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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEE COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

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 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,

v.

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.

INITIAL REPLY BRIEF OF APPELLANTS-RESPONDENTS

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INTRODUCTION

The opportunity to acquire a minimally adequate education is a constitutional right guaranteed to each child in the Plaintiff Districts. It is perhaps the most fundamental right of citizenship. Under our system of government, this Court is charged with the profound duty of safeguarding this constitutional right. Thus, although the General Assembly has the responsibility to provide the educational opportunity, this Court must hold the General Assembly accountable when it fails to honor its constitutional obligation to our State's children.

The record of academic achievement in the Plaintiff Districts is, by all accounts, appalling. The overwhelming inability of children in the Plaintiff Districts to acquire a basic understanding of the skills and knowledge necessary for productive citizenship establishes that the State, through the public school system, is failing its children.

Defendants, who do not deny that all objective measures of educational achievement are unacceptably low in the Plaintiff Districts, instead attempt to distract this Court's attention from the significance of these educational outcomes by arguing they are not relevant to the constitutional question at issue in this case. Indeed, Defendants go so far as to argue that the quality of educational inputs (in particular teacher quality and funding resources) does not appreciably affect student achievement—the inference being that if the quality of inputs does not affect the outcomes, then the outcomes cannot reflect on the quality of the inputs. Defendants' own witnesses, however, disagree. Educational experts who testified at trial, including state policymakers and Defendants' own experts, agreed that better outcomes are the goal of the education system, that schools make a difference, and that poor outcomes reflect that the educational inputs are not meeting the children's needs. Thus, evidence of outcomes

must be considered to determine whether inputs are adequate to create the constitutionally required educational opportunity.

Defendants would prefer that the Court focus only on the educational inputs, but again, Defendants seek to distract the Court's attention from the evidence showing that the teachers, physical supports, instructional time, and funding resources provided by Defendants are inadequate. Instead, they focus on the education policies and legislation they have enacted. "Policies" do not educate children; teachers, time, instructional materials, facilities, and other educational inputs educate children. Thus, the State's obligation goes beyond setting education policy and funding, as it consistently and erroneously argues; it must provide a system of free public schools sufficient to offer children in the Plaintiff District the opportunity to acquire a minimally adequate education.

This is precisely the fallacy in Defendants' reliance on the Educational Accountability Act ("EAA"), which Defendants hold out as the answer to improving achievement in the Plaintiff Districts. The EAA is only legislation, and legislation does not create opportunity. For the accountability system to work, the students in the Plaintiff Districts must be provided with the resources they need to acquire the educational skills for which they will be held accountable. Despite the enactment of the EAA ten years ago, students in the Plaintiff Districts continue to fall further and further behind the rest of the State, and they show no consistent progress toward acceptable levels of achievement. Thus, the outcomes show that the State is not providing inputs adequate to create the constitutionally required educational opportunity for children in the Plaintiff Districts.

Finally, Defendants urge the Court to remember that they are not guarantors of educational achievement and object that Plaintiffs seek to hold them to a "strict liability"

standard that would "require the General Assembly not only to guarantee educational outcomes regardless of student participation, but also to assume liability for the failure of any person employed within the system to do the job for which he or she was hired." (Defs.' Br. 17-18.) Defendants are not required to guarantee achievement, and Plaintiffs do not seek to hold them responsible for things they cannot control. But Defendants can and do control the quality of inputs provided to children in the Plaintiff Districts, and they have a non-delegable duty to ensure that those inputs are of sufficient quality to provide each child with the opportunity to acquire a minimally adequate education.

Defendants cannot satisfy this obligation merely by providing "minimally adequate" educational resources. As stated in the Plaintiffs' Initial Brief, children raised in poverty require enhanced opportunities if they are to learn, not minimal offerings. Thus, Defendants must consider the educational needs of children in the Plaintiff Districts when providing educational resources, a responsibility that Defendants refuse to accept and that the trial court acknowledged but inexplicably failed to apply when evaluating the adequacy of the separate components of the education system. As discussed more fully in Plaintiffs' Response Brief,[1] Plaintiffs proved at trial that the lack of educational opportunities in the Plaintiff Districts is the result of Defendants' systemic failure to provide educational resources sufficient to create opportunity in light of the needs of the children. (Pls.' Response Br. 63-65.)

Having established that Defendants have breached their constitutional obligation to the children in the Plaintiff Districts, this Court must intervene to provide a remedy for the children aggrieved by the State's constitutional failure.

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[1] Reference to Plaintiffs' Response Brief (or "Pls.' Resp. Br.") herein refers to the Respondents' brief Plaintiffs filed as to Defendants' Cross-Appeal.

STATEMENT OF FACTS

The Statement of Facts in Defendants' Brief, filed on February 28, 2008 (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' previous briefs filed on December 13, 2007 and February 28, 2008, which are incorporated by reference.

STANDARD OF REVIEW

This Court may "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). Specifically, this Court, in the absence of a jury verdict, "may reverse a factual finding by the lower court."' Campbell v. Carr, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004) (quoting Crowder v. Crowder, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965)).

As they must, Defendants concede that this Court has the right to conduct a *de novo* review of the facts in considering this appeal. However, Defendants ask the Court to defer to the trial court's evaluation of the evidence instead of making its own factual findings. Rather than adopting the standard of review urged by Defendants, this Court should take an affirmative approach in which it "*will* find facts in accordance with [its] own view of the preponderance of the evidence." Kelly v. Peeples, 294 S.C. 63, 65, 362 S.E.2d 636, 637 (1987) (citing Townes, 266 S.C. 81, 221 S.E.2d 773) (emphasis added).

In Abbeville County School District v. State, 335 S.C. 58, 515 S.E.2d 535 (1999), Defendants also asked the Court to avoid difficult issues by dismissing this matter for failure to state a claim. This Court, however, chose not "to circumvent [its] duty" of interpreting the meaning of South Carolina's Education Clause. Id. at 67, 515 S.E.2d at 540. Similarly, in

considering this second appeal in this landmark case, the Court should review the full record *de novo* and make its own factual findings. Townes, 266 S.C. at 86, 221 S.E.2d at 775.

Defendants' case law on this issue merely allows this Court to adopt the trial court's factual findings in certain limited situations that are not present here. For example, the domestic relations case of Lee v. Lee, 237 S.C. 532, 535, 118 S.E.2d 171, 172 (1961), states as follows: "[T]he trial Judge saw the witnesses, heard the testimony delivered from the stand, and had the benefit of that personal observance of and contact with the parties which is of peculiar value in arriving at a correct result *in a case of this character.*" Id. (emphasis added). Unlike the cases cited by Defendants, the situation before this Court has a far-reaching and long-tem effect on the entire state. Although deference may be appropriate in a matter such as a divorce case, it is improper in a case involving the education and future of the children of South Carolina. The impact of this case on so many children and families compels a full and meaningful review of the entire record to ensure that this Court reaches the correct result on an issue of paramount importance to our state.

Further, none of Defendants' cases holds that this Court must rely completely on the trial court's factual findings and, even in the limited situations that constitute the exception to the Townes rule, precedent states only that the appellate court need not completely disregard the findings, not that they should be adopted wholesale.

Finally, the trial court itself acknowledged and relied on this Court's independent review of the facts. (See, e.g., 7/12/07 Order ¶ 42 ("The question of whether [trial court] drew improper or incorrect conclusions from the testimony will be answered by the appellate court's review of the depositions, the entirety of which were made a part of the record.").) The

trial court's reliance on this Court's *de novo* factual findings is an important reason that, alone, requires *de novo* review.

BURDEN OF PROOF

"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, 266 S.C. at 86, 221 S.E.2d at 775 (emphasis added). Therefore, the appropriate standard of proof in this case is the preponderance of evidence standard.

In arguing for the Court to use a standard of proof beyond a reasonable doubt, Defendants rest their entire argument on the mistaken premise that Plaintiffs are asking the Court to find a statute unconstitutional. Plaintiffs, however, did not argue the statutes were unconstitutional at trial, and the trial court did not make a finding regarding the inquiry. "An appellate court's task, with limited exceptions such as original jurisdiction actions, **is to review the lower court's decisions**." Jean Hoefer Toal, et al., Appellate Practice in South Carolina, 167 (2d. ed. 2002) (emphasis added). Defendants argue what the burden of proof **would have been** had the Court decided the question of whether a statute was unconstitutional. However, the trial court specifically notes that it was **not** considering "whether individual statutes affecting education in South Carolina are constitutional." (12/29/05 Order ¶ 19.) Therefore, the issue of whether individual statutes that affect education in South Carolina are constitutional is not properly before this Court. Defendants cannot change the issue in this appeal to get a more favorable burden or proof.

As Plaintiffs have repeatedly stated, finding that the current system of public schools does not afford the opportunity for a minimally adequate education does not require this Court

to find any current education law unconstitutional and therefore the proper burden of proof is by a preponderance of the evidence.

ARGUMENT

I. The Trial Court Adopted the Correct Constitutional Standard But Failed to Apply It Consistently To the Facts, Leading To Incorrect Conclusions.

A. Defendants, not the Plaintiffs, seek to alter the constitutional standard established in Abbeville.

Defendants incorrectly argue that Plaintiffs "want the Court to throw out the definition of a minimally adequate education announced in *Abbeville County* and reinterpret the education clause to make the legislature a guarantor of unspecified educational outcomes that must provide students 'a chance at life.'" (Defs.' Br. at 13.) In reality, it is Defendants who want the Court to throw out the definitions established in Abbeville. In Abbeville, this Court recognized that the purpose of education is to benefit not just the individual child, but the public at large. The trial court correctly interpreted this to mean that a "minimally adequate education" must be a level of education sufficient to enable all children in the State to "have a chance at life" and to become "productive citizens." On page 13 of their Response, Defendants imply that the trial court characterized a society where children have a "chance at life" as "utopia," but in the cited portion of the trial transcript, the trial court was simply commenting on defense counsel's strategy in cross-examining Plaintiffs' expert Dr. Terry Peterson. As discussed in Plaintiffs' Initial Brief, a "minimally adequate education" does not mean a "minimal" education; it means an education that is "minimally adequate" to prepare students for life and productive citizenship. Anything less is constitutionally unacceptable.

Further, the term "minimally adequate" defines the minimum acceptable level of educational achievement, but Defendants want to rewrite Abbeville so that the term

"opportunity" will be defined as a "minimally adequate" opportunity. That is not, however, this Court's holding. Thus, although the State is not obligated to guarantee that each child **accomplishes** the prescribed level of educational achievement, the State is obligated to guarantee that each child has **the opportunity to acquire that level of achievement**. A "minimally adequate" opportunity is meaningless under Abbeville, and because educational inputs create opportunity, a "minimally adequate" input is likewise meaningless under Abbeville. Rather, the Constitution, as interpreted by this Court in Abbeville, requires the State to provide whatever resources are necessary to ensure that the "opportunity" is sufficient to enable each child to accomplish the goal of a "minimally adequate education."

B. The correct constitutional standard required the trial court to consider inputs in view of their individual and cumulative ability to meet the needs of the children in the Plaintiff Districts.

Defendants argue that the trial court's analysis was correct because "the best way to evaluate the system as a whole is to examine the inputs into the system individually and determine whether they are constitutional." (Defs.' Br. 21.) Plaintiffs agree that an analysis of inputs was not only permissible, but required. Plaintiffs disagree, however, with the trial court's flawed analysis of these inputs and how the court used its findings in reaching its conclusions.

The trial court found the component parts to be "minimally adequate" and thus constitutionally permissible when viewed abstractly and removed from the students' needs. However, the court should have considered whether the components were adequate to offer the children the opportunity to learn measured, as the trial court recognized they must be, through the eyes of the children. (12/29/05 Order ¶ 35.) Minimally adequate components, individually or when layered, offer no opportunity whatsoever to children whose needs exceed them.

Accordingly, next the trial court's methodology was flawed in that it measured the quality of the individual inputs against the wrong standard.

Further, Abbeville also required the trial court to examine whether the cumulative effect of these inputs—"the system"—offered the required opportunities. Defendants did not address the evidence, discussed on page 16 of Plaintiffs' principal brief, that shows how the cumulative effect of individual factors determines the educational opportunities in schools. Instead, they argued that consideration of the educational system as a whole, rather than its component parts, is illogical because it asks the court to conclude that an education system comprised of individually adequate parts is inadequate, or stated differently, that "the whole is less than the sum of its parts." (Defs.' Br. 19.) To the contrary, as Plaintiffs' expert Dr. Terry Peterson explained at trial, the "cumulative effect" refers to the fact that each input builds upon the preceding input to add greater overall value. (Tr. (6/10/2004) 31:1-32:16.) Plaintiffs showed that the system was comprised of parts that were individually insufficient to address education needs of at-risk children and, when taken together, create a system that unquestionably is unable to create the required educational opportunity for these children. Thus, the trial court correctly concluded that the system as a whole was unconstitutional (because it was not providing the constitutionally required educational opportunity), but incorrectly determined that the component parts - with the exception of early childhood - were "constitutionally adequate."

C. There was no factual or legal basis on which the trial court could logically deny relief to children above grade three.

Plaintiffs have shown that the lack of opportunity in the Plaintiff Districts establishes the unconstitutionality of the education system as a whole, requiring relief beyond early

childhood education measures. (Pls.' Initial Br. 103-04.) Defendants' response is that Plaintiffs' proposed relief would be "akin to a mechanic informing a customer that one of his or her tires is flat and that therefore the customer needs to invest in a new car." (Defs.' Br. 30.) Contrary to this suggestion, the lack of early childhood education in the State's public education system is not similar to a flat tire on an otherwise perfectly good car. Plaintiffs have established that the inadequacies in the public education system leading to the lack of opportunity in the Plaintiff Districts are system-wide.

Further, there was no factual or legal basis for the trial court to distinguish young children as the only children entitled to educational opportunity. Having recognized that, under Abbeville, the State's obligation runs to each child, and that opportunity must take into account the enhanced needs of children impacted by poverty, there was no logical basis for the trial court to conclude that the State was only obligated to overcome the effects of poverty for children under the age of third grade, rather than for all children as the Constitution requires.

In addition, the trial court found, and the evidence is clear, that students in the Plaintiff Districts were not offered the opportunity for a minimally adequate education. This included all grades, not just those in K-5 through grade three. All children are entitled to relief.

Plaintiffs offered ample evidence at trial establishing the effect of poverty on the educational needs of children of all ages, and the evidence clearly showed that students progressing through the system in all grades would need additional help to have an opportunity to succeed. (Tr. (9/28/04) 71:21-72:2; (9/21/04) 156:23-157:22.) Plaintiffs also offered ample evidence at trial establishing that, as the trial court agreed, "at-risk students can and do learn at high levels if provided the right learning environment and skilled teachers." (7/12/07 Order ¶ 54.) This evidence was not limited to early childhood, but showed the positive effect of

adequate educational resources on achievement for children of all ages. Accordingly, there was no logical basis for the court to limit its ruling by requiring Defendants to address deficiencies in early childhood education only, when the evidence showed the entire education system was unconstitutional and needs to be addressed.

II. Consideration of Educational Outcomes is Proper and Necessary When Evaluating Adequacy of Educational Inputs and Does Not Equate "Opportunity" With "Achievement."

Defendants accuse Plaintiffs of mistakenly equating "opportunity" with "achievement," incorrectly stating that Plaintiffs rely exclusively on evidence of educational outcomes to prove the inadequacy of the education system. (Defs.' Br. 22-24.) Plaintiffs have never taken such a position, but have consistently maintained that the complete system of inputs, outputs, and students' needs must all be considered to determine whether an "opportunity" exists. The trial court agreed, although it ultimately failed to follow its own stated approach. (See 12/29/05 Order ¶ 53; see also 7/12/07 Order ¶ 51) (holding "inputs, outcomes, and the impact of poverty must be taken into account in determining whether or not the State has fulfilled its constitutional obligation").)

A. Experts for both sides and legal authorities uniformly agree that outcomes are relevant to show quality of education system.

As discussed in Plaintiffs' Initial Brief, educational experts confirmed at trial that outputs are relevant to the quality of an education system and its ability to deliver the required educational opportunity. Indeed, Defendants' own expert James Guthrie, on whose testimony and opinions Defendants heavily rely in responding to Plaintiffs' Initial Brief, unequivocally confirmed the importance of considering outcomes to evaluate the effectiveness of the State's education system:

> **I absolutely believe that one ought to focus on outcomes to appraise the effectiveness of the education system** and particularly one should use outcomes relative to the characteristics of the students.

(Tr. (9/21/04) 87:24-88:2 (emphasis added); see also id. (9/21/04) 109:8-10 ("when my concern is the effectiveness of the school, then I want to look at the achievement outcomes").) Similarly, defense witness Sandy Smith testified that, as a matter of policy, the State of South Carolina uses output indicators—PACT scores, exit exam scores, and graduation rates—to measure school quality and to determine whether the school needs to be improved. (Tr. (6/17/04) 200:20-201:8.)

Also, courts around the country have specifically considered evidence of outcomes in determining whether or not the state is living up to its constitutional obligations. (See Pls.' Initial Br. 99 (citing cases).) Defendants have not, and cannot, distinguish that authority; instead, they cite to other legal authority that does not support their argument. Indeed, after stating that "[a]lmost every court examining the adequacy of education systems has held that inputs are the proper measure of adequacy," Defendants do not cite a single case suggesting that outputs are immaterial, but instead cite three cases stressing the *importance* of educational outcomes in evaluating whether the opportunity for an education is present: Paynter v. State, 797 N.E.2d 1225 (N.Y. 2003); New York State Association of Small City School Districts, Inc. v. State, 840 N.Y.S.2d 179 (N.Y. App. Div. 2007); and Leandro v. State, 488 S.E.2d 249 (N.C. 1997).

Unlike the case before this Court, the plaintiffs in Paynter did not allege or offer proof of any inadequacies in educational inputs. Instead, they claimed that the State of New York was responsible for failing to adopt legislation (school residency and non-resident tuition requirements) that could directly mitigate the effect of demographic factors on educational

achievement. In rejecting the plaintiffs' claim for failure to allege that poor educational outcomes were caused by the State's failure to provide adequate educational inputs, the Paynter court reiterated the proof requirement set forth in Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995) ("CFE I") for a viable education adequacy claim:

> [The plaintiffs must prove that] the State [has failed] to provide a sound basic education (as required by the New York Constitution) in that it provide deficient inputs - teaching, facilities and instrumentalities of learning—which lead to deficient outputs such as test results and graduation rates; and that this failure is causally connected to the [State's] funding system.

Paynter, 797 N.E.2d at 1228. The Paynter court expressly noted that "evidence of whether students are receiving a sound basic education may include - in addition to proof about these essentials [educational inputs] - facts showing the outcomes of the educational process, such as examination results." Id. at 1228; see also N.Y. State Ass'n, 840 N.Y.S.2d at 183 (citing Paynter and CFE I for the appropriate standard of proof in an education adequacy case).

In Leandro, 488 S.E.2d at 259-60, the North Carolina Supreme Court also recognized that "the level of performance of the children of the state and its various districts on standard achievement tests" should be considered in determining whether the opportunity existed. In quoting this opinion for the proposition that such evidence of outcomes may not be treated as "absolutely authoritative," Defendants failed to mention the remaining portion of the order discussing the relevance of outcomes, in which the court noted that "such 'output' measurements **may be more reliable than measurements of 'input'** such as per-pupil funding or general education funding provided by the state." Id. at 260 (emphasis added).

Finally, Defendants again took a quotation on outputs out of context, this time from the article authored by Michael Rebell. (Defs.' Br. 25.) In discussing the current wave of school adequacy litigation, the author notes—as this Court did in Abbeville—that courts have

generally defined constitutional adequacy in terms of opportunity rather than outcomes, but also recognized the probative value of outcomes:

> [A]lthough many state accountability systems, especially in states that have adopted "high stakes" testing programs, emphasize student achievement scores as the basic determinants of whether students are obtaining an appropriate education, the constitutional criterion for determining the level of educational services that must be provided for an adequate education tends to emphasize educational opportunity, not educational results. Output measurements are considered important guideposts for determining whether an education system is functioning well and whether further scrutiny is warranted, but they are not seen as constituent elements of a constitutional definition of adequacy.

Michael A. Rebell, Educational Adequacy, Democracy and the Courts in Achieving High Educational Standards for All (Conference Summary) 218, 242 (Timothy Ready et al., eds. 2002) (citing CFE I and Leandro, which, as discussed above, support the proposition that evidence of outcomes is relevant to prove adequacy of inputs).

B. Inputs affect outcomes, and the fact that other factors contribute to poor achievement does not mean outcomes are irrelevant to inputs.

In their Initial Brief on Cross-Appeal, Defendants argued that socio-economic conditions found in the Plaintiff Districts are the cause of academic failure, making the clear implication that poor children cannot learn and that the students are doing as well as can be expected given their backgrounds. Plaintiffs refuted this argument by showing that schools do matter and that, as defense experts agreed and the trial court held, "at-risk students can and do learn at high levels if provided the right learning environment and skilled teachers." (Pls.' Response Br. 64.)

In a subtle variation of this argument, Defendants now contend that objective measurements of student performance (specifically SAT/ACT scores and graduation rates) are irrelevant when evaluating the adequacy of inputs because the quality of educational inputs

(specifically teacher quality and spending) does not appreciably affect achievement. This argument is a transparent effort to detract from the significance of the poor educational outcomes and inadequate inputs. Plaintiffs address arguments pertaining to the effect of specific inputs elsewhere in this brief.

Defendants' arguments regarding the relevance of SAT/ACT scores and graduation rates fail for several reasons. First, Defendants argue that SAT/ACT scores are not "generally accepted to be measures of a state's overall education system" but rather "are a reflection of the fact that a large majority of students are on free and reduced lunch." (Defs.' Br. 110.) Trial evidence established that SAT scores of students in the Plaintiff Districts were among the lowest in the country. (Tr. (2/24/04) 49:20-23) Even though Defendants' expert James Guthrie testified that these scores reflected the "challenge of teachability" in these districts due to poverty, he admitted that the scores also reflected that those districts were not rising to the educational challenges faced by their students. (Tr. (9/21/04) 90:13-23.) Other witnesses confirmed that SAT/ACT scores, like other objective measurements of student performance, reflect on the overall effectiveness of the education system. (Tr. (10/6/03) 244:16-245:17; (2/24/04) 49:9-19.)

Similarly, citing to the testimony of Plaintiffs' expert witness, Dr. Terry Peterson, Defendants argue that graduation rates reflect on students' individual reasons for dropping out of high school that are unrelated to education such as "to work, pregnancy and child care, and criminal conduct." (Defs.' Br. 111.) Defendants, however, mischaracterized the expert's testimony. Dr. Peterson was testifying about different strategies that could positively affect student achievement, including by increasing the graduation rate, when the following exchange took place:

Defense counsel:	Kids drop out of high school for a lot of reasons don't they, Dr. Peterson?
Dr. Peterson:	Yes.
Defense counsel:	Not all of them are education related?
Dr. Peterson:	Not all of them are, but many of them are.

(Tr. (06/10/04) 38:7-11.) Dr. Peterson also testified that the low graduation rates in the Plaintiff Districts could be improved as the result of improved educational opportunity in schools. (Tr. (06/10/04) 31:11-32:8; 37:25-38:3.) Other witnesses confirmed that low graduation rates, like other objective measurements of student performance, reflect on the overall quality and effectiveness of the education system. (Tr. (2/13/04) 22:16-23:1 (J. Anderson); (10/6/03) 246:25-247:5 (Lindsey).)

Thus, evidence of low SAT/ACT scores and graduation rates in the Plaintiff Districts, like other evidence of educational outcomes, is relevant when evaluating the effectiveness of the education system in providing educational opportunity.

C. Educational outcomes show lack of opportunity in the Plaintiff Districts.

Standing in stark contrast to their argument that educational outcomes are irrelevant to the adequacy of inputs, Defendants paradoxically argue that the test scores actually prove that the educational inputs are working. (Defs.' Br. 106-13.) Plaintiffs have previously refuted Defendants' argument that achievement by some means opportunity for all. Specifically in response to Defendants' comments about HSAP passage rates and graduation rates, however, Plaintiffs note the following.

In 2004, the first-time failure rate on the HSAP for tenth-grade students in the Plaintiff Districts ranged between 55% and 33%. (See Pls.' Ex. 6859E.) This compares to a state-wide first time failure rate of 24%. In addition, the statistic that 85% of students "eventually" passed the exit exam in 2004 is misleading. This reflects the percentage of high school seniors

who have passed the exam by their fourth and final try, but it does not measure the percent passage rate of students who originally took the test because it excludes those who dropped out before their senior year. Further, it signifies only that 85% of high school seniors in 2004 were able to demonstrate that they had acquired the skills expected of, at most, a tenth grader.

In addition, Defendants argue that, based on 2004 graduation rates, the "overwhelming majority" of students in the Plaintiff Districts graduate within four years. The 2004 graduation rates to which Defendants cite are not part of the evidence in the record, and Plaintiffs have moved to strike this and all other post-trial information not presented and noted judicially at trial, including information from 2004 report cards.[2] The evidence at trial showed an unacceptably low average graduation rate of approximately 50% in the Plaintiff Districts, and this evidence was not challenged by Defendants. (Pls.' Initial Br. 102; Tr. (2/13/04) 23: 6-14; (6/9/2004) 72:9-21; (6/10/04) 24:15-18).)

The fact that some students in the Plaintiff Districts pass PACT and are eventually able to pass the HSAP exam and graduate does not prove that a constitutionally required opportunity to acquire a minimally adequate education is available for all children. In arguing otherwise, Defendants blame the unsuccessful students for being unable or unwilling to take advantage of the "opportunities" offered in the schools. (Defs.' Br. 26-30.) But, as Defendants themselves have repeatedly argued, many non-school related factors—in addition to

[2] Further, because the 2004 graduation rates cited by Defendants, which came out in the last few weeks of trial, are known to be unreliable and were calculated in a manner different from the graduation rates used at trial, this Court should not rely on them. The graduation rates entered as exhibits at trial were based on data from the National Center for Education Statistics (NCES). (See Pls.' Exs. 6094 (raw data) and 6858 (graduation rates).) By contrast, the report card graduation rates beginning after 2003 are self-reported by individual schools. The EOC has recognized that such data is subject to over-inflate actual rates and therefore requires that until more accurate data is available in 2009, all report cards must include a warning that the graduation rates published in the report cards may be higher than the actual graduation rates. See, e.g., 2007-08 Accountability Manual, 36-37 (found at http://www.sceoc.com). Even if accurate, the 2004 graduation rates cited by Defendants range from a low of 64% in Florence 4 to a high of 83% in Jasper and Allendale, with an average rate of 75%. This still means that one in four students in the Plaintiff Districts fails to graduate from high school, and even Defendants admit that this needs to be improved. (Defs.' Br. 112.)

poverty—affect student achievement, and it cannot be assumed that all children in the Plaintiff Districts stand on an equal footing with one another simply because the vast majority are impacted by poverty. Educational opportunity must be sufficient to reach "each child" in the Plaintiff Districts, not only those children who are the more fortunate among the disadvantaged. Further, witnesses testified at trial that children in the Plaintiff Districts come to school in kindergarten excited, eager, and ready to learn, but as they move through a school system that continues to fail them, they lose their sense of self-esteem and enthusiasm for school. (Tr. (9/30/03) 106:2-22; (10/02/03) 140:25-141:17, 142:5-8 (noting quality of instruction, environment and resources over a number of years negatively affects students' attitudes).)

Thus, the low graduation rates, along with low PACT scores, low SAT/ACT scores, low first time HSAP passage rates, and poor school quality ratings in the Plaintiff Districts are universally regarded as unacceptable and, taken together, undeniably create the inference that the schools are failing their children.

III. Defendants' Accountability System Does Not Create The Required Opportunity.

Relying almost exclusively on testimony from their expert witness, Dr. James Guthrie, Defendants argue that they have set up a "state of the art" accountability system through the Education Accountability Act ("EAA") that overwhelms all other educational inputs and, given enough time, will positively affect achievement and provide the opportunity to acquire a minimally adequate education to all students. (Defs.' Br. 39-41.)

A. Educational inputs—not accountability legislation—create opportunity.

Relying principally on the testimony of their expert Dr. Guthrie, Defendants argue that South Carolina's accountability system is solely responsible for improvements in student

achievement and should not be disturbed. The EAA, however, is only legislation, and legislation does not create opportunity. For the accountability system to work, the students must be given the tools they need to acquire the educational skills for which they will be held accountable. Indeed, Defendants state that one of the objectives of the EAA is "[to] **provide resources** to strengthen the process of teaching and learning in the classroom to improve student performance and reduce gaps in performance." (Defs.' Br. 40 (emphasis added).) Even Dr. Guthrie, who testified that the accountability system is an excellent plan, admitted that the State has a "corresponding duty to make sure that the people who deliver the education and the students have the resources available to them to meet the learning standard [imposed by statute]." (Tr. (9/21/04) 112:9-12); see also Abbott ex rel. Abbott v. Burke (Abbott IV), 693 A.2d 417, 428-29 (N.J. 1997) (holding that standards do not ensure achievement; improvement depends on the sufficiency of educational resources).

B. The EAA accurately measures but fails to address lack of opportunity.

Defendants, while praising the EAA, refer to the Act's learning standards as "goals," arguing that they far exceed the opportunities and outcomes mandated by Abbeville. This Court's outline in Abbeville, 335 S.C. at 68, 515 S.E.2d at 540, contemplates a progressive and cumulative process to prepare students to be productive American citizens, thus benefiting not only the students, but also the State at large. As discussed more fully in Plaintiffs' Initial Brief, the State curriculum standards appropriately fill in the "broad parameters" outlined in Abbeville and establish the threshold below which students may not fall. (Pls.' Initial Br. 49-52.) Although Defendants' retained expert, Dr. Guthrie, opined that the State curriculum standards exceed the level of education contemplated in Abbeville, he also admitted that students must learn the material in the standards to successfully graduate high school and have

a chance to become a successful citizen. (Tr. (9/21/04) 116:14-117:4.) Therefore, Defendants' own expert concedes that the state standards encompass the skills and knowledge deemed necessary for productive citizenship, and a "basic" understanding of the state standards is necessary to conclude that a student has acquired a "minimally adequate education."

Defendants agree that the PACT tests accurately assess whether South Carolina students are actually acquiring the knowledge and skills set out in the EAA curriculum standards; however, Defendants do not interpret and apply those results as the PACT creators intended: not only to identify areas in which improvement is needed but also to identify and provide the resources required to improve those areas. For example, Dr. Sandra Lindsay—Deputy Superintendent for the Division of Curriculum Services and Assessment at the State Department of Education and one of the contributing authors of the PACT Users Guide—testified about the disconnect between Defendants' mandated testing and their failure to follow through by using the test results to effect reform:

> What we are doing by standardized testing without providing some way out, without providing some sort of service so that they can make up what they don't know is just to simply restate the obvious to that child until we drive them out of school.

(Tr. (10/7/03) 58:17-21.)

Finally, the technical assistance component of the EAA is ineffective. Rather than providing assistance to students who are at-risk of failure due to their educational needs, technical assistance pursuant to the EAA comes only after enough students in a school have failed PACT or other assessments to earn the school an Unsatisfactory or Below Average report card rating. Thus, the trial court correctly found that such technical assistance was "largely ineffective because [it] come[s] too late." (12/29/05 Order ¶ 160; 7/12/07 Order ¶¶ 72-73.)

C. Incremental improvement in test scores does not show that opportunity is present or will be created by giving the EAA more time.

Finally, Dr. Guthrie opines that the EAA is responsible for improvement in PACT scores from 2001-2003 and assumes that, with time, they will continue. Relying on Dr. Guthrie's testimony, Defendants contend that even if opportunity was lacking in the Plaintiff Districts, improvement in educational outcomes (PACT scores and school ratings) in the Plaintiff Districts proves that the EAA creates the required opportunity. The evidence does not support this conclusion.

First, Dr. Guthrie assumes that improvement is attributable to the EAA because higher percentages of younger students (who have been exposed to the EAA throughout their schooling) are scoring basic or above than are older students (who have had less exposure to the EAA). However, the decline in test scores as children get older is explained by the cumulative effect of the lack of opportunity on at-risk students. (Tr. (7/29/03) 130:1-20 (L. Anderson); (2/24/04) 105:7-107:17 (J. Anderson).) As Dr. Jo Anne Anderson testified:

> Our students have performed less well on academic measures as they progress through school. In practical terms, the disadvantages some children bring to the classroom are not remedied and the gap increases as students enter upper grades. Third grade scores are better than eighth grade scores.

(Tr. (2/13/04) 62:16-64:22.) In fact, the same phenomenon occurred in 2000, when according to Dr. Guthrie, the EAA would not yet have had an opportunity to impress a differential effect upon the performance of third graders as compared to eighth graders. (Defs.' Ex. 3147.) Thus, this data contradicts Dr. Guthrie's theory that better performance on PACT in younger grades is the result of exposure to the EAA.

In addition, Dr. Guthrie assumes that the increase in PACT scores shown from 2001 to 2003 for students at the same level (such as third graders in 2001 to third graders in 2003)

indicates that the EAA is working. However, PACT test results do not show that scores are steadily improving in the Plaintiff Districts in any significant way. PACT scores by district for the years 2000–2004 illustrate that any increase in scores is sporadic at best and fails to establish a consistent, linear increase. (Tr. (9/21/2004) 124:15-128:2 (showing "jagged tooth" improvement).) Indeed, as the chart on page 107 of Defendants' response brief indicates, many of the districts show a precipitous drop in the percentage of students scoring basic or above between 2000 and 2001, with improvement between 2001 and 2004 insufficient to recover that gain. Therefore, these sporadic gains cannot reliably be interpreted as proof that the PACT scores will continue to improve.

Finally, even if the sporadic gains in PACT scores were to continue, they are coming far too slowly and show that the Plaintiff Districts are continuing to fall further behind the rest of the state. (Tr. (2/13/04) 207:9-16 (J. Anderson); Pls.' Ex. 6364Y, 6364Z.) Comparing school ratings in the Plaintiff Districts with statewide averages likewise shows the Plaintiff Districts are falling continually behind the rest of the state.

Defendants argue that improvement in school ratings in the Plaintiff Districts from 2001 to 2003 "is attributable to the EAA, and will continue without intervention of the courts." (Defs.' Br. 112.) Relying on Plaintiffs' Exhibit 6352A, Defendants have made an obvious and glaring error in their calculations. (See Defs.' Br. 112, n.38.) As shown in that exhibit, the total number of unsatisfactory and below average (combined) schools **statewide** fell from 247 in 2001 to 180 in 2003. This shows a 27.2% decrease in the total number of unsatisfactory and below average schools **statewide**. In the Plaintiff Districts, the number of unsatisfactory and below average schools went from 31 in 2001 to 27 in 2003, a 12.9% decrease. However, Dr. Jo Anne Anderson testified that two or three of those schools were actually merged or

closed, resulting in virtually no improvement in school ratings in the Plaintiff Districts. (Tr. (2/24/04) 25:13-27:2.) If three schools closed or were merged, that would leave 1 out of 31 schools improving—a negligible improvement rate of 3%. In fact, in 2003, while 17.4% of schools statewide were rated unsatisfactory or below average, a disturbing 75% of schools in the Plaintiff Districts fell into this category. (Pls.' Ex. 6352-B; Tr. (1/15/04) 107:9-20.)

Thus, contrary to Defendants' argument, the evidence of PACT scores and related school ratings demonstrate that the Plaintiff Districts are continuing to fall further and further behind the rest of the State, and the State is not doing what it needs to be doing to ensure that the children in the Plaintiff Districts are provided with the opportunity to acquire a minimally adequate education.

IV. Educational Inputs Are Inadequate to Meet the Needs of Children in the Plaintiff Districts.

A. Defendants are responsible for the lack of high-quality teachers in the Plaintiff Districts' classrooms.

Plaintiffs' Initial Brief established the negative effect of teacher quality issues on educational opportunities in the Plaintiff Districts. (Pls.' Initial Br. 17-69.) Defendants respond that: (1) South Carolina has a licensing and certification system in place that is designed to "assure that teachers in South Carolina are at the very least minimally qualified to teach students in South Carolina" (Defs.' Br. 34); (2) evidence does not support the conclusion that teacher characteristics in the Plaintiff Districts have a negative impact on students' educational achievement in the Plaintiff Districts (id. at 92, 105-06); and (3) poor teacher quality in the Plaintiff Districts is not the State's responsibility (id. at 17-18, 103-04).

Defendants' arguments fundamentally miss the point. The overwhelming evidence adduced at trial established that teacher quality is of paramount importance in delivering

education to children and that having a highly skilled and effective teacher in every classroom is essential to providing the opportunity to students in the Plaintiff Districts. Plaintiffs do not argue that negative teacher characteristics "cause" poor results. Rather, Plaintiffs showed—and Defendants do not dispute—that a causal relationship exists between teacher quality and student achievement. Plaintiffs showed that a disproportionate clustering of negative teacher characteristics indicated a lower-quality teaching force in the Plaintiff Districts and supported this inference with direct testimonial evidence from "on the ground" witnesses about the widespread lack of a consistently high-quality teaching force in the Plaintiff Districts. Plaintiffs also proved that this lack of high-quality teachers is the result of Defendants' failure to fund adequate teacher salaries and provide effective procedures to improve the quality of teaching in the Plaintiff Districts.

1. It is undisputed that at-risk children in the Plaintiff Districts need a high-quality teacher in every classroom.

As discussed in Plaintiffs' principal brief, and as undisputed by Defendants, teachers and the quality of instruction they deliver to children are of primary importance. (Pls.' Initial Br. 17-21.) High-quality teachers, trained and skilled in "active teaching" through engaging the students, are even more essential in schools with high poverty enrollments. (See Record Compilation 15 (quoting Tr. (2/9/04) 42:8-43:3; (8/11/03) 32:19-35:16, 37:24-40:23; (10/2/03) 142:21-143:10, 143:25-144:17; (1/6/04) 125:9-126:21; (9/28/04) 71:20-72:2; (9/29/03) 95:24-96:25.) Education is a cumulative process, and the undisputed evidence establishes that even one ineffective teacher can significantly damage a child's educational progress, not only for the year the child is in that classroom, but for successive years. (See Record Compilation 16, quoting (8/11/03) 48:20-49:6; (9/29/03) 110:20-111:23; (10/2/03)

142:9-17; (7/30/03) 197:13-198:13; (5/25/04) 74:20-75:20, (6/7/04) 42:18-25; (10/6/03) 181:13-182:12; (Tr. (8/11/03) 48:6-49:9.)

2. Plaintiff Districts do not have high-quality teachers in every classroom.

a. Teacher characteristics are reliable indicators of the quality of a teaching force.

Plaintiffs acknowledge that teacher *characteristics*—certification, advanced degrees, experience, and graduation from competitive colleges—do not guarantee that any individual teacher possesses the knowledge, training, and skills necessary to deliver effective instruction to at-risk children. Nevertheless, Plaintiffs' expert witnesses on teachers and teacher quality—Doctors Janice Poda, Linda Darling-Hammond, Gloria Ladson-Billings, Henry Levin, and Barnett Berry, all of whom are former teachers who have devoted their careers to analyzing, training, and understanding teachers and teaching—uniformly testified that tabulation of teacher characteristics is useful as an indicator of the quality of a teaching staff. (Tr. (8/11/03) 32:5-37:7, 136:3-137:6; (9/22/03) 67:23-68:13; (9/12/03) 57:3-58:24; (9/29/03) 38:8-13; (4/19/04) 74:12-75:13.) Most courts recognize the value and persuasiveness of such evidence. See, e.g., Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 334 (N.Y. 2003) (CFE III); Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 495 (N.Y. Sup. Ct. 2001); Tenn. Small Sch. Sys. v. McWherter, 894 S.W.2d 734, 738 (Tenn. 1995).

Even more important than the numbers and statistics is the very real effect ill-prepared and ill-equipped teachers have on students, as established by expert Ray Rogers. (Tr. (8/11/03) 48:6-49:9.)

b. Plaintiff Districts have more teachers with negative characteristics, indicating a lower quality teaching force.

Defendants also argue that the differences in teacher certification characteristics between Plaintiff Districts and the state at large are not large enough to be of concern. (Defs.' Br. 96-98.) The evidence is undisputed, however, that despite their greater need, the at-risk children in Plaintiff Districts have less access to teachers with the positive characteristics that indicate higher quality. (See, e.g., Pls.' Ex. 6152.)

First, Defendants' statistical analysis to support their argument of minimal differences is fatally flawed by their expert's unexplained exclusion of 8,000 of the 45,837 South Carolina classroom teachers from his analysis, including special education teachers, foreign teachers, kindergarten and pre-kindergarten teachers, and teachers he did not classify as "full-time" teachers, although they were under contract for the full year. (Tr. (11/4/04) 74:7-75:4; Pls.' Ex. 6857A; Pls.' Initial Br. 34, n.8.)

Second, Defendants' statistical analysis measured characteristics that no one at trial suggested were meaningful. For example, Defendants argue the insignificance in percentages in Plaintiff and non-plaintiff districts of teachers with additional credits beyond a Bachelor's degree (Defs.' Br. 98), although every teacher in South Carolina must have a Bachelor's degree and take additional courses to maintain their licenses, meaning that virtually every certified teacher in South Carolina falls into this category. (Tr. (11/4/04) 80:3-18.) As another example, Defendants argue that differences in "professional certification" percentages were minimal (Defs.' Br. 96-97), although, notably, their category of "professional certifications" included teachers with substandard certifications and certified teachers who hold out-of-field permits allowing them to teach subject matters in which they have no special training. (Tr.

(11/4/04) 109:8-110:6, 215:11-19).) Defendants ignored the numbers of teachers who are teaching outside their fields or who hold substandard certifications[3] and who are not as trained or as knowledgeable as those who hold standard certifications. Defendants did not rebut Plaintiffs' evidence showing that these lesser-trained and lesser-skilled teachers are present in greater percentages in Plaintiff Districts, in classrooms filled with at-risk children.

c. The high rate of teacher turnover in Plaintiff Districts results in a lower-quality teaching force.

Defendants argue that the amount of turnover among the teaching staffs in the Plaintiff Districts is not serious or even problematic,[4] relying on an analysis of numbers to conclude that Plaintiff Districts actually **benefit** from the high turnover year after year. (Defs.' Br. 99-101.)

Defendants' argument is simply not credible. First, it is based on Dr. Wolkoff's flawed and invalid analysis of the State's teacher workforce, based on only a partial count of the workforce. See discussion, supra. Second, for Defendants to argue that a three-year average teacher turnover in six of the Plaintiff Districts ranges from 20% to over 25% (Pls.' Exs. 1556 and 6152C) is not problematic is patently absurd. Six of the eight Plaintiff Districts have turnover rates placing them among the top eight in the state; only the districts of McCormick and Lexington 4, both of which are among the named Plaintiffs in this case, have higher rates. (Pls.' Ex. 1566.) These districts must find candidates to replace approximately one-quarter of their teacher workforce year after year. Included in this nearly constant turnover are all the attendant difficulties that come with employees who are unfamiliar with their new school, the

[3] "Substandard certification" is simply a shorthand way of referring to those that do not meet the standards of "highly qualified" under the State plan required in the No Child Left Behind legislation, which is applicable to any school receiving federal funding under the legislation, 20 U.S.C. § 6319. (Tr. (9/22/03) 140:5-142:1, 182:2-183:5 (Poda).)

[4] Even the trial court acknowledged that the amount of turnover in Plaintiff Districts is "something of a management and planning problem." (12/29/05 Order ¶ 217.)

school's faculty and staff, the school's curriculum and practices, the students, parents, and community. Turnover at those levels in schools costs money and negatively impacts on students and schools. (Tr. (9/22/03) 200:22-201:12, 202:12-203:15; (9/23/03) 64:15-68:2.)

Third, as long as conditions and funding realities remain unchanged in Plaintiff Districts, they cannot hope to and in fact do not attract better candidates than those they lost. Even if the replacement teachers have qualifications equal to those they are replacing, the instability and constant introduction of teachers new to Plaintiff Districts undermine efforts at school improvement and student achievement. (See Pls.' Initial Br. 39-40.)

d. Undisputed testimonial evidence supports the conclusion that Plaintiff Districts lack a quality teaching force.

Plaintiffs did not limit their proof to statistical evidence of negative teacher characteristics. Plaintiffs also relied on direct evidence—testimony of live witnesses, including State Department of Education witnesses and Defendants' own experts discussing widespread examples of low quality teaching in Plaintiff Districts. All three of Defendants' experts who visited schools in the Plaintiff Districts observed and identified systemic and disabling instructional problems that kept children from learning, testimony that is undisputed by Defendants. (See Tr. (9/22/04) 18:10-15 (Guthrie): (6/30/04) 173:4-8; (7/1/04) 27:3-29:19 (Smith); (9/28/04) 108:23-111:1 (Walberg).) Defendants ignore this evidence, relying instead on the rules and regulations they have promulgated to control teacher quality.[5] Further, Defendants do not even address the evidence from their own experts or the "boots-on-the-ground" witnesses about what is actually going on in the classrooms in the Plaintiff Districts.

[5] Defendants' reliance on regulations relating to teacher qualifications begs the question: if teacher qualifications and characteristics have nothing to do with teacher quality, then why have Defendants imposed teacher licensing requirements in the first place (see Tr. (8/11/03) 136:13-23 (state certification requirements incorporate basic standards for training that teachers are expected to meet before entering the classroom to teach)), and why do Defendants mandate higher salaries for teachers with advanced degrees and more years of experience?

Defendants disparage "Plaintiffs' repetitive and subjective testimony" regarding teacher quality, urging this Court to accept their "empirical data"[6] on teacher characteristics in its place. (Defs.' Br. 93.) Although Defendants would prefer that the Court ignore the real-world testimony about problems of teachers in the Plaintiff Districts, this testimony is important to an understanding of the teacher issues Plaintiffs face. When the Court considers this and other evidence presented by Plaintiffs, the Court will be compelled to find that the greater weight of the evidence requires a finding that teachers in the Plaintiff Districts are not adequate.

e. The trial court erred in admitting and relying upon depositions of principals to support its findings of adequate teacher quality and instruction.

Defendants argue that the depositions of principals of schools in Plaintiff Districts were properly admitted under South Carolina Rule of Civil Procedure 32(a)(2) as depositions of managing agents of parties or under Rule 32(a)(3)(E) because of "exceptional circumstances." (Defs.' Br. 90-91.) Plaintiffs demonstrated in their principal brief why Defendants' legal argument on the admissibility of these depositions fails. (See Pls.' Initial Br. 54-58.)

The trial court expressly deferred to this Court's review of the depositions of principals on the question of whether it drew improper or incorrect conclusions. (7/12/07 Order ¶ 16.) The deposition testimony outlines major deficiencies in teacher and instructional quality and does not support the trial court's findings on multiple points.[7] Plaintiffs' outline of the inaccuracies and mischaracterizations of the deposition testimony are mentioned in Plaintiffs'

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[6] "Empirical" is defined as "relying on or derived from experiment or **observation**" and "guided by **practical experience** and not theory." The American Heritage® Dictionary (4th ed. 2003) (emphasis added). Thus, Plaintiffs' evidence of observations of teachers in classrooms is as much "empirical" as is Defendants' statistical analysis using a calculator.

[7] Defendants erroneously state that Plaintiffs did not call all the principals to testify at trial "because their pre-trial testimony did not corroborate the other testimony presented at trial." (Defs.' Br. 88.) This is not true.

principal brief and discussed more fully in Plaintiffs' Memorandum in Support of Their Motion to Alter or Amend Judgment Pursuant to Rules 52 and 59 SCRCP, which is incorporated herein by reference. (See Pls.' Initial Br. 59-60; Plfs.' Mem. In Support of Mot. to Alter or Amend J. 42-52.)

The deposition testimony of these principals should not have been admitted or relied upon by the trial court as support for its findings.

3. The State is failing in its responsibility to ensure a consistent, high-quality teaching force in the Plaintiff Districts.

Defendants disclaim responsibility to ensure that there is a high quality teacher in every classroom. Defendants argue that so long as they promulgate appropriate rules and regulations, their job is done. In truth, their job is only partly done. It is the State's responsibility to ensure that each child is provided the opportunity to acquire a minimally adequate education. Such an opportunity requires that at-risk children have access to the best teachers. Therefore, the State must ensure that they have the best teachers. The State can satisfy this responsibility through the following: certification and licensing requirements that will ensure all teachers are competent; tighter controls governing who can teach our State's children; salary adjustments and other incentives necessary to get the best quality teachers into the classrooms where they are the most needed; and effectively implemented and adequately funded professional development and corrective action programs to improve instruction (and to get bad teachers out of the classrooms where they are causing the most harm).

a. Defendants' licensing and certification requirements are ineffective to ensure that teachers have the knowledge and skills needed to instruct the at-risk children in Plaintiff Districts.

Defendants take the position that their policies and procedures are "state of the art" (Defs.' Br. 39) and perfectly aligned to provide high quality teachers, but they fail to address the undisputable fact that their policies and procedures are not working, as evidenced by the fact that the Plaintiff Districts lack a consistently high quality teaching force.

Relying on their reading of State Department of Education regulations, Defendants claim that the teacher certification process in South Carolina is sufficiently challenging to ensure that only qualified teachers are allowed to teach in classrooms in Plaintiff Districts. (Defs.' Br. 31-34, 96-97.) As confirmation of their argument, they point to an article from *Education Week,* a weekly news magazine rather than a peer-reviewed publication, that praised South Carolina's procedures "for improving teacher quality." (Id. at 31.) Review of the article touted by Defendants discloses that the magazine's analysis of South Carolina's teacher improvement efforts was confined to a review of the State's paper requirements (much like Defendants' analysis at trial). (See Defs.' Ex. 3314.) Notably, the article did not rate the current teaching workforce in South Carolina generally or in Plaintiff Districts. Tellingly, the article undercuts Defendants' arguments by pointing out that low-performing and rural schools, such as those in Plaintiff Districts, still struggle to attract and keep teachers and, further, have more inexperienced teachers, more teachers with substandard teaching certificates, and more teachers with out-of-field permits. Further, the article references South Carolina's shortage of properly trained special education, mathematics, science, and foreign-language teachers. (Defs.' Ex. 3314-0005.)

On the other hand, Plaintiffs demonstrated that the passing grades on teacher examinations required for certification (known as the "cut scores") are "shockingly low" (Tr. (9/22/03) 106:19-109:24 (Poda).) Defendants argue that they are not responsible because the State Board and the State Department of Education set the scores (Defs.' Br. 35), apparently forgetting that these agencies are arms of the State and that the State is the entity ultimately responsible for their actions. Plaintiffs do not ask the Court to set higher cut scores, as Defendants claim. (Defs.' Br. 33, n.15.) Rather, Plaintiffs seek to have the Court simply acknowledge that the teacher examinations now in place do not ensure that teachers have the knowledge and skills necessary for classrooms full of at-risk children.

In addition, as Plaintiffs pointed out in their principal brief, numerous avenues are available in South Carolina allowing persons who have not satisfied the very minimal certification requirements to assume control of South Carolina classrooms and the education of children, including at-risk children with learning challenges that require understanding and skilled teachers to overcome them. (See Pls.' Initial Br. 24-27.) Defendants simply cannot justify their neglect and disregard of the very real problems created by unlicensed, not fully trained, ill-equipped teachers being put in charge of so many classrooms in Plaintiff Districts.

b. Defendants have failed to provide effective means for improvement or termination of low quality teachers.

Defendants argue that Plaintiff Districts can simply dismiss any deficient teachers or "fix" them through professional development efforts, ignoring the practical realities of both avenues that render them ineffective remedies. (Defs.' Br. 103-104.) Further, Defendants argue that if professional development is not effective in transforming the ill-qualified, poorly equipped, and inexperienced teachers in Plaintiff Districts into high quality teachers, it is not

Defendants' fault because they put the districts and State Department of Education in charge. (See id.) Defendants again seem forget that they—not the districts and not the State Department of Education—are constitutionally responsible for the system. Education is ultimately the responsibility of Defendants; they may not abdicate this responsibility.

Defendants also claim that Plaintiff Districts have plenty of money for professional development because they provide technical assistance to the lowest performing schools in the form of offering retraining grants for professional development. (Defs.' Br. 103-04.) However, the trial court found that the technical assistance provided under the EAA, which includes this funding, is ineffective because it comes too late. (12/29/05 Order ¶ 160.) Defendants have not contested this finding. Further, the Education Oversight Committee also views the retraining grants as ineffective, for the following additional reasons: the State does not provide the funding in a timely or efficient manner, limiting the ability of the schools to make effective use of them; the constant teacher turnover in the schools hampers the effectiveness of the retraining because the schools are constantly having to train new teachers in the approved activities; and the administration and teaching staffs are too unstable because of high turnover for institutionalization and long lasting change to occur. (Defs.' Ex. 898 at 29-30.)

In their principal brief, Plaintiffs pointed out the lack of funding and the ineffectiveness of the professional development efforts that are possible. (Pls.' Initial Br. 46-49.) Collectively, the teachers in Plaintiff Districts have less training, less understanding, and fewer skills, than those in the State as a whole. Therefore, they have further to go in acquiring the knowledge and skills they need to provide effective instruction to at-risk children. (Tr. (9/29/03) 114:17-115:5.) It is essential that they either be transformed into effective teachers

or replaced with teachers already possessing those abilities. Defendants are failing in their responsibility to do either.

Plaintiffs also outlined the many reasons the ADEPT system of mentoring new teachers and assisting teachers needing improvement failed in its purpose. (Pls.' Initial Br. 43-46.) Defendants did not respond to these arguments, and Plaintiffs need not revisit those issues.

c. Defendants have failed to ensure that Plaintiff Districts have the funding necessary to attract and retain high-quality teachers through more competitive salaries.

Defendants also deny that Plaintiff Districts have to pay lower salaries and maintain that the salaries in the Plaintiff Districts have no effect on the Plaintiff Districts' frustrating efforts to hire and keep teachers who are properly equipped to deliver instruction to their children. (Pls.' Initial Br. 93-96.) In support of this argument, Defendants rely on comparisons of average teacher salaries in South Carolina with other states and comparisons of teacher salaries in the Plaintiff Districts with rates of compensation for other kinds of jobs in their communities. (Id.) Defendants' argument, and the trial court's findings adopting it, fail to address the real issue—whether the teacher salaries in Plaintiff Districts are competitive with teacher salaries in neighboring districts. Competitiveness in the same geographic area is obviously key to hiring the best teachers. Plaintiffs showed that they are not competitive, and that the lack of competitive salaries contributes to the high rate of teacher turnover and low quality teaching force plaguing the Plaintiff Districts. (See Pls.' Br. 34-37.)

Defendants first argue that *average* teacher salaries in South Carolina are not much different from other states and there is, therefore, "no evidence" suggesting that teacher salaries in Plaintiff Districts are not competitive. (Defs.' Br. 37-38.) A teacher considering several job offers is not interested in the *average* teacher salary; his interest is in the *individual*

salaries for the particular jobs he is considering. Plaintiffs demonstrated clearly that the *actual* salaries for teachers in Plaintiff Districts were lower than those for teachers with the same experience and education in other districts with which they compete for teaching talent. (Tr. (9/23/03) 29:25-35:10; Pls.' Exs. 6138 (showing salary ranges across the state compared with salaries in Plaintiff Districts), 6152A , 6152B (showing the state mandatory minimum salaries, compared with the salaries of Beaufort County and of Plaintiff Districts after local salary supplements are added); see also Defs.' Exs. 3225 at pp. 221-228 & 2907 at pp. 223-230 (showing salary schedules of all districts in the state); Tr. (9/24/03) 158:7-160:18.)[8]

In contrast to Defendants' illogical use of average *statewide* salaries to prove that teacher salaries paid by Plaintiff Districts were competitive, Plaintiffs used evidence of average teacher salaries in various districts as one indicator of the negative teacher characteristics in their workforce;[9] Plaintiffs did not rely exclusively on average salaries, whether statewide or on a district basis, to prove competitive disadvantage. Instead, Plaintiffs offered evidence of the actual salaries of teachers in Plaintiff Districts as compared with neighboring districts. Despite Plaintiffs' uncontroverted evidence that individual teachers in Plaintiff Districts are *individually* paid less than they would be in other districts, the trial court limited its references to *average* teacher salary evidence, and then erroneously concluded that that it had no evidence upon which to find individual disparities creating a competitive disadvantage. (12/29/05 Order

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[8] Plaintiffs also proffered the entire salary schedule from Horry County, neighboring Marion 7, showing its complete pay scale for comparison with the salary schedules of Plaintiff Districts. This evidence was wrongly excluded as irrelevant. (See Cts.' Ex. 3; Tr. (7/30/03) 162:5-163:11; (8/5/03) 7:18-8:21.) Plaintiffs contend that this was error, and that such evidence should have been admitted as relevant on Plaintiffs' inability to compete with other districts to attract and retain high quality teachers.

[9] Both teacher experience and teacher education levels are factored into teacher salary levels. (See 1999-2000 State Minimum Salary Schedule, Pls.' Ex. 474; see also Tr. (7/30/03) 158:21-161:16 & 163:24-164:6 (explanation of teacher salary schedules and different district salary supplements in South Carolina).) Because both characteristics are factored into salaries, low average salaries indicate either low teacher experience overall, fewer advanced degrees overall, or both. In other words, low average salaries indicate a less qualified teacher workforce.

¶ 208.) The trial court erred in crediting evidence of statewide average teacher salaries in its finding that teacher compensation "in South Carolina") was not constitutionally defective. (Id. ¶ 206 (notably, the court's finding was not tied to Plaintiff Districts alone).) Further, Defendants' expert Dr. Wolkoff compared teachers' salaries with compensation in other professions, trying to make the point that teachers in Plaintiff Districts are paid well compared to other people and jobs in their. As Dr. Poda pointed out, however, such a comparison is nonsensical because school districts are not in competition with just any other employer. (Tr. (11/4/04) 85:23-86:20) (calling Wolkoff's comparison akin to comparing apples and oranges).)

In straining to find a reason to claim that the lower teacher salaries in Plaintiff Districts have no negative impact on their ability to hire and keep high quality teachers, Defendants claim "difficulty in analyzing" teacher compensation because teachers allegedly do not work as many days as workers in different kinds of jobs. (Defs.' Br. 38.) Analyses and comparisons of teacher salaries are not difficult at all; they require a simple review of the various districts' salary schedules. Plaintiffs' evidence established that their actual teacher salaries were not competitive with the employers with which they compete (i.e., neighboring school districts). (Pls.' Br. 34-37.) Defendants offered no contradictory evidence on those points.

Supplementing the plain evidence of lower, non-competitive salaries, the superintendents, principals, teachers, State Department of Education personnel—who have on-the-ground experience with these issues—provided vivid testimony that low salary levels prevent poor school districts, like Plaintiff Districts, from staffing their classrooms with the kinds of qualified and quality teachers necessary to reach the poor children filling them. The applicant pools are meager, and the quality of the applicants is generally less than what is necessary to teach at-risk children. The competition from neighboring districts which can and

do pay their teachers higher salaries leaves Plaintiff Districts with teachers who were unable to find a job elsewhere. (See, e.g., Pls.' Br. 37-38.) Many open positions are filled at the last moment with almost anyone who is available, substantially increasing the chances that the new hires do not have the qualifications or skills needed for the children in Plaintiff Districts.

School districts like Plaintiff Districts with high aggregations of children in poverty may have some very talented "missionary" teachers who commit to teach in such schools despite the poor working conditions and low salaries.[10] There are not enough such missionaries, however, and Plaintiffs cannot depend on the good will of such talented teachers to fill their classrooms. (Tr. (9/29/03) 102:9-103:1.) Instead, the Plaintiff Districts require sufficient discretionary funding to supplement their teacher salaries, improve their working conditions, and provide sufficient incentives to attract and retain enough high quality teachers to ensure the delivery of the opportunity for each child to acquire a minimally adequate education in every classroom.[11]

B. Defendants Are Not Satisfying Their Obligation To Provide Physical Supports Adequate To Provide the Required Educational Opportunity.

Defendants' overarching theme with regard to the physical supports seems to be that "the trial judge liked our witnesses better." As detailed above, this equity matter must be considered *de novo*, making its own findings of fact and considering testimony and other record evidence in determining whether the facilities in the Plaintiff Districts are "safe" and

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[10] Some districts like Dillon 2 are blessed with a number of home-grown, talented teachers and principals loyal to their local schools. The experienced teaching and administrative staff in Dillon 2 is rapidly being depleted by retirement, however, and the applicant pool for Dillon 2 is not of the size or high quality as in the past. Given the low salaries on their salary schedule, Dillon 2 leaders are pessimistic about their ability to staff their schools with high quality personnel in the future. (Tr. (8/7/03) 92:23-94:12, 97:3-18.)

[11] Plaintiffs also appealed the following rulings of the trial court: excluding evidence of race; finding that children receiving special education services are not entitled to the same educational opportunity as all other South Carolina children; finding that vocational education opportunities were sufficient. (Pls.' Initial Brief 60-69.) Defendants have not responded to these issues.

"adequate." After reviewing the evidence as briefed by Plaintiffs and Defendants, the Court must find that Defendants are not satisfying their constitutional duty to provide children in the Plaintiff Districts with physical supports adequate to provide proper educational opportunities.

1. The record shows that Defendants are not meeting Abbeville's directive to provide "safe and adequate" facilities.

Defendants first attack the facilities issues by arguing that no empirical evidence (by which they mean statistical analysis) correlates facilities and achievement. (Defs.' Br. 47-48.) Defendants hinge this attack on the trial court's finding that "evidence in this case does not bear out a connection between facilities and educational outcomes." (Id. at 47 (citing 12/29/05 Order ¶ 268).) As Plaintiffs' expert Terry Peterson testified, facilities do impact student performance as well as quality of teaching, teacher attendance, and teacher morale. (Tr. (6/7/04) 105:18-23, 102:3-105:17; (10/01/03) 52:1-53:10.) The record evidences that facilities may impact learning, and the trial court was incorrect in finding otherwise.

Defendants mistakenly claim that Plaintiffs did not challenge this in their principal brief, suggesting that "this finding should not be disturbed on appeal." (Defs.' Br. 47.) However, Plaintiffs did challenge the trial court's finding that there is "no connection between facilities and educational outcomes." (See Pls.' Initial Br. 70 ("The court also incorrectly found that facilities did not impede educational outcomes . . . .").) Thus, this issue is squarely before the Court.

Defendants' focus on statistical analyses as to whether facilities directly impact achievement is not relevant to whether the school facilities pass constitutional muster. Plaintiffs need not demonstrate a correlation between the condition of facilities and the ability to learn, and Defendants cannot avoid their constitutional obligation by attempting to persuade

the Court that safe and adequate facilities are unnecessary for learning. The requirement of providing safe and adequate facilities is a stand-alone requirement under Abbeville. In a finding that is not challenged by Defendants, the trial court noted that "Abbeville County holds, in part, that the education clause **requires the General Assembly to provide safe and adequate facilities**. It is therefore necessary for the Court to determine whether the facilities in the Plaintiff Districts are in fact adequate and safe. . . ." (12/29/05 Order ¶ 262 (emphasis added).) The record shows that Defendants are not meeting this directive because many schools in the Plaintiff Districts are unsafe or inadequate. (See discussion in Pls.' Initial Br. 68-84.) In addition to the specific details discussed herein, Defendants disregard the additional overwhelming testimony of facility deficiencies throughout the Plaintiff Districts, which are covered in detail in Plaintiffs' Initial Brief.

a. The trial court employed a flawed methodology in ruling on the safety and adequacy of facilities.

Taking an "all-or-nothing" approach to facilities and focusing on limited improvements to facilities in the Plaintiff Districts, the trial court found that a blanket condemnation of the facilities was unwarranted. However, Defendants' claim that the trial court concluded that there is no basis for finding specific schools are unsafe or inadequate is incorrect. (See Defs.' Br. 49.) The paragraphs of the July 12, 2007 Order cited by Defendants as support contain no such conclusion. (7/12/07 Order ¶¶ 25-26.) If anything, the cited paragraphs support Plaintiffs' argument that the trial court focused on the "good" facilities rather than taking a hard look at specific facility problems serious enough to render them unsafe and inadequate.

b. The trial court wrongly ignored credible evidence presented by witnesses who actually work in the school facilities.

Defendants' claim that the trial court took a "school-by-school, and in some cases, room-by-room evaluation" of the facilities in the Plaintiff Districts is an overstatement of the court's analysis. Far from making such a detailed factual review, the trial court relied heavily on fire marshal reports, accreditation reports to the State Department of Education, and the testimony of Defendants' expert, Dr. James Smith. (See 12/29/05 Order 116-145.) The trial court's almost complete reliance on these sources is fraught with problems. (See Pls.' Initial Br. 73-76.) As Dr. John Suber testified, accreditation is not intended to, nor does it, measure quality in any way. (Tr. (1/15/04) 77:1-13, 78:4-8, 80:16-19, 81:19-20.) Because schools must be accredited in order to operate, one superintendent bluntly admitted that he certifies that his buildings meet all regulations because "it's either that or I close up. Then what am I going to do?" (Tr. (10/9/03) 106:14-18.) Thus, accreditation statements are not conclusive on the adequacy or safety of facilities.

Defendants characterize Plaintiffs' facilities evidence as "anecdotal, emotional, and unsystematic." (Defs.' Br. 47.) Frankly, no evidence could be any more relevant than this so-called "anecdotal" evidence from witnesses who work in the schools every day. Defendants' suggestion that Plaintiffs' witnesses were not credible, or even truthful, is offensive, particularly in light of the great personal risk superintendents, principals, and teachers took in testifying in this case. Contrasting Plaintiffs' real-world testimony with Defendants' evidence from a paid expert who spent very little time in the schools makes it plain that the greater weight of the evidence supports Plaintiffs' claims that the facilities are not adequate or safe. Most of the other evidence Defendants presented as to facilities was no more convincing—

Defendants relied heavily on third-party administrative reports of officials (such as fire marshals). (See Defs.' Br. 49.) Those reports were provided for specific administrative purposes that did not take into account Abbeville's requirements of what makes a facility "adequate" or "safe" for learning.

c. "Non-educational areas" must be considered in the facilities analysis.

The trial court and Defendants discount evidence regarding spaces in the schools that they label "non-educational areas," referring to the 1,351 pictures in evidence of which they note "only 113 depict educational spaces." (12/29/05 Order ¶ 267; Defs.' Br. 49) It is nonsensical to suggest that "facilities" do not include restrooms, cafeterias, hallways, or other spaces that fall into Defendants' ambiguous category of "non-educational areas." Defendants' own policy states that school facilities include "facilities necessary for instructional and related purposes, including, but not limited to, classrooms, libraries, media centers, laboratories, cafeterias, physical education spaces, related interior and exterior facilities, and the conduit, wiring, and powering of hardware installations for classroom computers or for area network systems." S.C. Code Ann. § 59-144-30 (2004). Given the undisputed fact that Defendants specifically require Plaintiff Districts to provide these spaces and further state in legislation that such spaces are properly considered "school facilities," it is disingenuous for Defendants to argue that evidence of unsafe and inadequate conditions in those spaces is immaterial.

d. Defendants are ultimately responsible for facility maintenance.

The trial court also purportedly absolved Defendants from responsibility for facilities by asserting that Plaintiffs have not adequately maintained their buildings. (12/29/05 Order ¶ 267; Defs.' Br. 49.) Regular adequate maintenance of their old buildings is quite expensive

and beyond the means of Plaintiff Districts, given their limited local revenues and the lack of state support for such expenses. (See, e.g., Tr. (7/31/03) 66:17-67:17.) The constitution places the ultimate responsibility for supporting and maintaining the public schools, including their facilities, on Defendants. Defendants cannot discharge that responsibility by simply shifting it to the local school districts and blaming them if they are unable to shoulder the burden. See argument in funding section, infra.

e. Some facilities in the Plaintiff Districts continue to be unsafe and inadequate despite Defendants' contention that the problems have been corrected or the facilities have been replaced.

Defendants' contention that "Plaintiffs continue to ignore" improvements to facilities in the Plaintiff Districts is untrue. Plaintiffs recognize that schools have been renovated and new schools have been built, but those improvements do not negate the unsafe and inadequate conditions still existing in other schools. In recognition of the fact that some schools are safe and adequate, Plaintiffs did not present evidence in their Initial Brief on all schools or even all districts. Plaintiffs do not argue that "schools must be new to be adequate" as Defendants contend. However, all schools must be "safe and adequate" pursuant to Abbeville, and Plaintiffs have demonstrated that there are schools in the Plaintiff Districts that are unsafe, inadequate, or both. (See Pls.' Initial Br. 72.)

In their district-by-district discussion of facilities, Defendants repeatedly refer to district websites and request that the Court take judicial notice of the information contained on those websites. In addition, the trial court also referred to information from 2004, 2005, and 2006 report cards regarding facilities. (7/12/07 Order ¶¶ 26-27.) Contrary to the trial court's statement, Plaintiffs did not request (and the trial court expressly did not take) judicial notice of

report cards after 2003.[12] Plaintiffs object to the consideration of this information and have filed a Motion to Strike with this Court seeking its exclusion. Consequently, Defendants' discussions of facilities in Jasper County, Orangeburg 3, Dillon 2, and Lee County should be disregarded because they are premised upon post-trial information allegedly found on the districts' websites. Rather than responding to the serious facilities issues in these districts raised in Plaintiffs' Initial Brief, Defendants rely on new information that is not authenticated, untested by evidentiary rules at trial, and is not a part of the trial court record.

Defendants claim witnesses "conceded they had no deficiencies" regarding the facilities in some of the Plaintiff Districts, including Marion 7. In their discussion of Marion 7, Defendants conveniently omit any reference to the safety and adequacy of the elementary schools instead stating that problems with the middle and high school facilities have been resolved. However, Everette Dean testified of many serious facility concerns at Britton's Neck Elementary in Marion 7, including but not limited to, a leaky roof and an exposed conduit with electrical hookups. (Tr. (7/30/03) 206:2-207:20.) Additionally, in his discussion of Rains-Centenary Elementary he mentioned many of the same deplorable conditions. (Tr. (7/31/03) 58:20-65:1.) A review of the trial testimony reveals that the facility deficiencies were not solved as easily as Defendants contend.

2. Defendants are failing to ensure safe and adequate transportation.

In their Response Brief at page 62, Defendants state that Abbeville makes no reference to the safety and adequacy of transportation. Abbeville does not specifically reference high

[12] The trial court took judicial notice only of 2004 PACT scores, HSAP scores, and AYP findings, but not the 2004 or subsequent report cards. (Tr. (9/30/04) 50:10-53:3 (trial court stating "I am perfectly content to stop right there," id. at 51:23-24); (11/5/04) 188:4-189:16.) Plaintiffs have moved to strike all other post-trial information not presented and noted judicially at trial, including information from 2004, 2005, and 2006 report cards and from district websites.

quality teachers either, but there is no question that such teachers are necessary to provide the opportunity for a minimally adequate education. The same is true for transportation, particularly in the rural areas in which the Plaintiff Districts are located. Despite their reference to Abbeville, Defendants do not actually dispute that transportation is an essential element of providing the constitutionally-mandated opportunity. Instead they suggest that their obligation has been met because they provide some of the transportation expense, disregarding whether Plaintiffs are fiscally able to shoulder the rest of that burden. Plaintiffs discussed the significant problems with the transportation system in their Initial Brief at pages 84-86 and demonstrated that Defendants are not fulfilling their constitutional duty with respect to this educational input.

3. Defendants do not dispute the importance of instructional materials.

Defendants have not disputed the importance of instructional materials in providing the opportunity for a minimally adequate education to children in the Plaintiff Districts. Plaintiffs refute Defendants' arguments that Plaintiffs have adequate funding for all necessary educational inputs, including instructional materials, below in Section V.

C. Additional time-on-task programs are necessary for children to acquire a minimally adequate education and therefore constitutionally required.

1. This Court has the authority to interpret constitutional requirements.

Plaintiffs challenge the trial court's erroneous finding that Defendants need not provide time-on-task programs to aid children in the Plaintiff Districts in receiving their due opportunity for a minimally adequate education. (See Pls.' Initial Br. 90-95.) Defendants counter by challenging both the Court's judicial authority to require such programs and by

championing the trial court's finding that such programs are not constitutionally mandated. (See Defs.' Br. 117-23.)

Defendants argue that Abbeville does not empower this Court to require additional time-on-task programs to remedy Defendants' constitutional failings regarding their duties to the Plaintiff Districts. Instead, Defendants contend that the General Assembly has virtually unlimited discretion to adopt (or not to adopt) specific programs to ensure that the constitutional requirements of a minimally adequate education are met. (Defs.' Br. 117-119.) This argument is essentially a re-hashing of Defendants' claim (based in part on separation-of-powers) that the Court is powerless to create any remedy for the aggrieved children, an argument that would render this Court's ruling in Abbeville virtually meaningless. Plaintiffs respectfully direct the Court's attention to pages 98 through 113 of their Response Brief for a full discussion of why it is appropriate for the Court to provide a remedy for Defendants' constitutional violation. Further, Defendants rely on Washington v. Salisbury, 279 S.C. 306, 306 S.E.2d 600 (1983), as support for their argument that time-on-task programs (specifically summer schools) are not constitutionally required. (Defs.' Br. 123.) Washington, a case decided before this Court's decision in Abbeville, is inapposite. Plaintiffs respectfully ask the Court to refer to Plaintiffs' full discussion of Washington in Plaintiffs' brief responding to Defendants' cross-appeal. (See Pls.' Resp. Br. 95-97.)

The Constitution requires Defendants to provide any resources necessary to create the required opportunity for children in the Plaintiff Districts. The greater weight of the evidence before the trial court, which may now be considered by this Court, mandates a finding that these additional time-on-task programs are necessary for Defendants to fulfill their constitutional duty to the at-risk children in the Plaintiff Districts. This Court has the authority

to state what the Constitution requires. Therefore, Defendants' arguments that the Court is without power to require additional time-on-task programs are without merit.

2. The record demonstrates that time-on-task programs are necessary to provide at-risk students the opportunity to acquire a minimally adequate education.

Defendants argue that the evidence at trial establishes that additional time-on-task programs, such as summer school and after-school programs "are not necessary to create the opportunity for a minimally adequate education." (Defs.' Br. 119-20.) As explained by Plaintiffs in their principal brief, this is not true. The greater weight of evidence on this issue requires a finding that these additional time-on-task programs are necessary and that they make a big difference in the learning opportunities afforded at-risk children. (See Pls.' Initial Br. 91-92, 94-95; see also Tr. (3/3/04) 164:13-23; (6/7/04) 8:8-17; (5/26/04) 171:5-10; (2/25/04) 32:21-34:25, 40:2-12; (3/4/04) 15:5-17:10).)

As yet another piece of evidence tipping the scales towards requiring a finding that additional time-on-task programs must be offered to children in the Plaintiff Districts, Plaintiffs also discuss various statutes enacted by the General Assembly to establish time-on-task programs such as summer schools and after-school programs. (See Pls.' Initial Br. 93.) Defendants mis-characterize Plaintiffs' inclusion of that discussion, however, by suggesting that Plaintiffs believe that the Legislatures' embracing such plans is tantamount to the plans being constitutionally required. (Defs.' Br. 121.) Indeed, Defendants' point that the fact that a statute exists does not mean it is constitutionally required is well-taken. However, that point does nothing to change the balance of evidence.

Consider, for example, Defendants' selective quoting of trial testimony to the effect that "no one knows" whether additional time-on-task programs would "enable learning deficits

attributable to poverty." (Defs.' Br. 122 (quoting Tr. (09/20/04) 118:2-17 (Guthrie).) Not surprisingly, Defendants chose not to direct the Court to the record evidence that demonstrated the critical need for additional time-on-task through summer school in order to prevent learning losses suffered by at-risk children. (Tr. (6/7/04) 7:3-12.) Expert witnesses testified at trial that research has shown that at-risk children lose as much as a third of their learning over the summer, because they don't have the experiences over the summer, which middle- and upper-class children have, that maintain and extend learning. (Tr. (2/13/04) 95:24-97:5; (5/25/04) 71:21-73:25.) As Dr. Jo Anne Anderson explains:

> There is fairly significant research that demonstrates that within the school year we make, we can make about the same level of progress with children from poverty and children from advantaged. But what happens in the summer is that the children from poverty go home. And the children from advantaged go to zoos, camp, and join the library reading club and their families may take them on a trip to the beach or somewhere else. And so what happens in those outside of the 180 days and six hours either reinforces or extends what happens in the school year and the research from Johns Hopkins would say that by the time the children, child from poverty comes back to school, he or she has lost about three months of what he learned the year before. And over time that becomes a cumulative deficit and if the children are about at the same level in grade three, children from poverty could be, you know, a year behind in grade six, two years behind in grade nine and they are not there for graduation. So that sort of reinforcement. A lot of these rural communities also do not have public libraries that are open as many hours. I mean, or boys and girls clubs, you know, any of those kinds of things that nurture and extend what happens in school.

(Tr. (2/13/04) 96:7-97:5 (emphasis added).)

The testimony at trial similarly established the need for after-school programs. When asked why after school programs are important for at-risk children, Leon McCray testified, "It's important to have [children from poverty] to get additional time because they come to you not prepared like students that come from a middle or upper class families. So the school is responsible for giving them that additional information that they need in order to be successful when they get out of high school." (Tr. (9/30/04) 70:23-71:3; see also Tr. (5/26/04) 149:9-

16.) Thus, after school programs are also needed to counteract the effects of poverty in providing a minimally adequate education.

The Court should review the record evidence and find that these additional programs are integral to the at-risk children in the Plaintiff Districts' receipt of the required educational opportunity. The Court may, and should, require Defendants to create a system of education that complies with the Constitution by including such programs.

V. Defendants Have Failed To Satisfy Their Obligation to Ensure Sufficient Funding Targeted To Address The Needs of Children In the Plaintiff Districts.

Despite overwhelming evidence to the contrary, Defendants continue to trumpet their refrain that Plaintiff Districts have adequate funding to provide the opportunity for each child to receive a minimally adequate education. Relying on their own version of per-pupil-spending[13] to advance their position, Defendants claim that they provide the Plaintiff Districts with more money each year and Plaintiffs spend more per-pupil than other districts in South Carolina. According to Defendants, the analysis ends there—they have offered the required opportunities to Plaintiffs. (See Defs.' Br. 63-74.)

Defendants also assert that Plaintiffs agree with their position that additional funding will not provide the mandated opportunities in Plaintiff Districts. (Defs.' Br. 63.) Defendants' partial quote from page 113 of Plaintiffs' Initial Brief disingenuously omits critical language. Consider the entirely different meaning of Plaintiffs' full statement (with the omitted language in bold). "Plaintiffs also agree that additional funding—**without focused direction toward the specific needs of the students in the Plaintiff Districts**—would not necessarily result in

[13] Plaintiffs dispute Defendants' characterization of per-pupil-spending in the Plaintiff Districts, as more fully discussed in Plaintiffs' principal brief. (Pls.' Initial Br. 127-29.)

increased educational opportunities." (Pls.' Initial Br. 113.) Plaintiffs' consistent position has been that funding must be targeted toward and meet the needs of their children.

Finally, Defendants also assert they have no responsibility to address funding problems within Plaintiff Districts, claiming instead that by setting up a system and policies, their job is done. They claim that any lack of money preventing the delivery of the required opportunities is caused by mismanagement or poor decisions on the part of the Districts, and that Defendants are absolved from their constitutional responsibility. They are not.

The arguments offered by Defendants on each of these issues are fundamentally flawed, and misstate Defendants' constitutional responsibilities.

A. The amount of per-pupil spending does not establish that children in the Plaintiff Districts are receiving the required educational opportunity.

1. Spending is adequate only if it addresses students' needs.

Defendants make several references to per-pupil spending, including arguments as to the usefulness of the In$ite summaries (Defs.' Br. 63-64), the amount of per-pupil money Plaintiffs receive compared to that other school districts receive (id. at 70-73), the economies/diseconomies of scale operating in districts of different sizes (id. at 74-75), and categorical funding restrictions, including restrictions on federal funding (id. at 66; 86-87).[14] Defendants' evidence of per-pupil spending is directed toward proving their claim that the Plaintiff Districts have sufficient per-pupil money, indeed even more per-pupil money than other districts, and Defendants, therefore, have no further funding responsibility for them.

[14]Defendants' brief also includes information regarding pupil expenditures that were compiled after trial. (See Defs.' Br. 71; 73-74.) Plaintiffs object to these assertions being considered on appeal—they were not before the trial court and are untested by evidentiary safeguards. Plaintiffs have filed a Motion to Strike this and other after-acquired information from Defendants' brief. (See Pls.' Mot. to Strike Post-trial Matter from Briefing and from Record.)

As detailed in their response to Defendants' cross-appeal, Plaintiffs urge this Court not to accept the faulty reasoning asserted by Defendants and accepted by the trial court that Plaintiff Districts' per-pupil expenditures must be sufficient because they were, arguably, higher than the State's average district. (See Pls.' Response Br. 40-41.) In truth, measurements of per-pupil spending do not establish adequacy because they do not establish that Defendants are providing the opportunities set forth in Abbeville. Constitutional adequacy is not measured by considering how much money is being spent. Defendants' premise in offering per-pupil spending as proof that they are fulfilling their constitutional obligations is essentially 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, Inc. v. State, 801 N.E.2d 326, 341-42 (N.Y. 2003) (internal citation omitted). The New York's highest court rejected this premise now argued by Defendants. Id. Plaintiffs urge this Court to do likewise.

The trial court properly found that children in Plaintiff Districts are not receiving the opportunity for a minimally adequate education, and Defendants' focus on the amounts of per-pupil expenditures does not establish the converse. The low quality of inputs (instructional quality, facilities, and instrumentalities of learning) and the low levels of outcomes (test scores, graduation rates, and workforce preparation) in Plaintiff Districts are directly linked to—and caused by—the failure of Defendants to ensure that Plaintiff Districts have the funding they need to deliver the opportunity for each child to acquire a minimally adequate education.

2. Per-pupil spending totals can be misleading because they mask what is available for spending and what must be purchased with this money.

Per-pupil expenditure data alone do not explain the intricacies of a school district's finances. Dr. Jo Anne Anderson warned that per-pupil expenditures, including those reported on the In$ite summaries, are not a reliable indicator of whether adequate educational opportunities were being provided because of difficulties in accurately defining what "per-pupil expenditures" really means. She explained that variables such as what is/is not included in the figure and the differences in per-pupil spending for fixed costs among districts of varying sizes make it difficult to compare per-pupil spending between districts. She made the point that what actually supports the instruction required to deliver educational opportunities is easily masked and very difficult to discern by reference only to per-pupil expenditures. (Tr. (2/25/04) 203:25-206:7.) The major issues raised by the use of per-pupil expenditures are explored briefly below.

a. In$ite summaries of expenditures are not complete and do not prove adequacies or inadequacies of revenues for educational needs.

As explained in detail in Plaintiffs' principal brief, the In$ite data—upon which Defendants rely in defense of their funding for the Plaintiff Districts—is of limited use as a funding metric. (See Pls.' Initial Br. 124-132.) In response, Defendants claim that In$ite is "unambiguous" and is the "officially compiled record" of school district spending. (Defs.' Br. 63.) In$ite is neither. Rather, In$ite is merely a summary of some, but not all, expenditures, organized into broad categories. It is a tool the State Department of Education (SDE) uses to easily respond to legislative and public inquiries about how various categories of expenditures compare from district to district. (See website cited by Defendants at

http://www.ed.sc.gov/agency/offices/finance/insite/, linking to the SDE's explanation of In$ite at http://www.ed.sc.gov/agency/offices/finance/WhatisIn.doc.) The school districts' audited financial statements, from which the In$ite summaries of districts' operating expenses are drawn, are the official records of school district revenues and expenditures. These audited financial statements—not In$ite—are the complete and accurate records of the school districts' revenues and expenditures. Further, the In$ite summaries do not reflect capital expenditures (such as facility upgrades), debt service, diseconomies of scale, or restrictions on revenues. (See generally Pls.' Initial Br. 124-32.)

b. Diseconomies of scale affect small school districts.

As explained in Plaintiffs' principal brief, smaller districts do not benefit from economies of scale, making per-pupil costs higher in those districts. (See Pls.' Initial Br. 131.) Defendants' response seems to be that since diseconomies of scale typically only apply to fixed costs, the remaining costs of educating students are unaffected by size of the district. (Defs.' Br. 74.) However, this distinction overlooks the fact once a small district devotes more money per-pupil to fixed costs, it then has less per-pupil money left to apply to other costs. (See Pls.' Initial Br. 131.)

c. Federal funds and other categorical funds inflate per-pupil spending in the Plaintiff Districts and often have little or no impact on student achievement because they cannot be freely applied to remedy systemic problems in a district.

Expenditures from revenues provided by the federal government to school districts, which provide such services as school lunches, services for students with disabilities, or summer school programs, are generally included in per-pupil expenditures, including the In$ite summaries. Defendants erroneously claim that school districts may simply use federal funds in

any manner they see fit because "federal funds are not limited in their use" and they "can become the source of unrestricted funding." (Defs.' Br. 66.) This is incorrect and entirely unsupported by law or fact; not even Defendants' witnesses made such sweeping assertions.

Defendants rely on testimony of their experts, James Guthrie and James Smith, to support their argument that schools simply do not know how to game the system well enough to get full use of available funding. Although neither of these experts has ever been a principal or superintendent of a school district responsible for accounting for funding usage, they opine that Title I[15] schools can use the Title I money provided by the federal government in any fashion they choose, and that the only reason some Title I schools do not take full advantage of those funds is because they do not know how use the funds to their best advantage. (See Tr. (6/28/04) 82:19-23; Defs.' Br. 86-87.) These opinions are contrary to record evidence—including the testimony of former counsel to the United States Secretary of Education Dr. Terry Peterson, as well as testimony of superintendents and other knowledgeable witnesses who have actually handled Title I funding. (See, e.g., Tr. (6/10/04) 68:25-76:11; (10/7/03) 128:20-130:24.) Further, Defendants' expert opinions misstate federal law.

If a school has a high enough percentage of students who are impoverished, it qualifies as a "Title I school." Title I money can then be used for all the students, rather than just the disadvantaged students, but still only for the specific Title I purposes for which it was approved by the federal government. (See Tr. (5/25/04) 119:21-121:24.) Under no circumstances can Title I money be used for purposes outside the Title I plan submitted by the school, which in turn must be in accordance with the Title I legislation. (See, e.g., Tr.

[15] Title I refers to the portion of the No Child Left Behind Act ("NCLB"), that targets disadvantaged students. 20 U.S.C. § 6301, et seq. (West 2002). NCLB reformed and renamed the Elementary and Secondary Education Act ("ESEA"), originally enacted in 1965.

(6/10/04) 68:20-76:11; (4/2/04) 141:17-142:4; (10/1/04) 39:3-41:14, 99:19-102:23, 139:23-140:5) It can never be used on a district-wide basis, which is how teacher salary schedules must operate under South Carolina law, so under no circumstances can Title I money be used to raise teacher salaries in a district. (Tr. (10/7/03) 130:21-24, 132:11-23; (6/8/04) 144:5-8; (10/1/04) 39:18-40:9.) It can also only be used in the particular schools within a district that enroll enough Title I students to qualify (Tr. (2/13/04) 38:3-15), and it can only be spread across all students in those particular schools for particular Title I purposes, such as reducing class sizes, if the percentage of Title I students is particularly high.

Second, the trial court and Defendants ignore the fact that the federal government provides significant funding to school districts through grant programs that are not part of Title I. They equate Title I funding with all federal funding, then erroneously assert that it all can be used for any purpose in a Title I school. However, there are numerous other federal programs providing funds to school districts for various specific purposes.[16] None of these federal programs are structured so as to allow the funding granted through them to be used as general funds, notwithstanding Defendants' assertions. (Tr. (10/01/04) 111:4-112:14 (Dr. Dean testifying that if districts do not stay within the regulations and the terms of the grants, they are "asking for trouble.").) As Senator John Matthews testified, such federal funding does not have strings, but ropes and chains attached to it, and it must be spent only on the categories for which it was earmarked. (Tr. (9/10/03) 146:14-147:13.) Inclusion of federal

[16] See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. (to assist in the education of persons with special needs, specifically those with disabilities between the ages of 3 and 21); Safe and Drug Free Schools and Communities, 20 U.S.C. §§ 7101-7165; 21st Century Community Learning Centers, 20 U.S.C. §§ 7171-7176; Enhanced Education Through Technology, 20 U.S.C. §§ 6751, et seq.; Teacher and Principal Training and Recruiting Fund, 20 U.S.C. §§ 6601-6651; Promoting Informed Parental Choice and Innovative Programs, 20 U.S.C. §§ 7201-7217e; Public Charter Schools, 20 U.S.C. §§ 7221-7221j; Star Schools Act, 20 U.S.C. §§ 7255-7255f; Carol M. White Physical Education Program, 20 U.S.C. §§ 7261-7261f; Excellence in Economic Education Act of 2001, 20 U.S.C. §§ 7267-7267f; Rural and Low-Income School Program, 20 U.S.C. §§ 7351-7355c.

funding in the calculation of per-pupil expenditures, and then to use those per-pupil expenditures as a measure of adequate educational opportunities, as Defendants urge, distorts the true picture. For example, including federal grants for food service expenditures distorts the per-pupil representation of how much goes to educational opportunities. (Id. 147:14-148:20.)[17]

Federal grant funding is not stable, recurring, flexible, or reliable enough to support a stable infrastructure sufficient to provide the constitutionally required opportunity. (Tr. (6/8/04) 146:7-147:2.) Funds provided by the federal government are welcome, helpful aids to Plaintiff Districts, but they do not allow the Plaintiff Districts to address their systemic problems, such as the inability to attract and retain high quality teachers because of their low salary structures. Federal funding is not a panacea for the unmet educational needs of the children in Plaintiff Districts, the responsibility for which the Constitution places on Defendants. The trial court was wrong to consider federal funding in its evaluation.

School districts are likewise limited in their ability to use other categorical funds. To illustrate, Marion 7 Superintendent Dr. Dean provided a detailed explanation of Marion 7's revenues and expenditures as recorded in its audited financial statement. He showed that school districts' revenues, in addition to federal funds, are often restricted to specific and limited purposes and cannot be used to remedy systemic problems within a district. More than half of Marion 7's total district revenue in 2001-02 was restricted and could be used only for certain purposes. (See Pls.' Ex. 6834, slides 9-11; Tr. (10/1/04) 6:2-117:19.) Accordingly, despite Dr. Dean's need to increase teachers' salaries, he explained that he could not increase salaries

[17] Defendants erroneously imply that In$ite expenditures do not include "district expenditures for administration, for transportation, [and] for food service." (Defs.' Br. 64.) Defendants quote Dr. Guthrie on this point, but Dr. Guthrie was referring only to the Instruction and Instructional Support categories on the In$ite summaries, not the total amounts shown on the In$ite summaries. (Tr. (9/21/04) 50:19-51:23.)

from the remaining non-categorical revenues because he could not be confident he could sustain the higher levels on a continuing basis as is required by law. (Tr. (10/1/04) 144:17-145:11.) Similarly, Dr. Paula Harris, State Superintendent in Allendale, testified that Allendale's per-pupil expenditures, highest in the state, do not demonstrate that money does not matter, but rather makes Allendale:

> [A] poster child for the fact that we have actively gone out and sought grants and other sources of money to provide the needs of children that we could not provide for with the general funded budget.
>
> All of that money that comes in comes in with strings attached or funding mandates as to how that money can be spent. And we have spent that money in accordance with those mandates.
>
> That money cannot be used to increase the minimum teacher's salary. It cannot be used to fix a building. We are limited in what those funds can be used for.

(Tr. (9/30/03) 130:19-131:8; see also id. 132:2-135:3; (10/1/03) 22:7-24:22; Pls.' Ex. 6168 (explaining that while Allendale's per-pupil expenditures are $10,404, only 60% of that amount, or $6191 per-pupil, is discretionary and more than 80% of that amount is committed to salaries, leaving nothing to apply after paying for other fixed operating costs to raise teacher salaries to attract and retain "first string teachers.").)

3. James Smith's opinions regarding the sufficiency of Plaintiff Districts' per-pupil expenditures based on professional judgment panels' opinions are unpersuasive and unreliable and should have been excluded.

Plaintiffs argued in their Initial Brief that James Smith's opinion testimony based on the opinions of others regarding the sufficiency of Plaintiff Districts' per-pupil expenditures was improper, unreliable, and based on invalid assumptions. (Pls.' Initial Br. 119-22.) The trial court therefore abused its discretion in admitting this evidence.

In their brief, Defendants did not counter Plaintiffs' showing that Dr. Smith's testimony did not satisfy the requirements of State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) and should not have been admitted. (See Defs.' Br. 84-85.)

More importantly, even if this opinion testimony were properly admissible, it showed the kinds of comprehensive services and programs that are deemed necessary to provide the opportunity for a minimally adequate education in districts similar to Plaintiff Districts. It is undisputed that the educational programs and services offered in Plaintiff Districts do not approach the comprehensive scope, depth, or quality of those described by any of the four panels convened by Dr. Smith. In other words, this testimony further undercuts Defendants' arguments that they are satisfying their constitutional obligation.

4. Per-pupil expenditures therefore do not prove funding adequacy.

Per-pupil spending does not prove that schools are delivering the opportunity for a minimally adequate education. Per-pupil spending is one piece of evidence and nothing more, and the In$ite summaries promoted by Defendants are not even fair snapshots of per-pupil spending. The inquiry is not how much money was spent, but whether sufficient money is available to be spent in a manner that offers children in Plaintiff Districts the opportunity for an education. Federal funds and other categorical funds have value, but their value is limited and cannot be used to remedy the systemic problems present in the Plaintiff Districts. The trial court incorrectly relied on per-pupil spending without determining whether Plaintiff Districts had sufficient funds available to be used effectively and in a manner that ensures the educational opportunities required by Abbeville.

B. Money spent properly indisputably affects achievement.

Defendants argue there is no correlation between spending and achievement and incorrectly portray Plaintiffs' argument on spending as "better achievement can be bought by more spending." (Defs.' Br. 113.) Plaintiffs have never advocated simply throwing money at poor performing schools[18] and generally agree with the trial court's finding that money spent without identifying student needs and employing funds to address those needs would make no difference in student achievement. (See 12/29/05 Order ¶¶ 410, 411.) Money itself does not have a direct impact on achievement. Rather, practices and programs—and the teachers who deliver them—directly impact achievement. For the disadvantaged students in the Plaintiff Districts these educational inputs are even more crucial for academic achievement. Teachers, additional educational time, instructional materials, and other educational inputs affecting achievement undisputedly cost money and create an undeniable link between spending and achievement.[19]

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[18] Plaintiffs discussed the correlation between spending and achievement in their Initial Brief at pages 114-18.

[19] Testimony and evidence proffered by Plaintiffs from Dr. James Ray of Spartanburg County School District Three (Spartanburg 3) and similar evidence from other districts, ruled inadmissible by the trial court, demonstrated that additional money applied to raise teachers' salaries to be competitive and to reduce turnover, as well as to target other specific needs important for the education of at-risk children, yields higher achievement by at-risk children. The students in Spartanburg 3 are similar to those in Plaintiff Districts in that large percentages live in poverty, their parents have low education levels, and their families face serious economic and other challenges affecting their stability. Despite these circumstances, Spartanburg 3 is able to utilize its much higher local revenues to pay its teachers among the highest salaries in the state, thereby attracting highly qualified teachers who tend to stay in the district, thus minimizing the direct and indirect costs of teacher turnover, and to provide multiple other services and programs to its population of at-risk students, with the result that the student achievement levels in Spartanburg 3 are higher than those attained by the children in Plaintiff Districts. (Tr. (6/11/04) 3:2-128:11.) Conversely, Plaintiff Districts are unable to provide the array of services and programs or employ a high quality teaching force like Spartanburg 3 because they do not have the higher local revenues that Spartanburg 3 uses to support those inputs. Consequently, their inputs are of much lesser quality and their student outcomes are unacceptably low.

Plaintiffs have appealed the trial court's exclusion of their proffered evidence showing conditions and circumstances in other school districts, including Spartanburg 3. The trial court erred in ruling that because equal educational opportunities were not at issue, evidence of comparisons with other districts was irrelevant. However, Plaintiffs offered such evidence not for purposes of proving an equal opportunity claim but to prove that increased spending positively affects student achievement, and the trial court's exclusion of it was error.

In support of their argument that spending and achievement are not correlated, Defendants cite to national data purportedly demonstrating a marked increase in per student spending with no increase in the national test scores. (Defs.' Br. 113-14.) The data used and the ultimate conclusion advanced by Defendants have been questioned and criticized.

> The often-quoted evidence that real per-pupil resources doubled in education from the late 60's to the early 90's while N.A.E.P. scores stagnated is flawed on four accounts. First, although N.A.E.P. scores did not rise much, this was partly because of rapid growth in the low scoring Hispanic population. ... Second, the real increase in educational expenditures was far less than the C.P.I., Consumer Price Index, adjusted per-pupil expenditure data would indicate. Use of more appropriate indices for adjustment of educational expenditures due to their labor intensity provides much smaller estimates of real growth. . . . Third, a significant part of the smaller estimated increase went for students with learning disabilities, many of whom were not tested. . . . Finally the association of additional resources with increased test scores depends upon the distribution of the increased spending.

(Tr. (9/27/04) 99:23-108:6 (defense expert Walberg quoting David Grissmer, et al., Does Money Matter for Minority and Disadvantaged Students? Assessing the New Empirical Evidence, National Center for Education Statistics, https://nces.ed.gov/pubs98/dev97/98212d.asp (1997)).) Moreover, this is a South Carolina case, and no evidence suggests that the equivalent South Carolina data would closely track the national data presented. Consequently, conclusions based upon national data are too general in nature to be applicable in this case.

Defendants argue that South Carolina data likewise demonstrate that spending and achievement are not correlated. Defendants rely on the testimony of Dr. David Armor to support this proposition.[20] Dr. Armor found that, after "controlling for poverty," PACT scores in a single year did not appreciably vary despite differences in per-pupil spending.

[20] Defendants' citations to Dr. Armor's exhibits are all one page number off. For example, Defendants cite to Defs.' Ex. 3342, pp. 57, 70, 84, 97. The correct citations are Defs.' Ex. 3342, pp. 58, 71, 85, 98.

(Defs.' Br. 114-15.) Plaintiffs addressed the problems inherent in Dr. Armor's methodology of adjusting test scores for poverty in their Response Brief at pages 68-69. Dr. Armor's data is inherently unreliable and masks the reality in the Plaintiff Districts. In addition, the use of per-pupil spending as a comparative tool is flawed for the reasons discussed in Plaintiffs' Initial Brief at pages 124-32. Furthermore, Defendants miss the point of Plaintiffs' argument regarding spending and achievement. The amount of money spent is not the issue. Rather, the way in which the money is spent is what impacts achievement.

Defendants also rely on Dr. Armor's data to argue that there is no correlation between achievement and higher teacher salaries, higher percentages of teachers with Master's degrees, and lower teacher/student ratios. Plaintiffs have previously demonstrated the impact of higher teacher salaries and higher percentages of teachers with advanced degrees on the overall quality of the teaching force and, ultimately, achievement. (Pls.' Initial Br. 33-38, 28-29.) Lower teacher/student ratios, also referred to as class size, do have a positive impact on achievement. Dr. Lorin Anderson, through the use of a highly illustrative path diagram (Pls.' Ex. 6835Q), testified that reduced class size directly results in fewer disciplinary problems, greater knowledge of students, and greater teacher satisfaction and enthusiasm. "[T]hese are found over and over and over again bordering on common sense in the sense that if you have smaller classes, you're likely to have better teacher control, you're likely to know the kids a little bit better and you're a happier camper as a teacher if you're - fewer students." (Tr. (11/5/04) 144:8-19.) Fewer disciplinary problems give rise to more instructional time; greater knowledge of students gives rise to more appropriate personalized instruction; and greater teacher satisfaction and enthusiasm give rise to greater teacher effort. (Id. 144:24-145:4.) These effects then lead to a greater opportunity to learn, greater student engagement in

learning, and more in-depth treatment of content - all of which directly impact student achievement. (Id. 145:5-19.) As Dr. Anderson's diagram of the impact of class size demonstrates, education is a complicated process and the effect of inputs such as teacher salaries and class size on achievement requires greater analysis than simply comparing one variable to another.

Contrary to Defendants' argument (and selectively omitted from their brief) is the testimony of Defendants' own experts who agreed with Plaintiffs that targeted spending does influence achievement. Defendants' experts, Drs. James Guthrie and James Smith of Management Analysis and Planning Associates ("MAP"), testified in Wyoming that targeted efforts to reach at-risk children require additional funding:

> MAP [Guthrie and Smith] and the legislature concluded additional funding was needed to allow Wyoming schools to properly deal with students at-risk of failure. At-risk students require specially tailored programs and more time spent on all aspects of academic endeavor in order to improve their academic achievement. The primary need of schools with concentrations of these students is increased adult attention in the school setting.

State v. Campbell County Sch. Dist., 19 P.3d 518, 545 (Wyo. 2001). Defense expert Michael Podgursky admitted that higher salaries are frequently necessary to hire and retain high quality teachers. (Tr. (6/16/04) 43:12-15, 116:6-117:1.) Defense expert Herbert Walberg summed up Plaintiffs' argument: "Distribution is key. . . . It's what you spent the money on rather than how much money you've spent." (Tr. (9/27/04) 108:16-20.)

Ignoring the testimony of their experts, Defendants rely solely upon statistics to support their argument that there is no correlation between spending and achievement. A skilled statistician can manipulate the calculations to support a desired outcome. That is what Dr. Armor did here in controlling for poverty. Common sense, on the other hand, supported by the testimony of Defendants' own witnesses, is all this Court needs to conclude that targeted

spending does have an effect on achievement. Plaintiffs have provided ample evidence that teachers and instructional programming can influence student achievement and Defendants' experts agree. (Pls.' Response Br. 69-76.) High quality teachers cost money. Extended school time costs money. Early childhood programming costs money. Instructional materials cost money. Consequently spending on education has an indirect, but very significant, effect on achievement.

C. Defendants may share the burden of funding schools but may not abdicate their constitutional responsibility to ensure adequate funding.

Defendants repeatedly and incorrectly assert that Plaintiffs contend that the State alone must carry the financial burden of educating its students. (See Defs.' Br. 64-66.) Plaintiffs do not now make, and have never made, such an argument. Plaintiffs recognize that the State may delegate some of its duties, including some (or, theoretically, all) of the funding burden, so long as the required educational opportunities are offered. (In fact, it did so with the Education Finance Act (EFA) formula.) Plaintiffs have no qualms with local funding, private funding, or federal funding for various purposes. Rather, the trial court erred in finding that Plaintiffs generally had sufficient funding to provide each child with the opportunity to receive a minimally adequate education and that Defendants are absolved of their responsibility for funding deficiencies in the Plaintiff Districts because of supposed poor decisions made by the State Department of Education or by the local districts.

When all is said and done, Plaintiff Districts simply do not have sufficient resources from their discretionary and categorical accounts to apply to their many educational needs. Even if they did, the issue is not whether funds are available; the issue is whether the schools

are providing their students with what they need to have the opportunity to attain a minimally adequate education.

1. Plaintiffs showed the overall funding mechanisms used by the Defendants, and not just the EFA, are inadequate to meet students' needs.

Defendants claim that Plaintiffs refuse to acknowledge funding outside of that provided by Education Finance Act (EFA). (See Defs.' Br. 67.) This is not true. Plaintiffs did discuss the EFA and its inadequacies in their principal brief, not because Plaintiffs claim it to be the only funding source, but because it is the state's "foundation funding," the foundation upon which the public school system and other funding mechanisms are built.[21] As it has eroded, it has become "a very unsolid, unstable footing for education," much like the foundation of a house that erodes over time. (Tr. (6/8/04) 160:7-16.)

Indeed, Plaintiffs have presented evidence of inadequacies, not just in the EFA, but in the overall funding mechanisms utilized by Defendants. Plaintiffs offer the following summary of such inadequacies, which, importantly, Defendants did not dispute, through evidence or argument:

- The Defined Program purportedly funded by the EFA formula is obsolete and does not address current educational needs and requirements. (See Pls.' Initial Br. 106-08.)

- Defendants have not funded the Base Student Cost element of the EFA formula, causing it to erode and become an unstable foundation upon which to support school funding. (Id. at 108-09; 135-36; see also Tr. (6/09/04) 74:21-24.) Repeated failures to fund the required annual inflation factor and actual reductions in the base student cost cause ripple effects in the funding for years to come. The General Assembly has only funded the base student cost at or very near the recommended level eight times since 1978. (Pls.' Ex. 6612QQ; see also Pls.' Ex. 6020; Tr. (9/11/03) 11:18-13:15.)

[21] Contrary to Defendants' argument at page 67 of their Brief, Plaintiffs are not pursuing a claim that Defendants "violated" the EFA so as to give rise to a cause of action for specific violations. Plaintiffs' claim is that the EFA is now so unstable and under-funded that it cannot serve its purpose as the foundation of education finance and cannot support a constitutionally adequate education.

- The Base Student Cost has not kept pace with mandatory minimum teacher salaries. 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) 238:14-22; 244:18-246:23; Pls.' Ex. 6019; Tr. (9/11/03) 6:18-8:11; 9:6-19.)

- Defendants claim that the EFA has been improved since trial because the base student cost "formula"[22] was "modified to add a .20 weight for at-risk students, further increasing funds to districts with high percentages of students on free and reduced lunch." (Defs.' Br. 70.) Defendants are referring to the provision in Act 388 of 2006 that, beginning in 2008-09; will apply a .20 weight to the annual increases in property tax reimbursement caused by inflation and population growth. For the reasons pointed out in Plaintiffs' Response Brief, this add-on weight may or may not add a negligible amount, but will not have an appreciable effect on Plaintiff Districts' overall funding. (Pls.' Response Br. 27-28.)

- The Education Improvement Act (EIA) requires that the penny sales tax proceeds be used to fund and promote innovative strategies and programs and not become part of the State's General Fund. (Pls.' Ex. 5035 (EIA) 33; S.C. Code Ann. §§ 59-21-1010 (2004) and 12-36-2620 (2000) (Supp. 2007).) However, 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 programs to improve and supplement the basic programs funded from the State's General Fund. (See Tr. (6/8/04) 187:10-22; 201:6-19.) The EIA is also being used to fund initiatives in other agencies besides the State Department of Education and the school districts. (Tr. (6/8/04) 201:20-202:10; 203:13-22.) Further, some of the EIA programs have not survived the switch from EIA funding to funding from the General Fund or other revenue, even if they have proven successful, and now must compete for priority with many other state needs and programs outside of education. Many now are either not funded or funded from other revenue sources on a basis that may not be recurring or stable. (See Tr. (6/8/04) 187:10-22; Tr. (9/11/03) 43:9-21; 44:25-45:16; 46:1-12; 49:23-52:17.)

- As explained in Plaintiffs' Initial Brief at page 106, programs established by the EIA were supported by funding available from the EIA Fund, repository for the state one-cent sales tax. Other statutory requirements of schools, however, were enacted with no

[22] The base student cost (BSC) is not a "formula" but merely a tally of the assumed costs of the various elements of the Defined Minimum Program (assumed in 1975, when the EFA was designed), increased by an annual inflation factor. S.C. Code Ann. § 59-20-20(6) (2004). The "formula" Defendants apparently meant to reference is the EFA formula, which involves a calculation of the total weighted pupil units (WPUs) in a district, then a multiplication of the total WPUs by the BSC, then a calculation and application of the district's index of taxpaying ability to that amount to determine how much of the total district BSC will be funded by the State and how much by the district.

revenue source dedicated to them, forcing Defendants or the school districts to find money for them from existing revenue streams.

- Despite being on notice of under-funding, Defendants continue to fail to fully fund educational needs or statutory requirements and have not paid for the educational commitments they made. (Pls.' Initial Br. 109-12; see also Pls.' Ex. 736 at 59-79; Pls.' Ex. 389 at 2-3; Pls.' Ex. 253 at 4, 27, 29.)

- State funding is not based on actual costs or needs, but is essentially arbitrary, based more on how much is available than on how much the services or programs actually cost. (See Pls.' Initial Br. 110, 112-13.) The actual funds flowing from the State to the school districts is dependent on the revenues taken in by the State each year and is too frequently subject to other funding and political pressures on the General Assembly. (Tr. (9/9/03) 9:21-10:9; 11:14-24; 13:7-16.) Defendants cannot ensure a constitutionally adequate system of education through such an ad-hoc, politically driven process.

- The State once paid for all transportation costs and therefore did not include it in the Defined Program of the EFA, but has steadily and shifted more of those costs to school districts, with the result that current State funding for transportation is insufficient and unreliable. (See Pls.' Initial Br. 41-43.)

- The State once paid for all school districts' employee fringe benefits and therefore did not include it in the Defined Program of the EFA, but the State has steadily shifted more of those costs to the districts, resulting in the insufficiency of current State funding for fringe benefits. (Tr. (6/8/04) 155:23-156:16; Pls.' Ex. 6022; Tr. (9/11/03) 55:17- 56:1-9; Tr. (6/8/04) 182:9-183:3.)

- State funding for professional development time and programs and for induction and mentoring of inexperienced or struggling teachers is insufficient. (See Pls.' Initial Br. 45-47.)

- 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 Pls.' Initial Br. 139-41.) Defendants make no effort to address the funding of school facility construction and maintenance beyond an occasional influx of funds when times are good.

- Special education funding is not adequate. (See Tr. (02/10/04) 108:12-109:9, 112:23-115:15; (01/05/04) 183:5-184:4.) Although the trial court found that special needs children did not fall within the definition of "each child" for purposes of the constitutional question, Plaintiff Districts are nevertheless required to provide a free and appropriate education for special needs children which costs money and adds to the funding pressures on the districts.

- The lottery proceeds that are raised pursuant to the South Carolina Education Lottery Act are 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 (2004) and 59-150-350(D) (2004). 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.)

- Defendants do not ensure consistent and reliable funding of the public school system, even for specific mandates it has imposed on the schools and school districts. The Legislature may fully fund an education initiative during its first year, but cut its budget significantly in subsequent years. A finance system that is inconsistent, unreliable, and not comprehensive does not provide the stability and support that a constitutional system of public schools demands. (See Tr. (9/8/03) at 222:10-15.)

(See also Pls.' Initial Br. 105-18, 132-43; Pls.' Response Br. 20-28, 31-41, 61-63.)

The problems outlined above have grown because Defendants have pieced together the education finance system in South Carolina through various parts of legislation over the last three decades. The result—a disjointed and often confusing set of laws governing education finance—resembles a patchwork quilt, built piece by piece with little thought given to the overall effect or the cohesiveness of its parts.

In addition, the continued shifting of costs by Defendants from the state level to the local districts has increased the pressure and exhausted the abilities of Plaintiff Districts to find money to pay for all they need and are obligated to pay. As briefly outlined in Plaintiffs' Response Brief, the limited value of taxable property in Plaintiff Districts historically limits the revenue that can be raised. (Pls.' Response Br. 20-21.) Even with exceptional tax effort, Plaintiff Districts cannot generate much revenue from higher mill rates because of the low assessed valuations in their districts. Plaintiff Districts' taxing efforts produced local revenues ranging from $2,694 in Allendale County School District to $1,213 in Dillon County School

District No. 2 in 2001-02, far less money than other districts (Defs.' Ex. 3225 at 257-60) and far less than they need.

Defendants cannot continue to simply delegate more and more of the increasing costs of teacher salaries, special education, employee fringe benefits, transportation, programmatic mandates, and facilities to the local districts to shoulder, with no consideration of whether the local districts have the means to pay for such costs. Local funding efforts "may not be used by the General Assembly as a substitute for providing an adequate . . . educational system throughout this state." Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989). The evidence at trial established that the funds available in Plaintiff Districts are insufficient to meet the funding requirements imposed on them and that to provide the resources necessary to provide each child in Plaintiff Districts the constitutionally mandated educational opportunity.

2. Defendants have failed to ensure adequate funding to meet the educational needs of children in the Plaintiff Districts.

Defendants seek to escape responsibility for failing to discharge their constitutional obligations by blaming Plaintiffs for mismanagement, poor purchasing and hiring decisions, and failure to offer proper professional development. The trial court also blamed the State Department of Education and the State Board for failures in the Plaintiff Districts. However, Defendants cannot hide behind an assertion that the money is available in Plaintiff Districts but is not spent as it should be. The General Assembly may delegate, and has delegated, duties under the Education Clause to the State Department of Education, the State Board of Education, local school districts and school boards, as well as individual schools and their administrators, teachers, and staff. It may not, however, through delegation of its duties, avoid its constitutional obligation to ensure an opportunity for a minimally adequate education to

each student. "[P]ublic education is not the duty of the separate counties but of the General Assembly." Charleston County Sch. Dist. v. Charleston County, 297 S.C. 300, 302, 376 S.E. 2d 778, 780 (1989) (citing Moye v. Caughman, 265 S.C. 40, 217 S.E.2d 36 (1975) and S.C. Const. Art. XI, § 3)); accord Moseley v. Welch, 209 S.C. 19, 34, 39 S.E.2d 133, 140 (1946) (finding "there is no inherent right of local self-government of the schools which is beyond legislative control"); see also Rose, 790 S.W.2d at 205, 211 (holding that the General Assembly has "the sole obligation" to establish, monitor, supervise, and ensure adequate funding of the public school system; "this obligation cannot be shifted to local counties and local school districts"); Claremont Sch. Dist. v. Governor, 794 A.2d 744, 755 (N.H. 2002) (holding that the "[S]tate may delegate its duty to provide a constitutionally adequate education, but may not abdicate its duty in the process"); see also Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1360 (N.H. 1997) (declaring "the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy"); Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) (internal citation omitted) (holding that if a local school district falls short of the constitutional requirements, for whatever reason, the state has the obligation to rectify the situation)).

The funding supplied by Defendants for the maintenance and support of the system of public schools results in inadequate inputs in Plaintiff Districts which in turn lead to inadequate student outcomes. Plaintiffs have outlined the gaps in the funding of necessary elements in this brief and in their principal brief at pages 33-40 (teacher compensation and turnover), 44-49 (teacher improvement efforts), and 136-43 (additional time and instrumentalities of education). The barriers set up or perpetuated by the funding mechanisms put into place by Defendants prevent the Plaintiff Districts' access to the funding necessary to fill the holes in their schools.

VI. This Court Has the Power and the Responsibility to Provide an Adequate Remedy.

Defendants again urge this Court to deny Plaintiffs' requested relief out of deference to legislative discretion. Specifically, they contend that education funding and policy decisions are best left to the elected officials who are "accountable to the public," the inference being that if those officials make poor policy choices, they will be held "accountable" through the political process and removed from office. (Defs.' Br. 124-25.) Defendants' position is ironic because the very point of this lawsuit is that the children in the Plaintiff Districts—like their parents and grandparents before them—are not able to meaningfully participate in the political process because they are unable to acquire an education that rises to the constitutional standard. Contrary to Defendants' argument, this case is not about political funding and policy choices best left to legislative discretion; this case is about the General Assembly's persistent violation of the fundamental constitutional rights of children in the Plaintiff Districts and the need to remedy this wrong. When the violation of a constitutional right is at issue, the matter becomes one of judicial concern.

Prior briefings on this issue have adequately addressed the law of separation of powers in South Carolina. When the legislature acts, or fails to act, in a way that violates the Constitution, the courts in South Carolina have the power to intervene. The difficult question is whether they should intervene and, if so, to what extent. In approaching an answer to this question in this case, three things are clear:

1. The required educational opportunity is lacking in the Plaintiff Districts. Abysmal educational outcomes in the Plaintiff Districts show that the State's public education system is not effectively meeting the needs of its children. The record of deficient educational

inputs establishes that the outcomes are attributable to the State's failure to provide the necessary resources.

2. The State has the power to change these children's lives through education. Witnesses for both sides and the trial court all agreed that, given the right resources, poor children can learn and achieve at high levels. At trial, ample evidence showed that specific resources can indisputably create educational opportunity, and without those resources, the opportunity will not exist for the children in the Plaintiff Districts.

3. The State will not remedy its constitutional failure unless this Court intervenes. Defendants argue that judicial intervention is not appropriate because they have shown their commitment to education and have enacted legislation aimed at addressing the educational needs of at-risk children in the Plaintiff Districts in response to the specific deficiencies identified by the trial court.

The new legislation, however, fails to remedy the specific deficiencies identified by the trial court and, in any event, does not address the system-wide deficiencies established at trial. (See the discussion at Plaintiffs' Response Brief at 14-33.) Thus, Defendants have not remedied their constitutional failure to provide each child in the Plaintiff Districts with the opportunity to acquire a minimally adequate education.

Further, Defendants' positions at every stage of this litigation directly contradict their stated commitment to education. When the parties first appeared before this Court ten years ago, Defendants denied any constitutional obligation to provide a quality education system to children in this state. After this Court rejected that argument in Abbeville, Defendants made no effort to evaluate the constitutional adequacy of their public education system in light of the Plaintiffs' claims in this case. Instead, and in direct contradiction of the trial testimony of

their own witnesses, Defendants have continued to maintain that school quality does not affect children's achievement, and consequently, they can do nothing to improve educational achievement in the Plaintiff Districts. Defendants blame poverty, the school districts, the parents, and even the children themselves, for the lack of educational achievement in the Plaintiff Districts. They take no responsibility for their own failure to provide adequate resources. Meanwhile, the record of educational achievement in the Plaintiff Districts continues to disappoint, and the children in the Plaintiff Districts fall further and further behind.

Thus, the posture of this case stands in stark contrast to the experience of the Massachusetts Supreme Court in Hancock v. Commissioner of Education, 22 N.E.2d 1134 (Mass. 2005), which Defendants repeatedly cite. In Hancock, the legislature had voluntarily undertaken a sweeping and comprehensive reform of the public education system during the pendency of the litigation, which was enacted into law the day after the trial court declared the public education system unconstitutional, and thereafter implemented. Consequently, no need for judicial intervention was necessary to remedy the constitutional deficiency. (See a full discussion in Plaintiffs' Initial Brief, 107-08.)

In short, while Defendants pay lip service to the idea that "education is their first priority," their failure to act and their positions in this case demonstrate unequivocally that Defendants are not considering the needs of children in the Plaintiff Districts when setting, funding, and implementing educational policy.

Against that background, this Court must make its decision. Contrary to Defendants' suggestion, decisions in other jurisdictions confronting "education adequacy" claims are particularly instructive. Those cases do not reveal, as Defendants argue, that the courts

"reluctantly intervened after many years of legislative inaction." (Defs.' Br. 128.) To the contrary, those cases demonstrate a pattern of increasing levels of judicial involvement as state legislatures continually failed to comply with their state constitutions. In each case, the first step, upon a finding that the state's public education system was constitutionally deficient, was to order the state legislature to bring the public education system into compliance with the constitution, including by adopting necessary legislation and identifying areas of constitutional infirmity. See Lake View School District No. 25 v. Huckabee, 91 S.W.3d 472, 510-11 (Ark. 2002) (ordering the state to remedy constitutional deficiencies in education finance system but staying mandate until January 1, 2004 to give legislature time to make changes voluntarily); Montoy v. State, 102 P.3d 1160, 1165 (Kan. 2005) (ordering legislature to "act expeditiously to provide constitutionally suitable financing for the public school system"); Rose v. Council, 790 S.W.2d 186, 209 (Ky. 1989) (ordering state to re-create and re-establish a constitutionally compliant system of education and specifying certain characteristics necessary for compliance); CFE v. State, 719 N.Y.S.2d 475, 549-51 (N.Y. Sup. Ct. 2001) (ordering defendants to take steps to provide students with a "sound basic education" and noting that the first step in this process was to conduct a cost study); Abbott ex rel. Abbott v. Burke (Abbott II), 574 A.2d 359, 384-87 (N.J. 1990) (ordering state to adopt legislation to remedy disparity in education financing); Hoke Cty. Bd. of Educ. v. State, No. 95-CVS-1158, 2000 WL 1639686 at *114 (N.C. Oct. 12, 2000), (providing state guidelines for resolving constitutional problems in education system and requiring state to advise court of remedial actions); DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997) (ordering the General Assembly to create "an entirely new" new school finance system, but noting that the court would not provide the specifics of legislation).

Subsequently, because state legislatures failed to comply with this basic remedy, many of the same courts cited above were compelled to consider increasingly involved judicial remedies. See, e.g, Lake View Sch. Dist. No. 25 v. Huckabee, 210 S.W.3d 28, 29-30 (Ark. 2005) (recalling its mandate and appointing special masters to investigate allegations that legislature was not complying with new legislation enacted to correct constitutional infirmity, rather than waiting for a new case to be filed to challenge the constitutionality of the new school finance system); Montoy v. State, 112 P.3d 923, 930, 940 (Kan. 2005) (ordering an immediate school funding increase of at least $285 million); CFE v. State, 814 N.Y.S.2d 1, 1 (N.Y. App. Div. 2006) (ordering the state to increase New York City Schools' annual operating funds by at least $4.7 billion per year); Abbott ex rel. Abbott v. Burke, 693 A.2d 417, 446 (N.J. 1997) (ordering legislature to assure that per-pupil funding was substantially equivalent between urban and wealthy districts before the next school year as interim relief and to conduct a comprehensive study to determine the needs of the students and the programs and cost necessary to meet those needs, under the continuing jurisdiction of the trial court); DeRolph v. State, 780 N.E.2d 529, 530 (Ohio 2002) (ordering legislature to enact a school funding system that is thorough and efficient, as explained in prior decisions; "a complete and systematic overhaul is what is needed, not further nibbling around the edges.")

Thus, these cases support the conclusion that the Court should provide a remedy for the constitutional inadequacy of the State's public education system, and the requested relief is a necessary and properly limited first step. Plaintiffs are not asking the Court to usurp any legislative function. Plaintiffs are not asking the Court to determine the means by which educational opportunities are provided to children in the Plaintiff Districts. Plaintiffs are simply asking the Court to require the General Assembly to evaluate and reform its system of

education so that it meets the educational needs of the children in the Plaintiff Districts as required by the Constitution—and to spell out the requirements for constitutional compliance in clear language compelling the State to act. Given Defendants' persistent denial of their constitutional obligation to provide educational resources sufficient to address the needs of children in the Plaintiff Districts, it would be futile to "wait and see" if Defendants will voluntarily create a system of education adequate to address those needs.

CONCLUSION

The Court remanded this case for a trial on the question whether the State was providing each child in the Plaintiff Districts with the opportunity to acquire a minimally adequate education. The trial court correctly found that it was not. For the reasons set forth in their briefs, Plaintiffs' respectfully request that this Court enter an Order affirming the trial court's judgment that the required opportunity was not present, reversing the trial court's finding that the constitutional deficiency was limited to the lack of early childhood intervention programs, and ordering 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 within a specified period of time.

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Respectfully submitted,

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March 28, 2008

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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

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*

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' SECOND SUPPLEMENTAL DESIGNATION 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, and their Supplemental Designation of Matter to be Included in the Record on Appeal filed February 28, 2008, designate the following matters to be included in the record on appeal:

1. Trial Transcript
   a. 4/2/2004: 141-142;
   b. 6/10/2004: 23-24, 31-32, 37, 68-76;
   c. 6/11/2004: 8-9;
   d. 9/30/2004: 46-53;
   e. 10/1/2004: 139-140, 144-145;
   f. 11/4/2004: 77-78, 80, 86, 109, 215;
   g. 11/5/2004: 192-193;
   h. 12/9/2004: 232-233.

2. Defendants' Exhibit 898.
3. Defendants' Exhibit 3147.
4. Defendants' Exhibit 3314.

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

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