

FILED

STATE OF NORTH CAROLINA
COUNTY OF WAKE

2018 MAR 13 PM 12: 22

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY, C.S.C.

95 CVS 1158

HOKE COUNTY BOARD OF ^{BY} EDUCATION, et al.,

Plaintiffs

and

ASHEVILLE CITY BOARD OF EDUCATION, et al.,

Plaintiff-Intervenors

v.

STATE OF NORTH CAROLINA, et al.,

Defendants

This cause coming on before the Honorable W. David Lee, Judge Presiding pursuant to Rule 2.1 of the General Rules of Practice at the February 15, 2018 special session of Wake County Superior Court upon motion of the North Carolina State Board of Education (hereinafter "SBE") pursuant to Rule 12 and Rule 60 of the Rules of Civil Procedure for relief from the judgment dated April 4, 2002 "and any other applicable remedial Superior Court Orders." The SBE seeks through this unusual request to be released "from the remedial jurisdiction of this Court."

Based upon the evidence, arguments and contentions presently before the Court, the Court makes the following findings of fact by at least a preponderance of the evidence:

1. The matters before this court are justiciable matters of a civil nature and this court exercises the subject-matter jurisdiction conferred by N.C.Gen.Stat. 7A-240. The Superior Court division is the proper division

where, as here, the principal relief prayed for is the enforcement or declaration of any claim of constitutional right. See N.C.Gen.Stat. 7A-245(a) (4). Moreover, personal jurisdiction over the person of the SBE has existed and has been exercised over the movant, with its active participation in these proceedings for more than twenty years.

2. The law of this case includes, *inter alia*, our Supreme Court's holding in *Leandro I* that there is a constitutional requirement that every child in this state have equal access to a sound basic education and that the state is required to provide children a qualitatively adequate education, i.e. an education that meets some minimum standard of quality.
3. The SBE is constitutionally empowered under Article IX, Section 5 of the North Carolina Constitution to supervise and administer the public school system and the educational funds referenced therein for the system's support. The SBE is also charged with making all needed rules and regulations related thereto. The Defendant State of North Carolina has the ultimate constitutional obligation to insure that every child has the opportunity to receive a sound basic education. Together, the actions and decisions of these defendants are indispensable in undertaking to deliver the *Leandro* right to every child.
4. At the commencement of this litigation the SBE, together with the State moved pursuant to 12 to dismiss the claims now before the court, which motion was denied by the trial court. This denial was affirmed on appeal. Principles of *res judicata* and collateral estoppel preclude a reexamination of the current motion strictly on Rule 12 grounds. This court is constrained, however, to consider the merits of the instant motion within the context of Rule 60 based upon the SBE's contentions that the circumstances have changed and that the claim to enforce the *Leandro* right is now moot.
5. Rule 60(b)(5) affords relief where the court's judgment has been satisfied, released or discharged or where it is no longer equitable that the judgment should have prospective application. There has been no final non-appealable judgment relating to the remediation and enforcement of the

Leandro constitutional right. The last Supreme Court pronouncement in this case (*Leandro II*) remanded the proceedings to the trial court and “ultimately into the hands of the legislature and executive branches” for remedial action, noting in the decision that “(W)hether the State meets this challenge remains to be determined.” As to binding force of this right, the SBE acknowledged in July of 2013 in its brief to the North Carolina Supreme Court that it is “bound by its judicially mandated constitutional obligations.” *New Brief of Defendant-Appellee State Board of Education* (N.C. Supreme Court, July 24, 2013). As to remediation and enforcement, Judge Manning’s last order of March 17, 2015 concluded that “a definite plan of action is still necessary to meet the requirements and duties of the State of North Carolina with regard to its children having equal opportunity to obtain a sound basic education.” Again, the SBE is constitutionally bound to administer and supervise the execution of such a plan.

6. *Leandro I* cautions that...”the courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children...with a sound basic education.” In *Leandro II* the trial court determined that such a showing had been made against the state defendants. The liability judgment then entered against the state defendants was affirmed in *Leandro II* and the defendants were ordered to address and correct the constitutional violations.
7. The SBE contends that the present circumstances of the educational system in Hoke County have so changed since the 2002 judgment that there is no longer a justiciable controversy before the court. The SBE supports this contention by summarizing changes and reforms, both legislative and executive in nature, that have occurred since 2002. However, the SBE has failed to present convincing evidence that either the *impact or effect* of these changes and reforms have moved the State nearer to providing children the fundamental right guaranteed by our State Constitution.
8. The statewide implications and applications of this case have been established throughout the course of this proceeding, as perhaps best

evidenced by the Judge Manning's comprehensive review as well as by the SBE's comprehensive list of statewide changes and reforms that SBE contends has eliminated a justiciable controversy with respect to *Leandro* compliance.

9. In terms of assessing compliance with *Leandro*, our Supreme Court has recognized that one metric for evaluation is education "outputs," i.e. test scores. Rather than demonstrating the absence of a justiciable controversy, a review of these outputs reveal an ebb and flow that at no time has demonstrated even remote compliance with the tenants of *Leandro*. As Judge Manning noted in his last order dated March 17, 2015, the results of the 2013-14 EOC, EOG, and ACT tests from the public schools indicate that "in way too many school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining a sound basic education as defined by and required by the *Leandro* decision." Judge Manning's order reviews in detail reading, math and biology results, generally within the 2012-2014 time frame, reflecting in each and every category that more than half of the students tested below grade level. Additional hard facts in evidence before this court include the SBE admission in 2015 that the demand for new teachers is not being met; that there were then more schools rated "D" or "F" than can be served; that the federal funding ("Race to the Top") ended in 2014-15, resulting in (1) the State Department of Public Instruction losing over half the staff-from 147 to 57-dedicated to serving those low performing schools and (2) loss of critical funding used to develop and implement effective teaching. In Hoke County, the LSA has been forced to hire lateral entry candidates-people with no formal training to work with this most at-risk population-to fill these positions. Earlier submissions to this court also indicate that in 2014 North Carolina ranked 49th out of 50 states in terms of percentage of its eleventh graders meeting the ACT reading benchmark. These are but a few examples revealing that the SBE is not supervising and administering a public school system that is *Leandro* compliant. The court record is replete with evidence that the *Leandro* right continues to be denied to hundreds of thousands of North Carolina children.

10. Rule 60(b)(6) affords relief “for any other reason justifying relief from the operation of a judgment.” Our appellate courts have called this provision of the Rule “a grand reservoir of equitable power to do justice in a particular case.” Norton v. Sawyer, 30 N.C.App 420, 426 (1976). Further, a determination under Rule 60 rests in the sound discretion of the trial judge. Harris v. Harris, 307 N.C. 684 (1983).
11. The SBE argues that legislation enacted by both Congress and our General Assembly now adequately address those criteria that our Supreme Court has decreed constitute a “sound basic education” (See *Leandro I*) and that the legislation also addresses the educational resources to which every child has the right of access—competent, certified, well-trained teachers, a well-trained competent Principal, and resources necessary for the effective instructional program (See *Leandro II*). The SBE further argues that these enactments must be presumed by this court to be constitutional.
12. This court indeed indulges in the presumption of constitutionality with respect to each and every one of the legislative enactments cited by the SBE. That these enactments are constitutional and seek to make available to children in this State better educational opportunities is not the issue before the court. The issue is whether the court should continue to exercise such remedial jurisdiction as may be necessary to safeguard and enforce the much more fundamental *constitutional right* of every child to have the opportunity to receive a sound basic education. Again, the evidence before this court upon the SBE motion is wholly inadequate to demonstrate that these enactments translate into substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards.
13. The SBE’s motion was filed in July, 2017 and to the extent that it is based on changed circumstances is untimely, the SBE’s brief hearkening to changes made in 2012, some five years before the filing of its motion.

Based on the foregoing findings of fact the Court makes the following conclusions of law:


1. The changes in the factual landscape that have occurred during the pendency of this litigation do not serve to divest the court of its jurisdiction to address the constitutional right at issue in this cause. The court has jurisdiction over the subject matter and over the person of the defendant. To the extent that the SBE seeks dismissal pursuant to Rule 12(b)(1) or (2) the motion should be denied. To the extent that the SBE seeks dismissal pursuant to Rule 12(b)(6), the trial court's previous denial of that motion having been affirmed on appeal in *Leandro I*, the re-assertion of that motion should be denied.
2. There is an ongoing constitutional violation of every child's right to receive the opportunity for a sound basic education. This court not only has the *power* to hear and enter appropriate orders declaratory and remedial in nature, but also has a *duty* to address this violation. This court retains both subject matter jurisdiction and jurisdiction over the parties as it undertakes this duty. Both state defendants have been proper parties to this litigation since its inception and each remain so.
3. The State recognizes its continuing constitutional obligations and has most recently joined with the plaintiffs in an effort to adopt a comprehensive approach to address those obligations. The successful delivery of the *Leandro* right necessarily requires the active participation of the SBE in the discharge of its constitutional duty to supervise and administer the school system and its funding. The SBE has a significant non-delegable role in affording the constitutional entitlements of *Leandro* to every child. The SBE has been and continues to be in the better position than the court to identify in detail those curricula best designed to ensure that a child receives a sound basic education.¹
4. These state defendants have the burden of proving that remedial efforts have afforded substantial compliance with the constitutional directives of our Supreme Court. To date, neither defendant has met this burden. Both

law and equity demand the prospective application of the constitutional guarantee of *Leandro* to every child in this State.

5. The Rule 60 motion is untimely, the same not having been filed within a reasonable time as required by Rule 60(b) (6). Further, the movant has failed to demonstrate that such extraordinary circumstances exists that justice demands relief from the previous rulings of the court or from the burden of the movant to establish that it has presented a remedial plan of action that addresses the liability of the movant established by the law of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, in the Court's discretion, that the motion of the defendant SBE should be and the same is hereby DENIED.

This the 7th day of March, 2018.


W. David Lee, Judge Presiding

¹ In *Leandro I*, the Supreme Court recognized that “judges are not experts in education and are not particularly able to identify in detail those curricula best designed to ensure that a child receives a sound basic education.” *Leandro I* reminded the trial court that judicial intrusion into the area of expertise as to what course of action will lead to a sound basic education is justified only upon a showing that the right is being denied, it initially being the province of the legislative and executive branches of government to take appropriate action. This court notes that both branches have had more than a decade since the Supreme Court remand in *Leandro II* to chart a course that would adequately address this continuing constitutional violation. The clear import of the *Leandro* decisions is that if the defendants are unable to do so, it will be the *duty* (emphasis mine) of the court to enter a judgment “granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government.” (*Leandro I*)

This trial court has held status conference after status conference and continues to exercise tremendous judicial restraint. This court is encouraged by Governor Cooper's creation of the Governor's Commission on Access to Sound Basic Education. Concurrent with the entry of this Order, this court has also appointed, with the consent of the plaintiffs, the Penn Intervenors and the State of North Carolina a consultant. This consultant has court approval to work with the Commission with a view toward submitting recommendations to the parties, the Commission and this Court of specific actions to achieve *Leandro* compliance. The time is drawing nigh, however, 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. It is the sincere desire of this court that the legislative and executive branches heed the call.