

SUPREME COURT OF NORTH CAROLINA

HOKE COUNTY BOARD OF
EDUCATION, *et al.*,
Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,
Plaintiff-Intervenor,

and

RAFAEL PENN, *et al.*,
Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA,
Defendant,

and

STATE BOARD OF EDUCATION
Defendant,

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. 95 CVS 1158
No. COA22-86

BRIEF OF DUKE CHILDREN’S LAW CLINIC, EDUCATION LAW CENTER, CENTER FOR EDUCATIONAL EQUITY, SOUTHERN POVERTY LAW CENTER, CONSTITUTIONAL AND EDUCATION LAW SCHOLARS AS *AMICI CURIAE*

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CONSTITUTIONAL AND EDUCATION LAW SCHOLARS AS *AMICI CURIAE*

INTRODUCTION

Amici Curiae Duke Children’s Law Clinic, Education Law Center, Center for Educational Equity, Southern Poverty Law Center and Constitutional and Education Law Scholars, respectfully submit this brief to provide crucial precedent from sister states regarding the central issue on appeal: whether the trial court, on remand from this Court, has the authority to adopt comprehensive measures developed by the State Defendant-Appellants (“State”) to remedy an adjudicated violation of the substantive right to public education guaranteed to all children in the North Carolina constitution and to direct the State to secure adequate funding for implementation of those remedial measures.¹

As we explain, courts in sister states have affirmed judicial branch authority to adopt specific programmatic remedies similar to the Comprehensive Remedial Plan in the trial court’s order below in those instances when the state does not voluntarily take responsive action but rather fails, on a continuing basis, to remedy the severe harms to children resulting from a violation of their constitutional right to public education. These courts have further concluded that they possess ample authority to direct their states to secure such additional funding as may be needed to implement the adopted remedial measures. As they have concluded, this authority is at the heart of a core judicial branch function: effectuating the delivery of a constitutional

¹ No one other than counsel and *amici curiae* participated in drafting and/or funding this brief. The brief was prepared *pro bono*.

education to public school children deprived of that education by an ongoing violation of their substantive rights.

ARGUMENT

I. THE JUDICIAL BRANCH HAS THE AUTHORITY TO ADOPT MEASURES TO REMEDIATE A CONTINUING VIOLATION OF THE CONSTITUTIONAL RIGHT TO PUBLIC EDUCATION AND ENSURE ADEQUATE FUNDING FOR THEIR IMPLEMENTATION

To address the recurring violation of the substantive constitutional right of North Carolina public school children to a “sound basic education,” as adjudicated in this case, the trial court below, on remand from this Court, entered an order containing the two directives at issue in this appeal. First, the trial court adopted a set of specific programs, staff, services and other initiatives, painstakingly developed by the State, as a “Comprehensive Remedial Plan” to resolve the underlying constitutional violation found in this litigation. Second, the court below directed the State to secure funding at the level determined by the State itself to be adequate for implementation of the remedial measures in Years 2 and 3 of the Plan in public schools across North Carolina.

As a threshold matter, the directives in the trial court’s order are consistent with established precedent from sister state courts in similar cases involving the remediation of adjudicated violations of the substantive right to education enshrined in their respective constitutions. These courts have held that directives and orders to address ongoing violations of the affirmative right to public education are well within the ambit of judicial branch authority and do not run afoul of separation of powers. As the Kansas Supreme Court noted, while a statute expresses the will of the legislature, the constitution is a direct mandate from the people themselves. Thus, it is the duty of the judiciary to “obey the will of the people as expressed in their constitution.” *Gannon v. State*, 303 Kan. 682, 735, 368 P.3d 1024, 1057 (Kan. 2016).

Further, New York’s highest court—the Court of Appeals—affirmed the judiciary’s power to ensure the fulfillment of that state’s constitutional right to a sound basic education, stating that “courts are . . . well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights.” *Campaign for Fiscal Equity v. State* (“*CFE II*”), 100 N.Y.2d 893, 931, 801 N.E.2d. 326, 349 (N.Y. 2003). Likewise, the New Jersey Supreme Court reached a similar conclusion over forty-five years ago when it made clear that the court serves “as the designated last-resort guarantor of the Constitution’s command” of public education and “possesses and must use power equal to its responsibility” even where judicial action may “seem to encroach[,] in areas otherwise reserved to other Branches of government.” *Robinson v. Cahill*, 69 N.J. 133, 154, 351 A.2d 713, 724 (N.J. 1975).

Where an adjudicated violation of the constitutional right to education is at issue, and where the state has voluntarily failed to remediate that violation after having more than ample time to do so, the judiciary unquestionably has the authority to compel state action. As the Washington Supreme Court recognized, the obligation upon the state to provide public education is a “positive” constitutional right that does “not restrain government action” but rather “require[s] it.” *McCleary v. State*, 173 Wash. 2d 477, 518–19, 269 P.3d 227, 248 (Wash. 2012). Thus, the Court concluded that, where the affirmative right of children to public education is at stake, the judicial branch possesses the responsibility to ensure that “state action achieves or is reasonably likely to achieve the constitutionally prescribed end.” *Id.* (quotation omitted).

A. SISTER STATE COURTS HAVE ADOPTED SPECIFIC MEASURES SIMILAR TO THE COMPREHENSIVE REMEDIAL PLAN TO REMEDY CONSTITUTIONAL VIOLATIONS

In *Hoke County Board of Education v. State* (“*Leandro II*”), this Court affirmed the trial court’s order that the State correct any and all education-related deficiencies preventing the provision of a constitutionally adequate education to North Carolina public school children. 358 N.C. 605, 637, 599 S.E.2d 365, 390–91 (N.C. 2004). The Court affirmed the trial court’s guidelines for such a remedy by specifying: (1) that “every classroom be staffed with a competent, certified, well-trained teacher”; (2) “that every school be led by a well-trained competent principal”; and (3) “that every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including at-risk children, to have the equal opportunity to obtain a sound basic education, can be met.” *Id.* at 636, 599 S.E.2d at 389. Having delineated these guidelines, this Court ordered the State to “act to correct those deficiencies that were deemed by the trial court as contributing to the State’s failure of providing a *Leandro*-comporting educational opportunity.” *Id.* at 647–68, 599 S.E.2d at 396. The Court further took the procedural step of remanding the case “to the trial court and ultimately into the hands of the legislative and executive branches [to] provide an education to the children of North Carolina.” *Id.* at 649, 599 S.E. 2d at 397; *see also Leandro v. State* (“*Leandro I*”), 346 N.C. 336, 357, 488 S.E.2d 249, 261 (N.C. 1997) (recognizing trial court may order relief “as needed to correct the wrong” to fulfill its “duty” in this case); *Abbott v. Burke*, 149 N.J. 145, 224, 693 A.2d 417, 446 (N.J. 1997) (remanding case to trial court “to effectuate” remedial relief consistent with Supreme Court directives).

After lengthy delays, the trial court's efforts on remand to develop a comprehensive remedy bore fruit. Following the guidelines established in *Leandro II*, and after receipt of a study and recommendations from independent education experts, the State developed and proposed a detailed and specific set of programs, staff, services and other interventions to ensure North Carolina children a constitutional sound basic education. The resulting Comprehensive Remedial Plan, agreed to by the parties and adopted by the trial court below, consists of seven core elements:

1. A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;
2. A system of principal development and recruitment that ensures each school is led by a high quality principal who is supported with early and ongoing professional learning and provided competitive pay;
3. A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk students as defined by the Leandro decisions;
4. An assessment and accountability system that reliably assesses multiple measures of student performance against the Leandro standard and provides accountability consistent with the Leandro standard;
5. An assistance and turnaround function that provides necessary support to low-performing schools and districts;
6. A system of early education that provides access to high-quality prekindergarten and other early childhood learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and
7. An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

(R. at 1688–89).

In addition to these programmatic elements, the State identified approximately \$8 billion as the level of funding adequate to phase-in implementation of the Comprehensive Remedial Plan over an eight year timeframe. Of that total, the State identified \$1.75 billion for

implementation of Years 2 and 3 of the Plan, respectively. (R. at 1841).² Based on those funding determinations, the trial court directed the State to secure the funds it identified as needed to ensure Plan implementation. (R. at 1864). In a progress report submitted to the trial court in August 2021, the State represented it had the funds to cover Years 2 and 3 of the Plan available within the state budget in the form of \$8 billion in reserve funds and over \$5 billion in projected revenues over existing budget levels. (R. at 1772).

As record before this Court demonstrates, the trial court's order adopting the Comprehensive Remedial Plan is carefully constructed, measured and, most importantly, embodies proposals developed by the State and agreed to by the parties, under judicial supervision on remand. Similar programmatic plans have been adopted by sister state courts to address ongoing violations of constitutional education rights in their states, as is the case here. For example, in its ruling in *Rose v. Council for Better Education*, the Kentucky Supreme Court declared the state's public school system inadequate and unconstitutional and directed the state to develop and implement a comprehensive set of education reforms. 790 S.W.2d 186, 212 (Kan. 1989); *Leandro I*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (relying upon *Rose* to define North Carolina's constitutional guarantee of a sound basic education). Comparable to the State's own reforms adopted in the trial court's order before this Court, Kentucky's highest court directed the state to redesign the school system to ensure adequate funding to meet the needs of all students, especially those at-risk from household and community poverty; adequate resources identified as necessary, such as well qualified teachers and staff; programs to assure post-secondary success; and proper state oversight and management. *Rose*, 790 S.W.2d at 212–13.

² Prior to trial court adoption of the Comprehensive Remedial Plan, the State adopted Year 1 of the Plan requiring implementing specific remedial actions in 2021. The State failed to do so and the unimplemented measures were incorporated into subsequent years of the Plan. (R. at 1682).

Similarly, to remedy the constitutional deficiencies adjudicated in New York, the Court of Appeals directed the state to reform the school finance system to provide sufficient funding for a package of essential education resources identified by the Court, including qualified teachers, administrators and staff, a platform of services for at-risk students, and additional resources for students with extraordinary needs. *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 115 (N.Y. Cnty. Ct. 2001); *CFE II*, 100 N.Y.2d at 907, 801 N.E.2d at 328 (ruling that, consistent with the Court’s guidelines, the trial court properly fleshed out the template for a sound basic education previously outlined in its prior ruling). The Court further directed the state to ensure that every school has sufficient resources to provide its students the opportunity for a sound basic education and that the state implement accountability measures to ensure the reforms actually achieve that constitutional mandate. *CFE II*, 100 N.Y.2d at 930, 801 N.E. 2d at 348.

The New Jersey Supreme Court also directed state implementation of a two-part remedy for a violation of the right of students in high poverty urban districts to a constitutional “thorough and efficient education.” First, the Court directed the state to provide a rigorous “regular education” curriculum and program comparable to that offered in successful suburban districts and equalize foundation funding levels between those districts and the high poverty districts. *Abbott v. Burke*, 149 N.J. at 223–24, 693 A.2d at 446. Second, the court adopted a comprehensive set of programs and services, developed by a trial court on remand, to remedy the “supplemental” academic, social and health needs of at-risk students in the urban districts, with a directive to the state to secure such additional funds as needed to ensure program implementation. As in the Comprehensive Remedial Plan in this case, the *Abbott* supplemental programs included well planned preschool programs, finding that access to high quality early

education “will have a significant and substantial positive impact on academic achievement in both early and later school years.” *Abbott v. Burke*, 153 N.J. 480, 463, 493–518, 710 A.2d 450, 456–69 (N.J. 1998).

Consistent with the rulings from these sister state courts, the trial court below was also well within its authority to direct implementation of the Comprehensive Remedial Plan developed and proposed by the State, and agreed to by the parties, to remediate the continuing harm resulting from the severe constitutional deficiencies in the North Carolina’s public school system. These cases further demonstrate that the courts are well suited to oversee the development of remedies that identify the programs, resources and funding levels necessary to ensure public school children the educational opportunity mandated by state constitutions. This is precisely what is embodied in the trial court’s order in this case. As the New Jersey Supreme Court observed, where, as here, a comprehensive program is required to remedy adjudicated educational deprivations, that remedy is necessary to ensure no North Carolina child “will be left out or left behind” in the fulfillment of the state’s guarantee of a substantive constitutional education. *Abbott v. Burke*, 153 N.J. at 528, 710 A.2d at 474; *see also Abbott v. Burke*, 163 N.J. 95, 102, 748 A.2d 82, 85 (N.J. 2000) (underscoring that judicial intervention is essential so “another generation of children” do not “pay the price of each year of delay”).

B. SISTER STATE COURTS HAVE DIRECTED STATES TO SECURE ADEQUATE FUNDING TO ENSURE IMPLEMENTATION OF COURT-APPROVED REMEDIAL MEASURES

The record before this Court is undisputed: after the trial court adopted the Comprehensive Remedial Plan, the Legislature failed to provide the funding identified as required to implement Years 2 and 3 of the Plan’s programmatic measures. In response, the trial

court directed the State to transfer available revenues within the state budget to ensure adequate funding for the Plan's implementation. (R. at 1841).

The trial court's directive to transfer available funds within the state budget to implement the Comprehensive Remedial Plan is entirely consistent with well-established authority exercised by sister state courts to effectuate remediation of continuing violations of the education rights of public-school children. When similarly faced with a need for funding to effectuate a judicially approved remedy, those courts have directed states to secure such funds as are required to implement those remedial measures. To be sure, the courts have confronted differing budgetary circumstances and, consequently, have taken different approaches in their judicial directives to meet those circumstances. Yet, as the trial court did in this case, these courts did not hesitate to use their authority to compel the state to act to secure the constitutionally prescribed funding.

As is the case here, the New Jersey courts were faced with state failure to fund judicially approved remedies designed to address the violation of the constitutional right to education in urban school districts. In response, the Supreme Court directed the state to "seek and secure" from the legislative branch the funding necessary to implement the required remedial measures. In 1997, the Court expressly ordered the state to "provide increased funding" to students in urban districts to "assure" per pupil funding for the regular education program at the levels spent on that program in successful suburban districts. *Abbott v. Burke*, 149 N.J. at 224, 693 A.2d at 446. A year later, the Court further directed the state to "seek appropriations to ensure the funding and resources" as necessary to implement the comprehensive set of remedial programs identified as needed for at-risk students in those districts, and to "secure" such funding from the legislature:

Requests by the [state] that funds be appropriated to implement educational programs deemed essential on the basis of demonstrated need will be the measure of the State's constitutional obligation to provide a thorough and efficient

education, and we anticipate that the Legislature will be fully responsive to that constitutional call.

Abbott v. Burke, 153 N.J. at 469–70, 710 A.2d at 517–521.

The New Jersey Supreme Court was again compelled to exercise this authority in 2011 when the state drastically cut funding below constitutionally adequate levels in the urban districts. The Court directed the funding be restored and, in so doing, made clear that the legislature’s appropriations power did not prevent judicial enforcement “where the harm being visited is . . . a real, substantial and consequential blow to the achievement” a constitutional education for at-risk students in the aggrieved urban districts. *Abbott v. Burke*, 206 N.J. 332, 376, 20 A.3d 1018, 1045 (N.J. 2011); and *see id.* at 342, 20 A.3d at 1024 (holding that “the State may not use the appropriations power as a shield from its responsibilities”); *see also Abbott ex rel. Abbott v. Burke*, 199 N.J. 140, 146, 971 A.2d 989, 992 (N.J. 2009) (accepting the state’s commitment to fully fund a new school funding formula for three years, finding the state’s provision of adequate funding “is not an occurrence in a moment in time; it is a continuing obligation”).

Similarly, the Kansas Supreme Court employed judicial branch authority to compel the state to fund a court-ordered remedy for violating the education rights of Kansas children under that state’s constitution. Just as the trial court in this case confronted, the Kansas legislature failed to provide constitutionally adequate funding after being afforded an extended opportunity to do so on its own. In 2014, the Supreme Court upheld a lower court finding that the legislature’s reduction in public school funding was unconstitutional. *Gannon v. State*, 298 Kan. 1107, 1197, 319 P.3d 1196, 1251 (Kan. 2014). The Court subsequently directed the state to put in place a mechanism to deliver funding to school districts at levels sufficient to enable students to achieve the state’s academic program standards. *Gannon v. State*, 305 Kan. 850, 918, 390

P.3d 461, 503 (Kan. 2017).³ When the legislature failed to provide the requisite funding, the court established a firm deadline for the state to do so that, if not met, would result in further judicial orders. *Id.* at 919, 390 P.3d at 504. In issuing these directives, the Court emphasized the core judicial function of enforcing its rulings, stating that “[s]taying the judicial hand in the face of continued violation of constitutional rights makes the courts vulnerable to becoming complicit actors in the deprivation of those rights.” *Gannon v. State*, 306 Kan. 1170, 1174, 402 P.3d 513, 518-19 (Kan. 2017) (quoting *Gannon v. State*, 303 Kan. 682, 739, 368 P.3d 1024, 1059 (Kan. 2016)).

Finally, the Washington Supreme Court utilized its inherent authority to ensure satisfaction of that state’s constitutional obligation to adequately fund court-adopted remedial measures when faced with continuing legislative recalcitrance. In 2012, the court upheld an adjudication that the state’s basic education program violated the constitutional mandate “to make ample provision for the education of all children residing within its borders.” *McCleary v. State*, 173 Wash.2d 477, 539, 269 P.3d 227, 258 (Wash. 2012). It ordered the state to make “sweeping reforms to remedy the deficiencies in the funding system” and retained jurisdiction to ensure that the reform plan was successfully carried out. *Id.* at 547, 269 P.3d at 261. When the legislature failed to fully fund the requisite program to deliver a constitutionally adequate education to all students—and even failed to present a plan to ensure the program would be fully funded by the court-ordered deadline—the court assessed the state a penalty of \$100,000 per day, an action which then yielded legislative compliance. *McCleary v. State*, No. 84362-7, 2015 WL 13935265, at *4 (Wash. Aug. 13, 2015) (holding that “[w]hen, as here, contempt results in an

³ Similar to the trial court’s order in this case, the *Gannon* Court identified the specific resources necessary to provide children an adequate education under the Kansas constitution. *Gannon*, 305 Kan. at 898-900, 390 P.3d at 490-94.

ongoing constitutional violation, sanctions are an important part of securing the promise that a court order embodies: the promise that a constitutional violation will not go unremedied”).

Where a sister state court has adjudicated a violation of the constitutional right to public education, the executive and legislative branches most often respond voluntarily by taking affirmative steps to develop, fund and implement a remedy to address that violation. Such action obviates the need for further judicial intervention. But as is evident from the cases discussed above, sister courts, while using different methods calculated to meet the circumstances presented in the records before them, also did not hesitate when necessary to exercise the inherent authority that lies at the center of the judicial branch: fully effectuating a remedy for an adjudicated violation of the affirmative constitutional right to public education.

This is precisely what the trial court did in its carefully constructed order now before this Court. The court below faced the severe educational deprivations endured by generations of public school children resulting from the state’s continuing violation of their substantive right to public education guaranteed in North Carolina’s constitution. It further adopted a Comprehensive Remedial Plan developed by the State itself and agreed to by the parties explicitly designed to remediate that violation. And it further directed the State to secure the State-identified funding to implement the Plan through the transfer of funds available within the state budget. In this way, the trial court, by issuing its order, exercised appropriate and measured judicial branch authority to fulfill a solemn constitutional promise: that all children be afforded the opportunity for school success so that they can “become contributing, constructive members of society”—a promise this Court has made abundantly clear is “paramount.” *Leandro II*, 358 N.C. at 649, 599 S.E.2d at 397.⁴

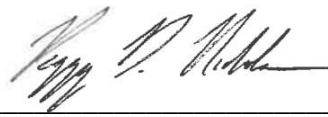
⁴ A growing body of high-quality research demonstrates that increased funding to implement the programs in the Comprehensive Remedial Plan will have measurable benefits on the education success and life prospects for at-risk

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully urge the Court to reverse and/or vacate the Court of Appeals order, and to affirm the constitutionality of the trial court's order of November 10, 2021.

Respectfully submitted this 20th day of July 2022.

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students. A recent review of that research concludes there is "compelling evidence that there is a positive causal relationship" between increased spending and the academic and life outcomes of students, including higher educational attainment, increased earnings, and a reduction in adult poverty. C. Kirabo Jackson, *Does School Spending Matter? The New Literature on an Old Question* 9, (Nat'l Bureau of Econ. Rsch., Working Paper No. 25368, 2018), <https://www.nber.org/papers/w25368>.

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This 20th day of July, 2022.

A handwritten signature in black ink, appearing to read "Peggy D. Nicholson", written over a horizontal line.

Peggy D. Nicholson