

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

HOKE COUNTY BOARD OF)
EDUCATION; et al.,)
)
Plaintiffs,)
)
and)
)
CHARLOTTE-MECKLENBURG BOARD)
OF EDUCATION,)
)
Plaintiff-Intervenor,)
)
and)
)
RAFAEL PENN, et al.,)
)
Plaintiff-Intervenors,)
)
v.)
)
STATE OF NORTH CAROLINA and the)
STATE BOARD OF EDUCATION,)
)
Defendants,)
)
and)
)
CHARLOTTE-MECKLENBURG BOARD)
OF EDUCATION,)
)
Realigned Defendant,)
)
and)
)
PHILIP E. BERGER, in his official)
capacity as President *Pro Tempore* of the)
North Carolina Senate, and TIMOTHY K.)
MOORE, in his official capacity as Speaker)
of the North Carolina House of)
Representatives,)
)
Intervenor-Defendants.)

**PLAINTIFFS' RESPONSE TO THE
STATE OF NORTH CAROLINA'S
SUBMISSION REGARDING THE
EXTENT TO WHICH THE
2021 APPROPRIATIONS ACT
COMPLIES WITH YEARS 2 & 3 OF
THE COMPREHENSIVE
REMEDIAL PLAN**

INTRODUCTION

This case is on remand from our Supreme Court for the limited purpose of determining “what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief” granted in the trial court’s order issued on 10 November 2021 concerning Years 2 & 3 of the Comprehensive Remedial Plan (the “Plan”).

On 4 April 2022, Defendant State of North Carolina submitted an affidavit from its Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management (the “State Affidavit”). ECF No. 12. The State Affidavit sets out an accounting showing the extent to which the 2021 Appropriations Act, 2021 N.C. Sess. Law 180, complies with Year 2 (fiscal year 2021-2022) and Year 3 (fiscal year 2022-2023) of the Plan. Specifically, it identifies the individual components of the Plan for these two fiscal years that were satisfied by the Appropriations Act and those that were not. The State Affidavit also sets out the gross cash and the net unreserved cash balances held by the State of North Carolina.

Plaintiffs are in agreement with—and do not dispute—the facts set forth in the State Affidavit. Those facts establish that:

- The State has failed to fully fund Years 2 & 3 of the Plan as it was required to do under the Court’s previous orders.
- Among the 44 specific components required to be funded for Year 2, the State provide *no* funding at all for at least 24 of them and only partial funding for others. The State underfunded Year 2 by \$257,418,175.
- Among the 42 specific components required to be funded for Year 3, the State provide *no* funding at all for at least 22 of them and only

partial funding for others. The State underfunded Year 3 by \$537,409,782.

- The State has the fiscal resources available to fund Years 2 & 3 of the Plan in full, but has chosen to disregard the Court’s prior orders. The State admits that, as of 25 March 2022, it has a gross cash balance of \$9.84 *billion* and a net unreserved cash balance of \$4.79 *billion* – amounts that are many multiples higher than the relatively modest amounts needed to fully fund Years 2 & 3 and comply with its constitutional obligations.

As the State Affidavit makes plain, the 2021 Appropriations Act falls *well* short of what is needed to implement both Years 2 & 3 of the Plan, despite the fact that there is more-than-enough unappropriated cash to do so.

THE ISSUE BEFORE THE COURT ON REMAND

The Supreme Court granted the State’s and Plaintiffs’ respective requests for by-pass review with regard to the appeal of the trial court’s 10 November 2021 Order (the “10 Nov. Order”). ECF No. 13. The issues on appeal for which the Supreme Court granted review, and thus has jurisdiction over now, involve significant constitutional questions about the authority of the judiciary—under the circumstances present in this 27-year long litigation—to order certain state actors to expend the funds necessary to implement a remedy for established and ongoing violations of fundamental constitutional rights.¹

¹ The issues for which the Supreme Court granted review and will decide include:

- Whether the judiciary has the express and/or 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 and, if so, what specific remedies may the judiciary order?
- Whether the General Assembly’s authority to appropriate funds pursuant to Article V, § 7 of the North Carolina Constitution overrides and renders meaningless the constitutional right to a sound basic education under Article I, § 15 and Article IX, § 2? (*continued on next page*).

Critically here, the Supreme Court also issued a limited remand (of “no more than thirty days”) for the Court to determine the following issue: what effect, if any, the 2021 Appropriations Act had on the relief granted in the trial court’s 10 Nov. Order. *Id.* This is the same issue that the Court had planned to address previously, but the Court could not do so after the appellate process was initiated.

Specifically, the relief granted in the 10 Nov. Order concerned the funding required to implement Years 2 & 3 of the Plan. At the time the 10 Nov. Order was entered, a budget had yet to be enacted pertaining to the fiscal years relevant for Year 2 (2021-2022) and Year 3 (2022-2023). Recognizing this, the Court stayed operation of its 10 Nov. Order for thirty days in the event that a budget was passed that may impact the funding amounts set forth in its order.

This happened a week later when the State enacted the 2021 Appropriations Act. Accordingly, on 30 November 2021, the Court issued an order extending the stay of the 10 Nov. Order and stating as follows:

[O]n November 18, 2021, the State enacted the [2021 Appropriations Act]. The Appropriations Act appears to provide for some—but not all—the resources and funds required to implement years 2 & 3 of the Comprehensive Remedial Plan, which may necessitate a modification of the November 10 Order.

-
- Whether the State’s obligations under the North Carolina Constitution to provide for a “general and uniform system of free public schools” that affords all students the opportunity for a sound basic education is unenforceable and therefore meaningless when the General Assembly refuses to appropriate the funds necessary to do so?
 - 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, § 15 of the North Carolina Constitution, which is the express will of the people, is an appropriation “made by law”?

See **Exhibit 1** (30 November 2021 Order). In that Order, the Court noticed a hearing for 13 December 2021. *Id.* at 3. The specific purpose of the hearing was for the State “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.” *Id.* Before that hearing could happen, however, the appellate process was initiated.

Accordingly, the Court did not have the opportunity to address the impact of the 2021 Appropriations Act on its 10 Nov. Order—*i.e.*, what funding requirements for Years 2 & 3 of the Plan were satisfied by the Appropriations Act and which were not—before the appeal. The Supreme Court has ordered a brief remand for the Court to address this issue now.

The fact that the State *must* fully fund and implement each of the specific components of Years 2 & 3 of the Plan is not in dispute. The State represented to the Court—without equivocation—that the Plan’s specific components are the “necessary and appropriate actions that *must* be implemented to address the continuing constitutional violations and to provide the opportunity for a sound basic education to all children in North Carolina.” See **Exhibit 2** (State’s Submission of the Plan at 4). The State further assured the Court it was “committed” to implementing the Plan in full to satisfy the Court’s previous orders, as well as the mandates of the Supreme Court. *Id.* at 2.

Based on the State’s representations and its own substantial review of the Plan (as well as years-worth of record evidence addressing the Plan’s specific components), the Court ordered the State to implement the Plan—“in full and in accordance with

the timelines set forth therein”—such that constitutional rights of North Carolina children could finally be vindicated. See **Exhibit 3** (11 June 2021 Order at 7). The Court found that “the actions, programs, policies, and resources propounded by and agreed to [by] State Defendants, and described in the Comprehensive Remedial Plan, are necessary to remedy continuing constitutional violations and to provide the opportunity for a sound basic education to all public school children in North Carolina.” *Id.* That order was *not* appealed. It is the law of the case.

THE QUESTIONS ASKED BY THE COURT

At issue here are Years 2 & 3 of the Plan. As the Court is aware, the Plan sets out the “nuts and bolts” for how the State will remedy its continuing constitutional failings to North Carolina’s children over eight fiscal years (2021-2028). For each year, the Plan identifies (1) the specific action items identified by the State as necessary to achieve compliance with the Supreme Court’s mandates, (2) the applicable agency charged to implement each specific action item, (3) a detailed 8-year timeline over which these specific and necessary components must be implemented, and (4) the precise funding, as determined by the State, required to implement each action and for each of the eight years. See **Exhibit 2** (the Plan).

Plaintiffs have conducted a comprehensive review of these elements of the Plan for Years 2 & 3, the 2021 Appropriations Act, and other publicly-available State documents concerning the budget. Based on this review, Plaintiffs inform the Court that they do not dispute the facts set forth in the State Affidavit regarding either (a) the specific components of the Plan for Years 2 & 3 that were satisfied by the 2021

Appropriations Act and those that remain unfunded or under-funded or (b) the amounts of gross and net unreserved cash balances presently held by the State of North Carolina. Plaintiffs will thus respond to each of the three questions presented by the Court based on the undisputed information provided by Defendant State of North Carolina.

1. ***What is 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?***

The Appropriations Act appropriated \$433,233,325 to fund the specific action items required in Year 2 of the Plan. *See* ECF No. 12.3 (State Affidavit at Ex. 3). The total amount required by the Plan, however, was \$690,651,500. *Id.* The State thus failed to fund \$257,418,175 (or \$690,651,500 - \$433,233,325) of the amount required to fully implement Year 2. *Id.* The Plan sets out forty-four (44) specific action items in Year 2 which require funding to implement. *Id.* As the State Affidavit correctly acknowledges, at least twenty-four (24) of those items received no funding at all (and some others received only partial funding) under the Appropriations Act. *Id.*

The Appropriations Act appropriated \$525,091,718 to fund the specific action items required in Year 3 of the Plan. *See* ECF No. 12.3 (State Affidavit at Ex. 3). The total amount required by the Plan, however, was \$1,062,501,500. *Id.* Thus, the State failed to fund \$537,409,782 (or \$1,062,501,500 - \$525,091,718) of the amounts required to fully implement Year 3. *Id.* The Plan sets out forty-two (42) specific action items in Year 3 requiring funding for implementation. *Id.* As the State

Affidavit states, at least twenty-two (22) of these items received no funding under the Appropriations Act. *Id.*

There are three agencies charged with administering the respective components of Years 2 & 3 of the Plan: the Department of Public Instruction (“DPI”), the Department of Health and Human Services (“DHHS”), and the University of North Carolina System (“UNC”). Plaintiffs agree with the comparison proffered in the State Affidavit showing the underfunding, in total and by the respective administering agency, between the funding required for Years 2 & 3 of the Plan and the funding provided in the Appropriations Act. *See* ECF No. 12.3. For ease of reference, Plaintiffs provide a copy of the State’s accounting:

Table 2: Funding by Administering Agency

	Year 2 (FY 2021-22)			Year 3 (FY 2022-23)		
	In Plan	Funded	Underfunded	In Plan	Funded	Underfunded
DPI	\$ 597,551,500	\$ 419,866,224	\$ 177,685,276	\$ 924,501,500	\$ 508,558,580	\$ 415,942,920
DHHS	\$ 76,400,000	\$ 9,846,101	\$ 66,553,899	\$ 113,400,000	\$ 11,512,138	\$ 101,887,862
UNC	\$ 16,700,000	\$ 3,521,000	\$ 13,179,000	\$ 24,600,000	\$ 5,021,000	\$ 19,579,000
TOTAL	\$690,651,500	\$433,233,325	\$ 257,418,175	\$1,062,501,500	\$525,091,718	\$ 537,409,782

There is an additional critical fact admitted by the State in its Affidavit that should be emphasized. The State acknowledges that “[i]n some cases, the [Plan] calls for recurring (R) funds, but the Budget appropriated **non**recurring (NR) funds.” *Id.* (emphasis added). While the use of nonrecurring funds (which is a violation of the Court’s Order to implement the Plan) can provide short-term funds for Years 2 & 3, their use poses a significant risk that the State will be unable to meet its obligations in later years of the Plan (*e.g.*, Years 4 & 5). As expressly set out in the Plan, the

funding requirements for most action items are achieved based on “incremental recurring increases in funding” from Year 1 through Year 8. *See, generally*, Exhibit 2. The failure of the State to use recurring funds in Years 2 & 3 (and indeed the failure to fully fund them) will make it significantly more difficult for the State to comply with the funding levels required in the later years of the Plan, and thus more difficult for the State to meet its constitutional obligations to the children.

2. *What is the amount of funds remaining in the General Fund currently both in gross and net of appropriations in the 2021 Appropriations Act?*

As of 25 March 2022, the State has a gross cash balance of \$9.8 billion and a net unreserved cash balance of \$4.79 billion. ECF No. 12 (State Affidavit at ¶ 9). The Appropriations Act itself reserves \$1.134 billion in Year 2 and \$1.134 billion in Year 3 to the State’s Saving Reserve. *Id.* at ¶ 8. This will, according to the State, bring the total unappropriated cash in that reserve to \$4.25 billion as of 1 July 2022. *Id.*

According to the State’s own submission, the amount of unappropriated funds available to the State therefore vastly exceeds the funds needed to implement the remaining items of Years 2 & 3 of the Plan that were not funded by the Appropriations Act. The same was true at the time the Court entered its 10 Nov. Order. As it does now, the State previously conceded to the Court—on multiple occasions—that the issue is not that the State lacks the money to fund the Years 2 & 3 of the Plan but that it lacks the will to use its resources to remedy its ongoing constitutional violations. *See Exhibit 4* (Court’s 28 September 2021 Order at p. 3, ¶ 5); 10 Nov. Order ¶ 22 (“The State has represented to the Court that more than

sufficient funds are available to execute the current needs of the Comprehensive Remedial Plan.”); *see also* **Exhibit 5** (State’s 6 August 2021 Submission to Court at 1) (State conceding that it “has the fiscal resources to implement the next two years of the [Plan].”); *id.* (“As of July 16, 2021 the Office of the State Controller reports that the State has \$8.0 billion in unappropriated cash balance.”).

It is undisputed, and indeed the law of the case, that hundreds of thousands of school children are being denied their fundamental constitutional right to have an equal opportunity to obtain a sound basic education. That undisputed fact is even more alarming when one considers that the State has more-than-enough resources to fully implement the remedy ordered by this Court but simply refuses to do so.

As held by the Supreme Court, “the children of North Carolina are our state’s most valuable renewable resource.” *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 616, 599 S.E.2d 365, 377 (2004). “If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, *our state courts cannot risk further and continued damage. . . .*” *Id.* (emphasis added). North Carolina’s children have waited long enough.

3. ***What is 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)?***

The State of North Carolina has repeatedly represented to the Court that it has (and has had) more-than-sufficient unreserved funds to fully comply with Years

2 & 3 of the Plan. As explained above, the appropriations in the 2021 Appropriations Act does not change this fact. As the State Affidavit makes plain, even with the operation of the Appropriations Act, the Plan is not fully funded despite the fact that there is more than enough surplus, unreserved cash to remedy the established and on-going constitutional violations.

The Court of Appeals' decision in *Richmond* is, thus, not implicated by the passage of the 2021 Appropriations Act. The *Richmond* case involved certain fees collected from criminal defendants convicted of improper equipment offenses. 254 N.C. App. at 424, 803 S.E.2d at 30. The State placed those fees in the Statewide Misdemeanant Confinement Fund, but Richmond County argued that it was entitled to them. *Id.* While the Court held that it “was well within the judicial branch’s power to order this money—taken from Richmond County in violation of the constitution—to be returned,” it could not do so because the fees had already been allocated to another entity, and the “money [was] gone.” *Id.* at 427-428, 803 S.E.2d at 31. This is not the case here. As set forth in the 10 Nov. Order, the unreserved funds in the General Fund have not been allocated or appropriated to any other entity, and those funds are available for disbursement.

To the extent the Court is asking about the impact of *Richmond*'s other holdings on the scope of the judiciary's authority to direct the transfer of unreserved funds to remedy long-established violations of fundamental constitutional rights impacting school children, and under the circumstances present in this 27-year-long litigation - those issues were previously (and extensively) litigated and are addressed

in the 10 Nov. Order and are squarely before the Supreme Court. Nothing in the 2021 Appropriations Act, which is the limited subject of this remand, impacts the Court’s prior legal analysis – an issue of paramount constitutional significance over which the Supreme Court has granted review and has jurisdiction. Only the numbers have changed.

CONCLUSION

Our Supreme Court remanded this case for the limited purpose of determining “what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief” granted in the 10 Nov. Order. As set forth herein, the 2021 Appropriations Act provides some—but not all—of the funding required for Years 2 & 3 of the Plan, despite the fact that there are more-than-enough unallocated resources to fully fund these years.

Based on the accounting set forth in the State Affidavit, which Plaintiffs do not dispute, 2021 Appropriations Act impacts the remedy set forth in Paragraph 1(a) – (c) (p. 19) of the 10 Nov. Order as follows:

- (a) Department of Health and Human Services (“DHHS”): ~~\$189,800,000.00~~ \$168,441,761.00;
- (b) Department of Public Instruction (“DPI”): ~~\$1,522,053,000.00~~ \$593,628,196.00; and.
- (c) University of North Carolina System: ~~\$41,300,000.00~~ \$32,758,000.00.

Plaintiffs respectfully submit proposed findings of fact and conclusions of law consistent herewith as **Exhibit 6** to this filing.

This the 8th day of April, 2022.

/s/ Melanie Black Dubis _____
Melanie Black Dubis
N.C. Bar No. 22027
Scott E. Bayzle
N.C. Bar No. 33811
Catherine G. Clodfelter
N.C. Bar No. 47653
PARKER POE ADAMS & BERNSTEIN LLP
301 Fayetteville Street, Suite 1400 (27601)
P.O. Box 389
Raleigh, North Carolina 27602-0389
Telephone: (919) 828-0564
Facsimile: (919) 834-4564
melaniedubis@parkerpoe.com
scottbayzle@parkerpoe.com
catherineclodfelter@parkerpoe.com

H. Lawrence Armstrong
ARMSTRONG LAW, PLLC
P.O. Box 187
119 Whitfield Street
Enfield, North Carolina 27823
Telephone: (252) 445-5656
hla@hlalaw.net

*Counsel for Plaintiffs Hoke County Board of
Education, et al.*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with BCR 7.8 and this Court's Order dated March 24, 2022 and contains fewer than 7,500 words exclusive of the caption, index, table of contents, table of authorities, signature blocks, or any required certificates. The brief was typed in 12-point Century Schoolbook font, and the undersigned relied on the word count feature of the software, Microsoft Word 365 Pro Plus.

This 8th day of April, 2022.

/s/ Melanie Black Dubis
Melanie Black Dubis
N.C. Bar No. 22027
Parker Poe Adams & Bernstein LLP
301 Fayetteville Street, Suite 1400 (27601)
P.O. Box 389
Raleigh, North Carolina 27602-0389
Telephone: (919) 828-0564
Facsimile: (919) 834-4564
melaniedubis@parkerpoe.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was electronically filed with the NC Business Court which will automatically send notification of same to the following:

Amar Majmundar
Senior Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
AMajmundar@ncdoj.gov

Matthew Tulchin
Tiffany Lucas
North Carolina Department of Justice
114 W. Edenton Street
Raleigh, North Carolina 27603
MTulchin@ncdoj.gov
TLucas@ncdoj.gov

Neal Ramee
David Noland
Tharrington Smith, LLP
P.O. Box 1151
Raleigh, North Carolina 27602
nramee@tharringtonsmith.com
dnoland@tharringtonsmith.com

Matthew Tilley
Russ Ferguson
W. Clark Goodman
Michael Ingersoll
Womble Bond Dickinson
301 S. College Street, Suite 3500
Charlotte, NC 28202-6037
Matthew.Tilley@wbd-us.com
Russ.Ferguson@wbd-us.com
Clark.Goodman@wbd-us.com
Mike.Ingersoll@wbd-us.com

David Hinojosa
Lawyers Comm. for Civil Rights Under Law
1500 K. Street NW, Suite 900
Washington, DC 20005
dhinojosa@lawyerscommittee.org

Christopher Brook
Patterson Harkavy LLP
100 Europa Drive
Suite 420
Chapel Hill, North Carolina 27517
cbrook@pathlaw.com

Thomas J. Ziko
Legal Specialist
State Board of Education
6302 Mail Service Center
Raleigh, North Carolina 27699-6302
Thomas.Ziko@dpi.nc.gov

Robert N. Hunter, Jr.
Higgins Benjamin, PLLC
301 North Elm Street, Suite 800
Greensboro, NC 27401
rnhunterjr@greensborolaw.com

This 8th day of April, 2022.

/s/ Melanie Black Dubis
Melanie Black Dubis
N.C. Bar No. 22027
Parker Poe Adams & Bernstein LLP
301 Fayetteville Street, Suite 1400 (27601)
P.O. Box 389
Raleigh, North Carolina 27602-0389
Telephone: (919) 828-0564
Facsimile: (919) 834-4564
melaniedubis@parkerpoe.com

**Index of Exhibits To Plaintiffs' Response To
The State Of North Carolina's 4 April 2022 Submission**

- Exhibit 1 30 November 2021 Order
- Exhibit 2 State's Submission of the Plan
- Exhibit 3 11 June 2021 Order
- Exhibit 4 28 September 2021 Order
- Exhibit 5 State's 6 August 2021 Submission to Court
- Exhibit 6 Plaintiffs' Proposed Findings of Fact and Conclusions of Law