

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

RECEIVED

DEC 13 2007

APPEAL FROM LEE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Thomas W. Cooper, Jr., Circuit Court Judge

---

Case No.: 2007-65159

---

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, Evert 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.; Erin 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 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.

---

**INITIAL CROSS-APPEAL BRIEF OF RESPONDENTS / APPELLANTS  
GLENN F. McCONNELL AND ROBERT WILLIAM HARRELL, JR.**

---

Robert E. Stepp  
Elizabeth Van Doren Gray  
A. Jackson Barnes  
Roland M. Franklin, Jr.  
SOWELL GRAY STEPP & LAFFITTE, L.L.C.  
1310 Gadsden Street  
Post Office Box 11449  
Columbia, South Carolina 29211  
(803) 929-1400

**Attorneys for Respondents / Appellants  
Glenn F. McConnell and Robert William  
Harrell, Jr.**

## TABLE OF CONTENTS

Table of Authorities.....	ix
Statement of Issues .....	xv
Overview of Issues .....	xvi
Statement of the Case.....	1
Statement of Facts .....	8
Standard of Review .....	23
Argument.....	25
<b>I.    Material Changes in the Laws Governing Education in South Carolina Since the Trial Court’s Decision Render Many Portions of the Trial Court’s Order Moot.....</b>	<b>25</b>
<b>II.   The Trial Court Erred as a Matter of Law in Finding and Concluding That Plaintiffs Were Only Required to Establish a Constitutional Violation by the Preponderance of the Evidence.....</b>	<b>33</b>
A.    All constitutional violations must be established beyond a reasonable doubt .....	33
B.    Plaintiffs’ challenge to multiple statutes does not lower their burden of proof.....	35
<b>III.  The Record Does Not Establish That the Failure of All Students in Poverty to Achieve is Caused by a Systemic Failure of Existing Legislative Programs.....</b>	<b>38</b>
<b>IV.  The Trial Court Erred in Using PACT Scores to Establish the Absence of the Opportunity to Receive a Minimally Adequate Education.....</b>	<b>40</b>
A.    Opportunity is distinct from achievement .....	41
B.    PACT scores are themselves a function of socio-economic status and do not establish the absence of opportunity.....	44

C.	To the extent that PACT scores are probative of opportunity, they establish that the opportunity to acquire a minimally adequate education is present in the Plaintiff Districts.....	47
1.	<u>Large numbers of students in poverty in the Plaintiff Districts score basic or above on PACT</u> .....	47
2.	<u>A score of basic or above on PACT is the equivalent of the achievement of a minimally adequate education at the appropriate grade level</u> .....	49
3.	<u>The success of students in poverty on PACT is the result of existing policies and the funding provided therefore</u> .....	51
D.	The fact that not all students achieve at desirable levels does not establish a constitutional violation.....	52
V.	<b>The Relationship Between Poverty and Achievement is Not the Result of Poor Schools, and Better Achievement Cannot be Legislated</b> .....	52
A.	Bad achievement is not caused by bad schools .....	53
B.	Good achievement for students in poverty cannot be legislated .....	55
VI.	<b>The Trial Court Erred in Requiring That Early Childhood Intervention Programs be Provided Because Such Programs are Outside the Scope of Article XI, Section 3 as a Matter of Law</b> .....	57
A.	History of the education clause .....	57
B.	The trial court’s remedy is not substantively justified under the education clause.....	60
VII.	<b>The Trial Court’s Decision Improperly Usurps the Right of the General Assembly to Determine the Manner in Which Educational Opportunities are Provided to Students in South Carolina</b> .....	61

A.	The trial court’s order is a violation of separation of powers because the trial court improperly invaded the province of the General Assembly under Article XI, section 3 .....	62
B.	The trial court’s order impermissibly decides a political question because the manner in which educational opportunities shall be delivered is textually committed to the General Assembly.....	66
<b>VIII.</b>	<b>The Plaintiff Districts Lack Standing to Sue.....</b>	<b>70</b>
<b>IX.</b>	<b>The Plaintiff Districts Lack Capacity to Sue.....</b>	<b>73</b>
<b>Conclusion</b>	<b>.....</b>	<b>75</b>

## TABLE OF AUTHORITIES

### Federal Cases

<i>Baker v. Carr</i> , 369 U.S. 186 (1962) .....	66, 67, 68
<i>Friends of the Earth v. Laidlaw Envtl Serv's</i> , 528 U.S. 167 (2000).....	71
<i>Goldwater v. Carter</i> , 444 U.S. 996 (1979).....	67
<i>Japan Whaling Ass'n v. Am. Cetacean Soc'y</i> , 468 U.S. 737 (1984) .....	67
<i>Kilbourn v. Thompson</i> , 103 U.S. 168 (1880).....	63
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996).....	71
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	71
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) .....	66, 67
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977) .....	38
<i>Nixon v. United States</i> , 506 U.S. 224 (1993).....	67
<i>San Antonio Indep. Sch. Dist v. Rodriguez</i> , 411 U.S. 1 (1973).....	64
<i>Stroman v. Colleton County Sch. Dist.</i> , 98 F.2d 152 (4th Cir. 1992).....	39
<i>United States v. Munoz-Flores</i> , 495 U.S. 385 (1990).....	67
<i>Vieth v. Jubelirer</i> , 541 U.S. 267 (2004).....	67

### State Cases

<i>Abbeville County Sch. Dist. v. State</i> , 335 S.C. 58, 515 S.E.2d 535 (1999) .....	<i>passim</i>
<i>Barnacle Broad., Inc. v. Baker Broad., Inc.</i> , 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000).....	23
<i>Beaufort Realty Co., Inc. v. Beaufort County</i> , 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).....	71
<i>Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.</i> , 353 S.C. 24, 576 S.E.2d 180 (2003) .....	25, 33
<i>Bergstrom v. Palmetto Health Alliance</i> , 358 S.C. 388, 596 S.E.2d 42 (2004).....	33

<i>Blandon v. Coleman</i> , 285 S.C. 472, 330 S.E.2d 298 (1985) .....	70
<i>Capital View Fire Dist. v. County of Richland</i> , 297 S.C. 359, 377 S.E.2d 122 (Ct. App. 1989).....	75
<i>Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing &amp; Reg.</i> , 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999) .....	70
<i>Carroll-Hall v. Rell</i> , No. X09CV054019406, 2007 WL 2938295 (Conn. Super. Ct., Sept. 17, 2007).....	65
<i>Chesterfield County v. State Highway Dep't.</i> , 191 S.C. 39, 3 S.E.2d 686 (1939).....	73
<i>Citizens for Lee County, Inc. v. Lee County</i> , 308 S.C. 23, 416 S.E.2d 641 (1992).....	70-71
<i>City of New York v. State</i> , 655 N.E.2d 649 (N.Y. App. 1995) .....	74
<i>City of Pawtucket v. Sundlun</i> , 662 A.2d 40 (R.I. 1995) .....	35
<i>Culbertson v. Blatt</i> , 194 S.C. 105, 110, 9 S.E.2d 218 (1940).....	63-63
<i>Curtis v. State</i> , 345 S.C. 557, 549 S.E.2d 596 (2001) .....	26
<i>Dist. No. 55 v. Musselshell County</i> , 802 P.2d 1252 (Mont. 1990) .....	74
<i>E. Jackson Pub. Schs. v. State</i> , 348 N.W.2d 303 (Mich. App. 1984).....	74-75
<i>Florence Morning News v. Bldg. Comm'n</i> , 265 S.C. 389, 218 S.E.2d 881 (1975).....	70
<i>Garvin v. Garvin</i> , 55 S.C. 360, 33 S.E. 458 (1899).....	23
<i>Gilbert v. Gladden</i> , 432 A.2d 1351 (N.J. 1984).....	63
<i>Greer v. Spartanburg Technical Coll.</i> , 338 S.C. 76, 524 S.E.2d 856 (Ct. App. 1999).....	38
<i>Gregory v. Rollins</i> , 230 S.C. 269, 95 S.E.2d 487 (1956) .....	65
<i>Gunter v. Fallaw</i> , 78 S.C. 457, 59 S.E. 70 (1907).....	23
<i>Hancock v. Comm'r of Educ.</i> , 822 N.E.2d 1134 (Mass. 2005) .....	69

<i>Hibernian Soc’y v. Thomas</i> , 282 S.C. 465, 319 S.E.2d 339 (Ct. App. 1984).....	74
<i>Horry County Sch. Dist. v. Horry County</i> , 346 S.C. 621, 552 S.E.2d 737 (2001) .....	64
<i>Jordan v. Holt</i> , 362 S.C. 201, 608 S.E.2d 129 (2005).....	23
<i>Joytime Distribs. &amp; Amusement Co., Inc. v. State</i> , 338 S.C. 634, 528 S.E.2d 650 (1999).....	33-34
<i>Mathis v. South Carolina Highway Dep’t</i> , 260 S.C. 344, 195 S.E.2d 713 (1973).....	25
<i>McCoy v. McCoy</i> , 283 S.C. 383, 323 S.E.2d 517 (1984) .....	26
<i>Miller v. Farr</i> , 243 S.C. 342, 133 S.E.2d 838 (1963).....	73
<i>Moseley v. Welch</i> , 209 S.C. 19, 39 S.E.2d 133 (1946).....	5, 64
<i>Moss v. Aetna Life Ins. Co.</i> , 267 S.C. 370, 228 S.E.2d 108 (1976).....	15
<i>Nebraska Coal. for Educ. Equity &amp; Adequacy v. Heineman</i> , 731 N.W.2d 164 (Neb. 2007).....	67
<i>New York Civil Liberties Union v. State of New York</i> , 771 N.Y.S.2d 563 (S.D.N.Y. 2004).....	38
<i>Newman v. Richland County Hist. Pres. Comm’n</i> , 325 S.C. 79, 480 S.E.2d 72 (1997).....	70
<i>Osterneck v. Osterneck</i> , 374 S.C. 573, 649 S.E.2d 127 (Ct. App. 2007) .....	23-24
<i>Parker v. Bates</i> , 216 S.C. 52, 60, 56 S.E.2d 723, 725 (1949) .....	73
<i>Paynter v. State</i> , 797 N.E.2d 1225 (N.Y. 2003) .....	40
<i>Richland County v. Campbell</i> , 294 S.C. 346, 364 S.E.2d 470 (1988).....	3, 5, 63, 64
<i>Richland County Recreation Dist. v. City of Columbia</i> , 290 S.C. 93, 348 S.E.2d 363 (1986).....	74
<i>Santee Mills v. Query</i> , 122 S.C. 158, 115 S.E. 202 (1922) .....	34
<i>Sea Pines Ass’n for the Prot. of Wildlife v. South Carolina Dep’t. of Natural Res. &amp; Cmty. Servs. Assocs., Inc.</i> , 345 S.C. 594, 550 S.E.2d 287 (2001).....	70, 71, 72

<i>Sloan v. Friends of the Hunley</i> , 369 S.C. 20, 630 S.E.2d 474 (2006) .....	25
<i>Sloan v. Greenville County</i> , 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) .....	23
<i>Sloan v. Sch. Dist. of Greenville County</i> , 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) .....	70
<i>Sloan v. South Carolina Bd. of Physical Therapy Examiners</i> , 370 S.C. 452, 636 S.E.2d 598 (2006) .....	33
<i>Smith v. Sch. Dist. of Greenville County</i> , Civil Action No. 6:03-2015-26. . . . .	74
<i>South Carolina Elec. &amp; Gas Co. v. Hartough</i> , Op. No. 4292, (S.C. App. filed Sept. 18, 2007) (Shearouse Adv. Sh. No. 35) .....	23
<i>South Carolina Pub. Interest Found. v. Judicial Merit Selection Comm'n</i> , 369 S.C. 139, 143, 632 S.E.2d 277, 278 (2006) .....	66, 67, 68
<i>State v. Broad River Power Co.</i> , 177 S.C. 240, 181 S.E. 41 (1935) .....	15
<i>State ex rel. Edwards v. Query</i> , 207 S.C. 500, 37 S.E.2d 241 (1946) .....	34
<i>State ex rel. Richards v. Moorner</i> , 152 S.C. 455, 150 S.E. 269 (1929) .....	34, 38
<i>State v. White</i> , 348 S.C. 532, 560 S.E.2d 420 (2002) .....	34, 35
<i>State v. Whittington</i> , 278 S.C. 661, 301 S.E.2d 134 (1983) .....	63
<i>State ex rel. McLeod v. Yonce</i> , 274 S.C. 81, 261 S.E.2d 303 (1979) .....	62, 63
<i>Townes Assoc., Ltd. v. City of Greenville</i> , 266 S.C. 81, 221 S.E.2d 773 (1976) .....	23
<i>Vincent v. Voight</i> , 614 N.W.2d 388 (Wis. 2000) .....	35
<i>Washington v. Salisbury</i> , 279 S.C. 306, 306 S.E.2d 600 (1983) .....	60, 61, 64
<i>Willis Constr. Co., Inc. v. Sumter Airport Comm'n</i> , 308 S.C. 505, 419 S.E.2d 240 (Ct. App. 1992) .....	73
<i>Wingfield v. South Carolina Tax Comm'n</i> , 147 S.C. 116, 144 S.E. 846 (1928) .....	34, 35
<i>Wright v. Colleton County Sch. Dist.</i> , 301 S.C. 282, 391 S.E.2d 564 (1990) .....	73

## State Statutes

S.C. Const. art. I, § 8 .....	62
S.C. Const. art. XI, § 5 (1895).....	57-58
S.C. Const. art. XI, § 3 (1973).....	<i>passim</i>
S.C. Code Ann. § 11-11-156 (Supp. 2006) .....	30, 31
S.C. Code Ann. § 59-6-10 (2004 & Supp. 2006) .....	8, 9
S.C. Code §§ 59-20-10, <i>et. seq.</i> (1990 & Supp. 1998).....	2, 8, 31
S.C. Code Ann. § 59-17-10 (2004).....	73, 74
S.C. Code Ann. § 59-18-100 (2004 & Supp. 2006) .....	9
S.C. Code Ann. § 59-19-340 (2004).....	60, 61
S.C. Code Ann. § 59-26-10 (2004 & Supp. 2006) .....	9
S.C. Code Ann. § 59-59-10 (Supp. 2006) .....	9
S.C. Code Ann. § 59-63-20 (2004).....	59
S.C. Code Ann. § 59-59-20(A), (B) (Supp. 2006).....	9
S.C. Code Ann. § 59-139-05 (2004).....	9

## Miscellaneous

16 Am. Jur.2d <i>Constitutional Law</i> § 223.....	63
78 C.J.S. <i>Schools and School Districts</i> § 15.....	73
Erwin Chemerinsky, <i>Federal Jurisdiction</i> 142 (2d ed. 1994).....	66
Fogle, Jennifer L., <i>Abbeville County School District v. State: The Right to a Minimally Adequate Education in South Carolina</i> , 51 S.C. L. Rev. 420 (2000).....	57, 58
<i>Journal of the Constitutional Convention of the State of South Carolina</i> 128 (1895).....	58

Dillon Sch. Dist. Two, <a href="http://www.dillon2.k12.sc.us/home/bondreferendum.asp">http://www.dillon2.k12.sc.us/home/bondreferendum.asp</a> (last visited Dec. 10, 2007).....	14
Florence County Sch. Dist. 4, <a href="http://www.florence4.k12.sc.us/schools.html">http://www.florence4.k12.sc.us/schools.html</a> (last visited Dec. 10, 2007).....	15
Jasper County Sch. Dist., <a href="http://www.jcsd.net/#">http://www.jcsd.net/#</a> (last visited Dec. 10, 2007).....	15
Lee County Schs., <a href="http://www.leeschoolsk12.org/site_res_view_folder.aspx?id=667fabf3-4943-49e0-92ab-2ed37ec6185e">http://www.leeschoolsk12.org/site_res_view_</a> <a href="http://www.leeschoolsk12.org/site_res_view_folder.aspx?id=667fabf3-4943-49e0-92ab-2ed37ec6185e">folder.aspx?id=667fabf3-4943-49e0-92ab-2ed37ec6185e</a> (last visited Dec. 10, 2007).....	15
Lake Marion High Sch. & Tech. Ctr., <a href="http://www.obg3.k12.sc.us/education/school/schoolhistory.php?sectiondetailid=65&amp;sc_id=1197316792">http://www.obg3.k12.sc.us/education/school/schoolhistory.php?sectiondetailid=65&amp;sc_id=1197316792</a> (last visited Dec. 10, 2007).....	15
South Carolina Department of Education website, <a href="http://ed.sc.gov/agency/offices/assessment/pact/scores.html">http://ed.sc.gov/agency/offices/assessment/pact/scores.html</a> (last visited Dec. 10, 2007).....	48

## Statement of Issues

- I. Are portions of the trial court's findings and order moot as a result of significant changes in education policies and funding mechanisms and amounts that have been enacted since this case was tried, including the enactment of legislation providing for pre-k programs in each of the Plaintiff Districts?
- II. Did the trial court err in deciding the case based upon the preponderance of the evidence standard when the system of free public schools in South Carolina is completely governed by statute and the standard for evaluating the constitutionality of statutes is beyond a reasonable doubt?
- III. Did the trial court err in using PACT scores to establish the absence of the opportunity to acquire a minimally adequate education when the concept of opportunity is distinct from achievement and when the evidence establishes that PACT scores more are a function of socio-economic status than school quality?
- IV. Did the trial court err in concluding that low PACT scores are an indication of the absence of an opportunity to receive a minimally adequate education when PACT scores in the Plaintiff Districts establish that all students, including those in poverty, have an opportunity to acquire a minimally adequate education?
- V. Did the trial court err in requiring that additional early childhood intervention programs be provided when such programs are outside the scope of the education clause as defined by constitutional history, statutory law, the decisional law of this State and the trial court's own decision?
- VI. In requiring that additional early childhood intervention programs be provided for students in poverty, did the trial court usurp the legislative prerogative in violation of the separation of powers and political question doctrines when the responsibility for free public education is textually committed to the General Assembly and there are no judicially manageable standards to address or resolve this inherent policy matter with finality?
- VII. Did the trial court err in concluding that the Plaintiff Districts have standing and the capacity to sue when any duties created by the South Carolina Constitution's education clause are owed to students and not the school districts, and when the power to sue and be sued afforded to political subdivisions of the State does not extend to challenging the acts of the creator of those subdivisions?

## Overview of Issues

This cross appeal raises several issues arising from the trial court's decision that students in the Plaintiff School Districts do not have the opportunity to acquire a minimally adequate education, and the trial court's unilateral imposition on the General Assembly of the court's policy choice to remedy the perceived deficiency "to the extent that is educationally possible." Although the Senate and the House agree with the very detailed factual findings of the trial court and do not challenge them in this cross appeal, the trial court's order of December 29, 2005 is flawed in several broad respects, all of which are discussed in the arguments that follow.

First, the trial court's order misinterprets the scope of the constitutional duty arising under the education clause to require programs and policies that are directed to social and economic, rather than educational conditions. In so doing, the trial court's order wrongly converts a commendable societal goal into a judicially supervised constitutional duty purportedly arising under the education clause. Neither the constitution as a whole, nor the education clause itself, however, requires the General Assembly to legislate away the effect of poverty on educational outcomes, even if it were possible to do so.

The trial court also failed to acknowledge the requirement of a causal connection between the system of educational policies and the perceived absence of opportunity. Thus, the court proceeds from the beneficial effect of pre-school programs on achievement to the conclusion that the absence of those programs is the cause of poor

achievement.<sup>1</sup> There is no such causal connection, and therefore no basis to find a constitutional violation.

Third, the trial court incorrectly concluded that because some students in poverty do not pass the PACT test, the opportunity to acquire a minimally adequate education is absent. In reaching this conclusion, the trial court ignored uncontroverted evidence that large number of students in poverty achieve far more than a minimally adequate education, and obviously could not so if the opportunity were not present. In reaching this erroneous conclusion, the trial court wrongly infers that individual failure is the result of a systemic inadequacy of education legislation. The overwhelming evidence in this record, however, is that poor achievement is not caused by poor schools, but rather by socio-economic factors that exist outside of the schools and outside the scope of education policy.

Additionally, by measuring constitutional adequacy by PACT scores, the trial court abandoned the opportunity standard of *Abbeville County* and impermissibly (and unwisely) substituted equality of achievement as the determining factor. If the trial court's order is sustained, judicial intervention in education policy may continue until unspecified, and perhaps unattainable, levels of achievement are reached. Achievement, however, cannot be legislated, and equality of achievement is not required. Nor should the state's aspirations for higher achievement be substituted for the constitutional minimum required by Article XI, section 3. The trial court therefore erred in declaring all of the existing inputs that create educational opportunity to be adequate, yet finding that achievement, which expressly is not the standard, was inadequate.

---

<sup>1</sup> In other areas, the trial court correctly finds that because pre-school programs might be beneficial does not mean that they are constitutionally required.

Finally, the trial court overstepped its authority by dictating to the legislative branch the specific programs to be used in South Carolina's schools. In *Abbeville County*, this Court expressly "emphasize[d] 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 Sch. Dist.*, 335 S.C. 58, 69, 515 S.E.2d 535, 541 (1999). In ordering the General Assembly to adopt "effective and adequately funded early childhood intervention programs designed to address the impact of poverty," the trial court assumed the role of a "super-legislature" or "super-school board" and impermissibly dictated a specific remedy to be utilized by the General Assembly to rectify for the alleged constitutional violation in the Plaintiff Districts.

It is for these reasons that the Senate and the House seek reversal of the trial court's order of December 29, 2005, and entry of judgment in favor of the Defendants.

## Statement of the Case

### **I. The Parties**

The trial court erroneously concluded that students in certain school districts are denied the opportunity to acquire a minimally adequate education because of the absence of effective and adequately funded early childhood education programs designed to address the impact of poverty on academic achievement. The Appellants/Respondents in this cross-appeal are school districts, students and taxpayers who individually and collectively challenge the statutory scheme creating and funding South Carolina's public schools.<sup>2</sup> The Plaintiff Districts are as follows: Allendale County School District ("Allendale"); Dillon County School District 2 ("Dillon 2"); Florence County School District 4 ("Florence 4"); Hampton County School District 2 ("Hampton 2"); Jasper County School District ("Jasper"); Lee County School District ("Lee"); Marion County School District 7 ("Marion 7"); and Orangeburg County School District 3 ("Orangeburg 3"). In addition, 25 individually named parents and 26 students from specified school districts joined as Plaintiffs.

The Respondents/Appellants include Glenn F. McConnell, in his representative capacity as President Pro Tempore of the South Carolina Senate and as a representative thereof; and Robert William Harrell, Jr., as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives. The State of South Carolina and Mark C. Sanford, as Governor of the State of South Carolina did not file a cross-appeal from the order of the trial court.

---

<sup>2</sup> For purposes of clarity, the Appellants/Respondents will be hereinafter referred to as "Plaintiffs."

## II. Original Claims Made

This case has been in litigation for more than fourteen years. On November 1, 1993, forty of the more than eighty school districts in the State of South Carolina, together with certain students and taxpayers, commenced a declaratory judgment action in the Court of Common Pleas for Lee County challenging the statutory scheme creating and funding South Carolina's public schools. (Compl. dated Nov. 1, 1993). Thereafter, as a result of district consolidations<sup>3</sup>, the number of Plaintiff Districts was reduced to thirty-six. Prior to trial, Plaintiffs' counsel selected eight school districts as trial plaintiffs for this proceeding. (See Order dated June 20, 2003).<sup>4</sup>

Plaintiffs' Second Amended Complaint, filed July 20, 1995, alleged violations of the South Carolina Constitution's Education Clause, S.C. Const. art. XI, § 3, the equal protection clauses of the state and federal constitutions, and violation of the Education Finance Act of 1977 ("EFA"), S.C. Code §§ 59-20-10 to -80 (1990 & Supp. 1998). (Second Am. Compl. filed July 20, 1995). Specifically, the Second Amended Complaint alleged that the state's statutory scheme of public funding for education (1) was under funded, lacked uniformity, and imposed unlawful tax burdens on Plaintiffs; (2) was not serving the purposes for which it was enacted; (3) had resulted in a disparity in the educational opportunities for students throughout the state; and (4) was not being funded at the level mandated by the EFA and the Education Improvement Act ("EIA").

---

<sup>3</sup> Marion 3 and Marion 4 were consolidated into Marion County School District 7. Orangeburg 3 was the product of a consolidation between Orangeburg 3 and Orangeburg 7. Both Marion 7 and Orangeburg 3 were trial plaintiffs.

<sup>4</sup> These eight districts are not class representatives, and the trial court's order does not have binding effect with respect to any other districts.

Plaintiffs sought a declaration that the EFA was unconstitutional as implemented, as well as a declaration that the level of education funding was inadequate. (Second Am. Compl. filed July 20, 1995, p. 24). Plaintiffs further requested the court to order the General Assembly to enact new education legislation for South Carolina and to appropriate funds alleged to be necessary to remedy past alleged inequities. (Second Am. Compl. filed July 20, 1995, p. 24).

Defendants filed motions to dismiss the Second Amended Complaint pursuant to Rules 12(b)(1) and (6), SCRCPP, which were heard by the trial court on July 3, 1995. (Defs.' Mot. to Dismiss dated Aug. 14, 1995). Defendants contended, among other things, that the facts as alleged did not constitute violations of the state or federal constitutions as a matter of law, and that no private right of action existed under the EFA. *Id.* On September 20, 1996, the trial court granted Defendants' motions to dismiss the Second Amended Complaint with prejudice for failure to state facts sufficient to constitute a cause of action.

### **III. The Abbeville County Decision**

Plaintiffs appealed the trial court's September 20, 1996 order to this Court, which affirmed dismissal of the action with the exception of the claim made pursuant to Article XI, Section 3 of the South Carolina Constitution. *See Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999).<sup>5</sup> This Court held that the Second Amended Complaint stated a claim for violation of the state constitution's education clause, which

---

<sup>5</sup> The dismissal of Plaintiffs' claims under the equal protection clauses of the state and federal constitutions was summarily affirmed under the strength of prior decisions of this Court. *Abbeville County*, 335 S.C. at 64-65, 515 S.E.2d at 538 (citing *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470 (1988)). Likewise, this Court affirmed the dismissal of Plaintiffs' claims brought under the EFA, finding that the EFA does not create a private right of action. *Abbeville County*, *supra* at 65, 515 S.E.2d at 539.

provides as follows: “The 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. In reaching that conclusion, this Court held that it was its duty “to interpret and declare the meaning of the Constitution,” and concluded that the trial court “erred in using judicial restraint, separation of powers, and the political question doctrine as the basis for declining to decide the meaning of the education clause.” *Abbeville County*, 335 S.C. at 67, 515 S.E.2d at 539.

This Court noted that at the heart of the education clause controversy is the question of what duty the state constitution imposes on the General Assembly by directing it to “provide for the maintenance and support of a system of free public schools open to all children.” *Id.* at 66, 515 S.E.2d at 539. This Court answered this question by holding that the education clause requires the General Assembly “to provide the opportunity for each child to receive a minimally adequate education.” *Id.* at 68, 515 S.E.2d at 540. The Court defined minimally adequate education

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.* This Court then remanded the case to the trial court for a determination of whether the requisite opportunity is present in the Plaintiff Districts.

In interpreting the education clause, however, this Court was careful to observe an important boundary between the judicial branch's duty and authority to declare the law, and the legislative branch's responsibility for policy matters in general, and the "system of free public schools" in particular. This Court emphasized 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," *id.* at 69, 515 S.E.2d at 541, and that members of the judiciary "are not experts in education, and we do not intend to dictate the programs utilized in our public schools." *Id.* at 69, 515 S.E.2d at 540. Thus, this Court concluded, "[w]e 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. We do not intend the Courts of this State to become super-legislatures or super-school boards." *Id.* This declaration is in accord with the previous recognition by this Court that under Article XI, section 3, "the framers of the Constitution have left the legislature free to choose the means of funding the schools of this state to meet modern needs." *Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 472 (1988). *See also 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.").

#### **IV. Proceedings on Remand**

On January 18, 2001, following remand, Plaintiffs again moved to amend their Complaint. (Pls.' Mot. to Am. Compl. filed Jan. 18, 2001). The proposed Third Amended Complaint reiterated prior allegations, but also for the first time sought

monetary damages and a jury trial. On June 1, 2001, the trial court granted Plaintiffs' motion to amend, but denied Plaintiffs' request for a jury trial, finding that Plaintiffs had waived any right to trial by jury that may have attached to the case. (Order filed June 1, 2001). Additionally, the trial court 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. (See Order dated Dec. 3, 2004).

In June of 2003, Plaintiffs filed a Fourth Amended Complaint, which contained allegations regarding the racial composition of the Plaintiff Districts. On July 3, 2003, the trial court, ruling from the bench, granted Defendants' motion to strike the allegations regarding race contained in the Fourth Amended Complaint because it was too late to inject those issues into the case.<sup>6</sup> Subsequently, on July 10, 2003, Plaintiffs filed another Fourth Amended Complaint omitting reference to the racial composition of the Plaintiff Districts. (Fourth Am. Compl. dated July 10, 2003).

*Abbeville County* charged the trial court to determine only one issue: Do students in the Plaintiff Districts have adequate and safe facilities in which they have the opportunity to acquire a minimally adequate education as defined by this Court? A non-jury trial commenced on July 28, 2003 and ended on December 9, 2004. During the 102 days of trial, 112 witnesses testified in person or by deposition, and approximately 4,400 documents were received into evidence. The trial court entered a lengthy order on

---

<sup>6</sup> Throughout the trial, Plaintiffs continued to proffer evidence concerning the racial composition of the Plaintiff Districts and its alleged impact on the opportunity to acquire a minimally adequate education. While the trial court allowed some evidence of the racial makeup of the Plaintiff Districts for limited purposes, the court ultimately concluded that student achievement is not a function of race, but rather of poverty. (See Trial Tr. (08/14/03), pp. 37-38). Accordingly, the court considered only evidence relating to poverty as pertinent to this case. See discussion at pages 20-22, *infra*.

December 29, 2005 finding that all existing components of the education system were constitutionally adequate, but students in the Plaintiff Districts were denied the opportunity to receive a minimally adequate education “because of the lack of effective and adequately funded early childhood intervention programs designed to address the impact of poverty on their educational abilities and achievements.” (Order dated Dec. 29, 2005 at p. 169). It is upon this erroneous conclusion that the Senate and the House base their cross-appeal. (Notice of Cross-Appeal filed by the Senate and the House on August 15, 2007).

### Statement of Facts

The eight Plaintiff Districts involved in this appeal are rural in nature and also share the common characteristic of having high percentages of students who qualify for free and reduced lunch under the federal guidelines. (Order dated Dec. 29, 2005 ¶ 113). The “free and reduced lunch” percentage is a measure of the number of students in poverty and who are “at risk.” (Order dated Dec. 29, 2005 ¶ 113).

Three of the Plaintiff Districts, Allendale, Jasper and Lee, are county-wide districts, and the remaining five are in counties with multiple school districts. (Order dated Dec. 29, 2005 ¶ 110).<sup>7</sup> The Plaintiff Districts vary widely in enrollment. At the time of trial, the smallest district was Marion 7 with 905 students, (Defs.’ Ex. 3004; Pls.’ Ex. 6264), and the largest district was Dillon 2 with 3,681 students. (Defs.’ Ex. 2976; Pls.’ Ex. 6236).

In South Carolina, “public education is funded by the federal, state, and local governments.” (Order dated Dec. 29, 2005 ¶ 56 (quoting *Abbeville County*, 335 S.C. at 64, 515 S.E.2d at 538)). In general, federal revenue accounts for approximately 9% of funding for education in South Carolina, while local revenue accounts for approximately 40%, and state funding accounts for roughly 50% of the total expenditures for education in South Carolina. (Order dated Dec. 29, 2005 ¶ 56; Pls.’ Ex. 6010). At the state level, South Carolina’s system of education policies and funding are embodied in many different legislative enactments, including the Education Finance Act of 1977 (“EFA”), S.C. Code Ann. § 59-20-10, *et. seq.* (2004 & Supp. 2006); the 1984 Education

---

<sup>7</sup> Florence county has a total of five districts; Hampton County has a total of two districts (Nos. 1 and 2); Marion County has three school districts (Nos. 1, 2 and 7); Orangeburg County has three school districts (Nos. 3, 4 and 5); and Dillon County has three school districts (Nos. 1, 2, and 3). (Order dated Dec. 29, 2005 ¶ 110).

Improvement Act (“EIA”), S.C. Code Ann. § 59-6-10, *et. seq.* (2004 & Supp. 2006); the Early Childhood Development and Academic Assistance Act, S.C. Code Ann. § 59-139-05 (2004); the 2005 South Carolina Education and Economic Development Act, S.C. Code Ann. § 59-59-10, *et. seq.* (Supp. 2006);<sup>8</sup> the Educator Improvement Act of 1997, S.C. Code Ann. § 59-26-10 (2004 & Supp. 2006); the Education Accountability Act (“EAA”), S.C. Code Ann. § 59-18-100, *et seq.* (2004 & Supp. 2006), as well as a plethora of legislative initiatives enacted specifically to enhance educational achievement for at-risk students.<sup>9</sup> The trial court found and concluded that by enacting these statutory provisions, the General Assembly “has demonstrated a strong commitment to educating the children of this State.” (Order dated Dec. 29, 2005 ¶ 101).

Recognized as “the most comprehensive piece of legislation for public education . . . enacted in South Carolina,” the EFA “distributes funds using a wealth-sensitive formula, which results in districts with low property wealth, such as the Plaintiff Districts, receiving more money [per pupil] than wealthier districts.” (Order dated Dec. 29, 2005 ¶ 68 (citations omitted)). “Per pupil expenditure” is calculated by dividing all funds spent by a district by the number of students in the district. The trial court correctly found that “the Plaintiff Districts’ per pupil expenditures and revenues tend to be among

---

<sup>8</sup> In 2005, the General Assembly repealed the South Carolina School-to-Work Transition Act of 1994 and enacted the South Carolina Education and Economic Development Act (“EEDA”). Under the EEDA, the Department of Education “shall develop a curriculum, aligned with state content standards, organized around a career cluster system that must provide students with both strong academics and real-world problem solving skills. Students must be provided individualized educational, academic, and career-oriented choices and greater exposure to career information and opportunities.” S.C. Code Ann. § 59-59-20(A). The EEDA makes it incumbent on school districts to “lay the foundation for the clusters of study system in elementary school by providing career awareness activities.” S.C. Code Ann. § 59-59-20(B).

<sup>9</sup> For a description of these initiatives as well as a discussion of all statutory enactments related to education policy and funding in South Carolina, see Order dated December 29, 2005 at pp. 32-54.

the highest in the State, and have been increasing over time.” (Order dated Dec. 29, 2005 ¶ 394).

The trial court also concluded, however, that the relationship between spending and achievement is not statistically significant. (Order dated Dec. 29, 2005 ¶ 402). The court made similar findings with regard to every other “input” into the then-existing education system. (See Order dated Dec. 29, 2005 ¶¶ 109, 197, 204, 205, 206, 214, 217, 219, 222, 260, 261, 274). The court found instead that “it is apparent that poverty is directly related to achievement, and explains most of the variation in achievement between districts and schools.” (Order dated Dec. 29, 2005 ¶ 423). The court therefore concluded that the education clause imposes a duty on the General Assembly and the State of South Carolina to create an education system that overcomes the effect of poverty on children in “pre-kindergarten and kindergarten, to enable them to begin the educational process in a more equal fashion to those born outside of poverty.” (Order dated Dec. 29, 2005 ¶ 428).

At the same time, however, the trial court acknowledged that poverty is associated with certain risk factors “that are present in society as a whole, and are *not directly related to school programs*.” (Order dated Dec. 29, 2005 ¶ 427) (emphasis added). The court found that ameliorating these non-school related risk factors “would have a positive effect on achievement, but these issues lie outside the traditionally accepted scope of education policy, and require interventions beyond those traditionally produced by schools.” (Order dated Dec. 29, 2005 ¶ 427) (internal citation omitted).

The trial court also conceded that it was “without mandate or authority to adjudicate what educational policies and programs would better serve the State, or to

substitute the judgment of the Court for that of the General Assembly.” (Order dated Dec. 29, 2005 ¶ 44). Therefore, the court continued, “this case is not about what the Court thinks is best for education in South Carolina or the Court’s view as to the best way to deliver educational services to students in South Carolina.” (Order dated Dec. 29, 2005 ¶ 46). The trial court recognized that “Abbeville County constrains this Court not to engage in policy making for education in South Carolina . . . . Accordingly, this Court must decide this case not in terms of whether the Court believes that one policy is superior and another is wanting, but rather based on whether the system of educational policies enacted by the General Assembly sufficiently provides the opportunity for students to acquire a minimally adequate education.” (Order dated Dec. 29, 2005 ¶ 47).

After examining and considering all of the education system inputs, the trial court endorsed the constitutional sufficiency of every existing aspect of the education system and concluded that all of the variables within the traditionally accepted scope of education policy were constitutionally adequate. The trial court made the following general findings and conclusions:

**1. South Carolina curriculum standards.**

The trial court found that “the substantive knowledge and skills reflected in the curriculum standards go far beyond the knowledge and skills comprising a minimally adequate education as defined in Abbeville County.” (Order dated Dec. 29, 2005 ¶ 109).<sup>10</sup> Indeed, the court continued, “the curriculum standards encompass more than ‘the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; a fundamental knowledge of economic, social, and political systems, and a history of governmental processes; and academic and vocational skills.’” (Order

---

<sup>10</sup> See discussion *infra*, pages 49-51.

dated Dec. 29, 2005 ¶ 109) (quoting *Abbeville County*, 335 S.C. at 68, 515 S.E.2d at 540)). Moreover, the evidence at trial established that “the curriculum being taught in the [Plaintiff District] schools was aligned to the state uniform curriculum standards.” (Order dated July 12, 2007 ¶ 16).

**2. Teacher quality and compensation.**

The trial court found that “there is no empirical evidence of a direct relationship between teacher characteristics and student achievement.” (Order dated Dec. 29, 2005 ¶ 253). Even if such a relationship existed, the court found that “[t]aking the record as a whole . . . teacher characteristics in the Plaintiff Districts do not explain any deficits in student achievement in any significant and predictable way.” (Order dated Dec. 29, 2005 ¶ 256). Nonetheless, the trial court found that a review of the evidence revealed that “South Carolina has an appropriate system to license and compensate teachers.” (Order dated Dec. 29, 2005 ¶ 222).

**a. Teacher licensing.**

The trial court found that the process for teacher licensing “is more than sufficient to ensure that teachers who are certified in South Carolina are at least minimally competent to deliver instruction compatible with the constitutional requirements.” (Order dated Dec. 29, 2005 ¶ 204).

**b. Teacher salaries.**

The trial court found that “[w]hen compared with the entry level salaries and average salaries paid by other southeastern states . . . South Carolina compares quite favorably.” (Order dated Dec. 29, 2005 ¶ 205). Therefore, the trial court found that it could not conclude “that teacher compensation in South Carolina represents a

constitutionally defective barrier to the attraction of qualified teachers into the profession.” (Order dated Dec. 29, 2005 ¶ 206). Indeed, the court concluded that “[t]here is nothing in the record from which the Court can objectively conclude that current levels of teacher compensation deny students the opportunity to acquire a minimally adequate education, or that raising teacher pay would create such an opportunity.” (Order dated July 12, 2007 ¶ 14).

**c. Teacher turnover.**

The trial court found that while teacher turnover is a problem in the Plaintiff Districts, “the fact that the percentages of returning teachers are lower in the Plaintiff Districts than in other districts is not itself a violation of the State Constitution, and does not mean that students who are taught by teachers who are new to a school or district do not receive the opportunity to acquire a minimally adequate education.” (Order dated Dec. 29, 2005 ¶ 214).

**d. Teacher experience.**

The trial court found that teachers in the Plaintiff Districts have sufficient experience and that it “would be hard pressed to find that even brand new teachers are necessarily inadequate to create the opportunity to acquire a minimally adequate education.” (Order dated Dec. 29, 2005 ¶ 219).

**e. Professional development.**

The trial court found that South Carolina has adopted “extremely comprehensive” standards for professional development in which teachers have the opportunity to “improve their content knowledge and pedagogical skills throughout their careers,”

(Order dated Dec. 29, 2005 ¶ 220), and that these programs are available in the Plaintiff Districts. (Order dated Dec. 29, 2005 ¶ 221).

**3. School Facilities.**

The trial court found that “[t]he actual evidence in this case does not bear out a connection between facilities and educational outcomes.” (Order dated Dec. 29, 2005 ¶ 268). While the court found that there are issues and problems with regard to many of the facilities in the Plaintiff Districts, the court concluded that many of these problems appear to be related to maintenance. (Order dated Dec. 29, 2005 ¶ 272). Moreover, the court found that many of the problems complained of by Plaintiffs with respect to facilities had been corrected. (Order dated Dec. 29, 2005 ¶¶ 272, 274).

In its order on reconsideration, the trial court further concluded that all of the Plaintiff Districts were in the process of getting new schools or substantially renovating, remodeling or adding on to existing facilities and that Plaintiffs had failed to show that any district’s facilities were systemically inadequate or unsafe. (Order dated July 12, 2007 ¶¶ 25–27). Since the date of that order, many districts have continued to build new or improve their facilities. According to public records, Dillon County passed a bond referendum on December 4, 2007, allowing it to replace or remodel the facilities that were not previously upgraded, including abandoning J.V. Martin Middle School for a new middle school facility, demolishing most of East Elementary and replacing it with a new facility and adding substantial additional space to Stewart Heights Elementary. Dillon Sch. Dist. Two, <http://www.dillon2.k12.sc.us/home/bondreferendum.asp> (last visited Dec. 10. 2007).<sup>11</sup> Florence School District 4 continues to operate out of one PK-

---

<sup>11</sup> Although many of the building projects referenced in this paragraph were anticipated in some respects during trial, the updated information provided herein is from the applicable

12 facility which was built in 2000 and has had two additions to it since that time. Florence County Sch. Dist. 4, <http://www.florence4.k12.sc.us/schools.html> (last visited Dec. 10, 2007).

Further, Lee County is building a new Middle School and Career Center on the campus of Lee County Consolidated High School, which was completed in only 2001. Lee County Schs., [http://www.leeschoolsk12.org/site\\_res\\_view\\_folder.aspx?id=667fabf3-4943-49e0-92ab-2ed37ec6185e](http://www.leeschoolsk12.org/site_res_view_folder.aspx?id=667fabf3-4943-49e0-92ab-2ed37ec6185e) (last visited Dec. 10, 2007). Jasper County is now operating in two new PK-12 schools, having replaced all of its old buildings with these new facilities in the Fall of 2007. Jasper County Sch. Dist., <http://www.jcsd.net/#>. Orangeburg School District Three is now operating in its new high school facility, which includes a state of the art technology center. Lake Marion High Sch. & Tech. Ctr., [http://www.obg3.k12.sc.us/education/school/schoolhistory.php?sectiondetailid=65&sc\\_id=1197316792](http://www.obg3.k12.sc.us/education/school/schoolhistory.php?sectiondetailid=65&sc_id=1197316792) (last visited Dec. 10, 2007). All the other facilities in the Plaintiff Districts had previously been remodeled or replaced as found in the Orders dated December 29, 2005 and July 12, 2007.

More importantly, the trial court concluded that Plaintiffs failed to satisfy their burden of proving that facilities in the Plaintiff Districts were unsafe. Instead, the record establishes that “[e]ach of the Plaintiff Districts certified to the State Department of

---

plaintiff school district’s web site and the House and the Senate request the Court take judicial notice of these facts which are now public knowledge. Judicial notice is a legitimate, well recognized substitute for proof. “It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge.” *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976). “[E]very statute is a public law, unless otherwise declared in the statute itself. The legislative journals of both houses of the General Assembly are judicially noticed. . . . ‘Courts will not profess to be more ignorant than the rest of mankind, and should take notice of whatever is or ought to be generally known within the limits of their jurisdiction.’” *State v. Broad River Power Co.*, 177 S.C. 240, \_\_\_, 181 S.E. 41, 48 (1935) (internal citations omitted).

Education that its facilities comply with DHEC regulations; are adequate in size and arrangement to house its programs; comply with fire marshal regulations; have safe and adequately maintained playgrounds, physical education and play equipment; have sufficient fire extinguishers; have adequate light, ventilation, and heating; and comply with all OSHA standards.” (Order dated July 12, 2007 ¶ 28).

**4. Instructional Materials.**

The trial court found that with the exception of Dillon 2 and Orangeburg 3, each of the Plaintiff Districts “spent more than the State average for instructional materials, in most cases by a significant amount.” (Order dated July 12, 2007 ¶ 21). In addition, each principal specialist and teacher specialist in the Plaintiff Districts receives additional funds for instructional materials and supplies. *Id.* Therefore, the court concluded that nothing in the record supported Plaintiffs’ contention that sufficient materials and supplies are unavailable in the Plaintiff Districts.

**5. Transportation.**

The trial court found that because the cost of transporting public school students continues to rise, “[t]he State has shifted a large portion of the responsibility for paying drivers’ salaries to the local school districts, while the responsibility for purchasing and maintaining a fleet of buses rests on the State.” (Order dated July 12, 2007 ¶ 17). This “tremendous shared cost of transportation, both monetary and otherwise, has become a necessary component in the education process.” *Id.* As a result, the trial court was compelled to conclude that it could not “find that the necessary shifting of some of the cost of the transportation of students to the local school districts rises to the level of a violation of the constitution.” *Id.*

**6. Time on Task.**

The trial court found that the General Assembly “has enacted several pieces of legislation providing for and authorizing extended learning time through summer school, after-school learning programs, homework centers and similar interventions” and that “[t]hese additional learning opportunities were provided as supplements to the normal school day and school year.” (Order dated July 12, 2007 ¶¶ 18, 19). The trial court further found that *Abbeville County* does not mandate these “supplemental interventions as a constitutional requirement,” which the court found to be “beneficial, especially to at-risk students.” (Order dated July 12, 2007 ¶ 19).<sup>12</sup> Notably, the trial court concluded that “the lack of such programs does not amount to a constitutional violation.” *Id.*

**7. Vocational Education.**

The trial court found that every Plaintiff District offers vocational programs that comply with state regulations, and that “[t]his fact alone is certainly evidence from which the Court can conclude that students in the Plaintiff Districts have the opportunity to acquire vocational skills.” (Order dated July 12, 2007 ¶ 22). Although Plaintiffs would prefer other types of vocational programs, the trial court concluded that because *Abbeville County* “does not specify that particular vocational courses must be made available . . . no constitutional violation can be premised on the failure of the Plaintiff Districts to offer particular courses.” *Id.*

---

<sup>12</sup> This finding is in direct conflict with the trial court’s conclusion regarding pre-school programs. The pre-school programs required by the trial court’s order are “supplemental interventions” that would probably be “beneficial, especially to at-risk students.” Just like additional learning time, however, the lack of additional pre-school programs “does not amount to a constitutional violation.”

**8. Revenue and Spending in the Plaintiff Districts.**

The trial court found that “[n]otwithstanding budget cuts that began in fiscal year 2000, education has remained the number one priority of the State . . . .” (Order dated Dec. 29, 2005 ¶ 394). With respect to the Plaintiff Districts, the trial court found that “Plaintiffs Districts’ per pupil expenditures and revenues tend to be among the highest in the State, and have been increasing over time.” (Order dated Dec. 29, 2005 ¶ 394). In fact, the trial court found that “Plaintiff District revenues from all sources exceed the State median, in most cases by a substantial amount.” (Order dated Dec. 29, 2005 ¶ 398). The court found that since this lawsuit was originally filed, “State revenues in the Plaintiff Districts have more than doubled.” (Order dated Dec. 29, 2005 ¶ 395). Indeed, today, “[s]chools in the Plaintiff Districts spend more per pupil, on average, than the ‘Good’ and ‘Excellent’ schools.” (Order dated Dec. 29, 2005 ¶ 399). Therefore, “whatever the situation that was present in those districts when this case began, substantial increases in funding have occurred in the intervening decade.” (Order dated Dec. 29, 2005 ¶ 395). Accordingly, the trial court was compelled to conclude that generally “there is sufficient money available to achieve the educational outcomes identified in Abbeville County.” (Order dated Dec. 29, 2005 ¶ 408).

Indeed, at the time of trial each of the Plaintiff Districts, with the exception of Dillon 2, spent more per pupil than the state average of \$7,232 per pupil:

	<b>2002-2003 Per Pupil Spending</b>
<b>Allendale</b>	\$10,946
<b>Dillon 2</b>	\$6,255
<b>Florence 4</b>	\$8,694

<b>Hampton 2</b>	\$8,437
<b>Jasper County</b>	\$8,058
<b>Lee County</b>	\$8,650
<b>Marion 7</b>	\$9,213
<b>Orangeburg 3</b>	\$8,298
<b>2002-2003 State Average Spending</b>	\$7,232

(Order dated Dec. 29, 2005, ¶¶ 123, 134, 143, 153, 162, 172, 182, 193). Additionally, this Court should take judicial notice that with the exception of Dillon and Lee, current per pupil funding levels are dramatically higher than they were at the time of trial, and that funding in these districts well exceeds the state average:

	<b>2007-2008 Per Pupil Funding (Projected)</b>
<b>Allendale</b>	\$16,536
<b>Dillon 2</b>	\$7,889
<b>Florence 4</b>	\$11,886
<b>Hampton 2</b>	\$11,884
<b>Jasper County</b>	\$10,780
<b>Lee County</b>	\$8,191
<b>Marion 7</b>	\$13,682
<b>Orangeburg 3</b>	\$12,382
<b>2007-2008 State Average Funding</b>	\$10,566

(See Part IB, Proviso 1.3, Act 117 of 2007).

As mentioned above, the trial court found that there is no direct relationship between spending and achievement:

The Plaintiff Districts tend to be the highest spending districts in the State, yet their achievement is lower. Dillon 2 presents a powerful illustration of the absence of any direct relationship between money and achievement. As noted above, Dillon 2 is the lowest spending of the Plaintiff Districts, and in fact spends less than the State average. Notwithstanding this relatively low level of spending, student achievement in Dillon 2 is among the highest of all of the Plaintiff Districts, with over 59.9% (ELA) and 62.5% (Math) of its students scoring at Basic or above on PACT for the 2004 school year. *See* Defendants' Exhibit 3319. At certain schools in Dillon 2, the students exhibit excellent performance. *See* Defendants' Exhibit 3339. The per pupil expenditures at East and South elementary schools are far below the average for Plaintiff District elementary schools. *Id.*

(Order dated Dec. 29, 2005 ¶ 402).

**9. The Relationship Between Poverty and Achievement.**

After examining every existing aspect of the education system and finding and concluding that student achievement in the Plaintiff Districts has no statistically significant relationship to money, facilities, teacher characteristics or other school inputs, and that all these inputs are constitutionally adequate, the trial court examined the relationship between poverty and achievement.

Much of the statistical evidence by both sides "controlled" for the effect of poverty on achievement. To control for an independent variable (in this instance, poverty) in statistical parlance means to separate its effect from the effect of other independent variables so that the separate and distinct impact of each can be measured. (See Trial Tr. (9/23/04), p. 30, ll. 15-25; p. 31, ll. 1-14). For example, diet and exercise may have a beneficial impact on the overall health of an individual, but in order to

determine how much of an impact diet alone has on health, one would have to control for (or separate out the effects of) other variables, in this instance, exercise. By doing this, one would be able to determine the independent effect of proper diet on overall health.

Because poverty is so strongly related to achievement, any analysis that seeks to determine the impact of any variable on achievement must control for poverty. For example, to determine the relationship between teacher experience and achievement, one must control for the effect of poverty. If you do not, you cannot separate the effect of teacher experience on achievement from the effect of poverty on achievement. In this way, the separate effect of any variable can be determined. When comparing achievement in different schools or districts, controlling for poverty permits you to understand how achievement would compare if every classroom had the same percentage of students in poverty.

The trial court agreed with the evidence offered by the Senate and the House that demonstrated that most of the achievement differences across the state were related to the number of students in poverty rather than any other factor, such as spending or teacher characteristics. The trial court, however, concluded that the reality of poverty was not a variable that could be “factored out” of an analysis of whether students in the Plaintiff Districts were receiving the opportunity to acquire a minimally adequate education:

While factoring out poverty is possible in statistical analysis, poverty is a reality in the lives of the students in the Plaintiff Districts which cannot be factored out. It is the most pervasive influence in their lives and in their educational abilities and achievement. Indeed the record in this case makes it clear that the principal factor that is directly associated with different levels of student performance is poverty.

(Order dated Dec. 29, 2005 ¶ 419).<sup>13</sup> The trial court found that this relationship “would appear to be greater in the very young.” (Order dated Dec. 29, 2005 ¶ 422).

The trial court also found that although “schools cannot reasonably be expected to eliminate poverty,” the education clause as defined in *Abbeville County* “imposes an obligation upon the General Assembly and the State of South Carolina to create an educational system that overcomes, to the extent that is educationally possible, the effects of poverty in the very young, to the pre-kindergarten and kindergarten, to enable them to begin the educational process in a more equal fashion to those born outside of poverty.” (Order dated Dec. 29, 2005 ¶ 428). The court concluded that despite all of the educational improvements enacted by the General Assembly since this case began, “the Defendants have failed in their constitutional responsibility to provide an opportunity for a minimally adequate education to the very youngest . . . .” (Order dated Dec. 29, 2005 ¶ 429). As a result, the court concluded that students in the Plaintiff Districts are denied the opportunity to receive a minimally adequate education “*because of* the lack of effective and adequately funded early childhood intervention programs designed to address the impact of poverty on their educational abilities and achievements.” (Order dated Dec. 29, 2005 at p. 169) (emphasis added).

---

<sup>13</sup> In making this statement, the trial court misunderstood the point of the evidence that measured the effect of school based inputs. The Senate and the House were not attempting to “factor out” poverty, but rather to show that the effectiveness of these school based inputs is very similar across the state, that there are no striking deficiencies regarding these inputs in the Plaintiff Districts, and to show that Plaintiffs’ suggested “fixes”—i.e., more funding, better teachers, etc., would not impact achievement as claimed by Plaintiffs. Thus, the intent was to emphasize the effect of poverty rather than to ignore it.

### Standard of Review

This case was tried in equity. On June 1, 2001, the trial court entered an order denying Plaintiffs' request for a jury trial. (See Order filed June 1, 2001). On December 3, 2004, the trial court denied Plaintiffs' Motion for Reconsideration,<sup>14</sup> concluding that "[t]he constitutional issue in this case is equitable in nature, and, in accordance with past case law, a jury trial is not warranted." (Order filed June 1, 2001 at 6). In an action in equity tried without a reference, this Court "may find facts in accordance with its own view of the preponderance of the evidence." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) (citing *Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)). This broad scope of review, however, "does not require this [C]ourt to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

This cross-appeal, however, primarily raises legal rather than factual issues. "A legal question in an equity case receives review as in law." *Sloan*, 356 S.C. at 546, 590 S.E.2d at 346 (citing *Gunter v. Fallaw*, 78 S.C. 457, 59 S.E. 70 (1907); *Garvin v. Garvin*, 55 S.C. 360, 33 S.E. 458 (1899)). Therefore, this Court's scope of review of the issues presented in this cross appeal "extends merely to the corrections of errors of law." *South Carolina Elec. & Gas Co. v. Hartough*, Op. No. 4292, (S.C. App. Filed Sept. 18, 2007) (Shearouse Adv. Sh. No. 35) at \*24 (quoting *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000)); *Osterneck v. Osterneck*, 374 S.C. 573, 577, 649 S.E.2d 127, 129 (Ct. App. 2007) ("In a law case tried

---

<sup>14</sup> The trial court issued this order *nunc pro tunc* "to reflect [the trial court's] ruling from the bench on June 25, 2003 approximately one month before the beginning of the trial on June 28, 2003." (Order filed June 1, 2001, n.4).

by the judge without a jury the standard of appellate review is limited to a correction of errors of law and a determination if there is any evidence to support the factual findings of the trial judge.'").

As is set forth below, the trial court's order is controlled by multiple errors of law. Accordingly, the order of the trial court should be vacated and judgment entered for the Defendants.

## Argument

### **I. Material Changes in the Laws Governing Education in South Carolina Since the Trial Court's Decision Render Many Portions of the Trial Court's Order Moot.**

The case below was tried beginning in July, 2003, and concluding in December, 2004. The evidence adduced at trial reflected programs, policies, and conditions that existed as of the time of trial. In fact, much of the evidence in the record concerned even earlier dates. (See, e.g., Defs.' Ex. 1792; Defs.' Ex. 2041; Defs.' Ex. 2534; Defs.' Ex. 2533; Defs.' Ex. 2776). For example, the most recent expenditure date that was available in July, 2003, was for fiscal year 2002.

In the time since the record in this case was closed, many things in the educational landscape have changed and significant legislation has been adopted that goes to the heart of the trial court's conclusion that that the General Assembly has failed to provide adequate early childhood intervention programs to satisfy its constitutional duty. That legislation has largely rendered moot the trial court's order as it relates to the adequacy of those programs because the order necessarily does not consider them. Any review by this Court of the order under appeal is of very limited, if any, utility because the issues addressed in the order no longer reflect the reality of educational programs in South Carolina.

"A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Sloan v. Friends of the Hunley*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) (citing *Mathis v. South Carolina Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). A change in the law or

the facts during the pendency of an action may render a case moot and prohibit review by this Court. See *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 353 S.C. 24, 29, 576 S.E.2d 180, 182 (2003) (“Because the original provision under which this case was brought is no longer applicable and the new requirements under [the Act] are substantially different, we vacate the order of the circuit court and dismiss this appeal as moot.”); *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (observing that “moot appeals result when intervening events render a case nonjusticiable”); *McCoy v. McCoy*, 283 S.C. 383, 386-87, 323 S.E.2d 517, 519 (1984) (holding that “the fact that custody was subsequently changed from wife to husband renders this temporary order no longer effective and therefore moot”).

This Court should take judicial notice of several enactments by the General Assembly since the close of evidence in this case that have altered the General Assembly’s approach to ameliorating the effects of poverty on early childhood education. New programs and initiatives, as well as additional funding and services to poor and underperforming schools render the concerns raised by the trial court moot and the record below stale.

1. The new program that most directly relates to the trial court’s ruling is the Child Development Education Pilot Program established by the General Assembly in the 2006-2007 General Appropriations Bill and continued into the current fiscal year. (See Part IB, Proviso 1.75, Act 397 of 2006 & Part IB, Proviso 1.66, Act 117 of 2007). The General Assembly created this early childhood development 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.” (Part IB, Proviso 1.66, Act 117 of

2007). The program provides that all four-year old children who meet the “at risk” criteria who reside in the Plaintiff Districts are eligible to participate, and that the program is to be extended into the remaining plaintiff districts with any remaining available funds. This program is available to families whose household income nearly doubles the income required to be considered in poverty. *Id.*

In accordance with the trial court’s ruling, the General Assembly has recognized that “there is a strong relationship between the skills and preparation of pre-kindergarten instructors and the educational outcomes of students.” *Id.* As a result, providers of the program must:

offer a complete educational program in accordance with age-appropriate instructional practice and a research based preschool curriculum aligned with school success. The program must focus on the developmental and learning support children must have in order to be ready for school. The provider must also incorporate parenting education that promotes the school readiness of preschool children by strengthening parent involvement in the learning process with an emphasis on interactive literacy.

*Id.* Further, the program must offer 6.5 hours of instruction for 180 days per year with an adult-to-child ratio of no more than one-to-ten. *Id.*

The General Assembly has made this program a funding priority. The current year’s appropriations bill sets the funding at \$3,931 per child to be increased yearly with inflation. *Id.* Also, in recognition of the financial difficulties that many of the targeted families face, the program sets aside money for transportation at the rate of \$185 per child serviced by a public provider and \$550 per child serviced by a private provider. *Id.* The program also provides that carry-forward money must be used to provide services to children ages zero to three, which will result in over \$4 million to these programs in the

current fiscal year. (*Id.* and Part IB, Proviso 1.79, Act 117 of 2007). To date, the General Assembly has provided more than \$40 million in funding to this program. (Part IB, Proviso 73.14, Act 397 of 2006 and Part IB, Proviso 73.12, Act 117 of 2007).

2. The General Assembly has also recognized that in order to understand the breadth of poverty's impact and to gauge the effectiveness of early childhood interventions it will be necessary to track students' progress. The 2006-2007 appropriations bill sets aside \$300,000 for the State Department of Education to use "to institute a plan for reviewing, on a district basis, early childhood assets of schools and districts." (Part IB, Proviso 1A.63, Act 397 of 2006). The goal of this program is to track children "from early childhood programs to fifth grade and beyond to study the relationships of strong early childhood programs and increased performance on PACT, decreased drop out scores, decreased referral for special education programs, and increased graduation rates." *Id.*

3. Children from impoverished conditions are also less likely to have access to adequate health care and screening. In order to address this problem and its corresponding impact on student performance, especially at the early childhood level, the General Assembly has provided \$25 million in recurring funding to place licensed nurses in each public elementary school. (Part IA, Section 1, XVIII, Act 117 of 2007). Pursuant to section 59-10-210 and beginning with the current fiscal year, the General Assembly has also obligated itself annually to provide funding for this program. The nursing initiative was enacted as part of the Students Health and Fitness Act of 2005. (Act 102 of 2005). The General Assembly found that placing a nurse in each public elementary school serves the purposes of (1) improving early detection of health problems that can

interfere with learning or lead to more serious or disabling health conditions; (2) preventing disease by teaching and encouraging healthy lifestyles and habits that have lifelong implications for children and their families; and (3) providing valuable health services, including administering medications and care management necessary for those students who have chronic or episodic health conditions and disabilities. *Id.*

4. Additionally, because children from impoverished conditions, as well as their families, are more likely to be plagued with problems stemming from illiteracy, the General Assembly has appropriated funds through the Parenting/Family Literacy Initiative to be allocated “to school districts that provide comprehensive family literacy programs which address intergenerational cycles of poverty through adult education, early childhood education and parenting programs.” (Part IB, Proviso 1A.26, Act 117 of 2007). In the 2007-08 budget alone, \$6.1 million was appropriated to this initiative to provide districts with these programs a minimum of \$35,000 each. (*Id.* and Part IA, Section 1, XI(B), Act 117 of 2007). Further, to increase the access to books in the community, the General Assembly has increased the state aid to county libraries. The fiscal year 2006-2007 budget appropriated \$5.4 million in surplus lottery revenue for library aid to be distributed equally among the counties. (Part IB, Proviso 1AA.7, Act 397 of 2006). Further, this year’s budget increased the minimum amount of state library aid to \$60,000 for each county and appropriated an additional \$1 million in lottery proceeds to be distributed equally among each county. (Part IB, Provisos 1AA.7, 17.1, Act 117 of 2007).

5. The General Assembly also has taken additional measures to ensure that students have access to the instructional materials they need to achieve. In the 2006-2007

budget, an additional \$5 million was appropriated to purchase current copyrighted textbooks, and this number was increased to \$15 million in the current budget. (See Act 407 of 2006, Part IB, Proviso 73.14, Act 397 of 2006, Act 122 of 2007, & Part IB, Proviso 73.12, Act 117 of 2007). These funds are in addition to the \$50 million recurring base appropriation for textbooks and instructional materials. (Part IA, Section 1, VII(B) & XI(A)(3), Act 117 of 2007). Also, \$1 million was provided in this year's budget to purchase updated materials in every school library. (Part IB, Proviso 73.12, Act 117 of 2007).

6. At trial, one of Plaintiffs' principal complaints was the reliance on property taxes to fund school operating costs. Since trial, many of the Plaintiff Districts have received a significant benefit from the property tax relief measures enacted since trial. Act 388 of 2006 provides an exemption for the property tax on owner-occupied real property for school operations to be funded by a one-cent increase in the state sales tax. This Act created the Homestead Exemption Fund to reimburse school districts for the loss of revenue resulting from the exemption. Section 11-11-156(B)(1) provides that no county may be reimbursed less than \$2.5 million to compensate for the loss in revenue. S.C. Code Ann. § 11-11-156 (Supp. 2006). This results in extra money for thirty school districts across twenty-two counties because the amount of money they were collecting prior to the act was less than the \$2.5 million reimbursement floor established by the Act. Section 11-11-156(A)(2) governs the increase in reimbursements to the school districts for subsequent years and provides that the increase in the amount of reimbursement a school district receives is determined on a weighted pupil basis. In addition to the weighted pupil units provided by the Education Finance Act, the act adds an additional

weight of .20 for every student in poverty. S.C. Code Ann. §§ 11-11-156; 59-20-30 (Supp. 2006). This provides both immediate and future increases in funding for school operations for many of the Plaintiff Districts.

7. Funds to provide technical assistance to below average and unsatisfactory schools were increased in the 2007-08 budget by \$34 million to a total of \$81 million. (See Part IA, Section 1, XI(A)(4), Act 397 of 2006 and Part IA, Section 1, XI(A)(4), Act 117 of 2007). The Education Improvement Act technical assistance program provides teacher and principal specialists along with assistance in strategic planning to help underperforming schools improve their ratings. This program also allows underperforming schools to use these funds to provide salary supplements to teachers with advanced degrees to improve teacher recruitment and retention.

8. Additional efforts to attract and retain teachers in poor and underperforming schools have been made through changes to the Teacher Loan Program. This program provides student loan forgiveness to teachers who agree to teach in an area of critical needs, either geographic or subject, or both. The definition of “critical geographic area” has been expanded to include schools that have an absolute rating of below average or unsatisfactory, schools where the average teacher turnover rate for the past three years is twenty percent or higher, or schools that meet the poverty index criteria at the seventy percent level or higher. (Part IB, Proviso 1A.49, Act 117 of 2007). This amendment should directly alleviate teacher recruitment and retention issues in the Plaintiff Districts.

9. Further, in the information age, access to and familiarity with technological resources are necessary to function in society. The K-12 Technology

Initiative is designed “to provide technology, encourage effective use of technology in K-12 public schools throughout the State, conduct cost/benefit analyses of the various technologies and should, to the maximum extent possible, involve public-private sector collaborative efforts.” (Part IB, Proviso 72.35, Act 117 of 2007). However, acquiring the necessary infrastructure to deploy these technologies in the classroom is costly, especially for the poorer districts. For the current year, the General Assembly has appropriated \$13 million to assist school districts in upgrading technology infrastructure, computers, virtual schooling, and online assessments. (Act 122 of 2007 and Part IA, Section 1, XI(E)(2), Part IB, Proviso 73.12, Act 117 of 2007).

10. Another initiative designed to provide technological resources to the less affluent school districts is the “iAm” Statewide Student Laptop Program. This program goes beyond just providing students with access to technology by actually placing the technology in the student’s hands. This pilot program will provide six public school grants to purchase laptops for ninth grade students “to enhance the educational opportunities, increase workforce competitiveness, and engage ninth grade students to take ownership and responsibility for their future and the future of South Carolina.” (Part IB, Proviso 1A.70, Act 117 of 2007). The program sets asides fifty percent of the grant funds for schools that scored unsatisfactory or below on the most recent EAA report card. Also, the program eliminates the matching requirement for schools that are in the top ten percent of total students on free and reduced lunch.

11. Finally, this Court should note that funding for students in the Plaintiff Districts has increased substantially since the time of trial.<sup>15</sup> The trial record therefore does not reflect the resources that today are being deployed to provide each child in the

---

<sup>15</sup> See discussion, *supra*, pages 18-20.

Plaintiff Districts with the opportunity to acquire a minimally adequate education even without the additional pre-school programs that have been provided.

These enactments by the General Assembly materially change the characteristics of the education system that was before the trial court. It is now impossible to know whether the trial court would have reached the same conclusion regarding the necessity for additional pre-school programs had the Child Development Education Pilot Program been in place at the time of trial. As was the case in *Beaufort County Bd. of Educ.*, intervening events have made the law and the facts significantly different from those considered by the trial court, and many of the legal and factual differences go to the heart of Plaintiffs' Fourth Amended Complaint. The order should therefore be vacated in its entirety and all appeals dismissed as moot. *See Beaufort County Bd. of Educ., supra* (vacating the order of the trial court and dismissing an appeal as moot because the law and the facts at the time of appeal were substantially different).

**II. The Trial Court Erred as a Matter of Law in Finding and Concluding That Plaintiffs Were Only Required to Establish a Constitutional Violation by the Preponderance of the Evidence.**

**A. All constitutional violations must be established beyond a reasonable doubt.**

It is well established that all statutes are presumed constitutional and will not be declared unconstitutional "unless [their] repugnance to the constitution is clear and beyond a reasonable doubt." *Sloan v. South Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 481, 636 S.E.2d 598, 613 (2006) (citing *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)); *see also Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 398, 596 S.E.2d 42, 47 (2004). "A legislative enactment will be declared unconstitutional only when its invalidity appears so

clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.” *Joytime Distribs.*, 338 S.C. at 640, 528 S.E.2d at 650. As this Court has explained,

[a]n adjudication that an act of the legislature is violative of the constitution, state or federal, and, therefore, invalid calls into play a delicate power of the courts and should be exercised with utmost caution and only in clear cases. It is a ‘balance’ of the government of checks and balances and constitutes a restraint upon the representatives of the people, whose the government is; and those representatives, constituting the legislature, are vested with plenary powers of government, limited only by the constitution, with which, it must be assumed, they consciously try to comply. In the interpretation and application of it, courts are and should be cognizant of a strong presumption in favor of the validity of legislation. It has often been said by this and other courts that unconstitutionality is found only when it is seen beyond a reasonable doubt.

*State ex rel. Edwards v. Query*, 207 S.C. 500, 528, 37 S.E.2d 241, 252 (1946). *See also State ex rel. Richards v. Moorner*, 152 S.C. 455, 464, 150 S.E. 269, 272 (1929) (observing that “‘it is a grave matter to declare a solemn enactment of the legislature, a coordinate branch of the government, invalid, and . . . the court in its deliberations and conclusions should be guided by the well-settled principle that the unconstitutionality of an act must be shown beyond a reasonable doubt.’”); *Wingfield v. South Carolina Tax Comm’n*, 147 S.C. 116, 123, 144 S.E. 846, 848 (1928) (observing that “‘it is but a decent respect to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until the contrary is shown beyond a reasonable doubt.’”); *Santee Mills v. Query*, 122 S.C. 158, 162, 115 S.E. 202, 203 (1922) (observing that “‘[t]he court should not declare a statute unconstitutional unless the validity is manifest beyond a reasonable doubt.’”).

Accordingly, Plaintiffs carry the heavy burden of proving the State's statutory education funding scheme is unconstitutional beyond a reasonable doubt and the trial court erred in concluding that the case was governed by the preponderance of the evidence standard. *See State v. White*, 348 S.C. 532, 537-38, 560 S.E.2d 420, 422 (2002) (observing that the presumption of constitutionality "places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution", and that only when the challenging party establishes the act is invalid, "leaving 'no room for reasonable doubt that it violates some provision of the Constitution,' [does] the burden shift[] to the state."). *See also Vincent v. Voight*, 614 N.W.2d 388, 408 (Wis. 2000) (holding plaintiffs failed to prove beyond a reasonable doubt that the statutory school finance system violates the state education clause); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 44-45 (R.I. 1995) (holding Plaintiffs failed to establish beyond a reasonable doubt that state's statutory scheme for financing public education violated the state's education clause). "[I]n no doubtful case will the judiciary pronounce a legislative act to be contrary to the Constitution. To doubt the constitutionality of a law is to resolve the doubt in favor of its validity." *Wingfield*, 147 S.C. at 123, 144 S.E. at 848 (quoting 6 R.C.L. at 75). The trial court therefore erred by applying the wrong standard of proof in evaluating Plaintiff's claims.<sup>16</sup>

**B. Plaintiffs' challenge to multiple statutes does not lower their burden of proof.**

The trial court sought to distinguish the clear precedents establishing the required burden of proof because "Plaintiffs do not claim that the statutes governing education in South Carolina are unconstitutional. They contend instead that the system of public

---

<sup>16</sup> To the extent any issue in this case is deemed to be governed by a preponderance of the evidence standard, Plaintiffs failed to meet that burden as well.

schools in the Plaintiff Districts does not provide an opportunity for a minimally adequate education to each child and is, therefore, unconstitutional.” (Order filed Dec. 29, 2005 ¶ 19). Therefore, the trial court continues, “[t]he question . . . is not whether individual statutes affecting education in South Carolina are unconstitutional, but whether the educational opportunities presented by the interplay and implementation of the system of free public schools developed by the General Assembly meet the constitutional mandate of offering each child in the Plaintiff Districts the opportunity for a minimally adequate education.” *Id.*

The trial court’s attempt to distinguish a challenge to a particular statute from an attack on the “interplay and implementation of the [school] system” is unavailing. If Plaintiffs are not challenging the constitutionality of the statutes governing education in South Carolina, judgment should have been entered for the Defendants. The only issue remanded to the trial court was the constitutional sufficiency of the education system, which is entirely a creation of the statutes that implement and fund it. No relief could have been awarded against the General Assembly unless it has failed to enact statutes sufficient to satisfy the constitutional requirement or adopted legislation contrary thereto.<sup>17</sup>

The trial court also overlooked the plain language of the complaint upon which Plaintiffs’ claim for relief is based. In their Fourth Amended Complaint, Plaintiffs contend that Defendants “have participated in the drafting of *unconstitutional statutes* and/or have failed subsequently to ameliorate the *unconstitutional aspects of those statutes* to the detriment of the Plaintiffs named herein.” (Fourth Am. Compl. (7/10/03) ¶

---

<sup>17</sup> Plaintiffs also were required to show a causal relationship between the legislation adopted by the General Assembly and the absence of the opportunity for students to acquire a minimally adequate education. See discussion, *infra*, pages 38-40.

72 (emphasis added)). Plaintiffs also allege in the alternative that “the State has not allowed some of the Plaintiff districts to raise funds because of irrational and *unconstitutional* local fiscal autonomy constraints.” (*Id.* ¶ 78 (emphasis added)). Plaintiffs seek, 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 . . . *and is therefore unconstitutional* under the Constitution of the State of South Carolina.” (*Id.*, p. 21 (emphasis added)). In addition, Plaintiffs seek an order “[r]equiring the Defendants to draft a proposal for a new system for providing an adequate education in South Carolina . . . .” (*Id.*) Plaintiffs seek this form of relief because they contend that the existing statutes are unconstitutional.

Therefore, contrary to the trial court’s finding, Plaintiffs *do* “claim that the statutes governing education in South Carolina are unconstitutional.” (Order filed Dec. 29, 2005 at ¶ 19.) The fact that Plaintiffs challenge multiple statutes or base their claim on the failure of the General Assembly to act does not lower their burden. It would be illogical to think that a plaintiff could avoid the duty to prove the unconstitutionality of a single statute beyond a reasonable doubt simply by alleging that multiple statutes are involved. Indeed, the more wide ranging the claim of unconstitutionality, the greater the proof that should be required.

Similarly, the General Assembly’s alleged failure to enact early childhood intervention programs must be proven beyond a reasonable doubt to violate the education clause. The constitution permits the legislature considerable discretion, which includes the right to act under many circumstances. It is no less “grave” to find that the General Assembly has violated the constitution by failing to discharge a duty imposed upon it

than to find that it has affirmatively acted contrary to the constitution. *See Moorer*, 152 S.C. at 464, 150 S.E. at 272. In either event, proof beyond a reasonable doubt is necessary.

Plaintiffs failed to establish any violation of Article XI, section 3 by even a preponderance of the evidence, and certainly did not introduce evidence sufficient to establish a constitutional violation beyond a reasonable doubt. Because the record does not establish a constitutional violation and because the trial court's decision is controlled by errors of law, the order must be reversed and judgment entered for Defendants.

**III. The Record Does Not Establish That the Failure of All Students in Poverty to Achieve is Caused by a Systemic Failure of Existing Legislative Programs.**

To prevail in this case, Plaintiffs were required to prove beyond a reasonable doubt that each child in the Plaintiff Districts did not have the opportunity to acquire a minimally adequate education, *and* that the absence of that opportunity was caused by some systemic failure of existing legislation as opposed to other causes. *Greer v. Spartanburg Technical Coll.*, 338 S.C. 76, 80, 524 S.E.2d 856, 858 (Ct. App. 1999) (stating that a causation test “distinguishes between a result caused by a constitutional violation and one caused by other factors”); *see also New York Civil Liberties Union v. State of New York*, 771 N.Y.S.2d 563 (S.D.N.Y. 2004) (dismissing amended complaint alleging failure to provide sufficient resources and facilities for a sound basic education because complaint did not allege a systemic failure). *Greer* cites and adopts a two part test for causation set out in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). In *Mount Healthy*, plaintiff claimed that he was discharged as a teacher on the basis of constitutionally protected conduct. The United States Supreme Court held that plaintiff was required to prove first that his conduct was

protected and was a substantial factor in the decision not to re-hire him. If those elements were established, then plaintiff had to establish that the school would not have reached the same decision even without the protected conduct. The South Carolina Court of Appeals in *Greer* also cites *Stroman v. Colleton County School District*, 98 F.2d 152 (4th Cir. 1992) as establishing a “but for” test for the latter issue.

Applying these principles to the present case, this Court must find that the record establishes (a) that there is an absence of opportunity; (b) which would not exist; (c) but for a systemic failure of the programs and policies in place at the time of trial; and (d) that was not caused by other factors. More simply put, the question presented in this appeal is whether students are not receiving the opportunity for minimally adequate education because of the policies and programs statutorily adopted by the General Assembly.

This question can only be answered “no.” As will be discussed in greater detail below, the record establishes beyond a reasonable doubt that children in poverty in the Plaintiff Districts have the opportunity to acquire a minimally adequate education under the programs that were in existence at the time of trial, and in fact large numbers of such students acquired much more than a minimally adequate education in the system of free public schools established by the General Assembly pursuant to the education clause. It is therefore beyond debate that the opportunity exists, even though not every student achieves at levels that are satisfactory.

The trial court erred in inferring that *individual* failure was caused by some *systemic* failure of existing policies and programs. Not only is that inference not supported by the evidence, the opposite is true. As this record overwhelmingly

demonstrates, the causes of poor achievement among students in poverty are a variety of non-school related factors that will exist no matter what educational policies are adopted in South Carolina. (Defs.' Ex. 3307, pp. 3-4).<sup>18</sup> The factors that the trial court found to indicate the absence of the opportunity to acquire a minimally adequate education are therefore not caused by any systemic failure of education policy in South Carolina. In fact, the existing system of legislation uncontrovertibly provides the opportunity for students to acquire a minimally adequate education, and many of them do. "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." *Paynter v. State*, 797 N.E.2d 1225, 1229 (N.Y. 2003). Without evidence establishing that students are denied the opportunity to acquire a minimally adequate education because of the existing system of laws, and in the face of evidence that the present system provides the required opportunity, the judgment below should be reversed.

**IV. The Trial Court Erred in Using PACT Scores to Establish the Absence of the Opportunity to Receive a Minimally Adequate Education.**

According to the trial court, "it is impossible to measure the presence or absence of an opportunity to acquire a minimally adequate education without some examination of the outcomes of the educational process." (Order dated Dec. 29, 2005 ¶ 49). The trial court relied upon poor Palmetto Achievement Challenge Tests ("PACT") test results (when coupled with poverty) in reaching its conclusion that students in the Plaintiff Districts did not have the opportunity to acquire a minimally adequate education. (Order dated Dec. 29, 2005 ¶¶ 168-69). Reliance on PACT test results to establish the absence of educational opportunity, however, is misplaced for several reasons, and the trial court

---

<sup>18</sup> See detailed discussion *infra*, pages 52-56.

therefore erred in inferring that poor achievement (no matter what other factors were considered) is proof of a lack of opportunity.<sup>19</sup>

**A. Opportunity is distinct from achievement.**

The trial court correctly found that opportunity “does not mean achievement or guaranteed success.”<sup>20</sup> (Order dated Dec. 29, 2005 ¶ 34). The trial court abandoned the obvious conclusion, however, and ultimately adopted a test in which opportunity is measured solely by achievement, even though the court recognized that the “plain and ordinary meaning” of opportunity was something different. (Order dated Dec. 29, 2005 ¶ 34) (“Opportunity means the *chance* for progress or advancement to occur. Opportunity does not mean that progress, advancement or achievement will, in fact, occur.” (Emphasis in original) (internal citation omitted)).

To equate opportunity and achievement is to fall prey to the fallacy that that every student would succeed if the opportunity were present. One of Plaintiffs’ mantras in this case was that “every child can learn.” (See Trial Tr. (8/13/03), p. 12, ll. 8-16; p. 55, ll. 15-25; p. 56, ll. 1-8; Trial Tr. (10/06/03), p. 115, ll. 4-21; Trial Tr. (12/09/04), p. 58, ll. 8-15; p. 59, ll. 1-8; p. 69, ll. 14-25; p. 70, ll. 1-4). The flaw in this reasoning is apparent. To say that every child *can* learn is not to say that every child *will* learn, no matter what opportunities are presented or what programs are in place. A student may not take

---

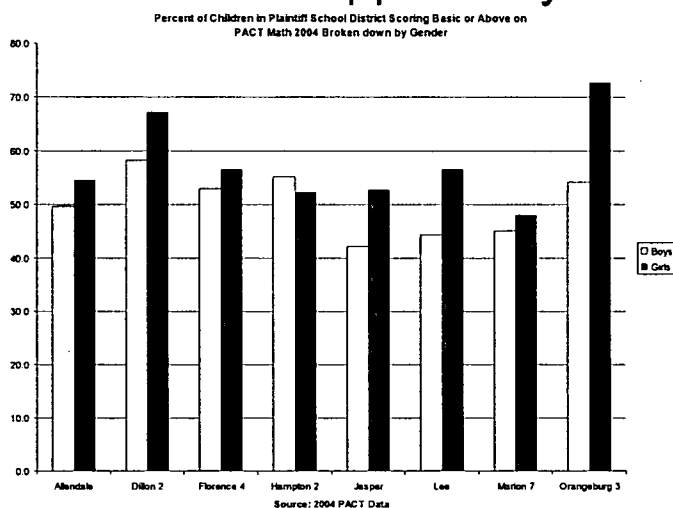
<sup>19</sup> As discussed above, poor PACT results are always associated very strongly with free and reduced lunch, and therefore, there is nothing distinctive about this combination of factors.

<sup>20</sup> The court then adopted a situational definition of opportunity by concluding that to determine whether an opportunity is present, “one must examine not only the means by which the opportunity is offered but also the characteristics of the one to whom it is offered.” (Order dated Dec. 29, 2005 ¶ 35). The propriety of this latter notion is debatable within the context of *Abbeville County* because it inevitably leads to a student-by-student standard that could only be satisfied by legislation aimed at the particular requirements of each individual. See discussion *infra*, pages 52-56.

advantage of an available opportunity for any number of reasons for which the state cannot be held accountable. The record in this case provides concrete evidence that this is true. For example, Plaintiff Tyrin B., a minor, failed algebra. (See Defs.' Ex. 1413). His mother testified that his failure was because he was not provided an opportunity to learn the subject. On cross examination, however, she discovered that Tyrin had missed 34 days of algebra class. (Trial Tr. (6/11/04), pp. 164-165). Whatever opportunity was present in that algebra class was patently not utilized by the student, and the record did not permit the trial court to conclude that Tyrin's failure was because of the absence of opportunity. In at least this example, therefore, Plaintiffs failed to establish that Tyrin's poor achievement was the result of the absence of opportunity.

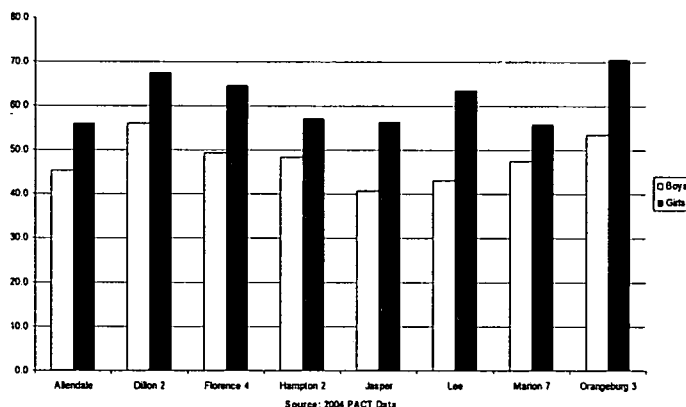
The imperfect relationship between opportunity and achievement is not evidenced merely by Tyrin's attendance record, however. The record provides other evidence that establishes the fallacy of the trial court's reasoning on a much broader basis:

## Does Different Achievement Mean Different Opportunity?



## Does Different Achievement Mean Different Opportunity?

Percent of Children in Plaintiff School District Scoring Basic or Above on  
PACT ELA 2004 Broken down by Gender



(Def.'s Ex. Nos. 3318, pp. 1-11; 3319, pp. 1-11; 3320, pp. 1-11; 3321, pp. 1-11; 3322, pp. 1-11, 3323, pp. 1-11; 3324, pp. 1-9; 3325, pp. 1-11).

These graphs show the percentage of students scoring basic or above on the 2004 PACT ELA and math tests in the Plaintiff Districts, broken down by gender. The evidence demonstrates is a significant difference in the number and percentage of girls who pass the PACT test compared with their male peers. Under the trial court's reasoning, one would conclude that the opportunity presented to the boys was somehow different from the opportunity presented to the girls. Yet such a conclusion is unsupportable in logic and in fact. There is no material difference in the percentage of students in poverty in either category. Both groups of students attend the same schools, with the same teachers. Indeed, in many instances, they sit next to each other in the same classrooms. There are no gender based disparities in spending or in any other inputs provided by the state. In every measurable way, the factors that create the opportunity to learn are identical for the girls and the boys. Yet their achievement is materially different. The trial court's reasoning would lead to the conclusion that their opportunities

are different because their characteristics (in this instance their genders) are different. But surely the education clause cannot be read to require programs designed specifically for male students so that their achievement will more closely resemble that of the girls. Any such conclusion would ignore the plain meaning of “opportunity”, and would require student-by-student programs to address every out-of-school factor that has an effect on achievement. The education clause does not guarantee achievement, however, and does not require schools to overcome every factor that leads to differing achievement among groups.

Thus, the fact that the achievement levels of students in poverty is lower than others does not mean that their opportunity to learn is different, and does not justify a finding that the education clause has been violated.

**B. PACT scores are themselves a function of socio-economic status and do not establish the absence of opportunity.**

The trial court also erred in using PACT scores as a way to measure educational opportunities because achievement on PACT is largely a function of socio-economic factors rather than school quality. It was error for the trial court to draw any conclusions based upon the concurrence of high levels of poverty and relative low PACT scores because those two variables are so strongly associated with each other regardless of the school or district that is examined. Although the trial court obviously understood this relationship, it wrongly interpreted the education clause to require the General Assembly to remedy a problem that is not caused by poor schools.<sup>21</sup>

Plaintiffs’ expert Greg Hawkins testified regarding the relationship between PACT scores and poverty and also examined the impact of other variables on PACT

---

<sup>21</sup> See discussion, *infra* at 52-56.

scores as well. (Trial Tr. (08/14/03), pp. 45-50; see also Pls.' Ex. No. 1458). Dr. Hawkins examined PACT scores in all districts in South Carolina. His analysis revealed that the correlation between PACT scores and poverty was  $-0.789$ . (Pls.' Ex. No. 1458).<sup>22</sup> This very powerful relationship means that for every 1% increase in the number of students on free and reduced lunch in a school, the number of students scoring basic or above on PACT will decrease by over three-quarters of one percent. *Id.* (Trial Tr. (8/14/03), p. 90-91). As explained by Dr. Hawkins, poverty accounts for over 62% of the variations in PACT scores across every school in the state. *Id.* (Trial Tr. (8/14/03), p. 37-39). That is an extremely high relationship that overwhelms any other variable, such as teacher experience, which was also measured by Dr. Hawkins. He determined in his study that teacher experience is correlated to PACT scores by a factor of 0.183, which means that only 3.3% of the difference in PACT scores is attributable to teacher experience. (Pls.' Ex. 1458).

This "profound" relationship between PACT scores and poverty, (Trial Tr. (8/14/03), p. 21), was confirmed by every other witness who examined the issue. Plaintiffs' expert Lorin Anderson found a correlation between PACT scores and poverty based upon the 2003 PACT test of  $-0.769$ , compared with the combined effect of teacher quality of 0.11. (Pls.' Ex. No. 6835A; Pls.' Ex. 6835I). Defense expert David Armor

---

<sup>22</sup> This negative relationship (negative slope) means that low values of PACT scores ("Y", the dependent variable or effect) tend to occur with high values of poverty ("X", the independent variable or cause), while high values of PACT scores tend to occur with low values of poverty.

concluded that poverty accounts for “nearly all” of the differences in PACT scores across the state. (Trial Tr. (9/23/04), pp. 30-32).<sup>23</sup>

While this relationship is indisputable, the trial court erred by concluding that there was a causal relationship between poor PACT scores and the absence of educational opportunity. That is not necessarily true, as the creators of the PACT test make clear:

A frequent misuse of test data is the tendency to equate high test scores with educational quality. . . . [C]haracteristics of students such as socio-economic background and the educational level of parents are factors which are strongly related to test performance. Comparisons of scores among schools and/or districts should not be made unless differences in the characteristics of students are accounted for in these comparisons. . . . Caution should be exercised in the interpretation of differences in the performance of various subgroups (e.g. male versus female) within the total population at any grade. While the data for various subgroups can provide information as to which of the subgroups as a whole may be most in need of additional instruction, *the 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.*

(Defs.’ Ex. No. 804, p. 8 (emphasis added)). The trial court fell prey to the error expressly cautioned against in the PACT User’s Guide by concluding that the lower PACT scores were caused by some failure of the educational system, in this case, the failure to offer additional pre-school programs. The evidence establishes that the relationship between PACT scores and poverty is universal and is not related to any measure of school quality. In the absence of a causal relationship between educational policy and achievement, it was error for the trial court to find a constitutional violation based upon relatively lower PACT scores for students in poverty.

---

<sup>23</sup> It is because this relationship is so powerful that it is necessary to “control” for poverty if the other relationship is examined. See discussion, *supra*, pages 20-22.

- C. **To the extent that PACT scores are probative of opportunity, they establish that the opportunity to acquire a minimally adequate education is present in the Plaintiff Districts.**

PACT scores however can be used to prove that students in the Plaintiff Districts have the opportunity to acquire a minimally adequate education. Because large numbers of students on free and reduced lunch pass the very rigorous PACT test, it is clear that the opportunity to acquire a minimally adequate education is present.

1. **Large numbers of students in poverty in the Plaintiff Districts score at basic or above on PACT.**

The vast majority of students in the Plaintiff Districts are on free and reduced lunch. According to the 2003 district report cards, those percentages are as follows:

	<b>Percent of Students on Free and Reduced Lunch</b>
<b>Allendale</b>	92%
<b>Dillon 2</b>	83%
<b>Florence 4</b>	80%
<b>Hampton 2</b>	92%
<b>Jasper</b>	69%
<b>Lee</b>	89%
<b>Marion 7</b>	92%
<b>Orangeburg 3</b>	89%

(Defs.' Ex. Nos. 2971; 2976; 2983; 2987; 2991; 2997; 3004; 3009).<sup>24</sup>

---

<sup>24</sup> These percentages are from the number of students tested enrolled in grades 3-8.

Notwithstanding the high incidence of poverty, however, a significant number of students in these districts have scored basic or above on PACT. For years 1999 through 2007, the percentages are as follows<sup>25</sup>:

**PACT SCORES 00-07**

	2000	2001	2002	2003	2004	2005	2006	2007
<b>Allendale</b>								
ELA	36.3	48	49.3	42.9	49.5	53.2	55.5	51.2
Math	32.9	45	40.5	50.5	52.9	54.8	49.2	53
<b>Dillon 2</b>								
ELA	70.4	56	68.5	47.8	59.9	60.3	61.3	58.8
Math	66.9	47	54.7	61.7	62.5	60.9	63.9	62.2
<b>Florence 4</b>								
ELA	49.4	43	49.8	49.6	59	49.7	57.2	54.2
Math	46.6	37	47.9	51.5	58.7	53.4	55	49.2
<b>Hampton 2</b>								
ELA	42.9	45	43.1	45.7	62.5	55.6	59.6	53.4
Math	30.1	32	29.7	40.6	56.6	54	60.4	53.5
<b>Jasper</b>								
ELA	48.3	45	46.1	46.8	49.8	55	52.4	50.7
Math	56.5	32	35.4	45.5	47.1	50.5	44.9	44.8
<b>Lee</b>								
ELA	58.9	42	48.5	48.5	55.4	54.7	57.3	51.4
Math	43.9	31	39.5	49	51.7	54.9	51.8	47.1
<b>Marion 7</b>								
ELA	66	39.6	54.8	45.3	54.8	52.4	60.8	57.4
Math	65.6	55	48.9	47.7	49.1	53.7	51.6	52.2
<b>Orangeburg 3</b>								
ELA	62.6	57	59.9	55.3	65.3	63.4	65.7	59.8
Math	53.8	47	48.7	55.5	61.4	63.3	66.3	64.6

Thus, large numbers of students on free and reduced lunch in the Plaintiff Districts have “passed” the PACT test.

---

<sup>25</sup> The PACT scores referenced from 2000 to 2004 were admitted in evidence at trial and are reflected in the trial court’s order at pp. 62-89. The PACT scores from 2005-2007 are from the South Carolina Department of Education’s website, <http://ed.sc.gov/agency/offices/assessment/pact/scores.html>, and Defendants ask this Court to take judicial notice of those scores.

2. **A score of basic or above on PACT is the equivalent of the achievement of a minimally adequate education at the appropriate grade level.**

The PACT Test User's Guide describes the curriculum standards adopted by the State of South Carolina for each subject and grade level provides as "designed to promote the following student competencies. The student will:

1. read, view, and listen to complex information in the English language;
2. write and speak effectively in the English language;
3. solve problems by applying mathematics;
4. conduct research and communicate findings;
5. understand and apply scientific concepts;
6. obtain a working knowledge of world, United States and South Carolina history, government, economics, and geography; and
7. use information to make decisions."

(Def.'s Ex. No. 804, p. 3). These standards were adopted pursuant to the Education Accountability Act, which requires that the curriculum standards reflect the highest possible competencies. S.C. Code Ann. § 59-18-300 (2004). As the trial court correctly found, the competencies prescribed by the standards "go far beyond the knowledge and skills comprising a minimally adequate education as defined in Abbeville County." (Order dated Dec. 29, 2005 ¶ 109).

Because the constitutional duty is satisfied by providing the opportunity to acquire the elements of a minimally adequate education as defined in *Abbeville County*, evidence that students had actually achieved an even higher level inarguably demonstrates that the required opportunity exists. As testified by then-Superintendent

Inez Tenenbaum, “[O]ur standards are commensurate to what a student should be able to know and do in a higher education setting as well as in the modern day work world in terms of English, math science, social studies, what young people are required to know or should know to be an educated, contributing member of our society as well as the global economy.” (Trial Tr. (5/4/04), p. 239, ll. 20-25; 240, ll. 2-8).

The extent to which a student is learning the material in the curriculum standards is what is measured by PACT. As its User’s Guide explains:

The South Carolina Palmetto Achievement Challenge Tests (PACT) are state level assessments aligned with the curriculum standards for each subject area and grade level. They are designed to measure the performance of public school students in grades three through eight in the content areas of English language arts (ELA), mathematics, science and social studies (history, government geography and economics).

(Defs.’ Ex. No. 804, p. 4). The PACT User’s Guide also provides the definitive explanation of the performance levels of students taking the test:

Four performance levels (Advanced, Proficient, Basic, and Below Basic) were established by determining three cut-off points. These performance levels are defined as follows: . . . . BASIC: Performance at the “Basic” level means that the student had passed the test. A student who performs at the “Basic” level on the PACT has met minimum expectations for student performance based upon the curriculum standards . . . .

(Defs.’ Ex. No. 804, p. 4).

The interaction of the constitution, the curriculum standards, and PACT make it easy to determine that all students who score basic or above on PACT are achieving more than a minimally adequate education.<sup>26</sup> It is simply impossible, therefore, to find that

---

<sup>26</sup> Although *Abbeville County* speaks in terms of “each child”, the trial court’s order and the evidence demonstrate that the issue is whether the existing policies are sufficient to create the

there is some systemic impediment to the opportunity to acquire a minimally adequate education in the Plaintiff Districts. On the other hand, it cannot be inferred that those students in the Plaintiff Districts who scored below basic on PACT have not acquired a minimally adequate education. Because the curriculum standards “go far beyond” and “encompass more” than what is required by *Abbeville County*, (see Order dated Dec. 29, 2005 ¶ 109), a significant percentage of those students scoring below basic may have achieved far more than what *Abbeville County* requires. PACT scores are therefore instrumental in establishing the presence of an opportunity for all students, including those at risk, but cannot be used to determine the absence of that opportunity.

3. **The success of students in poverty on PACT is the result of existing policies and the funding provided therefore.**

It is clear that the success of those students who pass the PACT test is the result of the school system and not some outside educational influences. The record in this case is replete with testimony and exhibits that establish that these students lack the resources necessary to provide outside educational support. (See, e.g., Trial Tr. (07/30/03), pp. 133-137; Trial Tr. (01/06/04), pp. 110-113; Trial Tr. (08/06/03), pp. 181-186; Trial Tr. (04/01/04), p. 149; Trial Tr. (10/08/03), pp. 115-129; Trial Tr. (03/04/04), p. 170; Trial Tr. (02/09/04), pp. 25-33; Trial Tr. (09/30/03), pp. 104, 108-109).

Because the evidence establishes that these students bring few, if any, extra resources from home or elsewhere with them to school, any success that they achieve is necessarily the result of the policies and programs that were then in effect. Because those programs result in the achievement by so many students of more than a minimally

---

opportunity generally for students in poverty to acquire a minimally adequate education. Because of the large number of students who perform well on PACT, it is clear that students in poverty have the opportunity to acquire much more than a minimally adequate education, although not all such students do.

adequate education, the existence of the opportunity for students to acquire such an education is obvious and undeniable.

**D. The fact that not all students achieve at desirable levels does not establish a constitutional violation.**

South Carolina has established high goals for educational achievement. The Education Oversight Committee has committed South Carolina to becoming “one of the five fastest improving systems in the country” thereby ensuring that “South Carolina’s student achievement will be ranked in the top half of states nationally” by the year 2010. (Pls.’ Ex. 6293). It is clear that as a state, we are not yet meeting that goal, and achievement in South Carolina needs considerable improvement for a variety of social and economic reasons. The fact that we have not met our goals, or that there would be societal benefits to improving educational outcomes, however, does not establish the existence of a constitutional violation. To acknowledge the obvious fact that poor students in South Carolina do have the opportunity to acquire at least a minimally adequate education is not to endorse the existing system as being the best we either could or should do. It is merely to acknowledge that the existing programs satisfy the minimum requirements. The quest for educational improvement in South Carolina will continue no matter the outcome of this case, but this Court must accept that the standard enunciated in *Abbeville County* has been met, and that judgment in this case should therefore have been entered for the Defendants.

**V. The Relationship Between Poverty and Achievement is Not the Result of Poor Schools, and Better Achievement Cannot be Legislated.**

Not only did the trial court err in measuring the absence of opportunity by examining PACT scores, but also that error is compounded by the court’s requirement

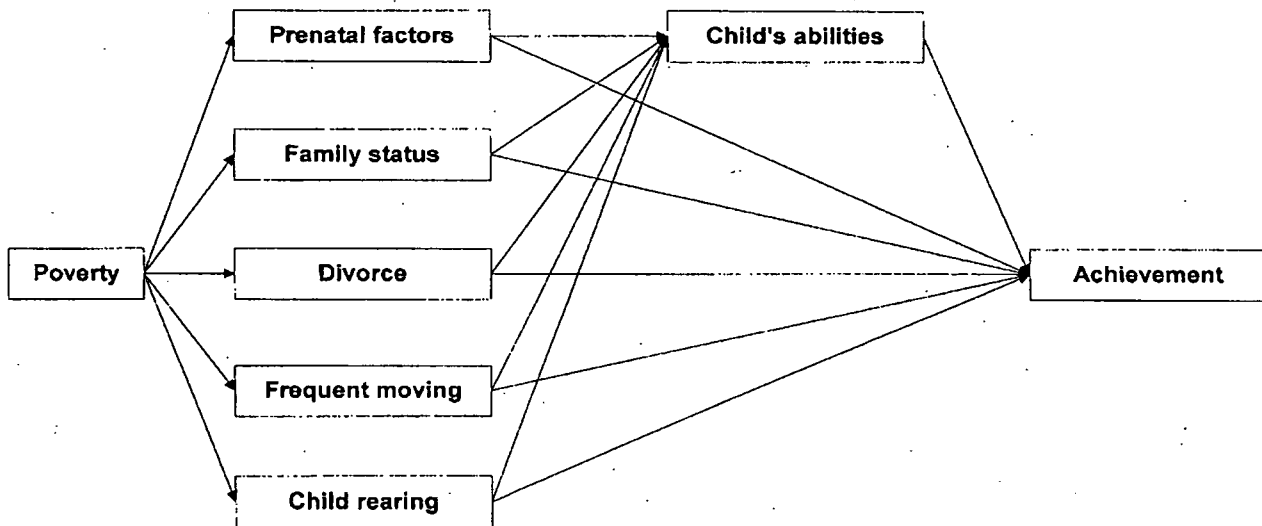
that the effect of poverty on achievement be eliminated by the General Assembly “to the extent that it is educationally possible.” (Order filed Dec. 29, 2005 ¶ 428). Remedying those effects, however, is not something that lies within the scope of the education clause for more than one reason. As the trial court acknowledged, the links between poverty and academic achievement “lie outside of the traditionally accepted scope of educational policy, and require interventions beyond those traditionally produced by schools.” (Order filed Dec. 29, 2005 ¶ 427).

**A. Bad achievement is not caused by bad schools.**

The statistical relationship between poverty and academic achievement has been addressed above. In addition to appreciating the strength of the relationship between poverty and achievement, it is equally important to understand the mechanisms through which poverty operates to cause poor achievement. As the evidence in this case overwhelmingly demonstrates, those mechanisms are not school related, and therefore lie outside of the scope of the education clause.

The relationships between poverty and the factors that affect achievement are illustrated by Defendants’ Exhibit Number 3307, pages 3-4:

### Poverty-Related Factors That Affect Achievement



Source: Child Development, 1994; American Psychologist, 1998

Dr. Herbert J. Walberg explained in his testimony that these “risk factors” are the mechanisms by which poverty operates to adversely affect academic achievement of students in poverty. (Trial Tr. (7/1/04) at pp. 172-76). It should be noted that inadequate or failed educational policies are *not* the reason that students in poverty tend to have poor achievement. The factors that affect learning relate to environmental and health conditions that are not school related, and schools can play only a limited role in ameliorating these conditions.

Schools are not the reason that PACT scores tend to be lower in the Plaintiff Districts, and again, the trial court erred in using PACT scores as the basis for finding a violation of the education clause. Plaintiffs’ expert Dr. Lorin Anderson agreed with Dr.

Walberg. He 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.

(See Trial Tr. (11/29/04), pp. 17-21).

What is important to this case about Dr. Walberg's exhibit and Dr. Anderson's reaction to it is that neither mentions schools at all. (Trial Tr. (11/29/04), p. 20). The "alterable variables" between poverty and achievement are related to things like pre-natal care, parenting classes, and greater home stability, not school based programs and policies. Because the connections between poverty and achievement are not school related, the poor achievement upon which the trial court relies to justify a finding in favor of Plaintiffs is not causally connected to education policy. In the absence of such a causal relationship, it was error for the trial court to find that poor achievement was evidence of a constitutional violation.

**B. Good achievement for students in poverty cannot be legislated.**

It was also error for the trial court to require the General Assembly to legislate away the effects of poverty on achievement because there are no known remedies for that

relationship. 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.” (Trial Tr. (7/01/04), p. 171, ll. 19-25). Defendants’ expert Dr. James W. Guthrie agrees. 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.” (Trial Tr. (9/21/04), p. 58, ll. 2-14). As Defendants’ expert Dr. David Armor testified, South Carolina, as well as society as a whole, has “not figured out a way to overcome the effects of poverty.” (Trial Tr. (9/23/04), p. 155, ll. 10-25; p. 156, 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 . . . .” (Trial Tr. (9/23/04), p. 157, 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.” (Trial Tr. (9/23/04), p. 157, ll. 9-13).

As the evidence in this case 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. This is why the trial court’s order necessarily concedes that these issues lie “outside of the traditionally accepted scope of educational policy.” (Order dated Dec. 29, 2005 ¶ 427). It was therefore error for the trial court to require the General Assembly to legislate away the effect of poverty on achievement.

**VI. The Trial Court Erred in Requiring That Early Childhood Intervention Programs be Provided Because Such Programs are Outside the Scope of Article XI, Section 3 as a Matter of Law.**

The Senate and the House submit that the trial court erred as a matter of law in concluding that because early childhood intervention programs might improve the educational opportunities for students in the Plaintiff Districts, such programs must be delivered as a matter of constitutional obligation. In requiring the General Assembly to adopt additional pre-school programs, the trial court made a policy judgment that enjoys no textual support in the state constitution and is certainly not required under *Abbeville County*. By impermissibly reading a constitutional obligation on the part of the General Assembly to provide early childhood intervention programs into the text of the constitution and *Abbeville County*, the Court overstepped its authority, entered the province of the legislature, and embraced a particular policy judgment in direct contravention of the constraints imposed by various decisions of our appellate courts, including *Abbeville County*.

**A. History of the education clause.**

The Constitutional Convention of 1868 adopted South Carolina's first education article, which provided for compulsory attendance for all students between six and sixteen years of age. See Fogle, Jennifer L., *Abbeville County School District v. State: The Right to a Minimally Adequate Education in South Carolina*, 51 S.C. L. Rev. 420, 425 (2000). In 1895, South Carolina's Constitution and its education clause were revised to read as follows:

The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years, and for the division of the Counties into suitable school districts, as compact in form as

practicable, having regard to natural boundaries, and not to exceed forty-nine nor be less than nine square miles in area

.....

S.C. Const. of 1895, art. XI, § 5. The 1895 Constitutional Convention Committee Journal indicates that in all of the various resolutions to amend the education clause, one thing remained constant, namely, it was the intent of the framers of the 1895 constitution that the duty of the General Assembly to provide for a system of free public schools did not extend to children younger than the age of six years. *See Journal of the Constitutional Convention of the State of South Carolina* 128 (1895). Indeed, the historical data suggests that the framers of the 1895 constitution were more concerned with providing for institutions of higher learning than they were any sort of early childhood education. *See id.* at 12 (providing a resolution to amend the education clause stating in part that “[a] common school education creates a demand for a higher or collegiate one, and it is your duty to support the higher institutions of learning in the State.”).

In 1966, the General Assembly approved by concurrent resolution the Committee to Make a Study of the South Carolina Constitution of 1895. Fogle, *supra* at 426. The committee recommended a variety of changes to the State Constitution, including the education clause. The current version of the education clause was passed in 1973 and is now found at S.C. Const. Article XI, § 3 providing as follows:

The 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. By eliminating the age parameters, the current education clause gives the General Assembly more discretion to legislate in the field of public education, which it has done by statute. The General Assembly has interpreted the scope of the education clause, limiting its application to students between the ages of five and twenty-one:

It is not lawful for any person who is less than five or more than twenty-one years of age to attend any of the public schools of this State, including kindergarten, except that:

\* \* \* \*

(6) Four-year-olds may attend optional child development programs . . .

S.C. Code Ann. § 59-63-20 (2004).<sup>27</sup> While the General Assembly's limitation on the scope of the education clause in no way trumps this Court's interpretation of the meaning of the clause, it is notable that some form of age limitation has been recognized constitutionally or statutorily or both since 1895. See S.C. Code Ann. § 59-63-20, history.

Therefore, the trial court's assertion that the parameters of a system of free public schools "in terms of age or grade levels are not defined in the education clause, nor are they defined in *Abbeville County*," (see Order dated July 12, 2007 ¶ 58),<sup>28</sup> is contradicted by the intent of the framers of the education clause and the statutory enactments made pursuant thereto. The current statutory scheme permits early childhood development

---

<sup>27</sup> While the enactment of a statute by the General Assembly cannot necessarily be interpreted to define the extent of a constitutional duty, it is important to note that the trial court relied upon statutory policies to illustrate the acknowledgement by the legislature of the importance of pre-school programs. (See Order dated July 12, 2007 ¶ 60). Therefore, the age limitations imposed by the legislature should also be considered.

<sup>28</sup> This Court recognized age limitations in the scope of the education clause by restricting its reach to "children."

programs for three and four year old children but declines to make them mandatory. S.C. Code Ann. § 59-19-340 (2004) (“The board of trustees of each school district *may* establish and provide for the education of children who will attain the age of four on or before September first of the applicable child development programs.”) (Emphasis added). Thus, although there is no duty on the part of the General Assembly to provide for early childhood intervention programs for children younger than five, it has done so.<sup>29</sup> The education clause, however, cannot be read to require mandatory programs to children younger than five.

**B. The trial court’s remedy is not substantively justified under the education clause.**

It appears that the trial court bases its conclusion that early childhood intervention programs are constitutionally required because of “numerous statutes specifically acknowledg[ing] this obligation.” (Order dated July 12, 2007 ¶ 57). But just as the trial court correctly concluded that summer school, after-school learning programs, homework centers and vocational education were “additional learning opportunities . . . provided as a supplement to the normal school day and school year,” (Order dated July 12, 2007 ¶¶ 18, 19), the same is true with respect to early childhood intervention programs adopted by the General Assembly. No matter how beneficial these programs may be to at-risk students, neither the education clause itself nor *Abbeville County* mandates these programs as a constitutional requirement, and the lack of such programs does not amount to a constitutional violation.

The limited scope of Article XI, section 3 was made apparent in *Washington v. Salisbury*, 279 S.C. 306, 306 S.E.2d 600 (1983). In *Washington*, plaintiffs brought suit

---

<sup>29</sup> See also the discussion at pages 26-33, *supra*, regarding the numerous early childhood programs that have been adopted since the Order in this case was entered.

against the superintendent of Beaufort County schools contesting the imposition of an \$80.00 per course summer school tuition fee. The trial court entered an order enjoining the collection of the tuition fee and defendants appealed.

Reversing the order of the trial court, this Court concluded that our constitution and state statutes do not provide an entitlement to free summer school:

A search of the South Carolina School Code . . . reveals no provision or requirement for summer school. The summer session in Beaufort County was operated in addition to the mandated 185 day school term and received no direct State aid. *It is evident that the summer school was not part of the free public school system required by the State Constitution;* therefore, there was no duty on appellants to make it available to all children, free of charge.

*Washington*, 279 S.C. at 308, 306 S.E.2d at 601 (emphasis added).

In the present case, a search of the constitution reveals no provision or requirement explicitly mandating the establishment of early childhood intervention programs. A search of the South Carolina Code reveals that there is a provision for early childhood intervention programs, but the duty to provide for such programs lies with each school district, not the General Assembly. *See* S.C. Code Ann. § 59-19-340 (2004). The fact that pre-school programs may be beneficial does not mean that they are constitutionally required, and it was error for the trial court to conclude otherwise.

**VII. The Trial Court's Decision Improperly Usurps the Right of the General Assembly to Determine the Manner in Which Educational Opportunities are Provided to Students in South Carolina.**

In the present case, the trial court usurped the majoritarian political process by making a policy decision that early childhood education programs shall be "the way in which educational opportunities are delivered to the children of our State." *Abbeville County*, 335 S.C. at 69, 515 S.E.2d at 541. The court's requirement that the General

Assembly adopt a particular that policy to remedy the perceived constitutional violation is inconsistent with the court's limited role in this litigation. This Court expressly held that the judicial branch is not empowered to dictate the programs used in our public schools, *id.* at 69, 515 S.E.2d at 540, and emphasized 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." *Id.* at 69, 515 S.E.2d at 541. While it was certainly within its authority to conclude that the impact of poverty denies students in the Plaintiff Districts the opportunity to acquire a minimally adequate education, the trial court overstepped its constitutional limits and exercised discretion left to the General Assembly as to how to address the relationship between poverty and achievement.

**A. The trial court's order is a violation of separation of powers because the trial court improperly invaded the province of the General Assembly under Article XI, section 3.**

Article I, Section 8 of the South Carolina Constitution explicitly states that "the legislative, executive, and judicial powers of the government *shall be forever separate* and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8 (emphasis added). As the text of Article I demonstrates, each branch of State government has certain delineated powers that are separate and apart from the other branches of government, which may not be usurped by any other branch. The legislative branch makes the laws; the executive branch carries them into effect; and the judicial department interprets them. *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979). Separation of powers expresses the policy that "the powers confided by the Constitution to one [branch of government] cannot be exercised by another."

*Culbertson v. Blatt*, 194 S.C. 105, 110, 9 S.E.2d 218 (1940) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880)).<sup>30</sup>

With respect to the judiciary's separate and independent role in the constitutional system, this Court has observed:

'It has been said that the policy and intent of the constitutional system is that 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, and that the exercise of any power or trust or the assumption of any public duty other than such as pertains to the exercise of the judicial function is not only without constitutional warrant, but is against the constitutional mandate in respect of the powers they are to exercise and the character of duties they are to discharge . . .

*Yonce*, 274 S.C. at 87, 261 S.E.2d at 306 (quoting 16 Am. Jur. 2d *Constitutional Law* § 223)); *State v. Whittington*, 278 S.C. 661, 663, 301 S.E.2d 134, 135 (1983)).

In *Abbeville County*, this Court acknowledged that jurisprudence in the field of public education is necessarily limited by the doctrine of separation of powers. 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

---

<sup>30</sup> The doctrine of separation of powers does not, however, require "an absolute division of powers among the three branches of government." *Gilbert v. Gladden*, 432 A.2d 1351, 1354 n.3 (N.J. 1984) (citation omitted). In fact, the doctrine "necessarily assumes a cooperative effort among them." *Id.* (citation omitted). Yet, this acknowledgement does not mean that the judiciary can usurp the role of the legislature by becoming intimately and inextricably involved in policy concerns best left to the majoritarian or legislative process. See *Yonce*, 274 S.C. at 88, 261 S.E.2d at 306 (" . . . we recognize that some overlapping authority *has been tolerated* by reason of the *minimal degree* of involvement.") (Emphasis added).

(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.”).<sup>31</sup> The *Abbeville County* decision affirms and bolsters this long-standing principle of South Carolina law.

In its order, the trial court concedes that *Abbeville County* emphasized that the “‘constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina’ rests firmly with the State.” (Order dated Dec. 29, 2005 ¶ 20 (quoting *Abbeville County*, 335 S.C. at 69, 515 S.E.2d at 541)). The trial court also acknowledges that it is the role of the General Assembly, not the courts, to develop the means by which the State complies with this duty. (Order dated Dec. 29, 2005 ¶ 20). The trial court therefore declined to rule on many issues sought to be litigated by Plaintiffs because they were beyond judicial review. Specifically, the trial court finds

---

<sup>31</sup> The United States Supreme Court also recognized these same sentiments in the federal education finance case, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (“The very complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them,’ and that, within the limits of rationality, ‘the legislature’s efforts to tackle the problems’ should be entitled to respect. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for some time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.”).

that it is “without mandate or authority to adjudicate what educational policies and programs would better serve the State, or to substitute the judgment of the Court for that of the General Assembly.” (Order dated Dec. 29, 2005 ¶ 44). Finally, the court states that “this case is not about what the Court thinks is best for education in South Carolina or for the Court’s view as to the best way to deliver educational services to students in South Carolina.” (Order dated Dec. 29, 2005 ¶ 46). The Court continues:

Abbeville County constrains this Court not to engage in policy making for education in South Carolina. This is not a forum about what ought to be or what policy choices the Court would make if it were authorized to do so. Accordingly, this Court must decide this case not in terms of whether the Court believes that one policy is superior and another is wanting, but rather based on whether the system of education policies enacted by the General Assembly sufficiently provides the opportunity for students to acquire a minimally adequate education.

(Order dated Dec. 29, 2005 ¶ 47).

Yet despite these findings, the trial court intrudes into the legislative domain in contravention of the doctrine of separation of powers. To direct the legislature to appropriate public funds for the establishment of early childhood intervention programs is, without question, a “trespass upon the legislative domain.” *Gregory v. Rollins*, 230 S.C. 269, \_\_\_, 95 S.E.2d 487, 491 (1956). *See also Carroll-Hall v. Rell*, No. X09CV054019406, 2007 WL 2938295 at \*11 (Conn. Super. Ct., Sept. 17, 2007) (affirming dismissal of education clause claim in favor of the state and noting that courts “must resist the temptation . . . to enhance [their] own constitutional authority by trespassing upon an area clearly reserved as the prerogative of a coordinate branch of government.”). Because the trial court violated the separation of powers doctrine and

the express proscription of *Abbeville County*, the Order of December 29, 2005 should be reversed.

**B. The trial court's order impermissibly decides a political question because the manner in which educational opportunities shall be delivered is textually committed to the General Assembly.**

The principle of separation of powers also is expressed in what is commonly referred to as the "political question doctrine." See *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). The political question doctrine has been recognized since the inception of judicial review. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall recognized that "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170. This Court has recognized this limitation on judicial authority and has expressly held that the Court will decline to decide cases "which are exclusively or predominantly political in nature rather than judicial." *South Carolina Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 143, 632 S.E.2d 277, 278 (2006) ("[T]he courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial.").

A political question exists when "its adjudication would place a court in conflict with a co-equal branch of government." *South Carolina Pub. Interest Found.*, 369 S.C. at 142-43, 632 S.E.2d at 278. Thus, the political question doctrine "refers to the *subject matter* that the Court deems to be inappropriate for judicial review." Erwin Chemerinsky, *Federal Jurisdiction* 142 (2d ed. 1994) (emphasis in original). The purpose of the doctrine is "to restrain courts 'from inappropriate interference in the

business of the other branches of Government,” *Nixon v. United States*, 506 U.S. 224, 253 (1993) (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990)), “deriving in large part from prudential concerns about the respect [the courts] owe the political departments.” *Nixon*, 506 U.S. at 254 (citing *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979)).

This Court has recognized that deciding whether a matter presents a nonjusticiable political question is a “delicate exercise of constitutional interpretation . . . .” *South Carolina Pub. Interest Found.*, 369 S.C. at 142, 632 S.E.2d at 278 (quoting *Baker*, 369 U.S. at 211). “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury*, 5 U.S. (1 Cranch) at 177. “Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

In *Abbeville County*, this Court found that the trial court “erred in using judicial restraint, separation of powers, and the political question doctrine as the basis for declining to decide the meaning of the education clause.” *Abbeville County*, 335 S.C. at 67, 515 S.E.2d at 539. While this Court has declared the law, however, the political question doctrine still “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government.” *Nebraska Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 176-77 (Neb. 2007) (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 468 U.S. 737 (1984)).

The *Baker* Court identified six characteristics of a political question:

Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; [(2)] or a lack of judicially discoverable and manageable standards for resolving it; [(3)] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; [(5)] or an unusual need for unquestioning adherence to a political decision already made; [(6)] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker*, 369 U.S. at 217. The presence of even one of the *Baker* characteristics that is “inextricable from the case at bar” demonstrates the existence of a political question. *Id.* Similarly, this Court has “declined to opine on issues where the Constitution delegates authority to the General Assembly.” *South Carolina Pub. Interest Found.*, 369 S.C. at 143, 632 S.E.2d at 278-79.

Thus, interpreting and declaring the meaning of the Constitution is a judicial duty of this Court. *Abbeville County*, 335 S.C. at 67, 515 S.E.2d at 539. Concluding that pre-school programs are required to address the impact of poverty on achievement, however, is a nonjusticiable political question because that issue is enmeshed with several of the characteristics identified in *Baker*.

First, the choice of educational programs is constitutionally delegated exclusively to the legislative branch of government. Second, to the extent that early childhood interventions are a “good idea,” they are but one policy choice out of a myriad of possible choices available. It is not for the courts to say that early childhood intervention programs are the most effective way to ameliorate the effects of poverty and improve

education in the State. That is a policy choice for the General Assembly.<sup>32</sup> See *Abbeville County*, 355 S.C. at 69, 515 S.E.2d at 540 (“We recognize that we are not experts in education, and we do not intend to dictate the programs used in our public schools.”). As the Massachusetts Supreme Court recently noted:

Other programs might be equally effective to address the needs of at risk students, such as remedial programs, . . . nutrition and drug counseling programs or programs to involve parents more directly in school affairs. *Each choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political.* Courts are not well positioned to make such decisions.

*Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1157 (Mass. 2005) (Marshall, C.J., concurring) (emphasis added) (footnote and internal citation omitted). This opinion echoes the very same sentiments long recognized by this Court in *Abbeville County*. See *Abbeville County*, 355 S.C. at 69, 515 S.E.2d at 540. By making this choice, however, the Court took on the role of a “super-legislature” in violation of the spirit of *Abbeville County*.

Finally, there are no judicially manageable standards for resolving this issue with finality. What level of achievement in the future will the Court determine to be sufficient to satisfy the constitution, and upon what basis? If pre-school programs are adopted, but

---

<sup>32</sup> The trial court found that it “would be remiss and would abdicate its responsibility under *Abbeville County* if, having found that the Defendants have failed to provide the opportunity for students to acquire a minimally adequate education, it did not point out where such failure(s) might lie. Otherwise, the Defendants would be forced to flounder in a sea of uncertainty in trying to determine what system or policies would need to be modified or adopted in order to ensure the existence of an opportunity for a minimally adequate education.” (Order dated Dec. 29, 2005 ¶ 48). But that is exactly what the legislative process is about. Policy issues have no easy answers, and it is up to the legislature to design and implement different alternatives to address different problems. The more a court “interferes in policymaking and political funding debates, the more we allow the Legislature to avoid difficult questions, and the more our citizens get accustomed to turning to the courts for solutions rather than to their elected officials.” *Hancock*, 822 N.E.2d at 1165 (Cowan, J., concurring).

PACT scores do not improve, is another remedy then required? If so, who will make that choice? Educational outcomes are the product of many variables, and there is no bright line test that this Court can apply to know what additional legislation it should require. Because of this lack of standards, it was error for the trial court to undertake to intrude into the policy making domain of the legislature. The trial court's order should therefore be reversed.

#### **VIII. The Plaintiff Districts Lack Standing to Sue.**

Finally, to the extent that the issues set forth above are not dispositive of the parties' appeals, the Court should at a minimum reverse the trial court's order to the extent that it found that the Plaintiff Districts have standing and the capacity to sue.

A fundamental prerequisite to the commencement of an action is the requirement that the plaintiff has standing. *Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000) (citing *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985)). Standing is a personal stake in the subject matter of a lawsuit. *Sloan, supra* (citing *Newman v. Richland County Hist. Pres. Comm'n*, 325 S.C. 79, 82, 480 S.E.2d 72, 74 (1997)); *Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't. of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). A private party "may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom." *Florence Morning News v. Bldg. Comm'n*, 265 S.C. 389, 398, 218 S.E.2d 881, 884-85 (1975); *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Reg.*, 337 S.C. 476, 486, 523 S.E.2d 795, 800 (Ct. App. 1999). "[S]uch imminent prejudice must be of a personal nature to the party laying claim

to standing and not merely of general interest common to all members of the public.” *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992). “A mere interest in a problem is not enough.” *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). Moreover, a party must demonstrate standing for each form of relief sought. *Friends of the Earth v. Laidlaw Envtl Serv’s*, 528 U.S. 167, 185 (2000); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (“[S]tanding is not dispensed in gross.”).

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court articulated the “irreducible constitutional minimum” that standing requires:

First, the plaintiff must have suffered an injury in fact – an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Id.* at 560-61 (citations and internal quotation marks omitted) (alterations in original).

The party seeking to establish standing “carries the burden of demonstrating each of the three elements.” *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 291. In the present case, Plaintiff districts, students, and taxpayers have failed as a matter of law to meet this burden.

The education clause provides that the General Assembly of this State “shall provide for the maintenance and support of a system of free public schools open *to all children* in the State . . . .” (Emphasis added). In *Abbeville County*, this Court held that

the education clause “requires the general Assembly to provide the opportunity for *each child* to receive a minimally adequate education.” *Abbeville County*, 335 S.C. at 68, 515 S.E.2d at 540 (emphasis added). As part of that constitutional requirement, this Court held that the General Assembly had the duty to provide students with adequate and safe facilities in which they have the opportunity to acquire three enumerated broad areas of knowledge. *Id.* In defining the duty, therefore, this Court made it clear that this duty is owed not to the counties or school districts, or taxpayers of the State, but rather *to students*. *Id.* at 69, 515 S.E.2d at 541 (“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.”) (Emphasis added).

In order for an injury to be “particularized,” “it must affect the plaintiff in a personal and individual way.” *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292 (citing *Lujan*, 504 U.S. at 651). Here, the school districts failed to establish a particularized injury because clearly the duty under Article XI, section 3 is owed to students in South Carolina, and only to students. The school district Plaintiffs also lack standing because in order to sue, a political subdivision must establish that it is a real party in interest—i.e., the Plaintiff school districts must allege and show an injury in fact in terms of their own proprietary interests or statutory rights to establish standing. As made explicitly apparent in *Abbeville County*, students, not school districts, are the intended beneficiaries of duties created by Article XI, section 3. Because the Plaintiff Districts are not the beneficiaries of the constitutional duty, they have suffered no particularized injury and lack standing to sue. The judgment should therefore be reversed as to those Plaintiffs.

## **IX. Plaintiff Districts Lack Capacity to Sue.**

The trial court also erred in failing to enter judgment in favor of the Defendants as to the claims of the Plaintiff Districts because those districts lack the capacity to sue the state. A school district in the State of South Carolina is a “body politic and corporate.” S.C. Code Ann. § 59-17-10 (2004). As a body politic, a school district is a creature of the state. *Wright v. Colleton County Sch. Dist.*, 301 S.C. 282, 288, 391 S.E.2d 564, 568 (1990). More specifically, a school district “is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools; . . . a political subdivision of a county.” 78 C.J.S. *Schools and School Districts* § 15 (footnotes omitted).

As a political subdivision, a school district is subject to the plenary control of the legislature of the state. *See Miller v. Farr*, 243 S.C. 342, 133 S.E.2d 838 (1963) (observing that “under our Constitution school districts have no permanent existence inasmuch as the General Assembly has plenary power to create new school districts or to consolidate existing school districts with other school districts”). Like a county of the state, a school district is ““but an agency or arm of the State for governmental purposes, and privileges conferred upon [them] and grants to [them] by the State . . . are merely for the convenient performance of the State’s governmental functions.”” *Parker v. Bates*, 216 S.C. 52, 60, 56 S.E.2d 723, 725 (1949) (quoting *Chesterfield County v. State Highway Dep’t.*, 191 S.C. 39, 46, 3 S.E.2d 686, 689 (1939)); *Willis Constr. Co., Inc. v. Sumter Airport Comm’n*, 308 S.C. 505, 509, 419 S.E.2d 240, 241 (Ct. App. 1992) (observing that a political subdivision “is a division or subdivision of the State invested with governmental functions.”).

In *Smith v. School District of Greenville County*, Civil Action No. 6:03-2015-26, United States District Court Judge Henry F. Floyd dismissed on Eleventh Amendment sovereign immunity grounds twenty-five putative class action suits brought by various individuals alleging violations of the Fair Labor Standards Act. Judge Floyd based his decision primarily upon review of the statutory and regulatory control exercised over school districts by the state. *See id.* at 15-17. Judge Floyd’s careful enumeration of the statutes and regulations governing school districts unmistakably illustrates that when a school district or other political subdivision of South Carolina attempts to bring an action against the state, the state, in effect, is suing itself. *See Dist. No. 55 v. Musselshell County*, 802 P.2d 1252, 1255 (Mont. 1990). “The logic of this view cannot be denied.” *Id.* at 529.

Although section 59-17-10 grants school districts the power to sue and be sued, this Court has expressly held that this power—a power afforded to almost all political subdivisions—“does not extend to a challenge of the acts of the creator of those subdivisions.” *Richland County Recreation Dist. v. City of Columbia*, 290 S.C. 93, 95, 348 S.E.2d 363, 364 (1986) (citing *Hibernian Soc’y v. Thomas*, 282 S.C. 465, 319 S.E.2d 339 (Ct. App. 1984)). This holding represents “the traditional principle throughout the United States” flowing from “judicial recognition of the juridical as well as political relationship between [school districts] and the State.” *City of New York v. State*, 655 N.E.2d 649, 651 (N.Y. App. 1995). As the Michigan Court of Appeals elucidated,

[s]chool districts and other municipal corporations are creations of the state. Except as provided by the state, they have no existence, no functions, no rights and no powers. They are given no power, nor can any be implied, to defy their creator over the terms of their existence. They surely have no power to bring suits of such nature on behalf of

residents within their boundaries, or to expend public funds to finance such litigation of, or on behalf of, private citizens.

*E. Jackson Pub. Schs. v. State*, 348 N.W.2d 303, 306 (Mich. App. 1984) (footnote omitted) (dismissing plaintiffs' attempt to "overturn the legislative scheme of financing and to thus compel the Legislature to enact a different system that would conform to plaintiffs' theories of equality"); *cf. Capital View Fire Dist. v. County of Richland*, 297 S.C. 359, 377 S.E.2d 122 (Ct. App. 1989) (citing cases) (acknowledging that political bodies of the state have the power to sue and be sued, but finding that "political subdivisions . . . lack the element of sovereignty that is a prerequisite to maintaining a suit under the doctrine of *parens patriae*").

Thus, the trial court erred in finding that the Plaintiff Districts have standing and capacity to sue, and the judgment in their favor should therefore be reversed.

### **Conclusion**

The order of the trial court should be vacated as moot, and all appeals dismissed. Alternatively, the portion of the trial court's order finding that each child in the Plaintiff Districts does not have the opportunity to acquire a minimally adequate education should be reversed, and judgment entered for Defendants.

*[Signature page follows]*

SOWELL GRAY STEPP & LAFFITTE, L.L.C.



---

Robert E. Stepp  
Elizabeth Van Doren Gray  
A. Jackson Barnes  
Roland M. Franklin, Jr.  
1310 Gadsden Street  
Post Office Box 11449  
Columbia, South Carolina 29211  
(803) 929-1400

**Attorneys for Respondents / Appellants Glenn F.  
McConnell and Robert William Harrell, Jr.**

Columbia, South Carolina

December 13<sup>th</sup>, 2007

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

---

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, Evert 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

RECEIVED

DEC 13 2007

S.C. SUPREME COURT

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.; Erin 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 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.

---

**DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL**

---

Respondents / Appellants propose the following be included in the Record on

Appeal:

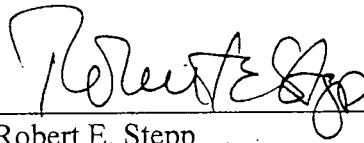
1. Order dated September 20, 1996
2. Order filed June 1, 2001
3. Order dated June 20, 2003
4. Order dated December 3, 2004
5. Order dated December 29, 2005
6. Order dated July 12, 2007
7. Complaint dated November 1, 1993
8. Second Amended Complaint, filed July 20, 1995
9. Defendants' Motion to Dismiss dated August 14, 1995
10. Plaintiffs' Motion to Amend Complaint filed January 18, 2001
11. Fourth Amended Complaint dated June 30, 2003
12. Fourth Amended Complaint dated July 10, 2003
13. Notice of Cross-Appeal filed by the Senate and the House on August 15, 2007
14. Transcript of Trial Testimony 9/23/04, p. 30, ll. 15-25; p. 31, ll. 1-14
15. Transcript of Trial Testimony 6/11/04, pp. 164-165
16. Transcript of Trial Testimony 8/14/03, pp. 45-50
17. Transcript of Trial Testimony 8/14/03, p. 37-39
18. Transcript of Trial Testimony 8/14/03, p. 90-91
19. Transcript of Trial Testimony 8/14/03, p. 21
20. Transcript of Trial Testimony 9/23/04, p. 30-32
21. Transcript of Trial Testimony 5/4/04, p. 239, ll. 20-25; 240, ll. 2-8
22. Transcript of Trial Testimony 8/13/03, p. 12, ll. 8-16; p. 55, ll. 15-25; p. 56, ll. 1-8
23. Transcript of Trial Testimony 10/06/03, p. 115, ll. 4-21
24. Transcript of Trial Testimony 12/09/04, p. 58, ll. 8-15; p. 59, ll. 1-8; p. 69, ll. 14-25; p. 70, ll. 1-4
25. Transcript of Trial Testimony 07/30/03, pp. 133-137
26. Transcript of Trial Testimony 1/06/04, pp. 110-113
27. Transcript of Trial Testimony 8/06/03, pp. 181-186
28. Transcript of Trial Testimony 4/01/04, p. 149
29. Transcript of Trial Testimony 10/08/03, pp. 115-129
30. Transcript of Trial Testimony 3/04/04, p. 170
31. Transcript of Trial Testimony 2/09/04, pp. 25-33
32. Transcript of Trial Testimony 9/30/03, pp. 104, 108-109
33. Transcript of Trial Testimony 7/01/04 at pp. 172-76
34. Transcript of Trial Testimony 9/21/04, p. 58, ll. 2-14
35. Transcript of Trial Testimony 11/29/04, pp. 17-21
36. Transcript of Trial Testimony 9/23/04, p. 155, ll. 10-25; 156, ll. 1-25
37. Transcript of Trial Testimony 9/23/04, p. 157, ll. 1-8
38. Transcript of Trial Testimony 9/23/04, p. 157, ll. 9-13
39. Transcript of Trial Testimony 7/1/04, p. 171, ll. 19-25
40. Defendants' Exhibit 0233
41. Defendants' Exhibit 0327

42. Defendants' Exhibit 804, p. 8
43. Defendants' Exhibit 804, p. 3
44. Defendants' Exhibit 804, p. 4
45. Defendants' Exhibit 1117
46. Defendants' Exhibit 1290
47. Defendants' Exhibit 1388
48. Defendants' Exhibit 1413
49. Defendants' Exhibit 1542
50. Defendants' Exhibit 1719
51. Defendants' Exhibit 1792
52. Defendants' Exhibit 2041
53. Defendants' Exhibit 2533
54. Defendants' Exhibit 2534
55. Defendants' Exhibit 2776
56. Defendants' Exhibit 2784
57. Defendants' Exhibit 2910
58. Defendants' Exhibit 2971
59. Defendants' Exhibit 2976
60. Defendants' Exhibit 2983
61. Defendants' Exhibit 2987
62. Defendants' Exhibit 2991
63. Defendants' Exhibit 2997
64. Defendants' Exhibit 3004
65. Defendants' Exhibit 3009
66. Defendants' Exhibit 3127
67. Defendants' Exhibit 3307, pp. 3-4
68. Defendants' Exhibit 3318, pp. 1-11
69. Defendants' Exhibit 3319, pp. 1-11
70. Defendants' Exhibit 3320, pp. 1-11
71. Defendants' Exhibit 3321, pp. 1-11
72. Defendants' Exhibit 3322, pp. 1-11
73. Defendants' Exhibit 3323, pp. 1-11
74. Defendants' Exhibit 3324, pp. 1-9
75. Defendants' Exhibit 3325, pp. 1-11
76. Defendants' Exhibit 3339
77. Plaintiffs' Exhibit 1458
78. Plaintiffs' Exhibit 6010
79. Plaintiffs' Exhibit 6236
80. Plaintiffs' Exhibit 6264
81. Plaintiffs' Exhibit 6293
82. Plaintiffs' Exhibit 6835A
83. Plaintiffs' Exhibit 6835 I

I certify that this designation contains no matter which is irrelevant to this appeal.

*[Signature page to follow]*

December 13, 2007



---

Robert E. Stepp  
Elizabeth Van Doren Gray  
A. Jackson Barnes  
Roland M. Franklin, Jr.  
SOWELL GRAY STEPP & LAFFITTE, L.L.C.  
1310 Gadsden Street  
Post Office Box 11449  
Columbia, South Carolina 29211  
(803) 929-1400

**Attorneys for Respondents / Appellants Glenn F.  
McConnell and Robert William Harrell, Jr.**