

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 93-CP-31-169

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,

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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 , Katisha 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,
Orangeburg 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 , Katisha 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, and 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,

Glenn F McConnell, as President *Pro Tempore*
of the Senate and as a representative of the South
Carolina Senate, Robert W 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, Mark C Sanford, as
Governor of the State of
South Carolina,

Respondents

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STATEMENT OF ISSUES ON APPEAL

- (1) Is the mootness doctrine inapplicable in this case where the State has failed to remedy the deficiencies in its public education system and when the Court's judgment will affect the parties' rights and responsibilities in this important public education matter?
- (2) Did the trial court correctly apply a preponderance of the evidence standard in this equitable civil case challenging the adequacy of the State's public education system?
- (3) Did the trial court correctly issue judgment for the Plaintiffs when the Plaintiffs proved Defendants were responsible for the lack of adequate educational opportunities in the Plaintiff Districts and when Defendants waived any challenge to the Plaintiffs' proof of causation?
- (4) Did the trial court correctly conclude that Defendants were required to address the impact of poverty on achievement "to the extent educationally possible" when the Education Clause requires the State to provide educational opportunities adequate to address the needs of children impacted by poverty and when the State can do so through the quality of its public education system?
- (5) Did the trial court properly rely on evidence of PACT scores, combined with other evidence of poor achievement, to support its judgment in this case when low PACT scores are a reliable indicator of a lack of adequate educational opportunities and where nearly half the students in the Plaintiff Districts "fail" PACT?
- (6) Did the trial court correctly interpret the Education Clause to require the State to provide early childhood intervention programs to children under the age of five when the trial court's interpretation that the Education Clause applies to all children without age limitation is consistent with the Constitution's language, history and purpose and when the State's constitutional obligation under the Education Clause, cannot be satisfied unless early childhood intervention programs are provided to children under five?
- (7) Did the trial court act within the scope of its authority in declaring the State's public education system to be constitutionally inadequate due to the failure to provide early childhood intervention programs when the court has duty to identify and remedy constitutional deficiencies in the State's public education system and when this Court has already held that separation of powers and the political question doctrines do not apply in this case?
- (8) Did the trial court correctly conclude that the Plaintiff Districts have standing and the capacity to sue because the Plaintiff Districts have been harmed by the State's failure to comply with its constitutional obligations and because school districts are authorized by statute to sue the State?

INTRODUCTION

"The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State"

S C Const art XI, § 3

In its landmark decision in Abbeville nine years ago, this Court took great strides toward the fulfillment of this constitutional promise for a better tomorrow for children in the Plaintiff Districts. Interpreting the scope of the duty imposed upon the General Assembly by this constitutional provision, this Court held that it is the paramount duty and responsibility of the General Assembly to ensure that each child receives the opportunity to acquire a minimally adequate education.

[W]e emphasize 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. v. State, 335 S.C. 58, 69, 515 S.E.2d 535, 541 (1999). If for any reason the system of free public schools in South Carolina does not “ensure the provision of a minimally adequate education to each student in South Carolina,” the State, through the General Assembly, has the ultimate duty to address the deficiencies and provide the opportunity. Id. at 69, 515 S.E.2d at 541.

Despite this Court's plain holding in Abbeville that the State is responsible for providing a minimally adequate educational opportunity to “each child” in South Carolina, Defendants evidently believe they are not responsible for providing adequate opportunities to the State's most vulnerable children. The evidence showing the poverty of the children in the Plaintiff Districts is unchallenged, the evidence showing their wholly unsatisfactory record of educational achievement is undisputed, and the evidence establishing that education is the

answer is overwhelming Defendants, however, continue to maintain that poverty—not educational policy—is the cause of poor academic achievement in the Plaintiff Districts and, more importantly, Defendants continue to disclaim any responsibility for addressing the impact of poverty on achievement

The trial court disagreed with Defendants on these issues

This [consideration of the relationship between poverty and achievement] brings the Court to the question that lies at the heart of this case Although schools cannot reasonably be expected to eliminate poverty, can schools address in specific ways the effects of poverty on achievement, and, if so, must they do so as a matter of constitutional obligation? The Abbeville Court provides the answer “We hold today that the South Carolina constitution’s education clause requires the General Assembly to provide the opportunity for **each** child to receive a minimally adequate education ” Abbeville, 335 S C at 68, 515 S E 2d at 540 (emphasis added) The modifier “each” is dispositive of the question “Each child” refers to children born to poverty as surely it does to those born to affluence *The State’s obligation to provide an opportunity for a minimally adequate education is, in no way reduced to children born to poverty It is, in fact enhanced for such children The indisputable relationship between poverty and academic achievement and the magnified impact of poverty on the abilities of the very youngest, most vulnerable form the basis of the obligation*

(12/29/05 Order ¶ 428 (bold emphasis in original, italicized emphasis added)) The trial court further recognized that the adequacy of educational opportunity must be viewed through the eyes of the children

[O]ne must examine not only the means by which the opportunity is offered, but also the characteristics of the one to whom it is offered The stairway that is one child’s avenue to achievement and success is simply an obstacle to one unable to climb So it is with opportunity, which cannot be measured or evaluated in some abstract qualitative way without taking into account the characteristics of the ones to whom the opportunity is offered

(12/29/05 Order ¶ 35) To satisfy its constitutional obligation under this standard, the State must take into account the needs of children living in poverty when designing and implementing educational policies and programs The trial court concluded that the State failed to satisfy its constitutional obligation by failing to address the needs of at-risk students for early

childhood intervention programs. Defendants challenge this ruling—not just as to the determination that the State has an obligation to provide early childhood programs, but also as to the trial court's interpretation of the scope of its duty in general.

Since the trial court's Order in December 2005, Defendants have enacted several pieces of education legislation intended to address inadequacies in the public education system. Defendants argue this new legislation renders the issues in this case moot. The best that can be said of the State's actions is that the State is continuing to “tinker around the edges” of a system that is fundamentally not prepared to address the challenges faced by the primarily at-risk students in the Plaintiff Districts. Certainly, the PACT results belie Defendants' argument that the new legislation has remedied the problem.

Plaintiffs do not believe the State's public education system will be able to meet the needs of the students in the Plaintiff Districts without a comprehensive evaluation and overhaul of the system, for all the reasons discussed in Plaintiffs' Initial Brief. Perhaps one of the greatest obstacles to the ability of the State's education system to meet these needs is Defendants' stated belief that they are not required to do so. Without resolution of the issues raised in this cross-appeal, the people of the State of South Carolina will have no standard against which to measure the constitutionality of future operations of the public school system. South Carolina needs the Court's guidance, and apparently, Defendants need a clear confirmation that providing all of South Carolina's children, with appropriate educational opportunity is their job.

Specifically, in their cross-appeal, Defendants raise several arguments—that, at their essence, indicate that Defendants believe they are “doing the best they can” to educate the children in the Plaintiff Districts. They are not

In Sections II, III, IV, and V of their brief, Defendants argue that Plaintiffs were required to prove beyond a reasonable doubt that adequate educational opportunities were absent in the Plaintiff Districts and that Defendants' system of existing legislation was the sole cause of this educational failure. Defendants argue that because poverty—not educational policy—caused the poor academic achievement, they cannot be held responsible for the lack of educational success in the Plaintiff Districts.

Contrary to Defendants' argument, the trial court applied the correct standard in holding that the Plaintiffs proved by a preponderance of the evidence that the State's education system failed to comply with constitutional requirements and that this failure was the "cause" of the poor achievement by students in the Plaintiff Districts. The fact that non-school factors may negatively impact children's achievement does not diminish Defendants' responsibility to provide an opportunity for a minimally adequate education to "each child," and Plaintiffs were not required to prove otherwise. While the State may argue it is more difficult to educate children raised against a background of poverty, poverty does not provide the State with an excuse for failing to meet these children's educational needs. To the contrary, the fact that children raised in poverty may be more challenging to educate is a factor that Defendants must consider in their design, support, and maintenance of a public school system, and the General Assembly must ensure that it designs and implements educational policies and programs sufficient to meet these children's needs.

The issue in this case is whether Defendants have ensured that each child is provided with the constitutionally required educational opportunity, not whether each child who failed to succeed did so solely because of school system failures. Abbeville does not require a showing that each and every child in the Plaintiff Districts who failed to achieve at acceptable levels had

no non-school factors exerting negative impacts on his or her achievement. Instead, Abbeville requires a showing that Defendants failed to provide an opportunity for each child to receive a minimally adequate education, which Plaintiffs can prove by showing that the State offers insufficient or deficient educational inputs to the State's school children through its educational policies and programs and their implementation, and that these deficiencies lead to unacceptable educational outcomes on a system-wide rather than an individual basis. See Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 332 (N.Y. 2003).

Further, the trial court properly rejected Defendants' argument that they cannot be charged with the responsibility to overcome the effects of poverty because there is nothing they can do to ameliorate the effects of poverty through education. (See Defs.' Initial Br. 40 ("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")) As discussed below, schools do matter, and particularly for children born to poverty, they are critically important if these children are ever to have a chance to rise above the circumstances into which they are born. We have to take the children as we find them, and everyone agrees that children raised in poverty can learn and achieve at high levels. In fact, despite the positions they have taken in this lawsuit, Defendants themselves have legislatively committed to making sure all children succeed and would not have done so if they truly believed that poor children are a lost cause. See, e.g., S.C. Code Ann. § 59-139-05(3) (1993) (establishing "the expectation that by providing extra assistance and learning time that enables young students to attain essential skills and success all children will be prepared for the fourth grade and all students will graduate from high school with their peers"). Plaintiffs do not contend that ensuring the opportunity for a minimally adequate education to impoverished children will be

easy. Regardless of the difficulty, however, the South Carolina Constitution promises an education to all of South Carolina's children. That obligation must be fulfilled, and it is the General Assembly's duty to meet that challenge.

In Section IV, Defendants also argue that the trial court erred in relying on evidence of PACT results in concluding that the requisite educational opportunities were lacking in the Plaintiff Districts. Educational outcomes in the Plaintiff Districts are distressing and unacceptable no matter by what legal standard the case is judged, and the authorities (educators and courts) agree that outcomes are reliable indicators of educational opportunity. In addition, PACT results are particularly appropriate measures of quality in South Carolina schools given that they were designed to measure students' acquisition of the skills and knowledge necessary to satisfy the Abbeville standard and were intended to be considered as a measure of school quality. With nearly half the students in the Plaintiff Districts failing PACT, the trial court could reach no other conclusion than to find that PACT results support a finding inadequate educational opportunities—a conclusion that was amply supported by record evidence as to all other educational outcomes. Accordingly, though the trial court relied in part on PACT results in reaching its decision, graduation rates, college entrance exams, and exit exams all supported the trial court's conclusion that unacceptable outcomes indicated lack of adequate opportunities. This conclusion was further supported by the evidence of inadequate inputs.

Finally, Defendants raise several constitutional challenges to the trial court's rulings, arguing in Section VI that early childhood education programs for children under the age of five are outside the scope of the Education Clause, in Section VII that the issues in this lawsuit are not appropriate for judicial resolution under the separation of powers and political question doctrines, in Section VIII that the Plaintiff Districts lack standing, and in Section IX that the

Plaintiff Districts lack capacity to sue the State. These arguments are utterly without merit. The parties and issues presented in this lawsuit were properly before the trial court before and now remain properly before this Court. The trial court correctly interpreted the scope of Defendants' obligations under the Constitution, and this Court has the power and authority to affirm the trial court's judgment and grant the relief requested by Plaintiffs. Indeed, this Court has the responsibility to vindicate the deprivation of constitutional rights of the children in the Plaintiff Districts.

These Plaintiffs have waited fifteen years for a resolution of the issues presented in this lawsuit, the children of South Carolina have waited far longer. More than one hundred years after South Carolina's first Education Clause was enacted, the constitutional promise of a "chance at life" has yet to be fulfilled. Plaintiffs respectfully request that this Court enter an Order affirming the trial court's judgment in part,¹ declaring the entire system of education unconstitutional, and ordering Defendants to design, fund, and implement a new system of education that can adequately address the needs of the primarily at-risk students living in the Plaintiff Districts.

STATEMENT OF THE CASE

Respondents in this portion of this cross-appeal, who were Plaintiffs below, are also Appellants as to other issues in this litigation. Because both Plaintiffs and Defendants below have appealed on various issues, the parties will be referred to as Plaintiffs or Defendants as

¹ In their Initial Brief of Appellants-Respondents, Plaintiffs appealed many of the trial court's findings as factually incorrect and challenged the remedy granted as limited and ineffective. For the reasons stated in their Initial Brief, Plaintiffs urge this Court to declare the entire system of education in South Carolina to be unconstitutional and to require the State to design, fund, and implement a new system of education that can adequately address the needs of the primarily at-risk students living in the Plaintiff Districts.

appropriate Plaintiffs adopt and incorporate by reference the “Statement of the Case” set forth in their Initial Brief of Appellants-Respondents (filed December 13, 2007) Further, Plaintiffs specifically disagree with the following assertion contained in Defendants’ Statement of the Case

- Defendants incorrectly assert that the trial court “concluded that student achievement is not a function of race, but rather of poverty ” (Defs ’ Initial Brief at 6, n 6) First, the support cited by Defendants for this "conclusion" is testimony by a witness rather than a finding or conclusion by the trial court Second, the actual finding by the trial court was that race and poverty were collinear, making it unnecessary to consider race separately from poverty (7/12/07 Order ¶ 30(b), (c)) At no point did the trial court conclude that student achievement is not a function of race

STATEMENT OF FACTS

Defendants’ Statement of Facts, found at pages 8 through 22 of their Initial Respondents-Appellants’ Brief (hereinafter “Defendants’ Brief”) includes several disputed matters with which Plaintiffs take issue Plaintiffs’ position as to such disputed matters is set forth in relevant argument contained herein or contained in Plaintiffs’ Initial Brief of Appellants-Respondents, which is incorporated herein by reference Briefly, Plaintiffs take issue with the following mis-statements in Defendants’ Statement of Facts

Defendants Mischaracterize the State’s Funding of Education

- Plaintiffs disagree with Defendants’ general discussion of the State’s legislative funding mechanisms and legislative policies contained in the Statement of Facts (See Defs ’ Initial Brief 8-9) In their discussion, Defendants do nothing to differentiate the State’s education-funding mechanisms from the legislative policies—this failure to properly explain the differences at least suggests that each of the referenced statutes and programs includes State funding dedicated to education To the contrary, of the statutes listed by Defendants in this paragraph on funding, only two—the Education Finance Act of 1977 (“EFA”) (Pls ’ Ex 5034) and the Education Improvement Act of 1984 (“EIA”) (Pls ’ Ex 5035)—include any direct revenue source Other statutes listed by Defendants as supportive of their commitment to education—the Early Childhood Development and Academic Assistance Act, Act 135 of 1993 (Pls ’ Ex 5037) the South Carolina Education and Economic Development Act and its predecessor, the South Carolina School-to Work Transition Act of 1994, Act 450 of 1994 (Pls ’ Ex

5038), the Educator Improvement Act of 1997, and the Education Accountability Act, Act 400 of 1998 (Pls ' Ex 5038)—contain **no** dedicated revenue sources and are entirely dependent on Defendants' yearly budgetary decisions. Although these and other "education initiatives" require that school districts provide particular services and accomplish particular goals, they neither legislate nor provide the funding for those mandates. Though laudable policies, they are nothing more if they are not funded or not funded adequately. Under the current structure, though, funding of these policies rests on Defendants' annual budgetary whims. (See also Initial Br of Appellants/Respondents 104-43)

- Defendants incorrectly assert that per-pupil expenditures are calculated by dividing "all funds spent" by the number of students. (Defs ' Initial Brief 9-10) As Plaintiffs explained in their Initial Brief, the per-pupil expenditures on which Defendants and the trial court relied to find that Plaintiff Districts "generally" had enough funding did **not** include all expenditures. (See Initial Brief of Appellants/Respondents 128-29) Although expenditures for repairing and maintaining school buildings are included in per-pupil expenditures as operating costs, expenditures for capital improvements or debt service are not, which skews the spending calculations. (Id) For example, when capital expenditures and debt service are factored back in to the expenditures, the 2001 and 2002 average per-pupil spending in the State as a whole was greater than that of the Plaintiff Districts. (Tr (6/7/04) at 233 5-234 18, Pls ' Exs 6625A, 6626A, 6730, 6731)

Defendants Improperly Include Evidence Not in the Trial Record in Their Statement of Facts

- Defendants improperly include post-trial information from outside the trial record concerning building and renovations plans by a few of the Plaintiff Districts. (Defs ' Initial Br at 14-15) Plaintiffs have had no opportunity to explain or dispute the conclusions drawn by Defendants in their Brief regarding the possible effects of these plans. Importantly, too, Defendants' unilateral inclusion of this "evidence" does not consider other information materially relevant to the new developments. For example, the bonds issued by Plaintiff Districts to provide capital to invest in new buildings or renovations naturally carry debt service charges to pay off the amount borrowed. (Tr (10/1/04) 16 18-21) The cost of debt service increases the budget pressure on Plaintiff Districts to find revenues from their limited sources to pay it. Plaintiff Districts historically have cut programs and personnel when faced with similar budget pressures. (See, e.g., Tr (10/10/03) 46 25-48 20 and 58 19-59 1 (Hampton District 2 Superintendent Thompson discussing need to cut personnel because of State budget cuts)) Plaintiffs had no opportunity to explain the effects of the budgeting decisions that had to accompany the post-trial issuance of bonds Defendants referenced in their Statement of Facts. Further, information that additional improvements are to take place is not tantamount to a finding that all inadequate and unsafe conditions described at trial have been remedied. (See Initial Brief of Appellants/Respondents 70-83) Finally, Defendants' statement that "[a]ll the other facilities in the Plaintiff Districts had previously been remodeled or replaced" is not supported by the record or the trial court

Orders (Id., see also, e.g., 12/29/05 Order ¶ 276 (Fairfax Elementary School built in the 1950s with one wing in 1970, not rebuilt or renovated), ¶ 280 (Allendale Elementary School built in the 1950s and not rebuilt or renovated), ¶ 303 (South Elementary School in Dillon 2 built in the 1950s and not rebuilt or renovated), ¶ 326 (Estill Elementary School in Hampton 2 built in 1939 with additions in 1962 and 1981, public street continues to bisect the school creating unsafe conditions), ¶ 358 (Dennis Intermediate School in Lee County had additions built in 1985 and 1988, no evidence of renovations or rebuilding since), Tr (3/5/04) 35 20-40 1, Pls ' Exs 1574-00X, 1574-0AS, (Bishopville Primary School in Lee County has structural damage and unsafe bus, car, and pedestrian drop-off and pick-up areas, not rebuilt or renovated))

- Defendants improperly included the General Assembly's projections of 2007-08 per-pupil funding to support their argument that higher per pupil spending in Plaintiff Districts must surely be sufficient (Defs ' Initial Brief at 19) The projections, too, are outside of the trial record and should not be considered on appeal Further, these figures, by themselves, simply cannot establish the adequacy of the educational opportunities provided Further, the figures cited by Defendants for 2007-08 are questionable and not verified in any way (See also discussion of mootness issue below)

Defendants Mischaracterize Statistics

- Defendants assert that “[m]uch of the statistical evidence on both sides [was] ‘controlled’ for the effect of poverty on achievement ” (Defs ' Initial Brief at 20) The parties disagree as to whether poverty can be ignored in considering whether a student can access the learning provided at his or her school In fact, the trial court ultimately rejected Defendants' argument that poverty should not be a consideration (See 12/29/05 Order ¶ 419) Defendants' statistical analysis that “controls for poverty” is faulty and skews the results to the conclusion they seek that poverty accounts for low achievement and that school matters very little (See also discussion of relationship between poverty and achievement below)

STANDARD OF REVIEW

Because this is a case in equity, the scope of review in this case is a *de novo* review, this Court makes its own findings of fact after reviewing the evidence

(1) The South Carolina Constitution Requires *De Novo* Review for Equity Cases

"The [Supreme] Court shall have appellate jurisdiction only in cases of equity, and in such appeals they shall review the findings of fact as well as the law, except in cases where the facts are settled by a jury and the verdict not set aside " S C Const art V, § 5 "In an action

in equity, tried by a judge alone, without a reference, on appeal the Supreme Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence " Townes Assocs , Ltd v City of Greenville, 266 S C 81, 86, 221 S E 2d 773, 775 (1976), Sloan v Greenville County, 356 S C 531, 545, 590 S E 2d 338, 345 (Ct App 2003) When the Supreme Court finds that the preponderance of the evidence is against a factual ruling made by the trial court, such a factual finding should be reversed Crowder v Crowder, 246 S C 299, 301, 143 S E 2d 580, 581 (1965)

(2) This Declaratory Judgment Is a Case in Equity

To determine if a case presents an action in equity, the Court must discern the main purpose of the suit See Baughman v Am Tel & Tel Co, 298 S C 127, 129, 378 S E 2d 599, 600 (1989) "The main purpose of the action should generally be ascertained from the body of the complaint " Sloan, 356 S C at 544-45, 590 S E 2d at 345 "However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the plain purpose of the action " Id (citing Bramlett v Young, 229 S C 519, 93 S E 2d 873 (1956)), see also Felts v Richland County, 303 S C 354, 356, 400 S E 2d 781, 782 (1991) ("A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue ")

Courts from around the country have uniformly ruled that a case challenging the adequacy of funding for education is a challenge in equity and a non-jury action See, e g, Roosevelt Elementary Sch Dist No 6 v Bishop, 877 P 2d 806 (Ariz 1994), Horton v Meskill, 376 A 2d 359 (Conn 1977), McDaniel v Thomas, 285 S E 2d 156 (Ga 1981), Hornbeck v Somerset County Bd of Educ, 458 A 2d 758 (Md 1983), Abbott ex rel Abbott

v Burke, 575 A 2d 359 (N J 1990), Leandro v State, 488 S E 2d 249 (N C 1997), Danson v Causey, 399 A 2d 360 (Pa 1979)

The underlying issue in this declaratory judgment is whether the State has violated the Education Clause of the South Carolina Constitution and other statutes by failing to provide the children of this State with the opportunity for a minimally adequate education. Cases dealing with rights derived from the state constitution are historically equitable in nature, with limited exceptions. Therefore, the Supreme Court can make factual determinations based on its own view of the evidence and reverse the trial court's factual findings when those findings are against the preponderance of the evidence.

(3) Legal Questions Raised on Appeal Do Not Change the Character of the Underlying Equitable Action into an Action at Law

The fact that legal questions are raised on appeal does not change the character of the underlying equitable action into an action at law. See Sloan, 356 S C at 546, 590 S E 2d 346. Instead, a case tried in equity retains its equitable identity and is reviewed pursuant to the standard of review applicable to equitable actions. In Sloan, the Court of Appeals rejected Greenville County's argument that the court should apply the "any evidence" standard of review applied in actions at law to the legal issues raised in the appeal of an equitable action for an injunction. Similar to the case before this Court, the legal issues raised on appeal in Sloan included mootness, standing, and the admissibility of evidence. Id. at 546, 590 S E 2d at 346. However, rather than allow these legal issues to transform the underlying nature of the action, the court properly determined that the action was "appropriately characterized as equitable and should be reviewed under the preponderance of the evidence standard." Id.

Because the underlying case was an equitable action tried without reference, this Court "has jurisdiction to find facts in accordance with its views of the preponderance of the

evidence " Townes, 266 S C at 86, 221 S E 2d at 775 Also, as to the legal questions raised in this cross-appeal, this Court has the power to correct legal errors made by the trial judge See State v Cochran, 369 S C 308, 312-13, 631 S E 2d 294, 297 (Ct App 2006) ("When a question of law is presented, [the] standard of review is plenary ") However, the fact that a legal "question" is raised on appeal does not alter the equitable nature of the case See Townes, 266 at 86, 221 S E 2d at 297 Accordingly, this Court should not defer to the factual findings of the trial court and make its own determinations based on the evidence presented at trial

ARGUMENT

I Post-Trial Initiatives Have Not Mooted This Case

In response to Chief Justice Toal's request to address the potential effect of post-trial legislation on the continued viability of Plaintiffs' claims, Defendants argue that the legislation has rendered Plaintiffs' claims moot, in whole or in part Additionally, Defendants point to miscellaneous pieces of legislation that continue the State's historical approach over the last twenty years or more of tinkering around the edges of education reform and funding (Tr (6/8/04) 151 12-16 (South Carolina tends to funding and policies in a "very piecemeal" fashion, resulting in misalignment of funding, policies, and standards), see also id at (7/29/03) 136 13-25 (resources and infrastructure need to be stable and in place for sufficient time to make a difference in educating at-risk children)) However, the post-trial legislation, even if enacted as a partial response to some of Plaintiffs' claims in this case, has not rendered Plaintiffs' case moot The actual controversy between the parties remains to be finally adjudicated

The mootness doctrine only applies "when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." See Sloan v Greenville County, 356 S C 531, 552, 590 S E 2d 338, 349 (Ct App 1997) (citing Curtis v State, 345 S C 557, 567, 540 S E 2d 591, 596 (2001), and Mathis v South Carolina State Highway Dep't, 260 S C 344, 346, 195 S E 2d 713, 715 (1973)).

In the case before this Court, Defendants have yet to evaluate the actual costs of providing a minimally adequate educational opportunity for each child and have not put into place a stable, long-term funding scheme designed to enable Plaintiff Districts to pay for those costs. Even if the limited four-year-old kindergarten program implemented by Defendants for two years through proviso² were deemed a complete resolution of the trial court's order finding that early childhood intervention programs were necessary—and Plaintiffs deny any contention that the legislative scope is sufficient to bring Defendants into compliance with the trial court order or the constitution—Plaintiffs still are also appealing the trial court's decisions relating to the other claims and issues. A decision by this Court on the merits of all issues raised in this appeal is necessary to resolve those outstanding issues between the parties.

This appeal is unlike that in Beaufort County Bd Of Educ v Lighthouse Charter School Committee, 353 S C 24, 576 S E 2d 180 (2003), in which the single provision of the statute at issue (the racial composition requirement in the Charter Schools Act) had been completely superseded by legislation enacted during the pendency of the appeal and was no longer even applicable. Thus, in that case, this Court had no need to rule on the constitutionality of the original provision. Further, in Lighthouse Charter, new legislative

² See detailed discussion of the Childhood Development Education Pilot Program (CDEPP) below.

provisions were "substantially different" than those at issue in the older statute, changing the character of the provision at issue. In this case, by contrast, Defendants have merely "tinkered around the edges" of education funding reform. Plaintiffs' issues have not been rendered moot by the piece-meal legislation Defendants describe, but remain an active and actual controversy.

Moreover, several exceptions to the mootness doctrine would apply, even if the Court were to find, which it should not, that this case has been rendered moot by Defendants' later enacted legislation. For example, in cases in which a disputed action or issue has become abstract or moot, "an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." See Sloan v. Greenville County, 356 S. C. 531, 552, 590 S. E. 2d 338, 349 (Ct. App. 1997), and the seminal case Ashmore v. Greater Greenville Sewer Dist., 211 S. C. 77, 44 S. E. 2d 88 (1947)). The case before this Court involves the constitutionality of South Carolina's system of public schools, specifically the question of whether Defendants have met their constitutional obligation to provide an opportunity for each child to receive a minimally adequate education—a matter that is indisputably of important public interest. Without resolution of the issues raised in this appeal, the people of the State of South Carolina and Defendants will have no standard against which to measure the constitutionality of future operations of the public school system.

This Court previously remanded this case for a trial on the facts. The people of South Carolina, Defendants, and Plaintiffs seek guidance from this Court as to whether the public school system satisfies the constitutional standard. This Court can, therefore, review this case under the public interest exception to the mootness doctrine, even if that doctrine applied.

In addition, courts recognize it is appropriate to consider cases that are “capable of repetition, yet evading review ” See Byrd v Irmo High School, 321 S C 426, 432, 468 S E 2d 861, 864 (1996) (applying the standard capable of repetition yet evading review to hear a case even though it may be considered moot) Thus, Defendants cannot use post-trial, piecemeal legislation to attempt to avoid or postpone a final decision on whether they have met their constitutional obligation under the Education Clause Although the trial record is closed, the schools continue to operate and the General Assembly continues to legislate If the Court vacates the trial court order, as Defendants argue it should, the result would be to send the case back to the trial court for rulings on the effects of post-trial legislation on the public school system Any appeal from such a future trial court decision would undoubtedly be met at this Court, like this appeal, with an argument from Defendants that the circumstances have again changed because the schools continue to operate, and the General Assembly continues to legislate The case would never come to an end, the children of our South Carolina will continue to suffer, and the issues would never be finally resolved

Other high courts that have addressed the issue with respect to school funding cases have agreed that this type of case is not appropriate for application of the mootness For instance, one court stated

Additionally, even assuming *arguendo* that this case could technically be deemed “moot,” it falls within the exception to the mootness doctrine that the case is capable of repetition yet evading review Theoretically, the Board could promulgate new standards every year, sunseting the previous year's standards If this were the case, then each time a declaratory judgment action is filed claiming that the method of school funding is not “thorough” under that year's standards, the district court could dismiss the case as moot claiming that those standards had been sunsetted Thus, a situation arises wherein the case is repetitive or continuing, but is incapable of being resolved

Idaho Schools for Equal Educ Opportunity v Idaho State Bd of Educ , 912 P 2d 644, 651 (Idaho 1996) (citations omitted)

Plaintiffs respectfully ask the Court to decide this case on the record established in the trial court, not on later enacted legislation or circumstances not presented to or considered by the trial court. See Campaign for Fiscal Equity, Inc v State, 801 N E 2d 326, 346 (N Y 2003) (commenting that while new regulations are being phased in and show promise, "court cannot conjecture about the possible effect of pending reforms, at least when determining whether, on the evidence gathered over four years and presented during the seven-month trial, a constitutional violation exists")

In determining whether the State's post-trial actions or other circumstances have rendered Plaintiffs' claims moot, the primary question is whether the Plaintiff Districts are now assured an adequate stream of revenue to deliver an opportunity for a minimally adequate education to each child. They are not. Except for altering the source of much of local districts' operating revenues from local taxes on owner-occupied residential property to a new state sales tax, Defendants have not reformed the basic mechanisms that govern the calculation and allocation of funds to the school districts. In fact, Act 388 of 2006, http://www.scstatehouse.net/sess116_2005-2006/bills/4449.htm, in setting up a tax swap of a new state sales and use tax for local property taxes from homeowners, actually created new problems in funding and distribution. Act 388 is discussed in further detail below.

Defendants have enacted new education provisions since trial, as they do every year, but questions remain as to whether any of these new provisions are accompanied by full or sufficient funding to pay for their new requirements. The pilot program providing half-day programs for four-year-olds in Plaintiff Districts, CDEPP, highlighted by Defendants in their

brief, is only a partial response to the trial court's identification of deficient early childhood intervention programs for children through third grade, is funded by non-recurring funds which do not cover the costs of a quality early childhood education program, does not reach all the four-year-olds who need it, and is not a permanent part of the public school system. Its continued existence is threatened by projected revenue shortfalls and the General Assembly's apparent lack of commitment to it as evidenced by the inclusion of it in an annual proviso rather than permanent legislation. Other provisos referenced by Defendants in their brief simply continue programs already in place, with varying degrees of funding sufficiency.

Perhaps the most glaring example of the continuing viability of Plaintiffs' claims is Defendants' failure to enact any state-level mechanism to assist the school districts in building or maintaining school facilities. Despite the concerns raised at the trial of this case, Defendants continue to ignore the school facility needs in Plaintiff Districts and have taken no steps whatsoever to attempt to remedy the facility deficiencies through state intervention. Defendants have done nothing to render those claims moot.

Unfortunately, since trial closed in 2004, PACT scores, exit exam and HSAP scores, and graduation rates have remained abysmally low, with over 50% of students in the districts of Hampton 2, Jasper, and Lee failing (or scoring Below Basic) on both the Mathematics and the English/Language Arts sections of the PACT tests in 2007. The scores in the other Plaintiff Districts are not significantly better than the low scores in those districts reported at trial.³ Defendants clearly have not taken sufficient action to remedy the barriers identified by

³ Although Plaintiffs object to Defendants' use of post-trial information in their Initial Brief, if this Court accepts such evidence, it should be aware that it can be used also to rebut Defendants' claims. For example, please see the State Department of Education website, <http://ed.sc.gov/agency/offices/assessment/pact/scores.html>, cited by Defendants at page 48 of their Initial Brief, which shows PACT scores for all districts since the trial ended.

Plaintiffs that prevent the State from providing each child in South Carolina with the opportunity for a minimally adequate education

A Act 388 of 2006 Does Not Remedy Funding Issues in Plaintiff Districts

Defendants maintain that "one of Plaintiffs' principal complaints was the reliance on property taxes to fund school operating costs" (Defs ' Initial Brief 30) and argue that Act 388 provides "immediate and future increases in funding for school operations " (Id at 31) Defendants miss the point of Plaintiffs' complaints and mischaracterize the effect of Act 388

1 Defendants Misstate Plaintiffs' Argument About Local Property Taxes

Very simply, Plaintiffs' argument is that the Defendants—in passing along increasingly greater costs to the local school districts to pay from their local revenues—do not consider the ability (or more accurately, the inability) of local school districts to raise sufficient local revenues, including local property taxes, to pay those costs

The local school districts' ability to raise sufficient revenue from the property tax is governed by the size of the property tax base, the property tax rate in mills, and the number of pupils in the district The limited value of taxable property in Plaintiff Districts results in historically low revenue that can be raised—with assessed valuations per pupil ranging between approximately \$8800 per pupil in Marion District 7 and \$20,300 per pupil in Jasper County—while the assessed valuation per pupil in other districts, such as Beaufort County, reached \$50,131 in fiscal year 2000-01 (See Pls ' Ex 154 at SDE-11457--SDE-11460, see also Defs ' Ex 3225 at 265-68 (for fiscal year 2001-02)) Even with exceptional tax effort, Plaintiff Districts could not generate much additional revenue from higher mill rates because of the low assessed valuations in their districts

Revenues for current operations from local property taxes in Plaintiff Districts ranged between \$1,112 per pupil in Dillon 2 to \$2,461 per pupil in Allendale in fiscal year 2001-02. By contrast, the amount raised per pupil from local property taxes in York County School District No. 2 was \$5,722 and in Beaufort County was \$4,527 (See Defs ' Ex 3225 at 253-56, see also Pls ' Ex 154 at SDE-11445--SDE-11448 (for fiscal year 2000-2001)) Plaintiff Districts are simply unable to raise sufficient revenues from local sources to fund the educational needs of their students and the programmatic demands of Defendants because of many factors beyond their control, including (1) Defendants' frequent failure to fully fund even the modest commitment laid out in the Education Finance Act—instead, passing on increasing costs to all school districts in the State, including mandatory increases of teacher salaries and benefits, (2) the increased costs of other goods and services purchased by school districts, (3) the pressing need to apply additional resources to ensure that the poorest and neediest students receive an adequate education, (4) the continued deterioration of crumbling buildings and the costs associated with maintaining those buildings, or conversely the increased costs of building new facilities, and (5) the ever-changing programmatic demands of the Defendants on school districts. Act 388 does little to remedy that problem in the long-term for most of the Plaintiff Districts, although a few of them will gain some revenue in the short term.

2 Defendants Mischaracterize the Effect of Act 388

Act 388 is strictly a property tax relief measure. It exempts the full value of owner-occupied residential property from all property taxes imposed for school operating expenses, S C Code Ann § 12-37-220(B) (2000), imposes an additional one-cent sales, use, and casual excise tax across the State, S C Code Ann § 12-36-1110 (Supp. 2007), and applies the

proceeds of the new state-wide tax to a newly created Homestead Exemption Fund to be used to replace the local property taxes on owner-occupied residential property that school districts had been receiving for operating expenses, S C Code Ann § 11-11-155 (Supp 2007) ⁴ The reimbursements from the Homestead Exemption Fund to the school districts funded by the new one-cent sales tax are essentially frozen at the level of the districts' respective local property taxes collected for operating expenses in 2006-07, regardless of local needs or circumstances, the only increases in the future will be calculated via a statutorily defined formula intended to account for annual inflation and population growth See S C Code Ann § 11-11-156 (Supp 2007) Accordingly, any inadequacies of the school districts' local property tax revenues to fund school operating expenses are frozen in place through the provisions of Act 388 Finally, while other types of local property—commercial, industrial, non-owner-occupied residential (rental) property, motor vehicle, boat, etc —are still assessed and available to generate property taxes for local school operating expenses, Act 388 imposed millage caps on those taxes, regardless of local needs or circumstances See S C Code Ann § 6-1-320 (2004) Act 402 of 2006, a constitutional amendment ratified by the voters in 2006, also limits the growth of the tax base with assessment caps, further hampering the ability of all school districts to generate additional revenue from new or appreciating property

Act 388 was not intended to reform—and does not reform—education funding in South Carolina Instead of addressing school funding needs or abilities, the Act swaps one revenue

⁴ The Homestead Exemption Fund will also be the repository for the funding used to reimburse school districts from two previously existing homestead tax exemptions the \$100,000 exemption on owner-occupied property and the exemption for homeowners aged 65 years and older Collectively, these provisions have eliminated the school districts' ability to draw on any taxes on owner-occupied homes in South Carolina This brief does not purport to address the policy issues implicated by Act 388 Plaintiffs' arguments in this brief are confined to the effects of the legislation on school districts

source for another and then constrains its availability to school districts. It does not reform or address the Defined Program, the calculation of the Base Student Cost, or the calculation of the Index of Taxpaying Ability governed by the Education Finance Act of 1977 (EFA). Those basic elements, which form the foundation of education funding and the distribution of a large share of state education funding in South Carolina, have not changed since the implementation of the EFA thirty years ago. The provisions implemented by the Education Improvement Act of 1984 (EIA) also remain essentially unchanged, with the EIA's "Penny for Education" remaining at one penny.⁵ The lottery proceeds that are raised pursuant to the South Carolina Education Lottery Act continue to be distributed to a number of different initiatives, both inside and outside the public school system, pursuant to the varying wishes of the General Assembly as expressed through proviso each year. See S.C. Code Ann. §§ 59-150-340 and 59-150-350(D) (2004).⁶ Finally, Act 388 makes no reference to and no attempt to address the funding of school facility construction and maintenance. The basic funding structure for

⁵ The purpose and intent of the Education Improvement Act ("EIA") is being defeated by Defendants' actions because EIA funds are now used to pay for permanent, mandatory programs such as those created by the Education Accountability Act ("EAA") and the Early Childhood Development and Academic Assistance Act (Act 135 of 1993), thus compromising the ability of the EIA to fund and promote innovative strategies and programs that would be available in addition to permanent programs funded from the State's General Fund. See Tr (6/8/04) at 187 10-22, 201 6-19. The use of EIA funds to pay for ongoing programs that should be paid for by the State's General Funds occurs although the EIA requires that the penny sales tax proceeds not become part of the State's General Fund. (See Pls.' Ex. 5035 (EIA) at 33, S.C. Code Ann. §§ 59-21-1010 (2004) and 12-36-2620 (2000).) The EIA is also being used to fund initiatives in other agencies besides the State Department of Education and the school districts, which was clearly not its intent. (Tr (6/8/04) 201 20-202 10, 203 13-22.) Not all of the EIA programs, even if they have proven successful and, therefore, should have been moved into permanently funded status, have survived the switch from the EIA penny funding to funding from the General Fund or other revenue, where they must now compete for priority with many other state needs and programs outside of education. These successful programs are now funded from other revenue sources on a basis that may not be recurring or stable. (See Tr (6/8/04) 187 10-22, (9/11/03) 43 9-21, 44 25-45 16, 46 1-12, 49 23-52 17.)

⁶ In fiscal year 2004, only approximately one-third of the total lottery proceeds were appropriated for educational needs in grades kindergarten through twelve. (Pls.' Ex. 6034M.)

education in South Carolina remains as it was before the trial of this case scattered and fractured

What effect will Act 388 have on the ability of school districts to pay their actual operating expenses? Since the reimbursement mechanism is tied to pre-existing millage rates for school operations on owner-occupied residential property and future reimbursement increases are limited to population growth and inflation, the effects will vary from school district to school district and will not be related to actual changing costs or needs Growth in Act 388 reimbursements may not allow districts to meet the same budget as the previous year in inflated dollars because it is not tied in any way to actual increases in costs or to the varying needs of the school districts What is certain is that Act 388 property tax reimbursements will not allow districts to increase their budgets to provide new or additional programs, even if mandated and not fully funded by the State Further, the Act will not provide any additional state funds to increase local teacher salary supplements to attract and retain high quality teachers As previously stated, because reimbursement is based on the tax revenues from owner-occupied residential property at mill rates set prior to the implementation of Act 388, any existing inadequacies in local revenues will be perpetuated by the reimbursement mechanism ⁷

⁷ For example, Dillon 2's millage rates have historically been low, largely because local laws passed by the General Assembly bestowed the authority to set local property tax millages in Dillon County on the General Assembly, and the historically low local revenues in that District were the direct result of actions by the General Assembly See S C Code §§ 21-2356 and -2404 (1962), R110, H4118, 115th Gen Assem , Reg Sess (S C 2003), A442, R395, H5063, 113th Gen Assem , Reg Sess (S C 2001) Dillon 2's Act 388 reimbursements will continue to be based on those historically low millage rates, despite the well-documented need for increased services to its large population of poor students While the three school districts in Dillon County will be entitled to a portion of the \$2.5 million minimum county allocation under Act 388 for a period of time, this is only a temporary improvement, because this amount does not grow until the amount to which a county is entitled grows to that amount through the

In addition, the mix of property types in school districts varies and will affect the Districts' abilities to raise additional local revenues if cost increases exceed the amount of reimbursement through Act 388 or local revenues are raised under its millage restrictions. A district with a substantial amount of property classified as industrial, commercial, and non-owner occupied residential (rental) will still be able to collect property taxes directly from those sources and can increase the tax millage on those properties to the level permitted by Act 388 if necessary to support rising school operating costs. By comparison, a rural district with primarily owner-occupied housing and little commercial or industrial properties will be heavily dependent on the Act 388 reimbursement mechanism for its revenue for school operations, even if future costs exceed the amount of reimbursement available to it.

The effects of increased costs will be felt quickly in fast-growing districts where additional staffing, facilities, and accompanying operating expenses will be required to accommodate rising student enrollments. Even in school districts that are losing students or that experience no growth, however, operating costs may rise faster than the Act 388 reimbursement. For example, Defendants annually impose statewide increases in minimum teacher salaries to keep the average teacher salary at the southeastern average. S.C. Code Ann. § 59-20-50(4) (2004). The Districts' share of those increases—combined with the step increases incorporated into district teacher salary schedules based on their additional years of experience or education and further combined with the increased employee benefits that accompany higher salaries—can quite easily exceed the amounts reimbursed under Act 388 to the districts for operating expenses, leaving nothing to pay for the increased costs of other

statutory increases in reimbursements effected by inflation and population growth. In the interim, there will be zero growth in state reimbursement to the Dillon County school districts for property tax relief.

goods or services. Unless a district has sufficient commercial, industrial, or rental property upon which it can levy and collect additional property taxes for its increased operating costs, it will have no means to pay for those increased costs.

Defendants claim that the minimum allocation of \$2.5 million of sales tax revenue to any county with less than that amount will result in "extra money" for some school districts. Importantly, however, at least two of the Plaintiff Districts, Orangeburg 3 and Florence 4, will see none of that "extra money." The distribution of the \$2.5 million minimum allocation is on a county basis, as opposed to a school district basis, and ignores needs and equities. This minimum allocation only comes into play in a county in which Act 388 reimbursements for property taxes on owner-occupied homes for school operating expenses in all school districts in a county would have resulted in county-wide reimbursements of less than \$2.5 million. S.C. Code Ann. § 11-11-156(B)(1) (Supp. 2007). Because property tax collections on owner-occupied homes for school operating expenses in Orangeburg County and Florence County totaled more than \$2.5 million, none of the school districts in those counties will receive any additional allocation. Whether a county will receive funds through this allocation, and if so, the amount of the allocation, is not related to need but instead to the amounts of owner-occupied residential property taxes historically collected county-wide. Further, the amount of that county allocation that a school district receives is related not to need but instead to its proportional share of student enrollment compared to other districts in the same county. Id. § 11-11-156(B)(1). The adequacy of funding related to needs is entirely irrelevant under Act 388, perpetuating Defendants' historic disregard of their obligation to meet the actual needs of South Carolina school children by providing and supporting a system of public schools that ensures that each child receives the opportunity for a minimally adequate education.

In addition, once the county-wide reimbursement reaches \$2.5 million through future statutory increases based on inflation and population growth, these districts will join the others in only receiving increases based on the inflation rate and population growth and their share of weighted pupils statewide. In the interim, which may be a very long time for some of these districts, they will receive no increases in their funds from the sales tax. Thus, the "extra money" touted by Defendants is only temporary and is not based on individual districts' size, wealth, or need, but on county-wide property tax history alone.

Defendants also claim that "[i]n addition to the weighted pupil units provided by the Education Finance Act, [Act 388] adds an additional weight of 20 for every student in poverty." (Defendants' Initial Brief 30-31.) Defendants, however, omitted some significant qualifiers applicable to this weight. First and perhaps most importantly, the 20 add-on weight is not applied to the total Act 388 reimbursements but only to the additional amount of the reimbursements beginning in 2008-09 that result from the application of the inflation and population growth factors. Accordingly, the "poverty factor" simply shifts some of the statewide annual increase to those districts with larger numbers of children in poverty. For small districts like Plaintiff Districts, the smaller numbers of children overall and the limited funding amount to which the "poverty factor" applies will mean they will not gain much in actual dollars from the "poverty factor."

Second, since the additional 20 weight is an add-on weight that applies to the Act 388 annual reimbursement calculation rather than an actual part of the EFA weighting formula, the wealth-sensitive provisions of the EFA do not apply to it. Therefore, every district, rich or poor, gets the same additional revenue for each poor student regardless of the district's ability to pay for additional costs for poor students.

Third, Act 388 adds no additional money because of poverty to the annual increase in reimbursement, which is based solely on inflation and population growth. The money distributed on the basis of poverty is carved out of, not added to, the statewide reimbursement increase.

Fourth, in those six Plaintiff Districts that receive proportional shares of the \$2.5 million minimum allocation per county, the maximum they will be allocated is their share of their county's \$2.5 million minimum allocation, despite the number or concentration of children in poverty in those districts.

Finally, even if a weight of 20 were applied to a district's entire Act 388 reimbursement, rather than only to "new" funds as this 20 weight will be applied, the weight is inadequate to offset the additional costs associated with the education of students in poverty. The 20 poverty weight in Act 388 is entirely insufficient to cover the costs of the additional educational services needed for students in poverty in Plaintiff Districts and, further, is not related to the relative needs for additional funding in the districts.

Act 388 also distorts and dilutes the wealth-sensitivity of the EFA since it alters the calculation of a school district's index of tax paying ability ("ITA"), which determines how much of the base student cost is borne by the State and how much by the school district. Owner-occupied residential property is now immune from any increases in the mill rate, but the EFA continues to include the value of owner-occupied residential property in the calculation of the ITA. Thus, although the value of owner-occupied residential property is used to determine how much taxing ability a school district has, the school district cannot use that property to increase its local revenues from taxes. It is now a form of "phantom property" for purposes of calculating the ITA, distorting the ITA as a measurement of district wealth.

B The Child Development Education Pilot Program Does Not Remedy Early Childhood Education Deficiencies in Plaintiff Districts

Defendants offer the Child Development Education Pilot Program ("CDEPP"), established by proviso in 2006 for only a two-year period, as their most direct response to the trial court's ruling. While it may be a partial fix, CDEPP in no way remedies the deficiencies in early childhood intervention identified by the trial court or about which the Plaintiffs complain.

First, CDEPP is limited to a pilot program of four-year-old kindergarten in thirty-seven districts in the counties containing the named Plaintiffs. This pilot program does not address the scope of early childhood interventions suggested by the trial court. The trial court found that Defendants were failing in their obligation to provide an opportunity for each child to receive a minimally adequate education because of deficient early childhood education, specifically including educational services from "the pre-kindergarten level and continuing through at least grade 3 " (12/29/05 Order at 161, see also id at 167).

Further, in the trial court's reference to "effective pre-kindergarten programs and four-year-old kindergarten programs," (id at 160 (emphasis added)), the court deemed programs for ages less than four years as within the scope of "early childhood education." This determination is in accordance with the General Assembly's recognition "that the years from birth through five years of age are critical to a child's ability to learn " (Id at 163 (citing to testimony by Sen. John Matthews at Tr. (8/15/03) 180, 221, and 222)) CDEPP, being limited to four-year-old programs, can only be deemed a partial response by Defendants to the trial court's findings. Defendants have made no effort to comply with the court's order by providing services for any children other than four-year-olds.

Second, Defendants' commitment to this pilot program is questionable. The State has operated a four-year-old kindergarten program for at-risk children for over twenty years, funded by EIA money.⁸ The EIA program's effectiveness in preparing at-risk children for the early grades in school has been documented on multiple occasions. In addition to numerous studies from around the country documenting the positive effects of quality early childhood education experiences on children's long term academic progress, the State itself issued three large-scale longitudinal studies in 1998, 1999, and 2000 specifically evaluating the EIA early childhood programs and found that "[i]n spite of their higher risk for school failure, program participants performed equally as well as non-participants when entering the first grade at public schools." (Pls. ' Ex. 339 at 16.) The eighteenth annual report on the EIA child development programs, entitled "What is the Penny Buying for South Carolina?," flatly stated that "[c]hild development programs for four-year-olds had a positive long-term effect on participants' later academic performances in comparison to similar students who did not participate in the program." (Pls. ' Ex. 339 at 28.) The four-year-old programs funded through the EIA are available not only to poor children in the Plaintiff School Districts, but to children in all school districts who score poorly on school readiness assessments, a feature that South Carolina's Education Oversight Committee ("EOC"), in its evaluation of CDEPP, recommends be incorporated into the CDEPP legislation. (See 2007-08 Implementation & Expansion of The Child Development Education Pilot Program (CDEPP) Summary Report ("EOC CDEPP Report") at 35, available at <http://www.sceoc.com/NR/rdonlyres/6F5AB929-399C-4EC7-84ED->

⁸ The CDEPP proviso requires the Plaintiff Districts involved in the trial of this case to forgo funding for the EIA four-year-old program they had been operating for years and to use CDEPP funding and requirements instead. The proviso also requires other named Plaintiff Districts not directly involved in the trial to choose between the EIA program and CDEPP.

853B60A01B07/15815/SummaryCDEPPEvaluationJan2008withCoverPage pdf)) With the proven success of the EIA four-year-old kindergarten program across the state, Defendants' actions are puzzling. Specifically, Defendants have needlessly created a new, more limited pilot program funded by non-recurring funds, purportedly to gauge the effectiveness of four-year-old kindergarten in preparing children for succeeding grades at school. Further, because CDEPP is funded by non-recurring funds, its stability and future existence are by no means assured.

Third, the CDEPP program is vastly underfunded. CDEPP per-pupil funding is inadequate to pay salary and fringe benefits for a teacher and teacher assistant in each class (as required by the legislation (See Part IB, Proviso 1 75(E) and (F), Act 397 of 2006, and Part IB, Proviso 1 66(E) and (F), Act 117 of 2007). Further, CDEPP per-pupil funding is inadequate to pay for supervision of the required curriculum or coordinating the licensing by the Department of Social Services required by the legislation (See Part IB, Proviso 1 75(C)(8), Act 397 of 2006, and Part IB, Proviso 1 66(C)(8), Act 117 of 2007).

In addition, the CDEPP proviso includes no funding for facilities, either to build new or to renovate or maintain older buildings to house additional four-year-old students. The participating school districts, including the Plaintiff Districts, identify the lack of space meeting the requirements of the legislation as one barrier to their abilities to provide the CDEPP program to all eligible four-year-olds (EOC CDEPP Report at 5). The EOC recommends, at a minimum, the "provision of some type of capital funding to cover at least the partial cost of health and safety upgrades related to standards at public schools and private centers that are seeking to house CDEPP children " (Id. at 20).

As a result of the under-funding of this and other pre-kindergarten programs, the EOC estimates that 2,256 eligible four-year-old children in poverty in the thirty-seven school districts named in this case are not served through any publicly-funded pre-kindergarten⁹ (Id at 34) "While not all of these at-risk four-year-olds may participate in a publicly-funded pre-kindergarten program if it were available because of family, employment, or other circumstances, the data indicate that more students could be served if facilities, professional staff, and instructional resources were available " (Id) Defendants clearly under-funded this program from its inception, and cannot be said to have remedied the barriers to the opportunity for a minimally adequate education that exist in the lives of poor children, as identified by the trial court

Finally, while Plaintiffs do not address in this brief Defendants' policy decisions in enacting the CDEPP legislation, they note that the EOC—in its evaluation of the CDEPP programs to date—have identified some features of the programs that should be adjusted to ensure greater effectiveness and efficiencies For example, teachers in private centers receiving CDEPP funding through First Steps are not required to have the same education or training as teachers in public school four-year-old programs, although the funding per child served is the same for the public and private centers Among other recommendations, the EOC recommends adjustments in the compensation system, as well as improvements in ongoing technical assistance and professional development opportunities, to ensure that teachers are aware of and able to create developmentally appropriate classroom environments and to

⁹ Publicly-funded pre-kindergarten programs include public school CDEPP programs, public school EIA four-year-old programs, private centers receiving CDEPP funding through First Steps, the Head Start federal program, and the ABC voucher program (See EOC CDEPP Report, Appendix A)

interact meaningfully with children to improve their language, literacy, numeracy, and social development (EOC CDEPP Report at 24-26)

To comply fully and meaningfully with the trial court's findings, Defendants must strengthen and expand the opportunities available through CDEPP and to address other early childhood education opportunities for children from birth through grade three. Until that is done, Defendants cannot claim to have followed the court's direction to provide appropriate and adequate early childhood intervention programs designed to ensure the opportunity to receive a minimally adequate education to each student in Plaintiff Districts.

C Isolated and Limited Legislative Initiatives Do Not Remedy Educational Deficiencies in Plaintiff Districts

Some of Defendants' "remedies" to the public school system's deficiencies are merely grant programs, single line appropriations to programs already in existence, and/or supported by non-recurring funding. Grants, isolated programs created by provisos, and other such limited remedies are not sustained efforts at reforming our system of public schools. Further, the money appropriated for these measures is outside the EFA funding formula, does not help school districts with basic expenses, and is not needs-based or wealth-sensitive. One-time-only, earmarked funds for programs created through provisos, as many of these programs are, cannot be used, by definition and law, to meet ongoing needs of school districts. Such funds do not allow districts to implement long term plans or programs.

Extensive use of one-time-only appropriations is further evidence that Defendants have failed to meet their constitutional obligations to support and maintain a long term and stable funding system for the public schools. These measures certainly do not render Plaintiffs' claims in this case moot. The post-trial initiatives do not remedy the backlog of mandates and

commitments they have consistently under-funded over the years (See Tr (10/6/03) 213 1-217 22)

In addition to the issues relating to the eroding of the EFA foundation and the robbing of the EIA for non-EIA purposes, as discussed above, Plaintiffs provided substantial evidence relating to the following funding issues

- The State once paid for all transportation costs, but has steadily withdrawn from its responsibility for transportation and shifted more of those costs to school districts, resulting in insufficient and unreliable State funding for transportation (See Pls ' Initial Brief at 141-43)
- The State once paid for all school districts' employee fringe benefits, but has steadily shifted more of those costs to the districts, resulting in insufficient State funding for fringe benefits is (See Tr (6/28/04) 155 23-156 16, Pls ' Ex 6022, Tr (9/11/03) at 55 17-21, 56 4-9, Tr (6/8/04) 182 9-183 3, (9/11/03) 56 1-3)
- State funding for professional development time and programs and for induction and mentoring of inexperienced or struggling teachers is insufficient (See Pls ' Initial Brief at 45-47)
- Defendants impose mandatory teacher salary increases without ensuring that EFA's base student cost the EIA's teacher salary supplement keep pace In order to fill the gap between the salary requirements and the funding they receive to pay those salaries, Plaintiff Districts must reallocate their local funds from another program or service, raise additional local funding through property taxes, or eliminate staff or services from their budgets See Tr (9/10/03) at 238 14-22, 244 18-246 23, Pls ' Ex 6019, Tr (9/11/03) at 6 18-8 11, 9 6-19
- Defendants have never attempted to sufficiently fund facility needs in Plaintiff Districts, despite knowledge of their deficiencies and the inabilities of Plaintiff Districts to fund those needs from other sources See Appellants-Respondents' Initial Brief at 139-41

Instead of enacting legislation targeted at remedying these deficiencies, including dealing with the problems that have grown over the years in EFA and EIA funding, Defendants simply enacted more piece-meal legislation that has no lasting or widespread effect

- Although Defendants have studied the effects of early childhood programs for many years and the results supported the continued use and expansion of such programs,

Defendants claim that the appeal should be vacated as moot because of a \$300,000 appropriation to the State Department of Education to track progress and study the effects of early childhood programs

Even if additional study were warranted, and Plaintiffs do not contest the policy reasoning behind this appropriation, Defendants included no appropriation at all to pay for the costs of the local school districts in collecting, recording, reporting, and analyzing the data, and they do little to nothing for the children in the classrooms

- Defendants seem to claim that appropriation of an additional \$5 million in 2006-2007 and \$15 million in 2007-2008 for textbooks,¹⁰ along with standard funding for textbooks and instructional materials, have remedied the deficiencies in those areas and mooted Plaintiffs' claims

However, Defendants allowed a deficit for routine textbook replacement of up to \$15 million per year to develop over a number of years, (Tr (10/06/03) 224 10-228 6, 232 13-19), and the English language arts area alone needs \$43 million for books (Id at 227 3-7) These recent appropriations, while welcomed, do not eliminate the deficits in textbooks and materials from years of under-funding In addition, allocation of these funds is generally based on pupil enrollment and does not consider concentration of poverty or a district's needs or ability to generate local revenues to compensate for the Defendants' under-funding Poor districts get no more money per child than wealthier districts to pay for these necessary instructional supports

- Defendants tout an increase in technical assistance funding as a reason for this Court to vacate the trial court's order, which ignores the trial court's finding that technical assistance funding is largely wasted because it comes too late (12/29/05 Order at 160) Teacher and principal specialists cannot be effective in improving instructional practices in schools as long as the schools continue to suffer from high rates of staffing turnover
- Inexplicably, Defendants also seem to believe that permitting underperforming schools to use technical assistance funds to provide salary supplements to teachers with advanced degrees will improve teacher recruitment and retention Technical assistance funding is provided in varying amounts from one year to the next and is limited to schools rated Unsatisfactory or Below Average If a district increased teacher salary supplements, the increase would have to apply to all teachers in all schools in the district, not just those at the schools entitled to technical assistance funding, and the district would be prohibited from reducing those salaries in succeeding years See S C Code Ann § 59-20-50(4) (2004), Jackson v Charleston County Sch Dist, 316 S C 177, 447 S E 2d 859 (1994), Richland County Sch Dist Two v S C Dep't of Educ, 335 S C 491, 517 S E 2d 444 (Ct App 1999) Therefore, if a district increased teacher salaries with technical assistance funds, it would have no way to sustain the

¹⁰ Plaintiffs were unable to locate these appropriations in the 2006-07 or the 2007-08 General Appropriations Bill, but for purposes of this argument, will assume that Defendants' assertion of additional money for textbooks in both years is correct

salary supplement payment, as required by the State, when the technical assistance funds are decreased or lost

- Defendants claim that changes in the Teacher Loan Program to allow student loan forgiveness to teachers who agree to teach in expanded critical needs areas will "directly alleviate teacher recruitment and retention issues in the Plaintiff Districts " (Defs ' Initial Brief at 31) These are not new changes, they were in effect during the trial of this case and are, therefore, not properly raised as an intervening event since the close of evidence Further, while they have been present through annual provisos for several years, the enabling legislation has not yet been amended, see S C Code Ann § 59-26-20(j) (2004), evidencing a lack of commitment on the part of the Defendants to commit to real reform and an intention to keep these changes, like so many others, as temporary measures only

Moreover, each of the Plaintiff Districts was already on the list of critical geographic areas for purposes of the Teacher Loan Program before and at the time of trial Under the prior Teacher Loan provisions, over 900 of the 1100 schools in South Carolina qualified as a critical geographic area (Tr (9/23/03) at 78 6-79 18, accord Pls ' Ex 6142 at 6) (in 2002-2003 and 2003-2004, 993 of the 1115 schools in South Carolina, or 89%, qualify as critical needs schools under the Teacher Loan Program)) The number of schools qualifying under the amended provisions currently total 754—still a very large number—thus, diluting the program's power to attract teachers to Plaintiff Districts Finally, these provisions are directed toward novice teachers and do not assist in attracting and reducing turnover of experienced or high quality teachers (Pls ' Ex 6142 at 17)

If Defendants are serious about reducing teacher turnover and improving student access to adequate education in the Plaintiff Districts there are a number of far more direct methods of accomplishing that result than allowing novice teachers to have their loans cancelled by teaching for a limited time in Plaintiff Districts, which they have been able to do for years

- Defendants seem to imply that the "K-12 Technology Initiative" is also new since the trial of this case ended, it is not This program is simply a continuation of technology funding made available to school districts from EIA funds for many years and certainly before the trial ever started Each year, Defendants decide the amount of such funding, based on what is available and on competing needs or interests Funding is not based on actual needs or costs in the schools or school districts In fact, the amount that Defendants appropriated to this initiative has grown smaller over time, declining from over \$40,000,000 in the 2000-01 General Appropriations Bill to the \$13,000,000 touted by Defendants in their brief See General Appropriations Bill H 4775 of 2001, Part IA, Section X(C) (\$3,200,000 for technology), id at § XIII D (\$19,658,634 for Technology Initiative), Act 111 of 2000, Section 1(1) (\$1,354,000 for K-12 Technology Initiative), and Act A1 of 2001, Part IA, Section 3 (11) (\$16,500,000 for K-12 Technology Initiative)

- The "iAm" student laptop program provides funding through a proviso passed by the Defendants in 2007 for grants awarded on a competitive basis to six schools to provide laptops to its ninth-graders. Plaintiff Districts alone have eight schools with ninth-graders, and many more such schools exist statewide. Defendants cannot credibly claim that providing laptops to a small percentage of ninth graders in six schools in South Carolina will "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," (Defs ' Brief at 32 (quoting Part IB, Proviso 1A 70, Act 117 of 2007))

Plaintiffs are encouraged that Defendants highlight several pieces of legislation that are not targeted directly toward the public school system but are nevertheless factors arguably outside "traditional school" that are essential to providing an opportunity for each child to receive a minimally adequate education. These measures do not rise to the level of mooted Plaintiffs' claims, but are welcome interventions into the circumstances faced by children who live in poverty.

- The Student Health and Fitness Act of 2005, S C Code Ann §§ 59-10-10, et seq (2004), requires schools to provide a minimum amount of physical activity for elementary students, requires nurses in elementary schools, and mandates several programs in school districts to promote healthy eating habits. This legislation went into effect in 2005, but the General Appropriations Bills for 2005-06 and for 2006-07 contained no funding for this item. Therefore, the allotted money may not be sufficient to pay the total costs of the nurses statewide. In addition, the distributions are not wealth-sensitive, so every district—whether rich or poor—gets the same amount regardless of need. Plaintiffs do not dispute the need for school nurses, but strongly disagree with Defendants' contention that their recent provisions render any of their claims moot.
- Defendants also point to appropriations to the Parenting/Family Literacy Initiative, a grant program that traces its existence back almost twenty years. Like the K-12 Technology Initiative, this is not a new program but is simply a continuation of funding made available from EIA funds for many years, certainly before the trial ever started. Indeed, the trial court considered evidence regarding programs addressing family literacy and parenting skills dating back to the Target 2000 legislation enacted in 1989 (Pls ' Ex 5036 at p 4-5) and continuing with Act 135 enacted in 1993 (Pls ' Ex 5037 at 7-8). Again, like the K-12 Technology Initiative, Defendants decide each year the amount of funding for these programs, based on what is available and balanced against competing needs or interests rather than actual needs or costs in the schools or districts. In fact, the amount appropriated to this initiative has not changed in any meaningful

degree for at least ten years ¹¹ (See Part IA, Section 1, XI(B) and Part IB, Proviso 1A 26, Act 117 of 2007 (\$4,159,555 for parent support and \$1,946,248 for family literacy), Part IA, Section 1, XI (E)(3) and Part IB, Proviso 19A 44, Act 155 of 1997 (\$4,691,380 for parent support))

- Defendants also cite to provisos in which appropriations were made to county libraries. Again, although Plaintiffs appreciate the \$60,000 minimum allocation to each county library, Defendants have not erased the deficits in funding the libraries or textbook needs in their schools, as discussed above. Evidence at trial established that the school libraries in Plaintiff Districts were woefully out of date and inadequate, and no evidence shows that any of Defendants' post-trial actions have changed that situation to any appreciable degree. (Tr (10/2/03) 204 5-15) (principal specialist testifying that when she arrived in Allendale, library books were so outdated that they discussed "someday" sending a man to the moon), see also id. (1/6/04) 9 5-19, (10/1/03) 39 2-16, 54 3-23, (10/8/03) 65 1-66 24, (1/13/04) 156 18-157 18)

Finally, Defendants note that per-pupil funding in Plaintiff Districts has increased since trial. The per-pupil figures cited as support for this statement compare 2002-03 InSite data to projections by the General Assembly of 2007-08 funding for every district, not only from the EFA formula but also from unidentified federal and local sources. The figures cited by Defendants for 2007-08 are questionable and not verified in any way. Indeed, the proviso for the BSC in 2007-08—from which Defendants derived the 2007-08 individual district funding projections in their brief—represents the very first time the General Assembly has ever included calculations of projected federal, state, and local funding for each district, and they mean nothing. Defendants have no control over the federal distribution of funding, their projections of amounts from federal sources are not confirmed or sourced in any way, and their inclusion of projected federal funding in the state budget proviso is essentially meaningless. Defendants also do not explain their projections of "per pupil" local funding in the 2007-08 budget bill, except to claim that it does not include revenues from local bond

¹¹ Defendants imply that every district in the state receives a minimum of \$35,000 for parenting and family literacy programs, but the provisos make clear that the minimum allocation to any district that receives such a grant is \$35,000, not that every district will receive a grant. (See Part IB, Proviso 1A 26, Act 117 of 2007)

issues. The figures in this bill are nothing more than projections, and in the case of the federal and local funds, are unexplained and unverified estimates.

The General Assembly has historically been wildly inaccurate in projecting per-pupil funding in the budget bill. In the 2005-06 General Appropriations Bill, the average total "per pupil" funding level projected was \$9,826, including state, federal and local funds but excluding revenues of local bond issues. (See Part IB, Proviso 13, Act 115 of 2005.) According to the InSite chart based on the school districts' actual audited financial statements and showing the state averages for fiscal year 2006, the average per-pupil spending level was actually \$8,159, including state, federal and local funds but excluding capital improvement costs, (see <http://ed.sc.gov/agency/offices/finance/insite/documents/06Insitestat001.xls>), a difference of \$1,667 per pupil or a total funding error of **\$1,157,968,214** (using a total student count of 694,642 as calculated by InSite, id.) or **\$1,117,960,214** (using a total student count of 670,433, as projected by the General Assembly in its budget proviso). The projected per-pupil funding stated in Defendant's initial brief, taken from the General Assembly's unexplained projections, is clearly not credible proof of actual funding.

Even if "per-pupil" funding in Plaintiff Districts has increased since the trial, this does not establish that Defendants have reformed the system of public schools and its funding structures to render Plaintiffs' claims moot. The funding for every single district in the state has increased since trial because of the application of the statutorily mandated adjustments in the EFA. First, the inflation rate increased the EFA's Base Student Cost ("BSC") each year. In 2005-06, the BSC was \$2,290, in 2006-07, it was \$2,367, and in 2007-08, it was \$2,476.

Second, the projected student counts also increased, from 670,433 (in 2005-06) to 677,092 (in 2006-07) to the currently projected count of 683,603 (in 2007-08). Operation of

the EFA formula anticipates adjustments and increases in per-pupil funding based on inflation, changes in student enrollment, changes in numbers of pupils with particular weights under the EFA formula, and changes in tax paying abilities of the districts. With increased student enrollment and the inflation rate alone, the BSC increased every year, resulting in higher per-pupil funding in every district of the state, but with no reform or basic change whatsoever in Defendants' education funding mechanisms. Thus, the mere fact that per-pupil funding in Plaintiff Districts increased does not establish that the Defendants' post-trial actions have rendered Plaintiffs' claims moot.

Plaintiffs further ask that this Court not accept the faulty reasoning asserted by Defendants, and accepted by the trial court, relating to the significance of relative levels of per-pupil expenditures. Measurements of per-pupil expenditures do not measure adequacy and do not establish that Defendants provided sufficient funding to ensure adequate inputs and outputs. Assuming *arguendo* that Plaintiff Districts had higher per-pupil expenditures, Defendants nevertheless failed to distribute sufficient funding to ensure that Plaintiff Districts were able to deliver constitutionally adequate educational opportunities to each child in their classrooms.¹²

In arguing that Plaintiff Districts had higher per-pupil expenditures than other districts, Defendants' premise appears to be like that of the State of New York in the Campaign for Fiscal Equity v. State litigation, "that some expenditure level, if high enough relative to figures nationwide [or statewide], simply must be 'enough,' without reference to student need, local costs, and the actual quality of inputs and outputs." Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 341-42 (N.Y. 2003). The truth is, and the record establishes, that Plaintiff

¹² Per-pupil expenditures are also not an appropriate means of measuring the amount of money Plaintiff Districts had to apply to their needs. (See Pls.' Initial Brief 124-32.)

Districts do not have sufficient revenues available to pay for the educational services and programs their children need, as evidenced by the low quality of inputs—instructional quality, facilities, and instrumentalities of learning—and the low levels of outcomes—test scores and graduation rates—in Plaintiff Districts. The Campaign for Fiscal Equity court rejected the argument that higher per-pupil expenditures ipso facto result in constitutionally adequate educational opportunities because the trial record did not establish that the students were receiving a constitutionally adequate education. Id.

Plaintiffs urge this Court to reject Defendants' argument on the same basis since the trial court properly found that children in Plaintiff Districts are not receiving the opportunity for a minimally adequate education, the amounts of per-pupil expenditures do not establish the converse. Purportedly higher per-pupil expenditures do not destroy the causative link between Defendants' actions or omissions and the lack of constitutionally adequate educational opportunities in Plaintiff Districts.

In conclusion, the children of poverty in this state cannot continue to suffer on continued reliance of the Defendants' position of "wait and see." History and the evidence in this case show that these piecemeal post-trial band-aids will not stem the flow of unrealized potential in the children who are not receiving the opportunity to break the cycle of poverty through education.

II The Trial Court Correctly Applied a Preponderance of the Evidence Standard

A The Burden of Proof in This Case Is by a Preponderance of the Evidence

The proper burden of proof in this case is by a preponderance of evidence, which is the standard usually applied in civil cases. The reason that the burden of proof is not proof beyond a reasonable doubt—as Defendants argue—is because Plaintiffs are not seeking to have a statute

declared unconstitutional. Instead, as the trial court correctly recognized, Plaintiffs' position in this case challenges whether "the *system of public schools* is unconstitutional " (12//29/05 Order ¶ 19 (emphasis added)) Recognizing this, the trial court properly concluded that this case "is an equitable civil case assessing the constitutionality of the education system as a whole. Therefore, the proper burden of proof is by a preponderance of the evidence " (Id. ¶ 48)

B A Reasonable Doubt Standard Is Inconsistent with This Court's Decision in Abbeville

This Court decided in Abbeville that the Education Clause imposes on the General Assembly an affirmative duty to provide an education that meets the constitutional mandate. This Court further set forth a standard to prove whether the mandate was being met: whether students were being provided the opportunity to acquire a minimally adequate education. Therefore, Plaintiffs challenge whether the State is providing the opportunity for students to acquire a minimally adequate education; they do not challenge the constitutionality of the statutes that comprise the education system. Consequently, this Court must determine by a preponderance of the evidence presented at trial whether the General Assembly is meeting the Abbeville standard this Court established to measure the adequacy of education, not statutes.

C Defendants Misconstrue the Purpose of this Lawsuit

In their cross-appeal, Defendants assert that Plaintiffs sought a declaration that the current educational statutes are unconstitutional and that this Court must declare the statutes to be unconstitutional before it can deem that the educational opportunity is inadequate. However, Plaintiffs requested that the trial court determine whether the children in the Plaintiff Districts are provided the opportunity to acquire a minimally adequate education. This question can be answered in the negative without declaring any current statutes unconstitutional.

Specifically, Plaintiffs asked the trial court to declare that "the State and other defendants have failed to meet their constitutional obligations" and that "the current system of funding and supporting education in South Carolina is inadequate and therefore unconstitutional " (Fourth Am Compl (7/10/03) ¶ 79) Plaintiffs also asked the court to require Defendants to "draft a proposal for a new system for providing an adequate education in South Carolina " Id This does not amount to a request find the laws governing the current educational system unconstitutional

Although Defendants assert that making this declaration requires this Court to find the existing statutes unconstitutional, that is inaccurate If this Court determines that the current system is inadequate, that determination does not amount to a finding that the current funding statutes are unconstitutional The General Assembly would not be required to repeal the current statutes and develop entirely new ones Rather, the General Assembly has the power to keep the current statutes in place as long as the new laws they propose will support an educational system sufficient to meet the educational needs of each student in the Plaintiff Districts

The reasonable doubt standard would apply in a situation in which the General Assembly enacted a specific piece of legislation that was constitutionally impermissible because, for example, it violated equal protection or due process In that situation, Defendants would be correct in arguing that a challenge to the legislation must be proven beyond a reasonable doubt This is what occurred in Richland County v Campbell, 294 S C 346, 364 S E 2d 470 (1988), when Richland County and some of its citizens unsuccessfully claimed that the shared funding plan in the Education Finance Act violated the equal protection guarantee of the South Carolina Constitution Similarly, in Moseley v Welch, 209 S C 19, 39 S E 2d 133

(1946), citizens of Williamsburg County successfully proved that a school funding statute was unconstitutional in that it denied them due process and equal protection of the law. However, unlike the case before this Court, those cases sought and received a finding that the educational statutes were unconstitutional.

Therefore, each statute enacted by the General Assembly that affects the system of public schools may be constitutionally valid and yet the system, as implemented, may be insufficient to meet the constitutional standard. This Court is not called upon to decide whether **the statutes** affecting public education violate some provision of the Constitution because they exceeded the constitutional limitations on legislative power, as in Moseley or in Campbell, but whether **the system** of public schools meets the constitutional mandate of quality outlined in Abbeville. Thus, the different purposes make the critical differences between this lawsuit and Moseley and Campbell.

D Cases Cited by Defendants Are Inapplicable to the Matter Before This Court

Defendants cite only two education finance cases in their burden-of-proof argument: City of Pawtucket v Sundlin, 662 A 2d 40 (R I 1995), and Vincent v Voight, 614 N W 2d 388 (Wis 2000). Neither case applies to the issues before this Court. Both were equity cases, requiring analyses of whether the education systems at issue violated the state and federal constitutional guarantees of equal protection. Because the case before this Court is not an educational equity case, and no claims of a violation of equal protection are currently asserted,¹³ the reasoning of Voight and City of Pawtucket is inapplicable.

¹³ This Court affirmed the dismissal of Plaintiffs' equal protection causes of action in the Abbeville opinion.

The Voight plaintiffs also specifically challenged three Wisconsin statutes, claiming they violated the right to an equal opportunity for a sound basic education, as the “uniformity” provision of the education clause¹⁴ in the Wisconsin Constitution required ¹⁵ Unlike Voight, however, Plaintiffs in this case do not challenge the constitutionality of any particular statutes. Rather, Plaintiffs challenge whether the opportunity for a minimally adequate education is offered each child in the Plaintiff Districts. In other words, Plaintiffs “do not question the wisdom of the General Assembly’s decisions, only its failure to comply with its constitutional mandate.” Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989).

City of Pawtucket is further suspect in that its holding directly contrasts with this Court’s decision in Abbeville. In that case, the Rhode Island Supreme Court held that the separation of powers doctrine prohibited it from making any determinations regarding the quality of the education system, which was entrusted solely to the legislature. “Because the Legislature is endowed with virtually unreviewable discretion in [the area of education], plaintiffs should seek their remedy in that forum rather than in the courts.” 662 A.2d at 57. Thus, the Rhode Island court never reached the issue presented to this Court because it did not find the legislature had an affirmative duty to act as this Court did in Abbeville, finding that the separation of powers doctrine does not prohibit judicial review of the quality of the system of public schools in South Carolina.

¹⁴ The “uniformity” requirement derives from the section of the education clause which provides that the school districts “shall be as nearly uniform as practicable.” Wis. Const. art. X, § 3.

¹⁵ Significantly, while the plaintiffs in Voight presented evidence of disparities of financial resources among districts as a direct result of the challenged statutes, they offered no evidence of inadequate outcomes such as “poor standardized test scores, college entrance rates, or the like.” 614 N.W.2d at 412. Therefore, unlike the case before this Court, there was no showing that any children lacked a sound basic education or that the basic education being received by students in poor districts was inferior to that of students in wealthy districts, and the court found no constitutional violation.

E Decisions from Other Jurisdictions Support the Trial Court's Burden of Proof

The Kentucky Supreme Court precisely phrased the issue in Rose v Council for Better Educ , Inc , 790 S W 2d 186, 209 (Ky 1989), a case cited with approval in Abbeville, stating that "[t]he ultimate issue is whether the system of common schools in the Commonwealth established by the General Assembly, with respect to the mandate of [the education clause in the Kentucky constitution], is in compliance with the constitution " In reaching its conclusion, the Rose court acknowledged, "[w]e do not question the wisdom of the General Assembly's decisions, only its failure to comply with its constitutional mandate We give deference and weight to the General Assembly's enactments, however, we find them constitutionally deficient " Id

Similar reasoning led to the same result in an Arizona school funding case In Roosevelt Elementary School Dist No 66 v Bishop, 877 P 2d 806 (Ariz 1994), the Arizona Supreme Court held that "the statutes [used to provide for the public school system] are inherently incapable of achieving their constitutional purpose Because the state's financing system is itself the cause of these disparities, the system, taken as a whole, does not comply with art XI, § 1 of the Arizona Constitution " Id at 815-16

Finally, the holding of the Wyoming Supreme Court in State v Campbell County School Dist , 19 P 3d 518 (Wyo 2001), is equally aligned with the trial court's finding In that case, the court stated that it was not their "constitutional responsibility to pass judgment on each line item of the funding model Those are the legislative choices for which the legislators are accountable to their respective constituencies " However, in the end, the court recognized that it must act to protect the rights afforded by the state constitution Id The court stated that even though it usually "will not encroach into the legislative field of policy making, as the final

authority on constitutional questions, the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution " Id Furthermore, similar to the relief Plaintiffs request from this Court, the Wyoming court found that "when the legislature's transgression is a failure to act, [their] duty to protect individual rights includes compelling legislative action required by the constitution " Id at 539-40

Ultimately, this Court must decide the simple question Is each child in the Plaintiff Districts provided safe and adequate facilities in which he or she is provided the opportunity for a minimally adequate education as defined in Abbeville? The record overwhelmingly demonstrates that the children in the Plaintiff Districts are not afforded this opportunity ¹⁶ However, that finding does not require this Court to find any current education law unconstitutional, only insufficient, and therefore the proper burden of proof is by a preponderance of the evidence

III Post-Trial Evidence Should Not Be Considered

A Post-Trial Evidence Should Be Excluded

Defendants have improperly introduced evidence of the Legislature's actions taken after the close of trial In doing so, Defendants disregard the unequivocal language of Rule 210(c) of the South Carolina Rules of Appellate Practice, which clearly prohibits this evidence on appeal **"The Record on Appeal shall not, however, include matter which was not presented to the lower court or tribunal "** S C R App P 210(c) (emphasis added)

¹⁶ Although Plaintiffs believe that this Court should base its decision on the preponderance of the evidence, they believe the evidence compels this singular result whether the Court utilizes the preponderance of the evidence, clear and convincing, or beyond a reasonable doubt standard

Not surprisingly, the South Carolina Supreme Court and the lower courts consistently apply the Rule's plain and well-established language to exclude evidence outside of the record. See, e.g., Helms Realty, Inc v Gibson-Wall Co, 363 S C 334, 339, 611 S E 2d 485, 487-88 (2005) (refusing to entertain appellant's argument because it was outside the record on appeal), S C State Highway Dep't v Meredith, 241 S C 306, 311, 128 S E 2d 179, 182 (1962) (emphasizing that the South Carolina Supreme Court will not consider *any* fact which does not appear in transcript of record), Tunstall v Lerner Shops, 160 S C 557, 562, 159 S E 386, 388 (1931) (finding that South Carolina courts may not consider alleged facts which are outside of the record), Bushardt v United Inv Co, 121 S C 324, 328, 113 S E 637, 639 (1922) (holding that a South Carolina court cannot raise an exception outside of the record), Timms v Timms, 286 S C 291, 294, 333 S E 2d 74, 75 (Ct App 1985) (holding that the Court of Appeals is confined to the record in deciding issues on appeal)

Likewise, other jurisdictions have strictly excluded facts outside of the record in similar education funding cases. See, e.g., DeRolph v State, 677 N E 2d 733 (Ohio 1997) (finding that the supreme court must consider the record as it is presented). In DeRolph, several school districts filed suit for declaratory relief seeking determination that the state's system of funding public education was unconstitutional. Id at 733. The Supreme Court of Ohio refused to consider evidence of facts outside of the record proffered by the state, and only considered evidence reflected in the record that the state failed to provide funding, teachers, buildings, and equipment to the school districts. Id at 742. In excluding the state's evidence pertaining to facts outside of the record, the Court opined, "it is imperative to consider the record as presented to us." Id

Therefore, Defendants' improper inclusion of facts not in the record should not be considered "Attorneys should not include information that is not in the record" as "courts are bound by what is contained in the record " Jean Hoefer Toal et al , Appellate Practice in South Carolina 213 (2d ed 2002)

B This Court Should Not Take Judicial Notice of Post-Trial Evidence

In conjunction with improperly alleging facts absent from the record—facts that Plaintiffs have not been given an opportunity to contest—Defendants requested this Court take judicial notice of this post-trial evidence Defendants assert that any facilities in the Plaintiff Districts that were unfit have been rebuilt or remodeled To prove this assertion, Defendants cited a few of the Plaintiff Districts' websites and improperly asked the court to take judicial notice of the information contained therein This Court must deny Defendants' request, as Defendants' post-trial "facts" are not proper for judicial notice and would deprive Plaintiffs of the right to rebut the evidence

The post-trial evidence accumulated by referencing many of the Plaintiff Districts' websites is not proper "evidence" for which a court takes judicial notice "For a fact to be subject to judicial notice, it must be so notorious that the court may properly assume its existence without proof " Masters v Rodgers Dev Group, 283 S C 251, 255, 321 S E 2d 194, 196 (Ct App 1984) (citing Moss v Aetna Life Ins Co , 267 S C 370, 228 S E 2d 108 (1976), State v Broad River Power Co , 177 S C 240, 181 S E 41 (1935)) "Unless a fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability, it is not subject to judicial notice " Masters, 283 S C at 255, 321 S E 2d at 194 Here, Defendants' facts do not meet these qualifications The

Plaintiff Districts' websites are utilized for many reasons, including a public relations tool, and the information contained therein is not necessarily indisputable. Defendants' reliance on the websites to show that these facts are "public knowledge" is incorrect and unfounded. The Court would set a dangerous precedent were it to take judicial notice on the basis of a website on the internet.

In addition, judicial notice of such post-trial evidence would strip Plaintiffs of their right to be heard and deprive them of the opportunity to present evidence rebutting Defendants' claims. In fact, in refusing to take judicial notice, the South Carolina Court of Appeals best described the danger in taking judicial notice for the first time on appeal as follows:

Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. See United States v. Jones, 580 F.2d 219 (6th Cir. 1978) (applying Fed. R. Evid. 201); Turner, Judicial Notice and Federal Rule of Evidence 201-A Rule Ready For Change, 45 U. Pitt. L. Rev. 181, 196 (1983). Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed, it may also violate the general principle that appellate review should be limited to the record. Comment, The Presently Expanding Concept of Judicial Notice, 13 Vill. L. Rev. 528, 560 (1968); Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 293 (1944). Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. Turner, supra at 196. For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

Masters, 283 S.C. at 256, 321 S.E.2d at 197.

Thus, the Court should not take judicial notice as urged by Defendants because the facts are not indisputable, as required by South Carolina courts. Furthermore, to take judicial notice of the "facts" Defendants assert would deny Plaintiffs an opportunity to contest such facts and would violate Rule 210(c) of the South Carolina Rules of Appellate Practice. Accordingly, this Court should deny Defendants' request regarding judicial notice.

IV The Trial Court Correctly Held That Defendants Failed to Provide Each Child in the Plaintiff Districts with the Opportunity for a Minimally Adequate Educational Opportunity

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

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

In ruling on the ultimate issue in this case—whether Defendants are providing the required educational opportunities to students in the Plaintiff Districts—the trial court considered all evidence presented and found that Defendants are not providing what is required (12/29/05 Order ¶ 433 (“Have the Defendants provided the children in the Plaintiff Districts the opportunity to acquire a minimally adequate education? I find that they have not ”)) In Sections III, IV, and V of their Initial Brief, Defendants challenge this conclusion, arguing that the trial court erred by (III) failing to require Plaintiffs to prove that Defendants’ system of education legislation was the sole cause of the educational failures in the Plaintiff Districts, (IV) relying on PACT results as evidence of the lack of adequate educational opportunities in the Plaintiff Districts, and (V) failing to conclude that poverty—and not the education system itself—was responsible for the lack of student performance in the Plaintiff Districts

Defendants’ arguments are without merit, and the trial court's finding that Defendants failed to provide each child in the Plaintiff Districts with the opportunity to acquire a minimally adequate education should be affirmed

A Defendants Did Not Preserve for Appeal the Argument That a Heightened Causation Standard Applies

For the first time in this decade-old litigation, Defendants attempt to attribute a heightened causation threshold on Plaintiffs. Defendants have waived their heightened causation argument by raising it for the first time on appeal.

South Carolina law is clear that an attempt to raise an argument for the first time on appeal is improper and the argument will not be entertained. Batty v. Stanley, 291 S.C. 546, 550, 354 S.E.2d 571, 573 (Ct. App. 1987). “An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal it must be raised to and ruled upon by the trial court.” Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 224, 647 S.E.2d 488, 492 (Ct. App. 2007) (quoting In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004)).

There are four requirements for preserving issues at trial for appellate review. “The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” S.C. Dep’t of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)).

Defendants have argued that Plaintiffs must establish causation—and Plaintiffs agree. Defendants did not argue below that Plaintiffs had to establish sole causation, however. Defendants have waived the heightened causation argument, and it cannot be properly considered on appeal. This portion of Defendants’ appeal should be dismissed on this ground alone.

Moreover, Defendants did not raise this causation issue in their Statement of Issues. The South Carolina Appellate Rules require an appellant’s initial brief to contain “[a] statement

of all the issues presented for review ” S C R App P 208(b)(1)(B) "No point will be considered which is not set forth in the statement of issues on appeal " State v Duncan, 356 S C 138, 142, 587 S E 2d 691, 694 (2003), Wright v Craft, 372 S C 1, 23, 640 S E 2d 486, 497 (Ct App 2007), Collins Entm't, Inc v White, 363 S C 546, 559, 611 S E 2d 262, 268 (Ct App 2006) Therefore, the issue of causation, even if it had been raised and ruled upon below, cannot be considered

B A “Sole Causation” Requirement is Improper in This Matter

Defendants cite to several inapposite First Amendment cases and make the novel argument that Plaintiffs should have been required to establish that students in the Plaintiff Districts did not have adequate educational opportunities AND that their poor student achievement was caused solely by systemic failure of Defendants’ educational system (Defs ’ Initial Br 38-40) Further, Defendants claim that the trial court committed error by “inferring that *individual* failure was caused by some *systemic* failure of existing policies and programs,” (id at 39 (emphasis in original)), and that since poor student achievement was caused by "a variety of non-school related matters that will exist no matter what educational policies are adopted in South Carolina," (id at 40), Plaintiffs’ proof of causation failed In short, Defendants argue that Plaintiffs must eliminate from consideration **all** other possible causes for a student's low achievement before they can prove that the system failed the student Neither the trial court’s rulings, the record evidence in this litigation, nor applicable law supports Defendants’ causation argument

1 Defendants’ Causation Argument is Not Supported by Cases Considering Educational Issues

Citing three cases, Defendants now claim that in addition to establishing that Defendants’ education system was a cause of inadequate educational opportunities being

provided to the Plaintiff Districts, Plaintiffs now suddenly must eliminate all other potential factors for poor achievement among students in poverty and establish that Defendants are the sole cause of such failures (See Defs ' Initial Br at 38-40) None of Defendants' cases support their causation argument

First, the only education case Defendants cite, New York Civil Liberties Union v State, 771 N Y S 2d 563 (N Y App Div 2004), does not address their exclusive causation argument¹⁷ In fact, other education cases ignored by Defendants—including a subsequent appellate court opinion in New York Civil Liberties Union—expressly recognize that other factors can also contribute to causing educational inadequacy, but reject the idea that other contributing causes must be excluded

When the New York Civil Liberties Union matter was appealed to New York's highest court, the New York Court of Appeals found that "the Education Article does not require that there be a single cause in order for plaintiffs to state a claim " New York Civil Liberties Union v State, 824 N E 2d 947, 950 (N Y 2005) Another New York education case, one cited in the New York Civil Liberties Union opinion (but not cited by Defendants), further illustrates that establishing causation in this matter simply does not require the strict "sole-cause' analysis that Defendants urge In Campaign for Fiscal Equity v State, 801 N E 2d 326 (N Y 2003), the state's highest appellate court observed there may be many causal links to one outcome, the law does not require "a search for a single cause of the failure of New York City schools " Id at 341 (quoting Campaign for Fiscal Equity, Inc v State, 719 N Y S 2d 475, 535 (2001) ("The law recognizes that there may be many 'causal links' to a single

¹⁷ Defendants do not even cite New York Civil Liberties Union to support their causation argument Rather, they cite it for dismissing a case in which the plaintiff had not alleged systemic failure—which is not at issue in this litigation

outcome, and there is no reason to think that the Court of Appeals 1995 opinion mandates a search for a single cause of the failure of New York City schools ") As courts in other education-adequacy cases frequently recognize, a host of non-school related factors may affect achievement, and none sever the causal link between the defendants' deficient education system and the failures in the schools Indeed, they expressly recognize that "a myriad of factors" may influence student performance and multiple causes of educational failures Paynter v State, 797 N E 2d 1225, 1228 (N Y 2003)

Defendants claim that "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 ' Initial Br at 40) At its essence, this argument suggests that poor children cannot learn no matter what schools do and that schools cannot be the cause of or contribute to poor achievement Other courts have considered, and disposed of, various iterations of this causation argument For example, in Campaign for Fiscal Equity, the State of New York made this same argument through the testimony of their expert, Dr David Armor Dr Armor—also an expert for the State of South Carolina in this litigation—opined that "poor student performance is caused by socioeconomic conditions independent of the quality of the schools and [is] better remedied with investment in other resources " Campaign for Fiscal Equity at 341 New York's highest court rejected this causation argument

The Appellate Division agreed [with defendants' argument on socioeconomic disadvantage], reasoning that because of 'demographic factors, such as poverty, high crime neighborhoods, single parent or dysfunctional homes, homes where English is not spoken, or homes where parents offer little help with homework and motivation more spending on education is not necessarily the answer, and the cure lies in eliminating the socioeconomic conditions facing certain students This is partly an argument about why students fail, which we have rejected in the discussion of outputs But it is also a distinctly constitutional argument in the sense that choosing between competing beneficial uses of funds is a legislative task

Had we accepted [this] argument [during an earlier appeal and denial of defendants' motion to dismiss], we would have saved everyone considerable effort and expense by dismissing the case on the spot. We did not do so. Decisions about spending priorities are indeed the Legislature's province, but we have a duty to determine whether the State is providing students with the opportunity for a sound basic education. While it may be that a dollar spent on improving "dysfunctional homes" would go further than one spent on a decent education, we have no constitutional mandate to weigh these alternatives. And, again, we cannot accept the premise that children come to the New York City schools ineducable, unfit to learn

Id. (citation omitted) (emphasis added)

Similarly, the Vermont Supreme Court in Brigham v. State, 692 A.2d 384 (Vt. 1997), noted "To be sure, some school districts may manage their money better than others, and circumstances extraneous to the educational system may substantially affect a child's performance. Money is clearly not the only variable affecting educational opportunity, but it is one government can effectively equalize." Id. at 390.

The New Jersey Supreme Court is in accord. That court recognized that a monetary remedy "may fail to achieve the constitutional object [and] that no amount of money may be able to erase the impact of the socioeconomic factors that define and cause these pupils' disadvantages." Abbott ex rel. Abbott v. Burke, 575 A.2d 359, 374 (N.J. 1990). However, the court concluded that "even if not a cure, money will help, and [] these students are constitutionally entitled to that help. Like other states, we undoubtedly have some 'ineducable' students, but in New Jersey there is no such thing as an ineducable district." Id., see also Abbott ex rel. Abbott v. Burke, 693 A.2d 417, 439 (N.J. 1997) (stating although the "judicial remedy is necessarily incomplete, [and] at best it serves only as a practical and incremental measure that can ameliorate but not solve such an enormous problem. [t]he finiteness of judicial power does not diminish the judicial obligation to vindicate

constitutional rights ”), DeRolph v Ohio, 677 N E 2d 733, 747 (Ohio 1997) (recognizing that although “money alone is not the panacea that will transform Ohio’s school system into a model of excellence [the court] must ensure that there is enough money that students have the chance to succeed because of the educational opportunity provided, not in spite of it”)

As Plaintiffs argued throughout the trial and this appeal, at-risk children have special needs that must be met in order for them to avail themselves of the opportunity to receive a minimally adequate education See Hoke v State, 599 S E 2d 365, 389-90 (N C 2004) It is not the needs of at-risk children that is the primary cause of their failure, but Defendants' failure to meet those needs and provide appropriate opportunities for at-risk children to learn that is the cause of such high rates of failure in Plaintiff Districts As Dr Sandra Lindsay expressed it,

I don't know how many times youngsters in this state who are high poverty who have been given those opportunities and have shown that they can catch up, I don't know how many times they have to demonstrate to us that they can do that before we recognize that it's something that we should do for all of them, not just in those rare cases where the community has converged and the community has provided the resources for the -- now, can they do it absolutely Are we doing it in these plaintiff districts and in other high poverty districts? No, we are not

(Tr (10/7/03) 59 15-25)

Accordingly, Defendants’ new causation theory finds no support in the New York case cited by Defendants or other apposite education cases

2 Defendants’ Causation Theory is Not Supported by the Non-Education Cases Defendants Cite

Defendants also cite one South Carolina state court case and several federal court cases as support for their sole causation theory These cases involve different issues and do not support the sole causation argument Defendants now try to set forth

In the case at bar, Plaintiffs have been harmed by Defendants' failure to satisfy their constitutional duties regarding education. Defendants' cases are not about a failure to perform a required duty properly, rather they involve allegations of employers taking action against employees because of the employees' exercise of constitutionally protected First Amendment rights. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977), Stroman v. Colleton County Sch. Dist., 981 F.2d 152 (4th Cir. 1992), Greer v. Spartanburg Technical Coll., 338 S.Ct. 76, 524 S.E.2d 856 (Ct. App. 1999).

Further, Defendants mischaracterize the two-part causation test they now ask the Court to apply in determining whether Plaintiffs have established the requisite causation. (See Defs' Initial Br. 38-40.) Defendants argue that this balancing test requires **Plaintiffs** to prove both that their constitutional right to adequate educational opportunities was violated, that Defendants were at least a "substantial factor" in Plaintiffs' rights being violated **and** that no other factor contributed to causing Plaintiffs' rights to have been violated. (See Defs' Initial Br. at 39.) However, the test urged by Defendants, which was set forth by the United States Supreme Court in Mt. Healthy City, 429 U.S. at 286-87, does not place the burden on a plaintiff to prove both parts of the two-part test. Rather, Mt. Healthy City provides that, once a plaintiff has shown that the defendant's conduct was a substantial cause of injury and/or the complained-of action (in Mt. Healthy City, employer/defendant's failure to re-employ plaintiff), the burden of proof then shifts to the **defendant**. The defendant must establish "by a preponderance of evidence that it would have reached the same decision as to [plaintiff's] reemployment even in the absence of the protected conduct." Id. at 287.

In other words, the cases Defendants cite do not require Plaintiffs to eliminate all other causes. Indeed, in Greer and the other two constitutional cases cited by Defendants on the

causation issue, the plaintiffs only needed to establish that the defendant's terminating or failing to rehire them was attributable primarily or substantially, although not necessarily exclusively, to their protected actions See id., Stroman, 981 F 2d 152, Greer, 338 S C 76, 524 S E 2d 856

In Greer, the defendant college demonstrated that it cancelled a course the plaintiff had applied to teach primarily because of the plaintiff's deception in his application for the course rather than because of his constitutionally protected affiliation with a not for profit labor organization that advocated unionization

In Mt Healthy City, 429 U S at 287, the United States Supreme Court, in vacating and remanding a case for further proceedings, held that the plaintiff would be required to demonstrate that his constitutionally protected conduct was a substantial or motivating factor in his employer's decision not to rehire him. The court would then determine whether, by a preponderance of the evidence, the employer would have acted the same even without the plaintiff's protected conduct

In Stroman, 981 F 2d 152, the plaintiff teacher was required to demonstrate that his First Amendment protected speech played a substantial role or was a motivating factor in his employing school district's decision to discharge him, a showing that the defendant school district would have to rebut with proof that he would have been discharged in any event

These First Amendment cases do not apply to the case at bar. Plaintiffs are not required to establish that Defendants' actions or inactions were a substantial cause of their inability to have a proper educational opportunity and then also prove that no other cause contributed to their injury. Plaintiffs have proved causation

3 Defendants' Causation Theory is Not Supported by South Carolina's Causation Law

Plaintiffs are not required to establish that no non-school factors exerted negative impacts on each student's achievement, and the cases cited by Defendants do not provide otherwise. Similarly, South Carolina law regarding proof of causation does nothing to bolster Defendants' argument that under the "but for" test of causation, Plaintiffs must establish that no other factor contributed to their low academic achievement.

That a plaintiff in a negligence action¹⁸ must establish causation in fact by demonstrating that his injury would not have occurred "but for" the defendant's negligence is hornbook law. However, a negligence plaintiff need not also establish that it was defendant's act or omission that was the sole proximate cause or the only cause contributing to the plaintiff's injury. Rather, the complained-of action or inaction by defendant need only be at least one of the proximate concurring causes of the injury. See, e.g., Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998) (citing Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977)). The fact that other causes may have contributed to the result does not relieve a defendant from responsibility when his action or inaction is a contributing cause to the injury. State v. Dantonio, No. 4333, 2008 WL 179273 (S.C. Ct. App. Jan. 16, 2008) (distinguishing Horton v. Greyhound Corp., 241 S.C. 430, 128 S.E.2d 776 (1962)).

Plaintiffs are not required to prove that all causes other than Defendants' insufficient education system had anything to do with the performance of the students in Plaintiff Districts. Rather, Plaintiffs were properly required to demonstrate that Defendants' actions or inactions

¹⁸ Although this is not a negligence action, citation to negligence law offers the best parallel to the claims in this matter since the "but-for" rule is often discussed in negligence actions.

were a proximate, significant cause of the educational failings in Plaintiff Districts. Plaintiffs have established causation.

C Plaintiffs Satisfied Their Burden of Proving Causation

To prove causation in an education adequacy case, a plaintiff must prove that the state provides deficient inputs—teaching, facilities, and other instrumentalities of learning—which lead to deficient outputs—such as test results and graduation rates—and that this failure is causally connected to the defendant's system of educational policies and programs, including funding. See Paynter v. State, 797 N.E.2d 1225, 1228 (N.Y. 2003) (finding that causal link can be shown by connection to deficiencies in the state's funding system). Though Defendants cited Paynter, they chose only select quotations from that opinion. In that case, the Court of Appeals of New York held the question is not to determine the cause of a student's poor performance, but whether the state provided adequate resources. “the causes of academic failure may be manifold, including such factors as the lack of family supports and health care. The question, therefore, is whether the resources the State places in the classroom are sufficient to address such factors as family support and healthcare.” Id. at 1229.

New York's highest court found that plaintiffs needed to “establish a correlation between funding and educational opportunity . . . a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children.” Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d at 340. The court continued as follows:

The trial court reasoned that the necessary “causal link” between the present funding system and the poor performance of City schools could be established by a showing that increased funding can provide better teachers, facilities and instrumentalities of learning. [citation omitted]. We agree that this showing, together with evidence that such improved inputs yield better student

performance, constituted plaintiffs' prima facie case, which plaintiffs established

Id Plaintiffs' evidence on causation consists precisely of the proof of a causal link approved in Campaign for Fiscal Equity and related education cases—increased funding targeted to Plaintiff Districts can provide better teachers, facilities, and instrumentalities of learning that will yield better outcomes

Defendants reference only their "existing legislative programs" and "policies and programs" in connection with their causation argument, with no acknowledgement that a system of public schools must consist of more than policies, programs, and legislation (See Defs ' Initial Br at 38, 39) They seem to argue that so long as they provide a system of policies and legislation, they have discharged their constitutional mandate of providing adequate educational opportunities for each child Even assuming *arguendo* that Defendants' policies and legislation are entirely sufficient for the design of an adequate system, if the design is not implemented as set out in the policies and legislation, a systemic failure will occur for which Defendants are responsible In fact, the existing design of the educational system—legislation, programs, and policies—and the way Defendants implement (or fail to implement) that design both contribute to Defendants' failure to satisfy their constitutional mandate

Policies and legislation are certainly a part of the public school system, but a complete and adequate public school system must also include sufficient people with adequate training and skills properly deployed to meet the educational needs of each child, materials that are appropriate to that child's needs, instructional time that is sufficient to deliver real opportunities to learn, safe and adequate facilities that foster rather than distract from learning, and other educational services that are necessary and appropriate to meet the educational needs

of each child. Delivery of these opportunities must be made available through adequate funding that is properly targeted and deployed to meet the child's needs. In short, policies and legislation by Defendants are nothing without proper implementation. Implementation requires qualified people, materials, and time—the inputs that are at the core of educational opportunities.

Plaintiffs have presented more than ample evidence that the system of policies and legislation as implemented by Defendants did not enable Plaintiff Districts to provide adequate inputs—teachers, facilities, time, and instrumentalities of learning—and, therefore, were causal factors of the low achievement of large numbers of children in Plaintiff Districts.

Therefore, Plaintiffs have established the requisite causation by demonstrating that the educational system failed in its design and in its implementation and that external factors (such as poverty) contributed to this failure and should be considered by Defendants in creating an adequate system of education. Defendants' assertion that Plaintiffs have not established causation because they have not shown that poor achievement was caused by the system only (Defs' Initial Br. at 38-39) is simply not supported by law.

D The Trial Court Correctly Held That Defendants Must Address the Effects of Poverty on Student Achievement

As explained in the following excerpt of the trial court's order, the interplay between poverty and student achievement is key to this litigation:

This [consideration of the relationship between poverty and achievement] brings the Court to the question that lies at the heart of this case. Although schools cannot reasonably be expected to eliminate poverty, can schools address in specific ways the effects of poverty on achievement, and, if so, must they do so as a matter of constitutional obligation? The Abbeville Court provides the answer: "We hold today that the South Carolina constitution's education clause requires the General Assembly to provide the opportunity for **each** child to receive a minimally adequate education." Abbeville, 335 S.C. at 68, 515 S.E.2d at 540 (emphasis added). The modifier "each" is dispositive of the question.

“Each child” refers to children born to poverty as surely it does to those born to affluence The State s obligation to provide an opportunity for a minimally adequate education is, in no way, reduced to children born to poverty It is in fact enhanced for such children

(12/29/05 Order ¶ 428 (bold emphasis in original, italicized emphasis added)) The trial court then squarely held that Defendants have a constitutional responsibility to overcome the effects of poverty "to the extent educationally possible " (12/29/05 Order ¶ 428)

The trial court’s finding that Defendants must address poverty’s impact in providing education is well supported by the weight of evidence at trial On appeal, however, Defendants claim that the trial court erred in this finding (See Defs ’ Initial Br 52-56)

In making their argument, Defendants seek to divorce the facts and statistics regarding the impact poverty has on academic achievement of students in the Plaintiff Districts from South Carolina’s constitutional mandate to provide each student with the opportunity to obtain a minimally adequate education In its order considering cross-motions for reconsideration, the trial court plainly disagreed

All witnesses, including the State’s witnesses, agreed that all students, including at-risk students, can learn at high levels Many witnesses, including defense experts, testified regarding the resources and programs needed for at-risk students to achieve at high levels Examples provided by these witnesses reinforce the conclusion that at-risk students can and do learn at high levels if provided the right learning environment and skilled teachers

(7/12/07 Order ¶ 54, see also Tr (9/23/04) 23 17-18, 24 11-12 (Armor), (9/27/04) 62 13-22 (Walberg), (6/18/04) 124 1-13 (S Smith))

Nonetheless, Defendants continue to argue that because the effects of poverty cannot be overcome by factors within the control of the schools, the trial court’s ruling erroneously requires them to “legislate away the affect of poverty on achievement ” (Defs ’ Initial Br 56)

In other words, Defendants' argument is that poor children can't learn,¹⁹ schools can do nothing about it, and, therefore, the schools shouldn't have to try

Common sense and the evidence presented at trial demonstrate that schools, and the teachers and educational programs within them, do affect achievement. Relying heavily on the testimony of Defendants' own experts, Plaintiffs have demonstrated that although poverty is a reality in the lives of many children in the Plaintiff Districts, the obstacles to achievement faced by these children can be overcome with quality teachers and targeted educational programming. (See Tr. (6/29/04) 118 21-23 (Smith), (9/21/04) 138 12-19 (Guthrie), (9/28/04) 48 12-20 (Walberg).) In other words, education can be tailored to provide opportunities to impoverished at-risk children.

Defendants simply cannot rest on their argument that poverty itself is the exclusive, unremediable cause of poor achievement. The abysmal educational results in the Plaintiff Districts are attributable to Defendants' failure to provide them with adequate educational opportunity. The trial court's Order finding that Defendants failed to satisfy their obligation to provide a minimally adequate educational opportunity to each child in the Plaintiff Districts should be affirmed.

¹⁹ Illogically, although disclaiming the ability or responsibility to help those children who are not succeeding, Defendants conveniently are quick to take credit for those at-risk children who are achieving some measure of educational success. (Compare Defs' Initial Br. 46 ("The evidence establishes that the relationship between PACT scores and poverty is universal and is not related to any measure of school quality[]") with id. at 51 ("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").) Defendants cannot have it both ways. Either schools make a difference, or they don't.

E The Trial Court Properly Rejected Defendants' Attempt to Establish Poverty as the Exclusive Cause of Poor Achievement

Defendants claim that their “bad schools” are not the cause of “bad achievement ” (Defs ’ Initial Br 53) (“Bad achievement is not caused by bad schools ”) To support this argument, Defendants rely almost exclusively on one exhibit—Defendants’ Exhibit Number 3307, pages 3-4 (hereinafter “T E X 13902”²⁰)—which was presented by their expert Herbert Walberg Based on that exhibit, Defendants claim that poverty, not failed educational programs and policies, explains the low achievement in the Plaintiff Districts T E X 13902 diagrams how poverty impacts such things as family status, divorce, and child rearing and how those factors in turn affect a child’s abilities and ultimately achievement (See Defs ’ Initial Br 53-54)

Focusing on that exhibit in a vacuum, Defendants argue that the importance of the exhibit is that neither schools nor teachers are included in the diagram (Id at 55 (“What is important to this case about Dr Walberg’s exhibit and [Plaintiffs’ expert] Dr Anderson’s reaction to it is that neither mentions schools at all ”) From there, Defendants jump to the unwarranted conclusion that “the connections between poverty and achievement are not school related ” (id), making “the poor achievement upon which the trial court relies to justify a finding in favor of Plaintiffs is not causally connected to education policy ” (Id)

Defendants’ argument completely misconstrued Dr Walberg’s exhibit and his testimony In fact, Defendants’ conclusion is even contrary to the testimony of Dr Walberg’s own trial testimony about the exhibit In discussing the exhibit, Dr Walberg agreed that the model **does** demonstrate how poverty impacts achievement Dr Walberg stated “I don’t

²⁰ Defendant’s Exhibit Number 3307 was a multi-page exhibit with numerous unrelated pages During trial, the exhibit now relied on by the General Assembly was referred to as “T E X 13902 ”

mean to say that all of the factors are represented [in this exhibit] I think this is just a way to indicate more specifically than just poverty, how poverty operates ” (Tr (9/27/04) 29 6-8) In fact—directly contradicting Defendants’ appellate argument that the exhibit proves there is no relationship between educational policy and poor achievement (Defs ’ Initial Br 55)—Dr Walberg admitted that the model could be made more complex by putting teaching qualities between ability and achievement (Tr (9/27/04) 26 24-27 2) He testified that if he were to include school factors on T E X 13902, he would include them “beneath and between child’s ability and achievement (Id at 84 6-21) Contrary to Defendants’ argument, Dr Walberg specifically testified, “[T]he higher quality of the school could make the child more able ” (Tr (9/27/04) 85 6-8 (emphasis added))

Similarly, Defendants have mischaracterized the “reaction” of Plaintiffs’ expert, Dr Loren Anderson, to the diagram used by Dr Walberg Defendants’ statement that Dr Anderson’s reaction to the diagram does not “mention[] schools at all” (Defs ’ Initial Br 55) is not true Within the very pages of Dr Anderson’s testimony cited by Defendants, Dr Anderson testified that the diagram contained a “glaring error” because “there’s no box or rectangle indicating school at all ” (Tr (11/29/04) 20 3-5) “This model suggests that students can achieve without ever going to school To completely eliminate any kind of schooling factor or schooling variables is so counterintuitive I mean, most people would not learn mathematics if they didn’t go to school ” (Id at 119 12-120 18) Dr Anderson explained that the diagram “comes out of a literature from the Child Development Group where they’re interested in a general understanding of the relationship between poverty and achievement with no concern whatsoever for the quality of the school in which the child gets ” (Tr (11/29/04) 20 7-12)

Although their argument regarding the relationship between poverty and achievement is focused only on the Walberg exhibit, in their Statement of Facts, Defendants improperly include additional discussion of their claim that there is no causal relationship between the two (See Defs ' Initial Br 20-21 (discussing method of "controlling [statistics] for poverty"))

In that discussion, Defendants rely on the testimony of another one of their experts, David Armor, who based his testimony on calculations that he had "controlled for poverty"²¹ (Tr (9/23/04) 24 6-10) In arguing that low achievement among poor children is purely a function of their socio-economic status, Dr Armor examined the achievement gap between the Plaintiff Districts and the rest of the state on the PACT at various grade levels He then "adjusted for poverty" and presented the achievement gap between the Plaintiff Districts and the rest of the State when poverty had been eliminated Although the Plaintiff Districts continued to score below the rest of the state in almost every example, Dr Armor found that the difference in scores was not statistically significant in most instances and concluded that "nearly all" differences in academic achievement are explained by poverty²² (Tr (9/23/04) 49 9-10)

²¹ Defendants spend two paragraphs in their Statement of Facts discussing the method of "controlling for poverty " (Defs ' Initial Br 20-21) Plaintiffs do not agree that "any analysis that seeks to determine the impact of any variable on achievement must control for poverty " (Id_ at 21) Furthermore, Defendants' narrative discussion of this issue includes virtually no citations Consequently, Plaintiffs ask this Court to disregard Section 9 of Defendants' "Statement of Facts" with the exception of any direct quotes to the orders of the trial court

²² In the example of fifth graders on the math PACT in 2003, however, Dr Armor admitted that the difference between the Plaintiff Districts and the rest of the state was statistically significant even when adjusted for poverty (Tr (9/23/04) 38 18-39 1) Although he did not opine on the cause of the difference, he testified that poverty did not entirely account for the difference in scores (Id_ at 39 15-16) Dr Armor likewise found statistically significant differences in fourth graders on the math PACT in 2002 (id_ at 43 23-44 10) and fifth graders on the math and ELA PACT in 2001 (id_ at 46 1-9) Dr Armor described these findings as a "blip" in the data (id_ at 39 25-40 5), but the reasonable conclusion to draw is that school-related factors were causing the difference in scores

Recognizing the absurdity of this argument, the trial court found the testimony that students in the Plaintiff Districts score similarly to students in the rest of the state after adjusting for poverty to be “unpersuasive ” (7/12/07 Order ¶¶ 50-51) To the contrary, the trial court correctly held that “poverty is a reality in the lives of the students in the Plaintiff Districts which cannot be factored out ” (12/29/05 Order ¶ 419)

The trial court properly focused on poverty as a real factor in the lives of the children in the Plaintiff Districts The court’s analysis, which culminated in its finding that Defendants must provide such children educational opportunities that are meaningful to them—and not simply opportunities that are “one-size-fits-all”—was correct on this important point and should be affirmed

F The Trial Court Correctly Held That Poverty Can Be Overcome Through Education

Additionally, the record is replete with other evidence presented by Plaintiffs that establish that poverty exists but can be overcome through appropriate education Again, Defendants have mischaracterized some of this evidence

In their Initial Brief, Defendants emphasize the statistical correlation between poverty and achievement (Defs ’ Initial Br 44-46) As they correctly point out, experts for both sides agreed that the correlation was approximately 7 Defendants err, however, in concluding that the magnitude of this correlation proves that poverty is the exclusive cause of poor achievement of impoverished children and cannot be overcome As explained by Dr Lorin Anderson, correlation does not equal causality (Tr (11/5/04) 15 9-13) Plaintiffs’ evidence showed that school-related factors can have a significant impact on the achievement of poor children The trial court agreed and found that specific program and strategies “show

considerable promise in ameliorating at least the effects of poverty on achievement ”
(12/29/05 Order ¶ 432)

1 Evidence at Trial Proved That School-Related Factors Do Affect the
Achievement of Impoverished Students

Defendants contend that improved inputs would not impact achievement in the Plaintiff Districts (Defs ’ Initial Br 22, n 13) Defendants cite to the testimony of Dr Greg Hawkins to support their contention that school-related variables have no impact on achievement Arguing that poverty overwhelms any other variable, they cite to Dr Hawkins testimony that 3 3 % of the difference in PACT test scores for impoverished children is can be attributed to teacher experience (Id_ at 45 (citing Pls ’ Ex 1458/5051) Defendants conveniently omitted Dr Hawkins’ testimony that the lower number of teachers with advanced degrees in the Plaintiff Districts explains 7 7 % of the difference in PACT scores and lower teacher salaries explain 16 8 % of the difference (Pls ’ Ex 1458/5051) “[W]hen we get down into teacher experience, teachers with advanced degrees, and average teachers’ salaries, yes, those are very, very important factors and they do differ substantially between high poverty schools and our more affluent schools ” (Tr (8/14/03) 49 5-11) Dr Hawkins testified that his findings demonstrate that when, for example, teacher salaries increase, PACT scores also increase (Id_ at 47 23-48 15)

Defendants also rely on the testimony of their own experts, particularly Dr Armor, who again “controlled for poverty” and concluded that school-related factors do not significantly impact the achievement of impoverished students Dr Armor’s nearly identical analysis to the analysis in the present case was rejected by the Court of Appeals of New York in Campaign for Fiscal Equity, Inc v State, 801 N E 2d 326, 341 n 8 (N Y 2003) The appellate court adopted the findings of the trial court, which held

Dr. Armor's analyses are not persuasive. First, all of Dr. Armor's studies are flawed by their reliance on single years of data. As noted above, education is a cumulative enterprise, and student outcomes are dependent not just on the resources that they receive in a single school year, but on the resources that they receive over years of schooling. Dr. Armor's analyses are not probative because they rest on the premise that students' test results in a single year can be compared to the resources available to the student in that single year to gauge the effectiveness of resources.

The court also finds that all of Dr. Armor's results are skewed by his decision to 'level the playing field' by adjusting test scores to account for socioeconomic characteristics of at-risk students. This decision rests on the premise that was not established at trial: that at-risk students' educational potential is immutably shaped by their backgrounds.

Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001)

In concluding that school-related factors do not impact achievement, Dr. Armor relied upon regression analysis, a statistical technique that examines the relation of a dependent variable to specified independent variables. On rebuttal, Dr. Lorin Anderson testified regarding the flaws in the defense experts' statistical data and presented his own interpretation of the defense experts' data, which demonstrated that school-related factors do have a meaningful effect on achievement even for children living in poverty.

The regression analysis used by Dr. Armor²³ is problematic because the outcome of the analysis depends a great deal on the variables used. "[B]y the choice of the collection of variables, you're actually influencing the results that you're likely to get." (Tr. (11/5/04) 37:5-7, see also id. at 62:13-22 ("I am suggesting that sometimes we make choices and the choices we make influence the interpretations we're going to have.")) By putting poverty into the analysis testing the effect of teacher quality variables, Dr. Armor constrained what "could emerge as plausible explanatory factors." (Tr. (11/5/04) 31:3-7.) To demonstrate this point,

²³ Other defense experts, including Dr. Walberg, also used regression analysis as the basis for their conclusions.

Dr Anderson used regression analysis to try to eliminate poverty as an explanatory factor because the finding that poverty does not impact achievement is counterintuitive based on the 7 correlation between poverty and achievement (Tr (11/5/04) 32 5-11) When analyzing the impact of both poverty and 2002 PACT scores on 2003 PACT scores, the 2002 PACT scores are a far better predictor of what the 2003 PACT scores will be (Tr (11/5/04) 32 5-36 12, Pls ' Ex 6835C, 6835D) “[P]overty is no longer significant within that regression equation, that I have through regression systematically eliminated the impact of poverty in PACT 2003” just as Dr Armor “virtually eliminated the impact of teacher quality” in his analysis (Tr (11/5/04) 36 6-12) Regression analysis is easily manipulated because of its inability to adeptly measure the interrelationships among the variables even though “it’s in the interrelationships that the causal explanations really lie ” (Tr (11/5/04) 39 20 40 4, Pl Exh 6835E) If regression analysis can be manipulated to eliminate poverty from having a significant correlation with achievement, it can certainly be manipulated to eliminate school-related factors like teacher experience

Rather than analyzing one teacher quality factor at a time as Dr Armor did, Dr Anderson conducted statistical analyses wherein he combined teacher quality factors (advanced degrees, continuing contract, and returning to school) into a composite teacher quality variable He testified that a composite variable increases the reliability of the analysis and is more reflective of reality because these teacher characteristics often go hand-in-hand (Tr (11/5/04) 78 2-12) He then correlated the composite teacher-quality variable with poverty and performance on PACT 2003 The composite teacher-quality variable had a - .417 correlation with poverty meaning that there are fewer teachers with the desired teacher characteristics in schools where there is a higher concentration of poverty (Id. at 74 19-76 14, Pl Exh

6835H) The composite teacher-quality variable had a .412 correlation with the PACT 2003 scores indicating that 16 to 18 percent of the variance in PACT 2003 could be attributed to teacher-quality factors (Tr (11/5/04) 76 16-21) “Because teacher quality is a manipulable or alterable variable, what this would suggest is any attempt to increase composite indicators of teacher quality would in fact have a significant impact on PACT 2003 ” (Tr (11/5/04) 81 5-9)

2 Evidence at Trial Proved That Specific Educational Programs and Teaching Practices Positively Affect the Achievement of Impoverished Students

Although Defendants argue that school programs do not affect a poor child’s achievement, Defendants’ own experts disagree Dr Herbert Walberg testified that “preschool programs, full-day kindergarten, and school parent problems mitigate [the effect of poor children learning at a slower rate]” and that the “depressing patterns [in low achievement of children in poverty] are hardly inevitable ” (Tr (9/27/04) 43 11-19) Dr Walberg further testified that additional programs should be used to raise achievement for children in poverty

Q You believe that school -- that public schools should try to compensate for the disadvantages that poor, minority students have in learning?

A Yes, I think they should try

Q In order to try to reduce the gap between poor and non-poor achievements, it could be that we need special programs or additional programs or a longer time in school, correct?

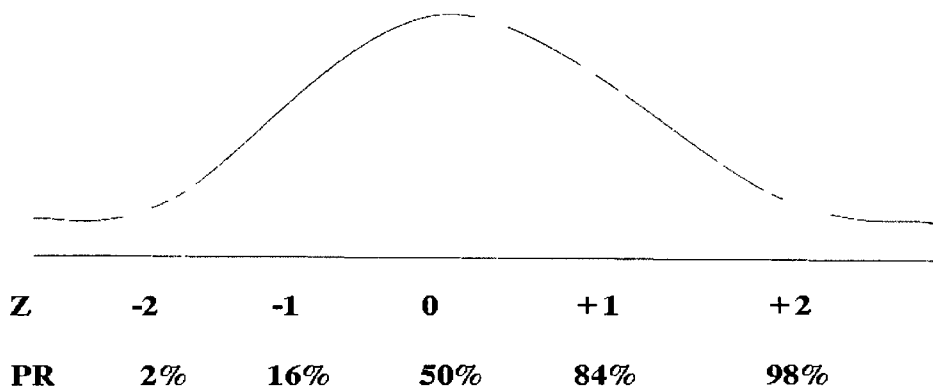
A Yes, I think those are among the better choices

(Tr (9/28/04) 48 12-20, see also Tr (9/28/04) 70 21-71 4 (“I believe that [sound educational programs and parental involvement] can compensate partially for [socioeconomic effect] if you have extraordinarily good programs ”)) Dr Walberg also identified other strategies that would produce remarkable results if implemented in the Plaintiff Districts Some examples of the strategies discussed by Dr Walberg include

Strategy	Effect on Achievement
Using cues in instruction	1 25
Using reinforcement in instruction	1 17
Computer-assisted instruction for early elementary students	1 05
Homework with teacher's comments	83

(T E X 13922 (part of Defs ' Ex 3307)) Understanding the dramatic difference these strategies can make requires some explanation For example, consider the effect of high quality "cues" in the classroom Implementing high quality cues results in a 1 25 standard deviation effect on student achievement Standard deviations are measured against what is commonly known as the "bell curve " The mean score is considered a zero in terms of standard deviation Fifty percent of the measured population is scoring above the mean and fifty percent is scoring below the mean Sixty-eight percent of the total population is between -1 and +1 standard deviations In terms of achievement, this means that only 16% of the population is scoring above one positive standard deviation This concept is best illustrated by the following graph

Curve 1
The Normal Curve, z-scores, and Percentile Ranks



6835 K

The graph shows the tremendous difference 1.25 standard deviations can have on the achievement in the Plaintiff districts. As Dr. Anderson testified, an effect size of 1.25 would literally move the entire distribution of students to the right. (Tr. (11/5/04) 115:6-13.) Once the distribution moves, the average student in the new distribution would be scoring better than ninety percent of the students in the initial population. (Id. at 114:15-19.) The strategies and the effects advanced by Dr. Walberg apply to all children including those in the Plaintiff Districts. (Id. 115:14-23.) The incredible effect that these strategies can make highlights the importance of quality teachers in the classroom and underscores the undisputed fact that all children can learn.

Testimony has shown that implementation of these strategies can and does help student achievement. This is evidenced in schools using these strategies that have been able to reach high achievement levels with at-risk students. Dr. Walberg described schools throughout the nation that are exemplars of this practice. Specifically, Dr. Walberg identified both Catholic schools and inner-city New York schools that have consistently shown high achievement levels with their at-risk populations. (Tr. (9/28/04) 15:1-23, 22:1-23.) The demographic characteristics of these schools are similar to the Plaintiff Districts. Examples provided by Dr. Walberg and others reinforce the conclusion that these students can and do learn if provided the right learning environment and skilled teachers.

Dr. Walberg's beliefs about the positive effect of educational programs were reiterated by another expert for Defendants, Dr. James Guthrie. Dr. Guthrie agreed that smaller class size, low pupil teacher ratio, high quality preschool, and full-day kindergarten all have positive effects on students from low-income backgrounds. (Tr. (9/21/04) 149:17-152:13)

Defendants' experts are simply echoing the previous testimony of Plaintiffs' witnesses Inez Tenenbaum testified that "[t]he research demonstrates that it is possible, that children in high poverty areas given the opportunity to have high quality early childhood education can overcome the disadvantages of poverty " (Tr (5/04/2004) 196 4-7) Other witnesses reiterated this idea with regard to specific programs For instance, Terry Peterson testified that research shows "after-school programs enhance learning, builds skills and connections, improve attendance, but also can reduce some of the negative risk factors that we also need to deal with " (Tr (5/25/04) 72 24 - 73 3) Blue Huggins testified in particular about the dramatic effect that the reading initiative program had on her own child (Tr (9/26/03) 172 22-173 12 ("The growth was immeasurable ")) Terry Peterson also emphasized the necessary foundation an early childhood program provides "A quality program can make a difference in the starting point of a child's learning It's almost like if you are a painting a wall of a house and somebody else comes in and does all the prep work, the spackling and all of that and you just come in and paint " (Tr (5/25/04) 131 5-13)

As this evidence shows, educational programs and teaching practices can overcome the effects of poverty, and poverty is therefore not the exclusive cause of poor achievement This evidence supports the conclusion that inadequate educational programs and policies, not poverty, are the cause of poor academic achievement in the Plaintiff Districts Contrary to Defendants' argument, Plaintiffs have properly established causation The trial court's judgment that Defendants have failed to satisfy their constitutional responsibility to provide a minimally adequate educational opportunity to each child in the Plaintiff Districts should be affirmed

V The Trial Court Properly Considered Evidence of PACT Scores As a Reliable Indicator of the Absence of a Constitutionally Adequate Educational Opportunity

Defendants incorrectly claim that the court erred by considering the PACT scores of children in the Plaintiff Districts (in conjunction with other factors such as poverty) in determining that Defendants have failed to provide adequate educational opportunities (See Defs ' Initial Br at 40-52)²⁴ Contrary to their argument, the trial court properly relied on the PACT results as evidence that educational opportunity was lacking in the Plaintiff Districts

First, the trial court expressly recognized that opportunity is distinct from achievement, and its rulings were fully consistent with that distinction Second, the trial court followed the experts who testified at trial and courts around the country in relying on evidence of outcomes as a reliable indicator of opportunity notwithstanding the existence of many non-school related factors affecting achievement, and the PACT results were particularly instructive in that regard Finally, the trial court properly rejected Defendants' argument that achievement by some proved adequate opportunity was available to all The trial court's ruling that children in the Plaintiff Districts were not receiving a minimally adequate educational opportunity was properly supported by the evidence in the record and should be affirmed

A The Trial Court Expressly Recognized That Opportunity is Distinct From Achievement, and Its Rulings Were Fully Consistent with That Distinction

Defendants argue that, in relying on evidence of PACT scores to prove the absence of educational opportunity, the trial court effectively equated opportunity with achievement

²⁴ Defendants argue that the trial court erred by concluding there was a "causal relationship" between poor PACT scores and the absence of educational opportunity The trial court did not find a "causal relationship" between poor PACT scores and the absence of opportunity A causal link exists between school quality and achievement, as discussed more fully below The trial court relied on evidence of PACT scores as a reliable indicator of achievement (12/29/05 Order at 159) This was entirely appropriate and indeed intended by the creators of the PACT users' guide, as discussed more fully below

(Defs ' Initial Br at 41) To the contrary, the trial court expressly held that "opportunity does not mean achievement or guaranteed success" and stated that it would not rely exclusively on evidence of outputs to determine the presence or absence of educational opportunity in the Plaintiff Districts

Inputs, outcomes, and the impact of poverty must be taken into account in determining whether or not the State has fulfilled its constitutional obligation

(12/29/05 Order ¶ 53, see also 7/12/07 Order ¶ 51) In reaching its conclusion that adequate educational opportunities were not present in the Plaintiff Districts, the trial court did consider, and was persuaded by, the evidence of low PACT scores (12/29/05 Order at p 160 (low PACT scores combined with high incidence of poverty "led [the court] to the conclusion that the children of the Plaintiff Districts are not receiving the opportunity to obtain a minimally adequate education "))

The trial court did not rely solely on the evidence of PACT scores, however, and ultimately concluded that Defendants were failing to provide an adequate educational opportunity because of the lack of early childhood education programs (See 12/29/05 Order at 162) Accordingly, the trial court's finding that the requisite educational opportunity was not present was based not only on the evidence of poor educational outcomes (low achievement on PACT), but also on the trial court's finding of inadequate inputs (lack of early childhood education)

Further, the trial court did not equate opportunity and achievement by "fall[ing] prey to the fallacy that every student would succeed if the opportunity were present " (Defs ' Initial Br at 41) Plaintiffs have never argued, and the trial court expressly denied, that every single child must achieve a "minimally adequate education" to conclude that a minimally adequate educational opportunity exists (12/29/05 Order ¶ 33)

This lawsuit is not about whether every single child must succeed to satisfy the Constitution. Certainly, if every single child in the Plaintiff Districts were passing PACT, this litigation would have been wholly unnecessary. By citing to the experiences of one child, Plaintiff Tyrin B, as an example of how Plaintiffs have failed to establish that poor achievement was caused by a lack of opportunity (Defs ' Initial Br at 42), Defendants seek to detract from the sheer force of the numbers of children who are failing, with no chance of becoming productive citizens.

As discussed above, Abbeville does not require a showing that each and every child in Plaintiff Districts who failed to achieve at acceptable levels had no non-school factors exerting negative impacts on his or her achievement. Abbeville instead requires a showing that Defendants failed to provide an opportunity for each child to receive a minimally adequate education, which is proved by showing inadequate inputs leading to unsatisfactory results on a system-wide rather than an individual basis. With half the children in the Plaintiff Districts not succeeding, the evidence plainly established that outcomes on a system-wide basis were patently unacceptable and indicated a lack of adequate educational opportunities.

B The Trial Court Properly Considered Evidence of PACT Scores in Addition to Other Evidence of Inputs and Outcomes, As a Reliable Indicator of Educational Opportunity

Experienced educators and state policy makers who testified at trial agreed that outputs are important in evaluating the effectiveness of an education system, (see, e.g., Tr (08/17/04) 117 11-19 (Harrell), (9/21/04) 87 24-88 2 (Guthrie)), and that student performance on state tests is an indicator of whether schools are providing their students with the opportunity to acquire a minimally adequate education. (Tr (09/08/03) 15 5-16 ("The General Assembly defined by statute what is the minimum adequate standard that you must meet is basics. If you

don't meet basics on our PACT test, you're not meeting our standards "), (05/03/04) 39 15-53 (Rep Gilda Cobb-Hunter testifying that test results and report cards issued for Orangeburg 3 demonstrated that the children in that district, who are her constituents, are not receiving the opportunity for a minimally adequate education))

Similarly, other courts around the country have specifically considered state education goals, standards, performance assessments, graduation rates, and post-secondary experience in determining whether the state is living up to its constitutional obligations See, e g , Hoke County Bd of Educ v State, 599 S E 2d 365, 381 (N C 2004), Leandro v State, 488 S E 2d 249, 259 (N C 1997) (finding that test performance scores and other "such 'output' measurements may be more reliable than measurements of 'input' such as per-pupil funding or general educational funding provided by the state"), Bismarck Pub Sch Dist #1 v State, 511 N W 2d 247, 270 (N D 1994) finding that "[s]tudent output is the appropriate measure of education quality), Montoy v State, 138 P 2d 755, 769 (Kan 2006), Abbott ex rel Abbott v Burke, 495 A 2d 376, 384 (N J 1985), Londonderry v State, 907 A 2d 988, 1000 (N H 2006)

In fact, Defendants themselves are more than willing to recognize a probative relationship between opportunity and achievement when it suits them Thus, Defendants argue paradoxically that while PACT scores cannot establish the *absence* of educational opportunity, they can establish the *presence* of educational opportunity (See Defs ' Initial Br at 47) Plaintiffs agree that the PACT test results, alone, do not establish the presence or absence of educational opportunity, but this does not invalidate their reliability as an indicator of opportunity Plaintiffs also agree that there are a variety of non-school related factors affecting achievement, but, as discussed above, these factors must be taken into account when evaluating

the presence or absence of educational opportunity because they must be overcome to the extent educationally possible

Defendants' example of the gender-based achievement gap is illogical in its argument that the girls and boys are or should be provided with different opportunities because they demonstrate different proficiencies (See Defs ' Initial Br at 42-44) Instead, the opportunities being provided in the school must be sufficiently adequate to enable all children—boys and girls alike—to acquire a minimally adequate education regardless of the unique learning challenges they may face

C PACT Results Are Particularly Significant in This Case

In addition, evidence of PACT test results was particularly significant in light of the relationship between PACT and the "minimally adequate education" discussed in Abbeville PACT tests are the standards-based assessments adopted by the State to measure whether its children have acquired the knowledge and skills the Defendants, through the EAA curriculum standards, have determined that they need to know and be able to do (Defs ' Ex 2621 at 4) PACT test results are the very basis upon which the quality of schools and school districts are evaluated under the Educational Accountability Act ("EAA"), with student performance on the PACT test determining the quality grade assigned by the State to the school for purposes of the published report cards S C Code Ann 59-18-900 (2004) (See also Pls ' Ex 6362 at 11-20, Tr (1/8/04) at 199 16-200 23, Pls ' Ex 6346C)

Despite the mandate from the EAA, Defendants selectively quoted from the PACT Score Report User's Guide (Defs ' Ex 804, duplicate of Defs ' Ex 2621) to support their proposition that PACT scores should not be used to evaluate the adequacy of educational opportunity in schools (See Defs ' Initial Br at 46) Defendants selectively quoted from a

passage on page 8 of the PACT Score Report User's Guide (which Defendants referred to as the "PACT User Manual"), but omitted key language and ignored the testimony of Dr. Sandra Lindsay, one of the authors of the guide, regarding its meaning. The entire passage from the manual reads as follows, with the language omitted by Defendants in bold print:

Cautions in the Use and Interpretation of PACT Data

Socioeconomic and Other Background Performance Factors

A frequent misuse of test data is the tendency to equate high test scores with educational quality. **Users of the data should remember that test data constitute a single source of information that should be used in conjunction with other relevant information to evaluate educational quality.** For example, characteristics 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.

Comparisons Among Student Subgroups

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. 2621 at 8 (emphasis added), quoted in Defs.' Initial Br. at 46.) The language omitted by Defendants changes the meaning of the excerpt and, in fact, makes the quote contradict Defendants' claim that factors such as poverty have no place in evaluating educational programs.

Further, Defendants' argument omits relevant trial testimony from Dr. Sandra Lindsay, Deputy Superintendent for the Division of Curriculum Services and Assessment at the State Department of Education. Dr. Lindsay testified that the language used in the manual did not

mean what Defendants argue in their brief²⁵ Dr Lindsay testified that the cautions in the use and interpretation of the test data refer to "the use of any single score as an indication of what a youngster needs or what you might want to do in program for that child as one piece of information," (Tr (10/7/03) 123 13-16), and to the use of the test scores **alone** to evaluate the effectiveness of a program or school, (id at 123 21-124 3 (cautioning against comparing the effectiveness of schools based solely on test scores, without taking into account demographic differences in the school populations and the kinds of resources and teaching available to them), 125 8-23 (referring to "abuse" of SAT scores as a measure of how effective a program or school is)) In fact, "the crux of much of our work in identifying gap information and using test score information [is] to indicate who is being served in South Carolina, who may need additional resources " (Id at 150 1-4) Dr Lindsay found that the "overwhelming data" from the Plaintiff Districts shows that the children in those schools are not being provided the opportunity to obtain a minimally adequate education because of the key lack of high quality teachers in sufficient numbers in Plaintiff Districts' schools as well as other resources (Id at 146 11-16, see generally id at 145 2-148 5 and 155 13-157 6)

Q Now if you consider [PACT data from Plaintiff Districts] in the context of other information that you have available to you, the other test data, for example, and that would include the S A T scores which should not be considered standing alone, the A C T scores, the same thing, should not be considered standing alone, the graduation rates, the exit exam results

When you look at the teacher characteristics, when you look at this whole package of information available to you on the Plaintiff Districts, do you have any reluctance in saying the students in the Plaintiff Districts are not being provided with the opportunity to acquire a minimally adequate education?

²⁵ Dr Lindsay pointed out that "since I helped to write it, I think probably I can give you some indication of what the genesis of that information is " (Tr (10/07/03) 124 12-14)

A I have no problem in stating that I use test scores because EAA requires us to use test scores That's very specific in the law as to the reporting of those, issuing of report cards that details that information

It's the piece of data that I'm required by law to use, but it's not the only data as you have indicated that we have There's tremendous anecdotal data from teachers, there is the other data that you have just indicated from other sources

There are the grades of children in – on tests that teachers have made There's the numbers of youngsters who are being retained There's the evidence of the lack of four year old program slots for our state

There's – it ranges the whole range I wouldn't have to rely on piece of data, a single piece of data All of it shows the same, very sad message for many of the – for the Plaintiff Districts and actually for other high poverty districts in our state

It – again, I said to you that I did not sleep well last night because of this very slide and the faces of the children that it represents There are large numbers of youngsters who are Below Basic, who have not any chance of mastery of grade level standards, of moving through the grade levels and realizing the dreams that they have for their futures

(Id at 155 13-157 1)

Witnesses consistently testified that a score of “Basic” on the PACT test is equivalent to the knowledge and skills necessary for a minimally adequate education (See Tr (1/8/04) 186 6-9 (Wilson) (“[B]asic is the minimum that a student should have As a matter of fact, the Education Accountability Act says a student that cannot perform basic level three years in a row must be retained ”), (8/14/03) 180 16-19 (Hawkins) (“In my mind and in my opinion I think that the state has operationally defined minimal adequacy in terms of PACT basic ”)) Nevertheless, Defendants argue that the curriculum standards tested by PACT are merely aspirational Incredibly, they argue that because a score of Basic demonstrates skills beyond what would be considered minimally adequate, “a significant percentage of those scoring below basic may have achieved far more than what Abbeville requires ” (Def ’s Initial Br at 51) In making this assertion, Defendants ignore evidence presented by Dr Lorin Anderson

demonstrating that students scoring below basic in the Plaintiff Districts have raw scores well below students scoring below basic in other districts in South Carolina

Dr Anderson testified that students scoring in the below basic category can be broken down into two groups below basic 1 (“BB1”) and below basic 2 (“BB2”) The students in BB2 are closer to the basic cutoff score and are the students that show some possibility of being moved up to basic (Tr (7/29/03) 189 18-190 10) The students in BB1 scored at the “absolute bottom ” (Id at 193 16-17) When compared to the rest of the state, the students in the Plaintiff Districts fall into BB1 in far greater numbers (Pls ' Ex 1404B, 1404C) In addition, the number of students in BB1 increases through the grade levels in the Plaintiff Districts more rapidly and in greater numbers than in the rest of the state (Id) According to Dr Anderson

[W]hat this suggests is that one of the culprits and disadvantages students here is the school itself is the school program they are being provided If the school were in fact doing an adequate job, you would see much more of a flat line

That’s what you see in a lot of the other state data when you look at the state as a whole, it tends not to necessarily increase or decrease, but there’s the idea that you take what you get and you work with it but you don’t harm the students under your care

(Tr (7/29/03) 199 8-18)

Accordingly, the trial court properly relied on evidence of PACT test results as an indicator of the absence of the required educational opportunity in the Plaintiff Districts

1 The Trial Court Properly Rejected Defendants’ Argument That Achievement by Some Proved Adequate Opportunity Was Available to All

Defendants apparently take comfort in the PACT statistics, arguing that the fact that “large” numbers of students in the Plaintiff Districts are scoring Basic or above on PACT

means the requisite educational opportunity is present²⁶ Defendants argue that that if any child achieves an adequate education in school, then the opportunity to acquire an adequate education must necessarily have been present in the school and, if the opportunity is present for one, then the opportunity is present for all The trial court considered and properly rejected this argument as inconsistent with the meaning of "opportunity" as a constitutional right

As discussed more fully above and in Plaintiffs' Initial Brief, "opportunity" is a subjective concept The fact that sufficient educational resources are provided to allow some children to acquire a minimally adequate education does not mean that the opportunity to acquire a minimally adequate education is available to "each child" as required by the Constitution Plaintiffs offered ample, uncontradicted evidence at trial establishing that children at-risk from poverty need better teachers, better facilities and instructional materials and more time-on-task to have the opportunity to acquire a minimally adequate education

Defendants argue that the inference may be drawn that because the vast majority of children in the Plaintiff Districts are at-risk from poverty, they presumably have no outside resources to help them learn and must attribute any educational success to the opportunities provided in school Defendants then infer that, because some of these at-risk children have achieved a minimally adequate education (defined as passing Basic on PACT), an adequate

²⁶ The PACT data presented by Defendants is district-wide data, broken down only by year and subject matter Defendants neglect to mention that PACT scores for children in Plaintiff Districts generally decline by grade, with far more eighth-graders than third-graders scoring at Below Basic (Tr (2/24/04) 18 25-19 10 (Dr Jo Anne Anderson testifying that schools are not adding value and students perform less well over time), Pls' Exs 5008H, 6612X, 6612Z, 1404B and 1404C (showing grade by grade increase in Below Basic 1 and Below Basic 2 scores)) This trend suggests that the gap between what the children in Plaintiff Districts know and what they need to know grows over time (see Tr (7/29/03) 130 1-12), and "the better the teaching that's needed" by "the very best teachers that are possible " (Id 133 24-134 14)

opportunity must be present for all children at-risk from poverty. This is an interesting and convenient correlation for Defendants to draw, considering that they have disclaimed the ability to overcome the effects of poverty through education. More importantly, as the trial court recognized in rejecting this argument, it improperly assumes that all children at-risk from poverty "share the same characteristics and therefore should be viewed collectively when determining whether they have the opportunity to acquire a minimally adequate education. This argument is merely another way of stating that an opportunity for one child is an opportunity for all." (7/12/07 Order ¶¶ 69-70)

Moreover, as discussed in a previous section above, Plaintiffs' proof that the requisite educational opportunities were absent in the Plaintiff Districts was not limited to evidence of PACT test results but rather was further supported by the overwhelming weight of evidence of system-wide deficiencies in the public education system as a whole. Although the trial court erred in disregarding this evidence in part, it did not disregard all such evidence and concluded that the requisite educational opportunity was not present in the Plaintiff Districts due to the lack of early childhood education programming. Accordingly, the trial court did not solely rely on evidence of PACT test results to prove lack of opportunity. Further, Plaintiffs have appealed that portion of the trial court's order concluding that the public education system (except early childhood) is adequate as unsupported by the record evidence and inconsistent with the trial court's conclusion that the requisite educational opportunity was not present. Therefore, this Court should affirm the trial court's conclusion that adequate educational opportunities are absent in the Plaintiff Districts.

VI Early Childhood Education for Children Under Five Years Old Os Within the Scope of the Education Clause

The Education Clause of the South Carolina Constitution applies to “all children” without age limitations. Nonetheless, Defendants argue that the trial court erred in requiring the General Assembly to provide early childhood intervention programs because the South Carolina Constitution does not include a requirement of educating children under five years old. (See Defs ’ Initial Br. at 57-61.) One of the judicial branch’s principal duties is to interpret the meaning of the Constitution. The trial court was free to interpret the Constitution to require the General Assembly to provide educational services to children under five years old as part of its constitutional obligation to provide each child with a minimally adequate educational opportunity.

A Interpreting the Scope and Meaning of the Constitution Is the Exclusive Province of the Courts

One of the bedrock principles of our state and national system of government is that questions of constitutional interpretation lie within the exclusive province of the judiciary. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Sims Amusement Co. v. SLED, 366 S.C. 141, 146, 621 S.E.2d 344, 348 (2005) (“The Court has the final responsibility of construing the constitution and laws of this state and must do so without concern for political or popular opinion”), Abbeville, 335 S.C. at 66, 515 S.E.2d at 539 (“It is the court’s duty to interpret and declare the meaning of the Constitution.”) Sitting as fact-finder and judge, the trial court found that additional educational programs are necessary and that, under the auspices of the Education Clause, Defendants must implement programs for children under five years of age. Defendants argue that this ruling is erroneous because it contradicts “the intent of the framers of the education clause” and the General Assembly’s current judgment

that the Education Clause should be limited to children between the ages of five and twenty-one

1 South Carolina's Constitutional History Does Not Provide a Valid Reference Point for Determining the Scope of the Current Education Clause

Defendants argue that the trial court's interpretation of the Constitution contradicts "the intent of the framers of the education clause " (Defs ' Initial Br at 58) Defendants' argument, however, is directed to the intent of the framers of the Education Clause enacted in 1895, and not to the intent of the framers of the current Education Clause at issue, which was enacted in 1973

Certainly, consideration of the "intent of the framers" is an important tool in a court's arsenal when asked to interpret the meaning of a constitutional provision Defendants would have this Court look back to the history surrounding the 1895 Constitution rather than the intent of the framers of the Education Clause at issue in this case Defendants would have the Court reach back in history and resurrect the 1895 Education Clause—a clause that also contemplated that children be segregated in obtaining their education—while disregarding the long and difficult road that led to the enactment of the 1973 clause But that history cannot be completely disregarded History explains how South Carolina's schools reached their present state and offers insight into the challenges faced by students and educators in the Plaintiff Districts History explains the seemingly hopeless cycle of poverty in the Plaintiff Districts History challenges the Defendants to reject the mistakes of the past and honor the constitutional promise guaranteed by the framers of the 1973 education clause at issue that the General Assembly must provide each child in South Carolina—regardless of ethnicity, social status, or geographical residence—with the opportunity to acquire a minimally adequate education

The State's first Education Clause was adopted in the Constitution of 1868 during a Constitutional Convention held after the Civil War. The clause provided, under Article X, § 3, that "[t]he General Assembly shall provide for a liberal and uniform system of free public schools throughout the state." According to the well-respected South Carolina historian Dr. Walter Edgar, the framers of the 1868 constitution desired a free public education for all, regardless of ethnicity, race, or social status. (Tr. (7/28/03) 188-24-189-24) Notably, the State's first education clause did not include an age limitation. After the Reconstructionists lost power in 1890, the newly elected governor Ben Tillman insisted upon a new constitution. (Id. at 194-5-15) This new constitution, adopted during the Constitutional Convention of 1895, moved the education clause to Article XI, § 5 and amended it to provide "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." Deleting the word "uniform" also paved the way for Article XI, § 7 of the 1895 Constitution, which stated that "[s]eparate schools shall be provided for children of the white and colored race."

In 1952, the General Assembly made a joint resolution to delete the education clause from the South Carolina Constitution. See 1952 S.C. Acts 2223. In March 1954, the public passed a referendum removing the Education Clause by eliminating Article XI, § 5, most likely because of increasing racial tension and the difficulty in meeting the "separate but equal" standard. See 1954 Acts 1695-96, League of Women Voters of S.C., A Short History of South Carolina's Public School System, 18-19 (1963). Two months later, the United States Supreme Court issued its decision in Brown v. Board of Education, and ordered integration of schools "with all deliberate speed." 349 U.S. 294, 301 (1954). Nine years later, under federal court order, Clemson University was the first South Carolina public school to be

integrated. Not until 1970, however, did the State fully integrate its schools and was deemed to have complied with federal desegregation requirements. Three years later, the current version of the Education Clause was enacted and ratified.

As this history reveals, the education clause adopted by the framers of the 1895 Constitution, to whom Defendants would have this Court look for guidance, provided not only for age limitations but also for racial division of students. Between 1954 and 1973, when the current Education Clause was enacted, the South Carolina Constitution contained no education clause at all. Asking this Court to cast back to 1895 and rely on the intent of the framers of the 1895 Constitution, who explicitly rejected a "uniform" education system in favor of a "separate-but-equal" doctrine that purposefully provided substandard educational opportunities to black South Carolinians, to inform this Court's judgment as to the meaning of the Education Clause in today's world lacks persuasive power. If looking back in history, why not consider the intent of the framers of the 1868 Constitution, who desired a liberal system of education available to all children, regardless of race, social status, or geographical residence. The State's first Education Clause under the Constitution of 1868 provided "The General Assembly shall provide for a liberal and uniform system of free public schools throughout the State." This clause included no age limitation.

The framers of the 1973 Education Clause at issue were well aware that the previous education clause enacted in 1895 had been limited to "all children between the ages of six and twenty-one years." By deleting the age limitation from the revised clause, the framers of the 1973 Education Clause did not intend to impose age limitations on the State's obligation. The clause now reads "The General Assembly shall provide for the maintenance and support of a system of free public schools open to **all children** in the State" (emphasis added).

S C Const Art XI, § 3 Giving these words their “ordinary and popular meaning,” see Abbeville, 335 S C at 67, 515 S E 2d at 539-40 (citing State v Broad River Power Co., 177 S C 240, 181 S E 41 (1935)), the trial court correctly found that the Education Clause applied to “all children” and did not include an age restriction

2 The Trial Court Rejected the General Assembly’s Interpretation of the Education Clause

Despite acknowledging that the General Assembly’s interpretation of the scope of the Education Clause “in no way trumps this Court’s interpretation of the meaning of the clause,” (Defs ’ Initial Br at 59), Defendants urge the Court to accept the General Assembly’s policy judgments that are reflected in its statutory enactments imposing educational age limitations as being relevant to the Court’s interpretation of the Constitution

Puzzlingly, Defendants state “it is important to note that the trial court relied upon statutory policies to illustrate the acknowledgment by the legislature of the importance of pre-school programs,” citing the July 12, 2007 Order at ¶ 60 (Defs ’ Initial Br at 60) In Paragraphs 60 and 61 of its July 12, 2007 Order, the trial court relied upon state statutory policies to support its conclusion that the State owes (and is failing to satisfy) a duty to provide children in poverty early childhood education services The trial court accepted and agreed with evidence establishing the General Assembly’s awareness of the critical importance of providing early intervention programs for children in poverty, but rejected the General Assembly’s judgment that such programs are not constitutionally required As such, the trial court expressly rejected the General Assembly’s interpretation of constitutional age requirements as reflected in its statutory enactments limiting the minimum age for compulsory education to five

The General Assembly has been vested with broad authority in the area of education. The purpose of this broad authority, however, is intended to give the General Assembly flexibility to adapt the public school system to meet evolving, modern needs. (7/12/07 Order ¶¶ 55, 58, 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 ”)) In Moseley, the following referred to a change in the procedure for funding the public schools

At one time the schools were supported largely, if not entirely, by local tax levies. This resulted in a great injustice to the children of the poor or weak school districts. The argument that taxes levied for schools should only be expended in the district where collected is now antiquated and entirely discredited. It has become imperative that aid be extended to the weaker school districts. The educational opportunities of a child should no longer depend on the wealth of the district in which he happens to reside.

Id., 209 S C at 34, 39 S E 2d at 141. Sadly, the General Assembly has chosen to interpret this flexibility as permission to restrict its obligation to educate the children of our State. The trial court rejected this interpretation. In doing so, the trial court was particularly mindful of the contradiction between the General Assembly’s recognition of the critical importance of early childhood education, particularly for children raised in poverty, and its decision not to accept responsibility for providing that needed education. (12/29/05 Order, App at 163-67, see also Pls ’ Ex 5035 at 12 (EIA), Pls ’ Ex 5040 at 3-4 (First Steps to School Readiness), S C Code Ann §§ 59-20-40(c) and 59-35-10 (Supp 2004) (EFA including weight in the basic funding formula for five-year-old kindergarten), id. § 59-5-65(8) (EIA adding voluntary half-day program for four-year-olds with predicted significant readiness deficiencies), id. § 59-139-05 (Act 135 emphasizing early childhood education and prevention of future education

problems), Tr (6/17/04) 231, 9-15 (S Smith) (agreeing that the many statutes enacted by the General Assembly that provide early childhood development and educational services embody the policy of the State of South Carolina “to reach children as much as possible before kindergarten so that they’re ready when they start school”)) In light of this internal contradiction, the General Assembly’s restrictive interpretation of the Education Clause is unpersuasive and was properly rejected by the trial court

B The Trial Court Properly Interpreted the Education Clause to Require the State to Provide Early Childhood Education

The trial court’s responsibility in this case was to determine whether the State was complying with its obligation to provide each child with the opportunity to acquire a minimally adequate education Thus, the trial court was faced with the task of determining what was necessary to provide such an opportunity and then to evaluate whether the State was complying through the system of free public schools As set forth below, the trial court concluded that the constitutionally required minimally adequate educational opportunity **could not** be provided by the State **unless** its system of free public schools extended educational services to young children (under the age of five) living in poverty

the facts adduced at trial showed well beyond a preponderance of the evidence that early intervention programs are required to educate children in poverty, and the State’s policies as set forth in numerous statutes specifically acknowledge this obligation Early intervention programs are required to educate children in poverty Without early intervention programs, the opportunities for children in poverty to acquire a minimally adequate education are illusory By neglecting to provide early intervention programs for children in poverty, the General Assembly has fallen below the constitutional floor established in Abbeville County

(7/12/07 Order ¶ 57, see also id. ¶ 59 (“The absence of any age or grade level parameters demonstrates that the duty of the General Assembly is to provide whatever is necessary to ensure children have the opportunity to receive a minimally adequate education ”))

Defendants challenge this conclusion, arguing that early childhood intervention programs are not “substantively justified under the education clause ” (Defs ’ Initial Br 60-61) The trial record is replete with evidence establishing the need for such programs, not the least of which is the record of testimony by the State’s representatives who concede the critical importance of early childhood education and the numerous State statutes acknowledging the same conclusion (See, e.g., Tr (9/8/03) 72 4-8 (Matthews) ("And that's the early intervention that we see we get results from "), (8/14/03) 216 11-14 (Herriott), (1/5/04) 21 1-6 (Land), (5/3/04) 47 14-17 (Cobb-Hunter) (testifying that "early childhood educational opportunities are critical regardless of the economic status, but in low socioeconomic instances, it's even more critical that they be provided for a variety of reasons"), (5/4/04) 100 9-19, 195 18-196 22 (Tenenbaum), (5/25/04) 81 4-10, 131 5-13, 134 1-6, 135 7-10 (Peterson), (8/15/03) 48 20-23, 49 11-13, 107 8-16 (Ramsdale), (9/30/03) 107 24-108 2 (Harris), (10/2/03) 151 4-14 (J Franchini), (10/08/03) 30 9-13 (J Franchini), (1/09/04) 27 13-24 (Wilson), (2/09/04) 44 18-45 3 (Harrison), (3/04/04) 97 20-98 7 (J Anderson), (3/04/04) 186 3-11 (Townes), (4/01/04) 147 1-4 (Singleton))

Unable to challenge the desirability of early childhood education programs, Defendants instead argue that, although such programs may be desirable, they cannot be required (Defs ’ Initial Br 61 (“The fact that pre-school programs may be beneficial does not mean they are constitutionally required ”) (citing Washington v Salisbury, 279 S C 306, 306 S E 2d 600 (1983)), Defendants argue that because neither the Constitution nor the South Carolina Code expressly provides for mandatory, state-funded early childhood intervention programs, such programs are not constitutionally required

The fact that the Constitution (or the South Carolina School Code, for that matter) does not contain language expressly requiring early childhood education does not mean such educational programming is not constitutionally required. The Education Clause has no language expressly requiring the State to provide school facilities, teachers, and instructional materials, either, but obviously these are all necessary parts of the “system of free public schools” contemplated by the Education Clause and essential for the State to satisfy its obligation to provide a minimally adequate educational opportunity to all children. Given the overwhelming evidence offered at trial about the importance of early childhood programs for children at-risk from poverty, it is equally obvious that such programs are essential if the constitutional promise of a “minimally adequate educational opportunity” is to have any meaning.

Washington v. Salisbury does not provide otherwise. In Washington, the plaintiffs challenged the constitutionality of a tuition requirement imposed by Beaufort County to support a county summer school program that was not mandated by the State. The Supreme Court, recognizing that the Constitution “places the responsibility for free public education with the General Assembly,” noted that the General Assembly, through the South Carolina School Code, did not provide for or require summer school. From this, the Court concluded that, “[i]t is evident that the summer school was not part of the free public school system required by the State Constitution.” 279 S.C. at 308, 306 S.E.2d at 601. Thus, the Court in Washington did not consider whether the public school system *could* or *should* include summer school programs, but left that decision to the General Assembly's unfettered discretion. The Washington Court did not in any manner address what programs the Constitution's Education

Clause may or may not require, nor did it consider what the State's duties were pursuant to the Education Clause See generally id

Even more importantly, the Washington decision was issued in 1983, some sixteen years before this Court issued its landmark decision in Abbeville, holding that the Education Clause included a qualitative component that the General Assembly was required to satisfy in providing a "system of free public schools " Abbeville, 335 S C at 68, 515 S E 2d at 540 Thus, although Washington apparently presumed, without any real analysis, that all that the Education Clause required was whatever the General Assembly had chosen to require, this Court's Abbeville decision made that presumption incorrect In other words, though not clear in 1983 when Washington was decided, that the system of free public schools provided by the General Assembly is subject to constitutional scrutiny was clearly set forth in the 1999 Abbeville decision Washington simply does not mandate the result Defendants seek

In the case at bar, though, the trial court properly considered programs and what the Education Clause, as interpreted through the lens of the qualitative requirements set forth by this Court in Abbeville, required The trial court properly determined that early childhood education programs are a necessary component of a public school system if such system is going to provide the constitutionally required educational opportunity Although the trial court found otherwise with respect to summer school, after-school programs, homework centers and vocational education programs, that decision, which the Plaintiffs have appealed as erroneous and contrary to the weight of the evidence, was based on the trial court's factual findings and not constitutional precedent

VII This Court Has Already Resolved the Issues of Separation of Powers and Political Question

At every stage of this litigation, Defendants have argued that Plaintiffs' claims present non-justiciable political questions and that the court lacks authority to resolve the issues under the separation of powers doctrine. This Court squarely rejected this notion in its previous opinion, recognizing that the trial court "erred in using judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause." Abbeville, 335 S.C. at 67, 515 S.E.2d at 539. Accordingly, this Court's previous ruling that judicial restraint, separation of powers, and the political question doctrine are inapplicable is the law of the case and not subject to challenge in this appeal. Jenkins v. S. Ry. Co., 145 S.C. 161, 163-64, 143 S.E. 13, 14 (1928) ("[W]hen an appellate Court passes upon a question and remands the cause for further proceedings, the question then settled becomes the 'law of the case' upon a subsequent appeal, and the only mode of reviewing the decision in the prior appeal is by a motion for a rehearing.") (citations omitted).

Seeking to distinguish this Court's prior ruling on their separation of powers argument, Defendants now argue that, although the court may define the educational opportunities required by the Constitution and determine whether the State has provided them, the court may not specify the reasons for the State's failure and is powerless to fashion a remedy once a constitutional violation is found. In this most recent iteration of the same argument, Defendants have given this Court no reason to disturb its prior ruling on this issue.

It is the court's exclusive province and duty to interpret the Constitution and to determine the legislature's compliance with legislative obligation. The power to determine the constitutionality of State action would be meaningless, however, if not accompanied by the power to require the State to cure the violation. The trial court expressly exercised judicial

restraint in deference to the General Assembly in this case, identifying the General Assembly's constitutional violation but declining to order the General Assembly to take any curative action (7/12/07 Order ¶¶ 43-45) Accordingly, not only did the trial court act well within the scope of its authority, but Plaintiffs argue that the trial court erred by giving too much deference to "legislative discretion" when it had the power and the responsibility to fashion an adequate remedy for the victims of the State's constitutional failure ²⁷

A The Trial Court Did Not Overstep Its Authority

1 Legislative Discretion in the Field of Public Education Is Not Unlimited

Throughout the course of this litigation, Defendants have argued that the General Assembly has virtually unlimited discretion in the field of public education They argue that the courts cannot impose qualitative standards on the level of educational opportunities constitutionally required, and below which the state cannot go They deny that the courts have the power and authority to review the constitutionality of the system of public education, an argument repeatedly rejected by this Court and other courts before it Faced now with the Judgment entered against them, they deny that the courts have the power to create a remedy for their constitutional failure Their argument, if accepted, would render Abbeville meaningless

As discussed above, the purpose of the General Assembly's broad discretion in the field of education is intended to give the General Assembly flexibility to adapt the public school system to evolving, modern needs (See 7/12/07 Order ¶¶ 55, 58, 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

²⁷ See Defendants' Initial Brief at 143-48 for discussion of this error

General Assembly free to meet changing conditions ”)) Thus, the General Assembly is not free to hide behind legislative “discretion” as an excuse to avoid satisfying its constitutional obligations Rather, in the exercise of its discretion, the General Assembly must comply with its constitutional obligations In the case at bar, these obligations require the State to “provide whatever is necessary to ensure children have the opportunity to receive a minimally adequate education ” (7/12/07 Order ¶ 59)

Further, the separation of powers doctrine gives **the court** the responsibility of determining whether the legislature, in the exercise of its discretion, has violated the Constitution See State ex rel Edwards v Osborne, 195 S C 295, 302, 11 S E 2d 260, 262 (1940) ("Our twofold duty is to refrain from interfering with legislative action which involves no clear constitutional infirmity, and to firmly condemn such action when it infringes upon constitutional restraints upon the legislative power ")

Courts in other states have consistently rejected separation of powers arguments and recognized the importance of the court's role in supervising the exercise of "legislative discretion" to ensure constitutional compliance As the Kentucky Supreme Court stated

To avoid deciding the case because of “legislative discretion,” “legislative function,” etc , would be a denigration of our own constitutional duty To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable

Rose v Council for Better Educ , Inc , 790 S W 2d 186, 209 (Ky 1989), see also Columbia Fall Elementary Sch Dist No 6 v State, 109 P 3d 257, 261 (Mont 2005) (“As the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right We conclude this issue is justiciable ”), Lake View Sch Dist No 25 v Huckabee, 91 S W 3d 472, 484 (Ark 2002) (“This court's refusal to review school funding under our state constitution [on the basis

that the issue involved a political question or violated the doctrine of separation of powers] would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state ”), Campbell County Sch Dist v State, 907 P 2d 1238, 1264-65 (Wyo 1995) (rejecting defendants’ separation of powers argument because the judiciary’s power to interpret the state constitution “must be exercised even when such action serves as a check on the activities of another branch of government”) (quoting Rose, 790 S W 2d at 209), James C Sheil, Note, The Just-Do-It Decision School-Funding Litigation Tests the Limits of Judicial Deference, 28 Seton Hall L Rev 620, 647 (1997) (“When a governmental body fails to meet its constitutional obligations, the courts are not only empowered, but are obligated to act ”), Note, Unfulfilled Promises School Finance Remedies and State Courts, 104 Harv L Rev 1072, 1091-92 (1991) (“The ineffectiveness of the political process to protect the school finance plaintiff’s constitutional rights and enhanced accountability of state courts strengthen the state judiciary’s claim to provide meaningful oversight of remedy formulation ”)

As the law of South Carolina and other states make clear, the judiciary must intervene when the legislative branch has violated its citizens’ constitutional rights South Carolina’s General Assembly does not enjoy unchecked power and discretion in the realm of education

2 The Trial Court Acted Well Within the Scope of its Judicial Authority

In finding that Defendants were not complying with their constitutional obligation to provide each child in the Plaintiff Districts with the opportunity to acquire a minimally adequate education by virtue of its failure to provide early childhood education programs, the trial court acted well within the bounds of its judicial authority In reaching its ruling, the trial court addressed the meaning of the term “all children” as used in the Education Clause and

determined that “all children” include children under the age of five. Additionally, the trial court addressed the meaning of a “minimally adequate educational opportunity” and concluded that the constitutionally required educational opportunity **could not** be provided by the State **unless** its system of free public schools extended educational services to young children living in poverty. In so doing, the trial court rejected Defendants’ conclusion that its responsibility to educate the children of this State was limited to children age five and older. In fact, the trial court’s conclusion in this regard was based, in part, on the General Assembly’s own judgment that early childhood education was critically important to the educational process, as discussed above. The trial court did not substitute its judgment for that of the legislature regarding the value of early childhood education, rather the court substituted its judgment for that of the legislature regarding a question of constitutional interpretation. Making this determination was squarely within the court’s area of responsibility. Abbeville, 335 S C at 66, 515 S E 2d at 539 (“It is the duty of this Court to interpret and declare the meaning of the Constitution.”)

Further, in keeping with Abbeville’s mandate, the trial court did not intrude on the legislative prerogative to determine the means by which educational opportunities are delivered. Rather, the trial court only concluded that the absence of early childhood education programs was a cause of the students in the Plaintiff Districts’ not having a minimally adequate educational opportunity. The trial court did not dictate the statutory framework to be used when providing early childhood education services. In other words, the court identified the deficiency in the public education system, but left it to the discretion of the legislature to determine and implement specific policies and programs designed to address this deficiency.

Finally, contrary to Defendants’ suggestion, the trial court did not impermissibly order the “appropriation of public funds for the establishment of early childhood intervention

programs ” (Defs ’ Initial Br 65) Review of its Order reveals that the trial court did not order the State to do anything Rather, the court held that “Defendants have failed in their constitutional responsibility to provide an opportunity for minimally adequate education to the very youngest” (12/29/05 Order ¶ 429) and that “early childhood intervention at the pre-kindergarten level and continuing through at least grade three is necessary ” (Id at 161) The court did not actually order the State to appropriate funds for this purpose or to enact legislation for this purpose

Interestingly, Gregory v Rollins, 230 S C 269, 95 S E 2d 487 (1956), the case cited by Defendants to support the proposition that the trial court had “trespass[ed] upon the legislative domain” appears to be the *only* reported case in South Carolina (until this one) addressing a situation in which a party claimed that the judiciary’s actions intruded on the province of the state legislature ²⁸ In Rollins, a committee of the Lancaster County Grand Jury petitioned the circuit court *ex parte* to approve a sum of money to pay for the services of a CPA and attorney to conduct an independent audit of the Office of Lancaster County’s affairs The circuit court issued an order requiring the Board of Directors of Lancaster County to pay the CPA and attorney their fees, and the Board of Directors argued that the court’s order was void because it was in violation of the constitutional separation of powers clause On appeal, the Supreme Court held that because the appropriation of public funds is a legislative function and beyond the province of the judiciary, the court could not compel county officials to issue any payment of funds Id at 274-75, 95 S E 2d at 490-91 Of note, however, the Supreme

²⁸ State ex rel McLeod v Yonce, 274 S C 81, 261 S E 2d 303 (1979), cited by the Defendants, involved a claim of infringement upon the powers of the executive branch, Culbertson v Blatt, 194 S C 105, 9 S E 2d 218 (1940), also cited by Defendants, involved a claim of infringement by the legislative branch The other cases cited by Defendants in support of this argument did not involve claims that the judiciary had intruded on the province of the legislature

Court recognized that, although it could not directly mandamus the appropriation of public funds, the circuit court could by mandamus require the proper officials of a county (such as the Lancaster County Board of Directors) to include a proper claim against the county in their next budget for county expenses Id at 275, 95 S E 2d at 491

In the case at bar, the trial court has not directly ordered the General Assembly to appropriate funds to pay for early childhood education programs The Rollins court, however, held that the separation of powers clause was not violated by the judiciary's ordering the legislature to take action—action that would ultimately result in the expenditure of funds Rollins does not support Defendants' rehashed separation of powers argument

B This Court Can Create a Remedy for the Constitutional Rights of This State's Most Vulnerable Citizens

Having found that Defendants were failing to satisfy their constitutional obligation to provide children in the Plaintiff Districts with a minimally adequate educational opportunity, and having determined that the proper exercise of judicial restraint prevented it from ordering the State to take any curative action, the trial court held as follows

This Court 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

(12/29/05 Order ¶ 48) Defendants argue that the court overstepped its authority in making these recommendations, asserting that the General Assembly has the exclusive right to “design and implement different alternatives to address different problems ” (Defs ' Initial Br 69, n 32) Under Defendants' theory, then, the trial court's power would be limited to defining the constitutional obligation at issue and determining whether it has been satisfied According

to Defendants, the court should not have provided any further ruling as to the constitutional deficiencies

The court's authority to interpret the Constitution, however, would be meaningless without the power to provide a remedy for the violation of constitutional rights. One of the primary purposes for the separation of powers is “the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances.” State ex rel McLeod v Yonce, 274 S C 81, 84, 261 S E 2d 303, 304 (1979), see also State ex rel McLeod v McInnis, 278 S C 307, 312-13, 295 S E 2d 633, 636 (1982) (same), State ex rel Edwards v Osborne, 195 S C 295, 302-03, 11 S E 2d 260, 263 (1940) (“[O]ur solemn duty can be no less than that of being diligent to maintain the balance of governmental powers that give rise to the power of a Court to declare an act of the General Assembly unconstitutional.”)

It is the province and duty of the judicial department to protect constitutionally declared fundamental rights of individuals from intrusion by the executive and legislative branches of government. The power of the judiciary to protect those rights depends upon the type of violation of those rights that has taken place. When a litigant claims that legislation exceeds constitutional requirements (infringement on “negative” rights), the court is able to protect the constitutional right by striking down the offending portion of the law at issue. On the other hand, when the legislature has failed to take necessary action and that failure has violated someone’s constitutional rights (violation of “positive” rights), the court must be permitted to do more so that the wronged person may obtain a remedy for such deprivation or violation of rights. More simply put, the court has the power—and the duty—to ensure that the law complies with the constitution, and, when (as here) the legislature has failed on its own to

make constitutionally sufficient legislative choices, the court must guide the lawmakers' efforts

Absent judicial guidance, Defendants would be left to continuously expend time and other resources in a "trial-and-error" process whereby the court would review the challenged system, find the system to be constitutionally inadequate, allow the "political process" time to propose, enact, and implement new solutions, and then return to the courts for review. This drawn-out process could cycle over-and-over until the system satisfied the judicial review process.

Meanwhile, thousands of students who continue through the States' school systems are being deprived of their constitutional right to a minimally adequate educational opportunity. Indeed, since this lawsuit was first filed in 1993, an entire generation of school children has passed through the constitutionally inadequate public school system in the Plaintiff Districts. These children, who were wholly deprived of their constitutional right to a minimally adequate educational opportunity, will never have that wrong righted. The children in the Plaintiff Districts do not have time to wait.

Further, the experience of courts in other states profoundly illustrates the gross inadequacy of this "trial-and-error" approach. The Abbott line of cases from New Jersey document what can only be described as a thirty-year battle to obtain a constitutionally adequate education system. See, e.g., Abbott v. Burke, 575 A.2d 359, 374 (N.J. 1990), Abbott v. Burke, 693 A.2d 417, 439 (N.J. 1997).

In Campaign for Fiscal Equity v. State, 801 N.E.2d 326 (N.Y. 2003), the New York Court of Appeals took counsel from the New Jersey situation and ordered that the New York

legislature conduct a costing-out study and to reform the education system to ensure adequate resources

Finally, the remedy is hardly extraordinary or unprecedented. It is, rather, an effort to learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation. A case in point is the experience of our neighbor, the **New Jersey Supreme Court, which in its landmark education decision 30 years ago simply specified the constitutional deficiencies, beginning more than a dozen trips to the court a process that led over time to more focused directives by that court** (compare Robinson v Cahill, 63 N J 196, 198 306 A 2d 65, 66 (1973) with Abbott ex rel Abbott v Burke, 119 N J 287, 385-91, 575 A 2d 359, 408-11 (1990)). In other jurisdictions, the process has generated considerably less litigation, possibly because courts there initially offered more detailed remedial directions, as we do (see e g , Rose v Council for Better Educ , Inc , 790 S W 2d 186, 215-16 (Ky 1989))

801 N E 2d at 349-50 (emphasis added). Based on New Jersey's experience, the court concluded, "we trust that fixing a few signposts in the road yet to be traveled by the parties will shorten the already arduous journey and help to achieve the hoped-for remedy." Id at 350.

Although legislative deference as suggested by the Defendants can be successful, see Hancock v Comm'r of Educ , 822 N E 2d 1134, 1141 (Mass 2005), it requires a legislature profoundly committed to the prospect of sweeping reform of an educational system proven to be constitutionally inadequate. As discussed above, our General Assembly continues to deny the responsibility to address the needs of the students in the Plaintiff Districts. Given its historical "wait-and-see" or "we-will-take-care-of-it" approach, prolonged and frustrating litigation appears more likely than not, while the children of our State continue to wait for relief that does not come.²⁹

²⁹ Defendants rely on Hancock v Commissioner of Education, 822 N E 2d 1134, 1141 (Mass 2005), as support for the idea that education policy choices must be left to the legislature. When considering the appropriate balance between judicial oversight and

C The Trial Court's Ruling Does Not Transform This Action into a Non-Justiciable Political Question

Citing the well-respected authority on federal jurisdiction, Chemerinsky's Federal Jurisdiction, Defendants assert that the political question doctrine refers to the "subject matter" of the dispute (Defs ' Initial Br 66 (citing Erwin Chemerinsky, Federal Jurisdiction 142 (2d ed 1994)) Plaintiffs agree, and note again that this Court has already found the "subject matter" of this lawsuit to be an appropriate subject for judicial review

Interestingly, though, in an apparent attempt to distinguish this Court's prior ruling, Defendants now focus on the trial court's *resolution* of the issues posed (See Defs ' Initial Br 68 (arguing that the trial court's "[c]oncluding that pre-school programs are required to address the impact of poverty on achievement, however, is a nonjusticiable political question

"))) This attempted change of focus, though, does not change the fundamental answer to the

legislative deference in this case, Hancock is instructive Three days after plaintiffs prevailed in a constitutional challenge to the Massachusetts system of public schools in McDuffy v Secretary of the Executive Office of Education, 415 Mass 545, 621, 615 N E 2d 516 (1993), Massachusetts enacted by emergency resolution an omnibus Education Reform Act of 1993, which had been under consideration as a response to the lawsuit Hancock v Comm'r of Educ , 822 N E 2d 1134, 1141 (Mass 2005) The state proceeded immediately to implement the seven-year phase-in of the reformed funding system

The Supreme Court of Massachusetts, in dismissing a revival of the McDuffy case filed in 1999, described the state in its majority opinion as having "embarked on a long-term, measurable, orderly, and comprehensive process of reform "to provide a high quality public education to every child " [citation omitted] "They are proceeding purposefully to implement a plan to educate all public school children in the Commonwealth, and the judge did not find otherwise They have committed resources to carry out their plan, have done so in fiscally troubled times, and show every indication that they will continue to increase such resources as the Commonwealth's finances improve " Id at 1140 Hancock was "not a case where the Legislature reasonably could be said to have neglected or avoided a constitutional command " Id at 1146

Unlike the Massachusetts legislature, Defendants in South Carolina have not taken such an orderly approach to this litigation or to the courts' rulings Defendants have taken no steps to reform South Carolina's system to meet the Plaintiffs' complaints, and have continued to fail to act comprehensively even after the trial court ruled the State was failing to comply with its constitutional obligations

question before the court. The issue remains a question of whether Defendants are complying with the Constitution in the field of public education—an issue that this Court has already found to be an appropriate subject for judicial review.

None of the other arguments set forth by Defendants suggest a reason for this Court to disturb its previous ruling, either. None of the six factors set out by the United States Supreme Court in its seminal case of Baker v. Carr, 369 U.S. 186, 210 (1962), suggests that this has now become a non-justiciable political question. (See Defs.' Initial Br. 67-68 (setting out the Baker factors).)

First, Defendants argue that the choice of educational programs is constitutionally delegated exclusively to the legislative branch of governments. This Court has already held that, while it is the General Assembly's prerogative to choose educational programming, the outcome of its choices (in other words, the quality of the public education system) is subject to constitutional scrutiny. The fact that Defendants' policy choices may be affected by the court's conclusions does not render the controversy a non-justiciable political question. The trial court agreed, repeatedly rejecting Defendants' attempts to persuade the court that the political question and separation of powers doctrines bar judicial review of legislative choices made with respect to educational policy. (See (7/12/07 Order ¶ 82) (concluding that "the results of the legislative process are appropriate matters for the Court's consideration"), 9/17/04 Order at 1-2 (denying Defs.' Mot. for Directed Verdict).) As discussed above, legislative policy choices must be subjected to constitutional scrutiny, or else the whole point of the system of checks and balances (to distribute power and prevent abuse) would be lost.

Second, attempting to shift focus from the constitutional question at issue, the Defendants argue that the trial court improperly invaded the General Assembly's province by

concluding that “pre-school programs are required to address the impact of poverty on achievement ” (Defs ’ Initial Br 68) The trial court did not make a policy determination of how best to address the relationship between poverty and achievement Rather, the trial court interpreted the Constitution to impose certain minimum requirements for a public education system³⁰ Educational systems are comprised of several necessary components, including teachers, facilities, and instructional materials Taking into account the effect of poverty on achievement, the court concluded that early childhood education was also a minimum necessary component of an education system that would be capable of providing a minimally adequate educational opportunity to children at who are at-risk because of poverty

Other states have also concluded that early childhood education programs are necessary to satisfy constitutional education adequacy requirements See, e g , Abbott v Burke, 710 A 2d 450 (N J 1998) (Abbott V), Hoke County Bd of Educ v State, 599 S E 2d 365 (N C 2004) In Abbott V, the New Jersey Supreme Court held that pre-school education was required for all three- and four-year-olds to ensure that children in the poorest communities received the education entitlements guaranteed by the state’s constitution The court provided

Empirical evidence strongly supports the essentiality of pre-school education for children in impoverished urban school districts That evidence demonstrates that the earlier education begins, the greater the likelihood that students will develop language skills and the discipline necessary to succeed in school A review of two major studies on pre-school cited by the parties also reveal that there is a strong correlation between the intensity and duration of pre-school and later educational progress and achievement

710 A 2d at 503 Although the New Jersey Constitution required a "thorough and efficient education" only for children ages five through eighteen, the New Jersey Supreme Court

³⁰ The trial court acted well within its authority to declare minimum requirements for a public education system capable of providing a minimally adequate educational opportunity to “each child,” including children at-risk from poverty, but Defendants maintain the trial court erred in identifying those minimum requirements

concluded that the constitutionally-required education could not be delivered to children within these age parameters unless children in poverty received pre-school education to prepare them to begin regular school at age five. The North Carolina Supreme Court in Hoke similarly concluded that North Carolina was required to offer early childhood education services to prepare children for school so that they would be able to avail themselves of the opportunity for a "sound basic education" when of school-age, as required by the North Carolina Constitution. Hoke, 599 S E 2d at 642.

Further, Defendants' reliance on Hancock v. Commissioner of Education as support for the conclusion that the trial court's decision on early childhood constituted an impermissible public policy choice is misplaced. In the quoted language, the Massachusetts Supreme Court was addressing a suggestion made by the dissenting justices that a cost study be ordered that would include the assumption that "in order to fulfill its constitutional obligation under the education clause, the Commonwealth 'must' provide free preschool for all three and four year old children 'at risk' in the focus districts." Hancock, 822 N E 2d at 1156.

Contrary to Defendants' argument, the trial court did not order the General Assembly to provide particular programs, such as three- and four-year-old preschool, as "the most effective way to ameliorate the effects of poverty and improve the education in the State" (Defs' Br. 68-69). Instead, like the New Jersey and North Carolina courts in Abbott V and Hoke, the trial court held that the constitutionally required educational opportunity could not be provided unless early childhood intervention programs were also provided. The trial court did not specify the nature of the programs to be provided. Compare Hoke, 599 S E 2d at 393 (concluding that early childhood education services must be offered as part of the State's obligation to provide a "sound basic education" to children of school-age but overturning that

part of the trial judge's order imposing a specific type of pre-school remedy, in that case pre-kindergarten (four-year-old) for at-risk children, the remedy apparently chosen by the South Carolina General Assembly but not specifically ordered by the trial court)

In fact, Hancock presents a case in point illustrating the stark contrast between the Massachusetts state legislature—committed to solving the problems and inadequacies in its education system in order to provide a high quality education for the benefit of all children—and the General Assembly of the State of South Carolina, which still refuses to accept responsibility for educating the State's most vulnerable children. As discussed above, the General Assembly's discretion when making educational policy choices is limited by constitutional obligation. The State is constitutionally obligated to “provide whatever is necessary to ensure children have the opportunity to receive a minimally adequate education.” (7/12/07 Order ¶ 59.) When the General Assembly fails to make policy choices necessary to satisfy the Constitution, as it has done here, the courts must intervene.

Finally, Defendants argue that because there is no specific “standard” or “bright line test” for constitutional compliance, there are “no judicially manageable standards for resolving this issue with finality” and “it was error for the trial court to undertake to intrude into the policy making domain of the legislature.” (Defs’ Initial Br. 69-70.) Defendants have this argument completely backwards. First, constitutional compliance is a question for the courts, not the legislature. Therefore, it is for the court to say when constitutional compliance has been achieved. Second, in this case, the trial court provided the General Assembly with a clear guidepost to constitutional compliance, advising that early childhood education services must be provided if the State’s public education system is to be judged constitutionally sufficient. Third, this Court presumably was well aware of the difficulties and delicate

balancing required in this case when it previously rejected the Defendants' argument that the political question doctrine could excuse the court from its responsibility to judge the legislature's constitutional compliance with the Education Clause. Finally, courts in other states have had no trouble finding and successfully implementing "judicially manageable standards" in education cases. Although the particular details of the court's involvement necessarily varies according to the facts of each case, the cases discussed above and in Plaintiffs' Initial Brief illustrate many examples of courts successfully guiding legislative policymakers toward constitutional compliance. Indeed, the greatest successes appear to be achieved where the court and legislature cooperate to achieve the common goal of securing the State's children in their constitutional right to a quality education.

VIII Plaintiff Districts Have Standing to Sue Defendants

The trial court correctly determined that the Plaintiff Districts have standing to sue. The standing requirement ensures that courts do not decide artificial or academic controversies. The United States Supreme Court has established three requirements to show standing: (1) the plaintiff must suffer an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged actions of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), see also Sea Pines Ass'n v. S.C. Dep't of Natural Res., 345 S.C. 594, 601, 537 S.E.2d 287, 291 (2001).

Defendants incorrectly assert that Plaintiff Districts failed to establish standing based on two factors. First, they argue that the duty under the Education Clause is owed to students only and Plaintiff Districts, as political subdivisions, did not establish that they are a real party in

interest. Second, Defendants argue that under Abbeville, 335 S C 58, 515 S E 2d 535 (1999), school districts are not the intended beneficiaries of the constitutional duties so that no particularized injury exists.

Along with the students, parents, and taxpayer Plaintiffs in this case, the School Districts themselves have standing because (1) they have suffered a particularized injury, (2) they are a real party in interest, and (3) their claims are critically important to the public.

A Plaintiff Districts Have Suffered a Particularized Injury Caused by Defendants' Inadequate Funding That Can Be Redressed by a Favorable Decision

As stated above, the first requirement of standing requires that a plaintiff suffer "an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." To assert the invalidity of an executive or legislative action in a lawsuit, a person must have sustained, or be in immediate danger of sustaining, prejudice as a result of the action. Baird v Charleston County, 333 S C 519, 530, 511 S E 2d 69, 75 (1999), Blandon v Coleman, 285 S C 472, 475, 330 S E 2d 298, 299 (1985). "Such 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). Plaintiffs in the present case meet the Lujan requirements and have suffered prejudice as a result of the legislature's inadequate funding of the school system.

Defendants argue that the Plaintiff Districts have not suffered a particularized injury because the legislature's duty under the Education Clause runs to students only. However, the Abbeville decision identifies *two independent beneficiaries* to the education system: each child and the public at large. "The purpose of providing a public education is to benefit not just the

individual receiving it, but also **the public at large** " 335 S C at 66, 515 S E 2d at 539 (emphasis added) The United States Supreme Court has also recognized the importance of education to society as a whole "Today, education is perhaps the most important function of the state and local governments **Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance to our democratic society** " Brown v Bd of Educ , 347 U S 483, 493 (1954) (emphasis added) Because of the importance of education to society as a whole, the Plaintiff Districts have a redressable injury when the State fails to fulfill its constitutional mandates

B Plaintiff Districts Have Standing as a Real Party in Interest

As political subdivisions, Plaintiff Districts must establish that they are a "real party in interest " In other words, Plaintiff Districts must allege and show an "injury in fact in terms of their own proprietary interests or statutory rights "

South Carolina school districts exercise a great deal of responsibility in their important role of delivering educational opportunities to the state's school children ³¹ The trial court's decision is supported by courts in other jurisdictions that have found that school districts' responsibilities, powers, and potential liabilities give school districts standing to sue if, because of a lack of funding from the state, they cannot provide the education required by their state's constitution See, e g , Idaho Sch for Equal Educ Opportunity v Evans, 850 P 2d 724, 585 (Idaho 1993), Harrisburg Sch Dist v Hickok, 762 A 2d 398, 404 (Pa 2000), Rose v Council for Better Educ , Inc , 790 S W 2d 186, 202 (Ky 1989), Washakie County Sch Dist

³¹ As discussed below, addressing the Plaintiff Districts' capacity to sue, South Carolina school districts are responsible for the maintenance and safety of school buildings, the hiring and firing of personnel, especially teachers, the daily management of the school, and the implementation of the educational process Further, the school districts may sue and be sued, enter into contracts, and hold real and personal property for school purposes S C Code Ann § 59-17-10 (1976)

No 1 v Herschler, 606 P 2d 310, 317 (Wyo 1980), Seattle Sch Dist No 1 v State, 585 P 2d 71, 490-95 (Wash 1978)

Plaintiff Districts have a concrete interest in seeking a remedy for the State's inadequate and unconstitutional method of funding education As stated by the Washington Supreme Court

The interests of the District are not theoretical, they involve actual financial constraints imposed upon the District by the challenged system itself

In considering the question of standing, what could be more fundamental to the maintenance of schools, and an educational program, than an action seeking to obtain sufficient revenue to keep a district operating with its basic programs intact so as to comply with the mandate of [the state constitution]? What could be more fundamental than respondent District's need for review of a system of public school financing that undermines its means of existence?

Seattle Sch Dist No 1, 585 P 2d at 82

Similarly, the Supreme Court of Wyoming, determining that school districts had standing in an education finance suit against the state stated, "The school districts are charged with the responsibility of providing education to the children of Wyoming and are tangibly injured if the statutes which guide their hands disenable them from so providing "

Washaki Sch Dist No 1, 606 P 2d at 317

Moreover, in a landmark education finance case, the Kentucky Supreme Court rejected the state defendants' argument that the school districts lacked standing, noting that the local school board has a duty to make "every effort" to remedy a constitutionally inefficient school system, including initiating legal action Rose, 790 S W 2d at 202

In the case at bar, Plaintiff Districts have a substantial stake and interest in this litigation and will suffer actual injuries if the State continues failing to meet its constitutional obligations The Plaintiff Districts have a duty to provide their students with the education

South Carolina's Constitution guarantees, even if legal action is required. Accordingly, the trial court correctly found that Plaintiff Districts have standing to bring their claims, a school district must have the ability to obtain redress if the State is failing to uphold its constitutional duty.

C The Plaintiff Districts Have Standing Because of the Public Importance of Their Claims

Additionally, Plaintiff Districts have standing because of the public importance of their claims. The concept that courts may confer standing on parties based on the importance of the issues and the need for guidance is neither a new nor infrequently used concept to South Carolina courts. The requirement of standing "is not an inflexible one." Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). A court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance. Charleston County Parents for Public Schs., Inc. v. Moseley, 343 S.C. 509, 514, 541 S.E.2d 533, 535 (2001), Sloan v. Sch. Dist. of Greenville County, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000) ("[T]he issues involved 'are of such wide concern' that this declaratory judgment action should be decided for future guidance in the expenditure of public funds pursuant to competitive sealed bidding requirements"), Baird, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (finding that doctors had standing to sue "by virtue of the immense public interest at stake" because the issuance of hospital bonds which clearly impacted a "profound public interest"), Thompson, 267 S.C. at 466, 229 S.E.2d at 719 (holding that the plaintiffs had standing because the questions involved in the case were of such wide public concern), Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 213, 423 S.E.2d 101, 103 (1992) ("[T]he questions involved here are of such wide concern that the rules on standing will not be inflexibly applied.")

Determining whether or not the Defendants have discharged their constitutional obligations to provide South Carolina students with the opportunity to acquire a minimally adequate education is an issue of profound importance to South Carolina's public Resolution of this issue will provide future guidance to the State as it continues to operate within the structure of the South Carolina Constitution

Therefore, in sum, Plaintiff Districts have standing to sue because they have suffered a concrete injury directly attributable to the State's inadequate funding of the educational system Further, Plaintiff Districts' responsibilities carrying out the educational system provides them standing as a real party in interest to challenge the State's funding Additionally, determining whether or not the state is meeting its Constitutional obligations is an important public issue Thus, the trial court correctly found that the Plaintiff Districts have standing to sue

D Plaintiff Students and Taxpayers Have Standing to Sue Defendants

Defendants do not contest the Plaintiff students' or taxpayers' standing to sue Accordingly, a finding that the Plaintiff Districts held standing to sue the State would be mere harmless error under South Carolina Rule of Civil Procedure 61 and would not warrant reversal of the lower court's findings

As Defendants argue in their brief, the Abbeville decision clearly demonstrates that the State must provide each child in South Carolina the opportunity to receive a minimally adequate education 333 S C at 68, 515 S E 2d at 540 The Plaintiff students have a personal stake in the subject matter of the lawsuit as the question of whether each child is receiving an opportunity for a minimally adequate education directly affects each student Sea Pines Ass'n, 345 S C at 600, 550 S E 2d at 291 The students' stake in the litigation is not nominal or technical, but a real interest in their education and future Additionally, the students' claims

are not "the result [of] the independent action of some third party not before the court " Lujan, 504 U S at 561 Regardless of the Districts' role, the students are claiming that Defendants' actions have harmed them because the Defendants ultimately are responsible for fulfilling the constitutional mandate Defendants' failure to fulfill its constitutional obligations causes the Plaintiff students direct harm

Moreover, Plaintiff taxpayers also have standing to sue the State South Carolina courts have long recognized a taxpayer's right to challenge unauthorized or illegal governmental action Sloan v Sch Dist of Greenville County, 342 S C 515, 520, 537 S E 2d 299, 301 (Ct App 2000), see also Sligh v Bowers, 62 S C 409, 413, 40 S E 885, 887 (1902) (noting that there was "no serious question" that taxpayers have the right to sue to prevent an illegal expenditure of public funds) In the instant case, the individual taxpayer Plaintiffs are challenging the Defendants' method of providing for an opportunity for a minimally adequate education to each child For a plaintiff to have taxpayer standing, the party "must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of her fellow taxpayers " Beaufort County v Trask, 349 S C 522, 529, 563 S E 2d 660, 664 (Ct App 2002) The Plaintiff taxpayers have a direct interest in the way the State spends taxpayer dollars on education as the educational system directly affects their community and children See, e g , Washakie County Sch Dist No 1 v Herschler, 606 P 2d 310, 317 (Wyo 1980) ("Parents are keenly concerned and suffer tangible injury if their children do not receive a proper education," and thus have standing to sue in education finance case against the State of Wyoming) Thus, in addition to the Plaintiff Districts, other Plaintiffs in this lawsuit have a separate basis for standing

IX Plaintiff School Districts Have the Capacity to Sue the State

A Plaintiff Districts' Extensive Responsibilities Place Them in the Best Position to Ensure That the State Fulfills Its Constitutional Obligations

The trial court correctly found that the Plaintiff School Districts have the capacity to sue the State of South Carolina. For South Carolina's complex and collaborative system of education to function successfully, the State cannot be immunized from accountability in a suit of this nature. The Plaintiff School Districts have capacity to sue the State because the General Assembly clearly provides the school districts with the right to sue and this right extends to suits against the State.

South Carolina Code Section 59-17-10 provides that school districts “*may sue and be sued*, and be capable of contracting and being contracted with and holding such real and personal estate for school purposes.” S.C. Code Ann. § 59-17-10 (1976) (emphasis added).

[A] grant to school organizations of the power to maintain actions implies a legislative intent that such organizations should prosecute any actions they might deem necessary for the protection and preservation of school funds and property.

[I]t has been held that a school district is both legally and practically sufficiently independent of the state to bring suit against the state.

78A C.J.S. Schools and School Districts § 674 (emphasis added)

The South Carolina legislature has delegated almost all day-to-day responsibility for the management of local schools to the districts by providing the districts the power to build and maintain school facilities and the responsibility for hiring teachers and other personnel. S.C. Code Ann. § 59-17-10 (1976). Because of their responsibilities, the Districts are in a unique position to ensure that South Carolina's children receive the education the Constitution guarantees. See Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 200 (Ky. 1989) (“Who is better qualified, who is more knowledgeable, who is more duty-bound, than the local

school boards to raise the question” of whether a state is complying with its constitutional obligation to its students?)

Other jurisdictions agree In Rose, the Kentucky Supreme Court noted that state statutes governing school districts failed to restrict the right of the local boards to sue the General Assembly Id at 200-01 Similarly, nowhere in the South Carolina Code is a restriction on the school district’s ability to sue Furthermore, the Rose court explained that the statutes that give school districts the authority to carry out their duty of promoting education also provides the school districts the duty to take legal action to declare an educational system unconstitutional Id at 201 In this state, the General Assembly has given the Plaintiff Districts extensive responsibility to promote local education Accordingly, the Plaintiff Districts should have the authority to bring a law suit to protect the interests of their students and to ensure that the State meets its constitutional obligations

Defendants rely on Smith v School District of Greenville, 324 F Supp 2d 786 (D S C 2004), to argue that when a school district sues the state, the state is actually suing itself In Smith, the district court listed several state statutes to demonstrate the pervasive control the state has over the school districts Id at 792-95 The court concluded that the relationship between school districts and the state renders school districts an arm of the state for purposes of Eleventh Amendment sovereign immunity Id at 796 However, Smith does not hold that school districts never have the capacity to sue the state

In fact, the United States Supreme Court specifically relied the close relationship between states and school districts as support for a school district’s right to sue the state of Washington In Washington v Seattle School District No 1, 458 U S 457 (1982), the Supreme Court noted the state’s formal authority over the local school districts, but permitted

the school districts to assert the Fourteenth Amendment to challenge the state's action. The Court noted that "Washington has chosen to meet its educational responsibilities primarily through 'state and local officials, boards, and committees,' and the responsibility to devise and tailor educational programs to suit local needs has emphatically been vested in the local school boards." Id. at 477-78, see also Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 736 (Idaho 1993) (finding that the school district's statutory power to "sue and be sued" allowed the districts to "prosecute any actions they deem necessary for the protection and preservation of the school funds and property"), Harrisburg Sch. Dist. v. Hickok, 762 A.2d 398, 404 (Pa. 2000) (interpreting the state's "sue and be sued" statute to allow suit by the school districts against the state).

Thus, the Plaintiff Districts' extensive responsibility for carrying out the education of students places them in the best position to challenge whether or not the state is fulfilling its constitutional obligations.

B Political Subdivisions Can Sue the State

Defendants further incorrectly argue that 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" (citing 78 C.J.S. Schools and School Districts § 15 (footnotes omitted) (Defs.' Initial Br. 73)). Defendants propose that although South Carolina Code Section 59-17-10 provides school districts the ability to sue and be sued, school districts, as political subdivisions, may not sue the state because political subdivisions cannot challenge the acts of their creators. The statute does not include any exceptions for the State, however, and South Carolina law and case law from other jurisdictions contradicts Defendants' argument.

Other jurisdictions have affirmed the right of a political subdivision to sue the state if an identifiable link exists between the rights of the subdivision's residents and the responsibility of the subdivision. See, e.g., Cent. Delta Water Agency v. State Water Res. Control Bd., 21 Cal Rptr 2d 453, 456 (Cal Ct App 1993) (finding that a political subdivision has the right to challenge a State's action "where the [political subdivision's] constituents' rights under the challenged provision are 'inextricably bound up with' the subdivision's duties under the enabling statutes") In the present case, a clear link exists between the rights of citizens in the Plaintiff Districts and the responsibilities that the Plaintiff Districts have for the education of those citizens.

Similarly, in Minnesota State Board of Health v. City of Brainerd, 241 N.W.2d 624 (Minn. 1976), the court recognized two exceptions to the rule prohibiting suits by a political subdivision against the state. The first exception applies "when the rights of the state or the public interest are involved." Id. at 628 (quoting Clinton Falls Nursery Co. v. County of Steele, 232 N.W. 737, 738 (1930)). The second exception applies when the interest of the political subdivision in challenging the State is "predicated upon some adverse effect upon the governmental unit." Id. (quoting Comm'r of Taxation v. Crow Wing County, 144 N.W.2d 717, 719 (Minn. 1966)).

In the case at hand, Plaintiff Districts fall into both of these exceptions. First, a profound public interest exists—the education of South Carolina's children. See Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976) (allowing a suit by a public official against the State because the suit concerned an issue of wide spread public concern and noting that that rule prohibiting suits by public officials against the State is "not an inflexible one"). Second, the State's actions promote adverse

effects on the Plaintiff Districts, as the districts lack qualified teachers and administrators to teach and lead in their schools ³²

Finally, Defendants primarily rely on Richland County Recreation District v City of Columbia, 290 S C 93, 95, 348 S E 2d 363, 364 (1986), to support their argument that the power to sue "does not extend to a challenge of the acts of the creator of those subdivisions " (citing Hibernian Soc'y v Thomas, 282 S C 465, 319 S E 2d 339 (Ct App 1984)) However, Defendants' reliance on Richland County is misplaced

In Richland County the recreation district brought suit to prevent the city from collecting taxes and administering recreational services to districts within the territories annexed by the city Id at 94, 348 S E 2d at 364 The court held that a "mere interest" by a special purpose district in the determination of the validity of a statute, "*without a showing that their rights of person or property are adversely affected by the operation of the statute* " was insufficient to convey standing for the recreation district to challenge the statute Id at 95, 348 S E 2d at 364 (emphasis added) Rather, the court found that "a lawsuit must be brought by the *real party in interest*," and not just a public official " Id (emphasis added) ³³

³² Even City of New York v State, 655 N E 2d 649 (N Y App Div 1995), cited by Defendants, provides an exception to its general rule barring local government challenges to state legislation "where 'the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription '" Id at 652 (quoting Jeter v Ellenville Cent Sch Dist, 360 N E 2d 1086, 1088 (N Y App Div 1977))

³³ In addition, the quotation from Richland County that Defendant relies upon to support its argument that a subdivision of a state may not challenge an act of its creator stems from Hibernian Society v Thomas, 282 S C at 468, 319 S E 2d at 341, a case in which the fraternal society sued the city and county for a refund of taxes paid, contending that their property was exempt from *ad valorem* taxes One of the main issues in the case was whether the city had to pay interest on the refund of property taxes Id at 472, 319 S E 2d at 343 Thus, the city challenged the statute on equal protection grounds because the statute required the city, and not the county, to pay interest on the refund Id Essentially, the court addressed the question of whether a city is a person in the context of an equal protection claim Id The

In the present case, however, the Plaintiff Districts are real parties in interest, because the districts are directly and adversely affected by the state's actions. Furthermore, even if this court finds that the Plaintiff Districts are not the real parties in interest, they fall into the exception explicitly set forth in Richland County, 290 S C at 95, 348 S E 2d at 364, for "overriding public issues," and Minnesota State Board of Health, 241 N W 2d at 628, involving "public interests." The current education crisis caused by the Defendants' actions is of utmost importance to South Carolina citizens, as it impacts South Carolina's future, its children.

C Even Assuming *Arguendo* That Plaintiff Districts Lacked Standing, It Was Harmless Error

Finally, even if this Court finds that the Plaintiff Districts lack capacity to sue the State, Defendants do not contest the Plaintiff students' or taxpayers' standing to sue the State. Accordingly, an erroneous finding by the lower court that the Plaintiff Districts had capacity to sue the State would be mere harmless error under South Carolina Rule of Civil Procedure 61 and could not warrant reversal of the lower court's findings.

For the reasons stated above, this Court should affirm the lower court's finding that the Plaintiff Districts have capacity to sue the State.

court held that a municipality lacks standing to challenge, on equal protection grounds, a statute enacted by the state of which the municipality is a subdivision. Id. at 472-73, 319 S E 2d at 344. In reaching its decision, the Hibernian court relied on Williams v. Mayor, 289 U S 36, 40 (1933), which states that "a municipal corporation, created by a state for the better ordering of government has no privileges or immunities under the Federal Constitution which it may invoke in opposition of its creator." Both Hibernian and Williams provide support for the proposition that "a governmental agency created and controlled by a state is not a 'person' entitled, as against that state, to equal protection of the laws under the Fourteenth Amendment." Hibernian, 282 S C at 473, 319 S E 2d at 344, see also Williams, 289 U S at 40. However, neither Hibernian nor Williams go so far as to support Defendants' sweeping proposition that a municipality has absolutely no power to challenge the acts of its creator.

CONCLUSION

As the foregoing discussion establishes, the trial court correctly interpreted the scope of the State's duty to provide a minimally adequate educational opportunity to each child in South Carolina and properly concluded that the State failed to satisfy that obligation to the children in the Plaintiff Districts. Accordingly, the judgment of the trial court on the ultimate issue in this case—that the State failed to provide a constitutionally adequate educational opportunity to each child in the Plaintiff Districts—should be affirmed.

Further, in the fifteen years since this case has been pending, the General Assembly has not demonstrated any consistent effort to remedy its constitutional failures in the field of public education. In fact, in this Cross-Appeal, the legislature continues to deny its constitutionally mandated obligation to meet the educational needs of children in the Plaintiff Districts. This Court has the power and authority to set the General Assembly on a clear path to constitutional compliance. Until the Court does so, the constitutional rights of the children in the Plaintiff Districts to a minimally adequate educational opportunity will continue to be violated. Accordingly, Plaintiffs request that this Court issue an Order requiring Defendants to evaluate and reform the entire education system to comply with the constitutional mandate of ensuring that each child is provided safe and adequate facilities in which he has the opportunity to acquire a minimally adequate education. Further, Plaintiffs request that the Court require that Defendants do so within a specified time and under the Court's supervisory jurisdiction. Plaintiffs ask the Court to affirm its order on the issues raised by Defendants' cross-appeal upon any grounds appearing in the Record on Appeal, pursuant to Rule 221(c) of the South Carolina Rules of Appellate procedure.

Plaintiffs ask the Court to affirm the trial Court's order on the issues raised by Defendants' cross-appeal based on the arguments above, the argument in Plaintiffs' Initial Brief, and upon any ground's appearing in the Record on Appeal, pursuant to Rule 220[©] of the South Carolina Rules of Appellate Procedure

Respectfully submitted,

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Feb 28, 2008

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEE COUNTY
Court of Common Pleas

Thomas W Cooper, Jr , Circuit Court Judge

Case No 93-CP-31-169

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

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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,
Orangeburg 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 , Katisha 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, and 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,

v

Glenn F McConnell, as President *Pro Tempore*

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S C SUPREME COURT

of the Senate and as a representative of the South
Carolina Senate, Robert W 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, Mark C Sanford, as
Governor of the State of
South Carolina,

Respondents

**APPELLANTS-RESPONDENTS' SUPPLEMENTAL DESIGNATIONS
OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellants-Respondents, supplementing their Designation of Matter to be Included in the Record on Appeal filed December 13, 2007, designate the following matters to be included in the record on appeal

- 1 Trial Transcript
 - a 8/11/2003 9-28, 100-101
 - b 8/12/2003 92-95, 167-169
 - c 8/17/2003 92
 - d 9/25/2003 175
 - e 10/02/2003 70-117, 119, 121-122
 - f 10/07/2003 123-125
 - g 10/08/2003 102-123
 - h 1/13/2004 126-130, 132
 - i 1/14/2004 48-76, 78-100, 103-108
 - j 1/16/2004 149-183
 - k 2/09/2004 22-57
 - l 2/12/2004 87, 171
 - m 2/13/2004 96, 183-196
 - n 2/24/2004 122, 142-157
 - o 3/4/2004 152-153, 170, 186, 190, 198, 212, 217, 226, 234, 235, 236, 243
 - p 3/5/2004 11, 12, 18, 19, 25, 26, 50, 51, 53
 - q 4/1/2004 110, 179, 190
 - r 4/2/2004 35, 42-45, 53, 67, 78, 83, 88, 92, 93
 - s 4/20/2004 10-12, 86-89
 - t 4/21/2004 113, 123
 - u 5/04/2004 241
 - v 5/24/2004 211-212
 - w 5/26/2004 19
 - x 6/18/2004 151, 152

y 6/28/2004 155-156
z 7/01/2004 177
aa 9/22/2004 117-134, 226
bb 9/23/2004 23-24, 38-40, 43-44, 46, 49
cc 9/30/2004 38
dd 10/1/2004 165-166
ee 10/08/2004 102-123
ff 11/5/2004 5-18
gg 11/29/2004 13-16, 20

2 Defendants Exhibit 3307
3 Defendants Exhibit 2621
4 Defendants Exhibit 804

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

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Respectfully submitted,

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Feb 28, 2008

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