

No. 425A21-2

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

HOKE COUNTY BOARD OF)
EDUCATION; et al.,)
Plaintiffs,)

and)

CHARLOTTE-MECKLENBURG)
BOARD OF EDUCATION,)
Plaintiff-Intervenor,)

and)

RAFAEL PENN, CHARLOTTE-)
MECKLENBURG BRANCH OF THE)
STATE CONFERENCE OF THE)
NAACP *et al.*,)
Plaintiffs-Intervenors,)

v.)

STATE OF NORTH CAROLINA and)
the STATE BOARD OF EDUCATION,)
Defendants-Appellees,)

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.)

From Wake County
No. P21-511

PLAINTIFFS-INTERVENORS' APPELLANT BRIEF

INDEX

INDEX..... 3

TABLE OF AUTHORITIES..... iii

INTRODUCTION 2

ISSUES PRESENTED 5

STATEMENT OF THE CASE 5

STATEMENT OF THE GROUNDS FOR APPELLATE
REVIEW..... 10

STATEMENT OF FACTS 10

 I. The Constitutional Right to a Sound Basic Education 10

 II. The State’s Failure to Provide a *Leandro*-Conforming
 Education..... 11

 III. The WestEd Report 12

 IV. The Comprehensive Remedial Plan..... 13

 V. The June 2021 Order 14

 VI. The November 2021 Order 15

 VII. The Trial Court’s April 2022 Remand Order: The State Budget
 Fails to Adequately Fund the CRP 17

ARGUMENT..... 21

 I. On Remand, the Trial Court Exceeded Its Authority by
 Modifying the Transfer Provisions of the November 2021
 Order. 21

 A. Relevant Proceedings Below Demonstrate a Narrow
 Remand that the Trial Court Exceeded. 23

 B. The Trial Court’s Removal of the Transfer Provisions of the
 November 2021 Order Exceeded Its Jurisdiction on Remand
 and Should be Voided..... 27

CONCLUSION 31

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Cases

D & W, Inc. v. City of Charlotte,
268 N.C. 720, 152 S.E.2d 199 (1966)..... 23, 29

Hoke Cnty. Bd. of Educ. v. State,
358 N.C. 605, 599 S.E.2d 365 (2004)..... *passim*

Joyner v. Joyner,
256 N.C. 588, 124 S.E.2d 724 (1962)..... 28

In re K.S.,
274 N.C. App. 358, 852 S.E.2d 909 (2020)..... 29, 30

Leandro v. State,
346 N.C. 336, 488 S.E.2d 249 (1997)..... 5, 7, 10, 14

In re Parkdale Mills,
240 N.C. App. 130, 770 S.E.2d 152 (2015),
rev. den., 368 N.C. 284, 776 S.E.2d 200
(2015)..... 30

Romulus v. Romulus,
216 N.C. App. 28, 715 S.E.2d 889 (2011)..... 22, 28

SED Holdings, LLC v. 3 Star Properties, LLC,
250 N.C. App. 215, 791 S.E.2d 914 (2016)..... 28

Upton v. Upton,
14 N.C. App. 107, 187 S.E.2d 387 (1972)..... 27

Statutes

Gen. Stat. § 1-277..... 10

N.C. Gen. Stat. § 1-294..... 28

N.C. Gen. Stat. § 7A-27, N.C 10

2021 N.C. Sess. Laws 180 *passim*

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Intervenor-Defendants.

PLAINTIFFS-INTERVENORS' APPELLANT BRIEF

INTRODUCTION

For 18 years since this Court's unanimous liability ruling in *Leandro II* in 2004, Plaintiffs and Plaintiff-Intervenor families and school districts have waited for a remedy to the State's ongoing constitutional deprivation of a sound basic education. The harm to children in at-risk circumstances is especially pronounced, with continuing dismal academic performance rates, high dropout rates, and low graduation rates. On 11 June 2021, the trial court approved the State of North Carolina's Comprehensive Remedial Plan ("CRP" or "the Plan"), which was intended to help the State accomplish its duty of providing a sound basic education to all North Carolina schoolchildren by providing essential resources, programs and services (the "June 2021 Order"). The State coffers were plush with over \$8 billion in unappropriated funds to help fund years two and three of the Plan and all looked promising.

Unfortunately, the General Assembly balked. After being provided an additional five months to fund the full implementation of the State's Plan, with a warning to act or else the court would, the General Assembly failed to pass a

budget. Accordingly, on 10 November 2021, Superior Court Judge W. David Lee entered an order under the court’s inherent, equitable and constitutional powers that, in part, required state fiscal officials to transfer approximately \$1.75 billion in unappropriated funds from the state treasury to the governmental agencies responsible for carrying out the various parts of the Plan (the “November 2021 Order”). These transfer provisions were critical to ensuring that the Plan did not remain just a good plan on paper, but one that would be put into practice to provide meaningful educational opportunities for all schoolchildren.

Since *Leandro II*, the State had never presented a comprehensive plan that would have fully resolved its ongoing violation of students’ fundamental right to a sound basic education and, as a result of that failure, students suffered. Even when the General Assembly passed the 2021 Appropriations Act on 18 November 2021, days *after* the November 2021 Order, that highly politicized budget failed to fund nearly half of the cost of the Plan, including providing no additional money for low-income students, students with disabilities, English learner students and high-need schools.

This Court accepted the State of North Carolina’s bypass petition to review, in part, the constitutionality of the November 2021 Order. However, due to the passage of the 2021 Appropriations Act, this Court remanded the case to the trial court for its limited consideration of the effect of the Act on the

outstanding obligations owed under the November 2021 Order. Newly appointed trial court Judge Michael Robinson carried out that responsibility. On 26 April 2022, the trial court issued a certified order to this Court finding that the General Assembly failed to fund nearly half of the Plan and that the State had more than enough unappropriated funds to cover the remaining costs for years two and three (the “April 2022 Remand Order”).

But Judge Robinson did not stop there. Though Judge Robinson acknowledged in the April 2022 Remand Order that this Court’s mandate essentially limited the trial court’s jurisdiction to doing the math, nevertheless, he proceeded to strike “decretal paragraphs 1–9 on pages 19–20 of the trial court’s 10 November Order...” (R p 2641), the key transfer provisions in the November 2021 Order. This Court never intended for Judge Robinson to exercise such authority on remand, and the striking of the transfer provisions was clearly not within jurisdiction of the lower court. Accordingly, Rafael Penn, *et al.*, (“Penn-Intervenors”) respectfully request that this Court strike, vacate or otherwise void that part of Judge Robinson’s April Order.¹

¹ Penn-Intervenors file this brief as appellants and will file a brief as appellees in response to the merits brief(s) filed by State Defendants and other parties in response to the Court’s granting of the State’s Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals (No. P21-511) in this same case.

ISSUES PRESENTED

Did the trial court exceed its jurisdiction or otherwise err by acting outside the limited scope of this Court’s instructions on remand when it struck the transfer provisions of the November 2021 Order based on an issue that was not before the trial court.

STATEMENT OF THE CASE

On 25 May 1994, school districts in five low-wealth North Carolina counties (Hoke, Halifax, Robeson, Vance, and Cumberland) and families sued the State of North Carolina and the State Board of Education (“State Defendants”), claiming that children were not receiving an adequate and equitable education as required under the North Carolina Constitution. (R pp 3–31). The State Defendants moved to dismiss the lawsuit (R pp 187–89); but in 1997, the Supreme Court of North Carolina held that children in the state are guaranteed the right “to receive a sound basic education in our public schools” and allowed the case to move forward on the merits. *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (“*Leandro I*”).

Following a trial on the merits that resulted in the State being held liable (R pp 234–681), in 2004, the Supreme Court affirmed in part. It held that the State had “failed in [its] constitutional duty to provide . . . students with the opportunity to obtain a sound basic education,” ordered the State to develop and implement a *Leandro*-compliant remedial plan to correct the deficiencies,

and remanded the case for remedy and additional findings as to the other plaintiff parties. *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 647–48, 599 S.E.2d 365, 396 (2004) (“*Leandro II*”).

On 9 February 2005, Penn-Intervenors intervened on behalf of historically marginalized at-risk students, charging that the State of North Carolina and Charlotte-Mecklenburg Schools had denied them a sound basic education. (R pp 948–69). Between the years 2004 and 2015, the trial court held over twenty evidentiary hearings in which it repeatedly concluded that the State was failing to provide the opportunity for a sound basic education to its schoolchildren. (R p 1825). As a result, in 2015, the trial court ordered the State Defendants to “propose a definite plan of action as to how the State of North Carolina intends to correct the educational deficiencies in the student population.” (R p 1257).

In 2018, the court rejected the State Board of Education’s contention that the educational system in Hoke County had improved, denying the Board’s motion for relief because it had “failed to present convincing evidence that either the *impact or effect* of” its “changes and reforms ha[d] moved the State nearer to providing children the fundamental right guaranteed by our State Constitution.” (R p 1302) (emphasis in original). In that same year, the court ordered the parties to identify an independent, third-party consultant to evaluate the State’s public education system and make detailed

recommendations for specific actions necessary to achieve compliance. (R p 1826).

In January 2020, the trial court ordered the State Defendants to work “expeditiously and without delay” to create and implement a system of education and educational reforms that would satisfy the State’s constitutional obligations. (R p 1826). On 15 June 2020, the parties submitted a Year One Plan to address the State’s constitutional deficiencies in Fiscal Year 2021. On 11 September 2020, the trial court ordered the State Defendants to implement the Year One Plan and, further, to develop and present a comprehensive plan that would fully satisfy the State’s *Leandro* obligation by 2030. (R p 1827). On 15 March 2021, the State Defendants submitted the CRP to resolve the constitutional violations that plagued generations of North Carolina schoolchildren. (R pp 1686–1742).

On 7 June 2021, the trial court entered an order approving the CRP and ordering the State to implement the CRP in its entirety after concluding that it had granted “every reasonable deference to the legislative and executive branches.” (R pp 1682–84). After providing the State five months to fully implement the CRP, on 10 November 2021, the trial court ordered state authorities to transfer \$1.75 billion, “the total amount of funds necessary to effectuate years 2 & 3 [of] the [CRP], from the unappropriated balance within

the General Fund to the state agents and . . . actors with fiscal responsibility for implementing” the CRP. (R p 1841).

On 24 November 2021, the Controller of the State of North Carolina petitioned the North Carolina Court of Appeals for a Writ of Prohibition, Writ of Supersedeas and a Temporary Stay of the November 2021 Order. (R pp 1888–1948). The Court of Appeals granted the writ on 30 November 2021 (“30 November Writ”). (R pp 2008–10).

On 7 December 2021, the State of North Carolina filed its Notice of Appeal. (R pp 1847–50). On 8 December 2021, Defendant-Intervenors Speaker of the House Timothy K. Moore and Senate President Pro Tempore Philip E. Burger concurrently filed their Notice of Intervention and Notice of Appeal. (R pp 1851–54).

On 15 December 2021, Plaintiffs Hoke County Board of Education, *et al.*, and Penn-Intervenors filed their respective notices of appeal and petitions for this Court to review the 30 November Writ. Plaintiff-Intervenors’ Notice of Appeal and Petition for Discretionary Review at 3, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. P21-511 (N.C. Dec. 15, 2021); *see also* Plaintiffs’ Notice of Appeal, Petition for Discretionary Review and, Alternatively, Petition for Writ of Certiorari, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. P21-511 (N.C. Dec. 15, 2021).

On 14 February 2022, the State of North Carolina filed its Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. P21-511 (N.C. Feb. 14, 2022). The Supreme Court granted the State’s petition on 18 March 2022 and stayed the other appeals and petitions filed. 18 March 2022 Order, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 425A21-2 (N.C.) (“18 March 2022 Order”). The Supreme Court remanded the case to the trial court “to determine what effect, if any, the enactment of the [2021] State Budget has upon the nature and extent of relief that the trial court granted in its [10] November 2021 order.” *Id.* at 2.

In an order issued on 26 April 2022, the trial court issued its order concluding that the Budget Act signed into law on 18 November 2021 “fails to provide nearly one-half of . . . total necessary funds” to fully implement the Comprehensive Remedial Plan. (R p 2630 ¶ 34). The Court also struck the transfer provisions of the November 2021 Order. (R pp 2641–43). On 25 May 2022, Penn-Intervenors, Plaintiffs, the State of North Carolina and Intervenor-Defendants filed notices of appeal of the April 2022 Remand Order. (R pp 2648–2669).

On 1 June 2022, this Court granted the Notices of Appeal concerning the April 2022 Remand Order and abated the appeals and motions to dismiss

regarding the Writ of Prohibition entered by the Court of Appeals. 1 June 2022 Order, *Hoke Cnty. Bd. of Educ., et al. v. State*, No. 425A21-2 (N.C.).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction over this appeal pursuant to N.C. Gen. Stat. § 7A-27, N.C. Gen. Stat. § 1-277 and this Court’s Orders of 18 March 2022 and 1 June 2022.

STATEMENT OF FACTS

I. The Constitutional Right to a Sound Basic Education

In *Leandro I*, the Supreme Court of North Carolina held that children in the state are guaranteed the right “to receive a sound basic education in our public schools.” 346 N.C. at 347, 488 S.E.2d at 255.

On remand and following a trial on the merits, in *Leandro II*, the Supreme Court concluded that the State had “failed in [its] constitutional duty to provide . . . students with the opportunity to obtain a sound basic education” and ordered the State to develop and implement a *Leandro*-compliant remedial plan to correct the deficiencies. 358 N.C. at 647–48, 599 S.E.2d at 396. The Court warned that the legislative and executive branches’ “authority to establish and maintain a public school system that ensures all the state’s children will be given their chance” to obtain a constitutionally compliant education would not go unchecked by the judicial branch:

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.

Id. at 642, 599 S.E.2d at 393.

II. The State’s Failure to Provide a *Leandro*-Conforming Education

In 2005, Penn-Intervenors intervened on behalf of students who were among the hundreds of thousands of at-risk students across North Carolina deprived of the opportunity for a sound basic education.² They endured “crippling learning environments,” economic and racial isolation, high administrator and teacher turnover, and “levels of student achievement, graduation rates, and other measures of student and school performance rates that are far lower (and disciplinary and dropout rates that are far higher) than those in higher income schools throughout the Charlotte district.” (R pp 952–53).

Between 2004 and 2018, the trial court held over twenty evidentiary hearings in which it consistently determined that the State was not providing the opportunity for a sound basic education to its schoolchildren. (R p 1825).

² An “at-risk” student is one who holds or demonstrates at least one of the following characteristics: “(1) member of a low-income family; (2) participate[s] in free or reduced-cost lunch programs; (3) [has] parents with a low-level education; (4) show[s] limited proficiency in English; (5) [is] a member of a racial or ethnic minority group; (6) live[s] in a home headed by a single parent or guardian.” *Leandro II*, 358 N.C. at 636 n.16, 599 S.E.2d at 389 n.16.

In 2018, upon receiving State Defendants’ proposed—and “wholly inadequate”—plan, the trial court warned, “The time is drawing nigh . . . when due deference to both the legislative and executive branches of government must yield to the court’s duty to adequately safeguard and actively enforce the constitutional mandate on which this case is premised.” (R pp 1304, 1306). It ordered the parties to identify an independent, third-party consultant to assist the Court in evaluating the State’s public education system and make detailed recommendations for specific actions necessary to achieve compliance. (R p 1826). The parties agreed to retain WestEd as a consultant. (R p 1826).

III. The WestEd Report

WestEd³ compiled its findings into a report that underscored the abysmal educational opportunities provided to schoolchildren, and at-risk students in particular (the “WestEd Report”). The WestEd Report concluded, “Students attending high-poverty schools are far less likely to receive a sound basic education.” (R p 1441).

The WestEd Report cited lower access to educational resources, qualified teachers, and qualified administrators as reasons for these discrepancies. Indeed, “school districts lack[ed] the funding necessary to meet the educational

³ In support of its work, WestEd also engaged the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute (LPI), a national education policy and research organization with extensive experience in North Carolina. (R p 1826).

needs of historically underserved student populations[.]” (R p 1379). And, “access to early childhood education remain[ed] out of reach for many low-income families,” despite the “critical importance” of providing “all at-risk students with the opportunity to attend high-quality early childhood programs.” (R p 1431). Moreover, students of color, economically-disadvantaged students, and students in high-poverty schools were all far less likely than their counterparts in low-poverty schools to have access to effective and experienced teachers. (R p 1403).

Based on the WestEd Report, all parties, including the State Defendants, ultimately agreed that “the time ha[d] come to take decisive and concrete action” to bring the State into compliance. (R p 1827). Yet, two years after the WestEd Report was published, North Carolina’s public education system continued to “leave[] too many students behind—especially students of color and economically-disadvantaged students.” (R p 1633).

IV. The Comprehensive Remedial Plan

Consequently, in January 2020, the trial court, yet again, ordered the State Defendants to work “expeditiously and without delay” to create and implement a system of education and educational reforms that would satisfy the State’s constitutional obligations. (R p 1827). On 15 June 2020, the parties submitted a Year One Plan to address the State’s constitutional deficiencies in Fiscal Year 2021, recognizing also that the COVID-19 pandemic had exacerbated

many of the inequities and challenges that are the focus of this case, particularly for at-risk students. (R p 1827–28). On 11 September 2020, the trial court ordered the State Defendants to implement the Year One Plan and, further, to develop and present a comprehensive remedial plan with the objective of fully satisfying the State’s *Leandro* obligations. (R p 1828).

After waiting 17 years for a remedy, on 15 March 2021, the State Defendants submitted their eight-year CRP to resolve the constitutional violations that plagued generations of North Carolina schoolchildren (“State’s March 2021 Submission”). The State Defendants represented to the trial court that the actions prescribed therein were “necessary and appropriate actions that must be implemented to address the continuing constitutional violations.” (R p 1831) (quoting State’s March 2021 Submission at 3, 4 (emphasis added by trial court)).

The State further assured the trial court that sufficient funds were available to execute the Plan, including \$8 billion in the State’s reserve balance and \$5 billion in forecasted revenues that exceeded the State’s existing base budget. (R p 1831).

V. The June 2021 Order

The availability of these funds did not escape the trial court’s notice. In the June 2021 Order, the court observed that “the State faces greater challenges than ever before in meeting its constitutional obligations,” that the

trial court had granted “every reasonable deference to the legislative and executive branches” to meet those obligations, and that the State’s failure to implement the CRP persisted despite the State’s acknowledgement of its constitutional necessity. (R pp 1682–84). The trial court thus ordered the State to fully implement the CRP. There appeared to be hope that the State would finally implement the CRP and live up to its constitutional duty.

VI. The November 2021 Order

But as of 10 November 2021, that hope had faded; “no budget [had] passed despite significant unspent funds and known constitutional violations.” (R p 1833). The Court held two status conferences in September and October 2021, urging the State Defendants to begin implementing the CRP, but the General Assembly failed to take any action to fund the CRP or otherwise. (R p 1831).

Thus, as part of its duties, and pursuant to its inherent, equitable, and constitutional powers, the judiciary stepped in to uphold the State Constitution. Having granted the legislative and executive branches “every reasonable deference” over the preceding 17 years, the trial court concluded that it must act to prevent the constitutional rights of North Carolina’s students from being rendered “meaningless.” (R pp 1832, 1838). On 10 November 2021, it ordered state authorities to transfer \$1.75 billion, “the total amount of funds necessary to effectuate years 2 & 3 [of] the [CRP], from

the unappropriated balance within the General Fund to the state agents and . . . actors with fiscal responsibility for implementing” the CRP. (R p 1841).

In the November 2021 Order, the trial court also recounted the deplorable 2004 conditions of many North Carolina schools, which had worsened over the previous decade and a half. Indeed, as of March 2015,

North Carolina was replete with classrooms unstaffed by qualified, certified teachers and schools that were not led by well-trained principals. Districts across the State continued to lack the resources necessary to ensure that all students, especially those at-risk, have an equal opportunity to receive a *Leandro*-conforming education. In fact, the decade after *Leandro II* made plain that the State’s actions regarding education not only failed to address its *Leandro* obligations, but exacerbated the constitutional harms experienced by another generation of students across North Carolina, who moved from kindergarten to 12th grade since the Supreme Court’s 2004 decision.

(R p 1826). Put simply, “the State ha[d] failed yet another class of students.”

(R p 1832).

But rather than ordering the immediate transfer of the funds, the trial court again deferred to the other branches of government. It stayed the November 2021 Order for 30 days, “to permit [them] to take further action consistent with the findings and conclusions of this Order.” (R p 1842). Instead of taking the necessary action to live up to its constitutional duty while the November 2021 Order was stayed, the General Assembly enacted a half measure: it passed the 2021 Appropriations Act (the “Budget Act” or “State

Budget”), which only funded a fraction of years two and three of the CRP. *See* 2021 N.C. Sess. Laws 180.

VII. The Trial Court’s April 2022 Remand Order: The State Budget Fails to Adequately Fund the CRP

The Supreme Court granted the State’s Petition for Discretionary Review and, Alternatively, Petition for Writ of Certiorari on 18 March 2022. 18 March 2022 Order. Subsequently, it issued a limited remand order, directing the trial court “to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its [10] November 2021 order.” *Id.* at 2.

The Supreme Court instructed the trial court to reach its decision within 30 days. After receiving briefing, reviewing the evidence, and considering the arguments of counsel on the remand issues, the trial court concluded that the Budget Act “fails to provide nearly one-half of . . . the total necessary funds. Specifically, the Budget Act funds approximately 63% of the total cost of the programs to be conducted during year 2 and approximately 50% of the total cost of the programs to be conducted during year 3.” (R p 2630 ¶ 34).

There are several programs specifically targeting the needs of at-risk students that the State Budget does not fund at all, including the following initiatives:

- Combine the disadvantaged student supplemental funding and at-risk allotments and increase funding such that the combined

allotment provides an equivalent supplemental weight of 0.4 on behalf of all economically-disadvantaged students (III.B.ii.2⁴);

- Increase low-wealth funding to provide eligible counties supplemental funding equal to 110% of the statewide local revenue per student (III.B.ii.3);
- Eliminate the limited English proficiency funding cap, simplify formula, and increase funding to provide per-student support equivalent to a weight of 0.5 (III.B.ii.4);
- Simplify teacher assistant formula and increase funding until funding will provide approximately one teacher assistant for every 27 K-3 students (III.C.iii.2);
- Provide resources and support to high-poverty schools to adopt a community-schools or other evidence-based model to address out of school barriers (V.C.ii.1);
- Provide funding to cover the reduced-price lunch co-pays for all students who qualify for reduced-price meals so that those students would receive free lunches (V.C.iii.1);
- Provide funding to increase recruitment and support for up to 1,500 Teaching fellows (I.C.ii.1), which intended to help schools increase the pipeline of diverse, well-prepared teachers to better support students, especially at-risk students; and for high quality teacher preparation programs in high-need rural and urban districts (I.C.ii.1), both of which can create long-term benefits for all of the schools, employees, and most importantly, the at-risk students of a particular district;
- Provide funding for comprehensive induction services through the NC New Teacher Support Program to beginning teachers in low-performing, high-poverty schools (I.G.ii.1); and
- Revise the funding approach for North Carolina Virtual Public School to remove barriers that prevent students in low-wealth districts from participating (VII.B.iii.1).

Id.

⁴ As referenced in the CRP. (R pp 1686-1743).

The State's failure to fully fund the CRP evidently was due not to a lack of funding, but to recalcitrance. On remand, the trial court concluded not only that the CRP was underfunded, but also that "the General Fund does contain sufficient unappropriated monies to make the transfer anticipated by the 10 November 2021 Order and the lesser amount of underfunding" after considering the State Budget. (R p 2640 ¶ 54).

Unfortunately, the trial court did not stop there. Instead, the court considered the impact of the Writ of Prohibition entered by the Court of Appeals on 30 November 2021, striking the transfer provisions of the November 2021 Order. (R pp 2627–28 ¶ 26, 2641 ¶ 58). As further discussed below, the validity of the writ was already before this Court on appeals and petitions filed by Plaintiffs and Penn-Intervenors and the overlapping seminal questions regarding the constitutionality of the transfer provisions were already accepted for review by this Court on 18 March 2022 in its granting of the State's Petition for Discretionary Review. This Court did not include the Court of Appeals' 30 November Writ as a matter for the trial court to consider on remand. Accordingly, Penn-Intervenors filed this appeal of the April 2022 Remand Order.

As this Court recognized in 2004, "[t]he children of North Carolina are our state's most valuable renewable resource. 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 because the perfect civil action has proved elusive.” *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 366. Since *Leandro II*, eighteen classes have been deprived of their constitutional right to a sound basic education, despite this Court’s shot across the bow to the State proclaiming, “We cannot similarly imperil even one more class[.]” *Id.* Without the inclusion of the transfer provisions in the November 2021 Order, it is almost certain that the General Assembly will continue to abdicate its constitutional duties and more classes of children will pass through schoolhouse doors denied a sound basic education.

ARGUMENT

This Court's limited remand of the case directed the trial court to decide the very narrow issue of determining what impact the Budget Act (passed eight days *after* the entry of the November 2021 Order) had on the outstanding obligations and costs not yet implemented under the State's CRP. Stated simply, it was a mathematical exercise. The trial court dutifully performed this mandate, issuing an order revising the figures in the November 2021 Order. (R pp 2618–2647).

The trial court should have stopped there, but it did not. Instead, it additionally considered the impact of the Writ of Prohibition entered by the Court of Appeals on 30 November 2021. It then struck the critical nine provisions in the November 2021 Order that required state fiscal authorities to transfer unappropriated funds from the state treasury to the state executive officers responsible for implementing the CRP's obligations. Because the trial court exceeded its limited jurisdiction on remand in doing so, this Court must strike that part of the lower court's order or otherwise vacate or void that part of the order.

I. On Remand, the Trial Court Exceeded Its Authority by Modifying the Transfer Provisions of the November 2021 Order.

This Court should vacate or otherwise strike the portion of the lower court's April 2022 Remand Order (R p 2641 ¶ 58) that removed the transfer

provisions of the November 2021 Order, paragraphs 1–9. Such action exceeded the trial court’s limited jurisdiction over the issues remanded by this Court. Prior to the remand, the lower court did not retain jurisdiction over this case because of the valid notice of appeal and petitions for review filed and accepted in this Court. *See Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889 (2011) (noting that the filing of a notice of appeal strips the trial court of jurisdiction to conduct any proceedings). The case was remanded to the trial court on 18 March 2022, but only for the limited purpose set forth in the remand order, namely: to allow “the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its [10] November 2021 order.” 18 March 2022 Order at 2.

Indeed, the trial court, itself, had determined that its lone obligations were to determine the effect of the Budget Act on the outstanding obligations owed under the November 2021 Order, whether the State had unappropriated funds available, and then to issue and certify an order to this Court reflective of its final determination. (R pp 2627–29). Yet, the trial court proceeded to amend the November 2021 Order and struck the transfer provisions of that Order, thereby essentially vacating the enforcement relief that was already in the jurisdiction of this Court based on the appeals filed and accepted. Accordingly, because the trial court exceeded the strict mandate of this Court

on remand, this Court should strike paragraph 58 of the April 2022 Remand Order. *See D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966) (holding that a remand mandate is “binding upon [the lower court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered.”).

A. Relevant Proceedings Below Demonstrate a Narrow Remand that the Trial Court Exceeded.

On 18 March 2022, this Court accepted review of both Plaintiffs’ Petition for Discretionary Review of the 30 November Writ entered by the Court of Appeals and the State of North Carolina’s Petition for Discretionary Review Prior to Determination by the Court of Appeals of the November 2021 Order. 18 March 2022 Order at 1. In the same order, this Court remanded the case to the trial court for no more than thirty days to determine any financial impact the Budget Act may have had on the relief that the trial court granted in its November 2021 Order. *Id.* at 2.

Subsequently, on 21 March 2022, Chief Justice Newby issued a separate order reassigning the case from Wake County Superior Court Judge W. David Lee—who had overseen the case for the past six years and who had issued the November 2021 Order—to Judge Michael L. Robinson of the North Carolina Business Court. (R pp 1873–1874).

Judge Robinson quickly and dutifully set out to examine the issues on remand, holding three hearings and allowing the parties to present argument and submit evidence and briefs to the court. (R pp 2624–2626). During the first hearing, Judge Robinson sought clarification around the scope of the remand. Penn-Intervenors, Plaintiffs, and the State of North Carolina urged the Court to limit its analysis to the plain language of the April 2022 Remand Order and to determine, essentially, the mathematical effect of the Budget Act on the amounts identified in the November 2021 Order. (R p 2627 ¶ 25). Defendant-Intervenors, however, urged Judge Robinson to expand the scope of the remand. They argued that the court should reexamine *de novo* the constitutionality of the November 2021 Order and, alternatively, to determine whether the most recent Budget Act satisfied the State’s obligation to provide a sound basic education to all schoolchildren. (R pp 2626–2627 ¶ 24).

Judge Robinson refused to expand the scope. (R pp 2627–2629). As he ruled in rejecting Defendant-Intervenors’ request to re-litigate all issues on remand:

28. Rather, the Court understands its mandate from the Supreme Court to require the trial court to enter a reasoned order which includes findings of fact and conclusions of law in two distinct categories. First, this Court is directed to determine whether the Budget Act as passed by the Legislature and signed by the Governor eight days after the 10 November Order, funds to any extent (and if so, to what extent), programs in years 2 and 3 of the CRP. Logically, if the Budget Act fully funds all of the programs and priorities during years 2 and 3 of the CRP, the 10 November

Order, to the extent it orders State officials to transfer a total of \$1,753,153,000.00 to DHHS, DPI, and the UNC System would arguably be mooted or made unnecessary by events transpiring subsequent to the entry of the 10 November Order.

29. Second, the Court understands that the Supreme Court's mandate implicitly requires this Court to inquire into the current status of the State budget and how appropriations in the Budget Act affect the amount of unappropriated funds in the State treasury. In this regard, the undersigned interprets the 10 November Order to have been based or supported, at least in substantial part, on the trial court's finding that there were sufficient unappropriated funds in the North Carolina treasury to fund years 2 and 3 of the CRP.

30. Finally, this Court understands that, depending on the outcome of the first two evaluations, if this Court concludes that the relief provided in the decretal provisions of the 10 November Order should be modified or amended, this Court is to enter an order so amending the trial court's earlier order. To the extent this Court may have misinterpreted its task in the Remand Order, it stands ready to comply to the best of its ability to any further orders and instructions of the Supreme Court.

(R pp 2628–2629).

As required by this Court, Judge Robinson examined the evidence and arguments before him to determine the effect of the Budget Act on the amounts needed to carry out the outstanding obligations owed under the CRP. He concluded that the Budget Act failed to cover nearly one-half of the State's obligation under the November 2021 Order for years two and three of the CRP. (R p 2630). Judge Robinson further concluded that the State did have available funds in amounts that exceeded the outstanding balance required to fully implement the CRP for years two and three. (R pp 2636–2637). The court

should have stopped there and entered an order concerning the modified amounts. However, it did not.

Instead, the trial court proceeded to determine the effect of the Court of Appeals' 30 November Writ on the November 2021 Order, contradicting its own understanding of this Court's narrow remand order. (R p 2621–22, ¶ 10 (citing *In re. the 10 November 2021 Order in Hoke County Bd. Ed. et al. v. State of N.C. and W. David Lee*); 2640 ¶ 55). According to Judge Robinson, because the Court of Appeals had previously held unconstitutional the trial court's November 2021 Order directing State Comptroller Linda Combs to pay unappropriated funds from the State Treasury to the state entities responsible for carrying out the outstanding obligations due under the CRP, the 30 November Writ was binding on the trial court and required the court to amend the trial court's November 2021 Order. (R pp 2621–22, ¶ 10; 2640 ¶ 55). Consequently, the court asserted in its April 2022 Remand Order that it was modifying the November 2021 Order, in part to “remove a directive that State officers or employees transfer funds from the State Treasury to fully fund the CRP. . . .” (R p 2640 ¶ 55). The court's modification struck “decretal paragraphs 1–9 on pages 19–20 of the trial court's 10 November Order....” (R p 2641 ¶ 58).

However, this Court never directed the trial court to address the impact of the Court of Appeal's Order on remand. The 30 November Writ was already the subject of Plaintiff's Petition for Discretionary Review, which was held in

abeyance by this Court. 18 March 2022 Order. Indeed, the constitutionality of the November 2021 Order, including its transfer provisions, was already the subject of the appeal filed by the State of North Carolina and accepted by this Court on 18 March 2022. Had this Court intended for the trial court to consider such an amendment, it plainly could have issued a remand order to determine the effect of the Budget Act “and the 30 November Order” on the November 2021 Order. But it did not.

Instead, for remand purposes, this Court focused its attention exclusively on the impact of the Budget Act on the amount of funding allocated under the November 2021 Order needed to ensure all students were provided a sound basic education. The trial court recognized as much (*see* R p 2624 ¶ 15) but, nevertheless, proceeded to expunge nine paragraphs concerning the transfer provisions of the November 2021 Order.

B. The Trial Court’s Removal of the Transfer Provisions of the November 2021 Order Exceeded Its Jurisdiction on Remand and Should be Voided.

The trial court had no jurisdiction to consider the impact of the Court of Appeals’ 30 November Writ on the trial court’s November 2021 Order. As a matter of course, filing a valid notice of appeal “removes a cause from the trial court which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court.” *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 388 (1972) (citing N.C. Gen. Stat. § 1-294); *Joyner v.*

Joyner, 256 N.C. 588, 124 S.E.2d 724 (1962)). “[A]ny proceedings in the trial court after the notice of appeal are void for lack of jurisdiction.” *Romulus*, 216 N.C. App. at 33, 715 S.E.2d at 892 (citing *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 580–81, 273 S.E.2d 247, 258–59 (1981)).

In this case, not only was a valid Petition for Discretionary Review of the 30 November Writ filed, but this Court granted such petition, as well as the State’s appeal and petition for discretionary review over the November 2021 Order. 18 March 2022 Order. In light of the pending appeals, jurisdiction over the validity of the 30 November Writ rests exclusively with this Court. Judge Robinson was, in effect, *functus officio* for matters beyond the remand and lacked jurisdictional authority to alter the transfer provisions in the November 2021 Order. *See SED Holdings, LLC v. 3 Star Properties, LLC*, 250 N.C. App. 215, 219–20, 791 S.E.2d 914, 918–19 (2016) (under the common law doctrine of *functus officio* and N.C. Gen. Stat. § 1-294, trial court is “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished” once a party gives notice of appeal).⁵

⁵ An exception may apply in cases where the matters presented in the trial court are “not affected by the judgment appealed from.” *SED Holdings, LLC*, 250 N.C. App. at 220, 791 S.E.2d at 919 (quoting *Faulkenbury v. Teachers’ & State Employees’ Ret. Sys. of N. Carolina*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422 (quoting N.C. Gen. Stat. § 1–294), *aff’d per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993)). That exception clearly does not apply here as the validity

Moreover, by considering the impact of the 30 November Writ, the trial court exceeded the scope of this Court’s remand. The Supreme Court’s mandate upon remand is “binding upon [the lower court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered.” *D & W*, 268 N.C. at 722, 152 S.E.2d at 202. The law is “abundantly clear that the inferior court must rigorously adhere to the mandate of the appellate tribunal on remand.” *In re K.S.*, 274 N.C. App. 358, 364, 852 S.E.2d 909, 913 (2020).

In *In re K.S.*, the appellate court remanded a child neglect petition filed by the Department of Social Services (DSS), mandating that the trial court conduct an adjudicatory hearing on the petition. *Id.* at 362, 852 S.E.2d at 911. Instead, the trial court moved forward with a *different* petition filed by DSS, conducting a permanency planning hearing unrelated to the child neglect petition. *Id.* at 361–62, 852 S.E.2d at 911–12. In reversing, the appellate court noted that “the trial court seemingly encouraged DSS to circumvent the unambiguous mandate . . . by allowing it to move ‘forward on the remand that the Court of Appeals has ordered or on their motion to review.’” *Id.* at 365, 852

of the writ is already pending before this Court and was not part of the remand order.

S.E.2d at 914. The trial court, thus, “erred by disregarding the unequivocal mandate of this Court” *Id.*, 852 S.E.2d at 914.

Here, the trial court similarly violated this Court’s mandate by failing to abide by the clear parameters set forth in this Court’s limited remand order. *See In re Parkdale Mills*, 240 N.C. App. 130, 135, 770 S.E.2d 152, 156 (2015), *rev. den.*, 368 N.C. 284, 284, 776 S.E.2d 200, 201 (2015) (recognizing that the plain language of an order controls when determining intent of an appellate court’s remand order). As in *In re K.S.*, this case was remanded to allow for specific fact-finding to “determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its [10] November 2021 order.” Remand Order at 2. The trial court, *sua sponte*, expanded the scope of the remand beyond the plain language of the mandate by determining the ultimate impact of the Court of Appeals’ 30 November Writ before this Court could rule on the matter. Because the trial court exceeded its specified remand authority, its Order striking the transfer provisions of the November 2021 Order should be voided and stricken.

Even if this Court were to determine that the trial court did have the authority to consider the effect of the Court of Appeals’ 30 November Writ on the transfer provisions of the trial court’s November 2021 Order, this Court should reverse and vacate the 30 November Writ. As the Penn-Intervenors will discuss in response to Defendant-Intervenors’ appellate briefing, the Court of

Appeals erred in concluding that the trial court lacked the authority to order that transfer.

CONCLUSION

For the above stated reasons, Penn-Intervenors respectfully urge this Court to strike, vacate or otherwise void that part of Judge Robinson's April 2022 Remand Order that eliminated the transfer provisions of the November 2021 Order.

Respectfully submitted this 1st day of July 2022.

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CERTIFICATE OF SERVICE

Pursuant to North Carolina Rule of Appellate Procedure 26, I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following counsel:

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This the 1st day of July, 2022.

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