FILED

2011 AUG 15 PM 4:40

WAKE CO., C.S.C.

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 95 CVS 1158
HOKE COUNTY BOARD OF EDUCATION, *et al.*; Plaintiffs, and ASHEVILLE CITY BOARD OF EDUCATION, *et al.*; Plaintiff-Intervenors v. STATE OF NORTH CAROLINA; STATE BOARD EDUCATION, Defendants.	**MOTION TO INTERVENE AND FOR CLARIFICATION OR RELIEF FROM ORDER**

Senator Philip E. Berger, President Pro Tempore of the North Carolina Senate, and Representative Thom R. Tillis, Speaker of the North Carolina House of Representatives, in their official capacities ("Movants"), respectfully submit the following (1) Motion to Intervene, and (2) Motion for Clarification or Relief From the "Memorandum of Decision and Order Regarding Pre-Kindergarten Services For At-Risk Four Year Olds" entered by the Honorable Howard E. Manning, Jr., on July 18, 2011 ("Order").

In support of this Motion, the Movants show the following:

1. The Order, among other things, prohibits the State of North Carolina ("State") from applying or enforcing any "artificial rule, barrier, or regulation to deny any at-risk four year old admission" to the North Carolina Prekindergarten ("Pre-K") program.

2. The Court determined that certain provisions in S.L. 2011-145 (the "Appropriations Act") appeared to "effectively eliminate and/or severely reduce the required at-risk prekindergarten services."

3. Specifically, the Court's Order faulted Section 10.7 (f) of the Appropriations Act for imposing a 20 percent cap on the number of at-risk four year olds who may be admitted into the Pre-K program. The Court stated that this restriction would decrease the number of at-risk children in the Pre-K program from 32,000 to 6,400.

4. The Court's Order also specifically disagreed with Section 10.7 (h) in the Appropriations Act, which requires a co-payment for at-risk four year olds.[1]

5. The Court's Order intended to address and correct a perceived imbalance in the allocation of Pre-K services among financially at-risk and nonfinancially at-risk four year olds within the existing levels of funding appropriated by the General Assembly.

6. The Court did not order the State to fund and administer Pre-K services for *all* of the approximately 65,000 eligible at-risk four year olds in North Carolina. Indeed, there is no finding by the Court that the *level* of funds appropriated for Pre-K services were unlawful or that the number of children at risk children served by the Pre-K program (32,000 out of 65,000 by the Court's estimate) was unlawful. Rather, the Court struck down the *allocation* of those funds between the two categories of at-risk four year olds.

---

[1] The Court's Order also criticized Section 10.7 (h) in the Appropriations Act, which requires a co-payment for at-risk four year olds, for its "severe and significant impact on the ability of at-risk children to access the program and have the remediation they need to be prepared for kindergarten." The Court also noted that the "co-pay requirement appears to be an unsettled issue at this time." While the Movants disagree with any suggestion that the Supreme Court's decision in *Leandro II* prohibits the imposition of the co-pay mechanism to preserve Pre-K slots for financially at-risk children, the basis of the disagreement is not unclear and is more properly raised by the State on appeal.

7. Nevertheless, on August 10, 2011, Governor Perdue issued Executive Order 100 ("EO 100"). EO 100 is a de facto unfunded mandate that orders the Department of Public Instruction to, among other things, "develop a plan for at risk four year olds who apply to be accepted into NC Pre-K." The plan includes removing all "barriers" to participation in the Pre-K program, "identifying" eligible at-risk children, and "searching" for unserved eligible at-risk four year olds. EO 100 also imposes myriad obligations on the State to provide adequate staffing, academic standards, financial support, supervision, and administration of expanded Pre-K services.

8. The breadth and scope of EO 100 suggests that the Governor is attempting to interpret the Court's Order as establishing a new constitutional obligation upon the State to provide free, universal Pre-K services to each and every at-risk four year old in North Carolina beyond the levels of service funded by the General Assembly. Indeed, Governor Perdue's spokesperson told the press that EO 100 "is in keeping with Judge Manning's order declaring the General Assembly's changes inconsistent with the Constitution." *See* "Perdue Strikes at Pre-Kindergarten Fees," *The News And Observer*, August, 11, 2011, located at: http://www.newsobserver.com/2011/08/11/1404532/perdue-strikes-at-pre-kfees.html#ixzz1V3kNYdxY (last visited August 14, 2011).

9. The Governor's interpretation of the State's constitutional obligation is not consistent with the terms of the Court's Order, the Constitution of North Carolina, or the Supreme Court's decision in *Leandro II*, which declined to recognize a separate constitutional right to pre-kindergarten for all at-risk prospective enrollees. *Leandro, II*, 358 N.C. 605, 644-645 (2004).

10. The Movants seek this clarification in their official capacities as leaders of the General Assembly's respective legislative chambers because the Office of the Attorney General has deemed itself unable to seek this clarification on behalf of the State due to an inability to obtain a conflict waiver from the Governor or the Department of Public Instruction.

THE INTERESTS OF THE MOVANTS

11. The Movants seek clarification of the Court's Order for three reasons.

12. *First*, the Movants assert that the Court's Order eliminating the 20 percent cap could have the unintended consequence of erecting the very barrier the Court intended to remove with respect to maximizing Pre-K services for financially at-risk four year olds. Despite the admittedly imprecise language used in the Appropriations Act, the General Assembly intended the 20 percent to limit only the services provided to children who are "at risk" for reasons *other than financial hardship* (e.g., children of certain military personnel, children with Individual Education Plans, children with chronic health conditions). Without the cap, the State could provide unlimited "slots" of Pre-K services to non-financially at-risk children at the expense of financially at-risk children. The Movants, therefore, respectfully ask the Court to clarify its Order to permit the State to apply the 20 percent cap, consistent with the General Assembly's true intent.[2]

13. *Second*, the Movants have a direct interest in any change in the law that would purport require the State, for the first time ever, to provide Pre-K services to all at risk students

[2] Although not immediately clear from the text and apparently not raised by the current parties before the Court, the Appropriations Act seeks to replicate in the Pre-K program the eligibility standards of the predecessor More at Four Program, which have been in effect since 2004. Those standards required that a participating child's family income does not exceed 75% of the State median income, except that 20% of the More at Four program's enrollees may have family incomes in excess of 75% of median income if the family or child has other designated

regardless of the cost to the State. EO 100, which was issued just weeks after this Court's Order, appears to obligate the State to provide such free universal Pre-K services, which, in turn, would require the State to obtain additional appropriations from the General Assembly. In light of the enormous burden that EO 100 would impose on the State just days before the first day of school, the Movants respectfully ask that the Court clarify that its Order did not require the State to fund and administer Pre-K services available above and beyond those services provided by the current levels of funds appropriated by the General Assembly.

14. *Third*, in the event that the Court intended to create a new constitutional obligation that would direct the General Assembly to appropriate funds sufficient to provide free, universal Pre-K services for all at-risk four years olds in the State, the Movants request relief from that Order on the grounds that such a remedy is barred by the separation of powers doctrine embodied in Section 6 of the North Carolina Constitution and by the decision of the Supreme Court in *Leandro II*. *See Leandro II*, 358 N.C. at 645 ("While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, we simultaneously recognize our limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain.")

MOTION TO INTERVENE

15. The Movants are the respective leaders of the Senate and House in the General Assembly. The authority to establish and maintain public school education is "the shared province of the legislative and executive branches." *Leandro II*, 358 N.C. at 643-645.

---

risk factors. Additionally, the median income requirement is identical to the Child Care Subsidy

16. The Office of the Attorney General is responsible for representing the interests of the State, which includes defending the constitutionality and validity of the laws enacted by the General Assembly. Indeed, the Supreme Court confirmed in *Leandro II* that "the State" is the legislative and executive branches which are constitutionally responsible for public education." 358 N.C. at 635.

17. As the legislative leaders of the State, the Movants have an interest in the validity and constitutionality of all laws enacted by the General Assembly, including the Appropriations Act.

18. The Movants have a specific interest in clarifying the scope of the Court's Order to assure that provisions of the Appropriations Act are interpreted in a manner consistent with the intent of the General Assembly to promote maximum access to Pre-K services for financially at-risk four year olds.

19. The Movants also have a specific interest in clarifying the scope of the Order to confirm that the Court did not (1) require the State to authorize, fund, and administer free, universal Pre-K services for all at risk four year olds without regard to cost, or (2) impact, impinge, or otherwise interfere with the legislature's exclusive authority to appropriate funds for public education.

20. Disposition of this action will impact the ability of the Movants to protect their interests and duties, as the leaders of the legislative branch, with respect to the establishment and maintenance of public education, including Pre-K services. The Movants have an interest in defending the constitutionality of the Appropriations Act enacted by their respective

---

program's income-eligibility requirements. *See* Section 10.1 of the Appropriations Act.

chambers. The Movants have an interest in protecting the exclusive province of the legislature to make decisions relating to budget and appropriations matters.

21. The Movants are not adequately represented by the Office of the Attorney General because that office did not agree to file this motion on behalf of the State of North Carolina. If the Movants are not permitted to participate in this litigation as surrogates for the State, there would be no vehicle for the interests of the legislative branch of government to clarify the scope of the Court's Order. For these reasons, the Movants respectfully request the Court grant their motion to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure.

MOTION FOR RELIEF OR CLARIFICATION UNDER RULE 60(b)

22. The Court's Order interpreted the 20 percent cap and the copayment in Sections 10.7 (f) and (h) of the Appropriations Act as creating an unlawful barrier to Pre-K services for at-risk four year olds. The Court, however, noted that both neither it nor the parties were clear about how the 20 percent cap in Section 10.7 (f) would be applied. The Movants intend to clarify that the General Assembly intended to cap only the amount of Pre-K services available for *non-financially* at risk four year olds—i.e., those eligible children "regardless of income" described in Section 10.7(f)—so that the inclusion of these participants does not serve as an unintentional barrier on services available for financially at-risk children. By clarifying its Order consistent with this interpretation, the Court could apply the cap in a manner that avoids the unintended effect of allowing new participants in the Pre-K program to crowd out the very at-risk children the Order intends to protect.

23. In light of EO 100, the Court also should clarify that its Order did not require the General Assembly to appropriate funds to establish a new, free, universal Pre-K program. The

Court's Order did not determine the funding levels set by the General Assembly to be unconstitutional—only the allocation of funds within those levels.

24. Given that EO 100 operates as an unfunded mandate upon local education authorities—the Court should also clarify that its Order did not require the State to make Pre-K services available to the estimated 65,000 at risk children in North Carolina regardless of the funds available for that purpose.

25. In the event that the Court's Order did intend to establish a new constitutional obligation upon the State to fund and administer Pre-K services for all at risk children, the Movants seek relief from the Order on the ground that such an obligation is inconsistent with the Supreme Court's decision in *Leandro II* and would infringe upon the appropriations power of the General Assembly in violation of Section 6 of the North Carolina Constitution.

WHEREFORE, the Movants respectfully request that this Court enter an order:

1. Permitting the Movants to intervene in this matter under Rule 24 of the North Carolina Rules of Civil Procedure;

2. Clarifying that the 20 percent cap in Section 10.7 (f) of the Appropriations Act does not apply to financially at-risk four year olds;

3. Clarifying that the Constitution does not require the State to implement a new program to provide Pre-K programs sufficient to provide Pre-K services to all at risk children in the State.

Respectfully submitted this the 15th day of August, 2011.

Charles F. Marshall
N.C. Bar No. 23297
D.J. O'Brien III
N.C. Bar No. 35481
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
150 Fayetteville Street, Suite 1600
Raleigh, NC 27601
T: (919) 839-0300
F: (919) 839-0304

Attorneys for Senator Philip E. Berger, President Pro Tem of the Senate, and Thom R. Tillis, Speaker of the House of Representatives

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **MOTION TO INTERVENE AND FOR CLARIFICATION OR RELIEF FROM ORDER** on the parties by either electronic mail and/or by depositing a copy thereof in the United States mail, postage prepaid, addressed as follows:

Melanie Black Dubis Parker Poe Adams & Bernstein, LLP 150 Fayetteville Stret, Suite 1400 P.O. Box 389 Raleigh, NC 27602 *Counsel for Plaintiffs*	Thomas J. Ziko N.C. Department of Justice 114 West Edenton Street Raleigh, NC 27603 *Counsel of Defendants State of North Carolina and State Board of Education*
Ann L. Majestic Tharrington Smith, L.L.P. 209 Fayetteville Street Raleigh, NC 27601 *Counsel for Plaintiff-Intervenor*	Julius L. Chambers Ferguson, Stein, Cambers, Wallas, Adkins, Gresham & Sumter, P.A. 741 Kenilworth Avenue, Suite 300 P.O. Box 36486 Charlotte, NC 28204 jchambers@fergusonstein.com *Counsel for Penn Intervenors*
John Charles Boger University of North Carolina School of Law Center for Civil Rights CB 3380 Chapel Hill, NC 27599-3380 jcboger@email.unc.edu *Counsel for Penn Intervenors*	Victor Goode Legal Department NAACP 4805 Mount Hope Drive Baltimore, MD 21215 vgoode@naacpnet.org *Counsel for Penn Intervenors*

Amicii Counsel:

Thomas M. Stern P.O. Box 2206 Durham, NC 27702 tomstern@durhamlawoffice.com *Counsel for North Carolina Association of Educators*	Gregory C. Malhoit 123 Forest Road Raleigh, NC 27605 gmalhoit@nccu.edu *Counsel for the Rural School and Community Trust*
Susan Pollitt 2626 Glenwood Avenue, Suite 550 Raleigh, NC 27608 susan.pollitt@disabilityrightsnc.org *Counsel for Disability Rights North Carolina*	Lewis Pitts Advocates for Children Services Legal Aid of NC, Inc. P.O. Box 2101 Durham, NC 27702 lewisp@legalaidnc.org *Counsel for Legal Aid of NC, Inc.*
Jack Holtzman Carlene McNulty NC Justice Center 224 South Dawson Street P.O. Box 28068 Raleigh, NC 27611 jack@ncjustice.org carlene@ncjustice.org *Counsel for North Carolina Justice Center*	

This the 15th day of August 2011.

D.J. O'Brien III