

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' AND PLAINTIFF-INTERVENOR/REALIGNED DEFENDANT
CMS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiffs Cumberland County Board of Education, Halifax County Board of Education, Hoke County Board of Education, Robeson County Board of Education, and Vance County Board of Education (“Plaintiffs”) and Plaintiff-Intervenor Charlotte-Mecklenburg Board of Education (“CMS”) hereby submit, pursuant to the Court’s instructions at the March 17, 2023 hearing, proposed findings of fact and conclusions of law.

FINDINGS OF FACT¹

1. On November 4, 2022, the Supreme Court issued its *Leandro IV*² Opinion and Order in this case and remanded the case to this Court as follows:

On remand, we narrowly direct the trial court to recalculate the appropriate distributions in light of the State’s 2022 Budget. Once that calculation is complete, we instruct the trial court to order the applicable State officials to transfer these funds as an appropriation under law. Accordingly, we stay the Court of Appeals’ 30 November 2021 Writ of Prohibition. Finally, we order the trial court to retain jurisdiction over this matter to ensure the implementation of this order and to monitor continued constitutional compliance.

2. The first directive is the matter presently before the Court: “On remand, we narrowly direct the trial court to recalculate the appropriate distributions in light of the State’s 2022 Budget.” *See Leandro IV* at ¶240.

¹ 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.

² *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 475-476, 2022-NCSC-108 at ¶240. In *Leandro IV*, the Supreme Court referred to its three previous decisions in this case as *Leandro I*, *Leandro II*, and *Leandro III*. This Court will follow the Supreme Court’s naming convention and refer to the November 4, 2022 decision as “*Leandro IV*.”

3. In order to allow this Court to perform the next directive, to “order the applicable State officials to transfer these funds as an appropriation under law,” the Supreme Court in *Leandro IV* stayed a November 30, 2021 Writ of Prohibition that “restrain[ed] the trial court from enforcing the portion of its order” requiring the transfer of funds as an appropriation under law. On March 3, 2023, however, the Supreme Court lifted the stay imposed in *Leandro IV*. Accordingly, this Court will not consider that directive at this time.

Background

4. On March 15, 2021, Defendant State of North Carolina submitted to the Court the Comprehensive Remedial Plan and Appendix (the “CRP”).

5. The CRP was developed by the State. *See Leandro IV* at ¶¶ 197, 229.

6. The “specific objective of the [CRP] was to satisfy the State’s and State Board of Education’s obligations to assure every child the opportunity to obtain a sound basic education.” CRP at 2.

7. The State’s CRP is a comprehensive set of specific action items to be implemented by the State over an eight-year period.

8. The CRP identifies the specific state agencies and/or departments (*e.g.*, Department of Health and Human Services, Department of Public Instruction, and the University of North Carolina System) charged with implementing each component of the CRP and for each of the eight years. *Leandro IV* at ¶ 65.

9. The CRP also identifies the amount of distributions, as determined by the State, required to implement each component and for each of the eight years. *Id.*;

see also CRP at 2 (CRP identifies “specific long-term actions that must be taken, a timeframe for implementation, an estimate of resources in addition to current funding, if any, necessary to complete those actions . . .”).

10. On June 7, 2021, the Court ordered the State to implement the CRP in full and in accordance with the timelines set forth therein and directed the State to secure such funding and resources necessary to implement in a sustainable manner the programs and policies set forth in the CRP.

11. The State, however, did not do so. *Leandro IV* at ¶¶ 67-71.

12. Accordingly, on November 10, 2021, the Court entered an order directing the transfer of funds necessary to implement the CRP (the “November 10 Order”). These were the funds, identified in the CRP, necessary to fully fund the Year 2 and Year 3 components of the CRP. That Order was stayed for thirty days.

13. Eight days after the issuance of the November 10 Order, on November 18, 2021, the Appropriations Act of 2021, 2021 N.C. Sess. L. 180 became law (the “2021 Budget”).

14. Also following the issuance of the November 10 Order, appeals were taken by certain parties to the North Carolina Court of Appeals and to the Supreme Court.

15. On March 21, 2022, the Supreme Court remanded the case—for the first time—back to the Court “for the purpose of allowing the trial court to determine what effect, if any, the enactment of the [2021] State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 order.”

16. On April 26, 2022, the Court considered and determined the remanded issue (the “April 26 Order”). As set out in that Order, the Court found that the State had underfunded the distributions required for Years 2 & 3 of the CRP in the following amounts:

- \$142,900,000 for CRP components administered through the Department of Health and Human Services (“DHHS”);
- \$608,006,248 for CRP components administered through the Department of Public Instruction (“DPI”); and
- \$34,200,000 for CRP components administered through the University of North Carolina System (“UNC System”).

17. The Supreme Court, in *Leandro IV*, held that the calculations in the April 26 Order were “diligent and precise,” but they had been “mooted by the State’s subsequent enactment of the 2022 Budget Act.” *Leandro IV* ¶ 211. That is because while this case was on appeal, the State passed its short-session 2022-2023 budget. The Supreme Court refers to this as the “2022 Budget Act.” *Leandro IV* at ¶¶92, 240.

18. The Supreme Court, therefore, “narrowly” remanded the case to determine if the distribution amounts set forth in the April 26 Order should be recalculated by this Court in light of the 2022 Budget. That is the factual issue presently before this Court.

19. Specifically, the narrow issue now before this Court is to take the “diligent and precise” calculations from April 26 Order and determine what, if any, recalculations are required “in light of the State’s 2022 Budget.” *Leandro IV* at ¶240.

Defendant State of North Carolina’s Submission

20. Following the Supreme Court’s remand directions, on December 19,

2022, Defendant State of North Carolina filed the Affidavit of Anca Elena Grozav, Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management, along with several spreadsheet attachments, which provided the State's accounting and/or calculations on the remanded issue (the "Defendant State's Accounting").

21. The Defendant State's Accounting identifies the amount of underfunding for both Year 2 and Year 3 of the CRP that remained after the enactment of the 2022 Budget.

22. Specifically, the Defendant State's Accounting, Grozav Aff. Ex.1, provides:

- a. For CRP Year 2: the CRP was underfunded by \$257,679,930; and
- b. For CRP Year 3: the CRP was underfunded by \$420,121,777.

The Parties Are Largely In Agreement On The Remanded Issue

23. As to the factual issue on remand—the amount of underfunding for Year 2 and Year 3 remaining in light of the 2022 Budget—the parties are largely in agreement.

24. Plaintiffs—Cumberland County Board of Education, Halifax County Board of Education, Hoke County Board of Education, Robeson County Board of Education, and Vance County Board of Education—do not dispute the calculations set out in the Defendant State's Accounting.

25. Plaintiff Penn Intervenors do not dispute the calculations set out in the Defendant State's Accounting.

26. Plaintiff-Intervenor Charlotte-Mecklenburg Board of Education does not dispute the calculations set out in the Defendant State’s Accounting.

27. The Defendant State Board of Education does not dispute the calculations set out in the Defendant State’s Accounting.

28. The Legislative-Intervenors, for the most part, also agree with the Defendant State’s Accounting.

29. On March 14, 2023, Legislative-Intervenors submitted an affidavit of Mark Trogdon, who is the Senior Advisor to the Legislative Services Officer. Trogdon Aff. at 2 ¶ 2.

30. As the Trogdon Affidavit states, in relevant part, “we agree with OSBM’s conclusions regarding the amount of funding provided for many of the action items in the CRP.” Trogdon Aff. at 4 ¶ 8.

31. The Legislative Intervenors, however, identify five specific components where its analysis differs from the Defendant State’s Accounting.³

32. Legislative-Intervenors contend that the Defendant State’s Accounting did not account for the following:

a. CRP Item I.G.ii.1: \$2,000,000 allocated through 2021 N.C. Sess.

L. 3 § 1.1 (the “2021 Budget”) for the New Teacher Support Program.

³ The Trogdon Affidavit noted two components that were not addressed in the State’s Accounting: CRP item V.B.ii.1 and VII.B.iv.2. Those two components are listed in the CRP with funding requirements “TBD” (or “To Be Determined).” The testimony at the hearing was that the Trogdon Affidavit, though including those two components, did not decrease the total amount of underfunding for Year 3. The Court therefore will not consider them in this narrow remand.

b. CRP Item I.A.ii.2: \$50,000 allocated indirectly through the 2021 Budget for an educator compensation study, which provided funding to the North Carolina Evaluation Fund grant.

c. CRP Item III.B.ii.2: \$26,068,720 allocated by the 2022 Budget to the At-Risk Student Services/Alternative Schools allotment.

d. CRP Item III.E.ii.3: \$6,236,038 allocated by the 2022 Budget to provide a stipend for masters-of-school-administration (“MSA”) interns.

e. CRP Item V.A.iii.1: \$14,000,000 allocated by the 2022 Budget to fund regional literacy and early learning specialists statewide.

33. According to the Legislative-Intervenors, accounting for these five items where the Trogdon Affidavit differs from the Defendant State’s Accounting, “reduces the amounts required to fund the remaining items in the CRP to \$257,629,930 for Year 2, and \$376,089,002 for Year 3.” Leg.-Int. Brief at 14 (citing Trogden Aff., Ex. A)).

34. At the hearing, Anca Elena Grozav, Chief Deputy Director of State Budget for the North Carolina Office of State Budget testified as to her affidavit and the Defendant State’s Accounting. Brian Matteson, current Director of the Fiscal Research Division, testified as to the information in the Trogdon Affidavit.

35. The testimony at the hearing shows that the 2022 Budget had no impact on the amounts of underfunding for Year 2 of the CRP. That is undisputed.⁴

⁴ There is a \$50,000 difference between the Year 2 underfunding amount identified in the State’s Accounting and that in the Trogden Affidavit. That difference is not the result of a different accounting based on the 2022 Budget. Rather, the difference pertains to how they categorized CRP VII.A.ii.3 and VII.B.iv.1. The State’s Accounting identifies \$50,000 for Year

36. As to the amount needed to fund the remaining items in the CRP for Year 3 in light of the 2022 Budget, the testimony at the hearing was as follows:

a. CRP Item I.G.ii.1: As to this CRP component, the difference between the Grozav Affidavit and the Trogdon Affidavit is that the Trogdon Affidavit included an additional credit of \$2,000,000. Both witnesses testified, however, that this \$2,000,000 was not allocated by the 2022 Budget. Instead, it came from the 2021 Budget. [Transcript, Hearing March 17, 2023, 16:15-17:8; 27:25-28:5; 44:1-13]. Mr. Matteson agreed that “the remand from the Supreme Court was to contemplate the impact of the ‘22 budget,” and “the fact that [the \$2,000,000] was not included in OSBM’s calculus comports with the fact that it was not in the ‘22 budget.” [Trans. 44:1-6-13.]

b. CRP Item I.A.ii.2: As to this CRP component, the difference between the Grozav Affidavit and the Trogdon Affidavit is that the Trogdon Affidavit included a credit of \$109,000.⁵ The evidence shows that this amount was not an allocation specific to the evaluation required in the CRP. [Trans. 62:8-15]. Instead, as Ms. Grozav testified, the General Assembly appropriated “a general pot of funding to provide agencies to perform program evaluations,”

2 for VII.A.ii.3 and \$50,000 for Year 3 for VII.B.iv.1 (which is what the CRP requires). The Legislative Intervenors, however, combine these and attribute the combined \$100,000 to Year 2 only. As the parties all agree as to the total (\$100,000), any discrepancy here has no practical effect to the issue on remand.

⁵ Though the Trogdon Affidavit attributed \$109,000 to component I.A.ii.2, Mr. Matteson’s testimony clarified that only \$50,000 should have been credited toward this CRP item. [Trans. 10:22:2-11].

[Trans. 62:23-15; *see also* 97:2-11]. This money was not targeted to implementing CRP Item I.A.ii.2.

c. CRP Item III.B.ii.2: This CRP component requires increased funding to a newly-created combined allotment consisting of what is now known as the Disadvantaged Student Supplement Fund (or “DSSF”) and what is now known as the At-Risk Student Services/Alternative Schools Fund (or “At Risk allotment”). The difference between the Grozav Affidavit and the Trogdon Affidavit with regard to this item is that the Trogdon Affidavit included a credit for funding that was allotted, not to any combined fund, but to the At-Risk allotment for school resource officers. The undisputed testimony at the hearing, however, was that the DSSF and the At-Risk allotment have not been combined as required by the CRP (the “Combined Allotment”). Because the Combined Allotment does not exist (despite the CRP requiring it), no funding can be credited to this CRP component. The Legislative-Intervenors contend that this Combined Allotment *may* be created in the future. [Trans. 19:15-20:4]. But, it is undisputed that this has not happened.

d. CRP Item III.E.ii.3: As to this CRP component, which called for an “increase [in] principal and assistant principal pay,” the difference between the Grozav Affidavit and the Trogdon Affidavit is that the Trogdon Affidavit included an additional credit of \$6,236,038 appropriated in the 2022 Budget to support 10-month stipends to MSA interns, a position defined by DPI as “

“[s]tudents in an approved full-time master’s degree program in school administration [who] are participating in their required internship at a school unit. Full-time students, while completing their internship, are not required to have a North Carolina educator’s license.”⁶ Requirements for certification and contracts for principals and assistant principals, including a requirement they hold certain licensure, are contained at G.S. §§ 284, 287.1, and 289, among others. Ms. Grosav testified that the Defendant State’s Accounting did not include the \$6,236,038 for MSA stipends because it is not part of the salary for principal or assistant principals; the stipend is a one-time, non-recurring stipend; and principals are not eligible, only interns. [Trans. 63:23-64:11]. Mr. Matteson also acknowledged that the stipends were not for principals, and that the stipends were not incorporated as part of any future compensation or permanent salary for the MSA interns who received the stipend. [Trans. 42:18-43:14]. However, Mr. Matteson testified that notwithstanding the statutory requirements applicable to assistant principals, and the distinctions from MSA interns, his testimony remained that it was appropriate to credit an additional amount for stipends for MSA interns to this item. [Trans. 41:7-24].

e. CRP Item V.A.iii.1: As to this CRP component, the difference between the Grosav Affidavit and the Trogdon Affidavit is that the Trogdon Affidavit included an additional credit of \$14,000,000 for “regional literacy and early learning specialists.” The evidence is that this was not targeted to low-

⁶ DPI Employee Salary and Benefits Manual, *available at* <https://www.dpi.nc.gov/media/15838/download?attachment>

performing school districts, which is what this CRP component is designed to address (*i.e.*, “direct, comprehensive, and progressive turnaround assistance to the State’s chronically low-performing schools and low performing Districts”). CRP at 36. Rather, this allotment was broadly available to every school district across the State and was not targeted to the CRP requirements. [Trans. 65:8-16; 55:6-11].

37. The Court finds that the evidence supports the following findings of fact:

a. CRP Item I.G.ii.1: The additional amounts that the Trogdon Affidavit credits to this item were not allocated by the 2022 Budget, which is the narrow issue on remand.

b. CRP Item I.A.ii.2: The additional amounts that the Trogdon Affidavit credits to this item were not allocated by the 2022 Budget, which is the narrow issue on remand. Furthermore, the allocated funding was for funding for evaluations generally, and not specifically the evaluation called for by this CRP item.

c. CRP Item III.B.ii.2: Because the At-Risk and DSSF funds have not yet been combined, the additional amounts that the Trogdon Affidavit credits did not, and could not be, credited to the Combined Fund called for by the CRP.

d. CRP Item III.E.ii.3: The testimony established that the additional \$6,236,038 was to be used for stipends for MSA interns, whose position is distinct from salaries of principal or assistant principals, which

positions and their required qualifications are also defined by General Statute, and therefore the \$6,236,038 did not increase compensation for principals or assistant principals.

e. CRP Item V.A.iii.1: The additional amounts that the Trogdon Affidavit credits to this item is not targeted to this CRP item. This CRP item is designed to address “the State’s chronically low-performing schools and low-performing districts.” CRP at 36, V.A.iii.1. The additional amounts described in the Trogdon Affidavit are not targeted to this purpose.

The Legal Issue Raised by Legislative-Intervenors Regarding Year 2

38. The Legislative-Intervenors also raise a legal issue regarding the scope of the transfer order regarding underfunding for Year 2.

39. Specifically, they argue that this Court may not implement a transfer for the full amount of underfunding required to implement Year 2 because “99% of the action items in Year 2 of the CRP call for recurring appropriations” that are “no longer necessary now that we are in Year 3.” Leg.-Int. Brief at 14-15. They contend, as a legal matter, that this is because “any portion of appropriation that remains unspent at the end of the fiscal year must revert back to the fund from which the appropriation it [sic] was made.” Leg.-Int. Brief at 15.

40. This legal issue, however, is beyond the factual issue presently before the Court.

41. Indeed, Legislative-Intervenors concede this in their filings to this Court.

42. They argued that everything within the scope of their recent filings to the Supreme Court should not, and cannot, be considered by this Court now. *See, e.g.,* Leg.-Int. Brief at 8.

43. But the legal issue they raise now—the legal impact of budgetary reversions for Year 2 recurring appropriations—is one of the legal issues raised in their recent filings to the Supreme Court.

44. The Legislative-Intervenors filed their recent filings to the Supreme Court in this Court. This included a Renewed Motion and Conditional Petition for Certiorari. *See* Leg.-Int. Brief, Tab 11. That Supreme Court filing raises the precise legal question they now raise before this Court. *Id.* at p. 23.

45. Based on their own arguments, the issue of whether the Budget Act requires “any portion of appropriation that remains unspent at the end of the fiscal year [to] revert back” (Leg.-Int. Brief at 15) is not before this Court.

46. The issue before this Court now is a factual, not legal, one. It is to recalculate the amount of underfunding in light of the 2022 Budget.

CONCLUSIONS OF LAW

1. The March 3 Order of the Supreme Court lifting its prior stay on the Writ of Prohibition prevents this Court from taking any action to enforce the transfer of the appropriate distributions.

2. Accordingly, the limited issue presently before this Court is factual—namely, to recalculate the amount of the distributions in light of the 2022 Budget.

3. Based on the submissions of the parties, including the Grozav and Trogdon Affidavits, the testimony at the hearing, and the arguments made in open court, this Court finds as follows:

a. With respect to the amount of underfunding for Year 2 of the CRP, the 2022 Budget did not have any impact.

b. The amount of underfunding set out in the April 26 Order for Year 2 does not require any recalculations in light of the 2022 Budget.

c. With respect to the amount of underfunding for Year 3 of the CRP, the disagreements between the State Defendant's Grozav Affidavit and the Legislative-Intervenor's Trogdon Affidavit that are relevant to the issue before the Court are resolved as follows:

i. Item I.G.ii.1: Because this Court's limited directive on remand was to recalculate the appropriate distributions "in light of the 2022 Budget," this Court does not credit to this item an additional \$2,000,000.00 that the Trogdon Affidavit credits.

ii. Item I.A.ii.2: Because this Court's limited directive on remand was to recalculate the appropriate distributions "in light of the 2022 Budget," and further, because the funding credited by the Trogdon Affidavit was not targeted specifically to this item, this Court does not credit to this Item the additional amount that the Trogdon Affidavit credits.

iii. Item III.B.ii.2: Because the Combined Allotment has not been created (as was required by the CRP), this Court does not credit the \$26,068,720 that the Trogdon Affidavit credits to it.

iv. Item III.E.ii.3: Because the testimony established that the additional \$6,236,038 was to be used for stipends for MSA interns, not for salaries of principal or assistant principals, the Court does not credit \$6,236,038 for this item.

v. Item V.A.iii.1: Because the additional amounts that the Trogdon Affidavit credits to this item were not allocated to the State's chronically low-performing schools and low-performing districts as required by this component, this Court does not credit to this item the additional \$14,000,000 that the Trogdon Affidavit credits.

4. With respect to the Legislative-Intervenors' legal argument concerning recurring funding in Year 2, this Court will not disturb Judge Robinson's "diligent and precise" calculations for Year 2. The arguments of the Legislative-Intervenors would require the Court to make a conclusion of law about an issue not presently before the Court on this limited remand, as set forth above.

5. Therefore, based on the submissions of the parties, including the Grozav and Trogdon Affidavits, the testimony at the hearing, and the arguments made in open court, this Court finds that the distribution amounts set out in the April 26 Order should be recalculated, in light of the 2022 State Budget, as follows:

- (a) ~~\$142,900,000~~ **[recalculated to \$133,900,000]** for CRP components administered through the Department of Health and Human Services (“DHHS”);
- (b) ~~\$608,006,248~~ **[recalculated to \$509,701,707]** for CRP components administered through the Department of Public Instruction (“DPI”); and
- (c) \$34,200,000 **[no recalculation required]** for CRP components administered through the University of North Carolina System.

This the 24th day of March, 2023.

/s/ *Melanie Black Dubis*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed with the Clerk of Court's electronic system and a copy was served upon counsel for all parties to this action by e-mail and U.S. Mail, first class postage prepaid, addressed as follows:

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This 24th day of March, 2023.

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