

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

95-CVS-1158

HOKE COUNTY BOARD OF EDUCATION;
HALIFAX COUNTY BOARD OF EDUCATION;
ROBESON COUNTY BOARD OF
EDUCATION; CUMBERLAND COUNTY
BOARD OF EDUCATION; VANCE COUNTY
BOARD OF EDUCATION; RANDY L. HASTY,
individually and as Guardian Ad Litem of
RANDELL B. HASTY; STEVEN R. SUNKEL,
individually and as Guardian Ad Litem of
ANDREW J. SUNKEL; LIONEL WHIDBEE,
individually and as Guardian Ad Litem of
JEREMY L. WHIDBEE; TYRONE T.
WILLIAMS, individually and as Guardian Ad
Litem of TREVELYN L. WILLIAMS; D.E.
LOCKLEAR, JR., individually and as Guardian
Ad Litem of JASON E. LOCKLEAR; ANGUS B.
THOMPSON II, individually and as Guardian
Ad Litem of VANDALIAH J. THOMPSON;
MARY ELIZABETH LOWERY, individually and
as Guardian Ad Litem of LANNIE RAE
LOWERY; JENNIE G. PEARSON, individually
and as Guardian Ad Litem of SHARESE D.
PEARSON; BENITA B. TIPTON, individually
and as Guardian Ad Litem of WHITNEY B.
TIPTON; DANA HOLTON JENKINS,
individually and as Guardian Ad Litem of
RACHEL M. JENKINS; LEON R. ROBINSON,
individually and as Guardian Ad Litem of
JUSTIN A. ROBINSON,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF
EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES,
individually and as Guardian Ad Litem of

CLIFTON MATTHEW JONES; DONNA
JENKINS DAWSON, individually and as
Guardian Ad Litem of NEISHA SHEMAY
DAWSON and TYLER ANTHONY HOUGH-
JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the
STATE BOARD OF EDUCATION,
Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF
EDUCATION,

Realigned Defendant.

**PLAINTIFFS' RESPONSE TO NORTH CAROLINA'S
PROGRESS REPORT DATED AUGUST 6, 2021**

This case is about one of the most important rights enumerated in the State Constitution: the right of North Carolina children to have an equal opportunity to obtain a sound basic education in a public school.

It is undisputed—and, indeed, the established law of the case—that the State is constitutionally mandated to ensure that *every* child in North Carolina, regardless of age, race, gender, socio-economic status, or the district in which he or she lives, is provided the opportunity to receive a sound basic education. *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (“*Leandro I*”). This constitutional obligation rests squarely on the State and may not be “abdicated by transferring the responsibility to the local boards of education.” *Liability Judgment* at 110 (¶ 3, citing *Leandro I*).

There is also no question that the State has violated, and is continuing to violate, the Constitution by denying this fundamental right to hundreds of thousands of children across North Carolina. *Liability Judgment* at 110-12; *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 647-48, 599 S.E.2d 365, 396 (2004) (“*Leandro II*”). Indeed, the State unequivocally admits to its continuing violation of the Constitution. *See, e.g., Consent Order of January 21, 2020* at 15 (State acknowledging that it has failed to meet its “constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education.”); *id.* (“[T]he Parties do not dispute [] that many children across North Carolina, especially at-risk and economically-

disadvantaged students, are not now receiving a *Leandro*-conforming education.”); *id.* at 17 (State conceding that it has “yet to achieve the promise of our Constitution and provide all with the opportunity for a sound basic education”); *State’s Submission of March 15, 2021* (“*State’s March 2021 Submission*”) at 1 (admitting that “this constitutional right has been and continues to be denied to many North Carolina children”); *id.* (“North Carolina’s PreK-12 education system leaves too many students behind, especially students of color and economically disadvantaged students.”); *id.* (“[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens.”); *Order dated June 7, 2021* at 6 (“State Defendants have acknowledged that additional State actions are required to remedy the denial of this fundamental right.”); *State’s Submission of August 16, 2021* at 1 (same).

Further, it is beyond dispute that such established deprivations of constitutional rights must be fully remedied by the State. *See Leandro II*, 358 N.C. at 644, 599 S.E.2d at 394 (the State must “address and correct” the underlying constitutional violations). Otherwise, our Constitution, and the inalienable rights granted to the citizens thereunder, are rendered meaningless.

***The Court Provided the State Seventeen Years of Deference
and Discretion to Develop the Remedy***

Once the violation of a fundamental constitutional right has been established, such as in this case, the State initially is to be afforded discretion in terms of devising and implementing the “nuts and bolts” of an effective remedial plan. *See Liability Judgment* at p. 111 (The executive and legislative branches of government should be permitted “initially at least, to use their informed judgment as to how best to remedy the identified constitutional deficiencies.”). If the State fails to do so, however, then it is the duty of the courts to order specific remedies to ensure the constitutional wrongs are corrected. *Leandro II*, 358 N.C. at 642, 599 S.E.2d at 393. *See also, e.g., Beard v. North Carolina State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987) (holding that “[t]hrough its inherent power the court has the authority to do all things that are reasonably necessary for the proper administration of justice” and that such “power may not be abridged by the legislature”).

In the seventeen years since the *Leandro II* decision, this Court has afforded the State (through its executive and legislative branches) discretion to develop its chosen *Leandro* remedial plan. The Court went to extraordinary lengths in granting the political branches of government time, deference, and opportunity to use their informed judgment as to the “nuts and bolts” of the remedy, including the identification of the specific remedial actions that required implementation, the time frame for such implementation, the resources necessary for the implementation, and the manner in which to obtain those resources.

Seventeen years is a long time, and during that period Plaintiffs repeatedly objected to the State's delay. *See, e.g., Plaintiffs' Motion for Order to Show Cause dated February 10, 2005; Plaintiffs' Motion to Show Cause dated April 29, 2014.* Indeed, in the last seventeen years, a new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education. While Plaintiffs have always appreciated that the development of a statewide constitutional remedial plan is no easy task, complexity does not—and of course cannot—excuse the State from deliberate and swift action when constitutional rights are at issue, especially the rights of children.

The State's Comprehensive Remedial Plan

On March 21, 2021, the State presented a Comprehensive Remedial Plan for constitutional compliance (the "Remedial Plan"). After being granted *years* of deference, the Remedial Plan sets out the "nuts and bolts" for how the State will remedy its continuing constitutional failings to North Carolina's children. The Remedial Plan is multi-faceted. It sets out (1) the specific actions identified by the State that must be implemented to remedy the continuing constitutional violations, (2) the timeline developed by the State required for successful implementation, and (3) the necessary resources and funding, as determined by the State, for implementation.

Indeed, the State represented to this Court—and it is thus undisputed in this case—that the actions outlined in the Remedial Plan are the "necessary and appropriate actions that must be implemented to address the continuing constitutional violations." *State's March 2021 Submission* at 3, 4 (emphasis added). The State further represented that the full implementation of each year of the Remedial Plan was required to "provide the opportunity for a sound basic education to all children in North Carolina." *Id.* at 3. And, the State assured the Court that it was "committed" to fully implementing the Remedial Plan and within the time frames set forth therein. *Id.*

This Court reviewed the Remedial Plan and agreed with the State. 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." *See* Order dated June 7, 2021 at 7 (§ A). With the consent of the State, the Court ordered the Remedial Plan to be fully implemented in accordance with the schedule identified by the State. *Id.* 7 (§ B).

Recognizing the passage of time since the *Leandro II* decision, this Court stressed to the State, "[t]ime is of the essence." *Id.* at 6. ("The urgency of

implementing the Comprehensive Remedial Plan on the timeline currently set forth by State Defendants cannot be overstated.”). As this Court previously found:

[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they live, work and engage as citizens. The costs to these students, individually, and to the State are considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

See Order dated January 21, 2020 at 1. And, the urgency to move now is exponentially heightened by the continuing effects of the COVID-19 pandemic on schools, children, and families.

The State’s Report Dated August 6, 2021

As this Court is aware, the State did not implement many of the specific actions required for Year 1 of the Remedial Plan, and unfortunately those were pushed out to later years of the Plan. The State’s recent submission, which describes its steps towards implementing the required actions for Year 2 and Year 3 of the Plan, raises further concerns. In fact, of the required action items for Year 2 alone, the State indicates that there is simply “[n]o action to report” for more than half of them.

Importantly, the State concedes—and does so without qualification—that it has more than enough resources to fully fund and implement every single component of Year 2 and Year 3 of the Plan. See *State’s Report* at 1 (The State conceding to the Court that it “has the fiscal resources to implement the next two years of the [Plan].”); see also *id.* (“nonpartisan forecasts ... put State revenues at a record high of \$29.7 billion in recurring revenue, nearly \$5 billion more than the base budget required to keep the State operating as it is today”); *id.* (“As of July 16, 2021 the Office of the State Controller reports that the State has \$8.0 billion in unappropriated cash balance.”). Indeed, the State further admits that Governor Cooper has already proposed legislation to demonstrate precisely how every Year 2 and Year 3 action item of the Remedial Plan can be fully implemented now within a balance budget. *Id.* Thus, the fact that the State can implement fully Year 2 and Year 3 of the Plan is not at issue.

While the State concedes that it can do so, its submission appears to forecast that it may not do so. This is because, according to the State, the General Assembly may withhold the required resources for Year 2 and Year 3. Critically, these are the same resources identified by the State in its previous submissions in this case when it represented to the Court that it was “committed” to fully implementing each year of the Remedial Plan. Now, in what at least appears to be a forecast of backtracking, the State notes that its Senate’s proposed budget provides only a mere 27.74% of the

resources necessary to implement Year 2, and only 20.16% of the resources for Year 3.¹ Notably, the State provides no explanation as to why this is the case.

The State's report notes, however, that "[a]s of the filing of [its] report," State officials are still working on legislation concerning the provision of the Year 2 and Year 3 resources and programs. Plaintiffs remain hopeful that, by the time of the upcoming status conference with the Court on September 8 (or shortly thereafter), the State will be in a position to report that all action items for Year 2 and Year 3 will proceed under the timelines set forth in the State's Remedial Plan. Plaintiffs respectfully submit that anything less than that is unacceptable.

The constitutional duty is long-established. The State's continuing violation of that duty is equally long-established and amplified every day. The State's plan to remedy that violation was approved by this Court, and there are more than enough resources available to fully implement it. North Carolina's children have waited long enough. As held by the Supreme Court, "the children of North Carolina are our state's most valuable renewable resource." *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377. "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). Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue.

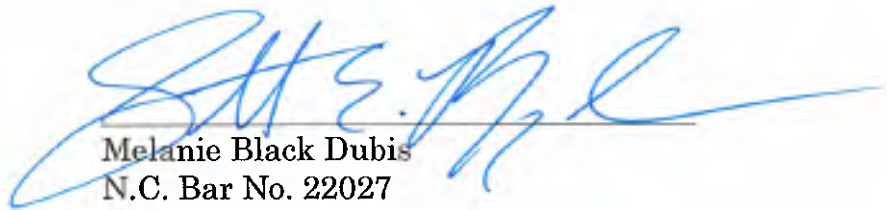
Indeed, this Court should not—and must not—tolerate continuing constitutional deprivations. Justice Orr, speaking on behalf of a unanimous North Carolina Supreme Court, addressed this very issue and stated:

Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

358 N.C. at 642, 599 S.E.2d at 393 (emphasis added).

¹ The proposed House Budget, which was released after the State's report, similarly withholds the required resources for implementation of Year 2 or Year 3. That proposal would allocate only about 54% of the resources needed for Year 2 and approximately 30% for Year 3.

This the 25th day of August, 2021.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on the following on this day by e-mail (the agreed-to form of service):

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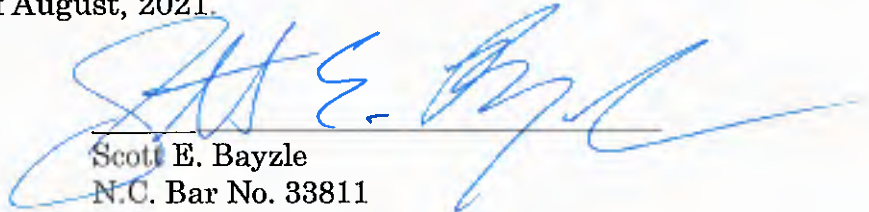
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This the 25th day of August, 2021.



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