

SUPREME COURT OF NORTH CAROLINA

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

Plaintiffs-Appellants, Cross-Appellees,)

and)

CHARLOTTE-MECKLENBURG BOARD OF)
EDUCATION,)

Plaintiff-Intervenor-Appellant,)

Cross-Appellee,)

and)

RAFAEL PENN; *et al.*)

Plaintiff-Intervenors-Appellants,)

Cross-Appellees,)

v.)

From Wake County
No. COA22-86,
No. 95-CVS-1158

STATE OF NORTH CAROLINA,)

Defendant-Appellant, Cross-Appellee,)

and)

STATE BOARD OF EDUCATION,)

Defendant-Appellee,)

and)

CHARLOTTE-MECKLENBURG BOARD OF)
EDUCATION,)

Realigned Defendant-Appellant,)

Cross-Appellee,)

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-Appellants,)
Cross-Appellees.)

BRIEF OF DEFENDANT-APPELLEE
STATE BOARD OF EDUCATION

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES ii

INTRODUCTION 2

ARGUMENT 3

I. THE COMPREHENSIVE REMEDIAL PLAN IS THE PRODUCT OF THE STATE BOARD OF EDUCATION’S COMMITMENT TO ITS CONSTITUTIONAL DUTY TO SUPERVISE AND ADMINISTER A UNIFORM SCHOOL SYSTEM THAT GUARANTEES ALL NORTH CAROLINA STUDENTS THE OPPORTUNITY TO OBTAIN A SOUND BASIC EDUCATION 3

II. THE ACTION STEPS IN THE COMPREHENSIVE REMEDIAL PLAN ARE NECESSARY TO AVOID JUDICIAL ENCROACHMENT ON THE STATE BOARD OF EDUCATION’S CONSTITUTIONAL AUTHORITY 11

CONCLUSION..... 14

CERTIFICATE OF SERVICE..... 16

TABLE OF CASES AND AUTHORITIES

Cases	Page(s)
<i>Hoke Cnty. Bd. of Educ. v. State</i> , 358 N.C. 605, 599 S.E.2d 365 (2004)	<i>passim</i>
<i>Leandro v. State</i> , 346 N.C. 336, 488 S.E.2d 249 (1997)	6, 7, 8, 13
<i>Whitaker v. Earnhardt</i> , 289 N.C. 260, 221 S.E.2d 316 (1976)	6, 7

Constitutional Provisions

N.C. Const. art. IX, s. 2(1)	3
N.C. Const. art. IX., s. 5.....	3, 13

Statutes

N.C.G.S. § 1-1A, Rule 12	4
N.C.G.S. § 1-1A, Rule 52	6
N.C.G.S. § 1-1A, Rule 60	4
N.C.G.S. § 115C-409(b).....	12

SUPREME COURT OF NORTH CAROLINA

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

Plaintiffs-Appellants, Cross-Appellees,)

and)

CHARLOTTE-MECKLENBURG BOARD OF)
EDUCATION,)

Plaintiff-Intervenor-Appellant,)

Cross-Appellee,)

and)

RAFAEL PENN; *et al.*)

Plaintiff-Intervenors-Appellants,)

Cross-Appellees,)

v.)

From Wake County
No. COA22-86,
No. 95-CVS-1158

STATE OF NORTH CAROLINA,)

Defendant-Appellant, Cross-Appellee,)

and)

STATE BOARD OF EDUCATION,)

Defendant-Appellee,)

and)

CHARLOTTE-MECKLENBURG BOARD OF)
EDUCATION,)

Realigned Defendant-Appellant,)

Cross-Appellee,)

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-Appellants,)
Cross-Appellees.)

**BRIEF OF DEFENDANT-APPELLEE
STATE BOARD OF EDUCATION**

INTRODUCTION

This matter has now been in the courts for twenty-eight years. It has been the subject of innumerable hearings in superior court, two decisions in the Court of Appeals, and three decisions in this Court. The resulting record shows that over the decades the State Board of Education has devoted itself to supervising a uniform public school system which guards and maintains every North Carolina student’s right to the opportunity to obtain a sound, basic education.

Legislative-Intervenors contend that the Comprehensive Remedial Plan (CRP) and the November 21, 2021, Order (R p 1843) directing State executives to transfer money from the General Fund to implement the action steps in the CRP were the product of a “friendly suit” wherein all the parties sought the same result. Legislator-Intervenors’ Opening Brief (LIOB), p. 48. Legislative-Intervenors contend that this “friendly suit” has produced an “unnecessary” remedy (LIOB, p. 51-54) and no longer presents a genuine controversy for

adjudication. LIOB, p. 48. Therefore, Legislative-Intervenors claim this case is moot, this Court lacks jurisdiction to consider or enforce the statewide remedy described in the superior court judgment, and the case must be dismissed. LIOB, p. 54. The record does not support these arguments.

ARGUMENT

I. THE COMPREHENSIVE REMEDIAL PLAN IS THE PRODUCT OF THE STATE BOARD OF EDUCATION'S COMMITMENT TO ITS CONSTITUTIONAL DUTY TO SUPERVISE AND ADMINISTER A UNIFORM SCHOOL SYSTEM THAT GUARANTEES ALL NORTH CAROLINA STUDENTS THE OPPORTUNITY TO OBTAIN A SOUND BASIC EDUCATION.

This case is, and always has been, about the constitutionality of North Carolina's general and uniform free system of public education. N.C. Const. art. IX, s. 2(1). The State Board of Education is constitutionally bound to supervise and administer that uniform system. N.C. Const. art. IX, s.5. Recognizing the broad implications of this lawsuit, its constitutional obligations, and in the firm belief that it has not violated those obligations, the State Board of Education has consistently and vigorously defended the constitutionality of that system against Plaintiff Parties' attacks. Rather than the product of a "friendly suit," the CRP represents the State Board of Education's independent, considered, and expert judgment on a cohesive, effective, and necessary remedy for constitutional injuries our State's courts

have found that system is inflicting on hundreds of thousands of North Carolina students. Order of March 18, 2018 (R p 1303).

The Legislative-Intervenors concede that until 2018 the State Defendants had consistently opposed Plaintiff Parties' attacks on the existing public school system. LIOB, p. 43. However, limiting review of the origins of the CRP to events after 2018 ignores the long history of the State Board of Education's defense of the existing public school system and all the efforts the State Board of Education made before that date to convince the superior court that the State had remedied the proven deficiencies in the public school system. The State Board of Education's 2017 Motion for Relief summarizes the extent of those efforts and provides the proper context for the State Board of Education's work on the CRP. (R p 1280).

Indeed, on July 24, 2017, after twenty-three years of defending the constitutionality of the public school system from continuous attack, the State Board of Education filed a motion under N.C.G.S. § 1-1A, Rules 12 and 60 to be released from the court's jurisdiction. (R pp 1280-87). In that motion, the State Board of Education argued that fifteen years of evidence proved that the North Carolina public school system had so changed in its legal and substantive character that Plaintiff Parties' original claims were stale and further proceedings would exceed the jurisdiction of the court based on those claims. (R pp 1284-1285).

In support of that motion, the State Board of Education presented three volumes of evidence documenting the extensive actions that both the General Assembly and the State Board of Education had taken to provide all North Carolina students with the opportunity to obtain a sound basic education and the attendant improvement in student performance over the years since the 2002 Judgment. (R pp 1288-92). That evidence described substantial improvements in supporting and maintaining a public school system that provided a competent teacher in every classroom, a competent principal in every schoolhouse, and adequate resources to support instruction in every school — components this Court had identified as essential to providing students with a sound basic education. *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 637-38, 599 S.E.2d 365, 390 (2004).

Relying on that record, the State Board of Education moved to be released from the 2002 Judgment.

The cumulative effect of these changes is that the State's current educational system is so far removed from the factual landscape giving rise to the complaint, trial, and 2002 Judgment that the superior court is now retaining jurisdiction over a "future school system" which was not the subject of the original action.

(R p 1285).

On March 13, 2018, the superior court denied the State Board of Education's motion. In support of its decision, the superior court specifically found that the evidence failed to prove that either the impact or effect of the

State's reforms had moved North Carolina's public school system nearer to providing children the fundamental right guaranteed under the constitution. (R p 1302). The court found that despite documenting fifteen years of administrative and legislative efforts to improve educational opportunities in Hoke County and across the state, the State Board of Education had failed to demonstrate even remote compliance with the tenets of Leandro. (R p 1303). Instead, the court found that the State Board of Education was continuing to deny hundreds of thousands of North Carolina children the opportunity for a sound basic education. (R p 1303).

Plainly, neither the State Board of Education's motion to escape the continued jurisdiction of the court nor the superior court's pointed rejection of the Board's evidence and arguments was the product of a "friendly" lawsuit. To the contrary, the State Board of Education's motion, and, indeed, the history of this case through the spring of 2018, demonstrates the State Board of Education's constant opposition to Plaintiffs' claims, its continued efforts to prove the reformed public school system was constitutional, and the court's repeated rejection of those efforts on grounds that they were constitutionally insufficient to remedy the injuries inflicted on North Carolina students.

Under N.C.G.S. § 1-1A, Rule 52, the superior court's findings of fact in a trial without a jury are unassailable as long as they were supported by competent evidence in the record. *Whitaker v. Earnhardt*, 289 N.C. 260, 265,

221 S.E.2d 316, 319-20 (1976) (“When the trial judge sits as the trier of facts, his judgment will not be disturbed on the theory that the evidence did not support his findings of fact if there be any evidence to support the judgment.”) That standard of review becomes all the more important in light of two of this Court’s holdings in this case.

First, this Court has held that, if the superior court finds on competent evidence that the State is denying children their fundamental right to the opportunity to obtain a sound basic education, then the burden shifts to the State to prove that the existing system of education is necessary to promote a compelling governmental interest. *Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997). Second, this Court has held that the State cannot hold the local boards of education responsible if they fail to implement State programs or allocate State funds to maximize the educational opportunities available to their students. *Hoke Cnty. Bd. of Educ.*, 358 N.C. at 635, 599 S.E.2d at 389.

The standards for reviewing the superior court’s findings in this case and this Court’s holding regarding the State’s nondelegable constitutional responsibility for the quality of North Carolina’s public school system made the State Board of Education’s further opposition to the superior court’s statewide liability legally impossible.

After finding that the public school system was still failing to provide students with constitutionally adequate educational opportunities, the superior court specifically called upon the State Board of Education to participate with the State and Plaintiff Parties in the development of a comprehensive remedial plan. (R p 1305). This Court has held that once the superior court had found students were suffering from a lack of access to a sound basic education, Plaintiff Parties were entitled to *any remedy that would redress that harm*. *Id.* at 615-16, 599 S.E.2d at 377. Consequently, if after March 2018 the State Board of Education refused to participate in the development of the CRP and conceded the field of possible remedies to Plaintiff Parties, the court could have imposed a remedy that was inconsistent with the State Board of Education's expert judgment on the best means for educating North Carolina students.

The Legislative-Intervenors emphasize that this Court has repeatedly stated that it would defer to the State's judgment on how to create a constitutionally adequate public school system. *Id.* at 622-23, 599 S.E.2d at 381; *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261. The State Board of Education acknowledges that is a generous judicial standard of review.

However, before the State Board of Education could claim judicial deference to its judgment on a proper remedy, the State Board of Education first had to produce a remedial plan. Therefore, after March 2018, the State

Board of Education's defense appropriately shifted from trying to convince the court that the existing public school system was constitutionally adequate, to developing a comprehensive remedial plan that it could endorse and the court would accept as a remedy for the deficiencies the court had repeatedly found in the existing system.

The resulting CRP was not the work of the Plaintiff Parties. Instead, the record shows that the CRP is built upon a host of programs and activities that the State Board of Education was supervising and administering long before March 2018. Many of those programs are described in reports that the State Board of Education submitted to the superior court. Defendants' Report to the Court (excerpt) (R pp 698-779); Defendants' Amendment to Report to the Court (R pp 800-825); Defendants' Second Report to the Court (R pp 876-878); Defendant State Board of Education's Report to the Court (R pp 934-945); Defendants' Report to the Court (excerpt) (R pp 991-1006); Defendants' Letter Report to the Court (excerpt) (R pp 1106-1136).

Those reports document the State Board of Education's and the State's continuing efforts to reform and improve the public school system, including: expanding quality prekindergarten programs; expanding disadvantaged student supplemental funds; strengthening local education agency assistance programs; expanding turn around teams to improve instruction in low performing schools; improving teacher working conditions to increase teach

retention and effectiveness; improving early reading programs; expanding the Learn and Earn program to improve high school student preparation for further education and skilled jobs; expanding teacher supply for hard to staff schools; increasing academic rigor; improving student assessments; providing high-quality professional development for teachers and principals; connecting school social services and delinquency prevention to coordinate services and increase family involvement in education; class-size reduction; identifying and intervening in high priority schools; and expanding partnerships between community colleges and schools of education to increase the teacher supply. Many of those programs originated in or were supported by legislation approved by the General Assembly.

When reviewed against the backdrop of decades of school reforms, the CRP is not a “wish list” (LIOB, p. 46) but an extension and expansion of the State Board of Education’s and the State’s continuous efforts to improve and extend educational opportunities in the public school system.

Eighteen years ago, this Court recognized that, while the instant case presented unique procedural and substantive issues, “our state courts cannot risk further and continued damage because the perfect civil action has proved elusive.” *Hoke Cnty. Bd. of Educ.*, 358 N.C. at 616, 599 S.E.2d at 377. The fact that the State Board of Education complied with a court order to consult with Plaintiff Parties while developing the CRP does not support a finding that this

unique case and the fundamental constitutional controversy it addresses has passed beyond the jurisdiction of this Court.

Consequently, the State Board of Education believes that this Court should retain jurisdiction over the disputes between the parties and has authority to declare their rights in this appeal.

II. THE ACTION STEPS IN THE COMPREHENSIVE REMEDIAL PLAN ARE NECESSARY TO AVOID JUDICIAL ENCROACHMENT ON THE STATE BOARD OF EDUCATION'S CONSTITUTIONAL AUTHORITY.

Legislative-Intervenors claim that all the programs in the CRP are not necessary to create and maintain a constitutionally adequate school system. LIOB, p. 55. Instead of addressing each component of the CRP, the Legislative-Intervenors state that the sufficiency of the programs funded in the 2021 budget has never been tested and those programs must be presumed to create and maintain a constitutional public school system. LIOB, p. 55.

While acknowledging that there could be more than one constitutionally acceptable remedy in this case, the State Board of Education stands by its representation that:

[T]he actions outlined in [the CRP] are the necessary and appropriate actions needed to address the constitutional violations in providing the opportunity for a sound basic education to all children in North Carolina.

(R p 1688). The State Board of Education's endorsement of the programs in the CRP as "necessary" acknowledges the purpose of the CRP in light of the

constitutional limits on the issues, the courts' constitutional authority, and the State Board of Education's constitutional obligations.

The State of North Carolina is committed to providing the “necessary resources” to “[i]nsure a quality education for every child in North Carolina.” N.C.G.S. § 115C-409(b). This Court has held that the State Board of Education and the State are obligated to provide every school with “the resources necessary to support the effective instructional program.” *Hoke Cnty. Bd. of Educ.*, 358 N.C. 636, 599 S.E.2d at 390. This Court has also found that “students were being denied their rightful opportunity to a sound basic education because the State had failed in its duty to provide the necessary means for such an opportunity.” *Id.* at 640, 599 S.E.2d 365. The Court's authority in this case is, therefore, limited to determining whether students are being denied their constitutional rights and what relief is *necessary* to remedy that injury. The Legislative-Intervenors agree. (LIOB, p. 57)

In light of legal obligations and standards, it would have served no purpose for the State Board of Education to develop and submit to the court a CRP which contained more programs than the State Board of Education considered constitutionally “necessary” to remedy the educational deficiencies in the existing public school system. If the State Board of Education had submitted a remedial plan that contained “unnecessary” programs, the superior court could not have deferred to the Board's judgment. Rather, the

superior court would have had to review that plan, select those education programs it believed were necessary and sufficient to create a constitutionally adequate system of public education. The result would have been untenable to the State Board of Education.

The people of North Carolina have placed their trust in the State Board of Education's educational expertise and constitutionally endowed it with the responsibility to supervise and administer the public schools to guarantee all North Carolina the opportunity for a sound basic education. N.C. Const. art. IX, s.5; *Id.* at 644-45, 599 S.E.2d 365. In recognition of that trust, power, and obligation, this Court has repeatedly stated it would initially defer to the State Board of Education's judgment on how best to fulfill its constitutional obligation. *Id.* at 645, 599 S.E.2d 365 (the legislative and executive branches share a history and expertise in education that "dwarfs that of this and any other Court."); *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261 (the administration of the public schools of the state is best left to the legislative and executive branches of government, therefore, the courts must initially grant every reasonable deference to them regarding what course of action will lead to a sound basic education). The State Board of Education's submission of a remedial plan that contained "unnecessary" programs would have been inconsistent with its constitutional obligations, this Court's restraint, and the people's trust.

The State Board of Education firmly believes that the action steps in the CRP are necessary to remedy the proven deficiencies in the North Carolina public school system.

CONCLUSION

For all the foregoing reasons, the State Board of Education prays that the Court declare the rights of the parties on this record.

This the 1st day of August, 2022

JOSHUA H. STEIN
ATTORNEY GENERAL

Electronically Submitted
Matthew Tulchin
Special Deputy Attorney General
State Bar No. 43921

N.C. R. App. P. 33(b) Certification: I certify that the attorney(s) listed below have authorized me to list their names on this document as if they had personally signed it.

Tiffany Lucas
Deputy General Counsel
State Bar No. 26237

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
mtulchin@ncdoj.gov
tlucas@ncdoj.gov

Counsel for State Board of Education

CERTIFICATE OF SERVICE

I do hereby certify that on this day a copy of the foregoing Brief was filed and served upon the following parties by email to the addresses shown below:

Melanie Black Dubis
Scott E. Bayzle
PARKER POE ADAMS & BERNSTEIN LLP
301 Fayetteville Street, Suite 1400 (27601)
P.O. Box 389
Raleigh, North Carolina 27602-0389
melaniedubis@parkerpoe.com
scottbayzle@parkerpoe.com

H. Lawrence Armstrong, Jr.
ARMSTRONG LAW, PLLC
119 Whitfield Street
Enfield, North Carolina 27823
hla@hlalaw.net

Neal Ramee
David Nolan
Tharrington Smith, LLP
P.O. Box 1151
Raleigh, North Carolina 27602
nramee@tharringtonsmith.com
dnolan@tharringtonsmith.com

David Hinojosa
LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K. Street NW, Suite 900
Washington, DC 20005
ehaddix@lawyerscommittee.org
dhinojosa@lawyerscommittee.org

Amar Majmundar
NORTH CAROLINA DEPARTMENT OF JUSTICE
114 W. Edenton Street
Raleigh, North Carolina 27603
AMajmundar@ncdoj.gov

Thomas J. Ziko
Legal Specialist
STATE BOARD OF EDUCATION
6302 Mail Service Center
Raleigh, North Carolina 27699-6302
Thomas.Ziko@dpi.nc.gov

Matthew F. Tilley
Russ Ferguson
W. Clark Goodman
Michael A. Ingersoll
WOMBLE BOND DICKINSON (US) LLP
One Wells Fargo Center, Suite 3500
301 S. College Street
Charlotte, North Carolina 28202-6037
Matthew.tilley@wbd-us.com
Russ.ferguson@wbd-us.com
Clark.goodman@wbd-us.com
Mike.ingersoll@wbd-us.com

Christopher A. Brook
PATTERSON HARKAVY LLP
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
cbrook@pathlaw.com

Michael Robotti
BALLARD SPAHR LLP
1675 Broadway, 19th Floor
New York, New York 10019
robottim@ballardspahr.com

Robert N. Hunter, Jr.
HIGGINS BENJAMIN, PLLC
301 North Elm Street, Suite 800
Greensboro, NC 27401
rnhunterjr@greensborolaw.com

Jane Wettach
CHILDREN'S LAW CLINIC DUKE UNIVERSITY LAW SCHOOL
P.O. Box 90360 Durham, NC 27708
wettach@law.duke.edu

John Charles Boger
104 Emerywood Place
Chapel Hill, NC 27516
johncharlesboger@gmail.com

Elizabeth Lea Troutman
Eric M. David
Daniel F. E. Smith
Kasi W. Robinson
**BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.**
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Greensboro, NC 27420-6000
etroutman@brookspierce.com
edavid@brookspierce.com
dsmith@brookspierce.com
krobinson@brookspierce.com

Richard Glazier
Matthew Ellinwood
224 S. Dawson St.
Raleigh, NC 27601
rick@ncjustice.org
matt@ncjustice.org

Peggy D. Nicholson
Clinical Professor of Law
Supervising Attorney, Duke Children's Law Clinic
Crystal Grant
Clinical Professor of Law
Director, Duke Children's Law Clinic
Duke Law School
Box 90360
Durham, NC 27708-0360
peggy.d.nicholson@duke.law
crystal.grant@law.duke.edu

David Sciarra
EDUCATION LAW CENTER
Executive Director
60 Park Place, Suite 300
Newark, NJ 07102
dsciarra@edlawcenter.org

John R. Wester
Adam K. Doerr
Erik R. Zimmerman
Emma W. Perry
Patrick H. Hill
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
eperry@robinsonbradshaw.com
phill@robinsonbradshaw.com

William G. Hancock
EVERETT GASKINS HANCOCK LLP
220 Fayetteville Street, Suite 300
Raleigh, NC 27601
gerry@eghlaw.com

Jeanette K. Doran
2012 Timber Drive
Raleigh, NC 27604
jeanette.doran@ncicl.org

This the 1st day of August, 2022.

/s/ Matthew Tulchin
Matthew Tulchin
Special Deputy Attorney General
NC State Bar No. 43921
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
mtulchin@ncdoj.gov

Counsel for State Board of Education