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S.C. Supreme Court

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
Opinion No. 27466
Heard September 18, 2012—Filed November 12, 2014

Abbeville County School District, *et al.*,

Appellants-Respondents,

vs.

The State of South Carolina, *et al.*, of whom
Hugh K. Leatherman, as President Pro Tempore
of the Senate and as a representative of the
South Carolina Senate, and James H. Lucas,
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.

**RESPONDENTS-APPELLANTS HUGH K. LEATHERMAN AND
JAMES H. LUCAS' PETITION FOR REHEARING**

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Introduction

Pursuant to Rule 221(a), SCACR, Respondents-Appellants Hugh K. Leatherman, in his representative capacity and as President Pro Tempore of the South Carolina Senate, and James H. Lucas, as Speaker of the South Carolina House of Representatives (hereinafter “the Senate and the House”), petition this Court for a rehearing of this case and submit that the majority opinion misapprehends the law and overlooks the evidence in deciding this case. The majority adopts a new standard for constitutional compliance that is inconsistent with the standard announced in *Abbeville County School District v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999) (“*Abbeville I*”); substitutes its own view of the evidence in contravention of the applicable standard of review; usurps the exclusive right of the legislative branch to determine matters of public policy; and imposes a remedy that is impermissibly vague and practically unworkable.

As defined in *Abbeville I*, the only issue in this case is whether students in the Plaintiff Districts have the opportunity to acquire a minimally adequate education in adequate and safe facilities. In *Abbeville I*, Plaintiffs brought a declaratory judgment action challenging the state’s funding of primary and secondary education. Among other things, Plaintiffs alleged that the system of public education was underfunded, resulting in a violation of the education clause of the state constitution. The “novel issue” before the Court in *Abbeville I* required interpretation of the South Carolina Constitution’s education clause, which states that “[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning as may be desirable.” S.C. Const. art. XI, § 3.

Proclaiming that “[i]t is the duty of this Court to interpret and declare the meaning of the Constitution[,]” the Court read a qualitative component into the education clause and held that the constitution “requires the General Assembly to provide the *opportunity* for each child to receive a minimally adequate education.” *Abbeville I*, 335 S.C. at 68, 535 S.E.2d at 540 (emphasis added). This Court “define[d] this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the *opportunity* to acquire:

- 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science;
- 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and
- 3) academic and vocational skills.”

Id. (Emphasis added).

In so holding, the Court acted within its authority to interpret and declare the meaning of the state constitution. The Court simultaneously recognized, however, the constitutional limits of that authority, declaring that the Court did “not intend by this opinion to suggest to any party that we will usurp the authority of [the General Assembly] to determine the way in which educational *opportunities* are delivered to the children of our state.” *Id.* at 69, 515 S.E.2d at 541 (emphasis added).

In *Abbeville v. State*, No. 27466, 2014 WL 5839956 (S.C. Nov. 12, 2014) (“*Abbeville II*”), the majority radically departs from the holding, principles, and doctrines recognized in *Abbeville I*. In finding a violation of the state constitution based on student achievement, the Court’s majority overlooks and misapprehends the evidence presented to

and relied on by the trial court, ignores the opportunity standard announced in *Abbeville I*, and overlooks the absence of a direct relationship between policy decisions and the achievement of students in poverty. Moreover, the majority creates a new, “heightened standard” for constitutional compliance, one that far exceeds the “minimally adequate opportunity” standard announced in *Abbeville I*. As the dissenting justices note, “[m]ake no mistake about it, by mandating an ‘outputs’ standard, the Court holds the General Assembly constitutionally responsible for socially desired outcomes”—namely, the eradication of poverty in the Plaintiff Districts. *Abbeville II* at *29 (Kittredge, J., dissenting). While this outcome is certainly desirable, a duty to achieve that end does not emanate from the text of Article XI, section 13 of the South Carolina Constitution.

In directing the parties to present a plan for approval by the Court to remedy the announced violation, the majority overlooks controlling precedent and its express recognition in *Abbeville I* that members of the Court “are not experts in education” and that this Court did “not intend to dictate the programs utilized in our public schools.” 335 S.C. at 69, 515 S.E.2d at 540. In retaining jurisdiction over this matter, the majority misapprehends the doctrine of separation of powers and the limitations of the Court’s jurisdiction recognized in *Abbeville I*. In fashioning a remedy that retains jurisdiction and directs the parties to present a plan to the Court, the majority reserves to itself the equivalent of an executive branch veto over the General Assembly’s discretion to determine the way in which educational opportunities are delivered to students in the Plaintiff Districts.

Finally, in reaching its decision, the majority announces, but then ignores, the applicable standard of review. *Abbeville II* at *4. All of the trial court’s findings of fact in favor of the Senate and the House are overwhelmingly supported by the record. A dislike

of the facts revealed by the record and as found by Judge Cooper, *see e.g., id.* at *15, does not justify *de novo* fact finding by this Court. The Court was bound to accept the trial court's findings of fact unless they were "without reasonable evidentiary support." *Id.* at *4. As the dissenting justices note, this longstanding rule was ignored by the majority. *Id.* at *28 (Kittredge, J., dissenting).

For all of these reasons, and for the reasons set forth in the dissenting opinion, the Court should withdraw the majority opinion and either grant a rehearing and reconsider this matter, or adopt the dissenting opinion as the opinion of the Court.

I. The Majority Erred in Rejecting the Trial Court's Reliance on Inputs as a Test for Constitutional Compliance.

*We hold today that the South Carolina constitution's education clause requires the General Assembly to provide the **opportunity** for each child to receive a minimally adequate education.*

Abbeville I, 335 S.C. at 68, 515 S.E.2d at 540 (emphasis added).

A. In finding a violation, the majority overlooks the opportunity standard announced in *Abbeville I*.

The most important word in *Abbeville I* is "opportunity." As the Senate and the House maintained at trial and before this Court—and as the trial court correctly found—opportunity connotes availability and occasion; it does not mean achievement or guaranteed success. (REC0000054 ¶ 34.) By expressly adopting an opportunity standard, in *Abbeville I* this Court plainly contemplated that inputs into the education system, as opposed to any particular set of outcomes or achievement, were the appropriate measure of constitutional compliance. Measuring inputs is facially consistent with the constitutional duty to "create a system of free public schools," and also provides an

objective standard for constitutional compliance that is not affected by intervening circumstances.

In *Abbeville II*, the majority overlooks and departs from the standard announced in *Abbeville I* by focusing on achievement instead of opportunity. On the one hand, the majority finds that “Defendants have seemingly addressed each of the important aspects of public school education, and provided the requisite funding for general education and additional programs.” *Abbeville II* at *9. The majority describes the educational statutory scheme as “comprehensive” and “robust.” *Id.* The majority notes further that “South Carolina’s school teachers are held to nationally recognized certification and professional development standards” *Id.* Additionally, the majority correctly observes that “monetary inputs into each of the Plaintiff Districts appeared to fulfill the General Assembly’s constitutional duty.” *Id.* The majority finds that the record contains more than reasonable evidentiary support to conclude that “[t]he instrumentalities of learning—funding, curriculum, teachers, and programs—are present and appear at the very least minimally adequate.” *Id.* (Footnote omitted). The majority thus finds that the standard of constitutional compliance announced in *Abbeville I* has been satisfied in the Plaintiff Districts. This finding should have compelled the Court to enter judgment in favor of the Senate and the House. A comprehensive and robust system of educational policies that includes additional financial resources for districts with sufficient numbers of at-risk students is more than adequate to provide the opportunity for students to acquire a minimally adequate education. *Paynter v. State*, 797 N.E.2d 1225, 1229 (N.Y. 2003) (“If the State truly puts adequate resources into the classroom, it satisfies its constitutional

promise under the Education Article, even though student performance remains substandard.”).

Yet in holding that “South Carolina’s educational funding scheme is a fractured formula denying students in the Plaintiff Districts the constitutionally required opportunity,” *Abbeville II* at *16, the majority changes the standard from one of requiring the General Assembly to create educational opportunities to one that requires the General Assembly to produce certain unspecified levels of achievement. In so doing, the majority eviscerates the clear holding of *Abbeville I*—which established the standard upon which the parties spent 102 days before the trial court litigating this case—and substitutes a brand new and unprecedented standard. Compounding this error, as noted in further detail *infra*, the majority fails to specify what those outcomes should be in order to meet *Abbeville II*’s new test for constitutional compliance.

B. In determining a constitutional violation based on student outcomes, the majority overlooks the absence of a causal relationship between policy decisions and the achievement of at-risk students.

A constitutional violation based on poor achievement can only exist in the Plaintiff Districts if there is a causal connection between policies adopted by the legislature and poor outcomes in those districts. A causal relationship is necessary so that a court can “distinguish[] between a result caused by a constitutional violation and one caused by other factors.” *Greer v. Spartanburg Technical Coll.*, 338 S.C. 76, 80, 524 S.E.2d 856, 858 (Ct. App. 1999). Although the majority acknowledges that the “instrumentalities of learning” are present and minimally adequate in the Plaintiff Districts, the majority finds that “student performance in the Plaintiff Districts demonstrates an apparent disconnect between intentions and performance.” *Abbeville II* at *10. The majority thereby assumes

that better inputs would produce better outcomes, and that poor achievement is necessarily a function of the absence of appropriate policies and funding. This assumption is incorrect and is completely unsupported by the evidence. The “disconnect” noted by the majority should come as no surprise to anyone familiar with the record in this case. This is exactly the point that the Senate and the House made repeatedly at the trial of the case, and that was expressly acknowledged by the trial court: student achievement is much more a function of socio-economic conditions than anything else. The Plaintiff Districts did not dispute this evidence, and indeed much of it was proffered by the Plaintiff Districts themselves. Thus, while the majority admonishes the Senate and the House to “take a broader look at the principal causes for the unfortunate performance of students in the Plaintiff Districts, beyond mere funding[,]” *Abbeville II* at *21, the majority overlooks the fact that the trial court did exactly that. Because achievement is a function of factors other than educational policy, the necessary causal relationship between educational policies adopted by the General Assembly and student achievement in the Plaintiff Districts is absent.

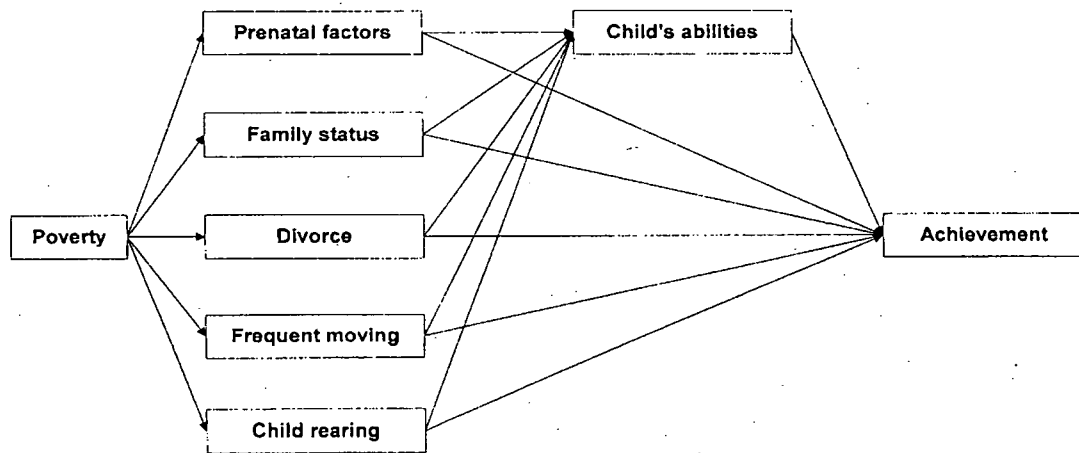
Even if it were not necessary to show that poor achievement by students in poverty is caused by a breach of the legislature’s constitutional duty, it should at least be necessary to show that the legislature has the power to change the result. Again, the majority implicitly makes this assumption without reference to any supporting evidence, and in the face of undisputed evidence that establishes that better achievement cannot be legislated or brought. To the contrary, the evidence presented at trial establishes that no known set of education policies can overcome the effects of poverty on achievement. As explained by Dr. Walberg: “Various [school] programs and practices [] have been especially designated

for poverty children. But best practices and policies in general have often not been able to substantially diminish the providence [sic] of poverty.” (REC014028, ll. 19-25.) Defendants’ expert Dr. James Guthrie agreed. He testified that no one as yet has “constructed a series of strategies and activities that would enable . . . any . . . reasonable person . . . to assert that schools can overcome the effects of poverty in order to elevate achievement.” (REC014435, ll. 2-14.) Defendants’ expert Dr. David Armor testified that South Carolina, as well as society as a whole, has “not figured out a way to overcome the effects of poverty.” (REC014773, ll. 10-25; REC014774, ll. 1-25.) Poverty is “an educational fact that we have to deal with and cope with” and unfortunately efforts to remedy the problem “have relatively small effects . . .” (REC014775, ll. 1-8.) The reason for this problem is that “so much of [the] low [PACT] score[s] is—is a function of family characteristics that are way beyond the control of the school system and the state at this point.” (REC014775, ll. 9-13.) At trial, the Plaintiff Districts did not introduce any evidence to the contrary.

As the evidence in the record makes clear, education policy is not the cause of poor achievement in the Plaintiff Districts, and education policy cannot be expected to remedy such poor achievement. The majority complains that the Senate and the House have enacted “multiple statutes which have no demonstrated effect on educational problems,” *Abbeville II* at *21, but this criticism overlooks the reality that there is no single statute or group of statutes that will remedy the socio-economic conditions that depress achievement. There are no silver bullets, and although the majority along with the Senate and the House wishes that were not the case, good achievement for students living in poverty cannot be legislated. That is because of the way that poverty operates to cause poor achievement.

Dr. Walberg's chart illustrates the extent to which the factors strongly associated with poverty affect achievement. As Walberg testified, certain "risk factors"—prenatal factors, family status, divorce, frequent moving, child rearing—are the mechanisms by which poverty operates to adversely affect academic achievement of students in poverty.

Poverty-Related Factors That Affect Achievement



Source: Child Development, 1994; American Psychologist, 1998

(REC038773; REC014027—REC014031.) Dr. Walberg's testimony, which was apparently overlooked by the majority, establishes that inadequate or failed educational policies are *not* the cause of poor achievement. The factors that affect achievement relate to environmental and health conditions that are not school related, and schools can play only a limited role in ameliorating these conditions. Plaintiffs' expert, Dr. Lorin Anderson, agreed with Dr. Walberg. Dr. Anderson testified that in order to ameliorate the effects of poverty on achievement it would be necessary to remedy the factors listed on Defendants' Exhibit Number 3307, p. 3:

But the other factor here is some of these boxes between poverty and achievement are in fact alterable variables, there are things in which you can change. And—and that’s an important point because that—that mitigates the causal—the direct causal nature of poverty and achievement.

You can go in and talk about education dealing with prenatal factors, for example, the assumption being that if we can improve prenatal factors, right, it will decrease the impact of poverty and increase the—the achievement by virtue of the fact we were able to go in and do something positive.

(REC016000—REC016004.)

The majority finds that “[t]he Record unequivocally supports [the] conclusion . . . that a focus on poverty within the Plaintiff Districts likely would yield higher dividends than a focus on perhaps any other variable.” *Abbeville II* at *18. But because the connections between poverty and achievement are not school related, the poor achievement of at-risk students upon which the majority relies to justify a finding in favor of Plaintiffs is not causally connected to a failure of education policy. In the absence of such a causal relationship, it was error for the majority to use poor achievement by students in the Plaintiff Districts as evidence of a constitutional violation. The majority interprets the constitution to require the General Assembly to remedy societal and economic conditions that lie outside of the school system and that are beyond its power to remedy under Article XI, section 3 of the state constitution.

The evidence relating to the specific outcomes reviewed by the majority in reaching its decision demonstrates the absence of a relationship between educational inputs within the control of the General Assembly and the outcomes deplored by the Court.

1. **Report cards.**

While the majority discusses report card ratings of certain Plaintiff Districts, the district report cards are simply a reflection of student test scores. Nevertheless, without any citation to any specific evidence, the majority states that “[t]he evidence at trial established that, while the Plaintiff Districts are capable of improvement, the institutions within these districts are largely unfit to provide students with the constitutionally mandated opportunity.” *Abbeville II* at *10. This finding by the majority is contrary to the record and is erroneous.

For each year at issue in the case, Allendale County School District certified to the South Carolina Department of Education (“SDE”) and the Office of School Quality that the district and its schools have educational standards in place that are consistent with the requirements of the Education Accountability Act (“EAA”) (REC000098 ¶ 118), and that teachers were teaching the curriculum standards and were offering the standard academic courses enumerated within SDE’s regulations. (REC000099 ¶ 119.) Moreover, Allendale County School District has the second highest per pupil expenditure in the state. (REC000100—000101 ¶ 123.)

Similarly, Dillon County School District 2 certified that it was offering the courses mandated by SDE, (REC000102 ¶ 129), and that teachers were teaching the state adopted curriculum standards and were offering the standard academic courses enumerated within SDE’s regulations. (REC000103 ¶ 130.) Moreover, Dillon 2 has received technical assistance under the EAA. (REC000105 ¶ 136.)

The evidence at trial established that teachers in Florence County School District 4 were teaching the curriculum standards and were offering the standard academic courses

enumerated within SDE's regulations and that the curriculum taught in Florence 4 was aligned to the state curriculum standards. (REC000106—000107 ¶ 139.) Moreover, Florence 4 was receiving technical assistance under the EAA. (REC000108—000109 ¶ 145.)

The evidence at trial established that teachers in Hampton County School District 2 were teaching the curriculum standards and were offering the standard academic courses enumerated within SDE's regulations and that the curriculum taught in Hampton 2 was aligned to the state curriculum standards. (REC000110 ¶ 148.) Moreover, Hampton 2 was receiving significant technical assistance under the EAA. (REC000112 ¶ 155.)

The evidence at trial established that Jasper County School District reports annually to SDE that its curriculum is in compliance with state regulations, (REC000113 ¶ 158), and that the courses being taught in Jasper County schools were aligned to the state uniform curriculum standards. *Id.* Moreover, Jasper County was receiving technical assistance and interventions from SDE. (REC000116—000117 ¶ 164.)

The evidence at trial established that Lee County School District reports annually to SDE that its curriculum is in compliance with state regulations, (REC000117—000118 ¶ 167), and that the courses being taught in Lee County schools were aligned to the state uniform curriculum standards and that students were being instructed pursuant to that curriculum. *Id.* Moreover, Lee County received a host of technical assistance under the EAA. (REC000120 ¶ 174.)

The evidence at trial established that Marion County School District 7 reports annually to SDE that its curriculum is in compliance with state regulations, (REC000121 ¶ 177), and that the courses being taught in Marion County schools were aligned to the

state uniform curriculum standards and that students were being instructed pursuant to that curriculum. *Id.* Moreover, Marion County received a host of technical assistance under the EAA in addition to funds received under the EFA and the EIA. (REC000123—000124 ¶ 184.)

The evidence at trial established that Orangeburg County School District 3 reports annually to SDE that its curriculum is in compliance with state regulations, (REC000125 ¶ 188), and that the courses being taught in Orangeburg 3 were aligned to the state uniform curriculum standards and that students were being instructed pursuant to that curriculum. *Id.* Moreover, Orangeburg 3 receives technical assistance under the EAA in addition to funds received under the EFA and the EIA. (REC000127—000128 ¶ 195.)

The majority overlooks all of these findings by the trial court to come to the mistaken conclusion that the schools in the Plaintiff Districts are unfit to provide students with the constitutionally mandated opportunity. For the majority to observe that “officials from each of the Plaintiff Districts testified at trial that teachers in their schools taught the curriculum standards” (standards that the majority finds “are present and appear at the very least minimally adequate”), and that teachers “offered standard academic courses as mandated by state regulations” (regulations that the majority acknowledges are part of “a robust constitutional scheme”), yet conclude that schools in the Plaintiff Districts are “largely unfit to provide students with the constitutionally mandated opportunity” is both inconsistent and not supported by the record.

2. **Student test scores.**

The majority finds that “the students’ PACT scores in the Plaintiff Districts were consistently, alarmingly low.” *Abbeville II* at *11. The majority agrees with the Senate

and the House that “test scores alone do not demonstrate a violation” but concludes, “we cannot completely ignore a substantive measure of student performance in assessing whether the inputs afford the students their mandated opportunity.” *Id.*

But in assuming that better inputs would yield better outcomes, the majority ignores the statistical evidence in the record, about which there was no disagreement. For example, the majority completely overlooks the testimony of Plaintiffs’ own expert, Greg Hawkins, who testified that poverty, not policy, accounts for over 62% of the variations in test scores across every school in the state. (REC002290—REC002292.) This means that if all of the schools in the state had similar students, the differences in test scores between the best performing school and the worst performing school would only be about one-third as great, without changing any other characteristics of the schools, including teacher certification rates and per pupil spending. The majority notes these statistics, *Abbeville II* at *18, but fails to account for these data in reaching its conclusion that school characteristics are determinative of student test scores. The majority also overlooks the testimony of defense expert David Armor, who concluded that poverty accounts for “nearly all” of the differences in PACT scores across the state. (REC014742—REC014744.) Further, the majority overlooks the express statement of the creators of PACT that the test data “cannot and should not be used as a basis for making cause and effect statements about the effectiveness of instruction offered to different groups.” (REC035948.)

The record contains more than reasonable evidentiary support establishing that PACT scores are mostly a function of socio-economic characteristics and are not a measure of school quality. Therefore, it was error for the majority to consider test scores in

assessing whether inputs afford students in the Plaintiff Districts with their mandated opportunity.

3. Teacher quality.

The majority concludes that “[t]he trial court erred in holding that the Defendants’ maintenance of an adequate teacher quality and certification regime translated into an adequate system of education delivery in the Plaintiff Districts.” *Abbeville II* at *15 (footnote omitted). In reaching this conclusion, the majority finds that “[t]he trial court appeared to rely on one witness’s comment that ‘what you do is more important than who you are.’” *Id.* at *13. But the trial court relied on far more than this one statement in reaching its conclusion, and the majority’s statement that “we cannot accept the trial court’s reasoning,” *id.* at *15, both ignores the record and overlooks the standard of review.

In reaching its conclusion, the trial court considered, and the Court’s majority overlooks, the testimony of Dr. Armor and Dr. Podursky, who both analyzed teacher characteristics such as education and experience and compared those characteristics to student achievement and, while using different methodologies, came to the same conclusion: “there is no empirical evidence of a direct relationship between teacher characteristics and student achievement.” (REC000152 ¶ 253. *See also* REC014375, ll. 14-24; REC040237; REC030238; REC040249; REC040262; REC040275; REC040289; REC040302 (no statistical association between teacher pay and achievement); REC014376, ll. 3-14; REC023859 (no statistical association between teacher turnover and achievement.)

The trial court found that the analysis of Plaintiffs’ expert, Dr. Lorin Anderson, supported this conclusion and, “[i]n some instances, Dr. Anderson’s work revealed even

less of a relationship between teacher factors and achievement.” (REC000153—000154 ¶ 256.) Dr. Anderson concluded that the combined teacher effect had a 0.11 relationship to PACT scores. According to Dr. Anderson, that means that for every one percent improvement in the teacher quality variable, you expect to get a one tenth of one percent improvement in PACT scores. (REC016008, ll. 10-20.) Therefore, to obtain a ten percent improvement in PACT scores, one would have to improve the teacher quality variable by 100%. Dr. Anderson also concluded that there was no statistically significant relationship between teachers with advanced degrees and test scores. (REC016005, l. 1—REC016007, l. 8 (L. Anderson).) Defendants’ experts Dr. Podgursky, Dr. Wolkoff, and Dr. Armor did not find any significant relationship between any teacher credential and achievement. (See REC035926 (teacher experience and achievement (math)); REC035911A (professional development days and achievement (math)); REC035927 (advanced degrees and achievement (math)); REC035928 (advanced degrees and achievement (language arts)); REC035929 (continuing contracts and achievement (language arts)); REC035930 (out-of-field certification and achievement (language arts)); REC035931 (teacher experience and achievement (language arts)); REC035932 (professional development days and achievement (language arts)); REC035934 ((continuing contracts and achievement (math)); REC035935 (out-of-field certification and achievement (math)); REC035936 (average teacher experience and achievement (math)). See also Defs.’ REC040244 (teacher certification and achievement, grades 3-5 (2003)); REC040265 (teacher certification and achievement, grades 6-8 (2003)); REC040269 (teacher certification and achievement, grades 3-5 (2002)); REC040296 (teacher certification and achievement, grades 3-5 (2001); REC040282 (teacher certification and achievement, grades 6-8 (2002).)

Thus, the trial court properly concluded that while the evidence overwhelmingly established that there is no correlation between teacher credentials and achievement, the one factor that does correlate statistically with better achievement is good teaching:

The Court does not doubt the sincerity of the beliefs expressed by many of the Plaintiff witnesses who attributed poor student achievement to lower levels of teacher characteristics that are generally considered to be important in the educational community

Dr. Lorin Anderson's statement that "what you do is more important than who you are" is a conveniently concise way to express the idea introduced into the case by Dr. Walberg that specific teaching practices can make a dramatic difference in student achievement. Tr. Trans. (09/28/04), p. 82, ll. 11-21; Defendants' Exhibit 3307. Most experts from both sides opined that the teacher was the greatest single educational influence on the child's academic development within the school itself. Thus, teachers do matter, but it is good teaching that makes a good teacher, not a particular set of credentials or level of experience.

(REC000153—000154 ¶¶ 255, 257.)

The majority poses the question, "[i]f certification does not matter, then why have certification at all?" *Abbeville II* at *15. This question misses the point. The Senate and the House have never contended that teacher certification is an unimportant piece of educational policy. The uncontroverted evidence in this case, however, is that improving teacher credentials will not improve achievement for at-risk students. The majority's conclusion that the trial court's reasoning "requires elevation of anecdote over evidence," *id.*, is belied by the overwhelming evidence contained in the record, which was obviously overlooked or misapprehended by the majority.¹

¹ The majority finds that the shifting of some of the costs of student transportation "surely contributes to a constitutional violation." *Abbeville II* at *13. However, the record in this case contains no evidence that correlates transportation issues in the Plaintiff

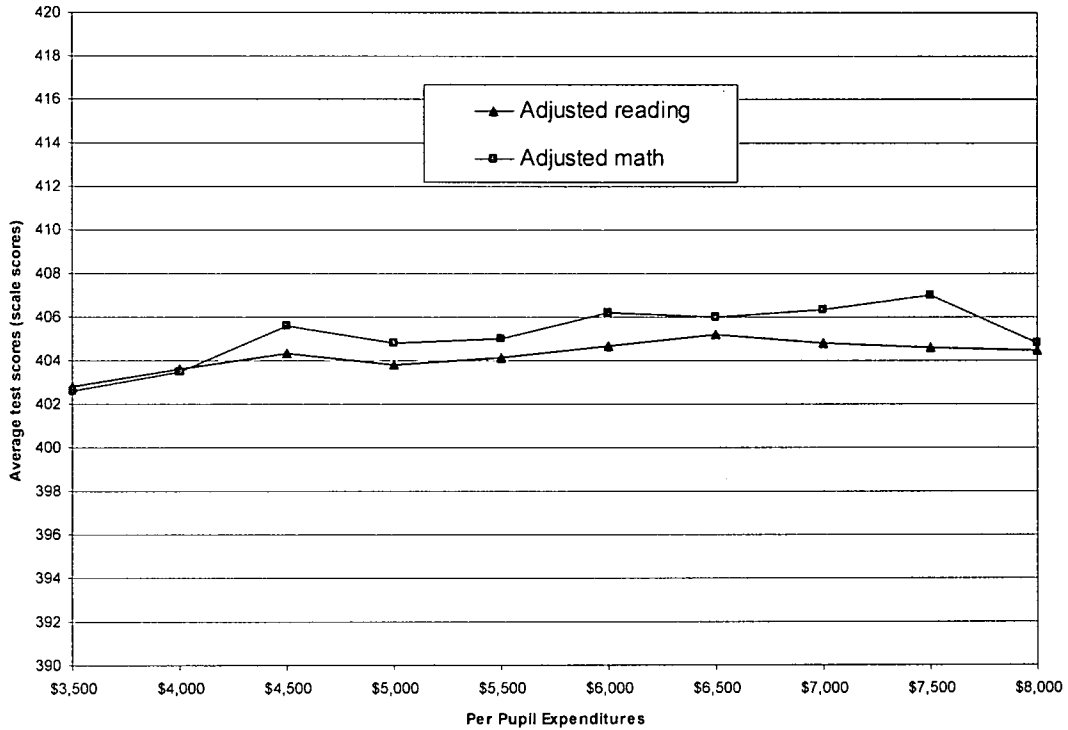
C. In determining a constitutional violation based on funding, the majority overlooks the absence of a positive correlation between spending and achievement.

The majority disagrees with the trial court's determination that student achievement is not significantly related to funding. *Id.*, at *18. In assuming that better achievement can be bought by more spending, the majority overlooks two key pieces of evidence.

First, the empirical evidence in the record demonstrates that both nationally and in South Carolina, there is no positive correlation between spending and achievement. Defendants' expert Dr. Armor examined the relationship between spending and achievement in detail using South Carolina data to track spending and achievement in both elementary and middle schools and found no significant increase in achievement over time as expenditures increased, a fact that is consistent across grades, subjects, schools, and years.

Districts with student achievement. Moreover, the majority finds that the parties "ignor[ed] the overarching dilemmas emanating from the organizational structure of public education." *Id.* at *16. According to the majority, "consolidation [of schools within districts] has led to increases in the length of bus routes, the number of students transported, fuel costs, and bus maintenance[.]" which purportedly has "a palpable effect on students." *Id.* at *12. But other than referencing testimony suggesting that students "are worn out before they get [to school]," *id.*, the majority fails to point out any evidence in the record that *but for* this circumstance, achievement with these students would vastly improve. While these concerns are understandable, as a reviewing court whose review "extends merely to corrections of errors of law[.]" *id.* at 4, the majority errs in finding these concerns constitute a constitutional violation.

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(REC040288. See also REC040261; REC040274; REC040301.)

Second, the majority overlooks the fact that education funding in the Plaintiff Districts is already higher than funding in non-Plaintiff Districts, and in most cases by a substantial amount. In fact, in fiscal year 2007-2008, a majority of the eight Plaintiff Districts were in the top ten of school districts in the state in terms of revenues received:

	State Revenue Per Pupil 2007-2008	Rank
Allendale	\$6,847	7
Dillon 2	\$5,548	43
Florence 4	\$7,159	4
Hampton 2	\$6,868	6
Jasper County	\$5,613	39
Lee County	\$6,843	8

Marion 7	\$8,341	1
Orangeburg 3	\$5,851	30
Average State Revenue	\$5,248	

(App. 00002—00003.)

Thus, the Plaintiff Districts continue to receive more than other districts and continue to receive more since this lawsuit began and each year since 2005, but there has been no appreciable effect on achievement. There is no evidentiary or logical basis to assume that even “more” money will produce any different result. The absence of a relationship between spending and achievement is vividly demonstrated by Dillon 2, which has the lowest funding but the highest achievement of any Plaintiff District. It was therefore error for the majority to find underfunding as a cause of poor achievement, and to insinuate additional funding should be a part of the court-ordered remedy.

II. The Court’s Remedy Violates Separation of Powers.

Finally, we emphasize that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests with the legislative branch of government. We do not intend by this opinion to suggest to any party that we will usurp the authority of [the legislative] branch to determine the way in which educational opportunities are delivered to the children of our State.

Abbeville I, 335 S.C. at 68, 515 S.E.2d at 540.

A. Although the majority acknowledges the right of the General Assembly to make policy decisions, both the determination of the violation and the remedy imposed violate the separation of powers doctrine.

In *Abbeville I*, this Court acknowledged that its jurisdiction in the field of public education is limited and guided by the doctrine of separation of powers. There is no doubt that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Abbeville II*, at *6 (quoting *Marbury v. Madison*, 5 U.S. 137, 138 (1803)). That

was what the Court did in *Abbeville I* when it concluded that “the circuit court erred in using judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause.” *Abbeville I*, 335 S.C. at 67, 515 S.E.2d at 539. In *Abbeville II*, the majority pays only lip service to the doctrine of separation of powers and the Court’s heretofore limited role in determining the manner in which educational opportunities are provided to students in this state. See *Abbeville II* at *18 (“This Court cannot suggest methods of fixing the problem”); *id.* at *19 (“[W]e refuse to provide the General Assembly with a specific solution to the constitutional violation.”); *id.* (“As we explicitly acknowledge above, the Defendants are the sole arbiters of educational policy choices.”) Yet, despite the majority’s acknowledgement that the Court “must be mindful of our proper role in articulating the reasoning and breadth of [its] decision” because resolution of the announced constitutional violation “require[s] policy determinations outside the purview of this Court,” *id.*, at *16, the majority opinion renders meaningless the principle that policy decisions regarding public education are within the exclusive province of the legislative branch. The remedy appropriates legislative power to the judiciary, and the majority concedes that “the remedy in this case may affect future policy decisions regarding the State’s education system” *Id.* at *6.

By retaining jurisdiction and directing the parties to present a plan to address the constitutional violation for approval by the Court, the majority improperly usurps the right of the General Assembly to determine the manner in which educational opportunities are provided to students in South Carolina. As cogently observed by the dissent, the majority’s remedy not only permits this Court to enter into, but also “to be the ultimate decider of the

longstanding debate over the merits of state education policies and mandates.” *Id.* at *24 (Kittredge, J., dissenting).

1. The doctrine of separation of powers.

The doctrine of separation of powers has been long recognized in South Carolina. Separation of powers expresses the policy that each branch of government has certain independent constitutional powers that cannot be exercised by another branch of government. *Culbertson v. Blatt*, 194 S.C. 105, 110, 9 S.E.2d 218 (1940). With respect to the separate and independent role of the judiciary, “the courts and judges not only shall not be required, but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to, or connected with, the administering of the judicial function” *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979) (quoting 16 Am. Jur. 2d *Constitutional Law* § 223). As observed by this Court in *Abbeville I*, the duty of this Court is simply “to interpret and declare the meaning of the Constitution.” 335 S.C. at 67, 515 S.E.2d at 539.

2. The Court overlooks the limits of its power in fashioning a remedy.

Historically, this Court has assumed a limited role in matters relating to public education, recognizing that our constitution “places very few restrictions on the power of the General Assembly in the general field of public education . . . the details are left to its discretion.” *Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 472 (1988) (emphasis added). See also *Horry County Sch. Dist. v. Horry County*, 346 S.C. 621, 632, 552 S.E.2d 737, 743 (2001) (“The legislature has wide discretion in determining how to go about accomplishing its duty to ‘provide for the maintenance and support of a system of free public schools.’”); *Washington v. Salisbury*, 279 S.C. 306, 308, 306 S.E.2d 600, 601

(1983) (“The plain language of [the education clause] places the responsibility for free public education with the General Assembly”); *Moseley v. Welch*, 209 S.C. 19, 33-34, 39 S.E.2d 133, 140 (1946) (“The development of our school system in South Carolina has demonstrated the wisdom of the framers of the Constitution in leaving the General Assembly free to meet changing conditions.”). *Abbeville I* affirmed and bolstered this long-standing precedent. Yet the majority in *Abbeville II* curtails legislative discretion in the education policymaking arena by placing the details of education policy in the hands of the School Districts and ultimately this Court.

3. **This Court is without authority to retain jurisdiction and order the Senate and the House to present a plan to the Court.**
 - a. **The remedy invests the Court with veto power over legislative prerogative.**

The majority recognizes that incursions into the educational policy arena by courts across the nation “have at times infringed upon the legislative prerogative, and now and again have demonstrated the judiciary’s inability to account for a number of policy decisions and practical considerations.” *Abbeville II* at *21 (citation omitted). The majority purports to “avoid a quagmire which would only serve to unnecessarily involve this Court in the Defendants’ bailiwick” by directing the parties to “work in concert” with each other “to chart a path forward” by developing and presenting a plan to the Court “to address the constitutional violation announced today.” *Id.* at *21-22. Until such time that the parties reappear, this Court retains jurisdiction of this case. *Id.* at *22.

This remedy, however, compounds rather than avoids the quagmire that results from failure strictly to observe the dictates of separation of powers by imbuing not only the Court, but also the Plaintiff Districts, with a role in the determination of education

policy in South Carolina. Ordering the parties “to reappear before this Court within a reasonable amount of time” with a plan to cure the announced constitutional violation violates the separation of powers principles recognized in this Court’s precedent, including *Abbeville I*, and equips this Court with veto power over legislative prerogative. As the Kentucky Supreme Court found in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), such a remedy is “a clear incursion, by the judiciary, of the functions of the legislature” that empowers this Court with veto power over the legislative prerogative in education policy:

The implications of such an open-ended judgment are very clear. The [] court retains jurisdiction as supervision of the General Assembly’s effort to provide a constitutional system of common schools. Under such an order, the General Assembly, in theory if not in practice, would literally have to confer, report, and comply with the judge’s view of the legislation proposed to comply with the order. The legislation would be that of the joint efforts of the General Assembly and the [] court, with the latter having the final word. That is, without a doubt, the type of action that was eschewed when the framers of the four constitutions of this state placed the separation of powers doctrine in the organic law of this state.

790 S.W.2d at 214. *See also Campaign for Fiscal Equality, Inc. v. State*, 814 N.Y.S.2d 1, 11 (N.Y. App. Div. 2006) (“The fact that the other two branches of government have not remedied constitutional failings in the past does not authorize the courts to commit their own constitutional violations now.”).

b. The remedy invests the Plaintiff Districts with veto power over legislative prerogative.

The majority’s remedy also violates separation of powers because it vests the Plaintiff Districts with veto power over the legislative prerogative in formulating education policy. By apparently requiring an agreement between the General Assembly and the

Plaintiff School Districts on the appropriate contents of the “basket of quality educational goods and services,” the majority’s decision gives the Plaintiff School Districts veto power over policy choices that are squarely in the province of the legislature. The Plaintiff Districts can preclude an agreement unless their every demand is satisfied in the plan. Such a usurpation of legislative power in the area of education policy by the Plaintiff School Districts violates the constitution generally and the doctrine of separation of powers specifically.

In sum, by requiring the parties to agree on the contents of a “basket of quality educational goods and services,” the majority overlooks the fact that this remedy both forces the legislature to concede legislative power and invests this Court and the Plaintiff School Districts with veto power over the legislative prerogative in education policymaking.

B. By finding a vague violation based on “we know it when we see it” reasoning, the Court requires legislative policy changes without any finding of a specific violation other than references to the “funding mechanism.”

Despite its rhetoric, the Court’s majority fails to clearly articulate the precise constitutional violation. On the one hand, the majority acknowledges that “the Plaintiff Districts do not argue that the statutes comprising South Carolina’s education regime in and of themselves are repugnant to the Constitution” *Abbeville II* at *4. On the other hand, the majority states that “Plaintiff Districts argue, and we agree, that the proper question is whether the education funding apparatus as a whole gives rise to a constitutional violation.” *Id.* Moreover, in concluding that the case is not moot, the majority expressly finds that “Defendants have not substantially changed the baseline funding mechanisms[,]” and therefore “the Plaintiff Districts may validly argue that the overall funding scheme

continues to disadvantage them in some fundamental way.” *Id.* at *5. While the majority claims they do not “*merely* order the Defendants to disperse additional funding to the Plaintiff Districts” and that “money *alone* is not the answer[,]” *id.* at *21, n.28 (emphasis added), the majority holds “that South Carolina’s educational funding scheme is a fractured formula denying students in the Plaintiff Districts the constitutionally required opportunity.” *Id.* at *16. These statements obscure the precise constitutional violation identified by the majority, thereby preventing certainty as to what must be done to remedy the violation. Does the funding apparatus have to change, or would it be sufficient just to appropriate more money under the existing formulas? If either of those changes are made, what if outcomes show no improvement over time? How much improvement is necessary over how much time? The majority requires the Senate and the House to adopt specific policy changes without any finding of a specific funding violation other than generic references to “funding mechanisms.” But the majority does not state in what way the funding mechanism is unconstitutional, other than it does not produce the outcomes the Court’s majority deems desirable. As noted by the dissent, the Senate and the House are not told what they must do to comply with the mandate, although “it cannot be denied that increased funding must be part of the legislative response.” *Id.* at *30 (Kittredge, J., dissenting). Indeed, the majority’s holding is nothing short of a “mandate to the General Assembly . . . to spend more[.]” *Id.* In fact, it is a mandate to the General Assembly to spend more in the Plaintiff Districts—districts that the majority acknowledges receive significantly more support from the state than other non-Plaintiff Districts receive. *Id.* at *7. Although school-to-work programs, teacher quality and certification, and early education programs may be important, the fact remains that the development and

implementation of these programs carry a cost as do all other functions of government.

Indeed,

[t]he issue of public education is thus no different from our political controversies concerning whether we should invest more money in our public transportation system or our roads, how much money we ought to allocate for environmental preservation, and the amount we should provide in public assistance to low-income individuals and families. In other words, the controversy . . . is largely a funding debate.

Hancock v. Comm’r of Educ., 822 N.E.2d 1134, 1164 (Mass. 2005) (Cowin, J., concurring).²

But courts are precluded by the doctrine of separation of powers from ordering the General Assembly to appropriate funds. In South Carolina, the General Assembly has “the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated money shall be spent.” *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 630 (2002) (quoting *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 313-14, 295 S.E.2d 633, 637 (1982)). See also *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (“The appropriation of public funds is a legislative function.”); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, ___, 181 S.E.2d 481, 485 (1935) (“[T]he Legislature has *full authority* to make such appropriations as it deems wise in the absence of any specific constitutional prohibition against such appropriation[.]”) (Emphasis added). Choices regarding how much money, if any, to spend and how to spend

² Of course, in their complaint Plaintiffs sought, among other things, a declaration “that *the current system of funding and supporting education* in South Carolina is inadequate to meet the minimum educational needs of the students in the Plaintiff districts” (REC000336.)

it are political decisions that in every instance are left to the General Assembly, not the courts or third parties.

The remedy required by the Court may well involve reallocation of public resources. The majority's oversight of this process constitutes a usurpation the authority of the Senate and the House to determine the way in which educational opportunities are delivered. *Abbeville I*, 335 S.C. at 69, 515 S.E.2d at 541. As noted by the Massachusetts Supreme Court, courts are ill-suited to offer solutions in education policy debates:

The courts, insulated from the political fray as we are for good reason, are ill suited to craft solutions to complex social and political problems. Unlike State legislatures and their staffs, judges have no special training in educational policy or budgets, no funds with which to hire experts in the field of education, no resources with which to conduct inquiries or experiments, no regular exposure to our school system, no contact with the rank and file who have the task of implementing our lofty pronouncements, and no direct accountability to the communities that house our schools. Had this lawsuit been successful and this court were once again to fashion a judicial remedy, the elected officials who, pursuant to our Constitution, ought to bear the ultimate burden of resolving our current educational debate would have been insulated from public accountability.

Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1165 (Mass. 2005) (Cowan, J., concurring).

This is precisely why this Court previously stated that, in the course of trying this case and deciding issues pertinent to this case, the courts of this state were not to become “super-legislatures or super-school boards.” *Abbeville I*, 335 S.C. at 69, 515 S.E.2d at 541. In *Abbeville I*, the Court defined the constitution's requirement in “deliberately broad parameters” so that those accountable to the public—*i.e.*, members of the General Assembly, not the trial court nor this Court nor the Plaintiff Districts, could fill in details.

The majority's remedy overlooks every stated separation of powers principle previously adhered to by this Court.

- C. **By failing to articulate an objectively measurable standard of compliance, the Court has put itself in the position to require the General Assembly to “guess again” until the General Assembly chooses policies the Court deems appropriate.**

The finding of a constitutional violation by the majority requires it to articulate an objectively measurable standard of constitutional compliance. William F. Dietz, *Manageable Adequacy Standards in Education Reform Litigation*, 74 Wash. Univ. Law Rev. 1193, 1203 (1996) (“[I]f a court is willing to recognize the existence of a right to an adequate education, the right is meaningless without a workable, and hence enforceable, standard to measure adequacy.”). But there is no such standard in the majority opinion. The majority discusses Plaintiff District report cards and notes that the most recent report cards show that “[f]ive of the Plaintiff Districts . . . received either Below Average or an Average rating.” *Abbeville II* at *10. But the majority does not say how much improvement would be necessary to cure the violation. Similarly, the majority found student test scores to be “alarmingly low,” *id.* at *11, but failed to mention how much test scores would have to improve in order to meet constitutional compliance.

Abbeville I's new, heightened standard of constitutional compliance is impermissibly vague. As the dissent correctly observes, the adoption of “I know it when I see it” jurisprudence in this case coupled with the failure of the majority to articulate an objectively measurable standard of constitutional compliance means that “the General Assembly is left to grope in the dark, and the net effect is that the General Assembly must revamp the education system without knowing what criteria will be used by this Court to judge the ‘constitutionality’ of its response.” *Id.* at *24, n.32 (Kittredge, J., dissenting).

To the extent that the Court's majority insists that outcomes must improve, it is imperative that the majority inform the Senate and the House how much they must improve in order to comply with the constitution. Otherwise, the Senate and the House will be relegated to play an endless guessing game with the Court in formulating education policy in the state.

III. The Majority's Remedy is Beyond the Power of the Court.

We do not intend the courts of this State to become super-legislatures or super-school boards.

Abbeville I, 335 S.C. at 68, 515 S.E.2d at 540.

A. This action was brought as an action seeking declaratory relief.

Plaintiffs brought this action seeking declaratory relief. In January of 2001, following this Court's decision in *Abbeville I* and following remand, Plaintiffs again moved to amend their Complaint. The proposed Third Amended Complaint reiterated prior allegations, but also for the first time sought monetary damages. On June 1, 2001, the trial court granted Plaintiffs' motion to amend, but denied Plaintiffs' request for monetary damages, finding that the South Carolina Constitution's education clause is not self-executing and, as such, cannot serve as a basis for a cause of action for damages against the Defendants. Thus, the case before the Court is for declaratory relief only.

In *Abbeville II*, the majority declares the law and announces a violation. Although this Court may possess equitable and remedial powers to correct a constitutional deficiency, a court's equitable and remedial powers are not unlimited, "and one of the most important considerations governing the exercise of remedial power is a proper respect for the integrity and function of local governmental institutions." *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 167 (1971)). Having announced a violation, the Court has fulfilled its role, and consistent with this Court's

precedent, any remedy should be left to the sound discretion of the General Assembly, not this Court or any other entity. *See Rose*, 790 S.W.2d at 214 (“Our job is to determine the constitutional validity of the system of common schools within the meaning of the Kentucky Constitution We have done so. We have declared the system of common schools to be unconstitutional. *It is now up to the General Assembly* to re-create and re-establish a system of common schools within this state which will be in compliance with the Constitution. We have no doubt they will proceed with their duty.” (Emphasis added)).

The trial court found that the state’s only deficiency in terms of complying with the constitutional standard set by this Court was the failure of the state early childhood intervention programs. The new program responsive to the trial court’s ruling is CDEPP, which was established by the General Assembly in the 2006-2007 General Appropriations Bill. (Part IB, Proviso 1.75, Act 397 of 2006 & Part IB, Proviso 1.66, Act 177 of 2007; *see also* App. 00007; 00241—00246.) The General Assembly created this early childhood education program “to focus on the developmental and learning support that children must have in order to be ready for school and must incorporate parenting education.” (Proviso 1A.45; App. 000371.) CDEPP has continued into the current fiscal year and is now funded on a recurring basis. (*See* App. 0222—0338.) Originally, CDEPP was available in only thirty-four school districts. In fiscal year 2013-2014, the General Assembly expanded CDEPP to districts that had a poverty index greater than seventy-five percent, which included an additional seventeen districts. In fiscal year 2014-2015, the General Assembly expanded CDEP to districts that had a poverty index greater than seventy percent, which

added an additional ten districts.³ Currently, there are sixty-one districts eligible for CDEPP, with five districts not participating. *See* S.C. Education Oversight Committee, *available at* <http://www.eoc.sc.gov/CDEPP/Pages/default.aspx>, pp. 7-15 (last visited Dec. 17, 2014).

In addition, for fiscal year 2014-2015, an additional \$4.5 million was appropriated for summer reading camps, bringing the total appropriation to \$6 million; fully funded reading coaches (a total of 300 coaches) were added to every elementary school where more than twenty percent of the students scored “Not Met” on the reading and research test; an add-on weight for poverty (0.2) was added to the Education Finance Act, which is expected to generate over \$100 million dollars to the Plaintiff Districts through the EFA; and \$29 million in lottery funds was appropriated for the K-12 Technology initiative. Finally, since the trial of this case, an additional \$96,094,027 from the EIA and \$291,326,076 from the EFA have been appropriated to assist in ensuring an opportunity for a minimally adequate education exists in the Plaintiff Districts.

Thus, since the trial of this case and without a court order, the Senate and the House have continued to enact substantial initiatives to ensure that students in the Plaintiff Districts receive an opportunity to acquire more than a minimally adequate education. The Court should leave further initiatives necessary to comply with the newly announced

³ In fiscal year 2013-14, the General Assembly appropriated \$22 million recurring dollars and \$4.2 million non-recurring dollars to CDEPP. In fiscal year 2014-2015, the General Assembly appropriated \$18.6 million recurring dollars and \$1.4 million non-recurring dollars to CDEPP. Thus, between fiscal year 2013-2014 and 2014-2015, the General Assembly has appropriated an additional \$40.6 million recurring dollars to fund CDEPP.

constitutional standard to the General Assembly's discretion to adopt without supervision by or interference from the Court.

B. The remedy imposed by the majority is unworkable.

The direction by the majority to the parties to agree on a plan to address the constitutional violation is unworkable. No one is authorized to speak on behalf of all members of the General Assembly, and no one person can bind the Senate and the House to enact legislation on behalf of all its members. The House is composed of 124 members and the Senate is composed of forty-six members, each with their own view of education policy and each with their own vote. Any proposed plan by the House or Senate would have to be prepared, proposed, read to the full body, sent to the appropriate committee(s) for review, where the plan could be changed, accepted, or rejected. If the plan is changed or accepted by the committee, it is then sent to the whole body, who may vote to accept, change, or reject the plan. Even if passed by one chamber, the plan must then proceed to the other chamber for review where it is subject to the same process. Once any such "plan" is passed, it must be signed by the Governor before it becomes law.

In short, the majority overlooks the fact that the Senate and the House are without authority to present a "plan" to the Court in advance of action by the General Assembly as a whole.

C. The majority opinion is unclear as to the process going forward, and the remedy is unconstitutionally vague as a result.

The majority orders the parties to reappear before the Court "within a reasonable time" to present "a plan to address the constitutional violation" *Abbeville II* at *22. The majority fails to define the contours of what might constitute a "reasonable time," instead "invit[ing] the parties to make additional filings suggesting a specific timeline for

the reappearance.” *Id.* The Senate and the House will comply with this requirement, but the necessary amount of time is unknowable. Even once the Senate and the House decide to place education policy at the top of its agenda, it could take months simply to propose a “plan” and even many more months for the plan to work its way through the committee process. Just as members of this Court are “not experts in education,” *Abbeville I*, 335 S.C. at 69, 515 S.E.2d at 540, nor are many members of the General Assembly, who would have to rely on experts and months of study to determine the policies that are best suited to improve achievement in the Plaintiff Districts. Moreover, if constitutional compliance is to be measured by achievement, it could take years of constant study, review, and adjustment before the “clear disconnect between the inputs and outputs of the education system” can be evaluated and resolved.

D. Retaining jurisdiction over this matter is an extreme remedy under the circumstances.

“In view of the separate powers entrusted to the three coordinate branches of government, it is not the usual function of the judiciary to supervise the legislative process” by retaining jurisdiction over a case and ordering the parties to, in the words of the majority, “work together in concert . . . to chart a path forward which appropriately prioritizes student learning.” *See Bismarck Pub. Sch. Dist. # 1 v. State*, 511 N.W.2d 247, 263 (N.D. 1994) (finding that the district court erred “in mandating specific actions and in retaining jurisdiction to enforce compliance with its decision,” opting instead to “accord respect to the coordinate branches of government . . . to remedy the disparate effects of the statutory method for distributing funding for education . . .”).

Although *Abbeville II* is the second time this case has been before this Court, *Abbeville II* represents the first time this Court has had occasion to assess whether a

violation is present. Most cases that have retained jurisdiction over an education funding case have done so only after the legislature has failed to act after a state's highest court has found a violation of the state's education clause. *See Abbott ex rel. Abbott v. Burke*, 693 A.2d 417, 445 (N.J. 1997) (abandoning the “prudent and preferred” wait-and-see approach applied in its three previous decisions only after years of continuous inaction on the part of the legislature); *State v. Campbell Cnty. Sch. Dist.*, 19 P.3d 518 (Wyo. 2001); *Montoy v. State*, 112 P.3d 923, 940 (Kan. 2005) (noting that “[t]he legislature has known for some time the increased funding of the financing formula would be necessary”); *McCleary v. State*, 269 P.3d 227, 261 (Wash. 2012) (retaining jurisdiction due to the state's history of “providing school districts with a level of resources that falls short of the actual costs of the basic education program”).

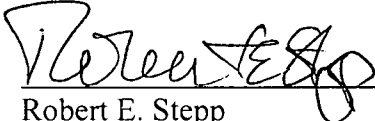
In contrast, as the majority notes, the Senate and the House have “addressed each of the important aspects of public school education, and provided the requisite funding for general education and additional programs” including “statutorily mandated funding for early childhood assistance, and transition programs for those students who choose to proceed directly from school to work.” *Abbeville II* at *9. Indeed, the majority concedes that “a robust educational scheme appears to be at work in the Plaintiff Districts” and “[t]he instrumentalities of learning—funding, curriculum, teachers, and programs—are present and appear at the very least” to meet the minimally adequate standard announced in *Abbeville I. Id.* (Footnote omitted). Therefore, it cannot be said that the Senate and the House have ignored education policy or are guilty of inaction in the area of education policy. The policies that may be necessary to abate the constitutional violation identified by the majority are complex and completely in the province of the General Assembly to

assess. Judicial assessment is not required nor constitutionally warranted. *Seattle Sch. Dist. # 1 v. State*, 585 P.2d 71, 105 (Wash. 1978) (finding that “[t]he trial court’s decision to retain jurisdiction is inconsistent with the assumption that the Legislature will comply with the judgment and its constitutional duties”).

Conclusion

In fifteen years, this Court has transformed the constitutional duty of the General Assembly to provide for a system of free public schools first into a requirement that the system provide the opportunity for each child to acquire a minimally adequate education, and then ultimately into a duty to design and fund a school system that guarantees unspecified levels of student achievement. In so doing, the Court’s majority ignores the detailed work of the trial court, including the substantial evidence in this record that that better achievement of students in poverty cannot be legislated or bought. The majority has declared a constitutional violation that is undefined and is undefinable except in the sole perception of the Court. The Court has improvidently assumed causal relationships that do not exist. The majority imposes a remedy that usurps the exclusive domain of the legislature and requires the General Assembly to cede its legislative authority both to the Court and to the Plaintiff Districts, with only a “guess again” standard for determining subsequent compliance. Moreover, the Court appropriates to itself the power to allocate limited state resources among competing public purposes, and notwithstanding its previously professed complete lack of expertise, the power to dictate (or at least veto) the educational policies to be adopted for this State. Even more troubling is the absence of any objectively articulable standard that would permit the General Assembly to understand what it has to do to satisfy the Court’s educational fiat.

The result is the very quagmire that the Court's majority professes to avoid. Although the majority's intended result is laudable, the decision runs counter to fundamental legal principles and is not consistent with the record in this case. The Court should reconsider its opinion and enter judgment for the Senate and the House.

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December 30, 2014

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

RECEIVED

DEC 30 2014

S.C. Supreme Court

Abbeville County School District, *et al.*,

Appellants-Respondents,

vs.

The State of South Carolina, *et al.*, of whom
Hugh K. Leatherman, as President Pro Tempore
of the Senate and as a representative of the
South Carolina Senate, and James H. Lucas,
as Speaker Pro Tempore 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 hereby certify that I have caused to be served a copy of the Respondents-Appellants Hugh K. Leatherman and James H. Lucas' Petition for Rehearing upon counsel of record, as reflected below, by hand delivery, this **30th day of December 2014**.

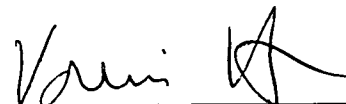
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