 of the Comprehensive Remedial Plan.

3. The funds adjudged to be owed by the State to DHHS, DPI, and the UNC System under this Order are for maximum amounts necessary, when combined with sums already appropriated by the General Assembly in the Budget Act or otherwise, to provide the services and accomplish the purposes described in years 2 and 3 of the Comprehensive Remedial Plan. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these

purposes and the savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability.

This Order is certified to the North Carolina Supreme Court.

SO ORDERED, this the 26th day of April, 2022.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge