

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEE COUNTY
Court of Common Pleas

Thomas W Cooper, Jr , Circuit Court Judge

Case No 2007-65159

RECEIVED

JUN - 9 2007

SC SUPREME COURT

Abbeville County School District, Allendale County School District, Bamberg County School District 1, Bamberg County School District 2, Barnwell County School District 19, Barnwell County School District 29, Barnwell County School District 45, Berkeley County School District, Chesterfield County School District, Clarendon County School District 1, Clarendon County School District 2, Clarendon County School District 3 Dillon County School District 1, Dillon County School District 2, Dillon County School District 3, Florence County School District 1 Florence County School District 2, Florence County School District 3 Florence County School District 4 Florence County School District 5, Hampton County School District 1, Hampton County School District 2, Jasper County School District Laurens County School District 55 Laurens County School District 56 Lee County School District Lexington County School District 4 Marion County School District 1, Marion County School District 2, Marion County School District 7, Marlboro County School District McCormick County School District Orangeburg Consolidated School District 3 Orangeburg Consolidated School District 5 Saluda County School District and Williamsburg County School District, Lena Manning individually and as a taxpayer residing in Allendale County and as Guardian ad Litem of Courtney V Courtney V a minor, by and through Lena Manning, as Guardian ad Litem William L Mills individually and as a Taxpayer residing in Allendale County and as Guardian ad Litem of Waylon P Waylon P a minor by and through William Mills as Guardian ad Litem, Betty Bagley, individually and as a taxpayer residing in Bamberg County and as a parent and Guardian ad Litem of Tyler B , Tyler B a minor, by and through Betty Bagley as Guardian ad Litem Ivert Comer Jr individually and as a taxpayer residing in Bamberg County and as parent and Guardian ad Litem of Kimberly C Kimberly C a minor by and through Evert Comer Jr , as Guardian ad Litem, Marla Q Jameson, individually and as a taxpayer residing in Barnwell County, and as a parent and Guardian ad Litem of Eleanor J Eleanor J a minor, by and through

Marla Q Jameson, as Guardian ad Litem, Victor M Lancaster, Sr , individually, and as a taxpayer residing in Barnwell County, and as parent and Guardian ad Litem of Christie L , Christie L , a minor, by and through Victor M Lancaster, Sr , as Guardian ad Litem, Dr Charles Clark, individually, and as a taxpayer residing in Chesterfield County, and as parent and Guardian ad Litem of Candace C , a minor, by and through Dr Charles Clark, as Guardian ad Litem, Colonel Larry Coker, individually, and as a taxpayer residing in Clarendon County, and as a parent and Guardian ad Litem of Corrie C , Corrie C , a minor, by and through Colonel Larry Coker, as Guardian ad Litem, Pamela Williams, individually, and as a taxpayer residing in Dillon County and as parent and Guardian ad Litem of Katisha W , Kathisha W a minor, by and through Pamela Williams as Guardian ad Litem Eddie Wright individually, and as a taxpayer residing in Florence County and as parent and Guardian ad Litem of Brandon F , Brandon F a minor, by and through Eddie Wright as Guardian ad Litem, John Whiteside, individually, and as a taxpayer residing in Florence County and as Parent and Guardian ad Litem of Joel W , Joel W , a minor, by and through John Whiteside as Guardian ad Litem, Dr Francis Mills, individually, and as a taxpayer residing in Hampton County and as a parent and Guardian ad Litem of Amy M , Amy M , a minor, by and through Dr Francis Mills, as Guardian ad Litem, Brenda Brooks, individually, and as a taxpayer residing in Hampton County, and as parent and Guardian ad Litem of Tyrin B , Tyrin B , a minor, by and through Brenda Brooks as Guardian ad Litem, Marva Tigner, individually, and as a taxpayer residing in Jasper County, and as parent and Guardian ad Litem of Bryan T and Bradley T , Bryan T , a minor, by and through Marva Tigner as Guardian ad Litem, Bradley T , a minor, by and through Marva Tigner as Guardian ad Litem, Robert Elisha Short, individually, and as a taxpayer residing in Laurens County and as parent and Guardian ad Litem of Robert B S , Robert B S , a minor by and through Robert Elisha Short, as Guardian ad Litem, Dr Keith A Bridges individually, and as a taxpayer residing in Laurens County and as parent and Guardian ad Litem of Jorgana Ranson B Jorgana Ranson B , a minor, by and through Dr Keith A Bridges, as Guardian ad Litem, Gail Y Harriott, individually, and as a taxpayer residing in Lee County and as parent and Guardian ad Litem of Rashade H , Rashade H , a minor, by and through Gail Y Harriott, as Guardian ad Litem Linda Carraway, individually and as a taxpayer residing in Marion County, and as parent and Guardian ad Litem of Kimberly W Kimberly W , a minor, by and through Linda Carraway as Guardian ad Litem, Dr John Nobles individually, and as a taxpayer residing in Marlboro County and as parent and Guardian ad Litem of Erin N Frin N , a minor, by and through Dr John Nobles, as Guardian ad

Litem, Patricia Hampton, individually, and as a taxpayer residing in McCormick County and as parent and Guardian ad Litem of Krystle H , Krystle H , a minor, by and through Patricia Hampton, as Guardian ad Litem, Bernice Profit, individually, as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Russell H , Russell H , a minor by and through Bernice Profit as Guardian ad Litem Matlin P Brown, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Tanisha P B Tanisha P B , a minor, by and through Matlin P Brown, as Guardian ad Litem, James Berry, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Dondrea B , Dondrea B , a minor by and through James Berry, as Guardian ad Litem, Gerald Smith, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Brenda S , Brenda S , a minor, by and through Gerald Smith, as Guardian ad Litem, Thomas Shealy, individually, and as a taxpayer residing in Saluda County and as parent and Guardian ad Litem of Thomas S , Jr , Thomas S , Jr , a minor, by and through Thomas Shealy, as Guardian ad Litem

Plaintiffs,

Of Whom

Allendale County School District, Dillon County School District 2, Florence County School District 4, Hampton County School District 2, Jasper County School District, Lee County School District, Marion County School District 7 and Orangeburg Consolidated School District 3, Lena Manning individually, and as a taxpayer residing in Allendale County and as Guardian ad Litem of Courtney V , Courtney V , a minor, by and through Lena Manning as Guardian ad Litem Pamela Williams, individually, and as a taxpayer residing in Dillon County, and as parent and Guardian ad Litem of Katisha W , Kathisha W , a minor, by and through Pamela Williams as Guardian ad Litem, Eddie Wright, individually, and as a taxpayer residing in Florence County, and as parent and Guardian ad Litem of Brandon F , Brandon F , a minor, by and through Eddie Wright as Guardian ad Litem, Brenda Brooks, individually and as a taxpayer residing in Hampton County and as parent and Guardian ad Litem of Lyrin B Lyrin B , a minor by and through Brenda Brooks as Guardian ad Litem, Marva Tigner individually and as a taxpayer residing in Jasper County, and as parent and Guardian ad Litem of Bryan T and Bradley T , Bryan T a minor, by and through Marva Tigner as Guardian ad Litem, Bradley T a minor, by and through Marva Tigner as Guardian ad Litem, Gail Y Harriott, individually, and as a taxpayer residing in Lee County and as parent and

Guardian ad Litem of Rashade H , Rashade H a minor, by and through Gail Y Harriott, as Guardian ad Litem, Linda Carraway individually, and as a taxpayer residing in Marion County, and as parent and Guardian ad Litem of Kimberly W , Kimberly W , a minor by and through Linda Carraway as Guardian ad Litem, Bernice Profit individually, as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Russell H , Russell H a minor, by and through Bernice Profit, as Guardian ad Litem, are

Appellants / Respondents,

vs

The State of South Carolina, Mark C Sanford, as Governor of The State of South Carolina, Glenn F McConnell, in his representative capacity as President Pro Tempore of the South Carolina Senate and as representative thereof, Robert William Harrell Jr as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives,

Defendants,

Of Whom

Glenn F McConnell, in his representative capacity as President Pro Tempore of the South Carolina Senate and as representative thereof Robert William Harrell Jr as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives

Respondents / Appellants

and

The State of South Carolina and Mark C Sanford as Governor of the State of South Carolina are

Respondents

RESPONDENTS / APPELLANTS GLENN F McCONNELL AND ROBERT WILLIAM HARRELL, JR 's RETURN TO BRIEF OF *AMICI CURIAE* THE LEAGUE OF WOMEN VOTERS OF SOUTH CAROLINA AND THE SOUTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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- Putting Arizona Education Reform to the Test Choice and Early Education Expansion*, Feb 19, 2007, available at <http://ednews.org/articles/8169/1/All-Day-Kindergarten-Failing-as-Education-Reform/Page1.html> 4
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- Janet Currie and Duncan Thomas, *Does Head Start Make a Difference?*, 85 Am Econ Rev 341 (1995) 5

Argument

Without having heard the evidence in this case the League of Women Voters of South Carolina and the South Carolina Conference of the National Association for the Advancement of Colored People (collectively, “the *amici*”) moved this Court on May 29, 2008 for leave to file an *amicus curiae* brief in this matter. The *amici*’s brief offers no unique insights into the legal issues in this case.¹ The brief purports to focus on “the General Assembly’s duty under the State Constitution to ensure the opportunity for children in poverty to participate in early childhood education programs (Br. of *Amicus Curiae* 3).” This statement begs the question. The issue before the Court is whether the education clause imposes a duty on the part of the state to adopt early childhood education programs.² As established below, the *amici*’s brief only serves to highlight why this Court should reverse the trial court’s conclusion that a constitutional violation exists in the Plaintiff Districts “because of the lack of effective and adequately funded early childhood intervention programs.” (REC000207)

I Affirming the Trial Court’s Order Would Transform This Court Into a Super School Board

The *amici* correctly state that “[t]his Court has recognized that the scope of a constitutionally adequate education system will necessarily evolve over time, depending

¹ As was the case with the South Carolina Appleseed Legal Justice Center and the South Carolina Association of School Nurses, the *amici*’s effort here is merely an extension of the Appellant/Respondents’ arguments before this Court and offers little by way of educating the Court about the law. Respondents/Appellants therefore incorporate the arguments set forth in their Return to Brief of *Amicus Curiae* South Carolina Appleseed Legal Justice Center and the South Carolina Association of School Nurses.

² The *amici* recognize the issue later in their brief when they urge this Court to further “interpret the South Carolina Constitution to require the General Assembly to offer economically disadvantaged pre-kindergarteners the opportunity to participate in high-quality early learning programs.” (Br. of *Amicus Curiae* 21)

on social context and other changes” (Br of *Amicus Curiae* 8 (citing *Moseley v Welch*, 209 S C 19, ___, 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”)))) But the necessary evolution of the scope of a constitutionally adequate education system does not envision judicial intervention as a necessary part of the process To the contrary, under South Carolina law, judicial intervention in the evolution of educational policy is the rare exception, not the rule That is precisely why this Court emphasized in *Abbeville County* “that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the *legislative branch* of government” *Abbeville County v State*, 335 S C 58, 69 515 S E 2d 535, 541 (1999) (emphasis added)) This is precisely why this Court explicitly stated that its opinion in *Abbeville County* was not intended to suggest that this Court would “usurp the authority of [the legislative] branch to determine the way in which educational opportunities are delivered to the children of our State” *Id*

Yet affirming the trial court’s order would lead to that anomalous result One only has to look at the first page of the *amici*’s argument wherein the *amici* inform the Court that “[t]here are numerous models of effective pre-kindergarten programs” (Br of *Amicus Curiae* 3, n 1) Presumably, the *amici* would have this Court disentangle the effective from the non-effective programs, and then select the best model for the legislature to adopt from the “numerous models” available today And because, as the *amici* contend the scope of a constitutionally adequate education system evolves over time, this Court will be called on repeatedly in the future to further define that scope as

various parties continually and creatively attempt to expand the scope of the education clause. That is not the role of this Court. To affirm the trial court's order, this Court would indubitably transform itself into a super-school board—a role that this Court has expressly renounced. *Abbeville County*, 335 S.C. at 69, 515 S.E.2d at 541.

Both the *amici* and the Appellants/Respondents fail to recognize that a decision by this Court that early childhood education is critical to an at-risk child's academic success is a policy decision that in turn is "fundamentally political." *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1157 (Mass. 2005). Moreover, choosing from among the "numerous models" available is an even more policy-laden task. *Mosely supra*. "Courts are not well positioned to make such decisions." *Hancock*, 822 N.E.2d at 1157. This Court should therefore reverse the trial court's decision with respect to early childhood education.

II No Constitutional Standard in South Carolina Requires High-Quality Pre-Kindergarten Programs for Children in Poverty

According to the *amici*, the constitutional standard of educational adequacy requires "high-quality" early childhood intervention programs for children in poverty. (See Br. of *Amicus Curiae* 5.) The *amici*, however, fail to point to a constitutional provision or language in *Abbeville County* to support this contention. Instead, the *amici* remarkably contend that selected trial evidence and national early childhood education research has somehow "establish[ed] that the concept of an adequate education under the South Carolina Constitution has evolved to include an opportunity for children in poverty to participate in high-quality pre-kindergarten programs." (Br. of *Amicus Curiae* 9.)

The problem with this assertion is that it is simply not true. The "uncontroverted testimony of witnesses" alluded to by the *amici* is not grounded in empirical research.

Moreover, at best, national early childhood education research is inconclusive. As Respondents/Appellants note in their Reply Brief, these programs are controversial because “a lot of working parents substitute these programs for childcare” and a lot of experts question whether it is “appropriate for children the age of three to be in institutional care or are they better off in a home setting. And there are people who—who believe strongly on both sides of that and who adduce evidence on both sides of that.” (REC013595, 1 10—REC013596, 1 5)

Indeed, on the other side of the debate, recent research reveals that for whatever reason, “students in preschool programs tend to have more behavioral problems as they go through school.” (REC013825, 1 22—REC013826, 1 15) Other researchers have concluded that early childhood education programs “initially improve learning but have no measurable impact on reading, math, or language arts test scores by fifth grade” and therefore “do not deliver long-term academic improvement.” See *Putting Arizona Education Reform to the Test: Choice and Early Education Expansion*, Feb. 19, 2007, available at <http://ednews.org/articles/8169/1/All-Day-Kindergarten-Failing-as-Education-Reform/Page1.html>.³ Indeed, contrary to the amici’s assertions, despite the research establishing “meaningful short-term effects on disadvantaged students’ cognitive ability,” most research concludes “that the academic effects of early education programs disappear soon after children leave the programs.” Lisa Snell, *Don’t Expect Long-Term Gain From Early Education Money*, Aug. 15, 2007, available at <http://www.educationreport.org/pubs/mer/article.aspx?id=8835>. This is especially true among

³ The articles cited in this Return are not in the record but are cited to establish that the articles cited by the amici are not the conclusive authority on the matter.

African-American students See Janet Currie and Duncan Thomas, *Does Head Start Make a Difference?*, 85 Am 1 con Rev 341 (1995) ⁴

In sum no constitutional standard exists requiring pre-kindergarten programs of any kind in South Carolina ⁵ Additionally, whether early childhood education is a good idea is disputed in the literature But one thing is clear Under South Carolina law, whether and to what extent early childhood education should be adopted is within the province of the legislature, not the courts

Conclusion

For the reasons set forth above this Court should accord little weight to the opinions expressed by the *amici*

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Columbia, South Carolina
June 9th, 2008

⁴ This case is not about race (See Reply Br of Resp ts/Appellants 45) However, Appellants/Respondents and their allies continually inject race into this case Respondents/Appellants response is not intended to sway the Court one way or the other on this matter Rather because the *amici* interject race into this case Respondents/Appellants intend to note that the question of whether early childhood intervention is beneficial to African-Americans and others is an open question in this policy debate Again the General Assembly, not the courts, is best suited to address this question

⁵ Of course, as noted in Respondents/Appellants Reply Brief the General Assembly has adopted pre kindergarten programs and other mcasures which make this matter moot (See Reply Br of Resp ts/Appellants 1 10) The adoption of these programs can hardly be said to bring early childhood education within the scope of the education clause

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Plaintiffs,

Of Whom

Allendale County School District, Dillon County School District 2, Florence County School District 4, Hampton County School District 2, Jasper County School District, Lee County School District, Marion County School District 7 and Orangeburg Consolidated School District 3, Lena Manning, individually, and as a taxpayer residing in Allendale County and as Guardian ad Litem of Courtney V , Courtney V , a minor, by and through Lena Manning, as Guardian ad Litem, Pamela Williams, individually, and as a taxpayer residing in Dillon County, and as parent and Guardian ad Litem of Katisha W , Kathisha W , a minor, by and through Pamela Williams as Guardian ad Litem, Eddie Wright, individually, and as a taxpayer residing in Florence County, and as parent and Guardian ad Litem of Brandon F , Brandon F , a minor, by and through Eddie Wright as Guardian ad Litem, Brenda Brooks, individually, and as a taxpayer residing in Hampton County, and as parent and Guardian ad Litem of Tyrin B , Tyrin B , a minor, by and through Brenda Brooks as Guardian ad Litem, Marva Tigner, individually, and as a taxpayer residing in Jasper County, and as parent and Guardian ad Litem of Bryan T and Bradley T , Bryan T , a minor, by and through Marva Tigner as Guardian ad Litem, Bradley T , a minor, by and through Marva Tigner as Guardian ad Litem, Gail Y Harriott, individually, and as a taxpayer residing in Lee County and as parent and

Guardian ad Litem of Rashade H , Rashade H , a minor, by and through Gail Y Harriott, as Guardian ad Litem, Linda Carraway, individually, and as a taxpayer residing in Marion County, and as parent and Guardian ad Litem of Kimberly W , Kimberly W , a minor, by and through Linda Carraway as Guardian ad Litem, Bernice Profit, individually, as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Russell H , Russell H , a minor, by and through Bernice Profit, as Guardian ad Litem, are

Appellants /Respondents,

vs

The State of South Carolina, Mark C Sanford, as Governor of The State of South Carolina, Glenn F McConnell, in his representative capacity as President Pro Tempore of the South Carolina Senate and as representative thereof, Robert William Harrell, Jr , as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives,

Defendants,

Of Whom

Glenn F McConnell, in his representative capacity as President Pro Tempore of the South Carolina Senate and as representative thereof, Robert William Harrell, Jr , as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives,

Respondents / Appellants

and

The State of South Carolina and Mark C Sanford, as Governor of the State of South Carolina are

Respondents

PROOF OF SERVICE

I hereby certify that I served a copy of the Return to Brief of *Amicus Curiae* upon counsel of record and all interested parties, as reflected below, by placing same in the United States mail, postage prepaid, this 9th, day of June, 2008

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June 9, 2009

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