No. 425A21-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

HOKE COUNTY BOARD OF EDUCATION, et al.,
Plaintiffs-Appellees,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Plaintiff-Intervenor-Appellee,

and

RAFAEL PENN, CHARLOTTE-MECKLENBURG BRANCH OF THE STATE CONFERENCE OF THE NAACP, *et al.*,
Plaintiffs-Intervenors-Appellees,

v.

STATE OF NORTH CAROLINA,
Defendant-Appellee,

And

THE STATE BOARD OF EDUCATION,
Defendant-Appellee,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Realigned Defendant-Appellee,

and

PHILIP E. BERGER, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,
Intervenor Defendants-Appellants.

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

****

LEGISLATIVE-INTERVENORS' MOTION TO DISMISS PLAINTIFF-INTERVENORS FROM APPEAL

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME Legislative Intervenor-Defendants / Appellants, Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, on behalf of the General Assembly and as agents of the State (together, "Legislative Intervenors"), pursuant to N.C. R. App. Proc. 37, and hereby move to dismiss Plaintiff-Intervenors (Rafael Penn, *et al*.) and their appeal from this proceeding.

SUMMARY

1. As set forth below, Plaintiff-Intervenors' claims are entirely unrelated to the issues involved in this appeal. The current proceeding concerns trial court orders that directed the State to implement and fund a sweeping, eight-year "Comprehensive Remedial Plan" ("CRP") that would rework much of the North Carolina public school system, among other things. The trial court ordered the CRP to supposedly "remedy" what it believed was a statewide failure to provide children with their constitutional right to a sound basic education. But, as has been made clear by papers recently added to the record on appeal, Plaintiff Intervenors were only granted a limited intervention in this matter to pursue claims related to the conditions in a specific subset of the Charlotte-Mecklenburg School district ("CMS"). (*See* Order Re: Motion to Intervene by CMS Students & Charlotte Branch of the NAACP (filed 19 August 2005), attached hereto as Exhibit A (the "Intervention Order")).[1]

[1] The trial court's 19 August 2005 Order granting Plaintiff-Intervenors limited intervention in this matter was not included in the record on appeal prepared by DOJ and the Plaintiffs. Justice

2. Justice Earls confirmed this point last Friday in an order denying Legislative-Intervenors' motion to recuse. In that order, Justice Earls held that, although she signed Plaintiff-Intervenors' initial complaint, she did not need to recuse herself because "the facts and claims at issue in the Intervening Complaint—which largely concerned student assignment policies in CMS—are entirely unrelated to the questions presently before this Court." (*See* Order, No. 454A21-2 at 4 (entered 19 April 2022) (Earls, J.)). In addition, Justice Earls introduced an August 2005 order from the trial court—which had not previously been made part of the record on appeal—that clarified that Plaintiff-Intervenors were only permitted to intervene for the limited purpose of pursuing their claim related to the conditions in CMS. The order also made clear that the trial court severed Plaintiff-Intervenors' claim from the underlying case as part of that order and has never reconsolidated Plaintiff-Intervenors' claims with those of the Plaintiffs—which relate to the conditions in five rural school districts elsewhere in the State.

3. Put simply, Plaintiff-Intervenors' claims are not at issue in this appeal. They therefore are not, and cannot be, "a party aggrieved" under N.C. Gen. Stat. § 1-271, nor can they claim that the orders below "affected a substantial right" that would give them a right to appeal under N.C. Gen. Stat. § 7A-27. Likewise, the only claim they have asserted in this case was severed from the proceedings that led to the orders now on appeal. Their appeal should therefore be dismissed for lack of appellate jurisdiction. Finally, allowing Plaintiff-Intervenors to participate as a "party" to this appeal, even though it is entirely unrelated to their claim, risks the appearance that the Court is granting favorable treatment to one of the Justice's former clients. Plaintiff Intervenors therefore should be dismissed as parties to this appeal as well.

Earls, however, retrieved the Intervention Order from the files of the Wake County Superior Court and attached it as exhibit to her Order last week. For ease of reference, Legislative Intervenors have attached a copy of the Order to this motion.

PROCEDURAL HISTORY

4. As this Court is aware, this case has a long history that dates back to an original complaint Plaintiffs filed in May 1994. (R p 3). While relevant proceedings are discussed below, the procedural history is set out more fully in Legislative-Intervenors' opening brief, filed on 1 July 2022.

5. Although Plaintiffs filed their original complaint more than a decade earlier, Plaintiff-Intervenors did not join this case until 2005—approximately six months after this Court issued its decision in *Leandro II*.[2] On 19 August 2005, the trial court (per Superior Court Judge Howard E. Manning, Jr.) issued an order that granted Plaintiff-Intervenors' motion to intervene only for the limited purpose of pursuing their claim related to the conditions in CMS. (Intervention Order at 4). In the same order, the court chose to "sever the CMS claims so as to permit a separate trial of the CMS claims from the pending matters that are on-going in the remedial phase of this case." (Intervention Order at 5).

6. This appeal arises from two orders issued by the trial court as part of the "remedial phase" of this litigation: (1) a 10 November 2021 Order entered by Superior Court Judge David W. Lee (the "November 10 Order"), and (2) a 26 April 2022 Order Following Remand, entered by Superior Court Judge Michael L. Robinson (the "April 26 Order").

7. The November 10 Order directed the State Controller and other State officials to transfer more than $1.7 billion to the North Carolina Department of Health and Human Services, Department of Public Instruction, and University of North Carolina System, in order to fund measures called for in years 2 and 3 of a Comprehensive Remedial Plan ("CRP") developed by

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[2] *Hoke County v. State, Hoke County Bd. of Educ. v. State,* 358 N.C. 605, 649 (2004) ("*Leandro II*").

the Executive Branch in consultation with the Plaintiffs. (November 10 Order at 19 (R p 1841)). The trial court did so based on conclusions that (i) the State supposedly had "failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered" in *Leandro II*, and (ii) the State (represented by the Department of Justice) had represented that each of the measures were "necessary and appropriate" to remedy that alleged violation and provide children with a sound basic education as required by the State Constitution. (November 10 Order at p. 9, ¶ 21 (Rp 1831) and p. 13, ¶ 11 (R p 1835)).[3]

8. Legislative Intervenors and certain Executive Branch agencies represented by the Department of Justice ("DOJ") separately filed notices of appeal from the November 10 Order. (R p 1851 (Legislative Intervenors' Notice of Appeal)); (R p 1857 (DOJ's Notice of Appeal)). In February, DOJ and the Plaintiffs (but not the Plaintiff-Intervenors) filed Petitions for Discretionary Review, asking this court to hear the appeals from the November 10 Order ahead of the Court of Appeals. On 18 March 2022, this Court granted those petitions and remanded the case for a period of 30 days to assess the impact of the subsequently enacted State Budget on the "nature and extent of the relief" granted in the November 10 Order.

9. After hearing arguments from the parties, Judge Robinson entered the April 26 Order Following Remand, which amended certain findings and conclusions in the November 10

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[3] As noted in Legislative Intervenors' briefs to this Court, the trial court erred in making these conclusions. *Leandro II* did not establish a statewide violation. To the contrary, this Court expressly held that, because the trial focused only on "evidence as it pertains to Hoke County in particular, our holding mandates cannot be construed to extend to the other four rural districts named in the complaint." *Leandro II*, 358 N.C. at 613, 599 S.E.2d at 375 at n. 5. Accordingly, the Court remanded the case for proceedings on Plaintiffs' claims related to those other four rural school districts, which represented Cumberland, Halifax, Robeson, and Vance Counties. *Id.* At the same time, the Court affirmed the trial court's holding that "'the bulk of the core of the State's 'educational delivery system'" including its "funding allocation systems" are "'sound, valid, and meet[] the constitutional standards enumerated by *Leandro*.'" *Id.*, 358 N.C. at 632, 599 S.E.2d at 387.

Order and entered a monetary judgment in favor of DPI, DHHS, and the UNC System which reflected funding called for in years 2 and 3 of the CRP that were not appropriated in the State Budget. (R p 2618).

10. Plaintiff-Intervenors, Plaintiffs, DOJ, and Legislative Intervenors each appealed the April 26 Order. (R p 2648 (Legislative Intervenors' Notice of Appeal)); (R p 2651 (State's Notice of Appeal)); (R p 2651 (Plaintiffs' Notice of Appeal)); (R p 2665 (Plaintiff-Intervenor's Notice of Appeal)). On 1 June 2022, this Court entered an Order accepting the additional appeals and setting a briefing schedule. The case is currently set for argument on 31 August 2022.

ARGUMENT

11. Plaintiff-Intervenors' claim in this matter is entirely unrelated to the issues presented in this appeal. The trial court's orders below purported to provide a "remedy" for a supposed *statewide* violation of the constitutional right to a sound basic education. Plaintiff-Intervenors' claims, however, did not allege a statewide failure to provide children with an opportunity to obtain a sound basic education, nor could the underlying theory of their claims support the imposition of a remedy on a statewide basis. Instead, the claims on which Plaintiff-Intervenors were permitted to join this case were limited to the conditions in certain categories of schools within a single school district.

12. The allegations in Plaintiff-Intervenors' initial complaint, filed in February 2005, focused on circumstances specific to CMS. Plaintiff-Intervenors alleged that they were "public school students in the Charlotte-Mecklenburg school district, some of whom are represented by their parents and next friends." (R p 950). They then asserted several claims against the State, State Board of Education, and Charlotte-Mecklenburg Board of Education, alleging that the district's student assignment plan and allocation of resources within the local school system failed

to provide sufficient educational opportunities to at-risk children in high poverty schools. (R pp 952-953).

13. On 19 August 2005, the trial court entered an order granting permissive intervention under Rule 24(b), "**limited**, however, to consideration of the facts and law arising under [Plaintiff-Intervenors'] third claim for relief. . . which addresses the 'failure of the CMS district to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools." (Intervention Order at 4 (emphasis in original)).[4] In doing so, the trial court specifically recognized that (i) Plaintiffs' claims concerning five "low-wealth" school districts in rural areas, including the "circumstances in distant Hoke County," on the one hand, and (ii) Plaintiff-Intervenors' claims regarding CMS, on the other, were not "directly affected" by one another. (*See* Intervention Order at 4, 6). Accordingly, the trial court chose to "sever the CMS claims so as to permit separate trial of the CMS claims from the pending matters [concerning the rural school districts] that are on-going in the remedial phase of this case." (Intervention Order at 5 (holding that "[s]everance (bi-furcation) will permit separate pretrial proceedings and separate trial of the CMS claims, if necessary, so as to avoid prejudice and delay in the broader action.")).[5] Although the trial court "reserve[ed] the authority . . . to consolidate any legal arguments or evidentiary hearings" (*id.*) there is no evidence that it did so with respect to the CMS claims.

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[4] The trial court further held that it "will not hear evidence or argument on the plaintiff-intervenors' first claim for relief, which contends that the CMS student assignment system violates their right to a sound basic education under *Leandro*." (Intervention Motion at 4).

[5] Shortly after the trial court granted intervention, Plaintiff-Intervenors filed a Second Amended Complaint that only the claim for which they were allowed intervention, which was based on the alleged "failure of the CMS Board, the State, and State Board [of Education] to provide sufficient human, fiscal, and educational resources to high poverty and low-performing high schools in the CMS district." (R p 1032).

14. Justice Earls confirmed these very points in an order issued last week. In that order, Justice Earls explained that she did not need to recuse herself from the case, even though she signed Plaintiff-Intervenors' initial and amended complaints, because "the facts and claims at issue in the Intervening Complaint—which largely concerned student assignment policies in CMS—are *entirely unrelated to the questions presently before the court.*" (Order, No. 454A21-2 at 4 (entered 19 April 2022) (Earls, J.) (emphasis added)).[6] She further noted that the matter involving the Plaintiff-Intervenors' claims "was severed from the underlying case and not at issue in this appeal." (*Id.*). Although Justice Earls' decision reflects only the position of one justice, her order makes clear that Plaintiff-Intervenors' claims concerning the conditions in their individual school district are "entirely unrelated" to the current appeal, which involves trial court orders that purported to grant relief for a supposed *statewide* violation.

15. Because their claims were severed from the underlying proceedings and are entirely unrelated to the issues on appeal, Plaintiff-Intervenors should be dismissed as a party from this proceeding, and their appeal from the April 26 Order should be dismissed. The statutes governing appellate jurisdiction only permit parties to appeal if they have been "aggrieved" by the order below. *See* N.C. Gen. Stat. § 1-271 (providing that "any party aggrieved may appeal in the cases prescribed in this Chapter"); *see also Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc.*, 68 N.C. App. 308, 309, 314 S.E.2d 302, 303 (1984) ("Under our law, it is rudimentary that the only person who may appeal is the 'party aggrieved.'" (citing *Gaskins v.*

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[6] As noted above, the trial court expressly stated that it would not hear Plaintiff-Intervenors' claims regarding CMS's student assignment plan. (Intervention Order at 4). Instead, it granted intervention only on Plaintiff-Intervenors' claim based on the alleged "failure" of CMS, the State, and State Board of Education "to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools." (Intervention Order at 4); (*see also* Plaintiff-Intervenors' Second Amended Complaint at ¶¶ 98-109 (R p 1032)).

Blount Fertilizer Company, et al., 260 N.C. 191, 132 S.E.2d 345 (1963)); *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) ("Only a 'party aggrieved' may appeal from an order or judgment of the trial division."); *Waldron Buick Co. v. Gen. Motors Corp.*, 251 N.C. 201, 205, 110 S.E.2d 870, 874 (1959) (dismissing appeal and explaining that "'[a] 'party aggrieved' is one whose right has been directly and injuriously affected by the action of the court.'" (quoting *Freeman v. Thompson*, 216 N.C. 484, 5 S.E.2d 434(1939)). Plaintiff-Intervenors, however, cannot be a "party aggrieved" since the only claims they have asserted are entirely unrelated to the orders below and thus the issues on appeal. For the same reason, Plaintiff-Intervenors cannot claim that the orders below affected any "substantial right" that might support an immediate appeal. *See* N.C. Gen. Stat. 7A-27.

16. Plaintiff-Intervenors should be dismissed as a party to this appeal for other reasons as well. There is no dispute that Justice Earls represented the Plaintiff-Intervenors in proceedings under the same trial court docket number. Justice Earls has ruled that this does not create an issue because Plaintiff-Intervenors' claims are not before the Court. Yet, Plaintiff-Intervenors have been permitted to filed hundreds of pages briefing and intend to appear at oral argument next week. (*See* Letter of David Hinojosa to The Hon. Grant Buckner (filed 15 August 2022)). It cannot simultaneously be true that Plaintiff-Intervenors' claims are not before the Court and that Plaintiff-Intervenors are "parties aggrieved" by the orders on appeal. Allowing parties who were formerly represented by one of the Court's members, but who have no direct interest in the matters on appeal, to participate in such a manner risks the appearance of partiality. (*See* 19 April 2022 Order, No. 454A21-2 at 4) (quoting *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 341, 361-62 (2018)) (noting it is "imperative that every action" of the Justices "must be tailored to protect this august Court from the appearance of impropriety") (Earls, J.).

17. Given the need to resolve this matter before oral argument on 31 August and to guard against any appearance that the Court is favoring Plaintiff-Intervenors, Legislative Intervenors request that the proceedings on this motion be expedited and the time for any response shortened in accordance with Rule 37(a).

WHEREFORE, Legislative-Intervenors request that the Court:

(a) Dismiss Plaintiff-Intervenors as a party to the proceedings on this appeal (Case No. 425A21-2);

(b) Dismiss Plaintiff-Intervenors' appeal from the trial court's order 26 April 2022 order below;

(c) Strike Plaintiff-Intervenors Opening, Response, and Reply briefs filed on 1 July 2022, 1 August 2022, and 12 August 2022, respectively.

[SIGNATURE APPEARS ON FOLLOWING PAGE]

Respectfully submitted, this the 23rd day of August, 2022.

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Pursuant to Rule 33(b) I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned certifies that on 23 August 2022 he caused a true and correct copy of the foregoing document to be served via e-mail upon the following:

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EXHIBIT A

NORTH CAROLINA: IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY: 95 CVS 1158

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

And

ASHEVILLE CITY BOARD OF EDUCATION, et al.,
Plaintiff-Intervenors,

Vs.

STATE OF NORTH CAROLINA;
STATE BOARD OF EDUCATION,
Defendants.

ORDER RE: MOTION TO INTERVENE BY CMS STUDENTS & CHARLOTTE BRANCH OF THE NAACP, RULE 24, NORTH CAROLINA RULES OF CIVIL PROCEDURE

THIS MATTER is before the Court with regard to the proposed plaintiff-intervenors, Rafael Penn, *et al.*, motion to intervene. The motion to intervene was filed on February 9, 2005. CMS filed a memorandum in opposition to the motion to intervene. The Court postponed hearing on the motion in order to concentrate its resources on the "high school problem" in North Carolina high schools, including the Charlotte Mecklenburg Schools ("CMS"), during hearings that the Court had previously scheduled for the week of March 7, 2005. CMS put on evidence concerning so-called improvements that were in place to improve the CMS high school performance for 2004-2005.

The Court discussed CMS' so-called improvement plans and reported its findings in a **Report From the Court: The High School Problem** filed May 24, 2005. CMS' high school performance was also discussed at length in that report and due to the continued dreadful academic performance in 10 out of 17 CMS High Schools, concluded that there was no excuse for those high schools to be so "academically in the ditch year after year." At the time that the Court filed

the report, the 2004-2005 ABC testing data for the EOC tests for CMS high schools were not available.

On July 8, 2005, the Court reviewed CMS' 2004-2005 high school performance composites and other ABC disaggregated data published by CMS on its website. Based on the published data, it appeared that the poor academic performance in the majority of CMS high schools continued to run rampant in spite of CMS' claims that it had in place a number of "plans" to aid high school student performance.

The ABC performance composite scores for CMS high schools for the past four years follow. It doesn't take a rocket scientist to conclude that the dreadful academic performance in the majority of CMS high schools continued unabated in 2004-2005.

CMS HIGH SCHOOLS - COMPOSITE SCORES - 2002,2003,2004 & 2005

	2002	2003	2004	2005
BUTLER	64.1%	70.9%	72.7%	75.5%
MYERS PARK	69.9%	72.0%	73.4%	81.2%
N. MECKL.	65.5%	69.5%	70.3%	71.9%
PROVIDENCE	78.4%	82.7%	83.5%	86.0%
S. MECKL.	66.6%	70.6%	71.9%	72.0%
WADDELL	39.2%	41.5%	39.4%	47.6%
E. MECKL.	64.2%	61.2%	61.2%	58.1%
GARINGER	36.2%	38.6%	43.7%	42.1%
HARDING U.	63.8%	60.2%	58.4%	56.5%
HOPEWELL	65.8%	67.6%	66.0%	64.6%
INDEPENDENCE	59.2%	56.2%	49.3%	56.2%
NW ARTS	60.1%	57.0%	58.6%	63.0%
OLYMPIC	49.8%	55.9%	53.5%	53.6%

OBERRY	**xx**	**50.4%**	**41.4%**	**46.6%**
VANCE	**57.0%**	**49.3%**	**48.0%**	**54.0%**
W.CHARLOTTE	**30.6%**	**24.8%**	**30.1%**	**35.7%**
W. MECKL.	**47.8%**	**43.9%**	**47.5%**	**46.7%**

It should be noted that EOC tests in U.S.History and ELPS were not administered in 2004 and 2005.

On July 11, 2005, the Court scheduled a special civil session to begin August 9, 2005, to hear a report from CMS about what "specific substantive, effective and academically proven corrective measures CMS will have in place in its bottom 10 high schools as of the start of the 2005-2006 school year to ensure those schools are Leandro compliant in terms of qualified, competent principals, qualified, competent teachers and resources so that the constitutionally required educational opportunity is provided in those schools to each and every child."

The Court also noticed a hearing on the CMS students' motion to intervene for August 9, 2005. On August 1, 2005, the proposed plaintiff-intervenors filed a first amended complaint adding additional plaintiff-intervenor parties and a new legal claim ("the CMS claims").

On August 5, 2005, the Court received a written report from CMS on its plans to improve high school performance.

At the hearing on August 9, 2005, the Court received a report from CMS about its proposed plans to "improve" CMS high school performance for 2004-2005. Markedly absent from either the written or verbal report was any goal for higher academic achievement. There was no set goal for academic improvement such as a 15% increase in the composite score for each troubled CMS high school for 2005-2006.

The motion to intervene was heard on August 9, 2005. Counsel for CMS and the proposed plaintiff-intervenors made arguments as well as any other counsel who wished to have a say on the matter. Counsel for the plaintiffs suggested that in the event the Court granted the motion, that the CMS claims be severed (bi-furcated) so as to not affect the on going remedial phase of this case. The Court took the

motion to intervene under advisement. The Court has now had time to review the written memoranda in support of and against the motion, the comments and arguments of counsel and the matter is ripe for disposition.

The proposed plaintiff-intervenors Rafael Penn, *et al.*, who are public school students in the Charlotte-Mecklenburg School District and their parents as next friends, together with the Charlotte Branch of the NAACP have moved to intervene in this action to enforce the constitutional rights of these and other school children in CMS to the equal opportunity to obtain a sound basic education under ***Leandro v. State*, 346 N.C. 336 (1997) and *Hoke County Board of Education v. State*, 358 N.C. 605 (2004).**

Rule 24, North Carolina Rules of Civil Procedure provides for intervention, upon timely application, as a matter of right under Rule 24(a) and for permissive intervention under Rule 24(b).

The motion to intervene before the Court alternatively relies on Rule 24(a) and Rule 24(b). The proposed plaintiff-intervenors argue principally for their right to intervene under Rule 24 (a). The Urban District Plaintiff-Intervenors, including the Charlotte-Mecklenburg Board of Education, strongly oppose the motion.

The Court will by-pass the issues raised under Rule 24 (a). Instead, for the reasons set forth below, the Court will, in the exercise of its discretion, grant the motion to intervene under Rule 24 (b)and allow permissive intervention. The intervention will be **limited**, however, to consideration of the facts and law arising under movants' third claim for relief, asserted in their First Amended Intervening Complaint, filed on August 1, 2005, which addresses "the failure of the CMS district to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools." **The Court will not hear evidence or argument on the plaintiff-intervenors' first claim for relief, which contends that the CMS student assignment system violates their right to a sound basic education under *Leandro*.**

Moreover, in the exercise of its discretion and to avoid any inconvenience to other parties to this action, including the original "low wealth" district plaintiffs who are not directly affected by the intervenors' claims, the

Court, pursuant to the authority granted by Rule 42 (b), will sever the CMS claims so as to permit separate trial of the CMS claims from the pending matters that are on-going in the remedial phase of this case.

Severance (bi-furcation) will permit separate pre-trial proceedings and a separate trial of the CMS claims, if necessary, so as to avoid prejudice and delay in the broader action.

Notwithstanding the foregoing, the Court reserves the authority, under Rule 42 (a), to consolidate any legal arguments and/or evidentiary hearings on the CMS claims with other hearings or motions in the broader action where appropriate, or in the alternative, to sever the CMS claims under Rule 21.

Permissive Intervention under Rule 24(b) is within the Court's discretion.

Rule 24 (b) authorizes the Court to permit intervention to anyone who "[u]pon timely application" makes a "claim or defense" which has "a question of law or fact in common" with the action already underway. The Court finds that all of those conditions are met, and that intervention here will further the full and fair adjudication of this action.

CMS has argued that the motion to intervene is untimely. In **Hamilton v. Freeman, 147 N.C. App. 195, 201 (2001)**, the North Carolina Court of Appeals considered in detail the standards that apply under Rule 24(a) and (b). Addressing the issue of "timeliness," the Court of Appeals stated:

> **In considering whether a motion to intervene is timely, the trial court considers "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Procter v. City of Raleigh Bd. of Adjust.*, q33 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999). Whether a motion to intervene is timely is a matter within the sound discretion of the trial court and will be overturned only upon a showing of abuse of**

discretion. *See State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E. 2d 645, 648 (1985) A motion to intervene is rarely denied as untimely prior to the entry of judgment, and may be considered timely even after judgment is rendered if "extraordinary and unusual circumstances" exist. *Id.; see also Procter*, 133 N.C. App. At 184, 514 S.E. 2d at 747 (concluding that proposed intervenors' motion was timely after entry of judgment).

***Hamilton v. Freeman*, 147 NC. App. at 201.**

The motion to intervene is timely.

Despite the protestations of CMS, this motion to intervene is timely. Here's why.

This case started in 1994, over eleven (11) years ago. However, the action to date has focused almost exclusively on the broader constitutional issues addressed by the North Carolina Supreme Court in **Leandro v. State, 346 N.C. 336 (1997)**, and on the many legal and factual issues that were necessary to determine whether the State and Hoke County, as a representative low-wealth school district, were providing Hoke County students with a sound basic education.

This Court's Judgment was entered in April, 2004, and appealed by the State of North Carolina. On July 30, 2004, the Supreme Court ruled on that appeal. ***Hoke County Board of Education v. State, 358 N.C. 605, 612 (2004)***

This case is now largely in the remedial phase but there are still academic performance issues relating to certain schools in North Carolina becoming ***Leandro*** compliant. For a school to become Leandro compliant and thereby be providing an equal opportunity for all of the school's children to obtain a sound basic education, the school must have in place three (3) fundamental assets: a competent principal, a competent teacher in each classroom capable of teaching the SCOS to the children in that classroom, and the resources to support the educational programs within the school.

Schools with ABC performance composites below 60% are schools that clearly are not providing the assets necessary to be ***Leandro compliant*** and thereby provide the constitutionally mandate educational opportunities to the children in that school.

Following the July 30, 2004 decision of the Supreme Court in this case, the Court reviewed the 2003-2004 ABC performance data statewide for all schools. The Court noticed that many North Carolina High Schools were not up to snuff and too many were below 60% composite. Of particular note were the CMS high schools.

Accordingly, the Court turned its attention to the performance of high schools in the CMS district in its November 10, 2004 fax only memo.

The Court held its initial hearing on conditions in CMS high schools on March 7, 2005. The motion to intervene was filed on February 9, 2005 and considering the history of this case, the motion to intervene is not untimely in any respect.

There is no valid claim of "delay" against the CMS children and parents in presently asserting their claims, since they had no immediate interest or other reason to intervene earlier while the Court was considering circumstances in distant Hoke County.

There will be, moreover, no prejudice to CMS in requiring CMS to meet the constitutional allegations now asserted in these CMS claims. Under ***Leandro***, all North Carolina children have the right to an opportunity sound basic education, and the State has the duty to provide that right. The right belongs to the children.

Aside from the hearings conducted by this Court and this Court's Report filed May 24, 2005, there has been no proceeding that has considered or focused on whether CMS (an urban district) is meeting or failing to meet its constitutional duties under ***Leandro***.

Accordingly, there will be no redundancy or duplication of cost or effort by now requiring the CMS district to answer the CMS claims asserted at this point. Moreoever, the legal standards for being ***Leandro compliant*** are clear and finally decided.

The Court's simultaneous decision to conduct to sever the CMS claims under Rule 42 (b), moreover, should protect the low-wealth plaintiffs and other urban intervenor districts from any prejudice to them. These parties will not need to expend extensive time or resources on the litigation of CMS-specific claims.

Finally, under the present posture of the CMS high schools academic performance, denial of the motion to intervene might seriously prejudice the CMS students' rights under the North Carolina Constitution.

These students are each guaranteed by ***Leandro*** the opportunity for a sound basic education. If their constitutional rights to the opportunity are presently being denied by CMS and the State which is ultimately responsible, they are entitled to petition the Court for relief.

The Court has informed the parties that it intends to consider and address that very issue: whether the "academic genocide" it reported to the Governor, the Leadership of the General Assembly, the Chair of the State Board of Education, and the Superintendent of Public Instruction in its Report From The Court: The High School Problem filed May 25, 2005 constitutes a constitutional violation by CMS.

No present party to the litigation represents, exclusively, the interests of CMS students and their parents. A full consideration of these issues requires such an adversary. The plaintiff-intervenors will play that necessary role. Without such a party, the rights of these students might well be adjudicated adversely to them without any opportunity for their views and/or evidence to be fully heard; that would constitute undue prejudice to the applicants.

CMS contends that the presence of these intervenors in the case is also unnecessary as CMS is quite capable of adequately protecting and looking out for their interests and is in fact doing so. The ABC scores of CMS's high schools tell a far different story and paints a far different picture. As far as those children in the bottom ten (10) high schools, the past 4 years academic performance shows an on going failure on the part of CMS to look out for their interests and does little to convince

this Court that CMS is adequately representing those children's interest at the present time. All things considered, denial of intervention here may well, as a practical matter, impede the intervenors' ability to protect their interests.

Beyond the question of timeliness, the Court's exercise of discretion rests on its judgment, informed by its six-year supervision of this complex case, that the motion to intervene will present numerous questions of law and fact that are common to the claims already asserted in this lawsuit. The "question[s] of law" likely to arise include many subsidiary issues about the application of **Leandro and Hoke County** to a large, metropolitan school district, and the respective responsibilities of the district and the State under such circumstances. Likely questions of fact include, among others, the wisdom of the wisdom and propriety of certain central school administration choices and practices, the challenges in recruiting and retaining competent certified teachers and principals in low-performing high schools, and the educational programs and policies that are necessary to improve student achievement among at risk and low-performing students.

Intervention here is also timely in that the Governor of the State of North Carolina has expressed concern over the poor performance of the 44 high schools in North Carolina that had 2004-2005 performance composites of less that 60%, ten of which are located in CMS.

To his credit, the Governor has directed that the State Board of Education and DPI create "turn around teams" to deal with these poorly performing high schools and has directed these teams to start in CMS. The intervention permitted here will not delay, obstruct or hinder the "turn around teams" in their vital work and their report on what may be necessary to effect real academic improvement in CMS's bottom ten high schools.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the motion of plaintiff-intervenors Rafael Penn, et al., to intervene in this action is granted in part and denied in part, in the sound exercise of the Court's discretion, pursuant to Rule 24 (b), N.C. Gen. Stat. §1A-1, Rule 24 (b).

2. That the plaintiff-intervenors may assert their Third Claim for Relief, set forth in their First Amended Intervening Complaint, filed on August 1, 2005, and any evidence or legal argument in support thereof. Their motion to intervene to assert the First and Second Claims for Relief is denied.

3. That their claim will be pursued separately from the other claims pending in this action, pursuant to Rule 42 (b), N.C. Gen. Stat. 1A-1, Rule 42 (b). The named defendants in intervention will respond under the Rules, and pre-trial discovery and trial, if necessary, will go forward separately on the intervening claim.

4. That the Court reserves the authority, pursuant to Rule 42 (a), to consolidate for discovery, argument, and/or evidentiary hearing certain portions of this intervention with other claims presently pending in this action, in the exercise of its discretion, where common questions of law or fact arise, or to avoid unnecessary cost or delay. The Court also reserves the authority pursuant to Rule 21, to sever the CMS claims if appropriate.

5. That the intervention permitted here is not to interfere with the remedial process and proceedings of this case in other school systems throughout the State of North Carolina nor with the work of the "turn around teams" which the Governor of North Carolina has directed be first focused on CMS high schools.

This the 19th day of August, 2005.

Howard E. Manning, Jr.
Superior Court Judge