THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM LEE COUNTY
COURT OF COMMON PLEAS

Thomas W. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2007-065159

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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. This Court Is Properly Called Upon To Hear This Appeal. 3

A. This Case Is Not Moot Because the South Carolina Public Education System Continues to Suffer From the Same Inadequacies That Were Responsible For the Constitutional Failure Established At Trial. 3

B. This Case Is Justiciable Because A Ruling Is Essential to Ensure Protection of Important Constitutional Rights. 6

1. This case is capable of repetition but evading review. 6

2. This case is of public importance and manifest urgency. 8

3. This case affects future events or has collateral consequences for the parties. 9

II. Defendants Have Failed To Correct Their Constitutional Violation. 10

A. Spending Is Not Rationally Related to Student Needs. 11

B. Post-Trial Education-Related Initiatives Do Not Solve Constitutional Problems. 18

III. This Court Can and Should Require the General Assembly to Remedy Its Persistent Constitutional Violation. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Abbeville County School District v. State,
335 S.C. 58, 535 S.E.2d 535 (1999) 1, 9, 20

Ashmore v. Greater Greenville Sewer District,
211 S.C. 77, 44 S.E.2d 88 (1947) 8

Boulder Valley School District RE-2 v. Colorado State Board of Education,
217 P.3d 918 (Colo. Ct. App. 2009) 7, 8

Brigham v. State,
889 A.2d 715 (Vt. 2005) 4

Byrd v. Irmo High School,
321 S.C. 426, 468 S.E.2d 861 (1996) 6

Campaign for Fiscal Equity v. State,
801 N.E.2d 326 (N.Y. 2003) 15

Campbell County School District v. State,
907 P.2d 1238 (Wyo. 1995) 16

Committee for Education Equality v. State,
294 S.W.3d 477 (Mo. 2009) 7

Cox ex rel. Cox v. State,
80 P.3d 514 (Or. Ct. App. 2003) 5

Curtis v. State,
345 S.C. 557, 549 S.E.2d 591 (2001) 6

Hussein v. State,
81 A.D.3d 132 (N.Y. App. Div. 2011),
aff'd, 2012 WL 2376939 (N.Y. June 26, 2012) 4, 5

Idaho Schools for Equal Educational Opportunity v. Idaho State Board of Education,
129 P.3d 1199 (Idaho 2005) 5, 8

Leandro v. State,
488 S.E.2d 249 (N.C. 1997) 15

Linda Mc Co., Inc. v. Shore,
390 S.C. 543, 703 S.E.2d 499 (2010) 3

Lobato v. State,
218 P.3d 358 (Colo. 2009) 15, 17, 18

McCleary v. State,
269 P.3d 227 (Wash. 2012) 16, 18, 21, 22

Montoy v. State,
120 P.3d 306 (Kan. 2005) 15

Neely v. West Orange-Cove Consolidated Independent School District,
176 S.W.3d 746 (Tex. 2005) 16

Nelson v. Ozmint,
390 S.C. 432, 702 S.E.2d 369 (2010) 6

Sloan v. Greenville County,
380 S.C. 528, 670 S.E.2d 663 (Ct. App. 2009) 6

Sloan v. South Carolina Department of Transportation,
379 S.C. 160, 666 S.E.2d 236 (2008) 8, 9

Other Authorities

American Recovery and Reinvestment Act of 2009 (ARRA),
Pub. L. 111-5 (2009) 14

INTRODUCTION

The record in this case established unequivocally that the General Assembly failed to meet its obligation to provide each child in our State the right to an adequate educational opportunity, and the constitutional violation has not been corrected. The question now is this: how will this Court meet its own mandate to address that failure?

Four years ago, Plaintiffs argued to this Court that, in determining the appropriate response to the State's constitutional violation, three things were clear:

1. The required educational opportunity is lacking in the Plaintiff Districts.
2. The State has the power to change these children's lives through education.
3. The State will not remedy its constitutional failure unless this Court intervenes.

(*See* Final Reply Brief of Appellants-Respondents filed 5/1/08 [hereinafter "Plfs.' Reply Brief"] at 70-71.) These statements remain true today. Although the Defendants state that "there is no data to confirm the impact of [legislative changes since 2005]," the record of educational achievement in the Plaintiff Districts—or lack thereof—stands as a monument to the Defendants' fundamental failure to remedy their persistent violation of constitutional requirements.

Defendants seek to avoid judicial oversight of their failure by invoking the doctrine of mootness. The Court must reject their suggestion that because teachers, students, facilities and education legislation change from year to year, the quality of the State's public education system eludes judicial review. This argument is fundamentally at odds with this Court's holding in *Abbeville* that the question of whether the State has met its constitutional covenant with its children must be adjudicated.

As discussed more fully in Supplemental Brief of Appellants-Respondents filed on June 11, 2012 [hereinafter "Plfs.' Supplemental Brief"], South Carolina's public education system has not meaningfully changed since trial. It is built on a foundational funding formula that bears no rational relationship to the needs of the student population it is intended to educate. The result is a system that cannot provide the resources necessary to create the constitutionally required educational opportunity for each child. Until the inadequacies in the *system* are addressed, the children in the Plaintiff Districts will continue to be denied that opportunity. Because the General Assembly has not addressed these inadequacies, the case is not moot, and this Court is properly called upon to review the trial court's Order determining the appropriate remedy for the Defendants' constitutional violation.

Even if the Court were to conclude the case is moot, which it should not, it is still properly called upon to hear this appeal under each of the three well-recognized exceptions to the mootness doctrine. Indeed, the very facts raised by the Defendants as to the inevitable changes that will occur from year to year in the public education system illustrate the importance of an Order from this Court finally determining the constitutional issues presented.

Each year in the Plaintiff Districts, new students enter the public education system hopeful of acquiring an education; each year another group of students departs the public education system disappointed, having missed out on the opportunities constitutionally guaranteed, but not provided by the General Assembly. This situation will persist as long as the General Assembly continues to rely on the unsteady foundational funding system that has been in place since long before this trial began. Accordingly, Plaintiffs renew

their request for an Order from this Court declaring that the current education system in South Carolina is unconstitutional and requiring the General Assembly to reform the system to correct the constitutional deficiencies.

I. This Court Is Properly Called Upon To Hear This Appeal.

A. This Case Is Not Moot Because the South Carolina Public Education System Continues to Suffer From the Same Inadequacies That Were Responsible For the Constitutional Failure Established At Trial.

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. . . . A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 556, 703 S.E.2d 499, 506 (2010). This case is not moot because the inadequacies in South Carolina's public education system that were responsible for the constitutional violation established at trial persist today.

In arguing the case is moot, the Defendants narrowly identify the issue presented as whether the constitutionally required opportunity existed at the time of trial. The scope of this appeal is not so narrowly drawn. This Court must affirm the manifestly correct finding that a constitutional violation existed on the record of evidence at trial AND find further that the State's failure to meet constitutional standards is attributable to a fundamentally flawed SYSTEM of public education, correcting the erroneous piecemeal (non-systemic) method of analysis applied by the lower court. Therefore, the issue before the Court is whether the system of education is designed to meet the needs of the at-risk children living in the Plaintiff Districts. The evidence at trial proved that it was not, and

the public record of legislative activity since the time of trial demonstrates conclusively that the General Assembly has not remedied that deficiency. Thus, a ruling by this Court that adequate educational opportunities did not exist at the time of trial due to deficiencies in the public education system will have a "practical legal effect upon the existing controversy" because the same deficiencies in the public education system persist today.

The fact that students, teachers, facilities and other conditions may have changed since the time of trial does not change the result. At trial, the Plaintiffs offered ample evidence of inadequate educational inputs to prove that the education funding system was unstable and inadequate to provide for the increased needs of the at-risk students living in the Plaintiff Districts. The Court may affirm that conclusion with reference to the overwhelming record evidence of the inadequate educational inputs and appalling outcomes that existed at the time of trial and continues through today. The education funding system that was proven to be inadequate based on the record evidence at trial has not meaningfully changed.

Courts in other jurisdictions confronting similar issues have found that a legislature's enactment of post-trial legislation does not moot a case challenging the constitutionality of school funding and other important issues involving public school education. As those courts have found, the issue is whether the post-trial legislation effects meaningful change. When, as here, it does not, or when any question remains as to whether the post-trial legislation will remedy the proven constitutional failure, the case is not moot. *See Hussein v. State*, 81 A.D.3d 132, 133 (N.Y. App. Div. 2011), *aff'd*, 2012 WL 2376939 (N.Y. June 26, 2012); *Brigham v. State*, 889 A.2d 715, 722 (Vt. 2005)

(noting that "a change in law does not automatically moot a claim that is based on a prior version of the law"); *Idaho Schs. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 129 P.3d 1199, 1206 (Idaho 2005) (school funding case was not moot because newly enacted legislation was inadequate to correct constitutional deficiencies in current funding system); *Cox ex rel. Cox v. State*, 80 P.3d 514, 515 (Or. Ct. App. 2003) (holding that "where a mechanism in place for school district funding at the time of trial was superseded by an initiative . . . while the appeal was pending," the "new funding scheme [did] 'not moot that issue'").

In *Hussein*, the plaintiffs sought to compel the state "to establish and maintain an education aid and funding system that would ensure that all public school children throughout the state would receive a meaningful opportunity to receive an education meeting the minimum standards set forth by the Court of Appeals." *Hussein*, 81 A.D.3d at 133-34. The appellate court denied defendant's motion to dismiss the claims as moot and held that the claims were ripe for review despite being based upon data obtained before the enactment of the General Assembly's response to the prior funding cases. *Id.*, at 134-135. The *Hussein* court likewise rejected the defendant's argument that the enactment of subsequent legislation mooted the plaintiffs' claims based on the possibility "that plaintiffs will successfully demonstrate, based on available data, that even the planned increases in aid are not sufficient to enable the school districts to provide a constitutionally-guaranteed sound basic education." *Id.* at 137. The New York Court of Appeals affirmed this decision on June 26, 2012.

Plaintiffs have shown in this case not only that the General Assembly continues to attempt piecemeal legislation clearly insufficient to offer children in the Plaintiff Districts

the constitutionally required educational opportunity, but as demonstrated in their Supplemental Brief, have shown that the General Assembly continues its intergenerational malfeasance by failing to meet its funding obligations under each supposed remedy it offers.

B. This Case Is Justiciable Because A Ruling Is Essential to Ensure Protection of Important Constitutional Rights.

Three well-recognized exceptions to the mootness doctrine allow the Court to hear this appeal, even if it finds, which it should not, that post-trial developments have rendered some or all of the issues moot: (1) capable of repetition but evading review; (2) public importance of manifest urgency; and (3) affecting future events, or having collateral consequences for the parties. *See Curtis v. State*, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001); *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). As the following discussion illustrates, a ruling from this Court is essential to ensure the protection of important constitutional rights.

1. This case is capable of repetition but evading review.

"[I]f the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction." *Curtis*, 345 S.C. at 567, 549 S.E.2d at 596; *Sloan,* 670 S.C. at 528, 670 S.E.2d at 667; *see also Nelson v. Ozmint*, 390 S.C. 432, 434-35, 702 S.E.2d 369, 371 (2010); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (finding that challenge to school policy fell within the exception where there was a reasonable expectation that someone in the future—not necessarily the complaining party—might be subjected to the action again).

Defendants claim the case is moot because of enactment of certain post-trial education legislation and because of factual "differences" that have developed since the

time of trial: such as turnovers in teachers, administrators, and students; changes in school buildings; and consolidation or mergers of school districts. The reality, however, is that change is unavoidable in a public school setting where students progress each year to a new grade level or school and, particularly, in the Plaintiff Districts where teacher turnovers are epidemic, and unsafe facilities require frequent repairs or replacement. Denying review of the adequacy of a public school system because of such factual changes would inherently render the State immune from constitutional oversight.

Further, short-term legislation and education policies set by the General Assembly are apt to change each year with each new legislative session. According to the Defendants' logic, these changes would require the Plaintiff Districts to re-file a lawsuit every year, only to see it dismissed every year when a new legislative session brought new education initiatives and programs, however temporary or peripheral. This would allow the State to insulate itself from accountability for constitutional compliance merely by making annual changes to education legislation or policies.

For these reasons, courts in other jurisdictions have expressly recognized that application of the "capable of repetition, yet evading review" exception is particularly appropriate where, as here, post-trial education legislation changes are not permanent. *See Boulder Valley Sch. Dist. RE-2 v. Colorado State Bd. of Educ.*, 217 P.3d 918, 922-23 (Colo. Ct. App. 2009) (exception applied when subsequent changes to school legislation were temporary); *Committee for Educ. Equality v. State*, 294 S.W.3d 477, 486 (Mo. 2009) (exception applied to inadequate funding case). (Please see Plaintiffs' Supplemental Brief for further discussion of the impermanent nature of many of the post-trial education reforms and initiatives identified by the Defendants as purportedly

mooting this appeal.)

2. This case is of public importance and manifest urgency.

Appellate courts in South Carolina may decide questions "of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.'" *Sloan v. South Carolina Dep't of Transp.*, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008); *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 97 (1947). This exception undoubtedly applies to the questions presented in this case.

The adequacy of public education is undeniably a matter of public importance. This Court has previously recognized both that educational opportunity is important for the benefit of both the child and the public at large and that the constitutional adequacy of the public education system is a matter appropriate for judicial review. Indeed, all parties agreed at trial on the paramount importance of a quality public school education. As trial testimony proved, the failure to provide the opportunity for children in poverty to acquire a minimally adequate education has significant, pervasive, and long-term effects that fundamentally impact our State and its future. Judicial oversight is essential in light of evidence that the State has repeatedly failed to provide students with the required opportunity for a "chance at life."

Other jurisdictions have likewise acknowledged the public importance of reviewing the constitutionality of public education funding in the face of mootness arguments. *See Idaho Schs. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 129 P.3d 1199, 1207 (Idaho 2005) (recognizing the public importance of reviewing the quality of the public education system, which "affects the present and future quality of life of Idaho's citizens and its future leaders, its children"); *see also Boulder Valley Sch.*

Dist. RE-2, 217 P.3d at 923 (applying "public importance" exception to constitutional challenge to education statute).

In addition, a decision by this Court establishing the unconstitutionality of the current education system is imperative and urgently required to secure important constitutional rights for each child in South Carolina. This Court has previously recognized that this case involves a novel issue and that "[i]t is the duty of this Court to interpret and declare the meaning of the Constitution." *Abbeville Cnty. Sch. Dist. v. State*, 335 S.C. 58, 66, 535 S.E.2d 535, 539 (1999). As discussed more fully in prior briefs, "new legislation" enacted by the General Assembly does not resolve the constitutional violations, leaving the issues ripe for review by this Court. More than one generation of children has already passed through the public education system since this lawsuit was filed, and this State cannot afford to sentence current and future generations to a similar fate while the General Assembly continues to fail to remedy its constitutional failure.

3. This case affects future events or has collateral consequences for the parties.

"'[I]f a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.'" *Sloan v. SCDOT*, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008). This Court can give effective relief in this case, but to the extent the passage of time may limit the effect of any relief on the rights of particular students, a ruling by this Court will nevertheless have a direct impact on future events, both as to the parties and to the entire state.

Without a ruling by this Court, residents in the Plaintiff Districts will continue to live in poverty, lacking the educational skills necessary to obtain employment adequate to support themselves and their families; the counties themselves will suffer economically and socially from the State's failure to provide the constitutional opportunity to their citizens; the entire State will suffer from an inability to recruit businesses that require an educated pool of workers and from the social cost of a poorly educated populace. Therefore, this case affects future events and has collateral consequences for all parties.

II. Defendants Have Failed To Correct Their Constitutional Violation.

In support of their mootness argument, Defendants maintain that the conditions leading the trial court to conclude that the constitutionally required educational opportunity was lacking at the time of trial no longer exist and that Defendants continue to make education "a top priority." The General Assembly's commitment to education is not on trial, however. What is at issue is whether the Defendants have discharged their constitutional duties in public education by creating and continuing a system of funding education that is rationally related to the needs of the students in our state. The post-trial record of legislative activity does not alter the conclusion proven at trial: they have not.

Spending on education in South Carolina is not rationally related to the needs of the students in South Carolina, and the post-trial education initiatives do not alleviate the deficiencies resulting from this foundational defect in the state education system. In addition, Defendants' argument that they have responded to the Plaintiffs' "complaints" by enacting new legislation intended to reform education policies misses the point. Defendants' *microscopic* focus on the quality of individual educational inputs and piecemeal education initiatives fails to account for the *macroscopic* effect of a system

built on an unstable foundation. The trial court made the same error when it found that individual educational inputs were "minimally adequate" and that, therefore, the State's constitutional violation was limited to its failure to provide funding for early childhood education programs.

The continuing poor performance of students in the Plaintiff Districts on the PACT (and, more recently, PASS) standards testing—together with arbitrary and uncertain funding—clearly demonstrate the Defendants' failure to maintain and support its system of public schools to meet their constitutional mandate.

A. Spending Is Not Rationally Related to Student Needs.

To support their claim that education funding has remained steady during the recession, Defendants refer only to "average state appropriations to education . . . over-time"; they pointedly omit reference to the amounts that were actually allocated to school districts. Defendants do not identify the pertinent time period or which appropriations were included in the "average state appropriations to education," and, therefore, Plaintiffs are unable to verify this specific claim. What is clear, however, is that actual allocations of EFA funds from the General Fund to the Plaintiff Districts declined by 25% to 53% in Plaintiff Districts from fiscal year 2008 to fiscal year 2011, and EIA revenues declined over the same period. As Plaintiffs pointed out:

> [T]otal 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 years.)

(Plfs.' Supplemental Brief at 13.) Similarly, allocations of lottery funds to school districts for K-12 education also fell. (*Id.* at 14-15.) In short, Defendants have reduced

state funding and support services (including transportation supports), forcing Plaintiff Districts to operate with fewer teachers and administrative staff, fewer programs for struggling students, and generally less resources all around. Educational efforts have suffered as a consequence.

Defendants also ordered mid-year reductions to appropriations for K-12 education in fiscal years 2008-09 and 2009-10. Appropriations to the Department of Education were cut by $297,016,211 in 2008-09 and by $186,898,385 in 2009-10. (*See* South Carolina Budget and Control Board Historical Analysis through November 15, 2011 at 99, maintained at http://www.budget.sc.gov/webfiles/OSB/historical/FY_2011_Historical_Analyses_for_webpage.pdf.) Plaintiff Districts, which generally enter into annual employment contracts with teachers and other personnel at the start of each fiscal year, are particularly hard-pressed to absorb mid-year reductions in their budgets and revenues. These mid-year budget cuts negatively impact on the Districts' abilities to meet their contractual salary obligations and inhibit their abilities to provide the at-risk children in their schools meaningful opportunities to learn and acquire an adequate education.

Defendants also claim that "education's percentage of total state appropriations . . . has remained steady during this time at 40.5% in 2008 to 42.2% in 2012." Even if that were the pertinent standard, and it is not, this statement is inconsistent with data published by the Budget and Control Board, which shows the following:

Fiscal Year	**Percentage of Total Funds Appropriated to Educational Functional Group**
2004-05	20.78%
2005-06	20.72%
2006-07	20.60%
2007-08	20.79%

Fiscal Year	Percentage of Total Funds Appropriated to Educational Functional Group
2008-09	20.60%
2009-10	18.44%
2010-11	16.90%
2011-12	17.89%

Source: South Carolina Budget and Control Board Historical Analysis through November 15, 2011 at pp. 21-28, maintained at http://www.budget.sc.gov/webfiles/OSB/historical/FY_2011_Historical_Analyses_for_webpage.pdf.

With respect to per pupil spending, Plaintiffs established in their initial briefing to this Court that simplistic comparisons of per pupil expenditures across districts as reported on the In$ite compilations are misleading for a variety of reasons and do not establish that children are receiving the required educational opportunities. (Final Principal Brief of Appellants-Respondents filed 5/1/08 [hereinafter "Plfs.' Principal Brief"] at 125-34; Plfs.' Reply Brief at 50-58.) In summary, simple comparisons of In$ite per pupil expenditures are not appropriate comparisons for the following reasons:

- In$ite does not separate expenditures made from general funds and those made from categorical funds and does not indicate any constraints on the uses to which districts may apply their funds. Consequently, In$ite does not show how much is actually available to pay for teachers, or summer school, or after school, or supplies, or building repairs, or other items.

- Calculations of per pupil expenditures in In$ite include amounts spent on building repairs and maintenance of old buildings, although they exclude amounts spent on capital improvements or debt service for new buildings. This results in higher apparent per pupil expenditures in districts with more old buildings.

- Diseconomies of scale inevitably result in higher per pupil costs for districts with fewer pupils over whom fixed costs can be spread. For example, one superintendent's salary of $90,000 in a district of 1000 students results in a $90 per pupil cost, but in a district of 5000 students the per pupil cost would only be $18.

- Per pupil expenditures in poor, rural districts are necessarily increased by ancillary services such as free and reduced meals for poor students, who comprise large percentages of the student population in Plaintiff Districts, and transportation needs in rural districts like the Plaintiff Districts.

These issues distort the true picture of the funding needs and realities in the Plaintiff Districts and skew the In$ite per pupil expenditure data to enable Defendants to imply that Plaintiff Districts have "more money" and can deliver the required educational opportunities to their students, in spite of the proven funding issues and educational deficiencies described at trial.

Moreover, Defendants unjustifiably take credit for funding they distributed to school districts, and which was expended by the districts, in 2009-10 and 2010-11 as a result of the federal stimulus bill, properly referred to as the State Fiscal Stabilization Funds (SFSF) under the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. 111-5 (2009). As Plaintiffs stated in their initial briefing to this Court, evidence of federal money is not relevant to the ultimate issue of whether the State has met its constitutional obligation of providing sufficient funding to provide the opportunity for each child to receive a minimally adequate education. (Plfs.' Principal Brief at 132.) This is particularly true in the case of the federal stimulus money, which was available for only two years to assist states in maintaining their essential state functions, including their educational systems, during the depths of the recession. As noted in Plaintiffs' Supplemental Brief, Defendants have since turned away additional federal funding assistance for South Carolina's school districts; the effects of that refusal are not yet reflected in In$ite data.

Finally, Defendants and the trial court err by assuming that higher per pupil expenditures—distorted as they may be by the above factors—are *ipso facto* sufficient to

ensure that each child is provided with the constitutionally mandated educational opportunities. As Plaintiffs have previously shown, measurements of per-pupil expenditures do not measure adequacy and do not establish that Defendants provided sufficient funding to ensure adequate inputs and outputs. (Respondents' Brief of Appellants-Respondents at 43.) By Defendants' faulty reasoning, similar to the argument advanced by the State of New York and expressly rejected by New York's highest court, "some expenditure level, if high enough relative to figures nationwide [or statewide], simply must be 'enough,' without reference to student need, local costs, and the actual quality of inputs and outputs," *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 341-42 (N.Y. 2003). Such an argument does not answer the question before this Court: Does the State ensure, through its legislation and funding, that each child in the Plaintiff Districts is provided with the opportunity to acquire a minimally adequate education? The trial court correctly determined that it does not, and focusing on per pupil expenditures as reported in In$ite does not establish the converse.

Defendants continue to fail to correlate their funding to the actual educational needs in the State, which substantiates their continuing failure to meet their constitutional obligation. As many courts have found, "a funding system that distribute[s] state funds to the districts in an arbitrary and capricious manner unrelated to [its constitutional] educational objectives," *Leandro v. State*, 488 S.E.2d 249, 258 (N.C. 1997), cannot be said to be a constitutional system. *See Lobato v. State,* 218 P.3d 358, 374 (Colo. 2009) (the court must determine whether the state's public school financing system is "rationally related to the constitutional mandate" of the education clause); *Montoy v. State*, 120 P.3d 306, 310 (Kan. 2005) (school financing formula must be based upon

actual costs to educate children rather than on former spending levels and political compromise); *Neely v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 784-85 (Tex. 2005) (court must determine whether the statutory provisions creating the public school system, including the financing of it, are arbitrary and therefore unconstitutional; "It would be arbitrary . . . for the Legislature to define the goals for accomplishing the constitutionally required general diffusion of knowledge, and then to provide insufficient means for achieving those goals."); *McCleary v. State*, 269 P.3d 227, 253, 258 (Wash. 2012) (state funding for education does not meet constitutional requirements if it is based on an outdated funding model or if it is supported by unstable and undependable state sources); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995) (legislature must make policy choices to meet the constitutional educational standard, determine the cost of those choices, then take necessary action to fund those costs).

The State of South Carolina has an obligation under Article XI, Section 3 of its Constitution to "provide for the maintenance and support of a system of free public schools." School funding that is not rationally related to or based on the actual costs of providing the constitutionally adequate educational opportunities does not fulfill this mandate. Plaintiff Districts alleged and proved at trial that school funding allocations are based on historical amounts and political compromises, resulting in arbitrary and irrational financial support of the constitutional mandate. (*See* Plfs.' Principal Brief at 107-15, 135 n.41.) Defendants purposefully chose to fund tax relief over the EFA's Base Student Cost. (Plfs.' Reply Brief at 63-68.) No legislation or funding provisions since the trial of this case have altered this result.

In a school funding case in Colorado, the plaintiffs similarly alleged that school funding amounts were based on "historical compromise" instead of a "rational determination" of the amount it would cost to provide an education meeting state standards. *See Lobato v. State*, 218 P.3d 358, 374 (Colo. 2009). On remand for trial on those allegations, the trial court recently found that the public school finance system, based on a funding mechanism set in place in 1994, was unconstitutional because it was "not rationally related to the mandate of the Education Clause" *Lobato v. State,* Case No. 2005CV4794175 at 176 (December 9, 2011), found at http://childrens-voices.org/wp-content/uploads/2011/12/Decision1.pdf, and also because it was insufficient to meet the requirements of Colorado's standards-based education, *id.* at 177, 179, similar to that which the Education Accountability Act put into place in South Carolina in 1998. The Colorado funding mechanism, like the EFA and EIA in South Carolina, was adopted before the implementation of the standards-based education.

> If only for that reason, it cannot possibly relate to funding the costs of that system. Neither the statewide base nor the factors have ever been changed to respond to those changing costs. As a result, the PSFA funding levels are now and have since inception been completely disconnected from the real, knowable funding needs of a thorough and uniform system of public education.

Id. at 176. The trial court further found that the plaintiff school districts "are unable to provide the educational programs, services, instructional materials, equipment, technology and capital facilities necessary to assure all children an education that meets the mandates of the Education Clause and standards-based education," *id.* at 178, because of a "systemic failure" that is "directly correlated to inadequate and irrational funding." *Id.* at 179. On this evidentiary foundation, the trial court ruled that the "entire system of public school finance . . . is not rationally related to the mandate of the Education

Clause," *id.* at 176, is "irrational, arbitrary, and severely underfunded," and is, therefore, unconstitutional. *Id.* at 182.

The Supreme Court of Washington recently decided a school finance case using very similar language and reasoning. *See McCleary v. State*, 269 P.3d 227 (Wash. 2012). The language and analysis of *McCleary* and *Lobato* can be applied directly and with little revision to South Carolina's system of public education today, which like those in Washington and Colorado, is not based on any rational connection to the real, current educational needs of students and is, therefore, unconstitutional.

B. Post-Trial Education-Related Initiatives Do Not Solve Constitutional Problems.

Defendants also identify post-trial legislative enactments they describe as "material changes in the laws governing education." As Plaintiffs have shown in earlier briefs, Defendants have not made meaningful changes in the funding or other structures supporting public education. Instead, Defendants continue to fail to deliver the constitutionally required educational opportunities to public school children. In summary:

- Defendants claim expenditures by Plaintiff Districts have increased. Plaintiffs discuss above the misleading illusions and incorrect conclusions related to this issue.

- Defendants claim to have resolved the problematic funding issues created by reliance on property taxes, referring to Act 388 of 2006. Plaintiffs pointed out that Act 388 is not school funding reform, but tax relief, and discussed the devastating consequences to school districts resulting from Act 388 (*See* Plfs.' Supplemental Brief at 33-35; Final Respondents' Brief of Appellants-Respondents, filed 5/1/08 [hereinafter "Plfs.' Final Respondents' Brief"] at 21-31.)

- Defendants claim they positively changed the way funding for technical assistance and other needs is provided to under-performing schools and districts by allowing flexibility in the use of some funding. As noted in Plaintiffs' Supplemental Brief, however, technical assistance funding has plummeted from $81 million in fiscal year 2007-08 to $6 million in 2011-12.

In addition, flexibility in funding is used by struggling school districts to meet basic funding obligations that once were covered by the now-reduced EFA or EIA state allocations. Flexibility results in funds actually being diverted away from technical assistance, in a "robbing Peter to pay Paul" scenario.

- Defendants claim to have addressed early childhood education through the Child Development Education Pilot Program ("CDEPP") established in the Plaintiff Districts. Defendants actually point to the CDEPP four-year-old kindergarten ("4K") program as its sole "specific response to the order of the trial court," ignoring the trial court's finding that early childhood interventions were also necessary for children "at the pre-kindergarten level and continuing through at least grade three." (*See* RECO000205-206 (December 29, 2005 Order); *see also* REC000022 (July 12, 2007 Order) (quoting Defendants' expert testifying about the need for interventions in the first six years of life).) Plaintiffs note that CDEPP continues to be a "pilot" program, as is apparent in its name and from the fact that no permanent legislation or funding has been enacted to support it, although the General Assembly required Plaintiff Districts to abandon their long-standing EIA-funded 4K programs that had been proven successful and to participate instead in CDEPP.

  In addition, despite Defendants' statement that they provide $550 in reimbursement per child transported, transportation funding is actually limited to $185 per child enrolled in a public school CDEPP program, and that money goes to the State Department of Education to reimburse it for its cost of transportation. (*See* Part 1B, Proviso 1A.45 (H) and (K), Act 73 of 2011; Part 1B, Proviso 1A.49 (H) and (K), Act 291 of 2010; Part 1B, Proviso 1A.62 (H) and (K), Act 23 of 2009; Part 1B, Proviso 1.62, Act 310 of 2008.) Plaintiff Districts do not receive reimbursement for any transportation costs related to CDEPP. Plaintiffs discussed other aspects of CDEPP in their Supplemental Brief at 31-32 and in their Final Respondents' Brief at 31-35.

- Defendants claim that "[f]acilities attacked at trial have been renovated or replaced with brand new schools." This is not true across the board and is certainly not due to any effort or funding from the Defendants. In fact, the school that is to replace the dilapidated J.V. Martin Junior High School in Dillon in August 2012 was made possible only because the federal government stepped in to help by providing stimulus funds through the United States Department of Agriculture, an unprecedented action. (*See* articles at http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2010/01/0034.xml&printable=true&contentidonly=true and http://www2.scnow.com/news/pee-dee/2011/apr/18/school-district-breaks-ground-dillon-middle-school-ar-1732047/.)

Defendants further claim that no record exists to evaluate the effect of its post-trial legislation. To the contrary, the record of student achievement in the Plaintiff

Districts continues to be distressingly low. As briefly described in Plaintiffs' Supplemental Brief (at 26-30), poverty in the Plaintiff Districts continues to run rampant, and student achievement has not improved. Defendants' post-trial legislation has not targeted the needs of students in the Plaintiff Districts or in the State as a whole and, therefore, is ineffective at remedying the constitutional deficiencies. Rather than rifle shots at the targeted needs, they acted more like shotgun blasts, scattering small pellets across a broad field and not making much impact.

III. This Court Can and Should Require the General Assembly to Remedy Its Persistent Constitutional Violation.

Defendants argue that any non-moot issues are not justiciable by this Court because they involve consideration of the policies best designed to improve student achievement, a uniquely legislative role. Plaintiffs have fully addressed Defendants' separation of powers argument in prior briefings, and this Court already refused the State's invitation to shrink away from examining whether the State was meeting its constitutional obligation in its original *Abbeville* decision. The State, however, continues to advance this argument.

In summary, Plaintiffs are not asking this Court to usurp legislative function by dictating which educational policy choices are best for our State. Instead, Plaintiffs are asking this Court to intervene because the General Assembly has failed to take action necessary to remedy its persistent violation of the State Constitution. While Defendants continue to assure the Court that education is their first priority, they have yet to address the systemic deficiencies in the public education system. Such reform is essential to bring the public education system into constitutional compliance.

In a recent decision, the Supreme Court of Washington articulated the important role of a state's judiciary in ensuring constitutional compliance in school finance litigation:

> The judiciary has the primary responsibility for interpreting [the state Constitution's education clause] to give it meaning and legal effect. We reiterated in *Seattle School District* the long-standing principle that "it is emphatically the province and duty of the judicial department to say what the law is." This is so, we explained, even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.

McCleary, 269 P.3d at 246 (internal citations omitted). In *McCleary*, as here, the plaintiffs proved at trial that the state had consistently failed to provide adequate funding for the system of basic education, largely because the state's basic education funding formulas were outdated and did not correlate to the real cost of providing students with the constitutionally required level of education. *Id.* at 253. The Washington Supreme Court agreed with the trial court's conclusion that the state's proven failure to fund basic education costs amounted to constitutional failure:

> If the State's funding formulas provide only a portion of what it actually costs a school to pay its teachers, get kids to school, and keep the lights on, then the legislature cannot maintain that it is fully funding basic education through its funding formulas. Even assuming the funding formulas represented the actual costs of the basic education program when the legislature adopted them in the 1970s, the same is simply not true today.

Id. at 254. In *McCleary*, however, unlike this case, the state had undertaken comprehensive reform efforts, including conducting a cost study to determine the actual cost of providing a basic education given today's student needs, empanelling a pupil transportation advisory committee to study and recommend a new transportation funding formula, and enacting a comprehensive education reform bill. The Washington court

nevertheless concluded that the state, despite its reform efforts, had failed to cure the constitutional deficiencies in the state education system because the legislature failed to create a funding formula that provided for sufficient funding to provide the level of resources necessary to meet student needs:

> We do not believe this conclusion comes as a surprise. Rather, the evidence in this case confirms what many educational experts and observers have long recognized: fundamental reforms are needed for Washington to meet its constitutional obligation to its students. **Pouring more money into an outmoded system will not succeed**.

Id. at 258 (emphasis added). After more than thirty years had elapsed since the state judiciary had been called upon to review and interpret the state constitution in the face of challenges to the state's funding of public education, the Washington court concluded:

> What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to [amply] fund education. [The state constitution's education clause] is a mandate, not to a single branch of government, but to the entire state. We will not abdicate our judicial role.

Id. at 259.

Ultimately, the *McCleary* court determined that continued judicial oversight was a properly limited remedy, but only after it determined that the legislature had already developed "a promising reform program" that, if fully implemented and funded, showed promise for remedying the deficiencies in the prior funding system. *Id.* at 260. In this case, however, Defendants have not undertaken comprehensive reform efforts like those of the Washington legislature. To the contrary, the State adheres doggedly to its outdated funding formulas, which are not only inadequate to meet the needs of today's students, but are not even fully funded according to statutory directive established based on the needs of students thirty years ago.

Defendants' misguided focus on property tax relief measures, changes to revenue source formulas, and piecemeal education initiatives cannot correct the constitutional deficiencies in the public education system, because those deficiencies are grounded in a fundamental failure to establish a rational relationship between funding and student need.

CONCLUSION

Defendants contend that the record of conditions existing in the public school system at the time of trial is of little more than "historical interest" to this Court because those conditions represent a unique snapshot of events existing at that time. Unfortunately, when viewing that snapshot from the perspective of educational opportunities present in the Plaintiff Districts, time appears to be standing still. It would be a tragic mark upon our State's history if this situation were allowed to continue. This Court has the legacy to kick-start the hands of time once again, finally bringing hope to the students in the Plaintiff Districts by Ordering the General Assembly to reform the public education system as necessary to bring it into compliance with the State Constitution. Only then will the Defendants remedy their constitutional failure and finally give the children in the Plaintiff Districts the "chance at life" to which they are constitutionally entitled.

(SIGNATURE PAGE ATTACHED)

Respectfully submitted,

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July 2, 2012
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEE COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2007-065159

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.

PROOF OF SERVICE

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:

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July 2, 2012

Hand Delivered

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

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 19 copies of Response Brief of Appellants-Respondents and Proof of Service in regard to the above matter. Please file the original and fifteen copies and return four clocked-in copies 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)
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