THE LONG AND WINDING ROAD: THE *LEANDRO* CASE SAGA CONTINUES*

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I have been asked by the North Carolina Law Review *to submit this essay reflecting on the* Leandro *Case from the perspective of the only person to have participated in the first two opinions issued by the Supreme Court of North Carolina. Thus, this will serve more as a personal reflection on the case than as a scholarly article normally published by the* Law Review. *Since my retirement from the court in 2004, I have not formally participated in the ongoing saga of the longest running case in North Carolina jurisprudential history. I have certainly followed the case through all its iterations since then. In fact, several months ago I found myself back in the courtroom at the Supreme Court of North Carolina for the next—and some would hope—final chapter of the case. Much has changed since that first oral argument there in 1996, when I was a relatively new justice on the court. And yet, much hasn't changed. But isn't that the issue? Had this case been the basis for a reality TV series, I have no doubt that as the clerk gaveled the court into session with the seven justices filing in, the background music would have to be the Beatles' 1970 Number 1 hit, "The Long and Winding Road." Yes,* Leandro *has traversed a long, long road since those early days, and that road has certainly been a winding road, one full of twists and turns, different personalities, both on and off the bench, and a changing political and educational landscape across the state. Is the end of that long and winding road in sight? Only time will tell.*

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INTRODUCTION

When counsel for the *Leandro* plaintiffs rose to begin oral argument on October 17, 1996, the political and judicial landscape was dramatically different than it is today. The Supreme Court of North Carolina had five elected Democrats, including Chief Justice Burley Mitchell and Justice Sara Parker, both of whom were on the ballot that November.[1] The two Republicans, I. Beverly Lake, Jr., and yours truly, had been elected in November of 1994, becoming the first Republicans elected to the court since 1896.[2] It was a veteran court with multiple years of experience in the appellate system, with Justices Webb and Lake also previously serving as superior court judges.[3] Justice Parker was the lone female (only the third in the history of the court at that time),[4] and Justice Henry Frye was the lone African-American and the first to ever serve on North Carolina's highest court.[5] All, to the best of my knowledge, had grown up in North Carolina, and all were products of the public school system.

Governor James B. Hunt, "the Education Governor," and the glue that held the Democratic Party of North Carolina together, had returned for an unprecedented third term.[6] The General Assembly was divided, with the Democrats controlling the State Senate and the Republicans controlling the House.[7] The Attorney General was Democrat Mike Easley,[8] whose lawyers would represent the named defendants, the State of North Carolina, and the State Board of Education.

Plaintiffs in the case consisted of a group of parents in their individual capacities and as guardians ad litem of their respective minor children who were

1. *See* Darren Janz, *A Guide to NC Supreme Court Elections*, POL. N.C. (Aug. 13, 2018), https://www.politicsnc.com/a-guide-to-nc-supreme-court-elections/ [https://perma.cc/3F6R-NRMW].

2. *Id.*

3. N.C. SEC'Y OF STATE, NORTH CAROLINA MANUAL OF 1995–1996, at 705–08 (Lisa A. Marcus ed. 1995–96) [hereinafter N.C. MANUAL OF 1995–96].

4. *See Historic Celebration Honors the Women Justices of North Carolina*, N.C. JUD. BRANCH (Apr. 10, 2018), https://www.nccourts.gov/news/tag/general-news/historic-celebration-honors-the-women-justices-of-the-supreme-court-of-north-carolina [https://perma.cc/4S5B-KK76].

5. Adrienne Dunn, *Henry E. Frye (1932-)*, N.C. HIST. PROJECT (2016), https://northcarolinahistory.org/encyclopedia/henry-e-frye-1932/ [https://perma.cc/R6TL-4K8X].

6. *See Gov. James B. Hunt*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/james-b-hunt/ [https://perma.cc/44H9-SAHH] ("Reelected in 1992 and again in 1996, Governor Hunt served a historic fourth term.").

7. *See* N.C. MANUAL OF 1995–96, *supra* note 3, at 705–08.

8. *See Gov. Michael F. Easley*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/michael-f-easley/ [https://perma.cc/AC86-LWYL].

enrolled in the plaintiffs' school systems and whose local Boards of Education were also plaintiffs.[9] Kathleen M. Leandro, the first named, lead plaintiff, and her son, Robert A. Leandro, graced the case with their name.[10] The five local school boards represented the low-wealth counties of Hoke, Halifax, Robeson, Cumberland, and Vance.[11]

After the case had been filed, a group of plaintiff-intervenors joined the litigation representing individuals and their children who were in so-called high-wealth counties, which included the local school systems of "the City of Asheville and of Buncombe, Wake, Forsyth, Mecklenburg, and Durham Counties and the boards of education for those systems."[12]

It was an imposing array of parties to the case and an all-star cast of attorneys, as well as numerous amicus briefs from a variety of interested organizations around the state. It didn't take long for the court to realize the scope and gravity of the matter before it when the large stack of briefs arrived at our chambers. And a quick perusal of the constitutional issues coming before the court only added to the importance of the case.

I. *LEANDRO I*

In the beginning, the case seemed pretty straightforward. The plaintiffs' complaint alleged certain rights under the North Carolina Constitution based upon different provisions relating to education and the violation of those rights by the State and the State Board of Education based on the General Assembly's inequitable funding formula for public schools.[13] This alleged inequity placed a significant funding responsibility on local school districts, and plaintiffs requested a declaration of these rights and a remedy to cure the violation of those rights.[14]

No one can deny that, when first filed, the case was all about money and the inequities of how it was allocated under state law. In a nutshell, the argument was that around twenty percent of the cost for funding public schools came from the counties and was used for facility construction, teacher supplements, and projects like state-of-the-art science labs.[15] The low-wealth plaintiffs contended that their tax bases simply could not provide adequate funds, and there were pleadings about rundown schools with no actual science

9. *See* Leandro v. State (*Leandro I*), 346 N.C. 336, 336, 488 S.E.2d 249, 249 (1997).

10. *Id.*

11. *See id.* at 342, 488 S.E.2d at 252.

12. *Id.* In the case name, these school systems are called "Asheville, Buncombe County, Charlotte-Mecklenburg, Durham County, Wake County, and Winston-Salem/Forsyth." *Id.* at 336, 488 S.E.2d at 249.

13. *Id.* at 342–44, 488 S.E.2d at 252–53.

14. *Id.*

15. *Id.* at 342–43, 488 S.E.2d at 252.

labs, out-of-date books, and teachers working for substantially less than those in high-wealth areas with substantial teacher pay supplements.[16] As a result of these funding inequities, students were not getting an adequate education compared with the opportunities provided to many other students across the state.[17]

In the early stages of the litigation, the high-wealth school district plaintiff-intervenors contended that they had an entirely different set of issues with the funding formula, based upon the unique circumstances of large urban district schools, separate and apart from the original plaintiffs.[18] The cynics reportedly said that the intervenors jumped into the litigation to protect their funding stream and make sure that the low-wealth counties didn't ultimately funnel off appropriations that the intervenors were counting on.[19] From an education policy standpoint, this may well mark another early chapter in the urban-rural divide in the state. But to reemphasize, at this point, the case was all about money and how much and to whom it would flow.

The early procedural history of the case is important to understand since it sets the stage for everything that has followed. The Attorney General's staff represented the State and also the State Board of Education.[20] It should be acknowledged that it is the responsibility of the Attorney General (Michael Easley when the case was first filed) and his staff to defend the State and its agencies in litigation and to defend the constitutionality of any law challenged.[21] They undertook that responsibility with great vigor and with, from my perspective, an incredibly narrow and limited view of the State's obligation in the public education realm.

After the intervenors became part of the case, the defendants moved to dismiss under N.C.G.S. § 1A-1 and Rules 12(b)(1), (2), and (6), asserting that the trial court lacked subject matter jurisdiction and personal jurisdiction and that the parties had failed to state a claim upon which relief could be granted.[22] The defendants' motion to dismiss was denied, and the case ultimately moved on to the North Carolina Court of Appeals.[23] The unanimous court of appeals decision reversed the trial court's denial of the motion to dismiss.[24] The court

16. *Id.*

17. *Id.*

18. *Id.* at 343–44, 488 S.E.2d at 252–53.

19. *See generally* George Lange & R. Craig Wood, *Education Finance Litigation in North Carolina: Distinguishing* Leandro, 32 J. EDUC. FIN. 36, 46–47 (2006) (discussing the impact of high-wealth, urban school districts as plaintiff-intervenors).

20. *Leandro I*, 346 N.C. at 341, 488 S.E.2d at 251.

21. *See Duties & Responsibilities*, N.C. DEP'T OF JUST., https://ncdoj.gov/about-ncdoj/duties-and-responsibilities/ [https://perma.cc/GAM6-D9UD].

22. *Leandro I*, 346 N.C. at 344, 488 S.E.2d at 253.

23. *Id.*

24. Leandro v. State, 122 N.C. App. 1, 14, 468 S.E.2d 543, 552 (1996), *aff'd in part, rev'd in part*, 346 N.C. 336, 488 S.E.2d 249 (1997).

of appeals stated, "the fundamental educational right under the North Carolina Constitution is limited to one of equal access to education, and it does not embrace a qualitative standard."[25] Essentially, the argument of the defendants was that the North Carolina Constitution required nothing more than a schoolhouse students could attend, books, and a teacher.[26] No qualitative right existed.[27] Nor did the court respond to the disparity in funding impacting the low-wealth plaintiffs.

So, the *Leandro* case arrived at the Supreme Court of North Carolina for oral argument when plaintiffs' counsel stepped to the podium to begin arguments with a packed courtroom watching. As a practical matter, while the underlying issue before the court was the correctness as a matter of law of the court of appeals' decision reversing the denial of defendants' motion to dismiss, there was obviously more to be decided than just that bottom line. To make that ultimate decision, the court had to address the defendants' first line of defense that the case and issues were "political questions" and thus not appropriate for consideration by the court.[28] As I recall from that oral argument years ago, the lawyers for the defendants pushed extremely hard on this issue.

Secondly, if the court held that it was not "a political question," then the court needed to address whether there was any qualitative right to a public education under the North Carolina Constitution. It was this issue that ultimately led us down the road the litigants have traveled for some twenty-seven years—a long and winding road.

In addition, the court needed to reach a decision on plaintiffs' theory regarding article IX, section 2(1) of the North Carolina Constitution. Particularly, plaintiffs' contention that by "requiring a 'general and uniform system' in which 'equal opportunities shall be provided for all students,'" the Constitution "mandates equality in the educational programs and resources offered the children in all school districts in North Carolina" and requires equal funding from system to system.[29] The allegations in the complaint upon which plaintiffs based this theory was that inequalities arose from the wide range of per-pupil expenditures from district to district all across the state.[30] As part of this argument by plaintiffs, it was contended that the funding disparities

25. *Id.* at 12, 468 S.E.2d at 550.

26. *Id.* at 7, 468 S.E.2d at 548. The State argued that the general and uniform requirements in the North Carolina Constitution "refers to uniformity not in its educational programs or facilities, but in the State's system of public education." *Id.*

27. *Id.* at 11, 468 S.E.2d at 550 ("We hold that under *Sneed* and *Britt*, the fundamental educational right under the North Carolina Constitution is limited to one of equal access to education, and it does not embrace a qualitative standard.").

28. *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 253.

29. *Id.* at 348, 488 S.E.2d at 255.

30. *Id.* at 342, 488 S.E.2d at 252.

between low-wealth and other counties violated article I, section 19, which provides equal protection of the laws.[31]

After arguments, the court adjourned to its conference room for consideration of the cases heard for oral argument. The supreme court, as opposed to my experience at the court of appeals, spends considerable time, particularly on very important cases, in a freewheeling and constructive discussion of the issues in a case before indicating how each justice will vote. At the end of the discussion on all of the cases, it is decided, under normal circumstances, by a predetermined system who will author the opinion. The process was not unlike the NFL draft, with one justice beginning by picking a case, followed by another justice, until all are selected. On occasion, as in *Leandro*, the significance of the case calls for "a Chief Justice's Opinion" in which the rest of the court defers to the chief to author the opinion (assuming the chief is in the majority). After the court's lengthy discussion in conference, *Leandro* was taken by Chief Justice Burley Mitchell.[32] The chief was the former district attorney for Wake County, a former court of appeals judge, a strong Governor Jim Hunt ally, and a loyal Democrat.[33] He was experienced, knowledgeable, and, at least by standards of the day, a moderate—and for those who knew Burley Mitchell's story, he was a bit of a character, having dropped out of high school to enlist in the Marines at sixteen, then turned down for being underage, and then later enlisted in the U.S. Navy at seventeen.[34]

The conference discussion, as detailed as practicable, quickly reached consensus that this was not a political question but an appropriate interpretation of the North Carolina Constitution. As stated in the *Leandro I* opinion, "[i]t has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution."[35] Thus, despite the State going all in on the political question argument, the court was not buying it. On the question of whether there was a qualitative right to education under the constitution, again with limited conference discussion, the court unanimously agreed that there was such a right.[36] On the equal protection question, the court found no

31. *Id.* at 352, 488 S.E.2d at 258.

32. *See id.* at 341, 488 S.E.2d at 251.

33. *See* Russell Rawlings, *Burley Mitchell Receives Liberty Bell Award*, N.C. BAR ASS'N (May 6, 2011), https://www.ncbar.org/news/burley-mitchell-receives-liberty-bell-award/ [https://perma.cc/89EM-L43N].

34. *Id.*

35. *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 253.

36. *Id.* at 351, 488 S.E.2d at 257 ("[W]e conclude that Article IX, Section 2(1) of the North Carolina Constitution requires that all children have the opportunity for a sound basic education."). The concurrence agreed with the "analysis and results reached by the majority . . . that does not deal with substantially equal educational opportunities." *Id.* at 364, 488 S.E.2d at 265 (Orr, J., concurring).

merit to plaintiffs' arguments.[37] Finally, on the applicability of the "equal opportunity" provision in the constitution, the court split, with no one agreeing with me as to its applicability.[38] Thus, the case was assigned to the chief justice to write the majority opinion, and I began working on a short dissent on the equal opportunity provision while concurring in the majority opinion as to the other issues.

Almost eight months after oral argument, on July 24, 1997, the Supreme Court of North Carolina filed the *Leandro I* decision. As noted, Chief Justice Mitchell authored the majority opinion, and I dissented in part on the equal opportunity claim and concurred in the balance of the decision. Throughout the give and take of getting the opinion finalized, it was patently clear that Chief Justice Mitchell had absolutely no intention of going down a funding path in the opinion. As stated in the majority opinion, "[t]he result would be a steady stream of litigation which would constantly interfere with the running of the schools of the state and unnecessarily deplete their human and fiscal resources as well as the resources of the courts."[39] Thus, the qualitative standard was articulated as the actionable path for deciding the merits of the case upon remand.[40]

I confess that while I agreed with and thought the qualitative standard was lofty in its eloquence, to me, it was an impractical solution, particularly in comparison to the equal opportunity funding path that the court could have chosen. On the day the opinion was filed, I anticipated a muted response of limited enthusiasm, particularly since the funding component was nonexistent. In a response of political brilliance, plaintiffs' attorneys and public education supporters instead hailed *Leandro I* as a major victory for public education and looked to move forward with the litigation.[41] Considering the court of appeals decision literally tossed them out of court,[42] I suppose it was predictable that the supreme court decision would be viewed as a major victory—and it was—in

37. *Id.* at 352, 488 S.E.2d at 258 ("[P]laintiffs contend that the disparities in the funding provided their poor school districts as compared to the wealthier districts deprive them of equal protection of the laws . . . . This argument is without merit.").

38. *Id.* at 348–49, 488 S.E.2d at 255–56. "Although the majority opinion acknowledges the 1970 constitutional amendment to Article IX, Section 2(1) that added the phrase 'wherein equal opportunities shall be provided for all students,' the majority apparently gives no significance to its meaning." *Id.* at 359–60, 488 S.E.2d at 262.

39. *Id.* at 350, 488 S.E.2d at 257.

40. *Id.* at 345, 488 S.E.2d at 254 ("Plaintiff-parties first argue that the Court of Appeals erred in holding that no right to a qualitatively adequate education arises under the North Carolina Constitution. We agree.").

41. Kristin Guthrie, *Suit Against State Goes to Trial*, NEWS-J., Aug. 20, 1997, at 1A, 11A (quoting plaintiffs' attorney as stating, "[w]e are very pleased with the decision").

42. Leandro v. State, 122 N.C. App. 1, 14, 468 S.E.2d 543, 552 (1996), *aff'd in part, rev'd in part*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("The trial court's order denying the State's motions to dismiss is Reversed.").

that context. It was difficult for me, however, to see how the new "opportunity for a sound basic education" could be translated into a meaningful remedy to the problems the complaint raised.

In summary, there are several major takeaways from the *Leandro I* decision. First, the court summarily disposed of the defendants' first line of defense: that the issues fell within the purview of the General Assembly as a political question.[43] Instead, the court acknowledged a right under the North Carolina Constitution that guaranteed "an opportunity for a sound basic education,"[44] and the opinion articulated that article I, section 15 and article IX, section 2 set out the standards of what that sound basic education would consist of.[45]

However, despite this qualitative standard, the decision—despite my "compelling" dissent—held "we conclude that the North Carolina Constitution does not guarantee a right to equal educational opportunities in each of the various school districts of the state."[46] There's a floor upon which the public school system operates—a sound basic education for all—but there's nothing to keep wealthy areas from providing greater educational services to their students while leaving low-wealth areas behind because of funding disparities. I thought, and still do, that this is incorrect, and, in hindsight, I believe that this litigation would have been over long ago if the equal opportunities argument had been accepted.

Further takeaways from the opinion deal with the mechanics of what was to happen next. The court set out standards for taking evidence at the trial phase of the case involving "inputs" and "outputs," the state's general educational expenditures and per-pupil expenditures, and the educational goals and standards adopted by the legislature.[47] In other words, the court attempted to lay out a road map for the case going forward in answering the claims raised by the plaintiffs. Finally, in a thread that runs throughout this litigation, the court significantly deferred to the executive and legislative branches of government:

> In conclusion, we reemphasize our recognition of the fact that the administration of the public schools of the state is best left to the legislative and executive branches of government. Therefore, 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 of the various

43. *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 253–54.

44. *Id.* at 347, 488 S.E.2d at 255 ("We conclude that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools.").

45. *Id.*

46. *Id.* at 354, 488 S.E.2d at 259.

47. *Id.* at 355, 488 S.E.2d at 260.

> school districts of the state a sound basic education. A clear showing to the contrary must be made before the courts may conclude that they have not. Only such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.[48]

Having paid due deference to the executive and legislative branches, Chief Justice Mitchell concluded the opinion by noting:

> But like the other branches of government, the judicial branch has its duty under the North Carolina Constitution. If on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent upon defendants to establish that their actions denying this fundamental right are 'necessary to promote a compelling governmental interest.' If defendants are unable to do so, it will then be the duty 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.[49]

Leandro I was in the books and since, procedurally, the decision dealt only with a motion to dismiss, it was remanded to the trial court "for proceedings not inconsistent with this opinion."[50] The next step on this yet unknown long and winding road was to happen shortly, when the chief justice, exercising his authority, appointed a Rule 2.1 trial judge under the General Rules of Practice for the Superior and District Courts to oversee the litigation.[51] That seemingly innocuous appointment would perhaps turn out to be the most significant step of the litigation process.

II. THE MANNING ERA BEGINS

Parties, attorneys, and education observers could little have known the enormous impact on this litigation that would occur when Chief Justice Mitchell appointed Wake County Superior Court Judge Howard Manning to oversee *Leandro II*.[52] Judge Manning, known as "Howdy," came from a long and illustrious family in eastern North Carolina that was prominent in legal circles

48. *Id.* at 357, 488 S.E.2d at 261.

49. *Id.* (internal citations omitted).

50. *Id.* at 358, 488 S.E.2d at 261.

51. *See* Hoke Cnty. Bd. of Educ. v. State (*Leandro II*), 358 N.C. 605, 612, 599 S.E.2d 365, 375 (2004).

52. *Id.*

across the state. In fact, the building at the University of North Carolina that housed the law school up until the 1960s was named for his family.[53]

Judge Manning was, to many, the quintessential conservative eastern North Carolina Democrat who had turned to the Republican Party in the 1980s when the Democratic Party became too liberal. Regardless of politics, he was considered an excellent trial judge—smart, personable in his own unique way, and from the "old school" of superior court judges—who did things his way with little concern for formalities. I cannot speak for any other observers, but my initial impression of the appointment was that it was not particularly favorable for the plaintiffs.

The Manning years ran from his appointment in 2002 until his mandatory retirement at age seventy-two on October 7, 2016.[54] This remarkable span of over fourteen years turned Howdy Manning into a household name, particularly in education circles. It would not be hyperbolic to say that, in that period of time, Judge Manning became perhaps North Carolina's most authoritative expert on the state of public schools and the problems the school system faced. As referenced above, he took, in many respects, an unconventional approach in learning about schools, such as showing up unannounced at various public schools for conferences with teachers, staff, and students; he also wandered the halls of the General Assembly button-holing legislators to talk about issues and concerns pertaining to the public schools. The opinions of the Supreme Court of North Carolina and the briefs of the parties going forward reflected in many ways the perception of Judge Manning as both extraordinarily knowledgeable of the public education system and unconventional in his handling of the case.

III. THE HOKE COUNTY TRIAL AND *LEANDRO II*

Initially, Judge Manning had to figure out how he was going to handle the trial for this case, particularly since he was dealing with multiple parties from the low-wealth plaintiff counties and the plaintiff-intervenors. The decision—made ostensibly by agreement of the parties, although there is no record of this proceeding—was that the litigation would begin with the low-wealth counties and that a representative county would be chosen from among the five plaintiff low-wealth counties.[55]

This decision, which seemed appropriate for the scope of the litigation at that time, would become an ongoing part of the controversy over the ultimate

53. *See* Todd Silberman & Tim Simmons, *Howard Manning Jr.—Tar Heel of the Year*, *Part 1*, NEWS & OBSERVER, Dec. 26, 2004, at A1.

54. *Judge Howard Manning Presented with Friend of the Court Award*, N.C. JUD. BRANCH (Sept. 15, 2016), https://www.nccourts.gov/news/tag/general-news/judge-howard-manning-presented-with-friend-of-the-court-award [https://perma.cc/Q4HJ-58D8].

55. *See Leandro II*, 358 N.C. at 608, 599 S.E.2d at 373.

rulings by the supreme court and shape the arguments to come. In retrospect, what seemed like an innocuous decision turned into a critical one. The litigation would have been far better served if a comprehensive order setting out the intent of this decision had been entered and consented to in writing by the parties. But, alas, hindsight as we know is always twenty-twenty. Hoke County was chosen as the low-wealth representative county and now stepped into the ring.

The Hoke County trial "lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that exceeds 400 pages."[56] Having noted this fact in the opinion, it should also be added that the reviewing court is bound, at least primarily, by the issues raised by the appealing parties and how those issues are framed. In this context, the supreme court in *Leandro II* was confronted with a voluminous order but a limited set of issues. The court attempted to frame the issues as (1) whether the trial court applied the correct standard in determining whether a violation of plaintiffs' constitutional rights to an opportunity for a sound basic education had occurred, (2) whether the trial court's mandate for mandatory pre-K classes for "at-risk" children was appropriate, and finally, (3) whether setting the age for mandatory school attendance was a political question left to the General Assembly.[57]

Since the trial had been limited to questions pertaining to Hoke County as the representative low-wealth county in the litigation, the court addressed its answers to the questions raised to Hoke County.[58] Even though there was extensive evidence about other counties around the state, the issues before the supreme court directed the court's response to Hoke County and Hoke County alone.[59] As previously noted, this limitation came to be a major issue in the subsequent actions of the trial court post *Leandro II*.

One particular part of the procedural posture of the case deserves special attention in this discussion. Originally, and as decided by the supreme court in *Leandro I*, the parties consisted of five low-wealth county school systems and six high-wealth intervenor systems, and the question was whether the representative student-plaintiffs had their constitutional rights violated by the State's action.[60] At no point in *Leandro I* (or in the original complaint) was there a discrete issue raised about "at-risk" students having their rights violated, particularly those who had not yet reached the age to enter the public school

56. *Id.* at 610, 599 S.E.2d at 373.

57. *Id.* at 610, 599 S.E.2d at 373–74.

58. *Id.* at 613, 599 S.E.2d at 375.

59. *See id.* ("[O]ur consideration of the case is properly limited to the issues relating solely to Hoke County as raised at trial.").

60. *See* Leandro v. State (*Leandro I*), 346 N.C. 336, 342–44, 488 S.E.2d 249, 252–53 (1997).

system.[61] However, in October 1998, the plaintiffs added an amendment, designated paragraph 74(a), alleging that children living in poverty were at a "severe disadvantage" upon entering the public school system and that adequate resources were not being provided to address the deficiencies these children faced.[62]

Thus, for the first time in the litigation, the issue of "at-risk" children, particularly those who had not yet entered public school, entered the litigation. The State opposed this amendment and challenged it on appeal.[63] In fact, by the time the case got to the supreme court in *Leandro II*, the entire focus of the fourteen-month trial had gravitated exclusively to deciding whether the constitutional rights of "at-risk" children in Hoke County, particularly pre-K children, had been violated under the standards set by *Leandro I* for the opportunity for a sound basic education.

The court in *Leandro II* answered the question and affirmed the trial court's determination that "at-risk" children had a constitutional right to the opportunity for a sound basic education and that the State and the Hoke County School System had violated their rights by its actions and inactions.[64] In a nutshell, *Leandro II* can be described as articulating that all children had the right to an opportunity for a sound basic education, including "at-risk" children not yet in the public school system.[65] In the context of the trial about the Hoke County System as a representative of the low-wealth county defendants, *Leandro II* further affirmed the trial court's findings and conclusions of law that those rights of "at-risk" pre-K children had been violated.[66]

Leandro II addressed a number of questions raised by the State that at least merit acknowledging because of their underlying importance to the litigation. First, the core holding of a state constitutional right to the opportunity for a sound basic education as articulated in *Leandro I* was unanimously affirmed.[67] It should be noted, since the case has now become so infected with partisan rancor, that the Supreme Court of North Carolina in *Leandro II* consisted of six elected Republicans and one Democrat who unanimously agreed on the decision.[68] Second, that constitutional right applies to all children, including

61. *See id.*

62. *Leandro II*, 358 N.C. at 618, 599 S.E.2d at 378.

63. *Id.*

64. *See id.* at 647–49, 599 S.E.2d at 396–97.

65. *Id.* at 620, 599 S.E.2d at 379 ("We read *Leandro* and our state Constitution . . . as according the right at issue to all children of North Carolina, regardless of their respective age or needs. . . . [T]he constitutional right articulated in *Leandro* is vested in them all.").

66. *Id.* at 644–45, 599 S.E.2d at 395.

67. *Id.* at 647–48, 599 S.E.2d at 396.

68. *See, e.g.*, KELLY AGAN & CHRISTINE ALSTON, GOV'T & HERITAGE LIBR., NORTH CAROLINA STATE SUPREME COURT JUSTICES 4 (2019) (listing the Supreme Court of North Carolina Justices as of 2004).

those not yet in the public school system.[69] Third, despite the State's argument that the evidence should have been limited to only the named individual plaintiffs, the court held that all of the evidence introduced at trial for the entire Hoke County System and other school systems was admissible.[70] This holding was based on the declaratory judgment status of the litigation, which allowed for "greater evidentiary leeway than a conventional civil action"[71] and is "arguably within the 'zone of interest' to be protected by the constitutional guaranty in question."[72]

Fourth, the State argued that the local school boards' status as plaintiffs required they be dropped from the suit since they had no constitutional right at issue.[73] The court disagreed and held that they had a critical role in the litigation and that declaratory judgment actions were not dependent on pure "plaintiff" or "defendant" status.[74] Fifth, the court determined, despite the State's arguments to the contrary, that it was the State who was ultimately responsible for the constitutional violation—not the local Boards of Education—and that the local boards were not diminished in their responsibilities by the ruling.[75]

Finally, the Supreme Court of North Carolina in *Leandro II* reversed one part of the trial court's order that dealt with the imposition of a specific remedy.[76] The order mandated that the State create a pre-K program as a remedy for the violation of the constitutional rights of "at-risk" pre-K children.[77] The court held that at this stage of the litigation such a specific remedy should not be imposed absent giving the State, and in particular the legislative branch, ample opportunity to propose and implement a different remedy should it so choose.[78]

In summary, *Leandro II* was both broad in its language and narrow in its holding. It was broad in the context of affirming the constitutional right articulated in *Leandro I* and in the scope of that right applying to all children. It was also broad in its view of how to handle such a constitutional claim in the context of a declaratory judgment action, including evidence to be heard, remedies to be attained, and the standards of a qualitative public education that meet the test of "an opportunity to a sound basic education."[79] And it was broad in its intent that the constitutional right was not limited by geography, financial

69. *Leandro II*, 358 N.C. at 648, 599 S.E.2d at 396–97.
70. *Id.* at 619–20, 599 S.E.2d at 379.
71. *Id.* at 615, 599 S.E.2d at 376.
72. *Id.* at 615, 599 S.E.2d at 376–77.
73. *Id.* at 616, 599 S.E.2d at 377.
74. *Id.* at 617–18, 599 S.E.2d at 378.
75. *Id.* at 635, 599 S.E.2d at 389.
76. *Id.* at 648, 599 S.E.2d at 396 ("Concerning the trial court's remedy . . . we reverse.").
77. *Id.* at 642–43, 599 S.E.2d at 393.
78. *Id.* at 644–45, 599 S.E.2d at 394–95.
79. *Id.* at 617, 599 S.E.2d at 378.

status of local school boards, or the age and circumstances of those imbued with such a right.[80]

On the other hand, *Leandro II* was also narrow in its holding. In reviewing the trial, the supreme court focused on the evidence as applied by the trial court to the situation in Hoke County, which was the representative low-wealth county plaintiff selected for trial, and to the violation of the rights of "at-risk" children in Hoke County.[81] The court was also narrow in its holding in that the case was remanded to the trial court for the determination of a remedy to specifically address the violations found in the Hoke County trial.[82]

How the trial court proceeded pursuant to the instructions given to it by the supreme court was beyond the scope and authority of the court. The court stated, "[a]s for the pending cases involving either other rural school districts or urban school districts, we order that they should proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion."[83] Thus, it was for the trial court and the parties to figure out what did not need to be tried—for example, the violation of the constitutional rights of "at-risk" children which *Leandro II* addressed as to Hoke County. Arguably, it would be a waste of judicial economy to retry the "at-risk" issues in the context of the other low-wealth plaintiff counties or perhaps in the context of all the school districts statewide regardless of economic status since the plight of "at risk" children would be reasonably similar in all the school districts of the state.

How and whether the trial court moved beyond the scope of "at-risk" children into a broader inquiry of whether non-at-risk students were being deprived of their constitutional rights was within the trial court's jurisdiction. Likewise, whether the violations extended beyond the named plaintiff school districts and encompassed the statewide North Carolina School System was an inquiry left to the parties and the trial court by *Leandro II*. The role of an appellate court is limited, or should be, and the *Leandro II* court answered the relevant issues brought to it from the trial in Hoke County and remanded to the trial court for such further action as required by the opinion. The *Leandro II* court did not know where the litigation would ultimately go. It only knew where it had been.

80. *See id.* at 649, 599 S.E.2d at 397 (declaring a necessity "that the State step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience").

81. *Id.* at 609, 599 S.E.2d at 373.

82. *Id.* at 647–48, 599 S.E.2d at 396–97.

83. *Id.* at 648, 599 S.E.2d at 397.

IV. JUDGE MANNING LEADS THE SEARCH FOR THE "PROMISED LAND"

A. *The "Wilderness Years" – 2004 to 2016*

While it may be a stretch to compare Judge Manning's quest for twelve years to find a solution to the *Leandro* litigation with Moses' forty-year travails to find the Promised Land, there are some similarities. Both went on a lot longer than anyone wanted them to or had anticipated. And Moses and Judge Manning got close, but "circumstances" prevented each from reaching the desired and long-sought destination. In addition, the long journey for each and for those attached to the quest was fraught with problems and barriers to getting where they wanted to go. Finally, public education advocates might well proclaim that in his order in the Hoke County litigation and in subsequent pronouncements over the years, Judge Manning delivered "the Ten Commandments" for a sound basic education.

I confess that, during the twelve-year time frame of 2004 when *Leandro II* came down and 2016 when Judge Manning retired and the case was handed off to a new judge, I really did not pay close attention to the litigation. In fact, most people didn't. Probably the best summary of this period can be found in *Leandro IV*, which states:

> Following *Leandro II*, the trial court diligently undertook its responsibilities on remand and initiated the remedial phase of the *Leandro* litigation. . . . The trial court primarily issued factual findings and legal conclusions based on . . . evidence in periodic "Notice of Hearing and Order[s]" or "Report[s] from the Court," in which the trial court memorialized past proceedings, made factual findings and legal conclusions, and requested particular information from the parties in upcoming hearings.[84]

Thus, this twelve year "wander" was replete with hearings—roughly a dozen of them—in which the trial court "took evidence and heard arguments from the parties regarding the State's various efforts to achieve constitutional compliance."[85]

Obviously if one combed the *Leandro* trial court record, the specifics of the various hearings would be clarified. Justice Hudson in *Leandro IV* describes this period as the "Remedial Phase,"[86] but I'm not sure that this timeframe was specifically devoted to finding a remedy—at least not the remedy anticipated in *Leandro II*. I do think that Judge Manning and the parties saw the solution to the "at-risk" problem as one that had statewide application and required a

84. Hoke Cnty. Bd. of Educ. v. State (*Leandro IV*), 382 N.C. 386, 2022-NCSC-108, ¶ 42.
85. *Id.* ¶ 43.
86. *See, e.g.*, *id.* ¶ 42.

statewide solution and spent copious amount of time working with parties representing the State to come up with a solution. In doing this, my impression is that Judge Manning was reluctant to order a remedy to this statewide problem and continued over the course of years to try and take evidence and work with elected leaders to get them to buy in to a workable solution. But that goal was never achieved during this time, and, in fact, the State continued to drag its feet in getting there.

What seems clear to me is that the focus was consistently on "at-risk" children. The hearings highlighted in *Leandro IV* confirm this. On September 9, 2004, shortly after *Leandro II* was decided, Judge Manning had a hearing "focused in part on the State's response to statewide teacher recruitment and retention issues through the DSSF program."[87] On March 15, 2009 (almost five years after *Leandro II*), the trial court addressed the problems in the Halifax County School System, one of the low-wealth plaintiff counties and one with a large "at-risk" population.[88]

Likewise, on November 8, 2013, the Supreme Court of North Carolina heard a third appeal in this case, *Leandro III*, with the underlying issue revolving around legislative changes to the "More at Four" pre-K program and the reduction in funding for it.[89] The case was never heard on the merits since the General Assembly made necessary changes to the law eliminating the basis for the appeal and rendering it moot.[90]

87. *Id.* ¶ 43. DSSF stands for "Disadvantaged Student Supplemental Funding." *Id.* ¶ 42.

88. *Id.* ¶ 44.

89. *See* Hoke Cnty. Bd. of Educ. v. State (*Leandro III*), 367 N.C. 156, 158, 749 S.E.2d 451, 453–54 (2013).

90. *Leandro IV*, 2022-NCSC-108, ¶ 47 n.7 (citing *Leandro III*, 367 N.C. at 159, 749 S.E.2d at 451). In a 2011 appropriations law, the General Assembly encouraged the state agency over its pre-kindergarten subsidy program, "More at Four," to "blend" "private pay" children with "subsidized children" in the same classrooms, capped the percentage of "at-risk" pre-kindergarten students that could benefit from the program, and required copayments from families benefiting from the program, other than families with at-risk children and children from certain military families. *See* Current Operations and Capital Improvements Appropriations Act of 2011, ch. 145, § 10.7.(e), (f), (h), 2011 N.C. Sess. Laws 253, 355–56. The trial court essentially held the enforcement of these provisions unconstitutional. *See* Memorandum of Decision and Order Re: Pre-Kindergarten Services for At-Risk Four Year Olds at 24, Hoke Cnty. Bd. of Educ. v. State, No. 95 CVS 1158, 2011 WL 7769952 (N.C. Super. Ct. July 18, 2011), *vacated*, *Leandro III*, 367 N.C. at 160, 749 S.E.2d at 455 [hereinafter Leandro III Trial Court Order]; *Leandro III*, 367 N.C. at 158–59, 749 S.E.2d at 454 (characterizing the trial court's decision as "finding" sections 10.7.(f) and (h) unconstitutional). The trial court reasoned that the "combin[ation]" of sections 10.7.(e), (f), and (h) of the legislature's 2011 appropriations law "appear[ed] intentionally designed to effectively eliminate and/or severely reduce the required at-risk prekindergarten services that had been provided . . . and to erect artificial and actual barriers to prevent eligible at-risk four year olds from obtaining the quality pre-kindergarten services that they are eligible to receive." Leandro III Trial Court Order, *supra*, at 19. "However, approximately one year after the trial court issued its order and while [an] appeal was pending, the General Assembly amended the challenged statutory provisions." *Leandro III*, 367 N.C. at 158–59, 749 S.E.2d at 454 (citing Act of June 5, 2012, ch. 13, sec. 2, 2011 N.C. Sess. Laws 65, 65–66 (Reg. Sess. 2012)).

From this twelve-year period consisting of hearings, the taking of evidence and findings of fact, and the issuance of various orders or reports, there are a number of takeaways. First, none of these orders had a decretal part that addressed the initial need for a remedy to address "at-risk" children in the statewide public school system or the low-wealth plaintiff counties or even in Hoke County alone. Such a decretal order would have subjected the order to appeal back to the supreme court to review the remedy. Second, the trial court perceived the "at-risk" problem as being statewide and invested considerable hearings to take evidence to this effect.[91] Third, even though there were bits and pieces of improvement in addressing the problems of "at-risk" children, there were still thousands of children not receiving "an opportunity for a sound basic education" even at the end of the twelve years. Fourth, the parties had been unable to reach any agreement on a plan to resolve the constitutional rights of "at-risk" students that would address the *Leandro II* mandate. There were no amendments to the pleadings that added other school districts as plaintiffs nor was the entire public school system added. Finally, while Judge Manning and the plaintiffs viewed the "at-risk" issue in the context of statewide relief, there were no findings or conclusions that addressed the issue of whether students across the statewide public school system, regardless of "at-risk" status, were having their constitutional rights to an opportunity for a sound basic education denied. Had such a decision been made and included in a final order, it would have no doubt been appealed immediately.

B. *The "Promised Land" Comes into View via the WestEd Report*

As previously noted, Judge Manning reached mandatory retirement age on October 7, 2016.[92] There were rumors that, upon waiting six months and attaining emergency judge status, Judge Manning would be reappointed as the judge overseeing *Leandro* with the hope that the litigation could finally be resolved. Regrettably, health issues intervened, and Chief Justice Mark Martin appointed Superior Court Judge W. David Lee from Union County as the new Rule 2.1 judge.[93]

In what I consider an important development in understanding the mindset of defendants, on July 10, 2017,

> the State Board of Education [("SBE")] filed a Motion for Relief Pursuant to Rule 60 and Rule 12 requesting that the trial court relinquish jurisdiction over the case. The SBE contended that "[b]ecause the factual

91. *See Leandro IV*, 2022-NCSC-108, ¶ 42.

92. *See* Ann McColl, *Everything You Need To Know About the Leandro Litigation*, EDUCATIONNC (Feb. 17, 2020), https://www.ednc.org/leandro-litigation/ [https://perma.cc/G7SR-2T3D].

93. *Id.*

> and legal landscapes have significantly changed [since the beginning of the case], the original claims, as well as the resultant trial court findings and conclusions, are divorced from the current law and circumstances [and] are stale." As such, the SBE argued, "[c]ontinued status hearings on the present system . . . exceed the jurisdiction established by the original pleadings in this action."[94]

In sum, it appears that the SBE and, I assume, the State felt that there was nothing further to do in the case and that the General Assembly had adequately addressed any issues raised in the case. The trial court disagreed.[95]

In fact, the trial court, in denying the motion, found that "the *Leandro* right continues to be denied to hundreds of thousands of North Carolina schoolchildren" and 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 an equal opportunity to obtain a sound basic education."[96] What was not specified was who those "hundreds of thousands of North Carolina schoolchildren" were and where they were. I must add that it's ironic that this order refers to the "equal opportunity" for a sound basic education, the very constitutional theory I dissented on in *Leandro I*.[97]

Judge Lee picked up exactly where Judge Manning left off in ruling that there was an ongoing violation of the state constitutional rights of students to receive an opportunity for a sound basic education; no court-imposed remedy had yet to be determined and those legislative changes over the years had not resolved the violations such as to render the case moot.[98] Judge Lee pointedly emphasized the court's authority to impose a remedy if need be,[99] expressing frustration that despite status conference after status conference and lots of judicial restraint, the case had not been resolved.[100]

At this point in the history of *Leandro*, I have to fall back on my Moses analogy and say that "a miracle" occurred. Throughout the litigation, beginning in 1994 and continuing up to 2018, the North Carolina Attorney General's Office had represented the State and the North Carolina State Board of

94. *Id.*

95. *Id.*

96. *Id.*

97. Leandro v. State (*Leandro I*), 346 N.C. 336, 351, 488 S.E.2d 249, 257 (1997) (holding that the North Carolina Constitution "does not require that equal educational opportunities be afforded students in all of the school districts of the state"); *id.* at 359–63, 488 S.E.2d at 262–64 (Orr, J., dissenting) (arguing that the "equal opportunity" clause of the North Carolina Constitution guarantees that all North Carolina children receive "substantially equal" education opportunities); *see also* N.C. CONST. art. IX, § 2, cl. 1 ("The General Assembly shall provide . . . for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students.").

98. *See* Hoke Cnty. Bd. of Educ. v. State (*Leandro IV Order*), No. 95-CVS-1158, 2021 WL 8566348 at *5 (N.C. Super. Ct. Nov. 10, 2021).

99. *Id.* at *7–*11.

100. *Id.* at *12.

Education, the two named defendants. Over the years, under different attorneys general and with an ever-changing State Board of Education with appointees of different political parties depending on the governor in power, the lawyers for the defendants had aggressively and consistently fought against the claims of the plaintiffs in *Leandro*. The record is uncontroverted that, from the beginning in attempting to get the case dismissed, through *Leandro II* where their arguments attempted to limit the scope and impact of the trial court's order, right up to the motion to have the case dismissed in 2017, the lawyers for the State and the State Board of Education did everything possible to minimize *Leandro*. This is not a criticism of those attorneys, who are professional, dedicated, and zealous in their duty to aggressively represent state government. It is simply stating a fact that for over twenty years their goal was to defeat, then minimize, the constitutional claims brought by the plaintiffs.

What changed may well be attributed to fatigue and a changing political landscape in the state. But in the context of politics, the *Leandro* story does not carry a consistent political theme. All of the attorneys general were elected Democrats during the litigation, including the present Josh Stein and former attorney general and current governor, Roy Cooper.[101] All of the governors during the course of the litigation, with the exception of Pat McCrory's four-year term from 2012 to 2016, were Democrats.[102] And most of the members of the State Board of Education were appointees of those democratic governors.[103] The two houses of the General Assembly were controlled at various times during this period by Democrats and Republicans in various combinations. Finally, the supreme court has had a varied composition throughout the litigation: *Leandro I* (five Democrats and two Republicans);[104] *Leandro II* (six Republicans and one Democrat);[105] and *Leandro IV* (four Democrats and three

101. *See North Carolina Former Attorney Generals*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/attorneys-general/past-attorneys-general/north-carolina-former-attorneys-general/ [https://perma.cc/W9VU-K22R]; *Josh Stein Wins Re-Election as Attorney General of North Carolina*, WBTV (Nov. 17, 2020), https://www.wbtv.com/2020/11/17/josh-stein-wins-re-election-attorney-general-north-carolina/ [https://perma.cc/EP8E-8EY2]; *Attorney General Bypasses Governor Run for Re-Election*, WRAL NEWS (July 11, 2006), https://www.wral.com/news/local/story/1091885/ [https://perma.cc/957H-UA2V].

102. *See Former Governors–North Carolina*, NAT'L GOVERNORS ASS'N, https://www.nga.org/former-governors/north-carolina/ [https://perma.cc/C2YW-ZSUT]; *US President and NC Governor Overview*, N.C. STATE BD. OF ELECTIONS, https://www.ncsbe.gov/results-data/election-results/us-president-and-nc-governor [https://perma.cc/97SZ-WWQ7].

103. *See Board of Education*, N.C. BD. OF EDUC., https://simbli.eboardsolutions.com/aboutus/aboutus.aspx?s=10399&tid=1 [https://perma.cc/K5HG-785S] (listing the current State Board of Education members with biographies including the appointing Governor).

104. *See* Janz, *supra* note 1.

105. *See id.*

Republicans).[106] The point being: no political party can claim sole credit or solely take the blame for the fact that, as of 2018, *Leandro* was still being litigated and the constitutional rights being violated remained unresolved.

On November 15, 2017, Governor Roy Cooper appointed nineteen members to a "Commission on Access to Sound, Basic Education" with the intent of finding a solution to the *Leandro* case.[107] While the commission was filled with experts on education and experience involving *Leandro* and its issues, it was by any account filled with individuals who were primarily registered Democrats. One of the major criticisms going forward was the lack of membership from the General Assembly, particularly the Republican majority.

Contemporaneously, in January 2018, the State and plaintiffs jointly moved "to nominate, for the court's consideration and appointment, an independent, nonparty consultant to assess the current state of *Leandro* compliance in North Carolina and to make subsequent comprehensive recommendations for specific actions necessary to achieve sustained constitutional compliance."[108] The court agreed and appointed WestEd who had been jointly nominated by the parties.[109]

As outlined in detail in *Leandro IV*, WestEd did a year-long deep dive in collaboration with the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute.[110] To say it was probably the single most comprehensive study of the N.C. public education system in history would be an understatement. However, the overall collaboration was done to the best of my knowledge without the buy-in from the General Assembly or Republican leaders in the state.

As stated in *Leandro IV*, the WestEd Report concluded that "the state is *further away* from meeting its constitutional obligation to provide every child with the opportunity for a sound basic education than it was when the Supreme Court of North Carolina issued the *Leandro* decision more than 20 years ago."[111] Among the multitude of recommendations contained in the report, "the action

106. *See* Jeff Tiberii, *North Carolina's Leandro Case: Everything You Need to Know*, WUNC (Aug. 29, 2022), https://www.wunc.org/education/2022-08-29/north-carolina-leandro-case-everything-need-know-court-schools [https://perma.cc/9N62-GDH3]; *State Supreme Court Reinstates Order Blocking Leandro Forced Money Transfer*, CAROLINA J. (Mar. 3, 2023), https://www.carolinajournal.com/state-supreme-court-reinstates-order-blocking-leandro-forced-money-transfer/ [https://perma.cc/ABP3-CRQZ].

107. *See* 32 N.C. Reg. 1176–78 (Dec. 15, 2017).

108. Hoke Cnty. Bd. of Educ. v. State (*Leandro IV*), 382 N.C. 386, 2022-NCSC-108, ¶ 52.

109. *Id.*

110. *Id.* ¶ 53; *see also* WESTED, SOUND BASIC EDUCATION FOR ALL: AN ACTION PLAN FOR NORTH CAROLINA 2 (2019), https://files.nc.gov/governor/Leandro-NC-Report-Final.pdf [https://perma.cc/55CZ-352L].

111. *Leandro IV*, 2022-NCSC-108, ¶ 53.

plan itemized the necessary statewide investments for every recommendation for each fiscal year from 2020–2021 to 2027–2028."[112]

While acknowledging that the State and the SBE had taken significant steps over time to improve student achievement, the trial court further stated, "[i]n short, North Carolina's PreK-12 public education system leaves too many students behind—especially students of color and economically disadvantaged students. As a result, thousands of students are not being prepared for full participation in the global, interconnected economy . . . ."[113] The trial court made two primary conclusions. The first was that there were substantial assets to meet these needs.[114] The second was that "many children" are not receiving a *Leandro*-conforming education.[115]

Over the course of the next several months, the trial court ordered that the Comprehensive Remedial Plan (CRP) be implemented in full and in accordance with the timelines set out by the court.[116] Finally, the trial court ordered the Office of State Budget and Management and the current State Budget Director, the Office of the State Controller, and the Office of the State Treasurer and the current State Treasurer to "take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the [CRP] from the unappropriated balance within the General Fund."[117] The amounts ordered were estimated to range in the multiple billions of dollars for implementation of the full plan. The "Promised Land" was in sight.

Needless to say, the political fallout of the trial court's order from the General Assembly, particularly on the Republican side, was tsunami-like in size. With the Republican leaders intervening in the case upon the entry of the Order,[118] the decision and *Leandro*'s future plunged ever deeper into the political morass of partisanship and institutional conflict over separation of powers. The lines were thus drawn for *Leandro* to make its way once again to the supreme court, and this time all the marbles were on the line, and it wasn't just the money involved. This time, the *Leandro* case was squarely in the middle of a potential constitutional crisis, as legislative leaders decried the constitutionality of the trial court's order and threatened to ignore it.[119]

112. *Id.* ¶ 56.
113. *Id.*
114. *Id.* ¶ 68.
115. *Id.* ¶ 60.
116. *Id.* ¶ 66.
117. *Id.*
118. *See* Alex Granados, *Legislative Leaders Join the Leandro Case*, EDUCATIONNC (Dec. 14, 2021), https://www.ednc.org/2021-12-14-legislative-leaders-join-the-leandro-case/ [https://perma.cc/E9L4-2PUA].
119. *See id.*

V. *LEANDRO IV*

Before embarking on the decision in *Leandro IV*, it's important from my perspective to take both the WestEd Report and its role in the trial court's decision and juxtapose it with the procedural posture of the *Leandro* litigation. This critical distinction, while mainly ignored by the media and advocates for public schools, was a central issue before the supreme court. How it was ultimately answered by the supreme court majority may well be the key to the long-term results in the case.

The WestEd Report constituted a broad, comprehensive study and review of the entire N.C. public school system.[120] All, and I mean all, of the shortcomings, challenges, and problems embedded in the system from Murphy to Manteo were reviewed and studied.[121] As a result, the report and the proposed funding to remedy the problems reflect a system-wide need and a system-wide solution over a multi-year timeframe. The trial court, with the consent of the parties, accepted the report[122] and the funding recommendations and ordered that the funding be complied with by the various governmental entities responsible.[123] Thus, a statewide remedy was imposed impacting all of the over 1.4 million public school students,[124] their schools, teachers, and staff in all of the local school systems across the state.

Lost in all of this is the posture and process of the *Leandro* litigation. The case was brought initially by five low-wealth county school systems and representative individual plaintiffs.[125] Six high-wealth school systems intervened as plaintiff-intervenors.[126] At no time throughout the litigation were additional school systems added as plaintiffs and at no time was the North Carolina public school system added as an entity. In fact, at the time of the *Leandro IV* argument, the only plaintiffs were the original low-wealth county plaintiffs and only one of the original plaintiff-intervenors, the Charlotte-

120. *See* WESTED, *supra* note 110 passim.

121. *Id.*

122. Hoke Cnty Bd. of Educ. v. State *(Leandro IV Order)*, No. 95-CVS-1158, 2021 WL 8566348, at *2 (N.C. Super. Ct. Nov. 10, 2021).

123. *Id.* at *12–*13.

124. *See* Hoke Cnty. Bd. of Educ. v. State (*Leandro IV*), 382 N.C. 386, 391, 2022-NCSC-108, ¶ 4; *see also* Emily Walkenhorst, *NC Board of Education Debates Funding, Hears Parent Commission Update*, WRAL NEWS (Apr. 8, 2022), https://www.wral.com/nc-board-of-education-debates-funding-hears-parent-commission-update/20227481/ [https://perma.cc/3ET4-SE3B].

125. Leandro v. State *(Leandro I)*, 346 N.C. 336, 488 S.E.2d 249 (1997) (including ten individuals and six county boards of education as plaintiffs and six individuals and six school systems as intervenors).

126. *Id.*

Mecklenburg School System, the others having withdrawn from the case.[127] In addition, Rafael Penn and several others were listed as plaintiff-intervenors.[128]

In addition to the limited set of plaintiffs in the case, there had only been one trial presided over by Judge Manning in Hoke County that led to the *Leandro II* decision. As previously discussed, that trial and resulting order was focused specifically on "at-risk" children in Hoke County and the resulting supreme court decision was thus focused on the issue of "at-risk" students, particularly pre-K, in Hoke County.[129] The resulting hearings and everything related to those hearings conducted by Judge Manning over the course of the next twelve years never resulted in what most lawyers would consider a final order or judgment in the case. There were findings made by the trial court and observations from those findings, but there was never an order entered that was even remotely similar to the Hoke County order reviewed by the supreme court in *Leandro II*.

This case is all about the alleged violation of constitutional rights and, if found to be violated, what appropriate remedy should be imposed. In properly addressing this, a court must decide who are the parties that allege their rights have been violated, what rights were in fact violated, and what is an appropriate remedy. In *Leandro*, the only parties whose rights were found to be violated were, at a minimum, "at-risk" pre-K students in Hoke County and, at its broadest, "at-risk" students across the state in all of the individual school systems in the state. While there is ample language throughout the record of the right to an opportunity to a sound basic education belonging to all children and ample language that thousands were being denied that right, there is no order beyond the Hoke County trial order that specifies who those thousands are or where they're located. There can be no doubt that thousands of children are being denied their rights. But in the scope of a 1.4 million student statewide system,[130] any remedy should be tailored to address those whose rights are being violated, as opposed to a remedy impacting all 1.4 million students,[131] regardless of the merit for addressing other needs in the system.

Before discussing the *Leandro IV* decision, several procedural notes should be observed. The supreme court ordered the trial court to reconsider the impact

127. *Leandro IV*, 2022-NCSC-108 (including Hoke County Board of Education, Charlotte-Mecklenburg Board of Education and Rafael Penn as plaintiffs).

128. *Id.* Rafael Penn was the only individual intervenor listed by name in *Leandro IV*. Additional plaintiff intervenors in the case include Clifton Jones, individually and as Guardian ad Litem of Clifton Matthew Jones and Donna Jenkins Dawson, individually and as Guardian ad Litem of Neisha Shemay Dawson and Tyler Anthony Hough-Jenkins. Hoke Cnty. Bd. of Educ. v. State, No. 95-CVS-1158, 2021 WL 8566348 (N.C. Super. Ct., Nov. 10, 2021).

129. Hoke Cnty. Bd. of Educ. v. State (*Leandro II*), 358 N.C. 605, 610–11, 599 S.E.2d 365, 374 (2004).

130. *See* Walkenhorst, *supra* note 124.

131. *Id.*

of the 2021 State Budget on the remedy imposed by the trial court.[132] On that same day, March 21, 2022, Chief Justice Newby reassigned the case from Judge Lee to Judge Michael L. Robinson.[133] I would note that Judge Lee retired shortly after this and sadly passed away some months later.[134] The trial court subsequently issued a new order addressing the impact of the 2021 State Budget, and that order came before the supreme court for oral argument on August 31, 2022.[135]

Regrettably, for the first time, the supreme court split sharply along partisan lines when the decision in *Leandro IV* was handed down on November 4, 2022. Justice Robin Hudson authored a 139-page majority opinion in which she was joined by the other three registered Democrats on the court, Justices Ervin, Morgan, and Earls.[136] Countering the majority was an 88-page dissenting opinion authored by Justice Berger and joined by Chief Justice Newby and Justice Barringer.[137]

The majority categorizes the case as primarily involving "the boundaries between the legislative and judicial branches."[138] After analyzing the constitutional responsibilities of both the legislative and judicial branches, the majority concludes that:

> we hold that because the Constitution itself requires the General Assembly to adequately fund the state's system of public education, in exceedingly rare and extraordinary circumstances, a court may remedy an ongoing violation of the constitutional right to the opportunity to a sound basic education by ordering the transfer of adequate available state funds.[139]

In the bulk of the analysis portion of the opinion, Justice Hudson provides substantial authority for courts under certain limited circumstances to impose a remedy like the one on appeal.[140]

However, having affirmed the highly controversial and unprecedented order by the trial court for the State to expend billions of dollars to meet the *Leandro II* mandate, the majority, briefly and virtually unnoticed, drives a stake in the heart of the arguments made by the legislative intervenors and focused

132. *Leandro IV*, 2022-NCSC-108, ¶ 80.

133. *Id.*

134. *David Lee*, *Judge Who Oversaw School Funding Case, Dies at 72*, U.S. NEWS (Oct. 10, 2022), https://www.usnews.com/news/best-states/north-carolina/articles/2022-10-10/david-lee-judge-who-oversaw-school-funding-case-dies-at-72 [https://perma.cc/694P-Z5QX].

135. *Leandro IV*, 2022-NCSC-108, ¶ 94.

136. *See id.* ¶ 1.

137. *See id.* ¶ 244 (Berger, J. dissenting).

138. *Id.* ¶ 119 (majority opinion).

139. *Id.* ¶ 145.

140. *Id.* ¶¶ 153–176 (citing several North Carolina cases and some persuasive authority from other states).

on in the dissent. Referencing Judge Manning's hearings over the course of the post-*Leandro II* remand, the majority determines that the factual findings and legal conclusions were "typically issued within documents titled 'Notice of Hearing and Order' rather than just 'Order.' But it is well within this Court's ability and authority to properly identify factual findings and legal conclusions as such, regardless of how they are labeled by a trial court."[141]

It is correct that an appellate court can review a trial court's finding of fact and decide that a "finding" is actually a conclusion of law.[142] However, that is not what the majority did here. After lamenting that "[t]echnicalities and refinements should not be considered in a case like this,"[143] the majority concludes "that the trial court, in alignment with this Court's instructions in *Leandro II*, properly concluded based on an abundance of clear and convincing evidence that the State's *Leandro* violation was statewide."[144] In this short, unobtrusive statement lies a quantum leap in the litigation. In one swoop, the case jumps from "at-risk" kids in low-wealth counties who are plaintiffs to arguably every student in the system across the state including those students who are not "at-risk."

What is unclear about this critical holding is what does the court mean by "statewide"? Has there been a statewide violation of the rights of "at-risk" children as arguably determined by *Leandro II*? Or does the court conclude that every child in every individual public school system has had their *Leandro* rights violated by the State? What the majority meant by "statewide" is critical because the remedy imposed must be narrowly tailored to address the violation.[145] If the harmed entity consists of "at-risk" children statewide, then the remedy must be narrowly tailored to address that violation.

Here, one must assume that since the remedy imposed at the trial level and affirmed by *Leandro IV* is statewide in its scope and impacts all children in the public school system, not just at-risk children in low-wealth counties who are parties to this suit, the majority has made a monumental leap in the litigation. This acrobatic feat leaps over the fact that Judge Manning never concluded that the entire state system, including every individual local system affecting every child no matter the economic status, was in violation of the *Leandro* standard. In fact, Judge Manning found in his first memorandum of decision in the Hoke County trial "that as a whole, North Carolina's Statewide Educational Delivery System—including its curriculum, teacher licensing and

141. *Id.* ¶ 191.

142. *See id.*; *see also In re* J.O.D., 374 N.C. 797, 807, 844 S.E.2d 570, 578 (2020); Hodges v. Hodges, 257 N.C. 774, 780, 127 S.E.2d 567, 572 (1962).

143. *Leandro IV*, 2022-NCSC-108, ¶ 191.

144. *Id.*

145. Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling-and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1408 (2016).

certification standards, funding delivery system, and school accountability program—was 'sound, valid, and constitutional when measured against the sound basic education standard of *Leandro*.'"[146] Apparently in the eyes of the majority, somewhere between *Leandro II* and now, the statewide system has gone off the constitutional tracks and Judge Manning knew it but never quite officially wrote it in an order, so the majority did it for him.

The supreme court remanded the case back to Judge Robinson with narrow instructions to consider whether the latest budget by the General Assembly had met the mandate of the court on initial funding to comply with *Leandro*.[147] That matter is still pending for the moment. What isn't still pending is the election results from 2022 and the dramatically different makeup of the Supreme Court of North Carolina beginning January 1, 2023.[148] With the retirement of *Leandro* IV author Justice Robin Hudson and the defeat at the polls of her Democratic colleague Justice Samuel J. Ervin, IV, the new court will have five elected Republicans and only two Democrats.[149] This new court, three of whom comprised the dissent in *Leandro IV*, are poised to revisit *Leandro* again in the near future. The "Promised Land" was finally reached with the *Leandro IV* decision, but will the children of North Carolina ever harvest the fruits of that arrival?

VI. "IT AIN'T OVER, 'TIL IT'S OVER" – YOGI BERRA

Over the course of the *Leandro* litigation, at least two generations of children in North Carolina have matriculated from kindergarten through the twelfth grade. Many have excelled, like the case's namesake Rob Leandro who graduated from Hoke County High School, earned an academic scholarship to Duke, graduated from law school at Vanderbilt, and now practices law in Raleigh.[150] Far too many, however, have followed the path of the "at-risk" middle schooler Jerome, referenced in *Leandro II*[151] and again cited in *Leandro IV*,[152] whose academic career was marked by failure, dropping out of school, and

146. *Leandro IV*, 2022-NCSC-108, ¶ 29.

147. *Id.* ¶ 211.

148. *See* Donna King, *Republicans Sweep Statewide Judicial Races*, CAROLINA J. (Nov. 9, 2022), https://www.carolinajournal.com/republicans-sweep-statewide-judicial-races/ [https://perma.cc/ES3J-T3ML].

149. *Id.*

150. Michael Cooper, *This 24-Year-Old Lawsuit Could Radically Alter Public Education in North Carolina*, SCALAWAG (Oct. 15, 2008), https://scalawagmagazine.org/2018/10/nc-education-lawsuit/ [https://perma.cc/2T9B-YG4E].

151. Hoke Cnty. Bd. of Educ. v. State (*Leandro II*), 358 N.C. 605, 620, 599 S.E.2d 365, 379 ("Whether it be the infant Zoe, the toddler Riley, the preschooler Nathaniel, the 'at-risk' middle-schooler Jerome, or the not 'at-risk' seventh-grader Louise, the constitutional right articulated in Leandro is vested in them all.").

152. *Leandro IV*, 2022-NCSC-108, ¶¶ 36–37 (quoting *Leandro II*, 358 N.C. at 620, 599 S.E.2d at 379).

ultimately the criminal justice system. The majority, however, presumably fell somewhere in between these two extremes.

The great genius of the North Carolina Constitution of 1868 was a commitment to free public education for children across the state—rich and poor, Black and white, urban and rural. The hope of those early framers to provide the educational seeds for individual success which would lead to prosperity and growth for a war-torn state still lives in the language of the *Leandro* decisions as first authored by Chief Justice Burley Mitchell through the most recent edition authored by Justice Robin Hudson. The constitutional right to the opportunity for a sound basic education was and remains a mandate for all who govern our great state.

The irony of this litigation is that in the beginning the court was firmly entrenched in the concept of not making the case about money but instead basing the right on a qualitative standard. Hopefully without seeming like I'm saying, "I told you so," I originally believed in *Leandro I* that basing the decision on the equal opportunity clause in article IX, section 2 would resolve the issues in the case by guaranteeing that children in low-wealth counties like Hoke and Halifax would receive the same resources as those children in wealthier parts of our state like Wake County and Mecklenburg County. Alas, I could find no one else on the court to agree with that perspective, and so we set off on the qualitative standard of an opportunity for a sound basic education.[153]

Inevitably, the case has come down to funding and equal opportunity. The latest iteration in *Leandro IV*, with its multi-billion-dollar remedy imposed on the General Assembly and orders to state officials such as the North Carolina State Controller to transfer money to meet that mandate, has not only steered the case down the funding path but potentially placed it on a constitutional collision course among the branches of government. For all the positives of the *Leandro* litigation, the State seems headed for a partisan battle over governmental power with the ultimate objective of providing a quality educational opportunity for the children of the state being turned into fodder over which this partisan battle between the branches of state government is to be fought.

I am convinced of the honest intentions of all who have been a part of this battle for all these years, many of whom have fought the fight and passed on like Robert Spearman, the original lead attorney for the plaintiffs. I am also convinced that Judge Howdy Manning, having devoted the better part of his extraordinary judicial career to this case, did everything possible to bring about a resolution that best served the children of North Carolina. It seems clear that his "unique" way of handling the litigation was meant to try and force the

153. *See* Leandro v. State (*Leandro I*), 346 N.C. 336, 358, 488 S.E.2d 249, 261 (Orr, J., dissenting in part, concurring in part).

powers that be in state government—of both political parties—to come forward with the necessary funding and programs to meet the *Leandro* mandate without attempting to force them to do so. That was a challenging and frustrating path to take. His reluctance to impose a final order that would have forced the legislature's hand reflects his conservative disposition on judicial power, and, but for the inexorable march of time, he may have achieved that end by consensus. But he didn't. Thus, we find ourselves in the current state of affairs.

From my perspective, the legislative argument that this litigation was somehow limited to Hoke County is simply wrong. There is little doubt in my mind that both in *Leandro II* and in the subsequent hearings over the years after that decision, the focus was on "at-risk" children across the state, both pre-K and already in the system. I believe that was the statewide solution Judge Manning hoped for and sought to obtain. I do not believe that he saw the case as one where the entire system was out of compliance with *Leandro* nor that just funding would solve the problem.

It appears that *Leandro* isn't over. It will get back to the newly constituted conservative majority on the supreme court—when I don't know, but I suspect sometime soon. What the court will do and how they will modify *Leandro* is yet to be seen. At a minimum, I would submit that the State has had way more time than is reasonable to address in a comprehensive way the "at-risk" population that *Leandro II* addressed. Hopefully, the new court will see the case at least in that light and hopefully so will the General Assembly. An amicable agreement by all parties to go down that route would be a major victory for our children, our schools, our beleaguered court system, and the parties involved.

As I noted in authoring *Leandro II*,[154] yet another generation is lost. How long can we keep fighting over a course of action that should be obvious? The WestEd Report lays out a blueprint for the future for the entire system.[155] That report can be used to narrow the focus for the time being to address the "at-risk" population. We have the time, the talent, and the resources to do that. We just need the will.

154. *See Leandro II*, 358 N.C. at 647, 599 S.E.2d at 396 (noting that the State has "failed in [its] constitutional duty to provide . . . students with the opportunity to obtain a sound basic education").

155. *See* WESTED, *supra* note 110, at 32–166.