No. 60A20 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

ASHLEY DEMINSKI, as guardian ad litem on behalf of C.E.D., E.M.D., and K.A.D.,

Plaintiffs-Appellants,

v.

PITT COUNTY BOARD OF EDUCATION,

Defendant-Appellee,

and

THE STATE BOARD OF EDUCATION,

Defendant.

From Wake County

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Board's response brief is a broadside attack on this Court's precedents. Each of the Board's main arguments calls into question decades of settled law.

First, the Board insists that it had a right to an interlocutory appeal on a meritless defense—sovereign immunity—that does not apply to direct constitutional claims. If the Board is right, then this Court was wrong in *Craig v. New Hanover County Board of Education*, 363 N.C. 334, 678 S.E.2d 351 (2009).

Next, the Board insists that this is a *Leandro* case, even though this is a case about the right to *access* a public education, not about the *substance* of that education. Again, if the Board is right, then this Court's prior distinctions of these two types of educational rights were wrong. *See Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997); *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 264 S.E.2d 106 (1980).

Finally, the Board tosses out a new argument not raised in the trial court or in the Court of Appeals. The Board says that the Deminskis may have an adequate remedy in a state statute about board of education policies, or maybe even under federal law. But the Board's arguments fly in the face of *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992).

The Board presents no good reason for this Court to overturn or undermine any of these foundational precedents, and it should decline the Board's implicit invitation to do so.

ARGUMENT

I. The Court of Appeals Lacked Jurisdiction over This Appeal.

The Deminskis have pleaded a colorable claim for a violation of the North Carolina Constitution. Thus, under this Court's precedent, the Board had no sovereign immunity defense. And without a plausible immunity defense, the Board had no right to an interlocutory appeal. The Board's arguments to the contrary are incorrect, for several reasons.

A. The Board's argument is inconsistent with *Craig*.

First, the Board cannot reconcile its theory of appellate jurisdiction with *Craig v. New Hanover County Board of Education*, 363 N.C. 334, 678 S.E.2d 351 (2009). Notwithstanding the characterization in the Board's response brief, *Craig* did not have a "narrow" holding. *Craig* held that sovereign immunity does not bar a direct claim under the state constitution for a school board's negligent failure to protect a student from severe peer abuse. *See id.* at 340, 678 S.E.2d at 355. Such a claim is a "colorable constitutional claim" to which sovereign immunity does not apply. *Id.* at 338, 678 S.E.2d at 354. In other words, this Court decided that remedies for fundamental rights are too

important to be barred outright by sovereign immunity. In *Craig*, that violation was the *negligent* failure to protect a student from peer abuse. Here, the Deminskis have articulated an even clearer constitutional violation: the school board's *knowing* denial of access to an education.

The Board, echoing the reasoning of the Court of Appeals in *Doe*, argues that sovereign immunity applies when the complaint alleges conduct that could support both a common law tort and a direct constitutional claim. Resp. Br. at 4; *id.* at 10 (quoting *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 365, 731 S.E.2d 245, 249 (2012)). That argument is just a disagreement with *Craig*. *Craig* expressly approved of the plaintiff bringing, "in the alternative," his "colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim." *Craig*, 363 N.C. at 340, 678 S.E.2d at 355.

Regardless, it makes no difference, because the Deminskis did not bring a common law negligence claim against the Board. Instead, the Deminskis seek redress for the Board's intentional interference with their constitutional right to access a public education by knowingly tolerating sexual and physical abuse by the students under its care. The Deminskis have never argued that this misconduct also constitutes a common law tort, so it makes no sense for the Board to complain that the Deminskis are "re-labeling" torts as constitutional violations.

The Board's response brief also fails to grapple with the implications of its own reading of *Craig*. According to the Board, an appellate court must "necessarily examine[] whether any constitutional claim exist[s]" when the government takes an interlocutory appeal based on sovereign immunity. Resp. Br. at 4. As the Board would have it, this Court must first assess whether a constitutional claim exists, and then—and only then—should the Court consider whether the claim is barred by sovereign immunity. But if that is true, the converse must be true as well: any time this Court reaches the second step and considers whether sovereign immunity applies, it must have already assured itself already that the constitutional claim exists at step one.

Under that logic, this Court in *Craig* must have determined that the right asserted—the right to be protected from sexual assault at school—actually exists under the constitution, since the Court ultimately considered (and rejected) the immunity defense. If the Board is right about how courts should analyze these issues, then *Craig* "necessarily" determined that negligently permitting peer abuse violates the state constitution. Thus, the Board's interpretation of Craig either dooms the Board on appealability or on the merits.

Craig, therefore, is an insurmountable hurdle. The consequence of *Craig* for this case is that the Board's assertion of immunity in the trial court was frivolous. That frivolous defense could not serve as a foundation for a substantial-right appeal.

B. The Board's argument is inconsistent with *Sandhill*.

The Board's efforts to distinguish *Sandhill* fare no better.

The Board's retelling of *Sandhill* ignores the bases for Justice Ervin's dissent—the opinion that this Court adopted. *See Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 236 N.C. App. 340, 762 S.E.2d 666 (2014) (Ervin, J., dissenting), *rev'd & dissenting opinion adopted per curiam*, 368 N.C. 91, 773 S.E.2d 55 (2015). The majority and dissenting opinions in *Sandhill* clashed over whether the trial court's entire preliminary injunction was immediately appealable. The majority determined that only part of the injunction was immediately appealable because only part of the injunction was improperly entered. *Id.* at 354, 762 S.E.2d at 676.

Justice Ervin strongly disagreed. Appealability did not turn on the correctness of the trial court's interlocutory order—a substantial right was affected regardless of whether the trial court's order was right or wrong. *See id.* at 362, 762 S.E.2d at 681 (Ervin, J., dissenting). As Justice Ervin explained, "the extent to which the substance of a party's position on the merits is correct and the extent to which that party has a right to seek immediate appellate review from an interlocutory order are two separate, and essentially unrelated, questions." *Id.* at 362 n.4, 762 S.E.2d at 681 n.4. Thus, Justice Ervin held that

the entire preliminary injunction was immediately appealable because the entire order restrained enforcement of the criminal laws, and that restraint affected a substantial right. *Id.* at 363–64, 762 S.E.2d at 682–83 (2014).

Here, the effect of the Board's argument is for this Court to overturn or ignore *Sandhill*, a decision which has the same precedential value as any other opinion of this Court. *See Bigham v. Foor*, 201 N.C. 14, 15, 158 S.E.2d 548, 549 (1931). The Board says that the trial court's order affected its substantial right to sovereign immunity, but *Craig* has already determined that the Board has no immunity defense to a claim like the Deminskis'; the assertion of the defense below was frivolous. The Board's only argument for the application of sovereign immunity (and thus interlocutory review under the substantial-right doctrine) is that the constitutional right asserted by the Deminskis does not exist. The Board, therefore, urges this Court to treat the merits and appealability as the same question. Yet these are "separate, and essentially unrelated, questions." *Sandhill,* 236 N.C. App. at 362 n.4, 762 S.E.2d at 681 n.4.

* * *

For either of these reasons, the Court of Appeals erred in exercising appellate jurisdiction.[1]

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[1] The Board gives no answer for why the government should always be entitled to an interlocutory appeal to challenge the existence or scope of an asserted constitutional right. *See* Opening Br. at 14–15. As the opening brief

II. Local Schools Do Not Have License to Engage in or Tolerate Severe Child Abuse.

Even if this Court were to determine that the Board lacked the right to an interlocutory appeal, the public interest in this case weighs heavily in favor of a resolution on the merits as well.[2] The Board's merits argument would grant license to engage in or tolerate extreme child abuse. Our constitution forbids that result.

A. The Board's absolutist argument should be rejected.

The Board's argument in its response brief is astonishing in its breadth. According to the Board, it can *never* violate the state constitution, no matter how irrationally it may deny a student access to a public education. The Board's position would apparently be the same if its teachers had abused the Deminskis themselves or locked them in a closest during the school day. There

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explained, fusing the merits and appealability inquiries serves no good purpose. The development of a factual record can only assist an appellate court in determining the proper standard to evaluate violations of constitutional rights.

[2] Even when an appeal should be dismissed as interlocutory for lack of a substantial right, this Court may still address the merits of the appeal when the "the subject matter of [the] case implicates the public interest to such a degree that invocation of [the Court's] supervisory authority is appropriate." *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 208, 794 S.E.2d 699, 705 (2016). Because this case deals with the constitutional rights of students across the state to access an education free from severe abuse, the public interest strongly supports a decision on both the jurisdictional and merits issues. Nor would a decision on the merits be an advisory opinion. Even if the appeal is dismissed, the case will continue in the trial court, and that court will benefit from the guidance that this Court provides.

is no support for that argument. The people of this State guaranteed that all children could access a public education. Any governmental actor that interferes with the access to a public education breaks that promise.

Although this case deals with a public school's decision to tolerate peer abuse, the Board's argument sweeps much more broadly. According to the Board, there is no claim under the state constitution for any misconduct related to "abuse of a student, even on school premises." Resp. Br. at 20 (quoting *Deminski v. State Bd. of Educ.*, 837 S.E.2d 611, 616 (N.C. Ct. App. 2020)). The Board insists that the promises made in our constitution have no bearing on a school's refusal to educate—or interference with the state's provision of education to—an "individual child." *Id.* at 22. So long as the state provides a "system of public education," local school boards are free to tolerate child abuse that denies access to that system. *Id.* at 21 (quoting *Leandro*, 346 N.C. at 346, 488 S.E.2d at 254). The Board's argument is so unconstrained that the Board does not even acknowledge a constitutional claim if the Board's *own teachers* routinely abused particular students or physically barred them from their classrooms on a whim.

There is no reason to accept the Board's broad claim. The constitution makes clear that "access" to a public education is an *individual* right for every child in our state. *Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980) (discussing N.C. Const. art. I, §§ 15 & 19, art. IX, § 2(1)).

The right of access is a "fundamental right." *Id.* When access is "threatened with restrictions," our courts scrutinize those restrictions to see whether the school can justify the restrictions "in light of the particular parties, the subject matter, and the circumstances involved." *Id.* And this individual "right" and "privilege" to access a public education, N.C. Const. art. I, § 15, cannot be "deprived" but by the "law of the land," *id.* art. I, § 19. Put another way, the arbitrary or unreasonable denial of an individual child's access to a public education violates our constitution. *King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ.*, 364 N.C. 368, 378, 704 S.E.2d 259, 265 (2010) ("[S]chool administrators cannot arbitrarily deny access [to a public education] without violating the state constitution.").

The Board does not dispute that the knowing toleration of child abuse is per se unreasonable. Rather, the Board argues its misconduct should be free from judicial scrutiny altogether.

The Board's first move is to shift blame to the State Board of Education. The Deminskis at first sued the State Board too, but the State Board was dismissed from the case because it was the County Board, not the State Board, that interfered with the Deminskis' education. Regardless of whether that dismissal was correct, it is at least true that the Pitt County Board was the body directly responsible for interfering with the Deminskis' education. The County Board knew about the abuse, had the chance to stop it, and failed to do so. The

County Board is the right defendant because the law-of-the-land clause prohibits all governmental actors—local government entities included—from depriving North Carolinians of their fundamental constitutional rights. *See Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 782–83, 413 S.E.2d 276, 289–90 (holding that "[e]ncroachment" on state constitutional rights is unlawful for anyone "clothed with the authority of the State").

What the County Board really seeks in this appeal is an implicit overruling of prior precedents ensuring educational access, where this Court has rightly understood that county boards of education are the proper defendants when their action (or inaction) is at issue. *See King,* 364 N.C. at 372, 704 S.E.2d at 261; *Sneed,* 299 N.C. at 618, 264 S.E.2d at 113.

The Board spends only a moment trying to distinguish these cases. *See* Resp. Br. at 26. The Board argues that *Sneed* and *King* are "utterly distinguishable" because those cases involved "the schools' own conduct" that denied educational access. *Id.* at 26.

The Board's argument ignores the final third of the Deminskis' opening brief. There, the Deminskis explained why the deliberate-indifference standard attributes the harms from peer abuse *to the school*, due to its special relationship with its students. Opening Br. at 23–37. That special relationship requires schools to protect the students from known or foreseeable harms and,

in the context of educational access, from harms that would effectively deny the students' right to access a public education.

Nowhere does the Board deny this special relationship or the workability of the deliberate-indifference standard.[3] Nor could it. Though the Board laments that the Deminskis seek to "immeasurably broaden" the right to access to a public education, Resp. Br. at 28, federal statutory law has mostly protected a similar right through the deliberate-indifference standard since at least 1999. *See* Opening Br. at 24–26 (discussing *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.,* 526 U.S. 629, 633 (1999)). *Davis*'s protection, however, is limited because it applies only where a school tolerates peer abuse that rests on a suspect classification, like sex or disability. The right asserted by the Deminskis is merely an incremental extension of the right in *Davis*: children have a right to access a public education free from severe peer abuse of any kind, even if not based on sex or disability, and government actors violate that right when they unreasonably ignore the abuse. This is not an "immeas-

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[3] Neither does the Board's amicus deny the workability of the deliberate-indifference standard, nor does the amicus suggest that the standard has led to inappropriate results in federal court. The amicus merely opposes a broad "educational malpractice" claim, NCSBA Br. at 11, but the Deminskis have never proposed that kind of claim.

urable expansion," but a modest one that fits the language of our state constitution and precedent from this Court.[4] *See* N.C. Const. art. IX, § 2(1) (guaranteeing "equal opportunities" to access a public education).

Next, the Board argues that this Court should cut off the Deminskis' remedies because educators should never be second-guessed in their handling of peer abuse. Resp. Br. at 29. To support its argument, the Board cites to *Coggins v. Board of Education of City of Durham*, 223 N.C. 763, 28 S.E.2d 527 (1944). But *Coggins* was about the reasonableness of a school board rule that punished all high schoolers for participating in secret societies. This case is not about generally applied rules, but about a school deciding to tolerate abuse of individual students. Unlike in *Coggins*, tolerance of child abuse is not a "political" question best left to elected officials. *Id.* at 769, 28 S.E.2d at 531. Rather, *Coggins* supports the Deminskis' position because it stressed that the "unreasonableness" of a school board's actions always remains "a judicial question, and the courts have the right of review." *Id.* Because this case is about the unreasonableness of the Board's response to their individual circumstances, *Coggins* requires that the Board's conduct be judicially reviewable.

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[4] The Board also suggests that causation may be difficult to prove in some cases of access denial. Resp. Br. at 28–29. Perhaps. But that is just a burden that plaintiffs may have to accept in certain cases. Here, at this stage in the case, all that matters is that the Deminskis have adequately alleged causation: because of the school's tolerance of the abuse, the academic performance of the Deminski children plummeted. (R p 7 ¶¶ 28–29.) Thus, causation is satisfied.

Besides, the deliberate-indifference standard already addresses the Board's concern. As the opening brief explained, the standard requires the plaintiff to prove that the Board's response to known harassment was unreasonable. Opening Br. at 31–33. If the Board means to say that courts and juries are unqualified to assess the reasonableness of this response, that is wrong. Courts and juries routinely do harder work than that. For example, they determine whether surgeons committed malpractice by acting below the medical standard of care, *Seraj v. Duberman*, 248 N.C. App. 589, 600, 789 S.E.2d 551, 558 (2016), and whether non-compete provisions in employment contracts are reasonable, *Sterling Title Co. v. Martin*, 266 N.C. App. 593, 597, 831 S.E.2d 627, 631 (2019). It is no harder to assess how a school responds, or fails to respond, to notice of harassment and abuse of a student in that school's care.

Finally, the Board also seeks refuge in the merits holding of *Doe*. Resp. Br. at 18–19. But *Doe* was different. The plaintiff in *Doe* alleged that the county school board was "negligent" in denying her right to an education free from abuse or psychological harm. *Doe*, 222 N.C. App. at 372, 731 S.E.2d at 253. But negligence, the majority held, is not enough for a violation of the law-of-the-land clause. *Id.*

This case is not about negligence, but about what the Board failed to do after it had *actual knowledge* of the abuse. When the Board *knowingly* permitting other students under the Board's control to deprive the Deminskis of their ability to access a public education—while in the classroom itself—the Board became culpable for cutting off the Deminskis' access to an education. So although *Doe* may present an interesting question about whether negligence is actionable, it's a question for another day.[5]

As these points show, the Deminskis are the only ones seeking a middle ground in this litigation. The deliberate-indifference standard properly balances the rights of students to access a public education with a public school's capacity to control its pupils. The Board's argument, by contrast, would bestow immunity on government officials, allowing them to deny access to a public education for any reason at all.

B. This is not a *Leandro* case.

The Board spends most of its response brief explaining this Court's series of cases on the state's constitutional duty to provide a sound basic education, a

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[5] The Board also argues that federal courts have declined to recognize the educational right asserted in this case. Resp. Br. at 20 n.4. That point is ultimately irrelevant. As the federal courts have themselves acknowledged, they have refused to recognize the right because it is inappropriate for *federal* courts to recognize *state* constitutional rights that state courts have not expressly recognized. *See, e.g.*, *Davis v. Blanchard*, 175 F. Supp. 3d 581, 595 (M.D.N.C. 2016).

right that was first recognized in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997). But *Leandro* doesn't answer any question here. *Leandro* was about the *quality* of the education provided in our public schools, but this case is about the right of individual students to *access* a public education on the same terms as all other students. That has nothing to do with *Leandro*.

In *Leandro*, the Court of Appeals had held that the educational provisions in the state constitutions did not guarantee any "qualitative standard" for the education provided in the state's public schools. *Leandro v. State*, 346 N.C. 336, 346, 488 S.E.2d 249, 254 (1997) (quoting *Leandro v. State*, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996)). Relying on *Sneed*, the Court of Appeals limited the educational guarantees in the state constitution to "equal access to education." *Id.* (quoting *Leandro*, 122 N.C. App. at 11, 468 S.E.2d at 550).

This Court reversed. The Court recognized that *Sneed* was indeed about "*access* to existing public education opportunities." *Id.* (emphasis added). But "the Court of Appeals' reliance upon *Sneed* was misplaced" because *Leandro* did "not involve issues of equal access to available educational opportunities." *Id.* In *King*, this Court again noted that *Sneed* was about educational access while *Leandro* was about educational quality. *See King*, 364 N.C. at 377, 704 S.E.2d at 265 ("But this Court's previous recognition of state constitutional

rights to equal educational access and a sound basic education compels more exacting review." (citing *Leandro* and *Sneed*)).[6]

Here, the Board makes the mistake of the Court of Appeals, confusing the right to access a public education (*Sneed*) with the right to an adequate curriculum (*Leandro*). This is a *Sneed* case—an equal access case—not a *Leandro* case about the qualitative standard for the curriculum offered to the Deminskis. Indeed, for purposes of this case, it does not matter *what* kind of education, good or bad, was being offered to the students in Pitt County. What matters here is that, because of the school's indifference to the abuse of the Deminski children, the Deminski children were denied equal access to whatever public education the school provided to everyone else.[7]

Because of this categorical error, the Board also mistakenly believes that it can shift the blame for its own misconduct to the state and the State Board of Education. But because this is not a *Leandro* case, the Pitt County School Board is the proper defendant.

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[6] And in *Leandro II*, the word "access" appears nowhere in the Court's opinion. *See Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004).

[7] The Board's own amicus apparently agrees: "Whether a school was deliberately indifferent to student-to-student harassment is indeed an entirely different question than whether the State has offered a sound, basic education to all children." NCSBA Br. at 9. Indeed, the two inquiries are entirely distinct.

After the Deminskis filed their complaint, and after the State Board was dismissed from this case, this Court decided *Silver v. Halifax County Board of Commissioners*, 371 N.C. 855, 857, 821 S.E.2d 755, 757 (2018). There, this Court held that a county school board is not a proper defendant for a constitutional claim that students are receiving a qualitatively deficient education. *See id.* at 869, 821 S.E.2d at 764. The holding was limited, however, to a county board's failure to provide sufficient funding for a sound basic education. As this Court held, "any complications born of the incompetence or obstinance of a county board of county commissioners relating to the finances of local education are the 'ultimate responsibility' of the State, which must step in and ameliorate the errors." *Id.* at 866–67, 821 S.E.2d at 763.

This isn't a case about the Board's failure to finance the Deminskis' sound basic education. It's a case about the Board's *interference* with the state's provision of that education. The Deminski children were denied the right to access the same public education provided to all other children in their county because the school unreasonably ignored abuse happening in the classroom. Nowhere did *Silver* give license to local schools to abuse their children or to tolerate their abuse.

C. The Deminskis have not waived reliance on the law-of-the-land clause to enforce their educational rights.

In the alternative, the Board argues that the Deminskis have "waived" any arguments about the enforceability of their individual constitutional rights through the law-of-the-land clause. Resp. Br. at 24. Although the complaint only cites the educational provisions of the state constitution, and not the law-of-the-land clause as well, that is not a waiver.

The law-of-the-land clause is the foundational clause for enforcing individual rights in the state constitution. That clause (often called our State's due-process clause) provides a "general and comprehensive" safeguard of individual rights. *State v. Hedgebeth*, 228 N.C. 259, 266, 45 S.E.2d 563, 568 (1947). The law-of-the-land clause is the vehicle for securing all individual rights against "the arbitrary exercise of the powers of the government." *Gunter v. Town of Sanford*, 186 N.C. 452, 456, 120 S.E. 41, 43 (1923) (quoting *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819)). The clause's protections extend to all "fundamental rights of the individual." *State v. Dobbins*, 277 N.C. 484, 497, 178 S.E.2d 449, 457 (1971). And, critical here, this Court acknowledged a decade ago that the "equal access provisions" dealing with education in the state constitution are "fundamental right[s]" protected by "due process." *King*, 364 N.C. at 372, 704 S.E.2d at 262.

That the Deminskis can enforce their educational rights through the law-of-the-land clause was not only evident from the case law, but also in the complaint. The complaint explains that the educational provisions of the state constitution guaranteed the Deminskis access to a public education. (R p 7 ¶ 31 (citing N.C. Const. art. I, § 15, art. IX, § 2).) The complaint then immediately explains that the educational rights individually guaranteed to the Deminskis were "denied" by the Board. (R p 8 ¶ 32.) The complaint frames the denial of that fundamental right in the clear language of due process.[8] *See* N.C. Const. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.").

Our system of notice pleading requires nothing more. *See U.S. Bank Nat'l Ass'n v. Pinkney*, 369 N.C. 723, 728, 800 S.E.2d 412, 416 (2017). As this Court has recognized, the allegations supporting even a "mislabeled claim" can withstand a motion to dismiss so long as the allegations adequately support "a

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[8] *See, e.g.*, *Farris v. Burke Cty. Bd. of Educ.*, 355 N.C. 225, 242, 559 S.E.2d 774, 784 (2002) ("Accordingly, we hold that petitioner was not *denied* her due process rights." (emphasis added)); *Leandro*, 346 N.C. at 353, 488 S.E.2d at 258 (explaining that an arbitrary funding system "could result in a *denial* of equal protection or due process") (emphasis added)); *Cty. of Lancaster, S.C. v. Mecklenburg Cty., N.C.*, 334 N.C. 496, 503, 434 S.E.2d 604, 610 (1993) (examining whether a procedure resulted in a "*denial* of due process" (emphasis added)); *In re Moore's Sterilization*, 289 N.C. 95, 101, 221 S.E.2d 307, 311 (1976) ("Respondent further contends that the statutes in question *deny* him substantive due process." (emphasis added)).

different legal theory." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979); *see also Haynie v. Cobb*, 207 N.C. App. 143, 149, 698 S.E.2d 194, 198 (2010) (discussing *Stanback* and explaining that "[t]he labels as to legal theories which plaintiff gave his claims in the 2007 complaint are not controlling").

Indeed, even in federal court, where the pleading standard is higher, the Board's waiver argument would fail. The Supreme Court of the United States, for instance, has held that a complaint pressing a constitutional claim cannot be dismissed for failing to cite to the statutory cause of action for the claim. *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014). The "[f]ederal pleading rules . . . do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id.* Once the "factual basis" of a complaint is sufficiently stated, a complaint should not be dismissed. *Id.* If a defendant insists on more, a court should just allow the plaintiff to amend the complaint and add the missing "citation." *Id.* at 12; *accord Chapman v. Yellow Cab Coop.*, 875 F.3d 846, 848 (7th Cir. 2017) ("[C]omplaints need not identify the applicable law . . . ."). As the Seventh Circuit has held, following *Johnson*, a complaint is not deficient for citing only one part of the constitution when the plaintiff also intends to present a claim under the "Due Process Clause" as "the fact that the complaint omits a legal theory cannot block a plaintiff from invoking that theory." *Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020); *see id.* at

975 ("Complaints plead *grievances*, not legal theories, and Koger's complaint spelled out his grievance . . . .").

The Board's thin waiver argument ignores these points. Under a proper understanding of the pleading standard, the Deminskis' complaint sufficiently pleads a violation of their constitutional right to access a public education, enforceable through the constitution's educational provisions and the law-of-the-land clause.

III. There Are No Other Adequate State Remedies Available.

In their response brief, the Board discovers a new argument that it never presented to either of the courts below. The Board argues that the Deminskis cannot pursue a direct constitutional claim because, the Board suggests, the Deminskis may have been able to follow a vague state statute or file a federal claim instead.

This late-coming argument is procedurally foreclosed because the Board never raised it in either court below, nor did it seek this Court's permission to raise the issue. The argument is also substantively meritless. The state statute to which the Board refers does not offer an adequate remedy, nor do federal statutes have any relevance to the adequacy inquiry.

A. The Issue of Alternative Remedies Is Not Before This Court.

The Board's alternative-remedies argument should be rejected at the outset as unpreserved. The Board cannot raise this argument for the first time in this Court.

This case comes to the Court on two tracks: a petition for discretionary review on appealability and a notice of appeal based on the dissenting opinion in the Court of Appeals. Neither of those tracks put the remedies issue before this Court.

When this Court reviews a decision of the Court of Appeals, its role "is to determine whether there is error of law in the decision of the Court of Appeals." N.C. R. App. P. 16(a). In that role, this Court's review "is limited to consideration of the issues stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed." *Id.* But the remedies issue was not stated in the Deminskis' notice of appeal, in the Deminskis' petition for discretionary review, or in the Board's response to the petition for discretionary review.

And when, as here, an appeal to this Court is based on a dissent at the Court of Appeals, this Court's review "is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court." *Id.*

r. 16(b). Yet the remedies issue was not mentioned at all in the dissenting opinion below (or the majority, for that matter), nor was it stated in the notice of appeal.

Compounding the error, the Board failed to preserve the remedies issue at any point in this case. The Board did not argue the remedies issue to the trial court, (R pp 12–21), nor did it argue the issue in its brief to the Court of Appeals, Defendant-Appellant's Brief, *Deminski v. State Bd. of Educ.*, 837 S.E.2d 611, 616 (N.C. Ct. App. 2020), (No. COA18-988), *available at* https://www.ncappellatecourts.org/show-file.php?document_id=236445.

These omissions by the Board preclude review of the Board's new remedies issue. The Board did not preserve the remedies issue because it did not raise it in the trial court, which constitutes a waiver of the issue. N.C. R. App. P. 10(a)(1); *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995) ("However, having failed to raise the alleged constitutional issues before the trial court, defendant has waived these constitutional arguments."). And because the Board did not raise the issue in its brief filed with the Court of Appeals, the issue, had it been preserved, would have been deemed abandoned. N.C. R. App. P. 28(b)(6); *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.,* 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008).

This Court, like the United States Supreme Court, is a "court of review, not of first view." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 913 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)). There is no reason for this Court to set aside its normal procedure and rules to bail out a party that has never made any effort to raise or preserve this argument in either of the courts below.

B. The Deminskis did not have an adequate state law remedy.

Even if the issue of alternative remedies were properly before this Court, the Board's arguments lack merit.[9] This Court held in *Corum* that only "in the absence of an *adequate state* remedy, one whose state constitutional rights

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[9] Amicus curiae North Carolina School Board Association (NCSBA) attempts to make this argument, NCSBA Br. at 5–9, under the guise of providing this Court insight as to why the Deminskis' constitutional claim "is not necessary" in light of "[v]arious local remedies and legal claims" that already exist. *Id.* at 5. This is a poorly veiled effort to inject a new argument into this case, one which the Board never raised in either of the courts below (and which NCSBA itself did not raise in its amicus brief below). The Court should not consider such arguments not made by the parties and that completely change the issues in the case. *See Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 632, 224 S.E.2d 580, 588 (1976) (refusing to consider an argument raised only by an amicus and not by the parties because "appellate review is limited to the arguments upon which the parties rely in their briefs"); *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581-82 (2020) (reiterating that an effort to radically transform a case by amici "goes well beyond the pale"); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001) ("Although an amicus brief can be helpful in elaborating issues properly presented by the parties, it is normally not a method for injecting new issues into an appeal."). Likewise, the exhibit that NCSBA submitted—which was never submitted in either lower court and is not a part of the record—should not be considered by this Court and is not fit for judicial notice.

have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289 (emphasis added). Here, the alternative remedies proposed by the Board and its amicus are not "state" remedies and are not "adequate" either.

"[T]he North Carolina Supreme Court's definition of adequacy is twofold: (1) that the remedy addresses the alleged constitutional injury and (2) that the remedy provides the plaintiff an opportunity to 'enter the courthouse doors.'" *Taylor v. Wake Cty.*, 811 S.E.2d 648, 654 (N.C. Ct. App. 2018) (citations omitted) (quoting *Craig*, 363 N.C. at 339–40, 678 S.E.2d at 355). The state remedy addresses the alleged constitutional injury "if, assuming the plaintiff's claim is successful, the remedy would compensate the plaintiff for the *same injury* alleged in the direct constitutional claim." *Id.* at 655–56 (emphasis in original) (citation omitted). And "adequate" state law remedies must provide "complete[]" relief for the damage suffered by the plaintiff whose state constitutional rights have been violated. *City-Wide Asphalt Paving, Inc. v. Alamance Cty.*, 132 N.C. App. 533, 539, 513 S.E.2d 335, 339 (1999) (quoting *Corum*, 330 N.C. at 789, 413 S.E.2d at 294).

1. N.C. Gen. Stat. § 115C-45 does not provide an adequate state law remedy for the Deminskis' constitutional injuries.

The Board argues that the Deminskis had an adequate state law remedy provided by N.C. Gen. Stat. § 115C-45(c)(2). Resp. Br. at 32–36. It claims that

this statute provides an administrative remedy for the Deminskis' constitutional injury—that they could have "challenge[d] the school's inaction or violation of a North Carolina law" under this provision. *Id.* at 33. But the Board misses that, under the plain language of this statute and the facts alleged in the complaint, this statute would not have given the Deminskis "the opportunity to enter the courthouse doors and present [their] claim." *Craig*, 363 N.C. at 340. Further, even if this were a remedy that the Deminskis could have pursued, it could not have been an "adequate" substitute for a direct constitutional claim for damages.

Section 115C-45 of the General Statutes provides North Carolinians with a mere procedural right to appeal to their local board of education "from any final administrative decision" in certain matters. N.C. Gen. Stat. § 115C-45(c). Complainants can then further appeal the local board's decision to the superior court "on the grounds that the local board's decision is in violation of constitutional provisions, is in excess of the statutory authority or jurisdiction of the board, is made upon unlawful procedure, is affected by other error of law, is unsupported by substantial evidence in view of the entire record as submitted, or is arbitrary or capricious." *Id.*

But this statute does not provide an adequate state remedy for the Deminski's constitutional injury for two reasons.

First, the remedies available through this procedure are not "adequate" because damages are not available. The type of remedy available through the statutory process can, at most, only provide *equitable* relief—the reversal of a school administrator's erroneous decision. *See* N.C. Gen. Stat. § 115C-45. The County Board has not obligated itself to pay damages. And remedies are inadequate when they provide only equitable relief and not money damages. *See City-Wide Asphalt Paving*, 132 N.C. App. at 539, 513 S.E.2d at 339; *Smith v. Town of Cramerton*, No. 3:18-CV-631-RJC-DCK, 2019 WL 4233614, at *8 (W.D.N.C. Sept. 5, 2019) ("Remedies are not adequate if they allow only equitable recovery and not money damages."); *Frye v. Brunswick Cty. Bd. of Educ.*, 612 F. Supp. 2d 694, 704 (E.D.N.C. 2009) ("For a remedy to be adequate, it must provide plaintiff the same type of relief, such that it 'completes his remedies.'").

Indeed, the Board, in its response brief, makes no effort to show that all the remedies sought by the Deminskis in this lawsuit are available under section 115C-45. The Board's amicus, in an attempt to shore up the argument, attached a non-record document showing what it says was a County Board policy that the Deminskis should have followed under section 115C-45. NCSBA Br. at 5–6 & Ex. A. The amicus argues that the policy allows for claims that result in a final administrative decision, which can then be reviewed under section 115C-45. *Id.* at 6.

But the attached policy undercuts the Board's remedies argument. Nothing in the policy says that money damages are available to victims like the Deminski children. In fact, the policy is entirely silent on remedies. Governmental immunity bars claims for money damages unless there has been a "plain" and "unmistakable" waiver of immunity. *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016). Nothing in the attached policy constitutes such a waiver. That silence means that damage claims are unavailable under the policy, rendering this remedy inadequate.

Second, this statute could not have applied to the Deminskis' case because it only provides an avenue for an appeal if the school board actually takes some action. But the complaint alleges no "final administrative decision" for the Deminskis to appeal, so they could not have obtained any relief under section 115C-45. *See* N.C. Gen. Stat. § 115C-45(c) ("As used in this subsection, the term 'final administrative decision' means a decision of a school employee from which no further appeal to a school administrator is available."). Ms. Deminski reported the abuse, (R p 6 ¶ 17), but the school administrators did not issue a decision for Ms. Deminski to appeal to the Board.

In every case cited by the Board in support of its new argument that section 115C-45 provided an available state law remedy, the school administrators issued a formal, final decision for the student or parent to appeal. *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 429 (2010)

(school decided to punish a student with a suspension lasting more than 10 days); *Rone ex rel. Roseboro v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, 220 N.C. App. 401, 402, 725 S.E.2d 422, 423 (2012) (petitioner appealed the school's decision to place him in alternative education to the local board under § 155C-45 and then appealed that decision to superior court); *Hentz v. Asheville City Bd. of Educ.*, 189 N.C. App. 520, 521, 658 S.E.2d 520, 521 (2008) (superintendent issued final decision removing petitioner children from school district). But what are families to do when school administrators unreasonably fail to respond to notice of a denial of educational access?

For these reasons, the administrative process outlined in section 115C-45 would not have allowed the Deminskis to seek a legal remedy for the damages that they suffered as a result of the constitutional violation, and thus it is not an adequate state law remedy. *See Craig*, 363 N.C. at 340 (holding that when the proposed alternative remedy could not provide the plaintiff with relief, it was not an "adequate remedy at state law"); *City-Wide Asphalt Paving*, 132 N.C. App. at 539, 513 S.E.2d at 339 (finding that, because the alternative state law "remedies [suggested by the defendant] are equitable in nature and do not provide plaintiff with an avenue to pursue money damages," they were not "adequate" remedies).

2. Federal law does not provide an adequate state law remedy for the Deminskis.

The Board argues in a footnote that the Deminskis have an alternative remedy in federal statutory law (Title IX), Resp. Br. at 33 n.6, but this argument is flawed.

First, under the plain language of the court's holding in *Corum*, the remedy for a state constitutional violation must be one that is provided by *state* law—not federal law. In *Corum*, the plaintiff raised several federal claims under 42 U.S.C. § 1983, in addition to the state constitutional claim. 330 N.C. at 789, 413 S.E.2d at 294. The entire first section of *Corum* involved this Court deciding that two of these federal claims survived the defendants' motion to dismiss. *Id.* at 771, 781, 413 S.E.2d at 288–89. But though the plaintiff was allowed to proceed with these two federal claims, this Court *also* held that the plaintiff could *still* bring his direct claim under the state constitution because he lacked an "adequate *state* remedy." *Id.* at 782, 413 S.E.2d at 289 (emphasis added). If the Board is right that remedies under federal law have any bearing on the availability of a state constitutional remedy, then *Corum* was wrongly decided.

As with the Board's other arguments, the Board cannot prevail in this appeal without calling this Court's prior decisions into question. There is no

basis to revisit those decisions, so it does the Board no use to tell the Deminskis to seek a remedy from the United States Congress.

Next, common practice supports this conclusion. There are no cases in which a court—state or federal—has even examined the question of whether a plaintiff's direct state constitutional claim was precluded by the existence of an alternative federal claim. *See* Matthew R. Gauthier, Comment, *Kicking and Screaming: Dragging North Carolina's Direct Constitutional Claims into the Twenty-First Century*, 95 N.C. L. Rev. 1735, 1745 (2017). Indeed, in those cases in which a plaintiff has brought both a federal claim and a state constitutional claim, courts have universally followed *Corum*'s example and focused exclusively on the state remedies available to the plaintiff, ignoring the federal ones. *See, e.g.*, *Braswell v. Medina*, 255 N.C. App. 217, 234, 805 S.E.2d 498, 510 (2017) (allowing plaintiff to proceed with both a federal claim and a state constitutional claim under *Corum*); *Davis v. Town of S. Pines*, 116 N.C. App. 663, 673, 675-76, 449 S.E.2d 240, 246–48 (1994) (allowing plaintiff to proceed with a federal claim but ignoring that claim for the purposes of determining if plaintiff had a *Corum* claim); *Kline v. Cleveland Cty.*, No. 119CV00197MOCWCM, 2020 WL 1692348, at *12, *15 (W.D.N.C. Apr. 7, 2020) (same); *Bailey v. Town of Beaufort*, No. 4:19-CV-60-FL, 2019 WL 6702651, at *6, 9 (E.D.N.C. Dec. 6, 2019) (same). The Board's meek footnote calls all of these illustrative cases into question.

There is no good reason for the whims of Congress to determine the scope of rights available under our state constitution. *Corum* is rooted in the understanding that the North Carolina Constitution "provide[s] citizens with protection from the State's encroachment upon [their] rights." *Corum*, 330 N.C. at 782, 413 S.E.2d at 290. Therefore, when the state infringes upon those rights but fails to provide an adequate remedy for the infringement, "the common law will furnish the appropriate action for adequate redress of such grievance." *Id.* at 782, 413 S.E.2d at 290 (quoting *Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241, 250, 132 S.E.2d 599, 608 (1963)). Thus, the federal government's creation of a remedy does not affect North Carolina's obligation to its citizens under the state constitution.[10]

Finally, even if the Court were to consider the impact of federal remedies, they are inadequate here. The harassment necessary for a Title IX claim must be suffered "on the basis of sex." 20 U.S.C. § 1681(a) (2018); *see Davis*, 526 U.S. at 651. Likewise, a claim of deliberate indifference under the Rehabilitation

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[10] Indeed, it would be odd for the scope of our state constitutional rights to be constrained by the whims of legislators elected by other states. In *Craig*, this Court held that "our constitutional rights should not be determined by the specific language of the liability insurance policies carried by the boards of education in each county." *Craig*, 363 N.C. at 342, 678 S.E.2d at 357. That would lead to inconsistent results across the geography of the state. *Id.* Similarly, allowing federal legislation to limit state constitutional rights would lead to inconsistent results across time, as federal statutes come and go.

Act only applies to harassment suffered "solely by reason of her or his disability." 29 U.S.C. § 794(a) (2018); *see S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cty.*, 819 F.3d 69, 76 (4th Cir. 2016).

Yet the complaint does not allege that all of the relevant harassment was based on sex, disability, or some other suspect classification. The Deminskis alleged that Plaintiff C.E.D. was "severely bullied by two students and repeatedly harassed sexually by two other students." (R p 4 ¶ 11.) They allege that two students repeatedly "grabb[ed] C.E.D. by the shoulders and push[ed] along C.E.D.'s spine with sufficient force that C.E.D. had trouble breathing and swallowing." (R p 4 ¶ 12.) C.E.D. does not suffer from a disability and this physical harassment was not sexual. Another student sexually harassed C.E.D., but also harassed her in other ways, including "staring at C.E.D., interrupting C.E.D. during tests and other assignments, and repeatedly talking to C.E.D. during instructional time." (R pp 4–5.) E.M.D. and K.A.D. also faced "substantially the same" harassment by one of the aggressors that victimized C.E.D., including "constant verbal interruptions laced with vulgarity[] and physical violence including knocking students' items onto the floor, throwing objects, and pulling books and other items off shelves onto the ground. (R p 6 ¶ 21.)

In sum, the Deminski children suffered extreme abuse that interfered with their fundamental right to receive an education, but the abuse was not

based on federally protected classifications. Federal law does not provide a remedy for these violations.

This conclusion makes sense in a case like this one. Suspect classifications like sex and disability are not the touchstone of the state constitutional right at issue. The state constitution promises *all* children the right to access a public education. Severe and pervasive harassment of any type—whether based on sex, race, disability, or the color of a child's eyes—can interfere with the access to education. That is what the Deminskis have alleged, and the state constitution requires a remedy for that deprivation.

CONCLUSION

The Board's arguments request license for public schools to tolerate or even engage in abuse of the children entrusted to their care. When North Carolinians promised to provide the state's children with access to a free public education, that is not what they had in mind. The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

This the 9th day of December, 2020.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed

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