

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM LEE COUNTY  
COURT OF COMMON PLEAS

Thomas W. Cooper, Jr., Circuit Court Judge

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Appellate Case No. 2007-065159

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JUN 11 2012

**S.C. Supreme Court**

Abbeville County School District, et al., ..... Appellants-Respondents,

v.

The State of South Carolina, et al., of whom John E. Courson, as President Pro Tempore of the Senate and as a representative of the South Carolina Senate, and Robert W. Harrell, Jr., as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives, are ..... Respondents-Appellants

and

State of South Carolina, Nikki R. Haley, as Governor of the State of South Carolina are, ..... Respondents.

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**SUPPLEMENTAL BRIEF OF APPELLANTS-RESPONDENTS**

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Pursuant to the Court's order dated May 23, 2012, Appellant-Respondents (hereinafter referred to as "Plaintiffs" or "Plaintiff Districts") submit this brief addressing statutory enactments of the General Assembly regarding public school financing for primary and secondary schools since June 25, 2005 and how the enactments have impacted the Plaintiff Districts' arguments.

### **INTRODUCTION**

Each child in the State of South Carolina has the right to a free public education. This right—perhaps the most fundamental right guaranteed by our State Constitution—is the promise to each child that he or she will be provided with the opportunity to acquire the fundamental skills and knowledge required to lead a meaningful and productive life.

In 1993, Plaintiffs brought this lawsuit to secure that right for the predominantly African American children living in poverty in the State's poorest and most isolated school districts. The children in the Plaintiff Districts were not receiving equal educational opportunity, and the design and funding of the public school system was insufficient to provide students with the constitutionally required educational opportunity. At that time, the primary funding mechanisms for South Carolina's public school system were based upon the 1977 Education Finance Act ("EFA") (Base Student Cost) and the 1984 Education Improvement Act ("EIA") (one penny sales tax). The EFA and EIA had been ineffective for years in providing a constitutionally adequate educational opportunity to the at-risk children in the Plaintiff Districts, and the conditions in the Plaintiff Districts continued to deteriorate unabated.

1. The primary funding mechanisms for education have remained the same since trial.

Ten years passed between the filing and the trial of this case. During that time, the trial court dismissed the case, and on appeal this Court interpreted the meaning of the Education Clause and remanded the case for trial. Despite this passage of time and the unrelenting conditions in the Plaintiff Districts, Defendants made no meaningful changes to the primary funding mechanisms for the public education system. Annual budget provisos provided some relief on a piecemeal basis, but these were fragmented gestures and were insufficient to make up for the fundamental shortfall in the primary funding scheme.

2. The EAA demonstrated the failure to satisfy Constitutional standards.

In 1999, the South Carolina General Assembly passed the Education Accountability Act ("EAA"). Although the EAA did not change the fundamental structure of education finance in the state, it did provide for the collection and publication of valuable data on student, school, and district performance. The EAA articulated performance standards in much the same way the Court had articulated the Constitutional standard for an adequate educational opportunity.

While the EAA failed to provide new or adequate resources sufficient to change the unconstitutional educational opportunity provided to the children, it did shine a bright and focused spotlight on the lack of opportunity and its causes: the children in the Plaintiff Districts had greater educational needs to overcome the deficits inherited from generations of poverty and illiteracy, and the EAA showed that those deficits were compounding. The primarily at-risk students were falling further and further behind for each year in which they did not receive adequate educational opportunity.

The case was tried in 2003-2004 against the backdrop of the education accountability movement in the United States, exemplified in South Carolina by the passage of the EAA. The Plaintiffs proved by overwhelming evidence that the at-risk children in the Plaintiff Districts had greater educational needs and that the then-current funding and policies were inadequate to meet those needs.

3. Plaintiffs proved that the Plaintiff Districts have higher needs, which were unmet.

Students in the Plaintiff Districts lacked access to the high quality teachers, instructional materials, and physical facilities they needed to overcome the substantial deficits caused by their social circumstances. Trial evidence showed these needs were not met and that the cost to remedy the deficit was significant.

4. Plaintiffs proved that the schools had inadequate resources: Inputs.

The State was not providing adequate financial resources, and the Plaintiff Districts lacked the financial resources to make up the difference.

5. Plaintiffs proved that the schools had inadequate educational results: Outcomes.

Outcomes in the Plaintiff Districts, as measured by standardized testing, school ratings and graduation rates, were abysmal.

6. The trial court ruled that the children were not receiving a constitutionally adequate educational opportunity.

On December 29, 2005, the trial court ruled that the children in the Plaintiff Districts were not receiving a constitutionally adequate educational opportunity. In reaching that decision, the court had the opportunity to consider the effect of 25 years of experience with the EFA, 20 years of experience with the EIA, and five years of experience with the EAA. The court also had the opportunity to hear and consider the

ample evidence proving that the generational cycle of poverty would never be broken unless these educational deficits were addressed by providing adequate resources to overcome those deficits, as required by the Constitution. The court rightly found that, under this system, children in the Plaintiff Districts were being unconstitutionally deprived of "a fair chance at life." On July 12, 2007, the trial court denied all motions to alter or amend the original order.

The additional eighteen months of experience under the EFA, EIA, budget provisos and the EAA did not change the trial court's conclusion that the children in the Plaintiff Districts were being deprived of a constitutionally adequate educational opportunity.

7. School funding has not meaningfully changed.

In 2007-08, in support of their appeal of the trial court's order, Defendants urged this Court to find the issues presented moot as the result of new education legislation passed after the trial evidence was closed. None of the eleven items of "new" legislation identified by the Defendants in their Cross-Appeal purported to modify the primary funding mechanisms of the EFA and EIA, and, predictably, many of the referenced initiatives were short-lived. None of the legislation addressed in Defendants' appeal altered the fact that the funding system is inadequate, and the children in the Plaintiff Districts are not receiving a constitutionally adequate educational opportunity.

Now, in 2012 this Court will hear re-argument and has invited briefing on the impact on the parties' arguments of post-trial legislation enacted by the General Assembly regarding public school finance. Regrettably, a review of post-trial legislation reveals that the General Assembly has failed to take action having any meaningful impact

on Plaintiffs' arguments. The core funding mechanisms remain the same as they were when this case was filed nearly twenty years ago: the 1977 Education Finance Act (with the 1974 Base Student Cost formula) and the 1984 Education Improvement Act. These continue to be supplemented, as they were at the time of trial, with annual budget provisos and fragmented, largely unfunded or underfunded legislation related to highly specific education initiatives.

Funding for these initiatives changes from year to year, which substantially reduces their effectiveness because they cannot support the schools' efforts to implement long-term strategies and programs. In addition, the General Assembly has passed tax exemption legislation that affects public school finance by shrinking the General Fund that funds the Base Student Cost—despite the fact that the Base Student Cost has been underfunded almost every year since its inception, resulting in the billion dollar education funding shortfall that existed at the time of trial.

Plaintiffs are aware that the recession has caused widespread economic hardship, but the children in the Plaintiff Districts are disproportionately impacted by the current financial downturn. The Plaintiff Districts are having a harder and harder time making up the funding shortfall necessary for their children to receive adequate educational inputs. Their efforts are further hindered by post-trial legislation impacting teacher salary step increases and limiting the autonomy of local school districts in their efforts to supplement the inadequate funds provided by the State. This translates into a greater decline in the quality of those inputs, resulting in a continuing decline of educational outcomes in the Plaintiff Districts.

In short, in the seven years since the trial record was closed, no meaningful change has been made to South Carolina's system of public school finance. The General Assembly's actions in reducing the revenues feeding the General Fund and restricting the ability of local districts to supplement state funds have had a compounding effect on the crushing impact of reduced resources in the Plaintiff Districts, which makes it virtually impossible for the poorest and most isolated children in rural South Carolina to receive an adequate educational opportunity.

The children in the Plaintiff Districts, never having experienced even minimally adequate educational opportunities in the past, are seeing their opportunities sliding further below the constitutionally mandated standard with each passing year. The resulting continuing decline in educational outcomes in the Plaintiff Districts demonstrates unassailably that the State continues to fail to provide adequate educational opportunity to the children in the Plaintiff Districts.

## **ARGUMENT**

### **I. THE PRIMARY FUNDING MECHANISMS ARE INADEQUATE AND REMAIN UNCHANGED.**

At the time of trial, the foundational funding mechanisms for public school education in this state were the 1977 Education Finance Act ("EFA") and the Education Improvement Act ("EIA"). Today, they are still the primary funding mechanisms, and the educational funding system in South Carolina remains unchanged and, in many ways, has actually weakened since trial. The legislative provisos that are supposed to supplement the EFA and EIA are similarly inadequate and do not cure the constitutional problem.

1. Primary funding from the EFA and EIA are inadequate.

The EFA establishes the basic state funding for all districts in South Carolina, known as "foundation funding." *See* S.C. Code Ann. §§ 59-20-10 et seq. The EFA prescribes that the Base Student Cost ("BSC") be based on the estimated cost, in the 1970s, of the Defined Minimum Program ("DMP"). The Defined Minimum Program consists of the minimum staffing and educational elements that the General Assembly decided that each student should have available in his or her school in 1974 (when the DMP and EFA were designed) and 1977 (when they were enacted). The other primary funding support for public schools comes from the penny sales tax enacted by the EIA in 1984. The EIA was intended to supplement the EFA by requiring that proceeds of the penny sales tax be used to fund and promote innovative educational strategies and programs. *See* S.C. Code Ann. §§ 59-21-1010 et seq.

Despite the passage of years, the EFA and EIA remain the foundational funding of the public schools. Plaintiffs established at trial that this foundation was "crumbling" and had become "a very unsolid, unstable footing for education." Much like the crumbling foundation of an old house eventually becomes incapable of supporting the weight of the house, the foundational funding provided by the EFA and EIA has weakened over time and is now incapable of providing the resources necessary to provide children in the Plaintiff Districts with an adequate educational opportunity.

From the filing of this lawsuit to the trial to the present, the situation is at best virtually unchanged and, in many ways, worse today than ever. The General Assembly has not revised the basic funding formulas and continues to underfund the Base Student Cost, while the pressure on the EIA penny to support multiple programs increased even

as its revenues fell. The evidence at trial established that, since enactment of the EFA in 1977, the State has rarely approved funding of the full Base Student Cost, and even more rarely applied the prescribed inflation factor to the formula, notwithstanding the statutory mandates. This situation has continued and indeed worsened since the trial, with the following table developed by the State Department of Education ("DOE") showing a comparison of the required and actual Base Student Cost during recent years:

School Year	BSC per B&CB	BSC per proviso	BSC as actually funded	Percent Inflation per B&CB	Percent Inflation per Proviso	Percent Change from PY BSC
2001-02	2,073	2,073	1,881	3.04	3.04	-6.04
2002-03	2,133	2,033	1,770	2.90		-5.90
2003-04	2,201	1,701	1,754	3.20		-0.90
2004-05	2,234	1,852	1,852	1.50		5.59
2005-06	2,290	2,290	2,290	2.50		23.65
2006-07	2,367	2,367	2,367	3.36		3.36
2007-08	2,476	2,476	2,476	4.60		4.61
2008-09	2,578	2,578	2,191	4.12		-11.51
2009-10	2,687	2,034	1,757	4.22		-19.81
2010-11	2,720	1,630	1,615	1.23		-8.08
2011-12	2,790	1,788	1,880	1.38		16.41
2012-13	2,790	2,012*	2,012*	0.00*		7.02*

\* Projection

B&CB: State Budget and Control Board.

BSC: Base Student Cost

PY: Prior Year

In 2003-04, Act 68 provided \$65,242,486 for EFA pursuant to the Federal Jobs and Growth Tax Relief Reconciliation Act.

In 2009-10, federal stimulus funds of \$184,922,339, provided through the American Recovery and Rehabilitation Act (ARRA) via the federal School District Stabilization Funds (SFSF), were included in the amounts distributed through the EFA formula by S.C. Act 23, Part III, allowing for an increase in the BSC of \$300.

As the table demonstrates, the State has failed to fund the mandated foundational Base Student Cost by amounts ranging from \$653 per student to \$1105 per student over the past four fiscal years. In FY 2010-11 the General Assembly funded the Base Student Cost at approximately the same level as in FY 1994-95, just after this suit was initiated.

In the past twelve fiscal years, including the proposed budget for FY 2012-13, the General Assembly has fully funded the EFA formula, based on the decades-old and inadequate Defined Minimum Program, only three times. The total deficit in EFA Base Student Cost—just during this twelve-year period—has grown to over \$5200 per student. In the past four fiscal years alone, this cumulative deficit has been \$3446 per student.

The effect on all school districts in the State has been devastating, but poor districts like the Plaintiff Districts that receive larger shares of the BSC from the State have borne particularly deep losses. For a poor district that receives 90% of the BSC from the State, the BSC deficit in 2010-11 of \$1105 roughly translates to a loss of almost \$20,000 in just one classroom of 20 students (assuming, unrealistically, that no student in the class had a disability or other issue recognized with an added weight in the EFA formula) ( $\$1105 \text{ deficit} \times 90\% \times 20 \text{ students} = \$19,890$ ). A wealthier district that receives only 10% of the BSC from the State, by contrast, would lose \$2210 in an identical classroom. Multiply those losses over an entire school and district and add to them additional BSC deficits from other years, and one begins to get a sense of the financial devastation inflicted on the Plaintiff Districts because of the State's failure to fund the EFA as the statute requires.

In addition, as pointed out repeatedly at trial, the Defined Minimum Program that was first devised in 1974 is devastatingly inadequate as a budget for a 21st Century educational opportunity **even when fully funded**. The foundational elements of the Defined Minimum Program were obsolete at the time of trial and are even more so today. For example, although computer technology is now a crucial part of our society and an essential element in education, the Defined Minimum Program has not been amended to

include technology in the list of standard costs funded by the EFA. The ever-changing landscape of education (and what is *now* required of our students, teachers, and schools) is not reflected in the almost forty-year old EFA foundation formula.

Consider the societal and educational changes since 1974, when the Defined Minimum Program was devised as the minimum, or floor, of the educational programs that each student should have: In 1974, when away from home, most people still made calls from telephone booths. Personal computers at work or home were a rarity. Gerald Ford was President, and Richard Riley was Governor. The United States has had six Presidents since then, including our first African American President. South Carolina has had five governors since then, including the first woman governor. A sample of innovations in our world since 1974 include:

- first drive-through restaurant (McDonald's) opened
- GPS invented; PowerPoints first introduced
- laser printers introduced
- MRIs first used
- CNN first aired
- CD-ROMs introduced; Apple Macintosh introduced
- HIV identified as cause of AIDS
- Microsoft Windows introduced
- disposable cameras introduced
- DNA is first used to convict criminals
- first woman (Sandra Day O'Connor) appointed to US Supreme Court
- disposable contacts introduced
- Dolly the Sheep, first genetically engineered animal, is born
- Internet introduced
- Yahoo, the first Internet search engine, and first satellite-based TV (DIRECTV) are introduced
- DVDs introduced
- YouTube introduced
- iPhones, iPods, and iPads are introduced
- Social media such as Facebook and MySpace are introduced

None of these breakthroughs or the advances they represent is reflected in the Defined

Minimum Program still used by the State to fund public education. Funding our children's education on a 1974 model devised before any of these breakthroughs is akin to educating children solely for an agricultural society during the Industrial Age. The State's failure to fully fund even the outdated the Base Student Cost, based as it is on the 1974 Defined Minimum Program, is clear evidence of the inadequacy of the opportunity provided to our poorest and most isolated African American children in our poorest rural school districts.

Also, the EFA still does not include a poverty weighting to reflect the indisputable difference in poor students' needs, despite increasing poverty levels in South Carolina and in the Plaintiff Districts. Several proposals incorporated a suggested weight for poverty,<sup>1</sup> but the General Assembly has not acted on any of these proposals. These proposals included the Education Oversight Committee ("EOC") study in 2003, as well as two bills that have apparently "died in committee:" S.433, a bill that included the recommendations of the Senate Select Committee on K-12 Funding, and H.3716, a bill introduced by the House Ways and Means Committee, were both sent to the Senate *Finance* Committee in March, 2011, where they remain today.

The General Assembly continues to ignore both the poverty of the individual child and the compounding impact of creating rural ghettos of poor children and herding them into small isolated rural districts. Repeatedly choosing to underfund these children and these districts has sentenced them to substandard opportunities in clear violation of their Constitutional rights. The result is to condemn South Carolina to a state of

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<sup>1</sup> Plaintiffs are not convinced that the suggested poverty weights in these proposals are sufficient and are also concerned that the compounding problems presented by the sheer aggregation and weight of poverty in their schools are not addressed. The purpose of referring to these studies and proposals is not to advocate specifically for them, but to emphasize the continuing lack of action by the General Assembly to address the poverty issues through any kind of comprehensive funding reform.

educational "haves" and "have nots" that lacks the ability to compete effectively in the 21st century global economy. The Education Clause of the Constitution provides for the general welfare of all South Carolina citizens in addition to the individual opportunity guaranteed to each child. When our state leaders fail to abide by the clear meaning of the Constitution, every South Carolinian is hurt.

Trial evidence established that the funds raised through the EIA penny sales tax (which was enacted by Constitutional Amendment in 1984 as a means to promote and fund innovative practices that would improve and supplement programs funded from the State's General Fund) have instead become an integral part of the base funding of education, rather than a means to improve it. The General Funds distributed through the EFA formula are no longer sufficient to support basic educational services and programs set out in the Defined Minimum Program, and the EIA penny sales tax is increasingly used as a primary source to fund the State's basic educational obligations. Indeed, the purpose of the EIA—to supplement the EFA programs funded by the General Fund—has now even been reversed by the shifting of line items from the General Fund to the EIA, thus enabling the General Assembly to “increase” the Base Student Cost with General Fund money that would otherwise be paying for those line items. Simultaneously, of course, the pressure on the EIA funds is intensified by the need to fund items that formerly had been paid by the General Fund. The combined impacts of continually underfunding the EFA Base Student Cost and constantly undermining the EIA by diverting the penny tax into General Fund items operate as a “knockout one-two punch” to the Plaintiff Districts. The effect is to create a permanent and unconstitutional structural deficit in the educational opportunities provided to at-risk students in the

Plaintiff Districts.

The total funding for public schools from the EFA and the EIA has declined in the last several years, as shown in the following table:

<b>Fiscal Year</b>	<b>Total General Fund Revenues</b>	<b>Education Finance Act Expenditures</b>	<b>Base Student Cost*</b>	<b>Education Improvement Act Revenue Collections</b>
2006-07	\$6,658,502,908	\$1,426,544,209	2,367	\$646,701,707
2007-08	\$6,392,934,378	\$1,506,691,472	2,476	\$633,243,384
2008-09	\$5,544,172,770	\$1,339,202,159	2,191	\$517,992,255
2009-10	\$5,309,460,775	\$1,088,894,001	1,757	\$551,283,727
2010-11	\$5,739,765,663	\$1,004,394,001	1,615	\$567,538,358
2011-12	Not available	\$1,109,394,001 **	1,880	Not available

\* The Base Student Cost reflects the actual funding, including mid-year cuts and federal stimulus funds.

\*\* Per Appropriation Act

Source: Budget and Control Board Historical Analysis through November 15, 2011 at pp 12, 59, and 60 available at [http://www.budget.sc.gov/webfiles/OSB/historical/FY\\_2011\\_Historical\\_Analyses\\_for\\_webpage.pdf](http://www.budget.sc.gov/webfiles/OSB/historical/FY_2011_Historical_Analyses_for_webpage.pdf); Base Student Cost data from State DOE. As the table demonstrates, total education funding under the EFA and the EIA declined by over \$633 million in the four fiscal years from 2007-08 to 2010-11. (The EFA funding was reduced by over \$568 million, dropping the Base Student Cost to 1994-95 funding levels, while the EIA funding dropped by almost \$66 million during those same four recent years.)

The allocations of EFA funds to the Plaintiff Districts have also declined, as shown in the table below:

<b>DISTRICT</b>	<b>2007-08 BSC \$2467</b>	<b>2008-09 BSC \$2184</b>	<b>2009-10 BSC \$1756</b>	<b>2010-11 BSC \$1615</b>	<b>Total cut</b>	<b>% cut</b>
Allendale	\$3,996,107	\$3,572,975	\$3,000,076	\$2,461,208	\$1,534,899	38%
Dillon 2	\$8,913,767	\$8,173,179	\$6,570,974	\$5,805,674	\$3,108,093	35%
Florence 4	\$2,264,086	\$1,833,904	\$1,470,929	\$1,067,449	\$1,196,637	53%
Hampton 2	\$3,345,254	\$2,899,603	\$2,192,197	\$1,806,403	\$1,538,851	46%
Jasper	\$5,224,153	\$5,320,490	\$4,302,348	\$3,929,048	\$1,295,105	25%
Lee	\$6,610,864	\$5,967,506	\$4,653,554	\$3,863,766	\$2,747,098	42%
Marion 7	\$2,046,950	\$1,761,241	\$1,360,984	\$1,152,664	\$894,286	44%
Orangeburg 3	\$7,758,858	\$6,762,478	\$5,208,566	\$4,538,713	\$3,220,145	42%

Source: South Carolina Department of Education (numbers rounded to the nearest dollar)

The impact of these cuts on the smallest and most isolated districts can easily be seen. For example, in Hampton 2 EFA funding was cut from \$3.345 million in fiscal year 2007-08 to \$1.806 million in fiscal year 2010-11. This is a cut of \$1.529 million, or forty-six percent (46%), in EFA funding from just four years before. These stark numbers again show the devastating impact of continually underfunding educational opportunities for our poorest and most isolated, predominantly African American children. Unreliable funding that crashes down 46% in four years makes it absolutely impossible for the Plaintiff Districts to provide constitutionally adequate opportunities for education to the children so unfortunate to live in those districts.

2. Supplemental funding by annual provisos is inadequate.

Beyond the primary basic funding mechanisms of the EFA and the EIA, the General Assembly provides funding for educational initiatives by proviso, through approval in the annual budget process. However, as discussed in previous briefs, funds sourced through annual proviso do not allow districts to implement long-term plans or programs because they are not stable, reliable streams of revenue.

The General Assembly uses provisos, for example, to allocate revenues from the State Education Lottery, codified at S.C. Code Ann § 59-150-350(D) (2004). The lottery revenues appropriated by the General Assembly for K-12 educational programs have also declined since the trial, both in terms of actual dollars and proportional shares.

<b>YEAR</b>	<b>TOTAL LOTTERY APPROPRIATIONS*</b>	<b>K-12 LOTTERY APPROPRIATIONS*</b>	<b>K-12 SHARE</b>
2004-05	\$339,618,335	\$102,823,895	30.3%
2005-06	\$277,000,000	\$48,500,000	17.6%
2006-07	\$297,003,117	\$59,500,000	16.7%
2007-08	\$258,000,000	\$49,614,527	19.2%
2008-09	\$252,322,729	\$49,614,527	19.7%
2009-10	\$246,600,000	\$43,891,798	17.5%

<b>YEAR</b>	<b>TOTAL LOTTERY APPROPRIATIONS*</b>	<b>K-12 LOTTERY APPROPRIATIONS*</b>	<b>K-12 SHARE</b>
2010-11	\$250,371,035	\$43,891,798	17.5%
2011-12	\$254,833,000	\$31,491,798	12.4%
2012-13**		\$28,291,798	

\* Excludes appropriations from unclaimed prize money

\*\* Proposed

*Sources:* Part 1B, Proviso 1AA.1, Act 91 of 2004; Part 1B, Proviso 1AA.12, Act 115 of 2005; Part 1B, Proviso 1AA.7, Act 397 of 2006; Part 1B, Proviso 1AA.7, Act 117 of 2007; Part 1B, Proviso 2.7, Act 310 of 2008; Part 1B, Proviso 2.7, Act 23 of 2009; Part 1B, Proviso 2.6, Act 291 of 2010; Part 1B, Proviso 2.6, Act 73 of 2011; Part 1B, Proviso 2.5, House Approved 2012-13 Budget Currently in Conference Committee; South Carolina Budget and Control Board Historical Analysis through November 15, 2011 at p. 81, maintained at [http://www.budget.sc.gov/webfiles/OSB/historical/Lottery\\_Appropriations\\_072911.pdf](http://www.budget.sc.gov/webfiles/OSB/historical/Lottery_Appropriations_072911.pdf)

In the past nine fiscal years, lottery funding to K-12 education has dropped a remarkable 72.5% from a high of \$102.8 million in FY 04-05 to only \$28.3 million in the FY 12-13 budget. This funding is for the whole state, not just the Plaintiff Districts, but once again this devastating drop in total funding lands yet another body blow to the likelihood that our State's poorest and most isolated, predominantly African American children will receive a constitutionally adequate educational opportunity. The cumulative impact of dramatically underfunding the EFA Base Student Cost, constantly diverting the EIA penny tax to General Fund uses, and now reducing lottery support to a statewide pittance has produced conditions in the Plaintiff Districts that are worse now than at the time of trial

In summary, the primary funding for South Carolina public education—under the EFA and EIA—remains the same, and it is constitutionally inadequate. Further, additional funding by proviso does not cure the funding inadequacy.

**II. FUNDING FOR A CONSTITUTIONALLY ADEQUATE EDUCATIONAL OPPORTUNITY MUST OFFER EACH CHILD A CHANCE AT LIFE.**

It is undisputed that the very purpose of education in South Carolina is to prepare its residents to become productive citizens, to participate in a democratic society, and to succeed in life. As this Court recognized in *Abbeville County School District v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999), educational opportunity is intended to benefit both the child and the public at large. Therefore, as the trial court held, a constitutionally acceptable educational opportunity means the opportunity to acquire the skills and knowledge necessary to have "a chance at life," including the opportunity "to be a productive citizen." (Trial Ct. Order at 15.) When evaluating whether the public education system provided by the State satisfies this constitutional standard, opportunity must be viewed through the eyes of the children (*Id.* at 16-17.)

The evidence at trial proved that, given the deficiencies in educational opportunities being offered by the Defendants, the then current state of education in South Carolina did not portend well either for the children living in poverty in the Plaintiff Districts or for the economic health of our State at large. In *Abbeville*, this Court left no doubt that the obligation to remedy this situation by providing adequate educational opportunity to each child rests squarely upon the shoulders of the State and not the districts, schools, or parents

**III. STATE CURRICULUM STANDARDS ESTABLISH THE KNOWLEDGE AND SKILLS NEEDED TO HAVE A "CHANCE AT LIFE."**

In 1999, the General Assembly passed the Education Accountability Act ("EAA"), a performance based accountability system for public education in South Carolina. Under the EAA, the State established comprehensive curriculum standards and

a system of measuring (through a standardized test-driven school rating system) whether students were actually acquiring the skills and knowledge set out in the EAA curriculum standards. The EAA also included a technical assistance component, which authorized funding for specialized support programs for schools that were receiving unsatisfactory ratings based on the percentage of students failing to demonstrate mastery of the state curriculum standards.

Trial evidence established that the EAA curriculum standards are necessary to ensure that children in South Carolina are taught and tested on what they need to know and accomplish. As the trial court observed, "Because those [curriculum] standards identify both the substantive knowledge and thinking skills that students in South Carolina are expected to learn, they play a key role in the determination of whether or not the opportunity to acquire the knowledge and skills required by *Abbeville County* is present." (Trial Ct. Order at 51-51.). see also, *Abbeville*, 335 S.C. at 68, 515 S.E.2d at 540 ("We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to acquire: (1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; (2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and (3) academic and vocational skills.")

The evidence at trial proved that overwhelming percentages of children in the Plaintiff Districts were failing the PACT test, which was designed to measure mastery of the state curriculum standards. The trial court concluded that when the high incidence of poverty and poor PACT test scores "come together so dramatically as they do in the case

of the Plaintiff Districts," the conclusion followed that the children of the Plaintiff Districts are not receiving the opportunity to obtain a minimally adequate education. (Trial Ct. Order at 160) ("Here there is evidence that the Plaintiff Districts have from 68% to 91.7% of students on free and reduced lunch. PACT scores for the Plaintiff Districts for the year 2002 indicate that 31.5% to 56.9% are scoring at below basic in ELA and 45.3% to 80.3% are scoring at below basic in math.")

At trial and on appeal, Defendants maintained that if the relatively new EAA was given sufficient time to work, the Plaintiff Districts would achieve marked improvement to outcomes. To the contrary, however, the passage of time has confirmed Plaintiffs' prediction that the EAA alone—without the support of the funding and programs adequate to meet the educational needs of the children in the Plaintiff Districts—could not create educational opportunity. As discussed more fully below, the record of academic achievement in the Plaintiff Districts continues to paint a dismal picture of the state of educational opportunity in those districts.

Further, instead of producing the opportunities optimistically predicted by the State, the EAA instead has shined a spotlight on the lack of opportunity in the Plaintiff Districts and helped identify its causes. The continuing decline in PACT test scores, and the similarly disappointing scores on the PASS test (which, as discussed below, replaced the PACT test in 2009), further reinforces that the technical assistance component of the EIA is ineffective. As the evidence at trial showed, such technical assistance comes far too late for students who, once they fail to master standards on grade level, continue to fall farther and farther behind.

**IV. POVERTY HAS A PROFOUND EFFECT ON THE CONSTITUTIONAL ADEQUACY OF OPPORTUNITY.**

Evidence at trial showed that 86% of the children in the Plaintiff Districts were eligible for free and reduced price lunch, which is a surrogate for poverty, against a statewide average of forty-eight percent. In the Plaintiff Districts poverty is co-linear with being African American. At the time of trial, poverty in the districts was 86%, and over 86% of the children were African American. Eligibility for free and reduced price lunch has increased and is now above 97% in each of the Plaintiff Districts. In some, including Allendale, Lee and Marion 7, approximately 97% of children are living in poverty. Poverty in the Plaintiff Districts is generational poverty, meaning these children come from families who have always lived in poverty. This legacy has been passed from grandparent to parent to child in an unbroken chain dating back to the time of Reconstruction. Evidence from both sides at trial confirmed that education is the only means of breaking this cycle of poverty. Even the State concedes that poor children CAN learn and that education can end the cycle of ignorance and poverty and despair.

Similarly, trial evidence also showed that the State's challenges in meeting the educational needs of these children are higher because of the devastating impact of poverty. These children come to school with tremendous deficits. Their parents and grandparents are the products of a constitutionally inadequate educational system. Many of them have suffered under exactly the same conditions their children now face. Many of these children are further distanced from a meaningful learning opportunity by cultural factors affecting their life experiences. As these at-risk children move through the school system, their learning deficits are compounded, and they fall further behind with each passing year.

For children living in poverty, therefore, the constitutional floor is necessarily higher. These at-risk children need the most capable and qualified teachers, better physical supports (facilities, instructional materials and supplies, and transportation), and more instructional time. Without adequate state funding for their educational needs, these children have no hope of success. Their local school districts are the most dependent on State funding, and they lack the financial resources to make up for the State's shortfall. The recent economic downturn has only exacerbated this situation, with children in the Plaintiff Districts suffering from a disproportionate impact.

**V. INADEQUATE FUNDING CONTINUES TO RESULT IN INADEQUATE INPUTS.**

Inadequate funding means inadequate resources to provide the high quality educational inputs so desperately needed by the children in the Plaintiff Districts. Plaintiffs previously provided this Court with evidence on the inadequacy of educational inputs: including teachers and other essential supports such as facilities, instructional materials, and instructional time.

1. Funding for teachers continues to be inadequate.

Of these inputs, trial evidence established that a teacher's effectiveness is the most important factor in a child's education. A knowledgeable teacher who is capable of helping children bridge the gap between what they know and what they need to know is essential to providing them with the opportunity to learn. Trial evidence proved that too many teachers in the Plaintiff Districts are not qualified or capable of delivering meaningful instruction to each child, so the children are not receiving the opportunity for a minimally adequate education. The Plaintiff Districts have difficulty attracting and retaining high quality teachers because of lower salaries, poor facilities, lack of support,

and the greater challenges the teachers must face.

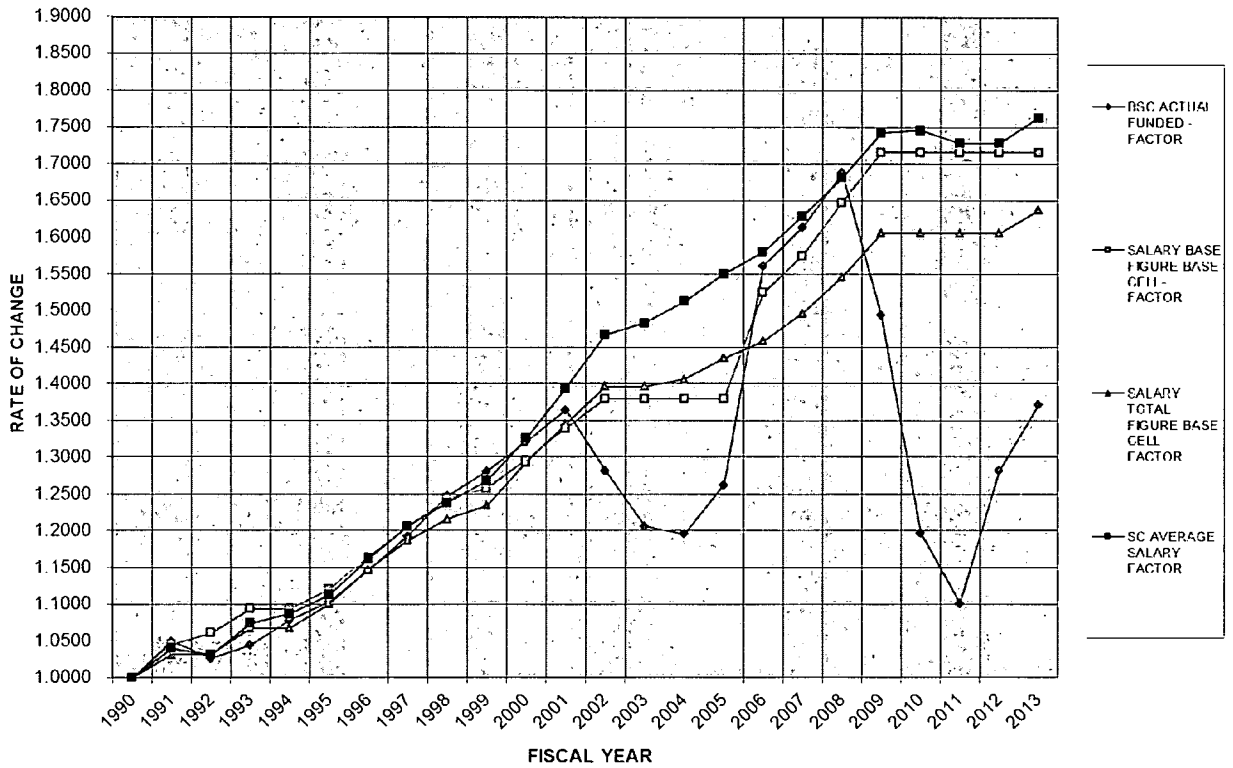
Since trial, the situation has become even more grave because of budget cuts and, paradoxically, the so-called recent "flexibility in funding," at least as it relates to minimum teacher salaries. In 2008, the General Assembly froze the required minimum teacher salaries in order to provide some relief to those school districts that could not fund increased salaries because of the economic recession. The required minimum salaries remained at the 2008-09 level for the next three years, through 2011-12. *See* Part IB, Proviso 1A.6, Act 73 of 2011. Some districts continued to fund at higher levels, but many took the option of freezing their teacher salaries at 2008-09 levels for several years. According to a survey of districts, all of the Plaintiff Districts maintained their district salary schedules at 2008-09 levels into 2010-11, with the exception of Orangeburg 3, which appeared to dip below that level, and Dillon 2. *See* A Review of South Carolina School Districts' Utilization of Financial Flexibility: Section III: All School Districts, maintained at <http://www.eoc.sc.gov/Home/EOC%20Reports/White%20Paper%20-%20Innovation/SECTION%203%20All%20School%20Districts.pdf>

In addition, the General Assembly allowed school districts to "waive step increases," meaning they were not required, as the state salary schedule contemplates, to increase teacher salaries because of additional years of experience. (Act 99 of 2011.) According to the analysis by the EOC, all of the Plaintiff Districts, with the exception of Dillon 2 took that option. *See id.*

These legislative options to the required minimum salary schedule resulted in a widening of any already existing gaps in salary levels among those districts that froze their teacher salaries (or waived the step increases) and those that were able to maintain the statutory increases. In other words the "haves"—districts capable of making up shortfalls—continued striding even further ahead of the "have nots"—like the Plaintiff Districts—in terms of ability to attract and retain the great teachers capable of meeting the needs of poor isolated, predominantly African American children in public schools. The General Assembly now proposes to require *all* districts to give their teachers a 2% raise for 2012-13. However, the gaps created by the legislatively-granted options allowing districts to reduce their salary schedules below previously mandated levels put those poorer districts, which had to exercise those options in order to continue operating, at a further competitive disadvantage in attracting qualified and effective teachers to their classrooms.

The following chart illustrates that even with the freezing of the base minimum teacher salary four years ago, a significant gap still remains between what the State is requiring districts to pay their teachers (blue line, “Salary Total Figure Base Cell-Factor”) and the amount the State is providing the districts to make those payments through its funding of the BSC (red line, “BSC Actual Funded-Factor”):

TREND ANALYSIS BSC AND TEACHER SALARY SCHEDULE - RATE OF CHANGE OVER TIME



Average teacher salaries in most of the Plaintiff Districts continue to lag behind the state average—suggesting a combination of lower salaries overall, less experienced teachers, and fewer teachers with advanced degrees—since those are the three primary factors that contribute to lower average salaries. The average salaries over the last four years are as follows:

DISTRICT	2007-08	2008-09	2009-10	2010-11
Allendale	\$38,199	\$43,290	\$40,196	\$39,518
Dillon 2	\$43,067	\$44,562	\$44,308	\$42,804
Florence 4	\$43,099	\$47,193	\$45,666	\$44,916
Hampton 2	\$41,371	\$42,881	\$45,173	\$45,723
Jasper	\$46,032	\$48,272	\$47,709	\$48,815
Lee	\$41,868	\$44,158	\$41,234	\$40,615
Marion 7	\$40,500	\$41,824	\$42,306	\$41,427
Orangeburg 3	\$47,084	\$49,199	\$48,568	\$48,127
STATE	\$45,107	\$46,992	\$46,618	\$46,166

Source: District Report Cards, 2008 through 2011.

This chart demonstrates that at least one of the Plaintiff Districts lagged behind state average salaries by over 14% as recently as FY 2010-11. The Plaintiff Districts cannot be expected to attract the greatest teachers to the children with the greatest needs with this kind of funding disadvantage permanently embedded in the State's unconstitutional public school system. Turnover rates for teachers in the Plaintiff Districts remain very high, with the multiple negative effects addressed in Plaintiffs' previous submissions to the Court. The teacher turnover rates in the Plaintiff Districts over the last few years are shown in the following table:

<b>DISTRICT</b>	<b>2006-07</b>	<b>2007-08</b>	<b>2008-09</b>	<b>2009-10</b>	<b>2010-11</b>	<b>5-year average</b>
Allendale	27.9	26.0	28.8	28.8	25.0	27.3
Dillon 2	8.5	11.3	12.6	6.0	5.1	8.7
Florence 4	30.8	26.2	31.4	18.6	22.0	25.8
Hampton 2	20.0	33.3	28.2	11.8	21.7	23.0
Jasper	31.6	28.5	21.7	13.5	16.3	22.3
Lee	26.1	14.9	24.7	21.7	36.4	24.8
Marion 7	13.8	22.8	18.2	11.5	7.7	14.8
Orangeburg 3	14.6	9.6	8.4	3.4	13.4	9.9
STATE	11.3	10.7	10.1	7.7	8.1	9.6

Source: CERRA, compiled from State Department of Education data. See [http://www.cerra.org/export/sites/default/research/docs/DistrictTurnoverRate\\_5year.pdf](http://www.cerra.org/export/sites/default/research/docs/DistrictTurnoverRate_5year.pdf).

Losing one-tenth to one-third of a workforce each year is extremely disruptive and harmful to any institution—and particularly so to institutions, like those in the Plaintiff Districts, that constantly struggle to deliver services.

2. Funding for essential supports continues to be inadequate.

Trial evidence also established that funding shortfalls further deprive the students in the Plaintiff Districts from the required educational opportunity because their facilities are not safe and inadequate, instructional materials and supplies are lacking, transportation costs are underfunded and additional time-on-task programs cannot be

supported. (Please see Plaintiffs' original briefs for more extensive discussion and data on these issues.)

Appropriations for instructional materials, which were already in short supply in the Plaintiff Districts, have been essentially cut in half since 2007-08. State appropriations for instructional materials have been cut \$30.1 million or 46.5% since FY 2007-08. The greatest impact, again, is on the Plaintiff Districts, which have no way of making up the shortfall and where the children and their families lack the resources to supplement public school instructional materials from private reserves of family or community wealth. Annual appropriations for materials are shown in the following table:

Fiscal Year	Total State Appropriations
2004-05	\$42,366,199
2005-06	\$49,777,587
2006-07	\$54,777,587
2007-08	\$64,777,587
2008-09	\$46,789,076
2009-10	\$39,785,050
2010-11	\$31,650,170
2011-12	\$34,650,170

Source: South Carolina Budget and Control Board Historical Analysis through November 15, 2011 at p. 66 ([http://www.budget.sc.gov/webfiles/OSB/historical/FY\\_2011\\_Historical\\_Analyses\\_for\\_webpage.pdf](http://www.budget.sc.gov/webfiles/OSB/historical/FY_2011_Historical_Analyses_for_webpage.pdf))

Flexibility provisions, enacted by the General Assembly in an effort to assist local school districts through the recession by permitting them to apply categorical or line item funding to other needs, have allowed what remains of funding for instructional materials to be directed elsewhere. *See* Part 1B, Proviso 1.40, Act 73 of 2011 (allowing funds to be transferred from the state general funds, the EIA, and the lottery “to ensure the delivery of . . . instruction to students” and also allowing the State DOE to suspend the purchase of updated textbooks).

The State DOE, in fact, suspended purchases of textbooks in 2009-10 and has not reinstated that expenditure. Part 1B, Proviso 1.43, Act 23 of 2009; Part 1B, Proviso 1.43, Act 291 of 2010; Part 1B, Proviso 1.40, Act 73 of 2011. As Plaintiffs previously showed the Court, the State was already tens of millions of dollars behind in purchasing new textbooks; the decision to suspend textbook purchases deepens the hole that must be filled if our children are to have access to current and up-to-date books in their schools. In addition, the General Assembly allowed school districts to retain for their own use the \$275 allotted to teachers for the purchase of classroom supplies and materials, thus further depleting the amounts available for the purchase of classroom instructional materials. Part 1B, Proviso 1A.16, Act 73 of 2011.

**VI. CONTINUING FAILURE OF STUDENTS MEASURED BY OUTPUTS CONFIRMS THE INADEQUACY OF THE STATE'S SCHOOL FUNDING.**

Outputs—as measured by standardized testing and school ratings—further reinforced the trial court's conclusion that the State's public education system is not providing the constitutionally required educational opportunity to children in the Plaintiff Districts. Since that time, outputs have continued their downward slide because of the State's unabated reliance on a fragmented, outdated funding system that ensures that the students in Plaintiff Districts will not receive the constitutional opportunity for a minimally adequate education.

Trial evidence revealed shockingly high percentages of poverty-stricken and African American children who were not graduating from high school, who were consistently scoring at the bottom of both national and state standardized tests, and who could not demonstrate basic proficiency of basic standards. Indeed, Defendants' finance

and teacher quality experts expressed heartfelt dismay at the systemic and disabling instructional problems that kept children in the Plaintiff Districts from learning.

At trial and on appeal, Defendants assured the Court that the situation would improve, but that the newly enacted EAA needed time to take effect. That argument was first made in 2003, four years after the EAA was enacted. Now, **eleven years later**, the EAA still has had no appreciable impact on the outcomes in the Plaintiff Districts.

The State's failure to constitutionally fund public education continues its long history of failing to educate children born and raised in poverty. In the "2009 Annual School and District Ratings Discussion Points" published by the EOC, some perspective is offered on district and student outputs:

- 15% of South Carolina's school districts received a "Below Average rating.
- 7% received an "At Risk" rating.
- Below Average districts are "in jeopardy of not meeting the State's standards for progress."
- At Risk districts fail to meet the standards for progress.
- In South Carolina, 10.8% of students went to schools in districts rated Below Average, and 4.9% of students attended schools rated as "At Risk."
- Thirty-two percent of schools during the school years 2008 and 2009 were deemed "sliders," meaning their ratings were lowered from year over year.

Schools with 90% or greater poverty were labeled "Extreme Poverty," and more to the point, achievement gaps comparing white children, African Americans, and poor children have not abated as promised by the State at trial. The report confirms that the gaps "are persistent and require significant attention and educational investment," which the State refuses to address. Poverty not only continues to burden our state, but increased in every district between 2008 and 2009, the years that were measured in the report. We continue to be a state with an undereducated populace and one with limited prospects for the very young. This can hardly be deemed progress since 2005.

The Annual District Report Cards for the eight Plaintiff Districts continue to prove that their children are not receiving this constitutionally mandated opportunity, and history demonstrates that it will not occur without dramatic changes, none of which have taken place since 2005. Students in the Plaintiff Districts, as the direct and undeniable lack of constitutionally sufficient educational offerings, are still failing.

A five-year report of the Plaintiff Districts reveals the following Absolute Ratings of each district since 2007, the last date we could find available data:

<b>District</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
Allendale	At Risk	At Risk	At Risk	At Risk	At Risk
Dillon 2	Below Average	Below Average	Below Average	Below Average	At Risk
Florence 4	Below Average	At Risk	At Risk	Below Average	Average
Hampton 2	At Risk	At Risk	At Risk	At Risk	At Risk
Jasper	At Risk	At Risk	At Risk	At Risk	At Risk
Lee	At Risk	At Risk	At Risk	Below Average	At Risk
Marion 7	Below Average	Below Average	At Risk	Below Average	Average
Orangeburg 3	At Risk	At Risk	At Risk	Average	Average

If the schools are failing, the State cannot expect a different result when measuring the outputs of students in these districts. The Plaintiffs proved, beyond doubt at trial, that the State was failing the children in the Plaintiff Districts, as evidenced by abysmal school ratings and student performance results. The Plaintiff Districts comprise the majority of the 7% of South Carolina's school districts that have been deemed "At Risk." This cannot be the result of chance or simple bad luck. Instead, it is the result of the lack of a meaningful educational opportunity.

Student outcomes in these districts are as predictable in 2012 as they were in 2005, and they are just as unacceptable by any measure now as they were during trial.

Failing student performance in the Plaintiff Districts are consistently shown by both the PACT test through 2008 the Palmetto Assessment of State Standards ("PASS") test that replaced PACT in 2009.

The change from PACT to PASS reduced the test results from four categories ("Advanced, Proficient, Basic, and Below Basic") to three ("Exemplary, Met, and Not Met"). "Proficient" and "Basic" were essentially grouped into "Met," which of course includes those who are "minimally prepared" to advance to the next grade, as defined in the former "Basic" category. "Not Met" is the current proxy for the former "Below Basic," meaning that the student did not learn what was expected in order to advance to the next grade. The schools, however, are forced to promote failing students irrespective of whether they have learned what is expected.

Proof that student outcomes in the Plaintiff Districts are as poor as they were in 2005 is proved by the 2011 Annual Report Cards. A summary of the outcomes for subjects tested below is as follows:

#### **Not Met Rates For 2011 By Subjects And Districts**

- Allendale, 52.4% to 75.7%.
- Dillon 2, 34% to 55%.
- Florence 4, 51.4% to 69.5%.
- Hampton 2, 50.4% to 70%.
- Jasper, 50.1% to 62.1%.
- Lee, 47.4% to 65.1%.
- Marion 7, 33.5% to 44.1%.
- Orangeburg 3, 40.3% to 56.1%.

The tables below show the percentages of students in grades 3 and 8 in the Plaintiff Districts scoring below grade level on the PACT English Language Arts ("ELA") and Math tests in 2001 and the PASS tests in 2010.

**Third grade scores below grade level:**

<b>District</b>	<b>2001 ELA Below Basic</b>	<b>2010 ELA Not Met</b>	<b>2001 Math Below Basic</b>	<b>2010 Math Not Met</b>
Allendale	50.4%	51.3%	48.5%	70.7%
Dillon 2	30.7%	23.8%	28.2%	31.6%
Florence 4	44.4%	45.8%	47.2%	71.9%
Hampton 2	46.6%	43.1%	50.4%	70.9%
Jasper	44.3%	46.93%	49.3%	69.8%
Lee	36.1%	32.8%	47.3%	62.1%
Marion 7	N/A	N/A	N/A	N/A
Orangeburg 3	29.1%	27.3%	37.3%	50.4%

**Eighth grade scores below grade level:**

<b>District</b>	<b>2001 ELA Below Basic</b>	<b>2010 ELA Not Met</b>	<b>2001 Math Below Basic</b>	<b>2010 Math Not Met</b>
Allendale	57.6%	66.9%	51.1%	74.7%
Dillon 2	42.6%	52.9%	60.1%	47.5%
Florence 4	56.7%	60.8%	66.7%	51%
Hampton 2	64.6%	72.9%	79.6%	60%
Jasper	62.0%	60.1%	76.6%	71.1%
Lee	63.6%	69.8%	69.8%	71.9%
Marion 7	N/A	N/A	N/A	N/A
Orangeburg 3	52.8%	60.0%	55.6%	62.8%

The outcomes are unchanged, unacceptable, and constitutionally impermissible.

For a full review of report cards see <http://www.eoc.sc.gov/reportsandpublications/Pages/default.aspx>.

The State's expert, Guthrie, testified at trial that if South Carolina were to just "stay the course," increases in student achievement would follow. He was not a gifted prognosticator. Unfortunately, South Carolina in fact has stayed the course, and the children in the Plaintiff Districts have borne the heavy burden of that decision.

Another revealing observation on the Report Cards is the continued comparison of the Plaintiff Districts to "Districts with Students Like Ours." They are described as districts with poverty indices of no more than 55 above or below the poverty index for the district. The State has decided that it's inappropriate to compare the Plaintiff Districts

with "normal" districts; it does not expect the Plaintiff Districts to perform as other districts do unless they have comparable poverty levels. Although the State's witnesses testified throughout the trial that "every child can learn and learn at high levels," apparently it does not believe this to be true. Instead, it expects these districts to perform as other high-poverty districts perform and no better. Implicit in this statement is a clear framing of the outcomes and expectations: children residing in high-poverty districts cannot and will not learn as children in the more affluent districts.

**VII. THE STATE HAS NOT EFFECTED MEANINGFUL CHANGE IN PUBLIC SCHOOL FINANCE SINCE 2005.**

In 2007-08, in support of their appeal of the lower court's Order, Defendants identified eleven "new" pieces of legislation that purported to "change the educational landscape" from that found to be inadequate at trial. Plaintiffs addressed each piece of legislation and proved that the "new" legislation was lacking because (1) it did not represent the sorely needed reform of the basic mechanisms that govern the calculation and allocation of funds to the school districts and (2) none of it assured an adequate stream of revenue to deliver an adequate educational opportunity to each child. Plaintiffs further noted that "questions remain as to whether any of these new provisions are accompanied by full or sufficient funding to pay for their new requirements." Subsequent events have, again, proven Plaintiffs' concerns legitimate.

1. CDEPP funding for early childhood is inadequate.

The State devised a four-year-old early childhood education pilot program (CDEPP). Six years later, CDEPP still not been implemented statewide and continues to be funded by proviso, at the whim of the annual budget process. Moreover, despite the documented need for facility space and improvements to house pre-kindergarten

programs for four-year-old children, the General Assembly has not met that need.

The Education Oversight Committee ("EOC") issued its most recent evaluation of CDEPP in January 2010, documenting modest and meaningful improvement in school readiness for the children enrolled. The EOC reported no expansion of CDEPP in public schools in 2008-09,<sup>2</sup> but also noted that 24 of 36 participating school districts maintained waiting lists for their CDEPP programs, with approximately 205 children on the lists.<sup>3</sup> Indeed, waiting lists for the public school CDEPP programs have existed since the early years of the programs.<sup>4</sup>

The EIA Program Report to the EOC for 2011-12 warned that funding cuts were impacting negatively on the CDEPP programs.

Because of EIA limited appropriations to CDEPP, the full per pupil funding amount of \$4218 was reduced to \$3670 per pupil. No funding for professional development or supplies and materials was given. Any further per pupil reductions could result in districts discontinuing the program. The SCDE has also not re-negotiated services with contracted personnel due to budgetary constraints, thus reducing the amount of technical assistance provided. During the past year, the SCDE used virtual means to provide information to schools and districts.

EIA Program Report for Fiscal Year 2011-12, at Question 8.<sup>5</sup>

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<sup>2</sup> 2009-10 Implementation & Expansion of the Child Development Education Pilot Program (CDEPP): Evaluation Report at 11

<sup>3</sup> *Id.* at 95.

<sup>4</sup> See 2007-08 Implementation & Expansion of the Child Development Education Pilot Program (CDEPP): Evaluation Report at 43, 72-73 (maintained at EOC website at <http://www.eoc.sc.gov/Reports%20%20Publications/2008-2012/Child%20Development%20Programs/FullCDEPPEvaluationReportJan2008withCoverPage.pdf>); 2008-09 Implementation & Expansion of the Child Development Education Pilot Program (CDEPP): Evaluation Report at 95 (maintained at EOC website at <http://www.eoc.sc.gov/Reports%20%20Publications/2008-2012/Child%20Development%20Programs/FinalColorVersionJanuary232009.pdf>).

<sup>5</sup> The report is maintained at EOC website at the following address:  
<http://www.eoc.sc.gov/Reports%20%20Publications/Budget%20Survey/2011/010215%20CDEPP%20SCD E-FINAL%2010-03-11rek.pdf>.

2. Act 388's fractured funding is defective and inadequate.

Act 388 of 2006 was a property tax relief measure, touted by the Defendants as alleviating the pressure on local districts to fund the expenses of their schools from local property taxes. Plaintiffs pointed out that far from being a cure, Act 388 created new problems for public schools and further escalated the arbitrariness of school funding in districts across the State. The harmful effects of Act 388 are many; some of the more serious are discussed below.

Act 388 has essentially destroyed the usefulness of the Index of Taxpaying Ability (“ITA”), a key feature of the EFA. The ITA's purpose was to ensure that property-poor districts (like the Plaintiff Districts and others that were unable to raise sufficient local revenues to pay the BSC) would receive larger proportions of the BSC from the State than did property-rich districts. The ITA is what made the EFA “wealth-sensitive.” Although Act 388 now prohibits school districts from raising operating expenses from homeowners’ *property taxes*, the EFA formula continues to use the homeowners’ *property values* in its calculation of the ITA, which governs how much of the BSC is paid by the districts and how much by the State. This has made the ITA meaningless and destroyed the only “wealth sensitive” aspect of the old and already inadequate EFA Base Student Cost formula. Act 388 forces school districts to contend with an increasingly chaotic funding mechanism, permanently sentencing the State's poorest and most isolated, predominantly African American children to unconstitutional educational opportunities.

Act 388 gave homeowners property tax relief and school districts “reimbursements” from sales tax revenues. Unfortunately, sales tax revenues are

notoriously more volatile than property tax revenues, and the increased reliance on sales tax revenues caused by Act 388 has increased the under-funding of already unconstitutionally substandard opportunities provided to children in the Plaintiff Districts.

Act 388's "reimbursement" of property tax revenues with sales tax revenues is locked into a base of 2006-07 property tax levels and rises across the board only with population growth and CPI growth (inflation). The funding does not increase with increases in the needs of the children, with continued aggregation of poor African American children into isolated rural ghettos, or with deteriorating conditions or outcomes. The deficiencies of property taxes in 2006-07 are locked in, and an already unconstitutional public education system is perpetuated.

Act 388 and the contemporaneously enacted Act 402 of 2006 together serve to make it impossible for the Plaintiff Districts to overcome the State's unconstitutional and under-funded public education system, despite efforts on the local level. Act 388 prohibits districts from gaining revenue on owner occupied property, and Act 402 creates an assessment cap that makes it impossible for local districts to take advantage of increased property values in the years ahead.

By taking over the formerly local system of property taxation and replacing it with State sales tax revenue, the State has assumed an ever greater responsibility for the quality of education provided at every local level. Unconstitutional public education opportunities have been made permanent by these acts of the legislature. The problems created by Act 388 clearly demonstrate how the system of funding education in South Carolina is fractured and must be reformed if we are to have any hope of ensuring the

provision of a constitutionally adequate opportunity to learn to all children.

3. Budget cuts have reduced the potential effectiveness of piecemeal legislation.

Of the piecemeal initiatives previously touted by the Defendants/Appellants, many have fallen prey to annual budget cuts. For example, compared to the \$81 million dedicated to technical assistance for schools performing at unsatisfactory and below average levels in the FY 2007/08 budget, current budgets have slashed those funds to \$6 million in FY 2011/12 and proposed for FY 2012/13. (Part IA, SECTION 1, XI, and Part IB, Proviso 1A.20, Act 73 of 2011); Part IA, SECTION 1, XI, and Part IB, Proviso 1A.10, House Approved Budget Currently in Conference Committee.)

Other initiatives have suffered a similar fate. Defendants identified a \$300,000 line item in the 2006/07 appropriations bill to study the impact of early childhood education programs on students' progress. (Part IB, Proviso 1A.63, Act 397 of 2006.) This budget item was not included in the FY 2011/12 budget.

The Defendants identified \$25 million in recurring funding to place licensed nurses in each public elementary school. (Part IA, Section 1, XVIII, Act 117 of 2007.) Funding has been cut to approximately \$20 million for 2011-12 (Part IA, Section 1, XI and XIII, Act 73 of 2011) and proposed for 2012-13. (Part IA, Section 1, XII, and XIV, House Approved Budget Currently in Conference Committee).

Despite the undeniable requirement that students today be proficient in technology, the iAm Student Laptop Program was funded only one year: 2007. The \$50 million reserved for instructional materials and textbooks in FY 2006/07 has dropped considerably: from \$50 million in FY 2006/07 down to \$36.1 million in FY

2011/12. (Part 1A, Section 1, VII, B and XI, A(3), Act 73 of 2011)

**VIII. POST-2005 LEGISLATION HAS ONLY EXACERBATED FUNDING PROBLEMS.**

Further, a review of legislation enacted since 2005 reveals that the General Assembly has failed to take any action having a meaningful impact on the educational opportunity being provided to children in the Plaintiff Districts. Instead, the General Assembly has taken actions that perpetuate the fragmented system that existed at the time of trial, reduce the revenue sources funding education, and hinder the already limited ability of local districts to make up for the State's shortfall. By way of example:

1. Provisos continue to reflect unpredictable, impermanent support for education programs: Annual appropriations bills reflect that the General Assembly has continued to fund highly specific education initiatives by budget proviso, which does not allow these programs to be implemented as long-term, sustainable programs. The most glaring example is CDEPP, the State's early childhood education pilot program. Early childhood education was the only area where the lower court ordered the State to create new programming, and the State has still never enacted permanent legislation guaranteeing a future source of funding for this program. In addition, as noted above, funding for new initiatives outlined by Defendants in their 2008 Cross-Appeal have been drastically cut.

2. Tax exemptions reduce funding sources: The General Assembly has, each year, approved numerous tax exemptions, which translate into loss of revenue for the State and negatively impact the amount of funding available for education. *See, e.g.* Act 340 of 2006 (property tax exemption); Act 388 of 2006 (property tax reform bill); Act 12 of 2007 (property tax exemption); Act 34 of 2007 (sales and use tax exemptions); Act 57

of 2007 (Homestead Exemption Fund); Act 115 of 2007 (sales tax); Act 338 of 2008 (sales tax exemptions); Act 367 of 2008 (property tax equalization and reassessment program); 2009 property tax equalization and reassessment program); Act 45 of 2009(property tax exemptions); Act 49 of 2009 (sales and use tax); Act 76 of 2009 (property tax exemptions); Act 57 of 2011(real property tax exemptions); Act 87 of 2011 (property tax credit). Moreover, the House Leadership recently proposed two bills as part of a comprehensive tax package that, when fully phased in, will reduce school district revenues by \$140 million and \$508.9 million respectively. H. 4993 (manufacturing property tax and business personal property tax reductions; H. 4998 (commercial property tax reduction).

3. Property tax legislation creates a "triple whammy" on local districts trying to supplement inadequate state funds: The General Assembly has enacted legislation that directly hinders the local districts' ability to make up for the State's funding shortfall. Indeed, three changes to the laws affecting property taxes and their distribution could be labeled a "triple whammy" on school districts.

(a) First, Act 388, discussed above, constrains the ability of school districts to fund their operations by tying them to property tax levels in effect in 2006-07, regardless of increased needs, and basing their replacement funding on unstable sales taxes.

(b) Second, the point of sale bill enacted in 2011, Act 57 of 2011, amended Act 388 to exempt 25% of the fair market value of so-called 6% property, including commercial property and second homes, from tax re-assessment when it is sold. This allows purchasers of such property to pay taxes on an artificially low value

and prohibits counties and school districts from collecting taxes on the true values of property.

(c) Finally, for the past three years, the General Assembly has suspended the maintenance of local effort (“MOE”) requirement set forth in 59-21-1030. *See* Budget Proviso 1.38. The MOE, first established by the EIA in 1984, requires school districts to maintain at least the same level of financial effort per pupil as the previous year, adjusted for inflation. School districts that are not fiscally independent (and, therefore, must rely on counties to assess and collect taxes for them) have had the leverage of the MOE to secure necessary funding from their counties. However, counties themselves have experienced decreased funding through the “Aid to Local Subdivisions,” which has been reduced by the General Assembly. Without the MOE requirement, the counties have not kept the school districts at their prior local funding levels.

This record of legislative activity reinforces the conclusion that funding education is not a top priority for the State. Indeed, despite the billion-dollar funding shortfall and education crisis in South Carolina, Defendants have not only cut revenues that would provide education funding, but have also resisted accepting—and even turned down—federal funding. In 2009, two citizens and the South Carolina Association of School Administrators sued Governor Mark Sanford, seeking an order requiring him to apply for over \$700 million in federal stimulus money. *See Edwards v. State*, 383 S.C. 82, 678 S.E.2d 412 (2009). The State would not have received the funds allocated in 2009-10 that allowed the BSC to be increased by \$300 had not this Court issued an order of mandamus in that case requiring the Governor to act.

In 2011, Governor Haley and State Superintendent Zais refused to request another \$143 million available to South Carolina through the federal Education Jobs Fund, Public Law No. 111-226 (August 10, 2010), a \$10 billion fund available to all states “to pay salaries and benefits, and rehire, retain, or hire employees for the 2010-2011 school year.”<sup>6</sup> The portion available to South Carolina was allocated and disbursed to other states. The table attached shows the allocations to all states:

<b>State or Other Entity</b>	<b>Cumulative Obligated <sup>1/</sup></b>	<b>Cumulative Outlays <sup>2/</sup></b>	<b>Cumulative Available Balance <sup>3/</sup></b>
Alaska	23,888,027.00	10,638,976.60	13,249,050.40
Alabama	151,748,704.00	143,029,648.93	8,719,055.07
Arkansas	92,660,895.00	87,093,259.64	5,567,635.36
American Samoa	8,324,352.00	5,835,140.12	2,489,211.88
Arizona	214,953,540.00	191,848,941.27	23,104,598.73
California	1,219,282,114.00	1,137,608,354.86	81,673,759.14
Colorado	161,878,618.00	156,345,974.05	5,532,643.95
Connecticut	112,118,999.00	83,931,677.00	28,187,322.00
District of Columbia	18,339,742.00	17,054,666.27	1,285,075.73
Delaware	27,830,331.00	20,493,040.13	7,337,290.87
Florida	563,020,764.00	553,271,200.29	9,749,563.71
Georgia	327,074,365.00	326,283,363.00	791,002.00
Guam	20,146,108.00	20,146,108.00	0.00
Hawaii	39,892,921.00	39,863,762.00	29,159.00
Iowa	97,915,400.00	97,880,563.83	34,836.17
Idaho	52,403,666.00	40,850,169.59	11,553,496.41
Illinois	421,533,983.00	378,179,300.00	43,354,683.00
Indiana	210,116,689.00	135,369,146.37	74,747,542.63
Kansas	93,822,647.00	93,803,537.13	19,109.87
Kentucky	136,939,318.00	86,740,644.03	50,198,673.97
Louisiana	149,203,507.00	139,318,335.22	9,885,171.78
Massachusetts	207,031,388.00	161,705,010.41	45,326,377.59
Maryland	181,573,218.00	156,856,234.49	24,716,983.51
Maine	39,646,042.00	25,360,500.77	14,285,541.23
Michigan	322,832,584.00	280,105,347.41	42,727,236.59
Minnesota	169,180,054.00	110,891,053.75	58,289,000.25
Missouri	192,530,618.00	192,530,618.00	0.00

<sup>6</sup> See <http://www.educationjobsfund.gov/Pages/home.aspx>.

State or Other Entity	Cumulative Obligated <sup>1/</sup>	Cumulative Outlays <sup>2/</sup>	Cumulative Available Balance <sup>3/</sup>
Northern Mariana Islands	8,289,850.00	8,289,850.00	0.00
Mississippi	99,267,859.00	95,345,198.72	3,922,660.28
Montana	31,191,576.00	30,737,469.00	454,107.00
North Carolina	302,867,431.00	211,885,657.47	90,981,773.53
North Dakota	21,835,501.00	18,204,942.51	3,630,558.49
Nebraska	59,760,789.00	59,409,585.16	351,203.84
New Hampshire	41,593,639.00	35,935,398.23	5,658,240.77
New Jersey	272,066,293.00	149,352,836.72	122,713,456.28
New Mexico	65,827,858.00	64,370,363.36	1,457,494.64
Nevada	84,341,093.00	75,517,125.18	8,823,967.82
New York	616,568,647.00	378,440,125.00	238,128,522.00
Ohio	366,515,940.00	264,865,144.83	101,650,795.17
Oklahoma	121,143,402.00	102,994,971.04	18,148,430.96
Oregon	119,691,912.00	107,866,917.02	11,824,994.98
Pennsylvania	393,546,112.00	387,815,661.00	5,730,451.00
Puerto Rico	131,281,961.00	49,236,277.68	82,045,683.32
Rhode Island	33,415,829.00	20,994,005.73	12,421,823.27
South Carolina	0.00	0.00	0.00
South Dakota	26,680,628.00	26,680,628.00	0.00
Tennessee	198,775,491.00	145,802,601.52	52,972,889.48
Texas	843,089,822.00	539,394,282.10	303,695,539.90
Utah	102,799,234.00	95,432,830.23	7,366,403.77
Virginia	253,168,067.00	158,493,861.06	94,674,205.94
Virgin Islands	13,239,690.00	13,239,690.00	0.00
Vermont	19,589,402.00	6,183,114.71	13,406,287.29
Washington	211,413,446.00	205,439,419.89	5,974,026.11
Wisconsin	182,304,066.00	137,866,610.64	44,437,455.36
West Virginia	55,465,437.00	25,701,101.05	29,764,335.95
Wyoming	17,792,687.00	13,866,514.76	3,926,172.24
Administrative	583,648.54	227,964.32	355,684.22

<b>Total Administered by</b>			
<b>Dept. of Education</b>	<b>\$ 9,949,995,904.54</b>	<b>\$ 8,122,624,720.09</b>	<b>\$ 1,827,371,184.45</b>

Bureau of Indian Education <sup>4/</sup>	50,000,000.00	50,000,000.00	0.00
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<b>Grand Total</b>	<b>\$ 9,999,995,904.54</b>	<b>\$ 8,172,624,720.09</b>	<b>\$ 1,827,371,184.45</b>
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<sup>1/</sup> Obligations are binding agreements that will result in outlays, immediately or in the future

<sup>2/</sup> Outlays are the amount of obligations paid

<sup>3/</sup> Available Balance is the obligated amount that has not resulted in an outlay

<sup>4/</sup> Funds apportioned to the Department of Education for the Bureau of Indian Education, which are administered by the Department of the Interior.

Similarly, federal money for special education services in South Carolina has now been reduced because the State did not meet the maintenance of effort (“MOE”) required in the federal Individuals with Disabilities Education Act (“IDEA”). The federal government provides funding to the states to be passed through to school districts to assist in providing the federally required free appropriate public education (“FAPE”) to children with disabilities. To prevent states from reducing and supplanting their own special education funding with the IDEA funding from the federal government, IDEA requires states to maintain at least the level of state funding from the previous year, referred to as the MOE. South Carolina has not met its MOE for three years and has actually reduced its special education funding by a larger percentage than it reduced the state budget. Accordingly, after much discussion and negotiation, the United States Department of Education informed Superintendent Zais that the allocation of IDEA funds to South Carolina has been reduced by \$36 million for 2011-12. This reduced allocation will stand as the base on which the State’s allocations for succeeding years will be built, thus reducing this funding for years to come.<sup>7</sup>

Further, Defendants know that the foundational funding system needs reform, but have failed to pursue efforts to revise it. As previously discussed, committees of both the House and Senate studied the funding issues in 2011, but their efforts have been stalled in committee with no further action since March 2011.

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<sup>7</sup> See <http://www2.ed.gov/policy/speced/guid/idea/monitor/lettertozaiss080911.pdf> and <http://www2.ed.gov/policy/speced/guid/idea/monitor/smfs-partb-waivers.html#sc>.

**IX. CONCLUSION: THE "SYSTEM" IS THE PROBLEM.**

As the discussion above illustrates, the current state of public school finance in South Carolina has not meaningfully changed in the nearly twenty years since this lawsuit was filed. The same primary funding mechanics—the EFA and EIA—are still in place. A continuing decline in funding resources means continued lack of resources adequate to meet the needs of the at-risk children in the Plaintiff Districts. The record of academic achievement in the Plaintiff Districts continues to demonstrate the monumental failure of the system of public education to support the constitutional promise of offering these children the opportunity to have a chance at a better life.

Trial evidence proved that the shortfall in education funding in 2003/04 was over a billion dollars. Yet the General Assembly continues to "tinker around the edges" of a fundamentally unstable and crumbling funding formula that cannot keep pace with modern requirements, continuing to insist that a "wait and see" approach will reveal a solution.

An entire generation of children has passed through the public education system since this lawsuit was filed, and still the General Assembly either will not accept that the current system of public education is fundamentally flawed or has other priorities than creating a public education system that can offer a minimally adequate educational opportunity to all children in the State, including the at-risk children in the Plaintiff Districts whose very lives depend on it.

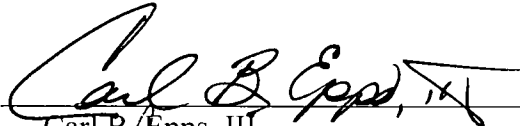
After all this time has passed without meaningful change in the state education system and without meaningful improvement of conditions in the Plaintiff Districts, the only conclusion to be reached is that the General Assembly will not meet its


constitutional obligation to the children of this State without the Court's involvement. Therefore, the Plaintiffs renew their request that this Court reverse the trial court's Order granting the limited remedy of requiring the General Assembly to implement an early childhood education program and grant the Plaintiffs' request for an Order requiring the General Assembly to design, fund and implement a comprehensive new funding system for public school education.

*(ATTACHED SIGNATURE PAGE)*

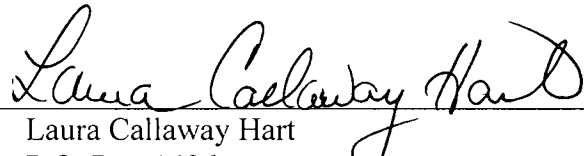
Respectfully submitted,

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June 11, 2012

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEE COUNTY  
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2007-065159

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Abbeville County School  
District, et al.,

Appellants-Respondents  
v.

**RECEIVED**

JUN 11 2012

**S.C. Supreme Court**

The State of South Carolina, et  
al., of whom John E. Courson,  
as President Pro Tempore of the  
Senate and as a representative of  
the South Carolina Senate, and  
Robert W. Harrell, Jr., as  
Speaker of the House of  
Representatives and as a  
representative of the South  
Carolina House of  
Representatives, are,

Respondents-Appellants

and

State of South Carolina, Nikki R.  
Haley, as Governor of the State  
of South Carolina, are,

Respondents.

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**PROOF OF SERVICE**

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I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants-Respondents, do hereby certify that I have served all counsel in this action with a copy of the documents hereinbelow specified by hand delivery to the following addresses:

Pleadings: Supplemental Brief of Appellants-Respondents

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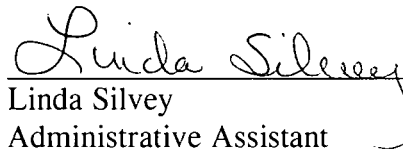
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June 11, 2012

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June 11, 2012

## Hand Delivered

The Honorable Daniel E. Shearouse  
Clerk of Court  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29211

**RECEIVED**

JUN 11 2012

**S.C. Supreme Court**

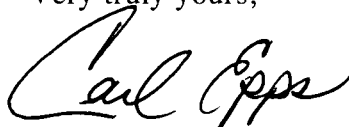
RE: Abbeville County School District, et al. v. State of South Carolina, et al.  
Civil Action No. 93-CP-31-169  
Court of Appeals Case Tracking No. 2007-065159  
Our File No. 11884/01500

Dear Mr. Shearouse:

Enclosed for filing are the original and 16 copies of the Supplemental Brief of Appellants-Respondents and Proof of Service in regard to the above matter. Please file the originals and return a clocked-in copy to us via our courier.

By copy of this letter to other counsel, we are serving them with a copy of the above-referenced document.

Very truly yours,



Carl B. Epps, III

CBEIII:ljs  
Enclosures

cc: Robert E. Stepp, Esquire (via hand delivery; w/enclosure)  
Elizabeth Van Doren Gray, Esquire (via hand delivery; w/enclosure)  
J. Emory Smith, Jr., Esquire (via hand delivery; w/enclosure)  
Swati Patel, Esquire (via hand delivery; w/enclosure)