

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUL 21 2016

SC SUPREME COURT

APPEAL FROM LEE COUNTY
COURT OF COMMON PLEAS

Thomas W. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2007-065159

Abbeville County School District, et al., Appellants-Respondents,

v.

The State of South Carolina, et al., of whom Hugh K.
Leatherman, Sr., as President Pro Tempore of the Senate
and as a representative of the South Carolina Senate, and
James H. Lucas, as Speaker of the House of
Representatives and as a representative of
the South Carolina House of Representatives, are Respondents-Appellants

and

State of South Carolina, Nikki R. Haley, as
Governor of the State of South Carolina, are, Respondents.

RESPONSE TO THE REPORT OF RESPONDENTS-APPELLANTS

NELSON MULLINS RILEY & SCARBOROUGH LLP
Carl B. Epps, III
Elizabeth Scott Moïse
Rachel Atkin Hedley
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

DUFF, WHITE & TURNER, LLC
Laura Callaway Hart
P.O. Box 1486
Columbia, SC 29202
(803) 790-0603

Attorneys for Appellants-Respondents

Appellants-Respondents (hereinafter referred to as “Plaintiffs” or “Plaintiff Districts”) hereby enter this Response to the Report of the Respondents-Appellants (hereinafter referred to as “State” or “Defendants”), submitted on June 29, 2016, pursuant to this Court's order in *Abbeville County School District v. State*, 415 S.C. 19, 780 S.E.2d 609 (2015) (“November 5, 2015 Order”).

Background

On November 12, 2014, this Court held that the Defendants had collectively violated their constitutional duty to ensure that the students of South Carolina receive the opportunity to acquire a minimally adequate education. *See Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 624, 767 S.E.2d 157, 159 (2014) (*Abbeville II*). In its opinion, the Court addressed the myriad factors contributing to its decision, including alarmingly low student and district performance, insufficient transportation, poor teacher quality, high teacher turnover, local legislation, school district size, and poverty and observed that it would be “near impossible” for the Defendants to meet their constitutional obligation without “a comprehensive effort . . . to determine the demands of providing the constitutionally mandated educational opportunity throughout the State.” *Id.* at 659, 767 S.E.2d at 178. Toward that end, the Court stated:

It is time for the Defendants to take a broader look at the principal causes for the unfortunate performance of students in the Plaintiff Districts, beyond mere funding. Fixing the violation identified in this case will require lengthy and difficult discussions regarding the wisdom of continuing to enact multiple statutes which have no demonstrated effect on educational problems, or attempting to address deficiencies through underfunded and structurally impaired programming.

Id. at 660, 767 S.E.2d at 178. The Court then directed both the Plaintiff Districts and Defendants "to reappear before this Court within a reasonable time from the issuance of this opinion, and present a plan to address the constitutional violation announced today, with

special emphasis on the statutory and administrative pieces necessary to aid the myriad troubles facing these districts at both state and local levels.” *Id.* at 661, 767 S.E.2d at 179. The Court made clear that “it is the Defendants who must take the principal initiative, as they bear the burden articulated by our State’s Constitution, and have failed in their constitutional duty to ensure that students in the Plaintiff Districts receive the requisite educational opportunity.” *Id.* at 662, 767 S.E.2d at 180.

Plaintiffs were initially encouraged by the efforts of the elected officers and representatives of the State of South Carolina to address the constitutional deficiencies identified in *Abbeville II*. Both the House and Senate formed committees to take testimony and receive evidence as outlined in the Joint Report submitted on June 29, 2016 by the Honorable Hugh K. Leatherman, as President Pro Tempore of the State Senate, and of the Honorable James H. Lucas, as Speaker and Representative of the South Carolina House of Representatives, submitted on June 29, 2016 (“Joint Report”). Representatives of the Plaintiff Districts were included as members of the House Task Force and invited to testify before the Senate Special Abbeville Committee. In addition, as outlined in the letter submitted to the Court on June 29, 2016 by the Governor’s Office, the Governor published an Education Reform Initiative in 2013, an Education Reform Proposal for FY 2015/16, and additional recommendations in 2017.¹

Because the parties were unable to agree on a timeline, however, Plaintiffs petitioned the Court in June 2015 for an order establishing a reasonable timeline to ensure that progress continued at an acceptable pace. This Court's Order of November 5, 2015, established a

¹ Notwithstanding the Governor’s efforts, her role in education is limited to making recommendations and signing or vetoing bills enacted by the General Assembly. Both the power and the duty to support and maintain the public education system falls squarely on the General Assembly.

deadline of one week after the conclusion of the 2016 legislative session for Defendants to “submit a written summary to the Court detailing their efforts to implement a constitutionally compliant education system, including all proposed, pending, or enacted legislation.” November 5, 2015 Order, 415 S.C. at 21, 780 S.E.2d at 610. Recognizing that it may take time to fully implement any proposed or adopted plan designed to meet the challenges of staffing and other critical needs, the Order directed the State to advise the Court, as part of its report, “as to an expected timeline for implementation of its proposed plan.” *Id.*

I. The Joint Report does not offer a plan or timeline for eliminating the constitutional violations.

Notwithstanding the work of the House Education Policy Review and Reform Task Force and the Senate Special Abbeville Committee researching the lack of opportunity in the Plaintiff Districts, the State has failed to translate either committee's body of work into action. The Joint Report therefore only details the extent to which the State studied the problems, but fails to set forth a remedial plan or a timeline for implementation as required by *Abbeville II* and this Court's November 5, 2015 Order.

1. Specific legislative action taken does not reflect a plan to eliminate the constitutional violations through comprehensive educational reform.

The Joint Report lists eight education bills that were introduced in the 2016 legislative session. Of these eight bills, only four were passed, and of those four, only two (H. 4936 and H. 4940) direct specific action.

- H. 4936 re-defines the expectations of a high school graduate, but contains no provisions for funding or assistance to support school districts in meeting this pronounced standard.
- H. 4940 charges the already existing Office of Transformation with providing limited technical assistance to underperforming schools and districts—which may or may not include the Plaintiff Districts—but the only technical assistance specified in this bill

consists of reviewing and analyzing data. In fact, this bill provides little to nothing that is new to the kinds of limited assistance that is already provided through the eighteen-year-old Education Accountability Act (“EAA”).

The remaining two bills that were passed (H. 4939 and H. 4938) only direct further study.

- H. 4939 set up a committee² to study current educational statutes to identify those that are obsolete. This bill also requires the State Department of Education (the “SDE”) to develop a technical assistance program for low-performing districts and to conduct monitoring of professional development and school boards in those districts. However, the bill provides no attendant resources to support the districts in addressing any problems uncovered by this monitoring.
- H. 4938 requires the SDE and other agencies to conduct a survey of college students to determine what incentives might be useful in recruiting teachers for rural and economically challenged school districts. Of note, the Center for Educator Recruitment, Retention and Advancement (“CERRA”), which has been in existence since 1985, has for many years conducted annual surveys of teachers leaving their positions regarding their reasons for doing so.

With all due respect to the General Assembly’s prerogative to select the method of delivering educational opportunity, these four bills cannot be considered evidence of a comprehensive plan to address the “myriad other issues, under the State’s control, working to prevent students within these districts from receiving the constitutionally required [educational] opportunity,” *Abbeville II*, 410 S.C. at 624, 767 S.E.2d at 159, particularly when compared to the robust set of recommendations proposed by the House Task Force in January 2016.³

² The committee will consist of representatives appointed by the State Superintendent, the Executive Director of the Education Oversight Committee, the Chairman of the House Education and Public Works Committee, and the Chairman of the Senate Education Committee. The appointee of the State Superintendent will chair the committee.

³ The Task Force Report contained nineteen pages of specific recommendations developed by the five committees of the Task Force to assist the Plaintiff Districts and the State in remedying the constitutional deficiencies identified in *Abbeville II*.

2. Funding and appropriations measures taken do not reflect comprehensive reform of an educational funding scheme reliant on a fractured formula.

The Joint Report states that the FY2016-17 General Appropriations Act “contained provisions to ease the financial burden borne by the plaintiff districts.” (Joint Report at 2.) However, the list of specific appropriations identified on pages 2-4 of the Joint Report do nothing to address this Court’s admonition that remedying the constitutional violations announced in *Abbeville II* will require a comprehensive effort to determine the demands of providing the constitutionally mandated educational opportunity throughout our State and to design spending plans in a manner targeted to address the “clear disconnect between spending and results.” *Abbeville II*, 410 S.C. at 653, 767 S.E.2d at 175.

Most of the appropriations identified in the Joint Report (15 of 18 listed) distribute funds statewide; the Plaintiff Districts, with their fewer numbers of students, will receive proportionate shares based on these lower numbers. However, the Plaintiff Districts’ needs, as outlined in *Abbeville II*, are much greater than those of districts of higher wealth and warrant focused spending in those districts, which is not considered in these funding measures designed as “one size fits all” throughout the state. For example:

- Item No. 3 identifies “\$19.2 million to reimburse school districts expenses for bus driver pay to relieve bus driver shortages and reduce student ride times.” (Joint Report at 3.) This amount represents a 3.25% salary increase given to all state employees, rather than a particular effort to improve school bus transportation for students in the Plaintiff Districts, some of whom are subjected to four-hour-per-day bus rides, due to the rural routes and limited number of buses and drivers available. No data indicates that a 3.25% raise will relieve bus driver shortages or reduce student ride times. In addition, this appropriation does nothing to equalize driver pay across the state or to address the competitive salary disadvantages of the Plaintiff Districts in recruiting bus drivers to serve their long rural routes.
- Item No. 7 identifies a “2% pay increase for teachers on top of the STEP increase and an increase in the state salary schedule to 23 years, adding dual

enrollment weighting.” (Joint Report at 3.) While the Plaintiff Districts are encouraged that the State acknowledges the need for higher teacher salaries, a statewide increase in teacher salaries does nothing to improve the abilities of the Plaintiff Districts to be more competitive with other districts in their efforts to attract and retain a highly qualified teaching staff. In addition, there is no indication or assurance that the funds allocated for this purpose will be sufficient to cover those increases. If they are not, the districts will be required to divert some of their own local funds to meet this mandate, which many can ill afford. The STEP increase mandated in this appropriation also increases the burden on local funds because the State did not provide funding to cover that mandate.

- Item No. 10 identifies “\$15.1 million for new buses to work toward a 15-year replacement cycle.” (Joint Report at 3.) This appropriation is statewide and is less than half the \$34 million per year that the State Superintendent of Education testified (during her appearance before the Senate Abbeville Subcommittee) was necessary to meet the 15-year replacement cycle. (See Joint Report at 14.)

Further, while some prioritization of the Plaintiff Districts appears in a few of the appropriations, the specific appropriations identified in the Joint Report do not reflect an effort to consider the needs of the Plaintiff Districts or to fund those needs in a systematic and rational way, which is what *Abbeville II* requires. For example:

- Item No. 4 identifies \$16.8 million “to provide technology upgrades in the Plaintiff Districts.” (Joint Report at 3.) There is no indication the General Assembly, in appropriating these funds, considered the greater technology challenges faced by the Plaintiff Districts in light of their aging facilities and historical lack of technology infrastructure.
- Item No. 5 identifies \$3.1 million “to pay for efficiency studies in all Plaintiff Districts.” (Joint Report at 3.) These funds go directly to the SDE to fund the efficiency studies mandated by H. 4939. As noted, no attendant plan or funding addresses any deficiencies identified in these studies.
- Item No. 18 identifies \$9 million for “Teacher Recruitment and Retention for Abbeville Districts and districts with poverty index of 80% or higher.” (Joint Report at 4.) The Plaintiff Districts acknowledge and are grateful that the General Assembly allocated funds to them and other high poverty districts to be used for teacher recruitment and retention. However, this calculates to a little less than \$50 per student, and there is no indication or assurance that the funds allocated for this purpose will be available in

subsequent years, so its potential impact on the districts' ability to recruit or retain teachers is doubtful at best.

Finally, and perhaps most importantly, the State continues to ignore the heart of the problem when it comes to adequate resources: that the State's entire funding system has become an irrational patchwork of funding streams over time, resulting in "a clear disconnect between spending and results." *Abbeville II*, 410 S.C. at 653, 767 S.E.2d at 175. This Court held that "South Carolina's educational funding scheme is a fractured formula denying students in the Plaintiff Districts the constitutionally required opportunity." *Id.* at 651, 767 S.E.2d at 173. This Court further stated:

[T]he cost of the educational package in South Carolina is based on a convergence of outmoded and outdated policy considerations that fail the *students* of the Plaintiff Districts. Though the evidence demonstrates the intersection of statutes and ever increasing funding streams, it does not show, at least to this Court, a comprehensive effort by the Defendants to determine the demands of providing the constitutionally mandated educational opportunity throughout the State. In our opinion, without that determination, it is near impossible for the Defendants to meet their constitutional obligation.

Id. at 659, 767 S.E.2d at 178 (emphasis in original). The limited funding offered by the provisos discussed above is not based on any effort to determine whether they are connected to the demands. Rather, they represent a continued pattern of funding totally independent of actual need or sufficiency.

Further, even assuming the Education Funding Act ("EFA") formula were adequate to determine and provide for the current educational needs of the students, which it is not, the State has failed to correct its historical underfunding of the Base Student Cost ("BSC") under the EFA formula, and the State's increase in the Base Student Cost under the EFA needs to be explained. If properly funded according to the Act, the BSC for fiscal year 2016-2017 would

be \$2,933. The General Assembly funded the BSC at only \$2,350 per pupil,⁴ a shortfall of \$583 per pupil. Therefore, while Defendants emphasize a \$130 per-pupil increase in the funds appropriated for the Base Student Cost, the reality is that this increase falls over \$500 million short of the legislatively mandated levels of funding specified in the EFA.

II. The constitutional violations outlined in *Abbeville II* require a meaningful and timely response.

For the reasons set forth in this Response, Plaintiffs respectfully request that the Court retain jurisdiction over this case and direct Defendants, once again, to present a plan for remedying the pervasive constitutional violations outlined in *Abbeville II*. The reality is that the State is in violation of this Court's November 5, 2015 Order because of its failure to submit a plan and a timeline to eliminate the constitutional violations identified in *Abbeville II*. While the Plaintiffs want to continue to work with the State in an effort to address the needs of the students in the Plaintiff Districts, Plaintiffs request that the Court, at a minimum, impose a concrete deadline of not later than one week after the conclusion of the 2017 legislative session for the State to submit a new report specifically stating a comprehensive educational reform package, including specific legislation targeted to address the violations identified in *Abbeville II*, and identifying as precisely as possible a timeline for implementing that plan.

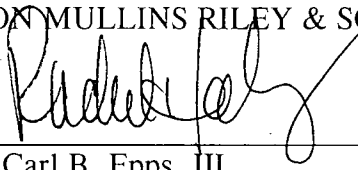
[SIGNATURE BLOCK ON FOLLOWING PAGE]

⁴ This is below the BSC of \$2367 used ten years ago, in fiscal year 2006-2007.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____



Carl B. Epps, III
Elizabeth Scott Moise
Rachel Atkin Hedley
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

DUFF, WHITE & TURNER, LLC

Laura Callaway Hart
P.O. Box 1486
Columbia, SC 29202
(803) 790-0603

Attorneys for Appellants-Respondents

July 21, 2016

Columbia, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants-Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by **hand delivery** to the following address(es):

Pleadings: Response to the Report of Respondents-Appellants

Counsel Served:

Via Hand Delivery

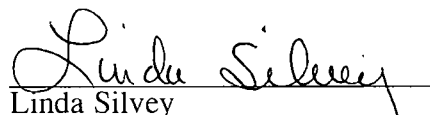
Robert E. Stepp, Esquire
Elizabeth Van Doren Gray, Esquire
Sowell Gray Stepp & Laffitte, L.L.C.
1310 Gadsden Street
Columbia, South Carolina 29211

Via Hand Delivery

J. Emory Smith, Jr., Esquire
Office of the Attorney General
Rembert C. Dennis Building
1000 Assembly Street
Suite 519
Columbia, SC 29201

Via Hand Delivery

Swati Shah Patel, Esquire
Holly Pisarik, Esquire
Office of the Governor
1205 Pendleton Street
Columbia, SC 29201


Linda Silvey
Administrative Assistant

July 21, 2016