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.

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INTRODUCTION

In 1963, Dr. Martin Luther King, Jr. spoke about the failure of the United States to honor constitutional guarantees to its citizens:

> In a sense we have come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.

(Dr. Martin Luther King, Jr., Address at the Lincoln Memorial for March on Washington for Jobs and Freedom (Aug. 28, 1963).) Dr. King then stated that America had given African Americans "a bad check," a check that had come back marked "insufficient funds." Yet he maintained hope that someday the check would be cashed: "But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation." Like Dr. King, the children of the Plaintiff Districts maintain hope that their checks, too, will be cashed. "Now is the time to make real the promises of democracy." *Id.*

At the Court's invitation, Plaintiffs have submitted a comprehensive review of post-trial education legislation, showing that the passage of time has not had a positive impact on the plight of these children. South Carolina's public education system has not meaningfully changed. Similarly, the Defendants' attitude toward education has not changed, continuing to show a lack of due respect for the importance of their constitutional duty, as reflected by budget cuts and political choices. Further, the record of educational achievement in the Plaintiff Districts continues to be dismal, notwithstanding Defendants' assurances at trial and on appeal that, with time, the Education Accountability Act ("EAA") would lead to marked improvement in outcomes.

Defendants dismiss the Plaintiffs' analysis as "sheer speculation" but do not even attempt to rebut the truth of the post-trial funding facts identified by the Plaintiffs. Further, as far as the failure of the EAA to improve outcomes, Defendants' response is audibly silent. Instead, Defendants retreat to old arguments, accusing Plaintiffs of misstating the constitutional standard, urging the Court to decline to decide the issues in this case, and attempting to convince the Court that nothing can be done by the General Assembly to improve outcomes in the Plaintiff Districts. These arguments have not improved with age and must be rejected, for all the reasons previously articulated to the Court.

The only viable remedy for the Defendants' persistent constitutional violation is comprehensive education reform. Unlike legislative bodies in other states that—when faced with a judgment of constitutional deficiency in public education—have voluntarily undertaken to reform their education systems, Defendants in this case deny responsibility for their failure and refuse to undertake any concerted effort toward education reform. The unrefuted public record of post-trial legislative activity in this State establishes that the Defendants remain committed to stay their course of unconstitutional adherence to a fundamentally flawed public education system. The passage of time has proven that, without Court intervention, the children in the Plaintiff Districts will have no hope of finally receiving the educational opportunity to which they are constitutionally entitled.

ARGUMENT

I. The Constitution, as Interpreted by this Court, Requires the General Assembly to Provide Educational Opportunity Sufficient to Give Students a Chance at Life.

Defendants argue that Plaintiffs confuse the issues by "substituting achievement for opportunity" and by ignoring the definition of what constitutes a minimally adequate education as defined by this Court in *Abbeville*. Defendants argue that *Abbeville* does not interpret the Constitution to require the opportunity to acquire "the fundamental skills and knowledge required to lead a meaningful and productive life." They maintain that these goals, while laudable, are aspirational only and are not reflective of the true scope of their constitutional obligation.

To the contrary, Defendants' constitutional obligation requires far more than simply providing a public school system founded without rational consideration of student needs, including minimally adequate school buildings, minimally adequate teachers, and minimally adequate curriculum. This Court previously rejected the Defendants' argument that the constitutional standard did not include a qualitative component. *See Abbeville Cnty. Sch. Dist. v. State*, 335 S.C. 58, 68, 515 S.E.2d 535, 540 (1999).

When determining the boundaries of that qualitative standard, the trial court correctly interpreted this Court's guidelines in *Abbeville* to mean that a constitutionally adequate educational opportunity was "intended to give each child in South Carolina a chance at life." Thus, the trial court correctly found that the opportunity to acquire a "minimally adequate education" means the opportunity to acquire an education sufficient to enable a child to become a productive citizen.

In a recent education funding case, the Supreme Court of Connecticut also held, as did this Court in *Abbeville*, that Connecticut's education clause required the state legislature to meet a qualitative standard designed to ensure that each child would have the opportunity to acquire the education necessary to become a productive citizen. *See Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rel*, 990 A.2d 206, 227 (Conn. 2010) (holding that Connecticut's education clause "embodies a substantive component requiring that the public schools provide their students with an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting, and to prepare them to progress to institutions of higher education, or to attain productive employment and otherwise to contribute to the state's economy"). In reaching that conclusion, the Connecticut court aligned itself with numerous states, including South Carolina, to recognize that this concept is implicit in a constitutional guarantee of entitlement to a free public education, even without specific qualitative language.

Defendants wrongly argue that this standard—against which Plaintiffs and the trial court have measured the presence or absence of opportunity—is based on "aspirations" rather than constitutional "obligations." Acquiring a "chance at life" through a minimally adequate educational opportunity is not merely an aspiration. It is a guarantee firmly rooted in the Education Clause of South Carolina's Constitution, which, as interpreted by this Court, requires the General Assembly to provide the resources necessary to make this chance at life a reality for each child in our State.

This does not mean that Plaintiffs "confuse achievement with opportunity," as Defendants have repeatedly argued. Instead, as the overwhelming evidence showed and the trial court agreed, achievement is a valid indicator of the presence or absence of opportunity.[1] Accordingly, the trial court properly considered evidence of outcomes, in particular the distressingly low PACT scores, as evidence of the lack of required opportunity.[2] The continuing, overwhelming failure of students in the Plaintiff Districts to establish mastery of the state curriculum standards reaffirms the trial court's conclusion that outcomes in the Plaintiff Districts constitute evidence of a lack of opportunity.

Further, Defendants are incorrect in claiming that Plaintiffs are attempting to "return to their previously rejected theory" that the lack of opportunity in the Plaintiff Districts is an equal protection violation. Plaintiffs referred once to their now dismissed equal opportunity claim in a brief synopsis of the history of this case. Following trial of their surviving claims, the trial court correctly held that when applying the constitutional standard, the court must view the education system through the students' eyes. In the Plaintiff Districts, this means considering the tremendous—and undisputed—impact of poverty on student needs. As shown in Plaintiffs' Supplemental Brief, poverty continues to run rampant in the Plaintiff Districts, with eligibility for free and reduced price lunch, a marker for poverty, above 90% in each of the Plaintiff Districts, and as high as 97% in some.[3] The trial court correctly considered the impact of poverty on student needs when

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[1] For a more detailed discussion, please see Final Respondents Brief of Appellants-Respondents at 82-87.

[2] *See id.*

[3] Plaintiffs' Supplemental Brief filed on June 11, 2012 included a typographical error on page 19. The figures stated in this brief are correct: 90% of students in each of the Plaintiff Districts, and over 97% in some, including Allendale, Lee, and Marion 7, are eligible for free and reduced priced lunch.

determining that the constitutionally required opportunity was lacking in the Plaintiff Districts.

II. This Court Should Reject the Trial Court's Erroneous Conclusions of Fact.

Judged against the qualitative constitutional standard established by this Court in *Abbeville*, Plaintiffs' evidence at trial proved that the required educational opportunity was lacking in the Plaintiff Districts, and the trial court agreed. Where the trial court erred was by failing to judge the constitutional adequacy of the **system** of free public schools **as a whole** and by wrongly applying the "minimal adequacy" standard, not to the public education system, but to individual components as if they were isolated from one another.[4]

The application of these legal errors led the trial court to make erroneous findings of fact based on the conclusion that individual components of the public education system were "minimally adequate." Not only were these findings flawed based on the overwhelming weight of evidence at trial, the trial court utilized them incorrectly. Uniformly minimally adequate inputs, cumulatively, do not provide the required educational opportunities to children in the Plaintiff Districts under any evidence presented at trial. Thus, the trial court's factual findings, which were discussed on pages 14-16 of the Defendants' response brief, were erroneous and were based on application of an incorrect legal standard. [5]

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[4] The trial court also erred by creating an inadequate remedy for the proven constitutional violation. See also the discussion in Final Principal Brief of Appellants-Respondents at 10-16.

[5] *See also* Final Principal Brief of Appellants-Respondents at 16-97.

The South Carolina Constitution gives this Court the right to make its own findings of fact after reviewing the evidence.[6] The evidence on which Plaintiffs rely—proving that students in the Plaintiff Districts lacked access to the high quality teachers, instructional materials, physical facilities and other supports they needed to overcome the substantial deficits caused by their social circumstances—was admitted at trial and provides a clear record on which this Court can and should rely to reach its own conclusions *de novo.* Because of the significance of this case for the entire state for generations to come and in light of the legal errors that infected the trial court's factual determinations, this Court should undertake its own review of the evidence without giving undue deference to the trial court's findings. Doing so will lead this Court to conclude, as it must, that the lack of opportunity is symptomatic of a fundamentally unstable and constitutionally inadequate system of education.

III. The General Assembly Can Satisfy Its Constitutional Obligations Through Education Reform.

Defendants contend that the Court cannot provide an adequate remedy because increased spending will have no effect on the quality of the educational opportunity they provide. However, the overwhelming weight of trial evidence conclusively established that Defendants can, and must, satisfy their constitutional obligation not only through funding reform, but also through analysis of the educational needs of children in the Plaintiff Districts and matching the needs with sufficient resources.

Defendants open their Response Brief argument with an incomplete quote from Plaintiffs' Final Principal Brief dated May 1, 2008: "Plaintiffs . . . agree that additional

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[6] *See also* discussion *id.* at 3-4; *see also* Final Respondents Brief of Appellants-Respondents, at 12-15; Final Reply Brief of Appellant-Respondents at 4-5.

funding . . . would not necessarily result in increased educational opportunities." Defendants' quotation, however, omits critical language from Plaintiffs' statement and, in so doing, entirely distorts its meaning. Plaintiffs have always maintained that "additional funding – **without focused direction toward the specific needs of the students in the Plaintiff Districts** – would not necessarily result in increased educational opportunities."[7] Increased spending will result in increased educational opportunities if it sufficiently and appropriately addresses students' needs. Plaintiffs argued this point, and highlighted the evidence used to prove it, in each of their prior briefs.[8] Unless and until Defendants acknowledge and align their system of education finance with this principle, their spending on education will remain unfocused, arbitrary, subject to political compromise, and inadequate, and their constitutional obligation to maintain and support an adequate system of public education will remain unmet.

Defendants' basic arguments in their Response Brief (as well as in their first Supplemental Brief filed June 11, 2012) are that Plaintiff Districts receive more funding than other districts, that funding for inputs is adequate, and that in any event more funding would not affect outcomes. Plaintiffs addressed these points in their prior briefs and will not repeat their arguments here, except to summarize by saying that Defendants' numbers are misleading, inputs are demonstrably inadequate, and Defendants' own witnesses concede that *targeted* spending *can* improve achievement.[9] In addition, the

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[7] *See* Final Principal Brief of Appellants-Respondents at 115 (emphasis added).

[8] *See, e.g.,* Final Principal Brief of Appellants-Respondents at 115-120; Final Respondents' Brief of Appellants-Respondents at 75-82; Final Reply Brief of Appellants-Respondents at 49-51 and 58-62.

[9] *See, e.g.*, Final Principal Brief of Appellants-Respondents at 16-96, 108-20, 125-34, and 138-45; Final Respondents' Brief of Appellants-Respondents at 74-82; Final Reply Brief of Appellants-Respondents at 23-45, 49-62, and 68-69.

following two critical points entirely undercut Defendants' argument: (1) to be effective, funding and spending must be both sufficient and targeted to needs, and (2) analysis of the school system cannot be confined to calculating how much is spent on a global basis, but must include a consideration of whether needs are met or left unmet, as well as what outcomes are achieved.

Defendants repeatedly assert that revenues and spending in schools has grown. They point to increases in national education spending over the last 50 to 100 years, although they ignore the increased costs associated with growth in student population, inflation, and educational mandates such as desegregation and special education for children with disabilities. Moreover, increased spending on a national basis is not the point. Indeed, increased spending in South Carolina or in the Plaintiff Districts is not the point either, if the increased spending is not directed to school and student needs. The trial record substantiates Defendants' failure to ensure, through a rational finance system in which funding is correlated with needs, that each child has access to constitutionally adequate learning opportunities.

While Defendants continue to spread money around the State for various projects and programs, they neglect the basic educational needs in the Plaintiff Districts—qualified and effective teachers who are in charge of classrooms with children who face educational challenges; appropriate instructional materials that are available when and where needed; and facility conditions that foster learning rather than distract from it. Simply stated, each child must have access to appropriate learning opportunities regardless of which school he attends. Providing extra computers to schools does not fill the basic need for effective teachers in every classroom.

The children in the Plaintiff Districts are hungry for adequate educational opportunities, yet Defendants choose to fund "extras" without consideration of basic needs. Constitutional compliance cannot be achieved without a complete reform of the educational system in South Carolina, so that offerings are correlated with needs.

IV. Defendants Do Not Challenge the Accuracy of Information Plaintiffs Submitted.

Defendants dismiss Plaintiffs' analysis of post-trial education legislation as "lawyer arguments" and "pure speculation."[10] Yet, with one exception (albeit unfounded) noted below, Defendants have not challenged the relevant funding facts supporting the Plaintiffs' analysis, as follows:

- Base Student Cost underfunded: Defendants have historically underfunded the Base Student Cost ("BSC"). Defendants failed to fund the mandated foundational BSC in each of the past four fiscal years.[11]
- Foundational funding formula unchanged: Defendants have not meaningfully changed the foundational funding formula since establishing the BSC based on the Defined Minimum Program in the 1970s. This includes failure to include a poverty weighting to reflect the indisputable difference in poor students' needs.[12] Although Defendants contend that the "base student cost formula has been modified specifically to add a .20 weight for at-risk students, further increasing funds to the Plaintiff Districts,"[13] this is incorrect. The citing reference is to Act 388. The .20 weight was added in Act 388 only to the increases in reimbursement

[10] Dfts.' Response to Plaintiffs' Supplemental Brief, at 17.
[11] *See* Plfs.' June 11, 2012 Supplemental Brief at 8.
[12] *See id.* at 7-11.
[13] Defs.' Response to Plaintiffs' Supplemental Brief, at 6.

to the school districts resulting from population growth and CPI, which have likely been non-existent in the Plaintiff Districts. It did not change the base student cost formula that governs the distribution of EFA funding, which continues unchanged to serve as the foundation formula for public school funding.

- EIA sales tax funds diverted: These funds have consistently been used to support basic education funding, rather than to fund improvements to education, as intended.[14]
- Decline in funding from the EIA: Total funding for education from the EIA has declined since FY 2006/07.[15]
- Decline in allocation of EFA funds to Plaintiff Districts: Allocations of EFA foundational funds to the Plaintiff Districts have declined between 38% and 53% since FY 2007/08.[16]
- Decline in lottery funds to support education: Supplemental funding from lottery revenues has dropped 72.5% from FY 2004/05 to FY 2012/13.[17]
- Budget cuts for education initiatives: Budget cuts have slashed funds for piecemeal initiatives originally identified by Defendants in their Cross-Appeal.[18] For example, technical assistance funds have been slashed from $81 million in FY 2007/08 to $6 million for FY 2011/12 and proposed FY 2012/13, and appropriations for instructional materials have been essentially cut in half since

[14] *See* Plfs.' June 11, 2012 Supplemental Brief at 12.
[15] *See id.* at 13.
[16] *See id.*
[17] *See id.* at 14-15.
[18] *See id.* at 35.

FY 2007/08.[19]

- Tax exemptions restrict education funds: The General Assembly has approved numerous tax exemptions, which translate into a loss of revenue for the State and negatively impact the amount of money available for funding education.[20]
- Provisional funding for early childhood education: Even after the trial court ordered Defendants to provide early childhood education to satisfy their constitutional obligations, Defendants have never provided permanent legislation or a dedicated source of funding for CDEPP; it continues to be funded by proviso, at the whim of the annual budget process.[21]
- Federal funds rejected: The State has turned down substantial federal funds available for education.[22]
- Lack of support for teachers: In 2008, the General Assembly froze the required minimum teacher salaries, which continued for the next three years, and allowed local districts to waive "step" increases based on teacher experience.[23]

V. Reductions in State Support for Education Demonstrate A Continuing Lack of Commitment to Improving Education and Meeting the Constitutional Mandate.

Plaintiffs urge the Court to recognize that the evidence at trial established that the Defendants have failed in their duty to support and maintain a constitutional system of public education that meets the requirements laid out in *Abbeville*, and that their reduced support since trial demonstrates that the Defendants remain committed to a course of

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[19] *See id.*
[20] *See id.* at 36-37.
[21] *See id.* at 31.
[22] *See id.* at 38-41.
[23] *See id.* at 21.

unconstitutional support and maintenance of the educational system.

Decisions made in this year's budgeting process aptly capture the General Assembly's mind-set—that education is just another "program" rather than a constitutional obligation. As noted above, the General Assembly's actions have demonstrated a continued lack of support for teachers, including by freezing teacher salaries and waiving salary step increases each year since 2008; these actions further reflect the General Assembly's failure to place importance on one of the undeniably important components of a child's educational opportunity. Yet, in her budget veto message on July 5, 2012, Governor Nikki Haley vetoed $10 million in appropriations to help districts pay teacher salaries, stating:

> We all come to Columbia with a set of priorities and certain goals that we wish to accomplish during our tenure in office. It is no surprise, then, that as we prepare each year's budget, there is enormous pressure to spend every dollar -- both recurring and non-recurring. When these funds are slated for allocation to **popular programs, such as education**, it is all the more difficult to vote "No."

Letter from Governor Nikki Haley to The Honorable Robert W. Harrell, Jr. dated July 5, 2012, found at http://www.governor.sc.gov/ExecutiveOffice/Documents/H.4813%20-%20Fiscal%20Year%202012-2013%20General%20Appropriations%20Act.pdf (emphasis added). This statement followed the Governor's expression of her priorities, as Governor and a former member of the Defendant State House of Representatives:

> Ultimately, budgets are about our priorities . . . . [T]he fiscal year 2012-2013 Executive Budget . . . funded over $100 million in tax relief, a commitment to infrastructure, and a tremendous amount of revenues left unspent. These vetoes will get us closer to that track.

Id.

These passages betray the mind-set in the State House, where Governor Haley was so recently a member of the House of Representatives—that education is viewed as a "popular program" rather than a constitutional obligation and that it should yield to the higher goal of funding "over $100 million in tax relief." This is contrary to the duty of the State and the General Assembly, which first and foremost must attend to its constitutional obligations. Funding of other programs must yield to the priority of funding constitutional mandates. *See, e.g.*, *Abbott ex rel. Abbott v. Burke,* 20 A.3d 1018, 1037-38 (N.J. 2011) (legislative authority to appropriate funds does not include power to disregard constitutional mandates; the mandate of the Education Clause controls over the Appropriations Clause); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (legislature must design, determine the cost, and fund the educational package that meets the constitutional mandate; "lack of financial resources will not be an acceptable reason for failure . . . All other financial considerations must yield until education is funded.").

Ultimately, in a news conference, the Governor reinforced this lack of respect for the importance of education and the constitutional obligation under which she is bound, saying, "The districts are going to have to live within their means and figure out how to respond to it." *See* Adam Bean, *Haley's Vetoes Cripple Two State Agencies*, The State Newspaper, July 7, 2012, found at http://www.thestate.com/2012/07/07/2344499/haley-issues-budget-vetoes.html#storylink=cpy. Living within means is one thing; being forced to slash essential services and deprive children of constitutional rights is quite another.

Governor Haley also urged the General Assembly not to fund the Education Oversight Committee from the General Fund, but to leave it as an EIA-funded item, using

this language:

> As I noted earlier, I value the EOC's assessments and rankings, and weighed them when preparing my Executive Budget. **At the same time, K-12 education is unlike many other core programs in that it can draw from a significant, dedicated funding source.** We should continue to fund the EOC through EIA and **leave General Fund resources available for all the other programs** that have no dedicated pool upon which to rely.

Letter from Governor Nikki Haley to The Honorable Robert W. Harrell, Jr. dated July 5, 2012, found at http://www.governor.sc.gov/ExecutiveOffice/Documents/H.4813%20-%20Fiscal%20Year%202012-2013%20General%20Appropriations%20Act.pdf (emphasis added).

This passage very clearly expresses the lack of recognition in the State House that education is a *constitutional obligation*, unlike what Governor Haley refers to as "other core programs," and, therefore, must take priority over "all the other programs" that the Defendants are anxious to fund with General Fund revenues. This passage also further betrays the deliberate misuse in the State House of EIA funding. This funding is intended to support innovative practices that, if successful, would become part of the educational practices supported on a permanent basis by the General Fund, as discussed in Plaintiffs' prior briefs. Instead, the EIA is being used by the Defendants as core, rather than supplemental, funding.

Also, Defendants are quick to take credit for federal stimulus money that was distributed to school districts in 2009 and 2010, while ignoring the fact that school districts across the state, including the Plaintiff Districts, have nevertheless had to cut teachers and essential supports, including instructional materials and transportation, due

to reductions in State support to school districts.[24] According to the 2009 Teacher/Administrator Supply & Demand Survey compiled by the Center for Educator Recruitment, Retention, & Advancement ("CERRA"), available at http://cerra.org/research/SupplyAndDemand/, South Carolina school districts reported a decrease of 1,531 teaching positions from 2008-2009 to 2009-2010. Of particular note, the 2009 Survey also reported that Hampton 2, a Plaintiff District, experienced a reduction of almost 25% of its teacher allocations in 2009-10, and Florence 4, another Plaintiff District, lost approximately 12% of its teacher slots. (*Id.* at 2.) In addition, "[d]istricts reported substantial budget reductions, often resulting in hiring freezes, elimination of positions, reductions in force, and mandatory furloughs." (*Id.* at 3.)

The reductions in teaching positions continued in the following two years. The 2010 Teacher/Administrator Supply & Demand Survey by CERRA, also available at http://cerra.org/research/SupplyAndDemand/, reported a decrease of 2,145 teacher positions since 2009 and noted that "districts continue to eliminate positions and programs to account for funding shortages." (*Id.* at 2.) In 2011, the decline slowed but continued, with districts reporting a decrease of 650 teaching positions from 2010. (*See* 2011 Teacher/Administrator Supply & Demand Survey at 2.)

With respect to vacancies in the teaching positions that survived the cuts, the CERRA Surveys contain the same indication each year: most of these vacancies are in small districts in isolated areas. For the last two years, the CERRA Survey has included this statement: "Location does play a significant role in the recruitment and retention of

[24] As noted in Plaintiffs' Supplemental Brief filed June 11, 2012, Governor Haley and State Superintendent Zais refused $143,000,000 in additional federal funds expressly intended to assist South Carolina in paying teachers and educators in 2011. (*See* Plfs.' Supplemental Brief at 39-40.)

teachers. The hardest-to-staff schools are often located in rural areas of the state that have some of the highest poverty levels." (2010 Survey at 4; 2011 Survey at 4.) Given the Defendants' failure to alter this situation, it should not come as a surprise that it continues today.

Report card data shows that although student enrollment in the Plaintiff Districts has tended to drop since 2007-08, the numbers of teachers in the Plaintiff Districts have fallen more precipitously.

Student Enrollment

DISTRICT	2007-08	2010-11	Change since 2008	% change since 2008
Allendale	1637	1527	-110	-6.7%
Dillon 2	3564	3510	-54	-1.5%
Florence 4	981	856	-125	-12.7%
Hampton 2	1220	1039	-181	-14.8%
Jasper	3312	3251	-61	-1.8%
Lee	2544	2294	-250	-9.8%
Marion 7	796	675	-121	-15.2%
Orangeburg 3	3254	3073	-181	-5.6%

Number of Teachers

DISTRICT	2007-08	2010-11	Change since 2008	% change since 2008
Allendale	123	132	9	7.3%
Dillon 2	221	195	-26	-11.8%
Florence 4	80	56	-24	-30.0%
Hampton 2	94	71	-23	-24.5%
Jasper	238	225	-13	-5.5%
Lee	197	166	-31	-15.7%
Marion 7	68	56	-12	-17.6%
Orangeburg 3	257	211	-46	-17.9%

Thus, while Dillon 2 has lost 1.5% of its student population since 2008, it has lost 11.8% of its teachers. Similarly, Florence 4 experienced a 12.6% decrease in its student enrollment, but a 30% decrease in its teaching staff. Students in the Plaintiff Districts, who are some of the most disadvantaged in the state, seem to be bearing the brunt of the

economic recession.

Finally, Defendants cannot take credit for increasing revenues or spending in South Carolina public schools over the past several years, nor can they assure this Court or the Plaintiff Districts that financial support for public schools will continue at recent levels. Hundreds of millions of dollars were directed toward South Carolina public schools by the federal government through the stimulus bill over the course of only two years: 2009-10 and 2010-11. During that limited time period, a total of $694,060,272 in State Fiscal Stabilization Funds ("SFSF") was awarded to South Carolina, of which 81.8%, or $567,741,302, was required to be allocated to education.[25] *See* Public Law 111-5, § 14002(a) (2009) (American Recovery and Reinvestment Act of 2009 ("ARRA")); State Fiscal Stabilization Funds State Allocation Data at http://www2.ed.gov/programs/statestabilization/sfsf-state-allocations.pdf; U.S. Department of Education Recovery Act Fact Sheet on South Carolina, accessible through http://www2.ed.gov/policy/gen/leg/recovery/state-fact-sheets/index.html. In addition:

- A total of $142,838,916 in other stimulus funds was awarded to South Carolina under Title I to support teaching and learning in schools with large populations of students living in poverty. (*Id.*)

[25] Defendants, overriding vetoes by the Governor, applied $184,922,339 of SFSF funds to increase the Base Student cost of the EFA for fiscal year 2009-10. Part III, Section 1 and Part III, Section 2(A)(1), Act 23 of 2009. They distributed $174,430,646 in SFSF funds to the State Department of Education in 2010-11, but did not direct that it be applied to the Base Student cost for that year. Part III, Section 1 and Part III, Section 2(A)(1), Act 291 of 2010.

- Another $187,556,479 was awarded to South Carolina under the Individuals with Disabilities Education Act ("IDEA") to help "ensure that children with disabilities, including children aged three through five, have access to a free appropriate public education" as required by law and to "make early intervention services available to infants and toddlers with disabilities and their families to meet each child's unique needs and prepare him or her for further education, employment, and independent living." (*Id.*)
- To support the use of technology in schools, $9,149,805 in stimulus funds was awarded to South Carolina in Education Technology Grants. (*Id.*)
- $817,322 was awarded to South Carolina under the McKinney-Vento Education for Homeless Children and Youth program to address the educational and related needs of homeless children and youth. (*Id.*)

Notably, the expenditures of these funds are accounted for in the In$ite data for each school district, resulting in increases in their per-pupil expenditures. Pursuant to the terms of the ARRA and South Carolina Appropriations Bills, however, school districts were cautioned that these stimulus funds were only temporarily available and that they should be used for short-term or one-time expenditures, rather than long-term or recurring needs. *See* Part III, Section 2(D), Act 291 of 2010; Part III, Section 2(H), Act 23 of 2009.

Those federal stimulus dollars described above are, in fact, no longer available, and Defendants have refused additional offers of funding assistance for South Carolina's public schools. As previously described, South Carolina officials refused to accept $143 million in federal assistance to save teacher jobs in 2011. Also in 2011, State

Superintendent Zais notified President Obama that South Carolina would not apply for a share of the $200 million available to it and eight other states in the third round of Race to the Top grant funds. The nine states that were eligible for this funding, including South Carolina, had been finalists in two prior rounds of Race to the Top grant competitions. South Carolina was again the only state not to accept additional funding. *See* articles at http://www.ed.gov/news/press-releases/department-education-awards-200-million-seven-states-advance-k-12-reform, http://www.mcclatchydc.com/2010/08/25/99638/sc-misses-out-on-race-to-the-top.html, and http://ed.sc.gov/agency/news/?nid=1757.

The undisputed reductions in allocations by the Defendants of state funds to public schools, their refusals to accept additional assistance from the federal government while state revenues continue to lag, and the continuing poor outcomes in Plaintiff Districts demonstrate Defendants' lack of commitment to support and maintain a system of public schools that meets the constitutional mandate.

VI. This Court Can Grant An Effective Remedy Without Passing Judgment on Educational Policy Choices.

As they have in the past, Defendants again urge this Court to grant deference to the General Assembly's discretion in matters involving education policy. By way of example, Defendants defend their decision to cut funding for instructional materials in half by responding that, while funding for "instructional materials" may have decreased, per pupil appropriations for "instruction" have increased. The reason disclosed is the possibility that "perhaps" a policy choice was made about the comparative value of technology and software as compared to textbooks.[26]

[26] Defs.' Response to Plfs.' Supplemental Brief, at 17.

Defendants cannot hide forever behind "legislative discretion" and "educational policy choices." There has never been any doubt in this case that the Court's role is not to step into the General Assembly's shoes and make education policy. Plaintiffs have never asked for such relief. At the same time, however, Defendants cannot escape review of the constitutionality of their actions by crying "policy choice" as a defense to every action.

The evidence at trial proved that South Carolina's foundational funding system is outdated and is not rationally related to the needs of the student population it is intended to educate. The point of Plaintiffs' analysis of post-trial legislation was to demonstrate that Defendants have refused to reform the education system, as desperately needed, and have cut their support for education. The Court can order the Defendants to remedy this constitutional deficiency without making a single judgment about any particular educational policy enacted by the Defendants. *See, e.g.*, *Hussein v. State*, No. 69, 2012 WL 2376939 (N.Y. June 26, 2012) (recognizing that New York's high court had previously rejected the idea that dictating qualitative standards for the public education system would invade the legislature's policy-making prerogative and confirming that it was the court's prerogative to set the constitutional standard of educational adequacy and ensure state compliance); *McCleary v State*, 269 P.3d 227, 246-47 (Wash. 2012) (court can provide guidelines to ensure constitutional compliance without invading legislature's authority to select means of compliance through policy choices); *Connecticut Coalition for Justice in Educ. Funding, Inc. v. REL*, 990 A.2d 206, 224 (Conn. 2010) (court may grant plaintiffs' requested relief of declaring a constitutional violation by legislature and ordering legislature to provide a remedy by creating and maintaining a compliant public education system without interfering with the legislature's province to set educational

policy).

CONCLUSION

This is a case of tremendous importance, not only to the children in the Plaintiff Districts but to the entire State. The outcome of this case will define our State, perhaps for generations to come. Will we—as a State—continue to tolerate the perpetuation of conditions that allow entire communities to languish without constitutionally adequate public schools?

Defendants are quick to lay blame for educational failure on the parents, school districts and local communities, who lack the resources necessary to help their children pull themselves up. They refuse, however, to accept any responsibility for their own failure to reform the state's education system to keep pace with modern requirements. And let us not forget the circumstances that created these communities in the first place—the historical deprivation that has allowed the cycle of poverty and hopelessness to continue, unabated, for generations. The State's mantra has been that poor children, particularly those living in rural, predominantly African American communities, face too many challenges to learn unless the problem of poverty could first be "solved," which it could not. This attitude, again articulated before this Court through the Defendants' continued insistence that there is nothing they can do to improve the plight of these children, has consigned whole generations to the scrap heap.

Nearly twenty years ago this suit was brought for the sole purpose of putting squarely before this Court the stark fact that the children of South Carolina are being systematically deprived of the constitutionally guaranteed right to an adequate educational opportunity in a system of free public schools. This generation of adults is

not doing well by its children. They will have to pay off huge public-sector debts. They will be expected to foot colossal bills for their parents' pension and health care costs. They will compete for jobs with people from emerging countries, many of whom have better education systems despite their vastly lower incomes. The least this generation can do for its children is to provide each child in South Carolina with "a fair chance at life." The Constitution requires it. The time is now.

(SIGNATURE PAGE ATTACHED)

Respectfully submitted,

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July 12, 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 12, 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 Reply 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.

In addition, our supplemental briefs include references to publicly available information gathered in response to the Court's May 23rd Order. If the Court would like for us to submit copies of this information in the form of an appendix for the Court's convenience, we will be glad to do so. If so, we respectfully request direction from the Court as to whether we should submit electronic briefs with hyperlinks, as we did in the initial round of briefing in 2008, or hard copies.

Very truly yours,

Carl B. Epps, III

CBEIII:ljs
Enclosures
cc: Robert E. Stepp, Esquire (via hand delivery; w/enclosure)
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