STATE OF NORTH CAROLINA

COUNTY OF WAKE

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 95-CVS-1158

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[PROPOSED]

ORDER FOLLOWING REMAND

THIS MATTER comes before the undersigned on remand from the Supreme Court following its decision in *Hoke County Board of Educ. v. State*, 382 N.C. 386, 879 S.E.2d 193 (2022) ("*Hoke County III*"). Pursuant to the Supreme Court's instructions, the Court hereby enters the following Order, which amends and supplements (a) the November 10, 2021, Order entered by Superior Court Judge W. David Lee; and (b) the April 26, 2022, Order Following Remand entered by Superior Court Judge Michael L. Robinson.

PROCEDURAL BACKGROUND

- 1. This lawsuit, which is commonly referred to as the "Leandro" litigation, was filed more than 28 years ago and has resulted in four decisions by the Supreme Court¹ including its most recent decision in Hoke County III. The majority and dissenting opinions in Hoke County III set out the procedural history of the case in detail. See 382 N.C. at 392-429 and 481-510, 879 S.E.2d at 199-220 and 253-69. As a result, the Court recites here only the factual and procedural background necessary to provide context for this Order.
- 2. On January 21, 2020, Judge Lee entered a Consent Order² Regarding Need for Remedial, Systemic Actions for the Achievement of *Leandro* Compliance, in which the Court directed

Those decisions are *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro*"); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Hoke County I*"); *Hoke Cnty. Bd. of Educ. v. North Carolina*, 367 N.C. 156, 749 S.E.2d 451 (2013) ("*Hoke County II*"); and *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 879 S.E.2d 193 (2022) ("*Hoke County III*"). The Court notes that, following the Supreme Court's decision in *Leandro*, the original lead plaintiff in this action, Robert Leandro, graduated and subsequently withdrew from the case. Since that time, the lead plaintiff has not been an individual parent or student, but instead the Hoke County Board of Education. The Court accordingly refers to the Supreme Court's subsequent decisions as "*Hoke County I*," *etc.*, to reflect this distinction.

the State to draft a plan to implement the recommendations of WestEd, a court-appointed consultant, to ensure children in grades K-12 are provided an opportunity for a sound basic education as mandated by the North Carolina State Constitution.

- 3. On March 15, 2021, the State Defendants in the case at that time (*i.e.*, the Executive Branch) submitted a Comprehensive Remedial Plan and Appendix (the "CRP").³ The CRP lists actions to provide the State's children with an opportunity to obtain a sound basic education, set out over an eight-year period. It further lists the party or parties responsible for each step. The Appendix sets out the estimated costs necessary to implement each action item, broken out by fiscal year. "Year 1" of the CRP corresponds to the State's FY 2020-21, and "Year 2" corresponds to FY 2021-22, *etc*.
- 4. On June 7, 2021, Judge Lee entered an order directing the State to implement the CRP in full, in accordance with the timelines set forth therein, and to secure such funding and resources necessary to implement the CRP's programs and policies.
- 5. Between June 7, 2021, and November 10, 2021, the North Carolina General Assembly did not pass, and the Governor did not sign, any legislation appropriating additional money to fund the items called for in the CRP.
- 6. On 10 November 2021, Judge Lee entered an order directing the State Controller, State Treasurer, and the Office of State Budget and Management ("OSBM") to transfer \$1,753,153,000 to the North Carolina Department of Public Instruction ("DPI"), Department of Health and Human Services ("DHHS"), and University of North Carolina System (the "UNC System"), to pay for the

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N.C. Gen. Stat. §1-72.2 provides that, when the State is named as a defendant in a proceeding challenging an act of the General Assembly, that the General Assembly through Legislative Intervenors, represents the Legislative Branch, and that the Governor, here represented by the Attorney General's office, represents the Executive Branch. See N.C. Gen. Stat. § 1-72.2. For ease of reference, the Court will refer to the parties using the designations used in the caption, and accordingly uses "the State" or the "State Defendants" to refer to the Executive Branch agencies represented by the Attorney General's office.

items in Years 2 and 3 of the CRP, and to treat those funds "as an appropriation from the [State's] General Fund."

- 7. On November 18, 2021—eight days after the issuance of Judge Lee's November 10, 2021, Order—the General Assembly passed, and the Governor signed, the Current Operations and Appropriations Act of 2021, 2021 N.C. Sess. L. 180 (the "2021 Appropriations Act"), which established a comprehensive State Budget for FY 2021-22 and 2022-23.
- 8. On December 8, 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).
- 9. The State of North Carolina and Legislative Intervenors each appealed the November 10, 2021, Order.
- 10. In addition to the parties' appeals from the November 10, 2021, Order, the then-State Controller, Linda Combs, filed a petition with the Court of Appeals seeking a Writ of Prohibition restraining the enforcement of the order's transfer provisions. On November 30, 2021, the Court of Appeals granted the Controller's petition and issued a 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." In re 10 November 2021 Order in Hoke Cnty. Bd. of Ed. v. State, et al. (Wake County File 95 CVS 1158), No. P21-511 (N.C. Ct. App. Nov. 30, 2021).
- 11. Plaintiffs and Plaintiff-Intervenors each filed appeals as of right with the Supreme Court seeking to challenge the writ of prohibition. At the same time, they also filed petitions for discretionary review and *certiorari* to address additional issues they believe were raised by the

writ of prohibition. The parties' appeals and petitions from the writ of prohibition have proceeded in the Supreme Court as Case No. 425A21-1. That case is separate from the parties' appeals from Judge Lee's and Robinson's orders, which proceeded before Supreme Court as Case No. 425A21-2.

- 12. On March 21, 2022, the Supreme Court granted the State's and Plaintiffs' "bypass" petitions and agreed to hear their appeals from the November 10, 2021, Order before a determination by the Court of Appeals. The Supreme Court then remanded the case (425A21-2) for a period of 30 days "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 granted" in the November 10, 2021, Order. That same day, Chief Justice Paul Newby assigned the case to Judge Robinson pursuant to Rule 2.1 of the North Carolina Rules of General Practice.
- On April 26, 2022, Judge Robinson entered an Order Following Remand, which he certified back to the Supreme Court. As part of that Order, Judge Robinson recalculated the remaining amounts necessary to fund the items identified in Years 2 and 3 of the CRP and attached a chart specifying the amount of funding necessary for each action item. In addition, Judge Robinson determined that the Court of Appeals' writ of prohibition was binding on the trial court, since it had not been overturned. As a result, he amended Judge Lee's order to delete the provisions requiring State officials to transfer funds from the Treasury, and instead entered a judgment against the State for the amounts shown in his calculations.
 - 14. All Parties appealed Judge Robinson's April 26, 2022, Order.
- 15. On November 4, 2022, the Supreme Court issued its decision on the parties' appeals from the Judge Lee's and Judge Robinson's orders (Case No. 425A21-2). As to the transfer provisions, the Court held that, "[u]nder the extraordinary circumstances of this case[,] the trial

court's November 2021 Order properly directed certain State officials to transfer State funds in compliance with the CRP." *Hoke County III*, 382 N.C. at 429, 879 S.E.2d at 220. The Court then vacated the calculations in Judge Robinson's order, "not because the trial court erred," but because "those calculations ha[d] been functionally mooted by the State's subsequent enactment of the 2022 Budget Act." *Id.*, 382 N.C. at 468, 879 S.E.2d at 244.

- 16. The Supreme Court in *Hoke County III* instructed this Court to do three things on remand: (1) "to recalculate the appropriate transfer amounts required for compliance with years two and three of the CRP in light of the 2022 Budget Act"; (2) "to reinstate [the November 10, 2021 Order's] transfer directive"; and (3) "to retain jurisdiction over the case in order to monitor compliance with its order and with future years of the CRP." *Id*.
- 17. Finally, the Supreme Court stayed (but did not vacate) the writ of prohibition issued by the Court of Appeals to "enable" the trial court to reinstate the transfer provisions of Judge Lee's Order. The Supreme Court then entered a special order that same day (November 4, 2022) in the parties' appeal from the writ of prohibition (Case No. 425A21-1). The order stayed the writ of prohibition "pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion filed in [*Hoke County III*]."
- 18. On December 29, 2022, Chief Justice Newby issued an order assigning this case to the undersigned pursuant to Rule 2.1 of the North Carolina Rules of General Practice.
- 19. On February 6, 2022, the Controller⁴ filed a motion with the Supreme Court asking the Court to reinstate the writ of prohibition and identifying issues that he believed were not addressed by the Court's opinion in *Hoke County III*.

⁴ Linda Combs, who had served as the State Controller, retired effective June 30, 2022. She was replaced by Nels Roseland. On July 22, 2022, the Supreme Court granted a motion to substitute Mr. Roseland for Ms.Combs.

- 20. On March 3, 2022, the Supreme Court entered an order granting the Controller's motion reinstating the writ of prohibition. The parties' appeals from the writ of prohibition (Case No. 425A21-1) remain pending before the Supreme Court.
- 21. On March 10, 2023, the undersigned held a status conference with the parties. In that hearing all parties agreed that, as a result of the Supreme Court's order reinstating the writ of prohibition, this Court's current task on remand must be limited to recalculating the additional amounts required to fund the items called for in Years 2 and 3 of the CRP, and that that this Court is without jurisdiction to reinstate the transfer provisions. The Court subsequently ordered the parties to submit briefs and affidavits reflecting their position as the amounts remaining to fund the items called for in Years 2 and 3 of the CRP.
- 22. On March 17, 2023, the Court held a hearing, at which all parties were represented through counsel, in which it took evidence and argument concerning its recalculation of the remaining amounts required to fund the items called for in the CRP in light of the 2022 State Budget. The Court, having considered the pleadings, affidavits, and testimony of the witnesses appearing at the March 17 hearing, as well as the briefs and arguments of counsel, finds and concludes as follows:

FINDINGS OF FACT

- 23. The Court adopts the findings and conclusions in Judge Lee's November 10, 2021, Order, Judge Robinson's April 26, 2022, Order Following Remand, and the prior Orders incorporated into both, which are all incorporated into this Order as if fully stated herein.
- 24. The current State Budget for the FY 2021-22 and 2022-23 biennium is the product of several appropriations acts. The 2021 Appropriations Act was enacted on November 18, 2022, and established a comprehensive, balanced budget for FY 2021-22 and 2022-23. The 2021

Appropriations Act was subsequently modified through the enactment of two technical corrections bills, one of which made additional appropriations. *See* 2021 N.C. Sess. L. 189; 2022 N.C. Sess. L. 6. On July 11, 2022, the Governor signed the Current Operations Appropriations Act of 2022, 2022 N.C. Sess. L. 74 (the "2022 Appropriations Act"), which made appropriated additional money and made modifications to the State Budget for FY 2022-23.

- 25. Although the State Budget provides significant funds for the State's K-12 educational system, it does not include appropriations that match those called for in the CRP.
- 26. The Court requested, and the parties have provided, calculations showing the additional amounts necessary to fund the items called for in Years 2 and 3 of the CRP. As a result, the parties have submitted two competing charts purporting to show which items called for in Years 2 and 3 of the CRP remain unfunded or underfunded.
- 27. The State (*i.e.*, the Executive Branch) has submitted charts prepared by Anca Elena Grozav, Chief Deputy Director of State Budget for OSBM (the "OSBM Charts"). Plaintiffs, Plaintiff Intervenors, and the Charlotte-Mecklenburg Board of Education, have all stated that they agree with the calculations in the OSBM Chart.
- 28. Legislative Intervenors have submitted a chart prepared under the supervision of Mark Trogdon, the former Director and current Senior Analyst at the Fiscal Research Division ("FRD"), which serves as nonpartisan staff to the General Assembly (the "FRD Chart").
- 29. In addition to the affidavits submitted with the OSBM and FRD Charts, the Court heard testimony from Ms. Grozav, and Brian Matteson, FRD's current Director of Fiscal Research.
- 30. The OSBM Charts and the FRD Chart are largely in agreement when it comes to the amount of funding provided for the items called for in Years 2 and 3 of the CRP. However,

FRD Chart includes additional funding for several items that Legislative Intervenors contend should be included. Those items are as follows:

- a. New Teacher Support Program an additional \$2,000,000 in Year 3
- b. Educator Compensation Study \$109,000 in Year 3;
- c. Disadvantaged Student Supplemental Funding / At Risk Allocation an additional \$26,068,720 in Year 3;
- d. Principal and Assistant Principal Salaries an additional \$6,236,038 in Year 3;
- e. District and Regional Support –\$14,000,000 in Year 3;
- f. Review and Adoption of Core Curricular Resources \$260,000 in Year 3; and
- g. Additional Cooperative and Innovative High Schools \$730,000 in Year 3.
- 31. In addition to these amounts, Legislative Intervenors contend that the Court should not include recurring appropriations called for in Year 2 of the CRP, since that year has now ended.
 - 32. The Court addresses each of these areas of disagreement below.

New Teacher Support Program

- 33. OSBM's chart does not include \$2,000,000, that was provided to the New Teacher Support Program ("NC NTSP") by the Governor from the Governor's Emergency Educational Relief ("GEER") fund.
- 34. The funds for the GEER program were provided to the State by the federal government as part of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Public Law 116-136 (March 27, 2020) and Consolidated Appropriations Act of 2021, Public Law 116-260 (December 27, 2020). The State then appropriated them to the Office of the Governor for the Governor to distribute. *See* 2021 N.C. Sess. L. 3, § 1.1 (appropriating approximately \$42 million to the Governor for distribution under the GEER program).

- 35. It is undisputed that the Governor directed \$2 million from the GEER program to the NC NTSP, and that he did so in August 2022, while this case was pending before the Supreme Court. Despite this, Plaintiffs and the State contend that this \$2 million should not count toward the funding called for in Year 3 because it was provided through a grant from the Governor's office, rather than a direct appropriation in the 2022 Appropriations Act. That argument fails for several reasons.
- 36. First, the Supreme Court has already held that Courts should consider all of the money provided for the State's education system, including money from federal sources, when determining whether the State has met its obligation to provide children with the opportunity to obtain a sound basic education. *See Hoke County 1*, 382 N.C. 386, 404, 879 S.E.2d 193, 206 (2004) (rejecting Plaintiffs' argument that the Court should exclude federal funds when considering the resources provided to local school districts). The Supreme Court has thus explained, "[w]hile the State has a duty to provide the means for such educational opportunity . . . no statutory or constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding." *Id.* For this reason, Judge Robinson concluded that federal moneys should be included when calculating the funding provided toward the items in the CRP. (*See* Order Following Remand at ¶ 42.a). That decision was not overturned, but rather was affirmed, by the Supreme Court in the appeal that followed. *See Hoke County III*, 382 N.C. at 468, 879 S.E.2d at 244.
- 37. Second, the Supreme Court has repeatedly held in this case that, when fashioning a remedy, the Court "must minimize its encroachment" upon the other branches and do "no more than is necessary" to correct the alleged constitutional violation. *Hoke County III*, 382 N.C. at 442, 879 S.E.2d at 228 (quoting *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 99-100, 405

S.E.2d 125, 133 (1991)). Requiring the State to appropriate money that has already been provided from another source is in no way "necessary."

- 38. Third, to the extent Plaintiffs argue that the Supreme Court's remand only allows this Court to consider money appropriated as part of the 2022 Appropriations Act when recalculating the amounts owed, they are mistaken. The Supreme Court in Hoke County III instructed as follows: "On remand, we narrowly direct the trial court to recalculate the appropriation distributions in light of the State's 2022 Budget." 382 N.C. at 476, 879 S.E.2d at 249 (emphasis added). Calculating the "appropriate distributions" requires the Court to consider funding already provided to the various programs under the CRP. To do otherwise would ignore the Supreme Court's previous holdings in *Hoke County I*, as well as its instruction the Court must "do no more than is necessary" when fashioning a remedy. Further, excluding the funds the Governor provided through the GEER program would run contrary to the principles Judge Robinson used when conducting his original calculations last April—calculations that the Supreme Court held were not only correct, but also "diligent and precise." Hoke County III, 382 N.C. at 468, 879 S.E.2d at 244. There is no indication that the Supreme Court intended to abrogate these rules when recalculating the "appropriate distributions" necessary to fund the remaining items under the CRP.
- 39. For each of these reasons, the Court finds that the \$2 million provided by the Governor from the GEER fund should be counted toward the funding provided for the NC TSP under the CRP.

Educator Compensation Study

40. The CRP called for \$50,000 in nonrecurring funds to be provided to DPI for an educator compensation study in Year 2. OSBM provided DPI with \$109,000 in funding for this

item in FY 2022-23, from the North Carolina Evaluation Fund Grant. The money for this grant was provided to OSBM through the 2021 Appropriations Act to spend in either FY 2021-22 or 2022-23. OSBM did not award this money to DPI until FY 2022-23.

41. The money OSBM provided DPI for the educator compensation study should be counted toward the funding called for in the CRP. Indeed, there is no dispute that the OSBM provided DPI this money, nor is there any dispute that it did so pursuant to authority it had under the 2022 State Budget and the State Budget Act.

<u>Disadvantaged Student Supplemental Funding / At Risk Allocation</u>

- 42. The CRP calls for the State to combine two allotments made to local school systems—the Disadvantaged Student Supplemental Funding ("DSSF") allotment and the At-Risk allotment—and then incrementally increase the appropriations to that allotment during each year of the CRP. (*See* CRP at pp. 25-26).
- 43. The 2022 Appropriations Act increased the amount made available to local school systems through the At-Risk allotment by \$26,068,720. This amount was intended to reflect the average actual salaries of school resources officers (SROs), which may be paid from this allotment. Although this amount was based on the cost of SRO salaries, local school systems are free to use this allotment for any of the purposes for which the At-Risk allotment may be used. The OSBM Charts, however, do not include this amount.
- 44. According to the CRP, "[t]he DSSF allotment was created in 2004 as a result of the *Leandro* case to provide districts with additional supports for at-risk students." (CRP at p. 25). Local school systems that receive money through the DSSF allotment are required to use it for specified, permissible purposes. The CRP provides:

DSSF funds must be used to: provide instructional positions or instructional support positions and/or professional development;

provide intensive in-school and/or after school remediation; purchase diagnostic software and progress-monitoring tools; and provide funds for teacher bonuses and supplements.

(Id.)

- 45. According to the CRP, "there is significant overlap in the purposes and allowable uses of the at-risk and DSSF allotments." (CRP at p. 26). The permissible purposes for which the At-Risk allotment can be used include: "identifying students likely to drop out"; providing "alternative instruction programs for these at-risk students"; "summer school instruction"; "transportation"; "remediation"; "alcohol and drug prevention"; "early intervention"; "safe schools"; and "preschool screening." (*Id.*)
- 46. The primary difference between the DSSF and At-Risk allotments is how they are distributed. The DSSF allotment is provided to all local school systems (also known as local educational agencies, or "LEAs") "based on a complicated estimate of each LEAs share of 'disadvantaged' student . . . and the LEA's estimated wealth level." (CRP at 25). The At-Risk allotment is distributed fifty-percent on a per-pupil basis and fifty-percent in proportion to the share of Title I funding a local school system receives. (CRP at 26). The CRP asserts that the "manner in which the DSSF allocation is more progressive," although it does not explicitly call for the State to use this formula if and when the DSSF and CRP formulas are ever combined.
- 47. Plaintiffs and the State argue that the additional \$26 million appropriated for the At-Risk allotment in the 2022 Appropriations Act should not count toward the funding called for in the CRP in Year 3 because the DSSF and At-Risk allocations were never combined. That argument is wrong for several reasons.

Title I of the Elementary and Secondary Education Act, as amended by Every Student Succeeds Act, is a federal program that provides financial assistance to local school systems or schools with high numbers of children from low-income families.

- 48. First, it is not clear what the permissible uses of such a combined allotment would be, and the CRP does not give any guidance on this point. Indeed, Ms. Grozav acknowledged during her testimony that combining the DSSF and At-Risk allotments would require a change in statute, and it thus impossible to predict what that new statute would provide. Given the significant overlap between the purposes for which the DSSF allotment and At-Risk allotment can be used, it is reasonable to expect that districts can use the additional \$26 million appropriated to the At-Risk allotment for many of the same purposes that would be allowed under a combined allotment.
- 49. Second, while Plaintiffs argue that more money would have been directed to low-performing districts if the DSSF and At-Risk allotments were combined, that is not clear either. While the CRP describes the DSSF distribution formula as "more progressive," it does not specify how funds should be distributed if and when the two allocations are combined. The CRP assumes that Statewide increases to the DSSF and At-Risk allotments—however they may be combined—will benefit all students across the State, including those in low-performing districts.
- 50. As a result, there is no basis to exclude additional money appropriated to the At-Risk allotment when calculating the amounts provided for Years 2 and 3 of the CRP.

Principal and Assistant Principal Salaries

- 51. The CRP calls for the appropriation of additional, recurring funds for principal and assistant principal salaries in Years 2 and 3.
- 52. The OSBM Charts do not include \$6,236,038 included in the 2022 Appropriations Act to pay stipends to masters of school administration ("MSA") interns in FY 2022-23. MSA interns serve as assistant principals in schools. Legislative Intervenors contend that the approximately \$6.2 million appropriated for MSA interns should be included when calculating the amounts appropriated for this item in the CRP, since it is used to pay stipends for interns who serve

as assistant principals and included as part of the allotments used for principal and assistant principal salaries.

- 53. Plaintiffs and the Executive Branch, on the other hand, contend that this money should not be included in the Court's calculations. To that end, Plaintiffs and the Executive Branch argue that the money appropriated to pay MSA interns does not "increase" the compensation paid to principals and assistant principals. Further, the Charlotte-Mecklenburg Board of Education argues that, even though they serve as assistant principals, MSA interns should not be considered assistant principals in this case because N.C. Gen. Stat. § 115C-2287.1(b) requires districts to hire permanent principals and assistant principals for an initial term of two to four years. Both arguments fail. First, as Mr. Matteson testified, the \$6.2 million appropriated for MSA interns is made available to districts as part of the State's School Building Administration allotment, which districts use to pay principal and assistant principal salaries. Thus, the appropriation of this money increases the overall money available to pay principals and assistant principals. Second, the mere fact that districts are required to hire *permanent* assistant principals for an initial term of two to four years does not mean MSA interns do not serve as assistant principals. To the contrary, it is undisputed that MSA interns serve as assistant principals during their internship.
- 54. Accordingly, the Court concludes that the additional \$6,236,038 appropriated for MSA interns in the 2022 Appropriations Act should be counted as increased funding made available for principal and assistant principal salaries as called for in the CRP.

District and Regional Support

55. The CRP calls for the appropriation of money in Years 2 and 3 to fully implement a new "District and Regional Support model" developed by DPI. OSBM's calculations do not include \$14,000,000 appropriated under the 2022 Appropriations Act for regional literacy and

early-learning specialists, which Legislative Intervenors contend should be counted toward this item. The FRD Chart accordingly includes the \$14 million appropriated for this item.

56. The money appropriated for regional literacy and early learning specialists should be counted as funding for District and Regional Support. The CRP describes DPI's system of District and Regional Support as follows:

The NCDPI has established a new District and Regional Support model that develops and aligns systems, processes, and procedures, to provide a unified system of support to North Carolina public schools that result in every child having equitable access to a meaningful, sound basic education through:

- A regional structure coordinating academic supports statewide;
- Opportunities for educator recognition, advancement, and growth;
- Diagnostic services that identify areas of improvements for schools and strict;
- Strategic reform strategies that lead to innovation and student success; and
- Effective partnerships to intervene in areas of critical need.

(CRP at p. 36). Providing resources to local school districts for regional literacy and early learning specialists serves these objectives. In particular, literacy and early learning specialists are part of the "regional structure" of "academic supports" called for in the CRP. They also qualify as "partnerships to intervene in areas of critical need" since literacy and early learning specialists are used to support districts serving students in these areas.

57. Although money for regional literacy and early learning specialists qualify as money available to fund the implementation of DPI's District and Regional Support model, Plaintiffs and the State contend this money should not be included because it was provided to all school districts across the State instead of just those that are low-performing. That argument, however, misreads the CRP. The CRP does not require that money appropriated for District and

Regional Support be provided only to low-performing districts. To the contrary, the CRP calls for the State to "fully implement" DPI's District and Regional Support model on a Statewide basis, as part of a "unified system to support North Carolina's public schools." (CRP at p. 36). The CRP then operates on the assumption that implementing this system on a Statewide basis will "support the improvement of low-performing and high-poverty schools." (*Id.*). In other words, the CRP assumes that a rising tide will lift all ships. Nowhere does the CRP state that the either District and Regional Support model, or the funding to implement it, must be limited to only low performing districts.

58. For the reasons stated above, the \$14,000,000 appropriated for regional literacy and early learning specialists should be counted as funding provided for the implementation of DPI's District and Regional Support model.

Review and Adoption of Core Curricular Resources

- 59. Although the CRP lists it as an action item for Year 3, the CRP does not identify the amount of funding needed for "Review and Adoption of Core Curricular Resources." Instead, the CRP lists the funding for this item as "TBD." OSBM did not include this item on its charts. However, the 2022 Appropriations Act includes \$260,000 in recurring appropriations for this item, which is reflected on the FRD Chart.
- 60. Although the FRD Chart reflects the \$260,000 appropriated for this item, it does not show these funds as reducing the total amount of additional funding called for under the CRP, since this money does not go to any other action item. During his testimony, Mr. Matteson repeatedly confirmed that FRD did not treat this money as reducing the overall total of additional funding required by the CRP, but instead included it for the purposes of accuracy and to show that this item was funded. The Court agrees with FRD's analysis and accordingly finds the \$260,000

appropriated for Review and Adoption of Core Curricular Resources counts toward the item called for the CRP, even though it does not reduce the remaining amounts called for to fund other items.

Additional Cooperative and Innovative High Schools

- 61. Like the item listed above, the CRP included "Additional Cooperative and Innovative High Schools" as an action item for Year 3, but listed the funding for this item as "TBD." The 2022 Appropriations Act included \$730,000 in additional recurring funding for this item, which is included on the FRD Chart but not included in those submitted by OSBM.
- 62. As with the money appropriated for "Review and Adoption of Core Curricular Resources" the Court agrees with FRD's analysis, and accordingly finds that the \$730,000 appropriated for this item counts as funding provided for Additional Cooperative and Innovative High Schools as called for under the CRP, even though it does not reduce the remaining amounts necessary to fund other items.

Recurring Funds

- 63. Legislative Intervenors contend that when recalculating the "appropriate distribution amounts" necessary to fund the action items called for in Years 2 and 3 of the CRP, the Court should not include *recurring* appropriations called for in Year 2, since that year has now ended. In particular, Legislative Intervenors argue that it is no longer necessary for the State to pay the recurring appropriations called for in Year 2, since the CRP anticipates that those appropriations will be made again in Year 3.
- 64. Recurring appropriations are those that are intended to be repeated each fiscal year until a change is enacted by the General Assembly. Generally, recurring appropriations are used for ongoing operating expenses that are incurred each fiscal year, such as salaries, utilities, or other funds necessary to pay for ongoing programs. Under the State Budget Act, recurring appropriations

are included in the "base budget" for the next budget cycle, which serves as the starting point for lawmakers as they made budget adjustments. In contrast, nonrecurring appropriations are made for only one fiscal year and are not repeated in the next year's budget unless the General Assembly appropriates additional funding. Nonrecurring appropriations are generally used to pay one-time expenses, such the costs to start a program or the cost to run a program that is only supposed to last for a limited amount of time.

65. The Court agrees that recurring appropriations called for in Year 2 should not be included when recalculating the "appropriate distribution amounts" necessary to fund the items called for in Year 2 and 3, now that Year 2 has ended. To give an example, the CRP calls for \$19 million in recurring appropriations to fund principal and assistant principal salaries in Year 2, and for that amount to be increased to \$29.7 million in recurring appropriations in Year 3. This means that, according to the authors of the CRP, the additional amount of funding necessary to pay principals and assistant principals in Year 3 is \$29.7 million dollars. There is no need to pay for principal and assistant principal salaries in Year 2, since that year is now over and the CRP anticipates the appropriations necessary to pay those same principals and assistant principals will be included again in Year 3. If the Court were to add Years 2 and 3 together—and require the State to pay \$48.7 million to pay principals and assistant principals in Year 3—it would be requiring the State to pay substantially *more* than the authors of the CRP claim is necessary to achieve *Leandro* compliance. The Supreme Court, however, has repeatedly stated that the Court

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Plaintiffs argue that excluding recurring appropriations from Year 2 would permit the General Assembly to benefit from its own delay. The Court does not agree. First, the money at issue belongs to the taxpayers, not the General Assembly, which is, in part, why the Supreme Court has repeatedly admonished that this Court must do no more than is necessary when fashioning a remedy. Second, regardless of who caused the delay, the fact remains that Year 2 has now ended, and accordingly there is no need to require appropriations that are called for again this year as part of Year 3. Finally, the delay in this circumstance is not a product of the General Assembly's

must only do "no more than is reasonably necessary" when fashioning remedies in this case. *See Hoke County III*, 382 N.C. at 442, 879 S.E.2d at 228 (quoting *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 99-100, 405 S.E.2d 125, 133 (1991)).

66. In response to Legislative Intervenors, Plaintiffs contend that the Court should include recurring appropriations called for in Year 2 in the amount payable this year because the recurring appropriations would have been used to pay for programs that should have occurred in Year 2. That, however, would result in double counting. Because recurring appropriations are repeated each year, the CRP necessarily assumes that any recurring appropriations called for in Year 2 will be made again in Year 3, and that the total amount of funding called for in Year 3 is all that is necessary to achieve *Leandro* compliance in that year. There is no need to pay salaries for personnel that were not employed in Year 2, nor to fund ongoing expenses for programs that were not in place in Year 2. The CRP anticipates that the recurring appropriations for those salaries and programs will be made again this year, and thus they are included in the Year 3 total. Further while Plaintiffs suggested during the hearing that recurring appropriations in Year 2 might be used to fund the "start-up costs" for particular programs, there is no evidence to support that position. Start-up costs would typically be paid through *nonrecurring* appropriations, since they represent one-time expenses. The CRP does not include any detail to show how the authors estimated the costs necessary to pay for each action item, nor the particular expenses for which the funds will be used. Instead, the CRP simply lists a dollar figure for each action item. Without any such detail, the Court has no basis to assume that recurring appropriations called for in Year 2 were actually for one-time (*i.e.*, nonrecurring) expenses.

actions—the Executive Branch also appealed Judge Lee's November 2021 Order and all of the parties, including the Plaintiffs, appealed Judge Robinson's Order Following Remand. The fact that Year 2 ended while those appeals were pending is merely a product of the appellate process.

67. For the reasons above, the Court finds that it is no longer necessary to require the State to pay recurring appropriations called for in Year 2 of the CRP since that year has now ended.

68. Based on the foregoing, the Court finds that the FRD Chart fairly and accurately reflects the remaining amount of recurring and nonrecurring funding provided for the various action items called for in Years 2 and 3 of the CRP, as well as the additional amounts required to fund each action item.

CONCLUSIONS

- 69. As stated above, the Court incorporates the conclusions in Judge Lee's November 10, 2021, Order as well as Judge Robinson's April 26, 2022, Order Following Remand. In particular, the Court incorporates the conclusions in those orders that (i) the Court has jurisdiction to require the implementation of the CRP and (ii) implementing and funding each of the various action items in the CRP is "necessary" to remedy a failure to provide the State's children with the opportunity to achieve a sound basic education.
- 70. Further, in complying with the Supreme Court's directive "to recalculate the appropriate distributions in light of the State's 2022 Budget" and resolving the differences between the FRD Chart and the OSBM Charts, the Court has adopted the same methodology and principles Judge Robinson used in preparing the calculations in his Order Following Remand. (*See* Order Following Remand at ¶¶ 41-42). The Court concludes that the FRD Chart accurately applies these principles.
- 71. Based on this analysis and the Court's finding that the FRD Chart accurately reflects the remaining amounts necessary to fund the various items called for in Year 2 and 3 of the CRP, the Court concludes that the "appropriate distribution amounts" required to pay for the

remaining items under Years 2 and 3 of the CRP, as reflected in Judge Lee and Judge Robinson's orders, should be recalculated as follows:

- a. The amount to be provided to DHHS⁷ should be reduced to \$80,650,000;
- b. The amount to be provided to DPI⁸ should be reduced to \$277,814,002; and
- c. The amount to be provided to the UNC System should be reduced to \$18,100,000.
- The writ of prohibition issued by the Court of Appeals prohibits the Court from taking any action requiring State officials to transfer money out of the treasury to fund the items in Years 2 and 3 of the CRP. In its order issuing the writ, the Court of Appeals held that "the trial court's conclusion that it may order [State officials] to pay unappropriated funds from the State Treasury is impermissible and beyond the power of the Court." *In re 10 November 2021 Order in Hoke Cnty. Bd. of Ed. v. State, et al. (Wake County File 95 CVS 1158),* No. P21-511 (N.C. Ct. App. Nov. 30, 2021). Thus, as a result of the Supreme Court's March 3, 2023, Order reinstating the writ of prohibition, this Court lacks the power to order the State officials to transfer these funds without an appropriation from the General Assembly. At the March 10, 2023, hearing, all parties agreed and acknowledged that the Court's review should therefore be limited to recalculating the additional funding required to fund items called for in Years 2 and 3 of the CRP.
- 73. Finally, the Court notes that, in order to preserve their rights, Legislative Intervenors continue to object to the entry of any order purporting to require the State to implement or fund the CRP. Among other things, Legislative Intervenors maintain that: (i) the Court lacks

This amount is calculated by adding \$250,000 in additional nonrecurring funds to DHHS called for in Year 2 and \$80,400,000 in additional recurring and nonrecurring funds called for in Year 3.

This amount is calculated by adding \$225,000 in additional nonrecurring funds to DPI called for in Year 2 to \$277,589,002 in additional recurring and nonrecurring funds called for in Year 3.

subject matter jurisdiction to enter orders purporting to dictate educational policy on a Statewide basis when Plaintiffs' claims relate only to the conditions in their individual school districts; (ii) there has been no judgment or order finding a violation anywhere other than Hoke County; (iii) Plaintiffs have failed to show that the provisions made for the State's education system in the current State Budget—which constitutes an act of the General Assembly and therefore should be treated as presumptively valid—is insufficient to provide North Carolina children with the opportunity to obtain a sound basic education; (iv) Plaintiffs have not shown that funding the remaining items under the CRP is necessary to provide Children an opportunity to obtain a sound basic education; (v) the consent orders requiring the CRP and directing the State to implement it are the product of a "friendly suit" in which there is no actual controversy, and thus the Court lacks jurisdiction; and (vi) before obtaining a judgment against the State, Plaintiffs should first be required to exhaust all available funds that may be used to pay for items in the CRP, including money provided to districts under various federal COVID-relief programs. The Court declines to address these arguments on the grounds that they are beyond scope of its review on remand. To the extent these arguments may be properly addressed at this stage, the Court rules against Legislative Intervenors based on the Court's decision in Hoke County III.

ORDER

- 74. It is THEREFORE ORDERED that the decretal paragraphs 1-9 on pages 19-20 of the trial court's November 10, 2021 Order are stricken and amended as follows:
 - 1. IT is hereby ORDERED, ADJUDGED, AND DECREED, that the Department of Health and Human Services ("DHHS"); the Department of Public Instruction ("DPI"); and the University of North Carolina System (the "UNC 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 already provided to each agency, whether through appropriations made under the State Budget or from other sources:

- a. DHHS recover from the State of North Carolina the sum of \$80,650,000;
- b. DPI recover from the State of North Carolina the sum of \$277,814,002; and
- c. The UNC System recover from the State of North Carolina the sum of \$18,100,000.

SO ORDERED, this the da	y of, 2023	
	James Ammons	
	Senior Resident Superior Court Judge	