No. 425A21-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION; et al., Plaintiffs

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Plaintiff-Intervenor

and

RAFAEL PENN, et al., Plaintiff-Intervenors

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION, Defendants

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Realigned Defendant

and

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

From N.C. Court of Appeals
22-86

From Wake
95CVS1158

* * * * * * * * * * * * * * *

ORDER

Pursuant to an administrative order entered by this Court on 23 December 2021,[1] and having considered the North Carolina Code of Judicial Conduct, the arguments of the parties, and this Court's precedents—and further having reviewed the procedural history of this case and relevant filings including those referenced by the parties and others—I conclude that grounds do not exist for me to disqualify myself from hearing and deciding the issues presented in *Hoke County Board of Education, et al. v. State of North Carolina, et al.* (No. 425A21-2). Accordingly, the Motion and Suggestion of Recusal filed by Legislative Intervenor-Defendants on 14 July 2022 is denied.

The North Carolina Code of Judicial Conduct provides that "on motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned" including instances where "the judge served as a lawyer in the matter in controversy." N.C. Code of Jud. Conduct, Canon 3(C)(1)(b). In their motion, Legislative Intervenor-Defendants argue that Cannon 3 requires me to recuse myself from this case for two reasons: (1) because I signed an Intervening Complaint on behalf of a group of Plaintiff-Intervenors in 2005 as an attorney at the University of North Carolina School of Law Center for Civil Rights,

[1]Available at: https://www.nccourts.gov/assets/news-uploads/Order%20re%20Recusal%20Motions%20Clocked%20In_0.pdf?VersionId=tF6Vi.8fLKF_2Cd7vX74DItZ0woUshB3

and (2) because I signed an amicus brief on behalf of the Southern Coalition for Social Justice when an earlier iteration of this case was before the Supreme Court of North Carolina in 2013. However, Legislative Intervenor-Defendants' motion omits important factual and legal context that is relevant to the application of Cannon 3(C)(1)(b) under these circumstances. In short, I have not served as a lawyer in the matter in controversy currently pending before this Court.

With respect to the Intervening Complaint filed in 2005, it is correct that I was one of several attorneys who signed a motion to intervene on behalf of "plaintiff-intervenors Rafael Penn, *et al.*, who were public school students in the Charlotte-Mecklenburg School District and their parents as next friends, together with the Charlotte Branch of the NAACP." Order re: Motion to Intervene, at 4, Hoke County Bd. of Educ., et al., v. State of North Carolina et al., No. 95 CVS 1158, Wake Co. Superior Ct., (Aug. 19, 2005).[2] The court did "grant the motion to intervene under Rule 24(b) and allow permissive intervention . . . **limited**, however, to consideration of the facts and law arising under movants' third claim of relief . . . which addresses 'the failure of the [Charlotte Mecklenburg School] district to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools." *Id.* (emphasis added). However, the court chose to "sever the CMS claims so as to permit separate trial of the CMS claims from the pending matters that are on-going

[2] Because the trial court's 2005 Order re: Motion to Intervene is not otherwise available in electronic format, I attach hereto a copy of that Order obtained from the files maintained by the Clerk of Court of Wake County.

in the remedial phase of this case." *Id.* at 5. Accordingly, the court ordered that the surviving CMS claim "will be pursued separately from the other claims pending in this action . . . and pre-trial discovery and trial, if necessary, will go forward separately on the intervening claim." *Id.* at 10. Although the court stated that it "reserves the authority . . . to consolidate . . . portions of this intervention with other claims presently pending in this action," *id.*, there is no record of consolidation while I was representing plaintiff-intervenors, nor do I have any recollection of ever appearing in court on their behalf. Thus, the matter in which I did appear seventeen years ago as one of several attorneys representing intervenors was severed from the underlying case and is not at issue in this appeal.

My representation of plaintiff-intervenors who were adverse to the defendants in this case is not the same as representing the plaintiffs "as [a] lawyer in the matter in controversy" as defined in Canon 3(C)(1)(b). *See State v. Mitchell*, 723 S.E.2d 584 (N.C. Ct. App. 2012) (unpublished) ("Canon 3(C)(1)(b) does not address the purported conflict defendant identifies, which involves [a judge's] prior representation of a party adverse to defendant in a matter unrelated to the present criminal case."). Significantly, 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.

With respect to the Amicus Brief filed in 2013, representing an amicus is not the same as representing a party to a "matter in controversy." *Cf. City of Las Vegas*

Downtown Redev. Agency v. Hecht, 940 P.2d 127, 130 (Nev. 1997) ("[W]e have stated previously that representing an amicus curiae is not the equivalent of representing a 'litigant' in an appeal. As such, it is clear that representing an amicus curiae is not the equivalent of 'acting as a lawyer in the proceeding . . . .' " (quoting Canon 3E(1)(d) of the Nevada Code of Judicial Conduct)); *see also Washington Mut. Fin. Grp., LLC v. Blackmon*, 925 So.2d 780, 788 n.2 (Miss. 2004) ("The motion does not charge that [the attorney] represents a party in this case. Rather, the firm filed an amicus curiae brief on behalf of a non-party."). As the Ninth Circuit has explained, "[a]n amicus curiae is not a party to litigation. . . . [T]he classic role of amicus curiae [is] assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Lab. & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). It is unsurprising that, during my decades-long career as a civil rights lawyer in North Carolina, I "assist[ed] in a case of general public interest" on behalf of the organization I led at that time, involving issues of paramount importance to the civil rights community. *See Miller-Wohl Co. v. Comm'r of Lab.*, 694 F.2d at 204.

Intervenor-Defendants correctly note that I recused myself in another pending case, *Bouvier, et al. v. Porter, et al.*, No. 403P21-1, based on my participation as a lawyer in that matter. But the circumstances in *Bouvier* were substantially different than the circumstances at issue here. In *Bouvier*, I represented the plaintiffs and appeared as counsel on the complaint and amended complaint that formed the basis

for the appeal that has come to our Court. Thus, I determined in my judgment that recusal was warranted pursuant to Canon 3(C)(1)(b) because I had "served as [a] lawyer in the matter in controversy." *See* Order, *Bouvier, et al. v. Porter, et al.,* No. 403P21-1 (Jan. 18, 2022). By contrast, in this case, I represented an attempted plaintiff-intervenor in a separate proceeding that "forms part of the historical background of [a] dispute" that has been ongoing for decades, *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 839 F.2d 1296, 1301–02 (8th Cir. 1988), and I filed an amicus brief on behalf of the civil rights organization I was leading a decade ago. Just as a jurist's prior career as a prosecutor is not understood to undermine their capacity to preside impartially in cases involving the State or defendants prosecuted by their office, *see State v. Pemberton*, 221 N.C. App. 671, 674 (2012) (unpublished), it would be a disservice to the judiciary and to the people of North Carolina to conclude that my prior career as a civil rights attorney precludes me from acting impartially in cases involving civil rights matters. *See United States v. Ala.,* 828 F.2d 1532, 1543 (11th Cir. 1987) ("Nor can we countenance defendants' claim that [a judge] is prejudiced and no longer impartial by virtue of his background as a civil rights lawyer."), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Black*, 490 F. Supp. 2d 630, 661 (E.D.N.C. 2007) ("[F]ormer civil rights attorneys are not necessarily barred from presiding as a judge in civil rights cases."); *United States v. Fiat Motors of N. Am., Inc.,*, 512 F. Supp. 247, 251–52 (D.D.C. 1981) (collecting cases rejecting arguments that a judge should recuse from discrimination cases based on

prior advocacy for civil rights and racial justice causes).

Indeed, in other jurisdictions, this issue most often arises in criminal cases and the general rule followed in those cases should be equally applicable here. Whether serving as a prosecutor, in other government service, in private practice, or as a public interest attorney, an attorney is not automatically recused as a judge from cases her office handled. *See, e.g., Laird v. Tatum*, 409 U.S. 824, 830 (1972) (Rehnquist, J., mem.) (the Justice's previous employment at the Department of Justice when the case was pending was not, by itself, grounds for discretionary disqualification); *Matson v. Bd. of Educ.*, 631 F.3d 57, 78 (2d Cir. 2011) (Straub, J., dissenting in part, concurring in part) ("A judge's prior governmental service, even with the same entity appearing before the judge as a party, does not automatically require recusal. Rather, prior governmental service disqualifies a judge from presiding over a matter only if the judge directly participated in the matter in some capacity … ."); *United States v. Di Pasquale*, 864 F.2d 271, 279 (3d Cir. 1988) ("[A]bsent a *specific* showing that [a] judge was previously involved with a case while in the U.S. Attorney's office that he or she is later assigned to preside over as a judge," recusal is not mandated. (emphasis in original)); *Beckum v. State*, 917 So.2d 808, 816 (Miss. App. 2005) (holding that proof that the judge "once worked as a member of a district attorney's office that prosecuted Beckum [does not alone] overcome the presumption of impartiality").

Based on the ABA *Codes of Judicial Conduct,* Brandeis Professor Leslie W. Abramson suggested the following criteria to evaluate the need for recusal in these

circumstances:

> When an allegation is made that a judge is presiding over the case of a prior client (or the case of a person who was the former client's adversary at the time of the representation) as to require disqualification or discipline, some of the factors to be evaluated include: (1) the relationship between the two proceedings; (2) the amount of time between the past proceeding and the instant case; (3) whether the past proceeding is relevant to the current case; (4) the number of cases in which the judge represented the former client; and (5) the compensation received by the judge for the prior representation.

Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 Geo. J. Legal Ethics 55, 83. By this standard, recusal is not required here. The proceedings are not substantially related, roughly ten years or more has elapsed since the prior representation, the past proceeding is not relevant to the current issues, there is only one case in which the prior parties were represented by me, and I did not receive any direct compensation for the pro bono representation.

I agree with the Pennsylvania Supreme Court Justice who explained that "[i]t is, indeed, imperative that my every action must be tailored to protect this august Court from the appearance of impropriety; that I must not allow my conduct to undermine public confidence in the judiciary." *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 341, 361-62 (2018) (cleaned up). At the same time, I do not believe the circumstances here warrant recusal.

Finally, Intervenor-Defendants' suggestion that my choosing to preside over

this case raises Due Process Clause concerns is without merit. Again, the circumstances present here are starkly different than the circumstances at issue in the case Intervenor-Defendants' rely upon, *Williams v. Pennsylvania*, 579 U.S. 1 (2016). In *Williams*, the Supreme Court held that it violated the Due Process Clause for the Chief Justice of the Pennsylvania Supreme Court to rule on a defendant's emergency application for a stay of execution when the Chief Justice, while previously serving as a District Attorney, had personally authorized prosecutors to seek the death penalty in the defendant's case. *Id.* at 4. The Court explained that recusal was warranted "when a judge earlier had *significant*, *personal* involvement as a prosecutor in a *critical decision* regarding the defendant's case." *Id.* at 8 (emphasis added). My involvement in the decades-long litigation that forms part of the background to this case is neither "significant" nor "personal," and I was not involved in the making of any "critical decision[s]" on behalf of the parties that shaped the course of the litigation.

Accordingly, because I am confident that I can rule on the issues presented in this case impartially, and because relevant ethical rules and precedents do not require my disqualification under these circumstances, Legislative Intervenor-Defendants' Motion and Suggestion of Recusal is denied.

This the 19th day of August 2022.

/s/ Earls, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of August 2022.

Grant E. Buckner
Clerk of the Supreme Court

Copy to:
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Judge Michael L. Robinson, Attorney at Law - (By Email)
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Mr. Thomas J. Ziko, Attorney at Law, For State Board of Education - (By Email)
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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