# The Supreme Court of South Carolina

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

v.

The State of South Carolina, et al., of whom Hugh K. Leatherman, 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, Henry D. McMaster, as Governor of the State of South Carolina, are, Respondents.

Appellate Case No. 2007-065159

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ORDER

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Pursuant to the instructions of a majority of this Court in *Abbeville County School District v. State* (*Abbeville II*), 410 S.C. 619, 767 S.E.2d 157 (2014), and orders dated November 5, 2015, and September 20, 2016, the parties in this matter have submitted new reports on the steps they have taken to provide students in the plaintiff school districts with the constitutionally mandated opportunity to receive a minimally adequate education. For the reasons that follow, we vacate the Court's continuing jurisdiction over this matter.

For the reasons set forth in Justice Kittredge's dissent in *Abbeville II*, we are convinced *Abbeville II* was wrongly decided as violative of separation of powers. *Id.* at 663–85, 767 S.E.2d at 180–92 (Kittredge, J., dissenting). The South Carolina

General Assembly has responded in good faith to comply with this Court's mandate. Those efforts include numerous legislative initiatives, as well as increased funding for students. The Executive Branch has similarly demonstrated a commitment to promote and advance educational opportunities in the plaintiff school districts.

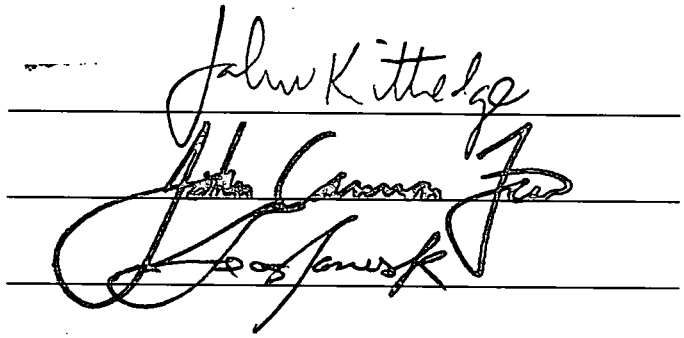
As a result of the numerous and good faith efforts, the House of Representatives requests that this Court's continuing supervision of this matter be ended. Understandably, the plaintiff school districts want this Court to keep its thumb on the scale of legislative power, especially the power of the purse. That, we will not countenance. The motion to vacate this Court's continuing jurisdiction is granted, and this case is dismissed.

Does the dismissal of this case reflect a lack of appreciation for the critical importance of public education in South Carolina? **Absolutely not**. As Justice Kittredge wrote in his dissent:

> I further acknowledge the self-evident truth concerning the critical importance of public education to the citizens of South Carolina. Indeed, all parties to this two-decades old lawsuit so stipulate. For many, particularly those who understandably hunger for positive change in South Carolina's public education system without concern for the source of that positive change, today's policy mandate to the South Carolina General Assembly will be embraced and applauded. As a citizen of our great State, I would find much to cheer about in the majority's decision. I, however, approach this so-called legal case not as a private citizen, but as a judge constrained by the rule of law and the inherent constitutional limitations upon the power of the Judicial Branch. . . . [In the conclusion of his dissent, he wrote,] I end where I began. The fact that this lawsuit does not present a legal controversy in no manner detracts from the critical significance of public education to all South Carolinians. Public education is, of course, a matter of great importance to our State and its citizens.

*Id.* at 663, 683–84, 767 S.E.2d at 180, 191–92.

To continue to exercise jurisdiction over the Legislative and Executive Branches under these circumstances would be a gross overreach of judicial power and violate separation of powers.[1] The case is dismissed.



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I respectfully dissent from my learned colleagues' decision to end the Court's jurisdiction over this case, as I would deny the defendants' various motions. However, I nonetheless agree in small part with the majority order. As the majority acknowledged, since this Court's decision in *Abbeville County School District v. State* (*Abbeville II*), 410 S.C. 619, 767 S.E.2d 157 (2014), we have had the benefit of seeing the defendants make steady progress toward remedying their failure to provide our state's children with a minimally adequate education.

I am particularly encouraged the defendants have recently come to realize that merely pouring more money into an outmoded system will not lead to success. As

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[1] *See* The Federalist No. 78, at 575 (Alexander Hamilton) (John C. Hamilton ed., 1866):

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honours, but holds the sword of the community: The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated: The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacious exercise of even this faculty.

a result of the House of Representatives' decision to more closely examine the self-described "outdated," "overcomplicated," "burdensome," and "piecemeal" approach to education policy and funding, I foresee a finish line to remedying the problems underlying this protracted litigation, one that will culminate in the fundamental reforms necessary for the defendants to meet their constitutional obligation to South Carolina students. I commend the House of Representatives on leading the other defendants toward a promising new approach to education in our state. More importantly, despite the Court's decision to end its continuing jurisdiction, I—in my capacity as a private citizen—look forward to seeing the results of the House of Representatives' decision to study the current education funding formula.

Were it up to me, I would end this Court's jurisdiction over the case once the defendants fully studied the problems with the funding formula and any adjustments that may be required. I believe that at that point, the Court's intervention would no longer be necessary to foster dialogue and cooperation. Instead, the defendants would finally have the information necessary to determine a path toward constitutional compliance, and the plaintiff districts and public would have the information necessary to judge the defendants' progress toward providing students with a minimally adequate education and hold the defendants accountable should they fail to follow through.

Unfortunately, our Court has lost the will to do even the minimal amount necessary to avoid becoming complicit actors in the deprivation of a minimally adequate education to South Carolina's children. *See generally* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 Harv. L. Rev. 1072 (1991) (discussing judicial acquiescence to inadequate remedies in school funding cases). The path toward constitutional compliance is unquestionably a lengthy and difficult one, but one which I am convinced the executive, legislative, and judicial branches of our State's government can navigate in order to reach the goal shared by all of the citizens of South Carolina: an education system that provides opportunity to all children.

Speaking only for myself, my intention in voting to continue the Court's jurisdiction over the matter in the past was to foster cooperation between the parties and defer to the General Assembly's policy determinations on how to specifically achieve constitutional compliance. I could not stand idly by as the defendants made unfulfilled promises to reform the education system and remedy the constitutional violation, for by doing nothing, our Court would have likewise become complicit in failing the children of our state. *Cf. Brown v. Bd. of Educ.*

(*Brown II*), 349 U.S. 294, 300–01 (1955) (retaining jurisdiction of the case until the defendants made a "prompt and reasonable start toward full compliance" with the ruling from *Brown I*); *McCleary v. State*, 269 P.3d 227, 260 (Wash. 2012) (en banc) (holding the state legislature failed to fulfill its constitutional duty to provide the state's children with an adequate education, and in discussing the remedy, stating "too much deference [to the state legislature to solely craft the remedy] may set the stage for another major lawsuit challenging the legislature's failure to adhere to its own implementation schedule").

Now, in granting the defendants' motions, the majority contends retaining jurisdiction over this case—even until there has been appreciable progress towards remedying the constitutional violation—would be a gross overreach of judicial power. However, looking at our sister courts across the country, our prior decisions to maintain jurisdiction were not unprecedented. *See, e.g.*, *Brown II*, 349 U.S. at 300–01; *Idaho Sch. For Equal Educ. Opportunity v. State* (*ISEEO V*), 129 P.3d 1199, 1209 (Idaho 2005) ("At this juncture, we will not remand the case to the district court, but will retain jurisdiction to consider future legislative efforts to comply with the constitutional mandate to provide a safe environment conducive to learning so that we may exercise our constitutional role in interpreting the constitution and assuring that its provisions are met."); *Montoy v. State* (*Montoy III*), 112 P.3d 923 (Kan. 2005) (per curiam) (ordering the state legislature to implement specific funding increases for education spending, acknowledging the court-ordered remedy was imperfect as it merely balanced several competing considerations, and retaining jurisdiction to ensure compliance with the court's opinion); *DeRolph v. State* (*DeRolph II*), 728 N.E.2d 993 (Ohio 2000) (holding that, three years after the state supreme court's initial determination the state's education funding system was still unconstitutional, the system was still not in constitutional compliance, and retaining jurisdiction over the matter); *McCleary*, 269 P.3d at 261 (rejecting the state legislature's suggestion that the court must wholly defer to the legislature's implementation of legislation to remedy its failure to provide the state's children with an adequate education, but stating the plaintiffs' proposal to set an absolute deadline for compliance in one year's time was unrealistic; finding instead that "[a] better way forward is for the judiciary to retain jurisdiction over this case to monitor implementation of the reforms under [the new education funding laws], and more generally, the State's compliance with its paramount duty [to provide children with an adequate education]"). While the majority disagrees it is within this Court's power to maintain jurisdiction, our previous decisions to maintain jurisdiction surely cannot be classified as a "gross" overreach given numerous other courts' decisions to do the same, including the

United States Supreme Court.[2]

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[2] Additionally, for states in which the courts have declared their states' education funding scheme unconstitutional and chosen *not* to maintain jurisdiction in education funding cases, it is rare for the state legislatures to remedy the constitutional infirmity on their own accord. For example, in 1997, in *DeRolph v. State*, the Ohio Supreme Court declared Ohio's education funding scheme unconstitutional, retained jurisdiction, and gave the legislature twelve months to implement a new funding scheme. *See State ex rel. State v. Lewis* (*DeRolph V*), 789 N.E.2d 195, 198 (Ohio 2003) (discussing *DeRolph v. State* (*DeRolph I*), 677 N.E.2d 733 (Ohio 1997)). The legislature was unable to agree on a new funding mechanism. Nonetheless, the court ended the litigation several years later in a 4-3 decision. *Id.* at 200–03. Now, twenty years after the initial decision, the Ohio legislature has yet to address the constitutional infirmity announced in *DeRolph I*. *See* Jim Siegel & Joe Vardon, *15 Years - No School-Funding Fix*, THE COLUMBUS DISPATCH (Mar. 25, 2012), http://www.dispatch.com/content/stories/local/2012/03/25/15-years--no-school-funding-fix.html.

In contrast, in 2012, in *McCleary v. State*, the Washington Supreme Court declared the state's education funding scheme unconstitutional and maintained jurisdiction over the case until 2018, when the state legislature had set a deadline for a new funding formula to be implemented. *McCleary*, 269 P.3d at 231. Subsequently, due to the legislature's lack of measurable progress toward its self-set goal, the court held the legislature in contempt and began fining the legislature $100,000 per day, to be paid into a "segregated account for the benefit of basic education." Order, *McCleary v. State* (Wash Sup. Ct. filed Aug. 13, 2015), *available at* http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/843627_081315McClearyorder.pdf. On July 6, 2017, the governor signed into law a new school funding plan intended to remedy the constitutional infirmity and contempt order. Rachel La Corte, *Gov. Inslee signs education funding plan aimed at satisfying the long-running McCleary case*, THE SEATTLE TIMES (July 6, 2017, 8:15 p.m.), https://www.seattletimes.com/seattle-news/politics/gov-inslee-signs-education-funding-plan-aimed-at-satisfying-the-long-running-mccleary-case/. The court is now determining whether the legislature has remedied the constitutional violation announced five years ago, and, as a result, whether the court may end its continuing jurisdiction.

Furthermore, as I stated previously, my desire to continue the Court's jurisdiction is not boundless, nor is it for an indefinite time period, as the defendants have indisputably laid extensive groundwork for the changes to come. Since our decision in *Abbeville II* three years ago, the defendants have gathered volumes of information about the problems facing the plaintiff districts and the State's education system as a whole. I am heartily encouraged by the House of Representatives' new effort to collect the most vital information yet: methods of updating and streamlining the State's fractured funding formula. Once the defendants are armed with this information, I am confident the parties will at last be able to make significant leaps toward remedying the problems facing the plaintiff districts.

Consequently, I believe the Court should maintain jurisdiction over this case only until the defendants complete a thorough study of the current education funding formula and identify the fruits of their labors to the Court. As always, the length of time between now and that date would be in the parties' control, as only they could dictate how much effort to put into that endeavor. In the meantime, I would opt to continue to monitor the progress toward a constitutionally compliant education system by requiring the submission of another report by the parties after the conclusion of the upcoming legislative session. In education, the students' progress is measured by yearly benchmarks and assessments. Surely the parties can expect no less of themselves than of their students.

Of course, the majority disagrees. As a result, I merely remind the parties that each day there is a delay in focusing their full attention and efforts on this problem risks another year in which South Carolina's students are denied their opportunity for a *minimally* adequate education, much less a quality education befitting the

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Of course, retaining jurisdiction is not necessary when the state legislature is truly motivated to remedy the constitutional violation and promote student learning. For example, in Vermont and Texas, the state legislatures were each able to pass new education funding laws very quickly despite the vast disparity in the two states' sizes: four months for Vermont, and eight months for Texas. *See Edgewood Indep. Sch. Dist. v. Meno* (*Edgewood IV*), 917 S.W.2d 717, 726 (Tex. 1995) (discussing its original decision in *Edgewood Independent School District v. Kirby* (*Edgewood I*), 777 S.W.2d 391 (Tex. 1989), and the state legislature's initial efforts at remedying its failure to constitutionally finance the state's education system); *Vermont School Funding System Works*, RURAL SCH. & CMTY. TRUST, http://www.ruraledu.org/articles.php?id=2829 (last updated Jan. 27, 2012).

students in this great State. The need for immediate action could not be more apparent. Conversely, failing to act would send a strong message about the parties' good faith commitment toward fulfilling their duties, constitutional or otherwise, to our state's children. In particular, I hope that in the future, the plaintiff districts do not merely wait for the General Assembly to grant them additional funding, and continue to seek new and innovative solutions to the problems facing their districts. As the Court stated previously in *Abbeville II*, the responsibility for the constitutional infirmity is the fault of all the parties, and the problems cannot be fixed through more funding alone.

I dissent.

_____ C.J.

I concur in Chief Justice Beatty's dissent.

_____ J.

Columbia, South Carolina

November 17, 2017

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