

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LEE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 2007-65159

Abbeville County School District, Allendale County School District, Bamberg County School District 1, Bamberg County School District 2, Barnwell County School District 19, Barnwell County School District 29, Barnwell County School District 45, Berkeley County School District, Chesterfield County School District, Clarendon County School District 1, Clarendon County School District 2, Clarendon County School District 3, Dillon County School District 1, Dillon County School District 2, Dillon County School District 3, Florence County School District 1, Florence County School District 2, Florence County School District 3, Florence County School District 4, Florence County School District 5, Hampton County School District 1, Hampton County School District 2, Jasper County School District, Laurens County School District 55, Laurens County School District 56, Lee County School District, Lexington County School District 4, Marion County School District 1, Marion County School District 2, Marion County School District 7, Marlboro County School District, McCormick County School District, Orangeburg Consolidated School District 3, Orangeburg Consolidated School District 5, Saluda County School District and Williamsburg County School District, Lena Manning, individually, and as a taxpayer residing in Allendale County and as Guardian ad Litem of Courtney V., Courtney V., a minor, by and through Lena Manning, as Guardian ad Litem, William L. Mills, individually, and as a Taxpayer residing in Allendale County and as Guardian ad Litem of Waylon P., Waylon P., a minor, by and through William Mills, as Guardian ad Litem, Betty Bagley, individually, and as a taxpayer residing in Bamberg County and as a parent and Guardian ad Litem of Tyler B., Tyler B., a minor, by and through Betty Bagley, as Guardian ad Litem, Evert Comer, Jr., individually, and as a taxpayer residing in Bamberg County and as parent and Guardian ad Litem of Kimberly C., Kimberly C., a minor, by and through Evert Comer, Jr., as Guardian ad Litem, Marla Q. Jameson, individually, and as a taxpayer residing in Barnwell County, and as a parent and Guardian ad Litem of Eleanor J., Eleanor J., a minor, by and through

Marla Q Jameson, as Guardian ad Litem, Victor M Lancaster, Sr , individually, and as a taxpayer residing in Barnwell County, and as parent and Guardian ad Litem of Christie L , Christie L , a minor, by and through Victor M Lancaster, Sr , as Guardian ad Litem, Dr Charles Clark, individually, and as a taxpayer residing in Chesterfield County, and as parent and Guardian ad Litem of Candace C , a minor, by and through Dr Charles Clark, as Guardian ad Litem, Colonel Larry Coker, individually, and as a taxpayer residing in Clarendon County, and as a parent and Guardian ad Litem of Corrie C , Corrie C , a minor, by and through Colonel Larry Coker, as Guardian ad Litem, Pamela Williams, individually, and as a taxpayer residing in Dillon County, and as parent and Guardian ad Litem of Katisha W , Kathisha W , a minor, by and through Pamela Williams as Guardian ad Litem, Eddie Wright, individually, and as a taxpayer residing in Florence County, and as parent and Guardian ad Litem of Brandon F , Brandon F , a minor, by and through Eddie Wright as Guardian ad Litem, John Whiteside, individually, and as a taxpayer residing in Florence County and as Parent and Guardian ad Litem of Joel W , Joel W , a minor, by and through John Whiteside as Guardian ad Litem, Dr Francis Mills, individually, and as a taxpayer residing in Hampton County and as a parent and Guardian ad Litem of Amy M , Amy M , a minor, by and through Dr Francis Mills, as Guardian ad Litem, Brenda Brooks, individually, and as a taxpayer residing in Hampton County, and as parent and Guardian ad Litem of Tyrin B , Tyrin B , a minor, by and through Brenda Brooks as Guardian ad Litem, Marva Tigner, individually, and as a taxpayer residing in Jasper County, and as parent and Guardian ad Litem of Bryan T and Bradley T , Bryan T , a minor, by and through Marva Tigner as Guardian ad Litem, Bradley T , a minor, by and through Marva Tigner as Guardian ad Litem, Robert Elisha Short, individually, and as a taxpayer residing in Laurens County and as parent and Guardian ad Litem of Robert B S , Robert B S , a minor, by and through Robert Elisha Short, as Guardian ad Litem, Dr Keith A Bridges, individually, and as a taxpayer residing in Laurens County and as parent and Guardian ad Litem of Jorgana Ranson B , Jorgana Ranson B , a minor, by and through Dr Keith A Bridges, as Guardian ad Litem, Gail Y Harriott, individually, and as a taxpayer residing in Lee County and as parent and Guardian ad Litem of Rashade H , Rashade H , a minor, by and through Gail Y Harriott, as Guardian ad Litem, Linda Carraway, individually, and as a taxpayer residing in Marion County, and as parent and Guardian ad Litem of Kimberly W , Kimberly W , a minor, by and through Linda Carraway as Guardian ad Litem, Dr John Nobles, individually, and as a taxpayer residing in Marlboro County and as parent and Guardian ad Litem of Erin N , Erin N , a minor, by and through Dr John Nobles, as Guardian ad

Litem, Patricia Hampton, individually, and as a taxpayer residing in McCormick County and as parent and Guardian ad Litem of Krystle H , Krystle H , a minor, by and through Patricia Hampton, as Guardian ad Litem, Bernice Profit, individually, as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Russell H , Russell H , a minor, by and through Bernice Profit, as Guardian ad Litem, Matlin P Brown, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Tanisha P B , Tanisha P B , a minor, by and through Matlin P Brown, as Guardian ad Litem, James Berry, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Dondrea B , Dondrea B , a minor, by and through James Berry, as Guardian ad Litem, Gerald Smith, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Brenda S , Brenda S , a minor, by and through Gerald Smith, as Guardian ad Litem, Thomas Shealy, individually, and as a taxpayer residing in Saluda County and as parent and Guardian ad Litem of Thomas S , Jr , Thomas S , Jr , a minor, by and through Thomas Shealy, as Guardian ad Litem,

Plaintiffs,

Of Whom

Allendale County School District, Dillon County School District 2, Florence County School District 4, Hampton County School District 2, Jasper County School District, Lee County School District, Marion County School District 7 and Orangeburg Consolidated School District 3, Lena Manning, individually, and as a taxpayer residing in Allendale County and as Guardian ad Litem of Courtney V , Courtney V , a minor, by and through Lena Manning, as Guardian ad Litem, Pamela Williams, individually, and as a taxpayer residing in Dillon County, and as parent and Guardian ad Litem of Katisha W , Kathisha W , a minor, by and through Pamela Williams as Guardian ad Litem, Eddie Wright, individually, and as a taxpayer residing in Florence County, and as parent and Guardian ad Litem of Brandon F , Brandon F , a minor, by and through Eddie Wright as Guardian ad Litem, Brenda Brooks, individually, and as a taxpayer residing in Hampton County, and as parent and Guardian ad Litem of Tyrin B , Tyrin B , a minor, by and through Brenda Brooks as Guardian ad Litem, Marva Tigner, individually, and as a taxpayer residing in Jasper County, and as parent and Guardian ad Litem of Bryan T and Bradley T , Bryan T , a minor, by and through Marva Tigner as Guardian ad Litem, Bradley T , a minor, by and through Marva Tigner as Guardian ad Litem, Gail Y Harriott, individually, and as a taxpayer residing in Lee County and as parent and

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Guardian ad Litem of Rashade H , Rashade H , a minor, by and through Gail Y Harriott, as Guardian ad Litem, Linda Carraway, individually, and as a taxpayer residing in Marion County, and as parent and Guardian ad Litem of Kimberly W , Kimberly W , a minor, by and through Linda Carraway as Guardian ad Litem, Bernice Profit, individually, as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Russell H , Russell H , a minor, by and through Bernice Profit, as Guardian ad Litem, are

Appellants / Respondents,

VS

The State of South Carolina, Mark C Sanford, as Governor of The State of South Carolina, Glenn F McConnell, in his representative capacity as President Pro Tempore of the South Carolina Senate and as representative thereof, Robert William Harrell, Jr , as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives,

Defendants,

Of Whom

Glenn F McConnell, in his representative capacity as President Pro Tempore of the South Carolina Senate and as representative thereof, Robert William Harrell, Jr , as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives,

Respondents / Appellants

and

The State of South Carolina and Mark C Sanford, as Governor of the State of South Carolina are

Respondents

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

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Statement of Issues

- I When the system of educational policies in the state is completely governed by statute, did the trial court err in concluding that this case is governed by a preponderance of the evidence standard?
- II Because the standard announced in *Abbeville County* is one of opportunity as opposed to guaranteed achievement, did the trial court correctly examine the various inputs of the education system individually to determine whether the system as a whole was constitutionally adequate?
- III Where the empirical evidence conclusively establishes that the system of teacher licensure is adequate, that teacher salaries are adequate, that the state's accountability system is state-of-the-art, that facilities are safe and adequate, and that funding is adequate, did the trial court correctly determine that, with the exception of early childhood intervention programs, the system of education in South Carolina is constitutionally adequate?
- IV When Rule 32(a), SCRCp, provides for the use of deposition testimony of anyone who at the time of the taking of the deposition is a managing agent of a governmental agency, did the trial court correctly consider the deposition testimony of superintendents and principals in the Plaintiff Districts concerning facts existing in their schools?
- V Did the trial court correctly conclude based on empirical evidence that the teacher characterization issues in the Plaintiff Districts do not deprive students in the Plaintiff Districts of the opportunity to receive a minimally adequate education?
- VI Does the level of achievement in the Plaintiff Districts establish that the opportunity to receive a minimally adequate education is present in the Plaintiff Districts?
- VII Did the trial court correctly conclude that there is no statistical association between spending and achievement in the Plaintiff Districts?
- VIII Did the trial court correctly conclude that additional time-on-task programs are not required under *Abbeville County* to provide the opportunity for a minimally adequate education?
- IX To the extent that a constitutional violation was established beyond a reasonable doubt, is the trial court's remedy sufficient and consistent with the doctrine of separation of powers?

Statement of the Case

I The Parties

The Appellants/Respondents in this appeal are school districts, students, and taxpayers who individually and collectively challenge the statutory scheme creating and funding South Carolina's public schools¹. The Plaintiff Districts are as follows: Allendale County School District ("Allendale"), Dillon County School District 2 ("Dillon 2"), Florence County School District 4 ("Florence 4"), Hampton County School District 2 ("Hampton 2"), Jasper County School District ("Jasper"), Lee County School District ("Lee"), Marion County School District 7 ("Marion 7"), and Orangeburg County School District 3 ("Orangeburg 3"). In addition, 25 individually named parents and 26 students from specified school districts joined as Plaintiffs.

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

II Original Claims Made

This case has been in litigation for more than fourteen years. On November 1, 1993, forty of the more than eighty school districts in the State of South Carolina, together with certain students and taxpayers, commenced a declaratory judgment action in the Court of Common Pleas for Lee County challenging the statutory scheme creating and funding South Carolina's public schools (Compl. dated Nov. 1, 1993). Thereafter,

¹ For purposes of clarity, the Appellants/Respondents will be referred to as "Plaintiffs."

as a result of district consolidations,² the number of Plaintiff Districts was reduced to thirty-six. Prior to trial, Plaintiffs' counsel selected eight school districts as trial plaintiffs for this proceeding. (Order dated June 20, 2003) ³

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

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

Defendants filed motions to dismiss the Second Amended Complaint pursuant to Rules 12(b)(1) and (6), SCRPC, which were heard by the trial court on July 3, 1995

² Marion 3 and Marion 4 were consolidated into Marion County School District 7. Orangeburg 3 was the product of a consolidation between Orangeburg 3 and Orangeburg 7. Both Marion 7 and Orangeburg 3 were trial plaintiffs.

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

(Defendants' Motion to Dismiss dated Aug. 14, 1995). Defendants contended, among other things, that the facts as alleged did not constitute violations of the state or federal constitutions as a matter of law, and that no private right of action existed under the EFA. *Id.* On September 20, 1996, the trial court granted Defendants' motions to dismiss the Second Amended Complaint with prejudice for failure to state facts sufficient to constitute a cause of action.

III The Abbeville County Decision

Plaintiffs appealed the trial court's September 20, 1996 order, which affirmed dismissal of the action with the exception of the claim made pursuant to Article XI, Section 3 of the South Carolina Constitution. *See Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999).⁴ This Court held that the Second Amended Complaint stated a claim for violation of the state constitution's education clause, which provides as follows: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." S.C. Const. art. XI, § 3. In reaching that conclusion, this Court held that its duty is "to interpret and declare the meaning of the Constitution," and concluded that the trial court "erred in using judicial restraint, separation of powers, and the political question doctrine as the basis for declining to decide the meaning of the education clause." *Abbeville County*, 335 S.C. at 67, 515 S.E.2d at 539.

⁴ The dismissal of Plaintiffs' claims under the equal protection clauses of the state and federal constitutions was summarily affirmed under the strength of prior decisions of this Court. *Abbeville County*, 335 S.C. at 64-65, 515 S.E.2d at 538 (citing *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470 (1988)). Likewise, this Court affirmed the dismissal of Plaintiffs' claims brought under the EFA, finding that the EFA does not create a private right of action. *Abbeville County*, 335 S.C. at 65, 515 S.E.2d at 539.

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

to include providing students adequate and safe facilities in which they have the opportunity to acquire

- 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science,
- 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes, and
- 3) academic and vocational skills

Id This Court then remanded the case to the trial court to determine whether the requisite opportunity exists in the Plaintiff Districts *Id* at 69, 515 S E 2d at 541

In interpreting the education clause, however, this Court was careful to observe an important boundary between the judicial branch’s duty and authority to declare the law, and the legislative branch’s responsibility for policy matters in general, and for the “system of free public schools” in particular This Court emphasized that “the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government,” *id* at 69, 515 S E 2d at 541, and that members of the judiciary “are not experts in education, and we do not intend to dictate the programs utilized in our public schools ” *Id* at 69, 515 S E 2d at

540 Thus, this Court concluded, “[w]e do not intend by this opinion to suggest to any party that we will usurp the authority of [the legislative] branch to determine the way in which educational opportunities are delivered to the children of our State. We do not intend the Courts of this State to become super-legislatures or super-school boards.” *Id.* This declaration is in accord with this Court’s previous recognition that under Article XI, section 3, of the constitution, “the framers of the Constitution have left the legislature free to choose the means of funding the schools of this state to meet modern needs.” *Richland County v. Campbell*, 294 S. C. 346, 349, 364 S. E. 2d 470, 472 (1988). *See also Moseley v. Welch*, 209 S. C. 19, 33-34, 39 S. E. 2d 133, 140 (1946) (“The development of our school system in South Carolina has demonstrated the wisdom of the framers of the Constitution in leaving the General Assembly free to meet changing conditions.”)

IV Proceedings on Remand

On January 18, 2001, following remand, Plaintiffs again moved to amend their Complaint (Pls.’ Mot. to Am. Compl. filed Jan. 18, 2001). The proposed Third Amended Complaint reiterated prior allegations, but also for the first time sought monetary damages and a jury trial. On June 1, 2001, the trial court granted Plaintiffs’ motion to amend but denied Plaintiffs’ request for a jury trial, finding that Plaintiffs had waived any right to trial by jury that may have attached to the case. (Order filed June 1, 2001). Additionally, the trial court denied Plaintiffs’ request for monetary damages, finding that the South Carolina Constitution’s Education Clause is not self-executing and, as such, cannot serve as a basis for a cause of action for damages against the Defendants. (*See* Order dated Dec. 3, 2004).

In June of 2003, Plaintiffs filed a Fourth Amended Complaint, which contained allegations regarding the racial composition of the Plaintiff Districts. On July 3, 2003, the trial court, ruling from the bench, granted Defendants' motion to strike the allegations regarding race contained in the Fourth Amended Complaint because it was too late to inject those issues into the case.⁵ Subsequently, on July 10, 2003, Plaintiffs filed another Fourth Amended Complaint omitting reference to the racial composition of the Plaintiff Districts. (Fourth Am Compl dated July 10, 2003)

Abbeville County charged the trial court to determine only one issue: Do students in the Plaintiff Districts have adequate and safe facilities in which they have the opportunity to acquire a minimally adequate education as defined by this Court? A non-jury trial commenced on July 28, 2003, and ended on December 9, 2004. During the 102 days of trial, 112 witnesses testified in person or by deposition, and approximately 4,400 documents were received into evidence. The trial court entered a lengthy order on December 29, 2005, finding that all existing components of the education system were constitutionally adequate, but students in the Plaintiff Districts were denied the opportunity to receive a minimally adequate education "because of the lack of effective and adequately funded early childhood intervention programs designed to address the impact of poverty on their educational abilities and achievements." (Order dated Dec 29, 2005, p 169)

⁵ Throughout the trial, Plaintiffs continued to proffer evidence concerning the racial composition of the Plaintiff Districts and its alleged impact on the opportunity to acquire a minimally adequate education. While the trial court allowed some evidence of the racial makeup of the Plaintiff Districts for limited purposes, the court ultimately concluded that student achievement is not a function of race, but rather of poverty. (*See* Trial Tr (08/14/03), pp 37-38). Accordingly, the court considered only evidence relating to poverty as pertinent to this case.

On January 11, 2007, the parties to this appeal moved for reconsideration of the trial court's order, and on July 12, 2007, the trial court entered an order denying both motions (Order dated July 12, 2007) On August 9, 2007, Plaintiffs filed a notice of appeal of the December 29, 2005 and July 12, 2007 trial court orders, and on August 15, 2007, the Senate and the House filed their notice of cross-appeal (Notice of Cross-Appeal filed by the Senate and the House on August 15, 2007) For the reasons set forth below, this Court should affirm the trial court's order⁶

⁶ The Senate and the House urge this Court, however, to vacate the order of the trial court and dismiss all appeals because the trial court erred in its findings concerning early childhood intervention programs and in awarding affirmative relief as set forth in the Senate and the Houses' cross-appeal brief previously filed in this Court

Statement of Facts

The Senate and the House adopt the Statement of Facts set forth in their Cross-Appeal brief

Standard of Review

This case was tried in equity. On June 1, 2001, the trial court entered an order denying Plaintiffs' request for a jury trial. (*See* Order filed June 1, 2001). On December 3, 2004, the trial court denied Plaintiffs' Motion for Reconsideration,⁷ concluding that "[t]he constitutional issue in this case is equitable in nature, and, in accordance with past case law, a jury trial is not warranted." (Order filed June 1, 2001 at 6)

In an action in equity tried without a reference, this Court "may find facts in accordance with its own view of the preponderance of the evidence." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) (citing *Townes Assoc. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)).⁸ This broad scope of review, however, "does not require this [C]ourt to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). "[N]or does it relieve the appellant of the burden of convincing this Court that the trial Judge erred in his findings of fact." *Lee v. Lee*, 237 S.C. 532, ___, 118 S.E.2d 171, 172 (1961).

In the present case, most of the facts are beyond dispute. Plaintiffs primarily make emotionally-based policy arguments best suited for consideration by the General Assembly, not this Court. The trial court rejected these same arguments. In advocating

⁷ The trial court issued this order *nunc pro tunc* "to reflect [the trial court's] ruling from the bench on June 25, 2003 approximately one month before the beginning of the trial on June 28, 2003." (Order filed June 1, 2001, n.4)

⁸ As set forth in the next section, the Senate and House believe that the correct standard to be applied is beyond a reasonable doubt because this action challenges the constitutionality of the system of educational policies in the state, which is completely governed by statute. See discussion, page 10, *infra*.

that this Court should “find for the Plaintiffs,”⁹ Plaintiffs rely on snippets of testimony from a few witnesses, which Plaintiffs hope will overcome the unassailable empirical data carefully considered by the trial court in reaching its decision during 102 days of trial. Even under a *de novo* standard of review, this Court does “not lightly disregard a trial judge’s credibility determinations.” *Cedar Cove Homeowner’s Ass’n, Inc. v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006).

Contrary to what Plaintiffs would have this Court believe, the trial court did not ignore Plaintiffs’ evidence. With little exception, the trial court allowed Plaintiffs to introduce all evidence they desired, and the trial court considered the issues in light of the evidence proffered by Defendants. The trial court, however, properly reached conclusions different from those urged by Plaintiffs. Even if this Court were to disregard the findings of the trial court completely and engage in total a *de novo* review of the evidence, a review of the facts and empirical evidence would inevitably compel this Court to reach the same conclusion as the trial court and affirm the trial court’s decision.

Burden of Proof

Although for purposes of Plaintiffs’ appeal, the Senate and the House urge this Court to affirm the trial court’s order, the Senate and the House take exception to the trial court’s conclusion that the burden of proof is by a preponderance of the evidence. (*See* Order dated Dec. 29, 2005 ¶¶ 16-24). Plaintiffs unquestionably challenge the constitutionality of the system of educational policies in the state. Therefore, the

⁹ Although this Court is entitled to “find facts in accordance with its own view” of the evidence, the Senate and the House urge the Court to give appropriate deference to the detailed and thorough evaluation of the evidence conducted by the trial court and to consider the issues in its capacity as an appellate, rather than a trial, court.

applicable burden of proof is proof beyond a reasonable doubt¹⁰ Accordingly, Plaintiffs carry the heavy burden of proving the State's statutory education funding scheme is unconstitutional beyond a reasonable doubt and the trial court erred in concluding that the case was governed by the preponderance of the evidence standard See *State v White*, 348 S C 532, 537-38, 560 S E 2d 420, 422 (2002) (observing that the presumption of constitutionality "places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution," and that only when the challenging party establishes the act is invalid, "leaving 'no room for reasonable doubt that it violates some provision of the Constitution,' [does] the burden shift[] to the state") See also *Vincent v Voight*, 614 N W 2d 388, 408 (Wis 2000) (holding plaintiffs failed to prove beyond a reasonable doubt that the statutory school finance system violates the state education clause), *City of Pawtucket v Sundlun*, 662 A 2d 40, 44-45 (R I 1995) (holding Plaintiffs failed to establish beyond a reasonable doubt that the state's statutory scheme for financing public education violated the state's education clause)

“‘[I]n no doubtful case will the judiciary pronounce a legislative act to be contrary to the Constitution To doubt the constitutionality of a law is to resolve the doubt in favor of its validity ’” *Wingfield v South Carolina Tax Comm n*, 147 S C 116, 123, 144 S E 846, 848 (1925) (quoting 6 R C L at 75) The trial court therefore erred by applying the wrong standard of proof in evaluating Plaintiffs' claims, although those claims fail under the preponderance of the evidence standard as well

¹⁰ To the extent any issue in this case is deemed to be governed by a preponderance of the evidence standard, Plaintiffs failed to meet that burden as well

Introduction to Argument

In *Abbeville County School District v State of South Carolina* this Court held that the education clause of the South Carolina Constitution requires that the state provide students with adequate and safe facilities in which they have the opportunity to acquire a minimally adequate education as defined in the opinion 335 S C 58, 68, 515 S E 2d 535, 540 (1999) *Abbeville County* does not require any particular level of achievement, either by individuals or by groups, and certainly does not hold that equality of achievement among different groups is constitutionally mandated *Abbeville County* also expressly acknowledges the primacy of the legislative branch in determining education policy, and cautions that South Carolina courts are not super-legislatures or super-school boards *Id* at 69, 515 S E 2d at 541

In this appeal, Plaintiffs ignore the plain holding of *Abbeville County*, disregard this Court's instructions concerning the role of the courts in education issues, and implore this Court to abjure its appellate jurisdiction and to sit instead as education czars to decide what education policies to adopt in South Carolina, what programs to employ, how to train and license teachers, and how much money to spend money on education Plaintiffs' arguments relate to matters that are not before this Court, are contrary to issues that this Court has already decided, and ignore fundamental legal principles Essentially, Plaintiffs ask the Court to assume duties not permitted under the education clause as interpreted in *Abbeville County* Although this brief will address the many specific arguments made by Plaintiffs, this introduction is intended to provide a more general overview of the many fallacies inherent in Plaintiffs' arguments

First, Plaintiffs want this 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, [to] become productive citizens, and engage in a meaningful way in a democratic society, enjoying the rights and privileges of citizenship

” (Pls ’ Br 5) This is not the standard this Court announced in *Abbeville County*. Plaintiffs refuse to accept this Court’s prior determination of the requirement of the education clause because according to Plaintiffs, “[m]inimally adequate teachers, physical supports, and instructional materials do not offer the children the opportunity for an education” that would accomplish the new objectives Plaintiffs want this Court now to read into the constitution (See Pls ’ Br 9). Plaintiffs therefore undertake a strained effort to re-write the plain language of *Abbeville County*. In Plaintiffs’ world, there is no distinction between “minimally adequate” and the very best practices and programs, and Plaintiffs urge this Court to require the most that can be done—what the trial court itself characterized as “utopia”—rather than what is minimally adequate (Trial Tr (06/10/04), p 179, ll 2-25). *Abbeville County* carefully differentiates between the two, however, and Plaintiffs’ failure to acknowledge that educational excellence measured by student achievement is not the constitutional standard places much of their argument outside the scope of the issues presented in this case.

Second, Plaintiffs consistently fail to distinguish between opportunity and achievement. The constitutional duty imposed by the education clause is to provide an opportunity for students to achieve. Neither the education clause itself, nor *Abbeville County*, requires the General Assembly to guarantee student achievement. Yet, Plaintiffs

somehow find achievement to be the “foundational bedrock” of *Abbeville County* (Pls ’ Br 5) Plaintiffs then pay lip service to the prior holding of this Court by consistently arguing that every failure of achievement is a failure of opportunity This is patently not the case, as pointed out in the Senate and the House’s brief in support of their cross-appeal Plaintiffs urge this Court to redefine the constitutional standard to one which guarantees success This rather tortured attempt is contrary to the plain meaning of “opportunity,” and would convert the *Abbeville County* standard into something it expressly is not and was never intended to be Even *Brown v Board of Education*, cited by Plaintiffs in the introduction to their arguments, acknowledges that opportunity is the appropriate legal standard 347 U S 483, 493 (1954) (“It is doubtful that any child may reasonably be expected to succeed in life if he is denied the *opportunity* of an education ” (emphasis added)) As the Senate and the House have illustrated in their brief in support of their cross-appeal, achievement may be relevant to establishing the presence of educational opportunities, but achievement is not necessarily evidence of the absence of opportunity

In that regard, it is also important to note that Plaintiffs largely ignore the actual data presented at trial concerning the relationship between many of the “inputs” that make up the educational system and student achievement While Plaintiffs want this Court to adopt an achievement standard for constitutional adequacy, they fail to acknowledge that there is little direct correlation between most of the inputs they discuss and educational outcomes For example, over 30 pages of Plaintiffs’ brief is dedicated to a discussion of teacher credentials, which Plaintiffs regard as a surrogate for teacher “quality ” (See Pls ’ Br 17-49) At trial, however, Defendants introduced detailed

statistical analyses that stand unchallenged in the record, which show that none of the analyzed teacher characteristics is related to student achievement in a statistically significant way¹¹ This Court should therefore reject Plaintiffs' effort to re-define constitutional adequacy in terms of achievement because there are no certain school-based mechanisms that directly influence achievement As the record in this case makes clear, by far the most important factors affecting achievement lie outside of the schools' control and outside of the scope of educational policies that can be legislated by the General Assembly

Fourth, Plaintiffs would have this Court ignore its own strictures regarding the relative roles of the courts and legislature in determining education policy and enforcing the constitution Plaintiffs choose to ignore well established law, including the express language of *Abbeville County*, and make the remarkable suggestion that the constitution *requires* this Court to usurp the policy-making duties of the General Assembly¹²

Plaintiffs have it exactly backwards The duty under the state constitution to create a system of public schools that provides the opportunity for a minimally adequate education rests exclusively with the legislative branch Indeed, Plaintiffs frequently cite the education clause for the proposition that the General Assembly is under a duty to fix whatever Plaintiffs contend is broken On the other hand, Plaintiffs, without further explanation, argue that this Court must sit as policymaker and decide what programs shall be a part of state policy, rather than a judicial reviewer of whether the legislature is

¹¹ See discussion, Section V *infra*

¹² (See Pls' Br 5-6 ("The State will argue that this Court should abstain, that the question before the Court is a 'political question' and public education policy, and that its implementation should be left to policymakers Were it not for the State Constitution, this would be correct"))

fulfilling its duty. This argument makes a mockery out of this Court's prohibition in *Abbeville County* concerning the courts becoming super-legislatures and super-school boards, and would also require this Court to ignore the even more fundamental separation of powers doctrine.

In short, this Court may not undertake to regulate public education by fiat as Plaintiffs boldly request, even if this Court agrees with the trial court that a constitutional violation exists. As the trial court aptly put it, "this case is not about what the Court thinks is best for education in South Carolina, or the Court's view as to the best way to deliver educational services to students in South Carolina." (Order dated Dec. 29, 2005 ¶ 46). "This case is not a policy forum about what ought to be or what choices the Court would make if it were authorized to do so." (*Id.* ¶ 47). Those issues are simply not before this Court, and Plaintiffs' emotionally-based arguments regarding the "need" to improve education in South Carolina are misplaced in the context of this case. The trial court correctly framed the issue it was called upon to decide: "Are students in the Plaintiff Districts being provided the opportunity to acquire a minimally adequate education in adequate and safe facilities as defined by the South Carolina Supreme Court?" (*Id.* ¶ 15). Rather than addressing this issue squarely and acknowledging that a less-than-perfect education system can satisfy the constitutional duty, Plaintiffs chose to try a case about whether the then-existing system of educational policies in South Carolina could and should be improved. For the most part, the arguments made in Plaintiffs' brief continue this distortion of the issue, and a great deal of the discussion in Plaintiffs' brief is therefore immaterial to the issues that are presented in this appeal.

Fifth, Plaintiffs ignore entirely the requirement that they prove not only the absence of the opportunity for students to acquire a minimally adequate education, but also that any such absence is causally connected to the system of laws that creates the system of education. *See New York State Ass'n of Small City Sch. Dists. Inc. v. State*, 840 N.Y.S.2d 179, 183 (N.Y. App. Div. 2007) (“To state such a cause of action, plaintiffs must allege, ‘first that the State fails to provide them a sound basic education in that it provides deficient inputs—teaching, facilities and instrumentalities of learning—which lead to deficient outputs such as test results and graduation rates, and, second, that this failure is causally connected to the funding system.’”) The strict liability scheme envisioned by Plaintiffs would require the General Assembly not only to guarantee educational outcomes regardless of student participation, but also to assume liability for any failure of any person employed within the system to do the job for which he or she was hired. Plaintiffs unabashedly disclaim any responsibility on the part of the Plaintiff Districts, the schools within those districts, or the parents of the students in those schools (Pls.’ Br. 5). Thus, Plaintiffs would have this Court excuse as a matter of law those persons who are actually raising the children, running the districts, schools, and classrooms, and instead require the General Assembly to legislate away the problems, whatever their cause.

This position is obviously unreasonable and legally unfounded. It is always necessary to consider whether the particular deficiency of which Plaintiffs complain is caused by a failure of policy or by some other factor. For example, Plaintiffs make much in their brief about the failure of some teachers in the Plaintiff Districts to actually teach (Pls.’ Br. 12). The failure of a teacher to teach is certainly bad and raises a question

about the educational opportunities that exist in his or her classroom. The teacher's failure to teach, however, is not the result of anything the General Assembly did or did not do, any more than the conduct of individual lawyers is attributable to this Court just because this Court issues the licenses to practice. There are many areas in which the legislature can affect conditions, and also many areas in which it cannot. This distinction must be kept in mind when considering Plaintiffs' arguments because Plaintiffs seek to impose responsibility upon the General Assembly for any deficiency, whether of the legislature's making or not.

Sixth, Plaintiffs' brief suggests that *all* at-risk students are failing, when this is not the case. If all students living in poverty were failing, that might provide some evidence of a systemic failure to provide opportunities to such students. The sweeping conclusion argued for by Plaintiffs, however, is not justified on the record in this case, in which large percentages of students in poverty in the Plaintiff Districts are passing the very rigorous Palmetto Achievement Challenge Test ("PACT"). Although Plaintiffs concede that these students are "school dependent," (Pls ' Br 8), Plaintiffs offer no explanation for how so many students in the Plaintiff Districts achieve more than a minimally adequate education if the required opportunity is not present in the schools. Nor can Plaintiffs offer any evidence that connects the failure of those students who do not achieve a minimally adequate education to some systemic failure, as opposed to other causes that are not constitutionally based.

Plaintiffs repeatedly cite evidence to the effect that at-risk students "require educational offerings greater than those born into more affluent families" (Pls ' Br 8). But Plaintiffs' statement leaves two important questions unstated and unanswered

“Greater than what?” and “For what purpose?” Plaintiffs ignore the fact that the Plaintiff Districts are among the highest spending districts in the state, and therefore these students already get greater educational offerings than do other students in the state. Nor do Plaintiffs make clear that the cited evidence relates to what would be necessary to equalize achievement. The Senate and the House do not dispute that greater resources would be required to accomplish that goal, although there are no programs that can actually accomplish that result. But as laudable a goal as improved achievement for at-risk students is, it is not constitutionally required. Nor does the education clause require equal achievement among individuals or groups of students. It is apparent from the record that the opportunity to acquire at least a minimally adequate education is present in the Plaintiff Districts, and Plaintiffs’ arguments to the contrary do not change that very obvious fact.

Finally, Plaintiffs repeatedly argue that the trial court erred in finding that the individual components of the education system are adequate in the face of outcomes that are less than what is desired. Plaintiffs invoke the adage that the whole can be greater than the sum of its parts to lend some apparent credibility to an argument that is otherwise unsupported. In reality, however, Plaintiffs are actually arguing that the whole is *less* than the sum of its parts because they contend that the entire system can be constitutionally inadequate even if all of its components are found to be sufficient. What seems like a contradiction or inconsistency to Plaintiffs, however, is readily understandable when one considers the absence of any significant relationship between the inputs that are without question sufficient to create the required constitutional opportunity and actual achievement. Achievement is a function of many factors, some of

which are measurable (like poverty) and some of which are not (like leadership) Most of the factors that affect school achievement are not school-based One of the fundamental fallacies of Plaintiffs' position is that the General Assembly can legislate achievement and should be answerable to this Court until achievement levels that are satisfactory to Plaintiffs are achieved

The Senate and the House do not dispute the importance of education or that South Carolina would benefit in many ways from improved achievement by all students The only question before this Court, however, is whether the system of educational policies as it existed at the time of trial and the funding provided to support those policies are sufficient to provide students with the opportunity to acquire a minimally adequate education

Argument

I The Trial Court Properly Evaluated the Adequacy of the Education System by Considering the Adequacy of the Individual Components Thereof

Plaintiffs are wrong to criticize the trial court's very systematic approach to evaluating the adequacy of the education system. According to Plaintiffs, "[I]nstead of evaluating whether the education system as a whole provided the constitutionally required educational opportunity, the trial court made a piece-meal evaluation of whether the individual elements of the education system were inadequate and concluded that each separate component (with the exception of early childhood education) was minimally adequate" (Pls.' Br. 11). Plaintiffs contend that the trial court's detailed approach of examining each of the traditional inputs into the educational system is "flawed" and that "the inquiry should have been whether the system offered the opportunities appropriate to meet the needs of each child in the Plaintiff Districts considering their needs." *Id.* But this was exactly the inquiry the trial court undertook. Plaintiffs fail to acknowledge that 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. If each component of the system is constitutional, then by definition the system as a whole is constitutional. This elemental logic somehow escapes Plaintiffs, who seek a conclusion that the whole is deficient, even though all of its components are more than minimally adequate.

But in addition to examining the components of the system, the trial court also asked whether the "educational system overcomes, to the extent that is educationally possible, the effects of poverty on the very young" (Order dated Dec. 29, 2005 ¶ 428). This is apparently the same type of analysis that Plaintiffs now argue should have been

undertaken. The trial court concluded that “early childhood intervention at the pre-kindergarten level and continuing through at least grade three is necessary to minimize, to the extent possible, the impact and the effect of poverty on the educational abilities and achievements” of children in the Plaintiff Districts (*Id.* at 168-69).

Plaintiffs’ objection therefore is not really to the process employed by the trial court, but rather to the relatively limited findings in their favor that resulted from the process. There is no basis in logic, fact, or the evidence presented at trial, however, for Plaintiffs to argue that the trial court’s conclusion that the system does not provide the opportunity for a minimally adequate education to the very youngest in the Plaintiff Districts required the trial court to conclude that the entire educational system in South Carolina is therefore flawed. The trial court identified the prevailing problems, considered the evidence, identified the aspects of the system that it believed did not pass muster, and offered a remedy (rightly or wrongly) tailored to the constitutional violation. *Abbeville County* did not require the trial court to do anything more. The trial court could not have engaged in a more complete and thorough examination of the system.

A Opportunity is measured by inputs into the educational system

In *Abbeville County*, this Court held that “the South Carolina Constitution’s education clause requires the General Assembly to provide the *opportunity* for each child to receive a minimally adequate education.” 335 S.C. at 68, 515 S.E.2d at 540 (emphasis added). Perhaps the most important word in the *Abbeville County* opinion is “opportunity.” The education clause does not require the General Assembly to ensure that all children in South Carolina receive a minimally adequate education or achieve at a certain specified level. Rather, the education clause requires the General Assembly to

provide only the *opportunity* for all children in South Carolina to acquire a minimally adequate education. Cf. *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) (observing that the state's uniformity clause, intended to ensure minimal educational opportunities, "does not require the legislature to ensure that all of the children in Wisconsin receive a free uniform basic education," but rather it "requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education")

As the trial court found, the word opportunity "connotes availability and occasion. It does not mean achievement or guaranteed success. The most consistent legal definition of opportunity appearing in the case law is 'a fit or convenient time' or 'a suitable occasion.'" (Order dated Dec. 29, 2005 ¶ 33 (citing *In re House's Guardianship*, 19 N.W. 973 (Minn. 1884), *In re Brown*, 39 P. 469 (Okla. 1885), *Lane v. Fidelity Mutual Life Insurance Co.*, 54 S.E. 854 (N.C. 1906))

The trial court further noted that the plain and ordinary meaning of the word opportunity "means the *chance* for progress or advancement to occur. Opportunity does not mean that progress, advancement or achievement will, in fact, occur." (Order dated Dec. 29, 2005 ¶ 34 (citing *The American Heritage Dictionary of the English Language* (4th ed. 2000))) Therefore, whether all students obtain the skills enumerated in *Abbeville County* does not determine whether the State has failed to meet its constitutional obligation. As State Representative Robert W. Harrell, the then-Chairman of the House Ways and Means Committee, testified, "[T]he purpose of education is to put the child in a position where they can do what's necessary to prepare themselves to do all these things. [T]here's a huge difference between [the State] making sure the opportunity exists and [the State] making sure the outcome occurs." (Trial Tr. (08/17/04), p. 117)

Thus, the only way to measure effectively the presence of opportunity is to assess whether the state is providing for a chance for progress to occur, not whether a certain level of achievement is in fact a present reality. If all of the inputs—*i.e.*, those things over which the state has control—are sufficient to create the required opportunity, it logically follows that the entire system is constitutionally adequate.

B The General Assembly can only provide inputs

Another reason why it was completely appropriate for the trial court to analyze the components of the education system is that the General Assembly can only exercise its constitutional duty to “create a system of free public schools” by creating the components of the school system through legislation. Legislation can only supply the inputs that create the opportunity. It cannot guarantee achievement. Nor can legislation guarantee that students avail themselves of the opportunity to receive a minimally adequate education. As argued below, many factors explain the relatively lower achievement by some students in the Plaintiff Districts, but this result is not caused by a failure of the General Assembly to provide appropriate policies and funding to create the opportunity for students to acquire a minimally adequate education. Because all the General Assembly can do is create the components of the education system, it is entirely appropriate to examine those components to determine whether the General Assembly has satisfied its constitutional duty.

C Plaintiffs’ focus on achievement is misleading; achievement is not the measure of opportunity

According to Plaintiffs, the only way to test the constitutional adequacy of the education system is to consider the “overwhelming percentages of poverty-stricken children in the Plaintiff Districts who are not graduating from high school, who are

consistently scoring at the bottom of both national and state standardized tests, and who cannot demonstrate basic proficiency of state curriculum standards ” (Pls ’ Br 11-12) Plaintiffs’ exclusive reliance on achievement is completely at odds, however, with the opportunity standard announced in *Abbeville County*, as well as uncontested evidence regarding the causes of poor achievement

Almost every court examining the adequacy of education systems has held that inputs are the proper measure of adequacy While some courts have treated outputs such as achievement scores as relevant to an adequacy inquiry, they have also relied on a wide range of inputs as well See *New York State Ass’n of Small City Sch. Dists. Inc. v. State*, 840 N.Y.S.2d 179, 183 (N.Y. App. Div. 2007) (observing that to state a cause of action under the education clause, the plaintiff must establish “‘first that the State fails to provide them a sound basic education in that it provides deficient inputs which lead to deficient outputs ’”), *Paynter v. State*, 797 N.E.2d 1225, 1229 (N.Y. 2003) (holding that proof of inadequate inputs is necessary for an education clause claim), *Leandro v. State*, 488 S.E.2d 249, 259-60 (N.C. 1997) (holding that the “level of performance of the children of the state and its various districts on standardized achievement tests” may be considered, but “they may not be treated as absolutely authoritative on the issue”)

For adequacy inquiries, “[o]utput measures 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 Timothy Ready *et al.*, eds., *Achieving High Educational Standards for All: Conference Summary* 218, 242 (2002) (footnote omitted), available at <http://www>

schoolfunding info/resource_center/research/adequacychapter pdf Indeed, achievement data are important to educators, administrators, and policy makers, but cannot be held up as the touchstone of constitutional adequacy Given that the focus of adequacy cases is on educational *opportunity*, courts have been reluctant to make educational *results* the lynchpin of the constitutional analysis, a course of action advocated by Plaintiffs See *Rebell, supra* at 242 Courts instead assess the right to an adequate education “by seeking to ensure the availability of essential resources, such as decent facilities, a safe environment, qualified teachers, and up-to-date textbooks They do not, however, guarantee that all students will fully meet demanding state standards or that unlimited resources must be made to overcome all impediments to equal educational outcomes” *Id* See also *Paynter*, 797 N E 2d at 1229 The same considerations prevail in the present case The trial court was therefore completely justified in relying on input evidence in support of its holding

Moreover, the evidence does not support any causal connection between poor achievement and the absence of opportunity See *New York State Ass’n of Small Sch Dists, Inc v State*, 840 N Y S 2d 179 (N Y 2007) The evidence conclusively establishes that the opportunity to receive a minimally adequate education is present in the Plaintiff Districts¹³ As defense expert Dr James Guthrie testified, achievement data does not reveal “anything about the effectiveness of the school by itself or—or the quality of education or the availability of educational opportunity” (Trial Tr (09/20/04), p 215, ll 5-16, p 105, ll 19-25, p 106, ll 1-6, p 122, ll 2-25, p 123, ll 1-5 (observing that “spending does not appear scientifically to be a determinant of student achievement”))

¹³ A complete discussion of this issue is contained in the Senate and the House’s Cross-Appeal Brief previously filed in this Court

See Paynter, 797 N E 2d at 1229 (“The causes of academic failure may be manifold, including such factors as the lack of family supports and health care”) This is because “[s]chools don’t have exclusive domination over what it is that enables youngsters to learn and achieve” (Trial Tr (09/20/04), p 62, ll 4-12) As Dr Guthrie testified, three major influences explain student achievement, and two of these influences are patently beyond the ability of schools to overcome

First, and most important, are environmental or socio-economic (S E S) factors, which are “virtually coincident with birth” (Trial Tr (09/20/04), p 73, ll 4-12, p 74, ll 5-8, Trial Tr (09/23/04), p 49, ll 24-25 (“[H]igh poverty is a very powerful influence on children before they enter school”)) These environmental influences “take place all throughout pregnancy,” and at birth “begin[] to flower in a much wider setting because now that the health of the child, the healthcare of the child, the nutrition of the child, all of that begins to matter” (Trial Tr (09/20/04), p 74, ll 18-25, p 75, ll 1-11) The financial well-being or the absence of well-being of the household, the education of the child’s parents, the number of siblings, the neighborhood environment, as well as other factors all conspire to “shape [and] affect the capacity of a child to benefit from formal instruction in school,” and indeed “impede[] their ability to benefit from the provision of schooling” (Trial Tr (09/20/04), p 75, ll 17-23, p 82, l 25, p 83, ll 1-25, p 84, ll 1-25, p 85, ll 1-22) The influence of this “most strongly understood social science finding[] we have in the world” explains an overwhelming sixty-two (62%) percent of the variation in PACT score results among Plaintiff and non-Plaintiff school districts (Trial Tr (09/20/04), p 76, ll 1-5, p 79, ll 9-25, p 80, ll 1-3, Trial Tr (09/23/04), p 49, ll 1-25, p 50, ll 1-5, *see also* Trial Tr (08/14/03), p 28, ll 22-25, p

29, ll 1-8 (Hawkins) (“There is no factor in the State of South Carolina that explains more variation on standardized test scores than level of poverty. It overwhelms every other measure.”)) This relationship is not unique to South Carolina. Rather, “[p]overty is a situation or a context that has been shown to negatively impact academic achievement across the country and it’s widespread.” (Trial Tr (08/14/03), p 88, ll 13-23)

It is also important to note that not even the best educators know how to overcome the powerful effect of environmental influences on achievement. “[I]t presently isn’t knowable. That would stretch social science beyond the current boundaries of knowledge.” (Trial Tr (09/20/04), p 118, ll 2-17). But as is explored more fully below, the fact that most students in the Plaintiff Districts are living in poverty does not mean that they are denied the opportunity to receive a minimally adequate education. (Trial Tr (09/20/04), p 77, ll 4-11)

The second factor influencing student achievement is the attributes or characteristics of the student. (Trial Tr (09/20/04), p 73, ll 15-18). As Dr. Guthrie testified, “[t]here’s a realm of capacity within students. And there is a distribution of motivation within students.” (Trial Tr (09/20/04), p 98, ll 10-17). Some students simply “won’t take advantage of opportunities that are available.” (Trial Tr (06/29/04), p 115, ll 10-13). Simply stated, “[s]ome care. Some care a lot. And some don’t care very much. And there are people distributed all in between. And so students bring to the schoolhouse something of self-determination in this process.” (Trial Tr (09/20/04), p 98, ll 17-21). Although it is difficult to quantify precisely, individual student motivation “counts for a lot,” and therefore the fact that students lacking motivation do not learn is

not evidence of the absence of an opportunity to learn (Trial Tr (09/20/04), p 100, ll 13-25, p 101, ll 1-7)

The third and final influence explaining student achievement is the conditions and characteristics of the schools (Trial Tr (09/20/04), p 73, ll 19-25) This is partly what this case is all about Taken together, schools and student characteristics only account for roughly one-third of the variation in achievement between Plaintiff and non-Plaintiff schools (See Trial Tr (09/20/04), p 103, ll 3-12) While schools can and do make a difference, determining how they make a difference is an on-going and formidable challenge (Trial Tr (09/20/04), p 103, ll 3-25, p 104, l 1) Social scientists know, for example, that teachers can make a difference, yet, no one knows what it is about a teacher that makes a difference

We can't find that their test scores particularly make a difference

We can't find the certification requirements make a difference We can't find that the years they've taught make a difference We can't find that their salary level makes a difference We can't find that the units beyond a bachelor's degree for which they have enrolled makes a difference

We – we can't find anything in a policy realm of which the policy system has leverage We can't find policy-associated leverage for a teacher That's the paradox

(Trial Tr (09/20/04), p 106, ll 7-25, p 107, ll 1-9)

Moreover, as is developed more fully below, the research reveals and the record reflects that there is only a limited causal relationship between these school-related factors and individual student achievement after controlling for the overwhelming environmental influences on achievement (See Trial Tr (09/23/04), p 33, ll 23-25, p

34, ll 1-25, p 73-77, p 84-93) Plaintiffs' dogmatic reliance on achievement as the only measure of opportunity therefore requires ignoring certain powerful influences that are undeniably outside of the control of schools on the one hand, while the General Assembly is required to legislate better achievement on the other hand

D The trial court correctly concluded that the system as a whole is constitutional with the exception of early childhood intervention

According to Plaintiffs, "having found that Defendants were not providing the requisite constitutional opportunity to children in the Plaintiff Districts, the trial court should have held the system as a whole to be unconstitutional " (Pls ' Br 103) But this is 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 After considering all of the evidence, the trial court expressly found that students in the Plaintiff Districts were denied the opportunity to receive a minimally adequate education "because of the lack of effective and adequately funded early childhood intervention programs designed to address the impact of poverty on their educational abilities and achievements " (Order dated Dec 29, 2005, p 170) The court meticulously set forth its reasoning in reaching this conclusion¹⁴

First, the trial court noted that the record in this case makes clear that poverty is "the principal factor directly associated with different levels of student performance[]" (Order dated Dec 29, 2005 ¶ 419) The court next observed that "the relationship between poverty and achievement would appear to be greater in the very young," (Order dated Dec 29, 2005 ¶ 422), and therefore "it is essential to address the impact of poverty as early as possible in the lives of children affected by it " (Order

¹⁴ The Senate and the House dispute this finding in their cross-appeal but accept it for purposes of this brief

dated Dec 29, 2005 ¶ 431) The trial court concluded that appropriately funded early childhood intervention programs were the only thing in the record that “show[s] considerable promise in ameliorating at least the effect of poverty on achievement ” (*Id* ¶ 432)

Thus, there is no contradiction in the trial court’s analysis The court found that all inputs into the educational system considered at trial were constitutional but were insufficient to satisfy the constitutional requirement only because of the lack of adequately funded early childhood intervention programs Inadequately funded early childhood intervention was the only piece of the puzzle that made an otherwise constitutional system unconstitutional Under these circumstances, the trial court was not required by logic or by the evidence to require that the state abandon its otherwise constitutional system and substitute a new, although unspecified, system

II Each Component of the Education System in South Carolina is Sufficient to Create the Opportunity for Students to Acquire a Minimally Adequate Education

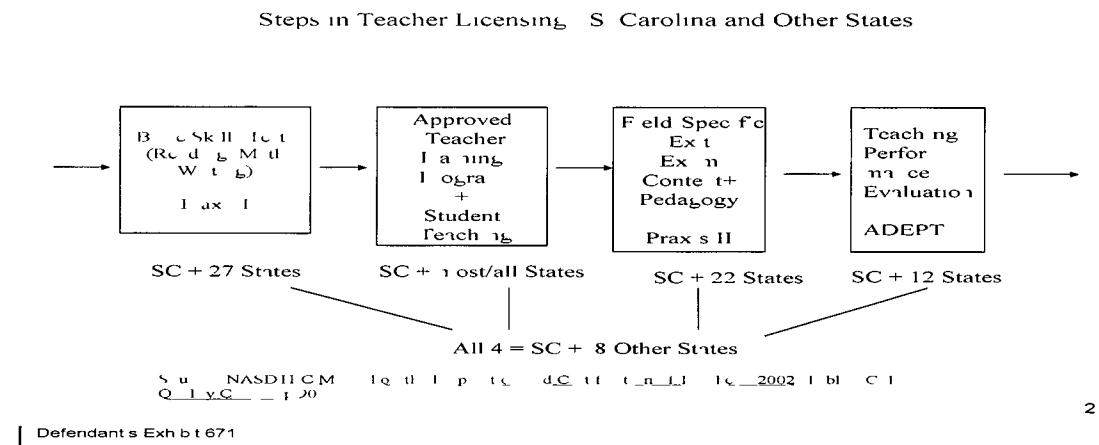
The overwhelming evidence supports the trial court’s determination that the components of the education system are constitutionally adequate

A South Carolina’s system of teacher licensure is adequate

1 Training and certification

South Carolina’s process for teacher education, training, certification, evaluation, and retention is one of the better programs of its type in the nation In fact, in 2004, *Education Week*, a highly respected national education publication, ranked South Carolina as being first in the nation for two consecutive years for improving teacher quality in the state (Trial Tr (01/09/04), p 143, l 25—p 145, l 19) The General

Assembly has put in place extensive requirements for teacher training, implemented by the State Department of Education (“SDE”) which assure that South Carolina’s classrooms have quality teachers who at a minimum deliver to their students the opportunity for a minimally adequate education



(Defendants’ Exhibit 671)

As demonstrated in Defendants’ Exhibit 671, South Carolina employs a multi-step process to license teachers. The first step begins before a prospective teacher is even admitted into a teacher education program at the undergraduate level. By law, teachers must pass the standardized Praxis I examination before entering a teacher education program. (Defendants’ Exhibit 672, 673, 674, Trial Transcript (06/14/04), p. 205, lines 4-25, p. 206, lines 1-11). The Praxis I exam is a college level exam published by the Educational Testing Service which tests basic academic skills in reading, writing, and math. (Trial Transcript (06/14/04), p. 205, lines 4-13). South Carolina and twenty-seven other states require Praxis I or an equivalent exam as a part of the admissions procedure to a teacher training program. (Trial Transcript (06/14/04), p. 205, lines 11-19). A minimum score on Praxis I, known in the vernacular as a “cut score,” is required for admission.

The State Board of Education, upon the recommendation of the SDE, sets the cut score for Praxis I (Trial Tr (11/04/04), p 146, ll 14-25, p 147, ll 1-23) For 1999-2000, the reading test cut score for South Carolina was 175, which is about in the middle of the cut scores established by the states that use this test (Trial Tr (06/14/04), p 217, l 9—p 224, l 13, Defs ' Ex 672) Other states' cut scores range from 170 to a high of 178 (Defs ' Ex 672) Similarly, South Carolina's math cut score falls in the middle of the score ranges established by other states (Defs ' Ex 672)

It is particularly interesting to note that while Dr Poda, Plaintiffs' expert who was Senior Director of the Division of Teacher Quality for the SDE, was critical of the level of the cut scores for all Praxis exams required by the SDE, she conceded that she and her division were the individuals who recommended the cut score levels for adoption by the State Board of Education (Trial Tr (11/04/04), p 146, ll 14-15, p 147, ll 1-23, p 148, ll 13-19, p 154, ll 7-25, p 155, ll 1-3) Thus, to the extent that the SDE believes that higher cut scores should be adopted, they can be changed without intervention by the courts Since the SDE has not undertaken to raise cut scores, the trial court understandably did not find that they should be changed ¹⁵

After passing Praxis I, prospective teachers must attend a teacher education program that is accredited by the SDE pursuant to standards published by the National Council for the Accreditation of Teacher Education ("NCATE") and successfully complete a student teaching experience of at least sixty days (Trial Tr (06/14/04), p 207, l 10—p 209, l 6) The prospective teacher must then (1) pass a Praxis II

¹⁵ Notwithstanding the express admonition in *Abbeville County* that the courts of this state are not experts in education, Plaintiffs want this Court to disregard the trial court's deference to the SDE as to the appropriate Praxis cut scores, and establish higher cut scores based solely upon the testimony of Dr Poda This seems to be exactly what this Court expressly refused to have the courts of this state do

examination in the subject in which certification is sought, (Defs ' Ex 675, 676, 677, 678, 679, Trial Tr (06/14/04), p 209, ll 21-25, p 210, ll 1-25), (2) pass a Praxis II examination called Principles of Learning and Teaching, within three years after he or she begins to teach, (Trial Tr (06/14/04), p 228, l 21—p 233, l 7), (3) be certified by the SDE, (4) attend an accredited teacher training program, and (5) complete the program known as Assisting, Developing and Evaluating Professional Teaching ("ADEPT") which evaluates and assists new teachers when they enter the profession (Trial Tr (06/14/04), p 213, ll 3-23) If the individual cannot complete ADEPT, she is removed from the teaching position

South Carolina is only one of nine states in the nation that incorporates all of these requirements in the teacher education program (Trial Tr (06/14/04), p 214, ll 6-13, Defs ' Ex 671) These requirements assure that teachers in South Carolina are at the very least minimally qualified to teach students in South Carolina (Trial Tr (06/14/04), p 237, l 24—p 239, l 4) As defense expert Dr Michael Podgursky testified, "[A] teacher who is academically incompetent would be very unlikely to get through all four steps of this [I]t seems to me this system would be likely to catch them, at least as a young teacher, as an initial teacher" (Trial Tr (06/14/04), p 237, l 24—p 239, l 4)

2 Certification standards

Plaintiffs also complain about what they characterize as "substandard certification"¹⁶ When the characterization is peeled away, however, what Plaintiffs refer

¹⁶ It is important to note that the SDE does not have a formal category of "substandard certificates" although Dr Poda and Plaintiffs called many certificates substandard, such as those given to teachers with out-of-state certifications until they could acquire a South Carolina

to are certifications that do not satisfy the federal legislation, “No Child Left Behind Act” (Trial Tr (11/4/04), p 110, ll 7-25, p 111, ll 1-3) This legislation has no bearing whatsoever on the issues in this case, and therefore calling the certifications “substandard” is misleading In fact, all teacher certifications are approved by both the SDE and by the very witness who complained about teacher quality at trial (Trial Tr (11/4/04), p 197, ll 1-25, p 199, ll 1-18) Dr Wolkoff established through his testimony that while these alternative certificates are present in the Plaintiff Districts, the non-Plaintiff Districts also have teachers with comparable alternative certificates, although in a somewhat lower percentage (Trial Tr (6/21/04), p 87, ll 13-25, p 88, ll 1-10, p 89, ll 3-10, Defs ’ Ex 3167, 3168, 3169, 3170, 3171, 3172)

There are also alternative routes to certification, including somewhat less rigorous requirements for persons who wish to teach in a subject matter for which there is a critical need (Trial Tr (09/22/03), p 182, ll 9-18) The SDE prescribes these alternative routes and their requirements, and Dr Poda’s department implements them (Trial Tr (11/4/04), p 197, ll 1-25, p 199, ll 1-18)

3 Accredited programs

Plaintiffs also complain that more of their teachers receive their teaching education from noncompetitive colleges than other districts According to Dr Poda, the noncompetitive colleges producing teachers that are not as qualified are predominantly historically black colleges, although she also included the teaching program at Columbia College and the University of South Carolina-Aiken as deficient as well (Trial Tr (9/23/03), pp 185—187) Additionally, her office put Wofford College, along with

certificate, temporary, interim, special subject, graded/regular and warrant certifications which had been grandfathered into the system (Trial Tr (11/04/04), p 111, ll 13-23)

Erskine College and Limestone College on “advisement status” because their programs were considered deficient (Trial Tr (9/23/03), p 183, l 19—184, l 3) But those programs are all licensed by the SDE (Trial Tr (11/4/04), p 198, ll 9-25, p 199, ll 1-18) If teachers who graduate from these programs are not competent to teach, the SDE can address and remedy the situation without any further legislative authority, and certainly without a court order

Moreover, Dr Michael Wolkoff testified that where a person attends college does not necessarily reveal anything about a particular teacher (Trial Tr (06/21/04), p 135, l 20-136, l 19) The trial court correctly found that the process of teacher education from initial Praxis I passage, admission to the education program, completion of the required education curriculum in addition to the other requirements for the undergraduate degree was sufficient to create a qualified teacher population The standards for accreditation published by the NCATE, adopted by the SDE, assure sufficient quality in the teacher education process (*See* Order dated Dec 29, 2005 ¶ 200)

4 Post-certification training professional development

The purpose of professional development is to improve the competency of all teachers at all experience levels South Carolina has adopted standards for professional development to which all such programs should adhere (Pls’ Ex 6149) These standards have been described as “extremely comprehensive” and “broad ” (Trial Tr (09/23/03) p 162, l 8, l 11) A minimum of five days of professional development time is provided for each teacher each year S C Code Ann § 59-1-425 (A) (Supp 2007) In many districts, including the Plaintiff Districts, the actual number of days devoted to

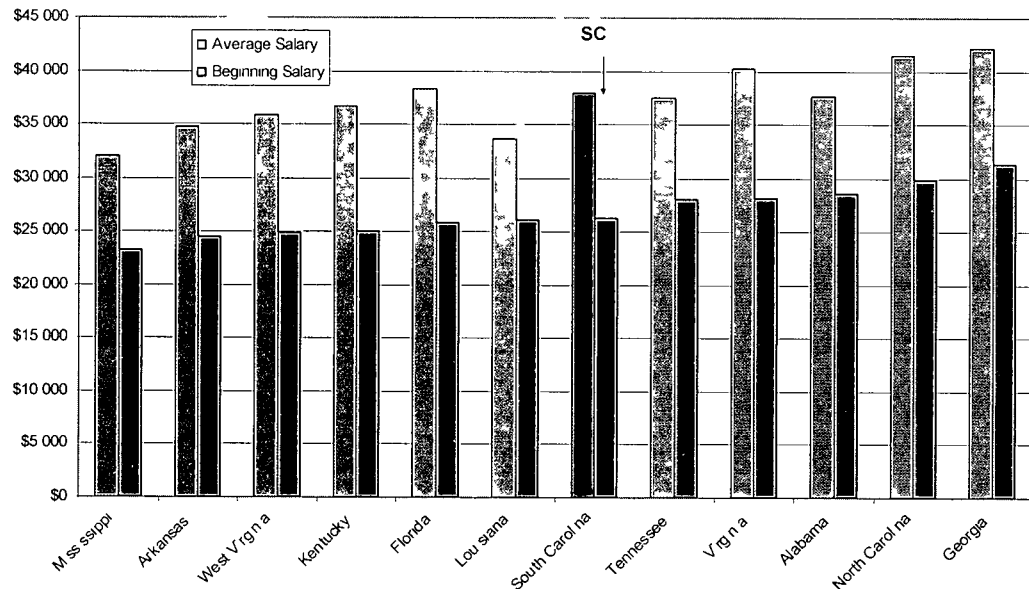
teacher professional development is substantially higher (Trial Tr (06/15/04), p 133, ll 2-25, p 134, ll 1-9)

Additionally, South Carolina rewards teachers with additional pay as their education increases beyond a bachelor's degree (Trial Tr (06/17/04) p 101, ll 12-13, Pls ' Ex 6021) Thus, teachers can and should continually improve their content knowledge and pedagogical skills throughout their careers Even if brand new teachers are assumed to be the least competent of all teachers, their abilities and skills should improve as they gain experience and further education

B Teacher salaries are more than adequate

Plaintiffs complain that South Carolina does not pay teachers sufficiently to attract and retain the best people in the profession When compared with the entry level salaries and average salaries paid by the local labor market and other southeastern states, South Carolina compares quite favorably (Trial Tr (06/15/04), p 18, l 16—p p 21, ll 18, p 37, ll 4-18, p 53, ll 21-25, p 54, ll 1-13, Defs ' Ex 688, 3268, 3266, 690, 3267, 691, 3264, 692, 3265, 3261) Defendants' Exhibit 688 shows the beginning and average salaries for teachers in twelve such states

Beginning And Average Teaching Salaries 2000 2001



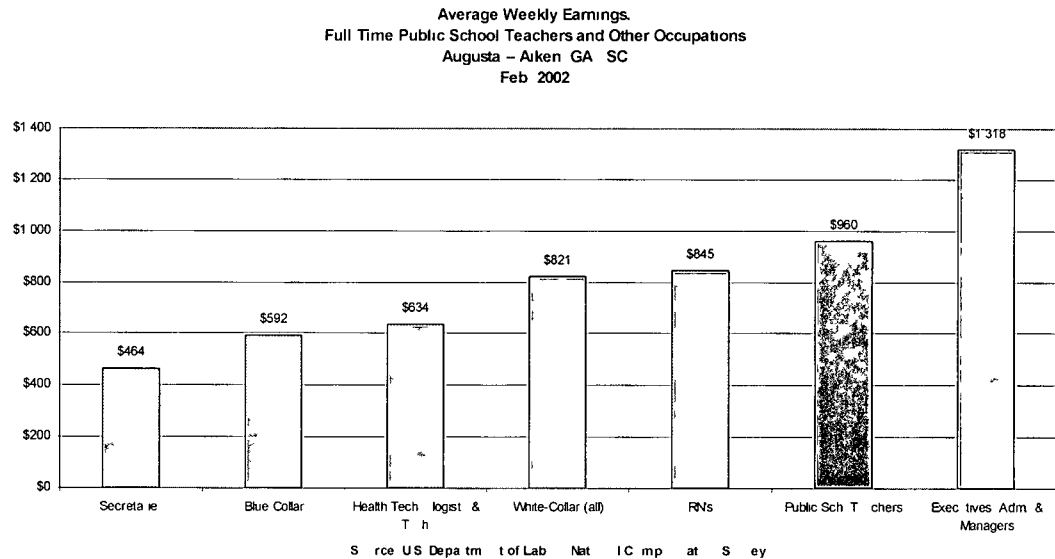
Source AFT Survey and Analysis of Teacher Salary Trends 2001 Table I 2

(Defendants' Ex 688)

For the 2000-01 academic year, South Carolina's beginning salary was seventh best, and its average salary was eighth best of the twelve states. *Id.* No evidence exists to suggest that teacher pay is not competitive in the Plaintiff Districts. (Trial Transcript (06/15/04), p. 54, ll. 14-23)

Part of the difficulty in analyzing teacher compensation in comparison to other occupations is the fact that teachers typically work on a 190-day contract, (Trial Transcript (08/13/03), p. 103, ll. 24-25), which is substantially less than most "full time" workers. The United States Department of Labor tracks compensation information for various labor markets (as defined by the Department of Labor) based on hourly, as opposed to annual, earnings. These data permit a direct hourly and/or weekly wage comparison of teachers in certain geographic areas compared with other kinds of workers in the same area. Defendants' exhibits 690, 691, 692, 3261, 3263, 3264, 3265, and 3267 show that

teachers in the respective markets analyzed in each exhibit are paid on an hourly and/or weekly basis at a rate that is more than the average for all white collar workers, and more than registered nurses



(Defs' Ex 3265, *see also*, Defs' Exs 690, 691, 692, 3261, 3263, 3264, 3265, 3267, Trial Tr (06/15/04), p 33, ll 16-25, p 34, ll 1-25, p 35, ll 1-23) Thus, there is no evidence that the system of teacher compensation in South Carolina is constitutionally inadequate or produces teachers who are not able to provide the opportunity for students to acquire a minimally adequate education

C South Carolina's accountability system is state of the art

One of the most important components of the education system in this state is the Education Accountability Act ("EAA") Adopted in 1998, the purpose of the EAA is "to establish a performance based accountability system for public education that focuses on improving teaching and learning so that students are equipped with a strong academic foundation" S C Code Ann § 59-18-100 (Rev 2004) Specifically, the Act requires the state to develop standards in math, reading, sciences, and social studies (Trial Tr

(05/04/04), p 23, ll 14-17) During the course of the trial, defense expert Dr James Smith opined that “in many areas South Carolina has been a leader and over time has refined that leadership and is one of the more enlightened states in terms of its education policy ” (Trial Tr (06/29/04), p 125, ll 18-24) One of the reasons that South Carolina has been a leader in education policy is that it has a strong accountability system in place Indeed, as the trial court observed, South Carolina’s accountability act “is nationally recognized as one of the very best ” (Order dated Dec 29, 2005 ¶ 84 (citing Defs ’ Ex 2780, p 2), Trial Tr (05/04/04) (Tennenbaum), p 75, ll 3-23 (“Our standards were mediocre at one point then after the [EAA], we put them, you know, within the 11th highest in the entire country in one study, and in the top ten in other studies ”)) The reason for this national recognition is that South Carolina has an accountability system that affects education in a way that is consistent with the goals of the state (See Defs ’ Ex 2780, pg 3) (giving South Carolina a grade of “A-” on its accountability policy)

The EAA has several objectives, including “(1) [to] use academic achievement standards to push schools and students toward higher performance by aligning the state assessment to those standards and linking policies and criteria for performance standards, accreditation, reporting, school rewards, and targeted assistance, (2) [to] provide an annual report card with a performance indicator system that is logical, reasonable, fair, challenging, and technically defensible which furnishes clear and specific information about school and district academic performance and other performance to parents and the public, (3) [to] require all districts to establish local accountability systems to stimulate quality teaching and learning practices and target assistance to low performing schools, (4) [to] provide resources to strengthen the process of teaching and learning in the

classroom to improve student performance and reduce gaps in performance, (5) [to] support professional development as integral to improvement and to the actual work of teachers and school staff, and (6) [to] expand the ability to evaluate the system and to conduct in-depth studies on implementation, efficiency, and the effectiveness of academic improvement efforts ” S C Code Ann § 59-18-110 (Rev 2004)

South Carolina’s accountability system contains three components First, the system contains curriculum standards that “set forth what the system expects ” (Trial Tr (09/20/04), p 169, ll 10-18) Second, the system has an appraisal component, which “measures the extent to which schools and students make progress on what’s specified, the expectations ” (Trial Tr (09/20/04), p 169, ll 19-22) Third, the system has “components of assistance for those who are not achieving the expectations ” (Trial Tr (09/20/04), p 169, ll 23-25, *see also* p 170, ll 1-10, p 178, ll 3-10) Each of these components is far more than minimally adequate, and together they create a powerful resource that creates educational opportunities

1 South Carolina’s curriculum standards are more than minimally adequate

The General Assembly has directed that South Carolina’s curriculum standards “be reflective of the highest level of academic skills ” S C Code Ann § 59-18-300 As the trial court found, “[b]ecause those standards identify both the substantive knowledge and thinking skills that students in South Carolina are expected to learn, they play a key role in the determination of whether or not the opportunity to acquire the knowledge and skills required by *Abbeville County* is present ” (Order dated Dec 29, 2005 ¶ 102)

The curriculum standards outline what a child should be able to know and do in each subject at each grade level,¹⁷ including but not limited to English, language arts, math, social studies, science, physical education, the arts, and foreign language (Trial Tr (10/06/03), p 87, ll 24-25, ll 1-25, p 89, ll 1, Defs ' Ex 2575, Pls ' Ex 5024 *See also* Pls ' Ex 6207, 6208, 6209, 6214, 6215, 6216, 6217, Defs ' Ex 3336) The purpose of the standards, as set forth by the Education Oversight Committee, is (1) to set clear, high expectations for student achievement, (2) to guide efforts to measure student achievement, (3) to promote educational equity for all, (4) to help parents in South Carolina determine whether their children are being taught the same subject content as children across the nation, (5) to inform parents of the academic expectations of their child, (6) to enable parents to participate actively in parent/teacher conferences, and (7) to assist parents in determining how the current grade level expectations are related to successive years' expectations (Defs ' Ex 3317)

Dr Guthrie examined South Carolina's curriculum standards and found them to be quite thorough In fact, Dr Guthrie testified that he "was unprepared for the detail into which South Carolina had gone" in promulgating its curriculum standards (Trial Tr (09/20/04), p 178, ll 7-25, p 179, l 1) He testified further that he was not the only one that found them favorable, but "at least two rating systems that have examined them found them to be among the most thorough and rigorous in the United States " (Trial Tr (09/20/04), p 179, ll 2-6, p 206-207 (noting that the Princeton Review and Fordham Foundation Review give South Carolina curriculum standards an "A"), *see also* Trial Tr

¹⁷ For example, for a description of what an eighth grade student is expected to master in English, language arts science and social studies, see Order dated Dec 29, 2005 ¶¶ 106-108

(06/09/04) (Peterson), p 89, ll 11-25, p 90, ll 1-15 (agreeing that South Carolina's curriculum standards are rigorous, Trial Tr (07/31/03) (Dean), p 165, ll 5-8 (same))

The curriculum standards set out competencies and skills that far exceed the requirements of a minimally adequate education as set out in *Abbeville County*. Dr Guthrie concluded that “[f]rankly these are high standards. These are not minimal standards that South Carolina has promulgated and it’s done it in a very comprehensive manner by engaging parents, by engaging the business community, by engaging academics, by engaging experts, by engaging educators.” (Trial Tr (09/20/04), p 179, ll 17-21). Moreover, the standards apply to everyone. “Doesn’t matter where you are, how wealthy your family or how poor your family, the State of South Carolina is saying we expect you—your child, to learn these things.” (Trial Tr (09/20/04), p 182, ll 24-25, p 183, l 1, *see generally* Trial Tr (09/20/04), pp 178-209)

The record establishes that there is no question but that South Carolina's curriculum standards include all of the knowledge, skills, and competencies necessary for a minimally adequate education as defined by *Abbeville County*. Indeed, the standards are substantially higher than those set forth in *Abbeville County*. As Dr Guthrie concluded, “[y]ou can satisfy [the standard established in *Abbeville County*] with a lot lower standard of expectations than South Carolina has chosen to incorporate in its curriculum standards.” (Trial Tr (09/20/04), p 201, ll 8-25, p 202, l 1, p 192, 199). The trial court was therefore correct in finding that South Carolina's curriculum standards “encompass more than ‘the ability to read, write, and speak the English language, and knowledge of mathematics and physical science, a fundamental knowledge of economic, social, and political systems, and of history and governmental processes, and academic

and vocational skills ”” (Order dated Dec 29, 2005 ¶ 109 (quoting *Abbeville County*, 335 S C at 68, 515 S E 2d at 540))

2 South Carolina’s assessment and assistance components are outstanding

Dr Guthrie evaluated the assessment and the assistance component of South Carolina’s accountability system, which evaluates student progress through the PACT test at various grade levels and allows educators to “fine tune the system” and “undertake mid-course corrections ” (Trial Tr (09/20/04), p 207, ll 20-25, p 208, ll 1-25, p 209, ll 1-12) Dr Guthrie concluded, based on his review of the appraisal component, that South Carolina has a good appraisal system (Trial Tr (09/20/04), p 208, ll 13-21)

In reviewing PACT scores for the years 2001-2003, Dr Guthrie noted that for students in the eighth grade at the time of trial, “all of their schooling would have been outside of this Act ” (Trial Tr (09/21/04), p 13, ll 12-20) But in terms of younger students, Dr Guthrie testified that he was “not surprised to see that the percent meeting standards in the early grades is higher than the percent generally meeting standards in the

later grades because the accountability system has been in place but for a relatively short period of time ” (Trial Tr (09/21/04), p 13, ll 21-25, p 14, ll 1, p 17, ll 13-15 (“Those students who have been longest exposed to the current set of curriculum standards and measurements, et cetera, those are the ones doing best ”)) In fact, Dr Guthrie testified that for every year the EAA had been in place, the percentage of students at each grade level in the Plaintiff Districts scoring basic or above in math and English and language arts increased as compared to the years prior to the adoption of the EAA (See Defs ’ Ex 3325 (Orangeburg), (Trial Tr (09/21/04), p 10, l 16 – p 15, l 4), Defs ’ Ex 3324 (Marion 7), (Trial Tr (09/21/04), p 15, l 5 – p 17, l 20), Defs ’ Ex

3323 (Lee), (Trial Tr (09/21/04), p 17, l 21 – p 10, l 5), Defs ' Ex 3322 (Jasper), (Trial Tr (09/21/04), p 20, l 6 – p 20, l 19), Defs ' Ex 3321 (Hampton Two), (Trial Tr (09/21/04), p 20, l 20 – p 22, l 5), Defs ' Ex 3320 (Florence 4), (Trial Tr (09/21/04), p 22, l 6–p 23, ll 21), Defs ' Ex 3319 (Dillon 2), (Trial Tr (09/21/04), p 23, l 22—p 25, l 5), Defs ' Ex 3318 (Allendale), (Trial Tr (09/21/04), p 25, l 6 – p 26, l 17))

Finally, with respect to assistance for those who are not achieving the expectations, Dr Guthrie testified that South Carolina is doing a good job “The surprise here is how well its doing relative to how long its been in place ” (Trial Tr (09/21/04), p 34, ll 2-16)

The EAA specifically commits various forms of technical assistance for underperforming schools and districts rated “below average” and “unsatisfactory” based upon test scores Principal specialists and principal leaders are placed in schools to either serve as the actual principal or to serve a coach for a principal in the school, working side-by-side with the principal to improve the school Teacher specialists are expert teachers who actually work in the schools to assist and train teachers Curriculum specialists work with curriculum alignment in the school to insure that teaching plans incorporate the required curriculum Additional funds are provided to principal specialists and to below average and unsatisfactory schools for the purpose of purchasing additional instructional materials for students at these schools Retraining grants provide extra funds for additional professional development for teachers at all below average and unsatisfactory schools Homework centers are also funded for these schools Finally, school liaisons, who are employees of the SDE, work with all unsatisfactory schools to provide additional assistance and guidance The plans for this assistance are all

coordinated through the SDE (Trial Tr (01/16/04), p 198, l 11—p 206, l 8) The effort is directed and focused on improving these schools

3 The South Carolina Education Accountability Act will improve achievement

All of these findings led Dr Guthrie to conclude that the best course of action for South Carolina “is stay the course” and not to alter what South Carolina is doing because states with similar accountability systems that have been in place longer than South Carolina’s “have maintained their [upward] trajectory, [and] we see their achievement growing ” (Trial Tr (09/20/04), p 243, ll 1-15, Trial Tr (09/21/04), p 27, ll 6-21 (“But one doesn’t drop an accountability system into place in 1999 and the next year, voila, all students win a Nobel prize This is steady work that must proceed systematically And it’s important to stay the course, not to pull up this turnip and continue to examine its growth ”), (Trial Tr (09/21/04), p 60, ll 14-25, p 61, ll 1-5), (Trial Tr (05/04/04), p 79, ll 25-25, p 76, ll 1-3 (Tennenbaum) (“My philosophy is we need to stay the course regardless of the revenues the state has access to We need to stay the course ”), (Trial Tr (05/04/04), p 143-p 144, l 11 (“[W]e don’t need to come up with a new plan for academic achievement The Education Accountability Act is a—an excellent plan ”), (Trial Tr (07/02/04), p 236, ll 11-17 (Walberg) (noting that if the state stays the course, an increase in achievement by all students in the state is expected))

The evidence in the record indisputably demonstrates that South Carolina’s accountability system works As Dr David Armor testified, “There aren’t a lot of school programs that affect achievement, but accountability systems appear to be one of those programs that does improve achievement ” (Trial Tr (09/23/04), p 185, ll 2-16) As

Dr. Walberg demonstrated, the reason two states—North Carolina and Texas—made the largest gains on the National Education Assessment of Progress (“NEAP”) is that both states had, among other things, great accountability systems. (*See* Defs.’ Ex. 2780, p. 7)

D Facilities in the Plaintiff Districts are Safe and Adequate

Before addressing each of Plaintiffs’ arguments regarding facilities, it is important to note two things. First, Plaintiffs’ own expert witness, Dr. Jo Anne Anderson, testified that the Education Oversight Committee’s 2001 study of facilities in South Carolina, *The Relationship of School Facilities Conditions to Selected Student Academic Outcomes*, (Defs.’ Ex. 894), concluded that there is no association between the age and condition of school facilities and student achievement. The trial court’s finding that “there is no empirical evidence to support a finding that achievement is related to the condition of facilities” is, therefore, corroborated by Plaintiffs’ own expert witness. (Order dated Dec. 29, 2005 ¶ 268). Plaintiffs do not challenge this finding in their brief, and this finding should not be disturbed on appeal.

Second, the trial court undertook a systematic, school-by-school, and in some cases, room-by-room, evaluation of the evidence presented to conclude that the facilities in the Plaintiff Districts, while not always new, are nonetheless adequate and safe as required by *Abbeville County*. As with other issues before this Court, Plaintiffs urge a different result based entirely upon evidence that is anecdotal, emotional, and unsystematic. In reviewing these issues, the Senate and the House urge this Court to give appropriate deference to the careful evaluation of the evidence undertaken by the trial court.¹⁸

¹⁸ Plaintiffs do not specifically address the issue of funding for facilities in Section III B 1 of their brief. The issue is dealt with extensively herein, *infra*, and those arguments are

Plaintiffs assert several theories for their contention that the facilities in the Plaintiff Districts are not safe and adequate as required by *Abbeville County*. First, Plaintiffs assert that the trial court's methodology is faulty in reaching the conclusion that all schools in the Plaintiff Districts are safe and adequate (Pls ' Br at 71). Second, Plaintiffs argue that the trial court ignored the weight of the evidence showing that the facilities are unsafe and inadequate (*Id* at 72). Third, Plaintiffs take issue with what they called "the limited evidence" the trial court relied upon in reaching its conclusions on this subject (*Id* at 73). Plaintiffs then conclude that the overwhelming weight of evidence shows that the facilities are not safe and adequate, and then proceed to discuss each school in the Plaintiff Districts, including, interestingly, some facilities that have not been used for over a year in some instances. When the record is reviewed, however, it is clear that the trial court considered all of the evidence, and that the trial court's conclusions are correct.

1 The trial court's methodology is not flawed

Plaintiffs' first argument regarding facilities is that the trial court's methodology regarding facilities is flawed (Pls ' Br at 71-72). Plaintiffs contend that the court misunderstood their argument regarding the safety and adequacy of the facilities, and that the Court failed to focus on the condition of the bad schools as opposed to the good schools. Neither position is correct. First, the trial court's December 29, 2005 Order and its July 12, 2007 Order both considered the facilities issues systematically. Indeed, the

incorporated in this section. Specifically, the arguments that (1) "local" money is in reality "state" money and should be considered for purposes of determining the total dollars spent on facilities, (2) the South Carolina Constitution specifically empowers school districts to issue bonds for capital expenditures and thus does not require the General Assembly to appropriate the money directly for facilities, and (3) that the General Assembly does, in fact, directly appropriate money for facilities, are applicable to this section and specifically reserved (Order dated Dec 29, 2005 ¶¶ 263-265).

December 29, 2005 Order made a school-by-school evaluation as to safety and adequacy in a twenty-six page review of each of Plaintiffs' schools (Order dated Dec 29, 2005 ¶¶ 275-393) The Court clearly discusses both the good and bad attributes of *each* school in *each* Plaintiff District (*Id*) The July 12, 2007 Order then references this extensive analysis and likewise concludes that there is no basis for either a blanket condemnation of each of Plaintiff Districts' schools or a finding that any particular school is unsafe or inadequate (See Order dated July 12, 2007 ¶¶ 25-26) Plaintiffs' objection to the trial court's approach to the facilities issue is without merit

2 Plaintiffs' representations to third parties about their facilities is revealing

The trial court did not ignore the greater weight of the evidence regarding facilities in the Plaintiffs' schools nor limit its findings only to the testimony of defense expert James Smith, the fire marshal reports, and the Districts' facilities certifications to the SDE Contrary to Plaintiffs' argument, the trial court also considered the testimony of superintendents, principals, and teachers, as well as photographs and videotapes of the facilities (See Order dated July 12, 2007 ¶ 267) Having given careful consideration to that evidence, the trial court disagreed with the conclusions offered by Plaintiffs, as it is entitled to do as the trier of fact For example, the trial court found that of the 1,351 photographs introduced into evidence by Plaintiffs, only 113 photographs were actually of educational spaces *Id* The rest of the photographs were either not educational spaces, unidentifiable, or depictions of maintenance problems attributable to the Plaintiff Districts *Id* It is clear that the trial court considered the evidence but was not persuaded by it

Likewise, the testimony of superintendents and principals proffered by Plaintiffs was not persuasive to the trial court. For example, Jerry Pace, a teacher from Marion School District 7 testified that the new, \$8,500,000 Creek Bridge Middle/High School was *not* adequate to provide the opportunity for a minimally adequate education in his classroom as far as he was concerned (Trial Trans (08/06/03), p. 119, ll. 1–4). This startling opinion is inconsistent with that of Dr. Everett Dean, superintendent for Marion 7, who testified that the new consolidated Creek Bridge School would in fact remedy all of the problems existing at the previous schools (Order dated July 12, 2007 ¶ 389).

The trial court was justified in considering the annual certification made by each district to SDE that the facilities (1) were maintained in accordance with standard requirements established by the South Carolina Department of Health and Environmental Control, (2) were adequate in size and arrangement to accommodate the programs offered, (3) complied with safety regulations of the state’s fire marshal, (4) had safe and adequately maintained playground, physical education and play equipment, (5) had sufficient fire extinguishers, which are inspected annually and are clearly designated in all buildings, (6) were designed and equipped to serve the specific purpose for which each classroom is used, (7) had adequate light, ventilation, heating in all utilized areas, (8) had properly maintained, safe and attractive facilities and grounds, and (9) complied with all OSHA standards in all educational laboratories and facilities (Order dated July 12, 2007 ¶ 269 (citing Trial Trans (07/31/03), p. 83, ll. 1–p. 84, l. 4, (08/12/03), p. 9, l. 15–p. 15, l. 1, Defs.’ Ex. 2832, 2833, 2835, Pls.’ Ex. 6312, 6313, 6314)).

The Plaintiff Districts also annually certified that they have fire drills at least once a month, have plans to provide for the protection and welfare of students in the event of

any disaster, tornado, hurricane, fire, and the like, conduct at least one emergency disaster drill within the first month of school, are in compliance with minimum building codes, and have met minimum requirements in all new facilities (*See id*) Plaintiffs take issue with this evidence as being limited to fire safety alone, as if that were insignificant even if true As set forth above, however, this evidence is not so limited but rather is geared to ensuring that the building is safe in various aspects, including building code compliance (*Id*)

Plaintiffs offered no evidence to contradict the fire marshal reports that all schools in the Plaintiff Districts were safe (Order dated July 12, 2007 ¶ 273) The fire marshal has no vested interest in this litigation, but rather is charged with protecting the safety of the school children in South Carolina without regard to who pays for the implementation of safety measures Although Plaintiffs attempt to discount these certification reports to SDE as merely “check-the-box” forms, Dr John Suber, head of SDE’s Office of School Quality and a witness for Plaintiffs, testified that the SDE relies on the accuracy of these certifications from each district (Order dated July 12, 2007 ¶ 269 (citing Trial Trans (01/16/04), p 188—p 190, l 18)) The trial court was justified in weighing more heavily the conclusions and certifications of the Plaintiff Districts outside the context of this litigation

Nor is the testimony of Dr Smith inconsistent with the other evidence regarding facilities According to Plaintiffs, “Smith’s 60-to-120 second classroom review was too limited to be reliable to support a finding that all facilities are ‘safe and adequate ’” (Pls’ Br, at 74) But Dr Smith acquired much experience evaluating facilities He testified that during the course of his professional life spanning over thirty years, he

observed instruction in thousands of school facilities (Trial Tr (06/28/04), p 52, ll 1-25, p 53, l 1) In evaluating the schools in the Plaintiff Districts, Dr Smith looked for impediments that would prevent a student from acquiring an adequate education based on his “experience in instruction and curriculum and visiting many thousands of schools” (Trial Tr (06/28/04), p 48, ll 16-25, p 49, ll 1-6) Specifically, Dr Smith evaluated the schools to determine whether “there is sufficient room for the kids are there sufficient instructional materials and supplies obvious[ly], is there adequate technology is there lighting[,] and then are there obvious health and safety hazards” (Trial Tr (06/28/04), p 53, ll 2-13) He did not assess, nor was his purpose to assess, the architectural or structural integrity of the buildings (Trial Tr (06/28/04), p 48, ll 3-25, p 49, ll 1-18) The trial court correctly found that Dr Smith was qualified to render an opinion whether any of the facilities in the Plaintiff Districts prevented the opportunity for a minimally adequate education (Trial Tr (06/28/04), p 56, ll 1-25, p 57, ll 1-25, p 58, ll 1-2) Dr Smith was also candid about the problems in the Districts’ facilities, and the trial court was justified in relying on Dr Smith’s testimony along with the other testimony that corroborates it

3 Persuasive evidence existed on facilities

The greater weight or preponderance of the evidence does not require the most evidence or the greater number of witnesses, rather, it means the most persuasive and truthful evidence See *Lee v Lee*, 237 S C 532, ____, 118 S E 2d 171, 174 (1961) (“preponderance of the evidence’ is that evidence which convinces as to its truth A preponderance of the evidence is not made out by the greater number of witnesses”) In determining what is most persuasive, the finder of fact is charged with considering the

most reliable, truthful evidence, not the most exhibits or the largest number of witnesses on any given issue. See Black's Law Dictionary 1182 (6th ed. 1990) ("Preponderance of evidence may not be determined by the number of witnesses, but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony.") As this Court has observed, the truth "might lie in the mouth of a single witness." *Lee*, 237 S.C. at ___, 118 S.C. at 174.

While the trial court found that there are issues and problems with regard to many of the facilities in the Plaintiff Districts, the court concluded that many of these problems appear to be related to maintenance (Order dated Dec. 29, 2005 ¶ 272). Moreover, the court found that many of the problems recounted by Plaintiffs with respect to facilities had been corrected or the buildings replaced altogether, a point the Plaintiffs continue to ignore (Order dated Dec. 29, 2005 ¶¶ 272, 274). In its order on reconsideration, the trial court concluded that all of the Plaintiff Districts were either building new schools or substantially renovating, remodeling or expanding existing facilities, and Plaintiffs had failed to show that any district's facilities were systemically inadequate or unsafe (Order dated July 12, 2007 ¶¶ 25–27). Plaintiffs' position that schools must be new to be adequate is not required by *Abbeville County*.

4 Four Districts conceded they had no deficiencies

It is clear that the trial court's findings that facilities are adequate are correct and amply supported by the evidence. In fact, Florence 4, Jasper County, Marion 7, and Orangeburg 3 by their own admission have adequate facilities. Plaintiffs nonetheless neglect to even acknowledge these new or remodeled facilities or the Districts'

withdrawal of challenges to their facilities. Under any circumstances these four districts have no claim under *Abbeville County* relating to their facilities.¹⁹

a Florence 4 has three new schools

Specifically, Florence 4's superintendent did not claim any deficiencies in that District's facilities. (Order dated Dec. 29, 2005 ¶ 320 (citing Trial Tr. (02/19/04), p. 127, l. 11—p. 128, l. 3)) Plaintiffs do not reference Florence 4 at all in their discussion of facilities. This lack of any deficiencies is consistent with Dr. Smith's testimony that the Timmonsville Education Complex is a "modern, very attractive building," containing the elementary, middle and high school facilities. (Trial Tr. (06/29/04), p. 49, ll. 7-25, Trial Tr. (02/09/04), p. 38, l. 13—p. 39, l. 13) Constructed in 2000, "the building "[has] all of the equipment that one would expect in a—a new facility." (See Trial Tr. (06/29/04), p. 51, ll. 1-25, p. 52, ll. 1-4, *see also* Defs.' Ex. 2831 (videotape)) Dr. Smith concluded that the materials, supplies, technology, equipment and facilities at Timmonsville K-12 are all sufficient to provide a minimally adequate education. (Trial Tr. (06/29/04), p. 52, ll. 5-21)

b Jasper County has two new PK-12 schools

The trial court found that Jasper County's superintendent testified that once the two new K-12 facilities were completed, all of the facilities issues would be resolved (*Id.* ¶ 338). Jasper County is now operating in two new PK-12 schools, having replaced all of its old buildings with these new facilities in the fall of 2007. *See* Jasper County

¹⁹ Although the House and Senate do not discuss the old facilities herein, they specifically reserve their rights as to these arguments if this Court deems the new or renovated buildings to be inapplicable to the issues.

Sch Dist <http://www.jscd.net/#> (last visited Feb 28, 2008)²⁰ Accordingly, Jasper County, by its own admission, no longer has any facilities issues, although Plaintiffs fail to acknowledge this fact²¹

c Marion 7's schools are adequate

Marion 7's superintendent testified that the new Creek Bridge Middle/High School will remedy all middle and high school facilities problems in that district and the trial court found such (Order dated Dec 29, 2005 ¶¶ 380, 385, and 389) Nonetheless, Plaintiffs still contend that the school is unsafe and inadequate, citing the testimony of Jerry Pace regarding the inadequacy of the \$8.5 million Creek Bridge School that was new when the trial commenced (Trial Trans (08/06/03), p 119, ll 1–4)

d Orangeburg 3's superintendent conceded the adequacy of Orangeburg 3's facilities

At trial, Orangeburg 3 Superintendent Dr David Longshore testified that upon completion of the new consolidated high school and reorganization of the other district schools, the facilities problems in Orangeburg 3 would be resolved (Order dated Dec 29, 2005 ¶ 391) The Lake Marion High School and Technology Center is now open, and

²⁰ Although many of the building projects referenced in this paragraph were anticipated in some respects during trial, the updated information provided herein is from the Plaintiff Districts' web sites, and the House and the Senate request the Court take judicial notice of these facts, which are now public knowledge. Judicial notice is a legitimate well recognized substitute for proof. "It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge." *Moss v Aetna Life Ins Co*, 267 S C 370, 377, 228 S E 2d 108, 112 (1976) "[E]very statute is a public law, unless otherwise declared in the statute itself. The legislative journals of both houses of the General Assembly are judicially noticed. 'Courts will not profess to be more ignorant than the rest of mankind, and should take notice of whatever is or ought to be generally known within the limits of their jurisdiction.'" *State v Broad River Power Co*, 177 S C 240, ____, 181 S E 41, 48 (1935) (internal citations omitted)

²¹ The trial court discussed in detail the old facilities in that district (See Order dated July 12, 2007 ¶¶ 338–355)

the schools in Holly Hill and Elloree have been reorganized as Dr Longshore testified they would be. Accordingly, Orangeburg 3 no longer has any facilities claims. See Orangeburg County Consol Sch Dist #3, http://www.obg3.k12.sc.us/education/components/sectionlist.php?sectiondetailid=5&sc_id=1201012415 (last visited Feb 28, 2008). In summary, of the eight Plaintiff Districts, four, by their own admission, concede they have no facility conditions that would be considered inadequate.

In the remaining four districts, many of the facilities have been completely or partially remodeled since trial, or other construction is currently planned. Thus, to the extent renovations have been completed since trial, Plaintiffs' claim that the facilities are inadequate is moot. Even absent these changes, however, the trial court's orders correctly analyzed and determined that the facilities in these districts are safe and adequate under *Abbeville County*. Subsequent improvements only further support this conclusion. The following sections highlight the evidence upon which the trial court relied to support its finding that the facilities satisfy the "minimally adequate" standard.

5 Allendale County School District

a Allendale Elementary School

Allendale Primary School was constructed in the 1950's as a high school, but is now being used as a primary school. (Trial Tr (06/29/04), p 44, ll 25-24). Dr Smith testified that all classrooms had adequate space and had at least one computer. (Trial Tr (06/29/04), p 44, ll 20-25). According to Dr Smith, although Allendale Primary is an older school, it is "certainly adequate for instruction." (Trial Tr (06/29/04), p 45, ll 4-7). Based on his observations, Dr Smith concluded that the materials, supplies, technology, equipment and facilities at Allendale Primary are all sufficient to provide a

minimally adequate education (Trial Tr (06/29/04), p 45, ll 4-21) These observations, coupled with the admissions to SDE by the District and the findings by the fire marshal, clearly support the trial court's finding that this facility was adequate and safe (Order dated Dec 29, 2005 ¶ 283)

b Fairfax Elementary

Although Dr Smith observed that the exterior of Fairfax Elementary had peeling paint, he concluded that the school had no impediments to providing a minimally adequate education (Trial Tr (06/29/04), p 46, ll 1-8) The school contains "multiple computers in most rooms," class sizes are small, and there is "certainly adequate space for the number of students " (*Id*) Based on his observations, Dr Smith testified that the materials, supplies, technology, equipment and facilities at Fairfax Elementary are all sufficient to provide a minimally adequate education (Trial Tr (06/29/04), p 46, ll 9-23) Despite the poor maintenance, Dr Smith's testimony, coupled with the Districts' admissions to SDE and the fire marshal's inspection, the trial courts' finding that this facility was safe and adequate is amply supported by the record (Order dated Dec 29, 2005 ¶ 279)

c Allendale-Fairfax Middle School

Allendale-Fairfax Middle School is "[a]nother 1960's vintage structure" with about 368 students (Trial Tr (06/29/04), p 47, ll 2-6) Dr Smith observed small class sizes and computers in every room (*Id*) Dr Smith found that although locker room maintenance was a problem, it is "all in all an adequate facility " (*Id*) Based on his observations, Dr Smith concluded that the materials, supplies, technology, equipment and facilities at Allendale-Fairfax Middle School were all sufficient to provide a

minimally adequate education (Trial Tr (06/29/04), p 47, ll 9-23) The trial court also considered the SDE and fire marshal reports in finding this facility adequate (Order dated Dec 29, 2005 ¶¶ 285, 287)

d Allendale-Fairfax High School

Allendale-Fairfax High School is an attractive, spacious, modern brick structure with 575 students (Trial Tr (06/29/04), p 47, ll 4-11) This school also has a weight room, a trainer room, a media center, a large multi-purpose room, “lots of technology” and “a lot of extra space” (Trial Tr (06/29/04), p 48, ll 4-16) Based on his observations, Dr Smith found that the materials, supplies, technology, equipment and facilities at Allendale-Fairfax High School are all sufficient to provide a minimally adequate education (Trial Tr (06/29/04), p 48, ll 17-25, p 49, ll 1-6) These observations, coupled with the admissions to the SDE by the District and the findings by the fire marshal, correctly form the basis of the trial court’s finding that this facility was adequate and safe (Order dated Dec 29, 2005 ¶ 291)

6 Dillon County School District 2

Dillon 2 is in the process of undergoing major changes to its facilities According to public records, Dillon County passed a bond referendum on December 4, 2007, allowing it to replace or remodel the facilities in its District that were not previously upgraded See Dillon County Sch Dist 2, *available at* <http://www.dillon2.k12.sc.us/home/bondreferendum> (last visited Feb 28, 2008) In fact, JV Martin Junior High School is being replaced with a new structure on the campus of Dillon High School, which will experience additional renovations again in the process See Dillon Sch Dist 2, <http://www.dillon2.k12.sc.us/home/middleschoomaps.asp> (last visited Feb 28, 2008)

Additionally, most of East Elementary School will be demolished and replaced with a new school on the same site. See <http://www.dillon2.k12.sc.us/home/eastmaps.asp> (last visited Feb. 28, 2008). Finally, Stewart Heights will be renovated and acquire new classrooms. See <http://www.dillon2.k12.sc.us/home/shsmaps.asp> (last visited Feb. 28, 2008).

Gordon Elementary was previously renovated, including the addition of a \$1.4 million wing, a media center, cafeteria, and administrative space. (Order dated Dec. 29, 2005 ¶ 308). Despite anticipated new renovations, Stewart Heights was renovated during the course of the trial at a cost in excess of \$100,000, and the trial court considered these renovations, Dr. Smith's testimony, and the SDE and fire marshal's reports in finding Stewart to be safe and adequate. (Order dated Dec. 29, 2005 ¶¶ 312-315). Finally, Dillon High School will be renovated again, even following the \$4.5 million in renovations the trial court referenced in its order finding this school to be safe and adequate. (Order dated Dec. 29, 2005 ¶¶ 316-319).

Dillon 2, despite its public complaints to the contrary, is on the verge of having every facility in its district new or substantially renovated. It is without question, therefore, that the facilities in this district will continue to be safe and adequate as previously found by the trial court.

7 Hampton County School District 2

The trial court found in its introduction to Hampton 2 that the district was in the process of renovating its facilities at a cost of more than \$2 million. Again, as is set forth below, while the witnesses testified about problems in the district, the photographs offered by plaintiffs at trial did not reflect the proposed and ongoing renovations and the

testimony did not reflect the district's admissions to SDE and findings of the fire marshal Hampton 2's superintendent conceded, on cross examination, that these improvements were not reflected in any of the photographs of schools in Hampton 2 he had identified at trial (Trial Tr (10/09/03), p 114, l 19—p 115, l 25) The trial court properly rejected the claim of inadequate facilities in Hampton 2

a Estill Elementary

Estill Elementary is comprised of two facilities an older building with classrooms on one side of the street and a number of portables with classrooms on the other side of the street (Trial Tr (06/29/04), p 14, ll 14-24) Dr Smith testified that the portables were “all relatively new portables and in good shape ” (Trial Tr (06/29/04), p 15, ll 2-7) Based on his observations, Dr Smith found that the materials, supplies, technology, equipment and facilities at Estill Elementary are all sufficient to provide a minimally adequate education (Trial Tr (06/29/04), p 16, ll 7-25, p 17, ll 1-5) The record also contains references to \$700,000 in renovations to this school (Order dated Dec 29, 2005 ¶¶ 326 - 329)

b Estill Middle School

Estill Middle School is an older school with small class sizes and considerable technology (Trial Tr (06/29/04), p 17, ll 6-14) Although Dr Smith observed that maintenance was a problem at Estill Middle School, the school “has no obvious impediments to offering a quality instruction ” (*Id*) Based on his observations, Dr Smith testified that the materials, supplies, technology, equipment and facilities at Estill Middle School are all sufficient to provide a minimally adequate education The trial court agreed (Trial Tr (06/29/04), p 17, ll 15-25, p 18, ll 1-3)

c Estill High School

Estill High School is “an attractive[,] modern appearing building that has a large gymnasium, and lots of surplus space ” (Trial Tr (06/29/04), p 18, ll 4-22) Based on his observations, Dr Smith found that although there are some maintenance problems, the materials, supplies, technology, equipment and facilities at Estill High School are all sufficient to provide a minimally adequate education (Trial Tr (06/29/04), p 18, ll 23-25, p 19, ll 1-15, p 20, ll 1-9, *see also* Defs ’ Ex 2852 (videotape)) Dr Smith, also noted the extensive wasted space in the facility *Id*

8 Lee County School District

Plaintiffs focus on problems at Bishopville Primary School, Lower Lee Elementary, and Mount Pleasant Middle School The trial court referenced Lee County Schools extensively in its Order (See Order dated July 12, 2007 ¶¶ 356 - 379) Lee Central High School is a state-of-the-art facility opened in 2001 and was recently upgraded with the addition of a new award winning career center See http://www.leeschoolsk12.org/site_res_view_folder.aspx?id=791107b4-0b59-401d-8a76-49b6c9101711 (last visited Feb 28, 2008) Plaintiffs do not identify any specific problems and cannot seriously contend that this virtually new school is not safe and adequate The only testimony regarding this facility that was offered at trial concerned problems attributed to the contractor of this new facility (Order dated July 12, 2007 ¶ 377)

Additionally, Lee County has recently started construction on a new middle school to replace Mount Pleasant Middle and Dennis Intermediate This new facility will be adjacent to the new Lee Central High School This construction will include a new

2000 seat gymnasium to replace the 1200 seat gymnasium built in 2001 with Lee Central High School²² See <http://www.theitem.com/apps/pbcs.dll/article?AID=/20071221/ITNEWS01/775490447&SearchID=73306328726290> (last visited Feb, 28, 2008) Substantial renovations have also taken place at West Lee and Lower Lee with state bond monies (See Order dated July 12, 2007 ¶¶ 366 and 369) Based on all the impartial evidence, the trial court also determined that Bishopville Primary, the only other facility in the district, was safe and adequate according to the standards in *Abbeville County*²³ The court correctly concluded that the facilities in these districts were adequate To the extent isolated maintenance issues existed, they certainly did not rise to the level of a constitutional violation

E Transportation is safe and adequate

Although *Abbeville County* makes no reference to the safety and adequacy of transportation, Plaintiffs argue that there is insufficient funding for transportation of school children in the Plaintiff Districts (Pls ' Br pp 141-143) However, not a single witness testified that the Plaintiff Districts cannot transport children to school every day²⁴ Despite the increased costs of transportation on both the state and the districts as a function of education, the trial court correctly found that shifting the cost of

²² This commitment to the athletic facilities in Lee County would seem to discount claims that Lee County's other facilities are so inadequate to prevent the opportunity for minimally adequate education It would seem that a newer gymnasium would not ordinarily take priority over new classrooms

²³ The House and Senate note for the record that many of the Plaintiffs Districts have made conscious decisions with already limited resources to renovate or build athletic or other collateral facilities while ignoring older educational spaces To the extent that the Plaintiff Districts choose to spend money on facilities that are not required to offer the opportunity to acquire a minimally adequate education, they cannot then claim a constitutional violation on the part of the State for not providing money for the same

²⁴ Of course, an occasional break down of a bus that delays timely arrival should not rise to the level of a constitutional violation

transportation of students to the local districts does not rise to the level of a constitutional violation and this Court should not disturb that ruling (Order dated July 12, 2007 ¶ 17)

F The Plaintiff Districts have adequate funding to provide the opportunity for each student in the Plaintiff Districts to acquire a minimally adequate education

Funding for education in South Carolina is more than sufficient to provide the opportunity for students in the Plaintiff Districts to acquire a minimally adequate education. Moreover, “Plaintiffs also agree that additional funding would not necessarily result in increased educational opportunities” (Pls ’ Br 113). The gravamen of Plaintiffs’ complaint is that there is not enough funding for programs *not* contemplated by *Abbeville County*. This case, however, is about what is required under *Abbeville County*, not about programs that are not constitutionally required.

1 In\$ite data is accurate

Plaintiffs contend that In\$ite data “do[es] not provide a true picture of the funding realities in school districts” (Pls ’ Br 126). This assertion is surprising given that In\$ite is endorsed by the SDE as the officially compiled record of school district spending in South Carolina and published by the SDE on its website. *See* South Carolina Department of Education, *available at* <http://ed.sc.gov/agency/offices/finance/insite> (last visited Feb 26, 2008). Plaintiffs are alone in their criticism of this data. Plaintiffs necessarily dislike In\$ite data, however, because In\$ite unambiguously shows the resources expended by Plaintiff Districts to educate their students, and exposes the fact that the Plaintiff Districts have more resources than the non-Plaintiff Districts.

In\$ite data disaggregates education spending data into various categories that are “contained in the Uniform Code of Accounts that the United States Office of Education

has been encouraging states to adopt over the last century ” (Trial Tr (09/21/04), p 49, ll 5-25, p 50, ll 1-2) With In\$ite,

what’s taken out are the district expenditures for administration, for transportation, for food service, and a debt service [a]nd capital outlay [T]his is a concentrated amount of money that goes for classroom teachers, for aides, and for various kinds of support staff like school psychologists or counselors And it also goes for instructional supplies such as paper and internet access

So we’re looking at what school districts spend on the children or to educate the children more than what they spend on things and other adults

(Trial Tr (09/21/04), p 50, ll 24-25, p 51, ll 1-13)

Therefore, contrary to Plaintiffs’ contention, In\$ite data does provide a true picture of the funding realities in school districts, especially on the amounts spent by each district to educate its students Contrary to Plaintiffs’ suggestion, In\$ite reveals that Plaintiffs have *already* spent more than most other districts in the state on a per pupil basis Any consideration of the adequacy of funding, therefore, must start with the proposition that Plaintiffs already have “more ”

2 Federal funding is relevant

Plaintiffs also complain that the trial court “improperly found that the amounts of federal funding were admissible because there was ‘no evidence in the record that the United States Secretary of Education [had] either refused or withdrawn federal funding from the State because such funds were being used in violation of Title I ’” (Pls ’ Br 130 (citing Order dated Dec 29, 2005 ¶ 58)) According to Plaintiffs, “[t]he question is not whether the State has violated federal law, rather, the question is whether the State is permitted to ‘take credit for’ federal government [expenditures] for certain supplemental

purposes as evidence that it is meeting its obligations to provide constitutionally adequate basic education ” (Pls ’ Br 130) ²⁵ But this was not the sole basis for the trial court’s finding that federal funds are relevant in determining whether the state has provided the opportunity for a minimally adequate education As was the case when Plaintiffs first argued this contention to the trial court, they fail to cite a single state statutory or constitutional provision limiting the ways of delivering educational opportunities to the children of this state Accordingly, the trial court’s finding that federal funds are relevant should be affirmed

The trial court properly concluded that this Court “did not set any limits by which the State must afford” the opportunity (Order dated Dec 29, 2005 ¶ 60) Instead, this Court deferred to the General Assembly “to determine the way in which educational opportunities are delivered to the children of our State ” *Id* at 69, 515 S E 2d at 541 As the Kansas District Court observed, “[I]t is not for the Court to determine or criticize where the dollars used to fund schools are obtained ” *Montoy v State*, No 99-C-1738, 2003 WL 23002704 at *3 (Kan Dist Ct Dec 19, 2003) The trial court’s role in the present case was to determine whether every child is receiving an opportunity to acquire a minimally adequate education regardless of where the money comes from, and to determine whether the state’s funding scheme adequately distributes resources in compliance with that constitutional directive, regardless of the sources of funding See *Hoke County Bd of Educ v State*, 599 S E 2d 365, 395 (N C 2004) (“While the State has the duty to provide the means for such educational opportunity, no statutory or

²⁵ Because Plaintiffs have now framed the question in this fashion, this Court should not allow Plaintiffs to later contend that the question is, in fact, about whether the state has violated federal law Should Plaintiffs do so, the Senate and the House would ask that this Court to consider *Hoke County Board of Education v State*, 599 S E 2d 365, 395-96 (N C 2004), wherein the North Carolina Supreme Court dismisses a similar claim

constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding ")

Second, as found by the trial court, if Plaintiffs' position were correct, "then anything regarded as necessary to create the opportunity for a minimally adequate education that is currently provided by federal dollars would have to be replicated by the State " (Order dated Dec 29, 2005 ¶ 61) In other words, if federal funds are currently paying for after-school programs, under Plaintiffs' theory, the state would have to pay for duplicative and unnecessary after-school programs

Third, when considering the use of federal funds, Plaintiffs' argument becomes somewhat ironic Plaintiffs chastise the use of categorical funds because they are "restricted" funds (Pls ' Br 124) As found by the trial court, federal funds are not limited in their use Thus, for example, "when a school's free and reduced lunch percentage is greater than 50%, the Title I funds become highly flexible, and those funds can be used for school-wide projects " (Pls ' Br ¶ 59 (citing Trial Tr (06/28/04), p 82, ll 7-25, p 83, ll 1-7)) Thus, federal funds can become the source of unrestricted funding that Plaintiffs contend is necessary to provide the opportunity for students to acquire a minimally adequate education

In sum, as the trial court correctly concluded, "no State statutory or constitutional provision obligates the State to be the exclusive source of the opportunity's funding " (Order dated Dec 29, 2005 ¶ 60) Plaintiffs continue to fail to point to any such provision because no such provision exists The finding by the trial court that federal funds are relevant and should be included in the court's analysis of whether students in the Plaintiff Districts are receiving the opportunity for a minimally adequate education

3 The EFA is not the issue

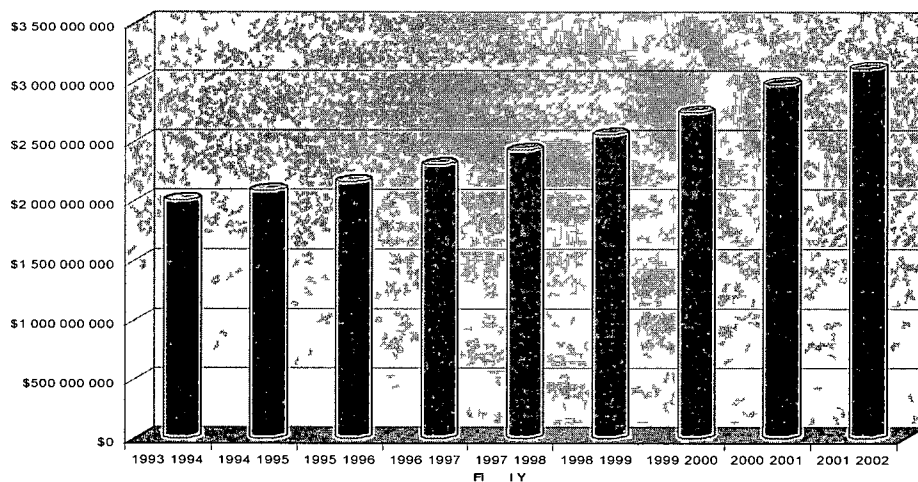
Abbeville County specifically held that there is no private cause of action under the 1977 Education Finance Act (“EFA”) for failure to fund at levels set forth in the Act *Abbeville County*, 335 S C at 65, 515 S E 2d at 539. Having failed initially in that argument in *Abbeville County* as well as before the trial court, Plaintiffs now attempt to reargue the same issue, but this time characterized in constitutional terms. Plaintiffs now complain that the base student cost (“BSC”) was not funded at required levels during certain years. Plaintiffs’ argument, however, deliberately overlooks the point that the opportunity to acquire a minimally adequate education is not created solely through the BSC. Plaintiffs ignore the significant other funds that flow into their districts annually from other state sources, such as the penny sales tax under the EIA, additional funding appropriated directly to the Plaintiff Districts in the form of interventions under the EAA, the South Carolina Education Lottery, and local and federal sources. Plaintiffs continually attempted to discount the importance of these other sources of funding, preferring instead to focus on the BSC. However, the trial court correctly found that the EFA is only *one* source of funding for education in South Carolina. (Order dated December 29, 2005 ¶ 75). Therefore, whether the Senate and the House “violated” the EFA is not, and has never been, the issue.

4 Education is the state’s top priority

Plaintiffs contend that a constitutional violation exists because the state has not made education its first funding priority. (Pls’ Br 132-133). This is clearly not the test set out in *Abbeville County*, and moreover, Plaintiffs’ argument is factually incorrect.

Chairman Harrell testified that in 1994, the Ways and Means Committee purposefully amended its rules and “move[d] education to the front of the budget bill so that it would be the first item that was taken up in the State budget every year ” (Trial Tr (08/16/04), p 47, ll 10-25, p 48, ll 1-8) Thus, since 1994, as a result of the General Assembly designating education as the number one budgeting priority Reflecting that priority, appropriations for education have substantially increased over time

**Total State Education Appropriations
FY 1993-1994 Through 2001-2002**



S e Defe dants E h bts 2849 d 3220

Defendants Exh #3254BL

65

(Defs ' Ex 3254BL, *see also* Trial Tr (08/06/03), p 12, ll 10-15, Trial Tr (08/16/04), p 23, ll 24-25, p 24, ll 1-4, p 38, ll 20-25, p 49, ll 3-15, p 50, ll 1-25 (establishing that between 1994 and 2004, funding to education has increased from 33% of the general fund to 36% of the general fund)) Moreover, even though the state experienced across-the-board budget cuts beginning in fiscal year 2000, education has remained the number one priority of the state and, in fact, state appropriations to education between fiscal year 2000 and fiscal year 2001 “increased dramatically ” (Trial Tr (08/16/04), p 39, ll 1-25,

p 40, ll 1-6) The plain facts reveal that total state revenues for education under the EIA and the General Fund increased between 1992-93 and 2002-03 sixty-seven (67%) percent. Additionally, even though the Average Daily Membership (“ADM”) of students in South Carolina has only increased 3.24% between 1993-94 and 2001-02, state education appropriations increased 55.17% (See Defs’ Exs 3254BN, 3254BM). Education is, and always has been, a top priority in the state.

Moreover, education receives 36% of the general fund of South Carolina in 2003-2004, an amount which has increased in recent years despite financial budgetary shortfalls in the state’s economy (See Defs’ Ex 3315, pp 6-16, Trial Tr (08/16/04), p 41, ll 9—p 42, ll 12). As Speaker Harrell explained, “education is clearly the priority of state government” even in depressed economic times. *Id*

Not only has education funding risen significantly state-wide, but also state funding allocated to the Plaintiff Districts has increased even more significantly and more than the state average (Defs’ Ex 2869, 2870, Trial Tr (08/6/03), p 23, ll 11-25). This general increase in funding has directly benefited the Plaintiff Districts. The uncontradicted evidence at trial also shows that since 1993, state revenues devoted to education in the Plaintiff Districts have more than doubled (See e.g., Defs’ Ex 2880). Between 1994 and 1995, and 2000 and 2001, state education revenue for Allendale increased 109%, Dillon 2 increased 51%, Florence 4 increased 89%, Hampton 2 increased 107%, Jasper increased 117%, Lee increased 80%, Marion 7 increased 94%, and Orangeburg 3 increased 83% (See Defs’ Ex 2870A).

The trial court was therefore understandably not persuaded that the Plaintiff Districts were underfunded. This Court should be similarly unconvinced.

5 Plaintiff Districts receive more money than non-Plaintiff Districts

Throughout the trial, Plaintiffs sought to deflect evidence that they received more actual dollars than the state average and indeed many other districts (Trial Tr (06/07/04), pp 233–241) Despite Plaintiffs’ protestations to the contrary, however, there is no question but that the Plaintiff Districts receive and spend more money per-pupil than the non-Plaintiff Districts This is not accidental The Plaintiff Districts are “required to pay less than 30 percent so the state would be sending more than 70 percent to those particular districts ” (Trial Tr (08/16/04), p 60, ll 16-24) In other words, “the base student cost is weighted toward the poor districts The poor districts get more money and the richer districts get less money from the state for the base student cost ” (Trial Tr (08/16/04), p 60, l 25, p 61, ll 1-4) Since the trial, the BSC formula has been 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 See S C Code Ann §§ 11-11-156, 59-20-30 (Supp 2006)

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

	2002-2003 Per Pupil Spending
Allendale	\$10,946
Dillon 2	\$6,255
Florence 4	\$8,694
Hampton 2	\$8,437
Jasper County	\$8,058

Lee County	\$8,650
Marion 7	\$9,213
Orangeburg 3	\$8,298
2002-2003 State Average Spending	\$7,232

(Order dated Dec 29, 2005, ¶¶ 123, 134, 143, 153, 162, 172, 182, 193) Additionally, this Court should take judicial notice that current per pupil funding levels in the Plaintiff Districts are dramatically higher than they were at the time of trial, and that, with the exception of Dillon 2, funding in these districts well exceeds the state average

	2005-2006 Per Pupil Funding
Allendale	\$11,956
Dillon 2	\$7,252
Florence 4	\$8,941
Hampton 2	\$10,130
Jasper County	\$8,242
Lee County	\$9,173
Marion 7	\$10,473
Orangeburg 3	\$9,334
2005-2006 State Average Funding	\$8,159

See South Carolina Department of Education, *available at* <http://ed.sc.gov/agency/offices/finance/insite/> (last visited Feb 26, 2008)

Additionally, education funding in the Plaintiff Districts has been consistently higher than funding in non-Plaintiff Districts. In fact, the seven of the eight Plaintiff Districts are in the top 28 of school districts in the state in terms of revenues received

	State Revenue Per Pupil 2001-2002	Rank
Allendale	\$5,182	5
Dillon 2	\$4,342	29
Florence 4	\$4,961	6
Hampton 2	\$5,321	2
Jasper	\$4,530	16
Lee	\$4,774	9
Marion 7	\$6,660	1
Orangeburg 3	\$4,661	12
District Median	\$4,132	

(Defs ' Ex 3225, pp 262-63)

Moreover, in a number of education programs, money is distributed based on percentage of students on free and reduced lunch "so that the Plaintiff Districts being poor areas would receive more money for anything that's distributed based on free and reduced lunch or other poverty-type distribution methods" (Trial Tr (08/16/04), p 61, ll 5-11)

Plaintiffs also receive considerable extra revenue under the EAA. In fact, in 2003-04 alone, the Plaintiffs Districts received \$11.8 million dollars to be used for intervention programs.

INTERVENTION DOLLARS FOR PLAINTIFF DISTRICTS

2003 2004

Principal Specialists/Leaders	9	\$150 610	\$1 438 290
Curriculum Specialists	12	\$108 98	\$1 107 920
Teacher Specialists	68	\$100 183	\$6 812 411
Curriculum Instructional Facilitators	15	\$5 000	\$30 000
Materials & Supplies	27	\$25 000 + \$2 100	\$665 000
Retraining Grants	28	\$25 000	\$700 000
Homework Centers	28	\$30 000	\$840 000
TOTAL			\$11 853 554

(Def's ' Ex 3131 p 40) The Plaintiff Districts have also benefited significantly from increased funding for education over the years since this lawsuit has been filed

	1992 – 1993 Revenue per Pupil	2005 – 2006 Revenue Per Pupil	Percent Increase²⁶
Allendale	\$4,820	\$11,956	148 0%
Dillon 2	\$4,052	\$7,252	79 0%
Florence 4	\$4,413	\$8,941	102 6%
Hampton 2	\$5,226	\$10,130	93 8%
Jasper	\$4,446	\$8,242	85 4%
Lee	\$4,293	\$9,173	113 7%
Marion 7²⁷	\$4,785	\$10,473	118 9%

²⁶ This chart was compiled from data extracted from Defendants' Exhibit 2903, p 254, and data from South Carolina Department of Education, *available at* <http://ed.sc.gov/agency/offices/finance/insite/> (last visited Feb 26, 2008)

²⁷ Marion 7 is a product of the merger of Marion District 3 and Marion District 4. Figures prior to the merger of Marion have been averaged as they were during trial.

Orangeburg 3	\$4,484	\$9,334	108 2%
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Thus, the Plaintiff Districts already receive “more” than other districts, and have received “more” each year since this lawsuit began

6 Diseconomies of scale are not relevant

In a further attempt to diminish the fact that their districts receive and spend more money per pupil than the state average, Plaintiffs suggest that their revenue and per pupil expenditures are “misleading” because they do not take into consideration the “diseconomies of scale operating in the Plaintiff Districts ” (Pls Br p 131) Plaintiffs argue it is simply more expensive to educate fewer children

However, Plaintiffs’ own witness, Dr Harry Miley, testified that while there are some diseconomies of scale applicable to smaller school districts, those diseconomies are largely manifested in fixed costs of those districts (Trial Tr (03/30/04), p 42, ll 5-14) Certainly a district with fewer students, such as Marion 7, will necessarily have a higher per pupil expenditure for its district management than a larger district, such as Dillon 2, simply as a result of the mathematical formula dividing the expense of the superintendent by the fewer number of students However, Dr Miley further explained that teaching costs would *not* be subject to those diseconomies of scale *Id* Rather, Dr Miley agreed that categories reflected on the In\$ite Reports, (Defs ’ Ex 2800), relating to teaching such as Instruction, Instructional Support, School Management (Principals, Assistant Principals and School Offices), and certain other items would vary depending upon the number of students in the district (Tr Trans, (03/30/04), p 3, l 24 – p 4, l 7, p 14, l 1-

p 15, l 1, p 15, l 11 – 15 , p 17, l 1-6, p 17, l 22- p 18, l 4, p 19, l 2-8, p 23, l 2-25)

Contrary to Plaintiffs’ assertion, the cost of the actual business of the district—education of its students—is largely a variable function depending upon the number of students, which will then drive the number of teachers, the amount of materials, and the number of schools in the districts, along with the number of meals served each day and students transported. There are no diseconomies of scale for these costs. Interestingly, in fiscal year 2001-02, with the exception of Dillon 2, the Plaintiff Districts all spent more money per pupil on instruction, face-to-face teaching, and instructional teachers to name a few important categories. (*See* Defs ’ Exs 3245B, C, & D) The record establishes that the Plaintiff Districts are, in fact, spending as much as or more, particularly on average, as the rest of the state in most categories which are tracked by InSite. (*See* Defs ’ Exs 3245E—AL) And the Plaintiffs spend more on average than the good and excellent schools, which they deem to be the benchmark for achievement in all but two categories (*See* Defs ’ Exs 3245A - AL) The data is very similar for the fiscal year 2002-03 as well. (*See* Defs ’ Exs 3326 – 3335) Once again, Plaintiffs’ efforts to change the fact that they have and spend more money per pupil in their districts than the state average fails.

7 Plaintiff spending in particular areas is adequate

a Time-on-task

According to Plaintiffs, “elements of effective time on task are frequently not available in Plaintiff Districts because of inconsistent and insufficient funding” (Pls ’

Br 137)²⁸ “Time on task” is a phrase used by Plaintiffs as a catch-all to encompass after school programs, Saturday school, summer school programs, enrichment programs and the like. Such programs are not mandated by the constitution or *Abbeville*. (See Section VI, *infra*) Nor are additional “time on task” programs necessary to provide each child with the opportunity to acquire a minimally adequate education since that opportunity is already present in the Plaintiff Districts.

Even if such programs are present in many of the Plaintiff Districts, (see Pls ’ Br 137), under the EAA, interventions for underperforming schools provide additional funding for after-school homework centers in the amount of \$30,000 per school. (Defs ’ Ex 3131, p 40) According to Dr. Suber, schools in the Plaintiff Districts received an additional \$840,000 for such homework centers in just one year. *Id.* Those funds are part of the SDE’s budget and are not included in the per pupil expenditures analyzed under InSite. (Trial Tr (03/31/04), p 81, ll 1-12, p 82, ll 1-2) The Plaintiff Districts have access to large additional amounts of money which is not reflected in their individual budgets because the funds come through the SDE as Dr. Suber testified. Additional funds are advanced from his office for things such as professional development, retaining grants for teachers, teacher specialists, and additional teaching materials. (Trial Trans (03/31/04), pp 10, ll 16-24, p 12, ll 8-22, p 81, ll 12-23, Defs ’ Ex 3131, p 40) For a full review of all the additional monies that the SDE provides across the state, much of which goes to the Plaintiff Districts, one needs only to review Dr. Suber’s hand written notes and budget. (Defs ’ Ex 3074)

²⁸ Plaintiffs offered testimony that these programs were not always available because funding for transportation to the programs was not present. However, at least in one instance, the record establishes that Ray Rogers, the Superintendent for Dillon 2, did not even ask for the funds that had been allocated to Dillon 2 for transportation to an after school program. (Trial Tr (8/12/03), pp 42-44)

Even if additional time on task programs would be beneficial, there is no constitutional violation. The trial court so found, and this Court should not disturb the ruling of the trial court. (See Order dated July 12, 2007 at ¶¶ 18-19)

b Instructional materials

According to Plaintiffs, Defendants have failed to adequately provide instructional materials to the Plaintiff Districts. (Pls. Br. at 138). However, the record reveals that spending in the Plaintiff Districts for instructional materials and supplies was in some cases vastly more than the state average. (See Defs.' Ex. 3254I). For example, in the 2001-2002 school year, Allendale, Florence 4, and Marion 7 spent more than twice the state average. (*Id.*)

Every school that is ranked "below average" or "unsatisfactory" on the report cards received under the EAA intervention program the sum of \$20,000-25,000 specifically earmarked for instructional materials and supplies *annually*. These funds are not distributed per capita, but rather per school. Thus, the smaller the school, the more funds are available per pupil.

Additionally, a principal leader assigned to a failing school has authority to spend an additional \$25,000 wherever the need is perceived. According to SDE employee Dr. John Suber, the individual in charge of the Office of School Leadership testified that \$660,000 in *additional dollars* were spent in schools in the Plaintiff Districts for *instructional materials only in one year*. (Trial Tr. (01/15/04), pp. 144-145, Trial Tr. (03/31/04), p. 78, ll. 4-16). He also testified that as long as a school has a below average or unsatisfactory designation, the funds are provided each successive year. (Trial Tr. (01/16/04), pp. 223-224). Some of the schools in the Plaintiff Districts have had these

ratings repeated. Thus, then funds could be as high as \$100,000 for four years *solely* for instructional materials. These funds are provided through the SDE and are in addition to funds spent directly at the district level. (Trial Tr. (01/16/04), p. 217, l. 12—218, l. 1, p. 218, l. 12-16). Additionally, the districts are afforded discretion in how to spend general funds for instructional materials, and they presumably know their needs better.

In some instances, the Plaintiff Districts have not used the available funds appropriately. In Jasper County, Superintendent William Singleton complained that the Plaintiff District did not have enough funds to buy laboratory specimens for biology and instead had to use “road kill.” (Trial Tr. (04/02/04), p. 40, ll. 6-22). This occurred in the same year that Jasper County spent \$279 per pupil on instructional materials for things that the superintendent could not identify. (Trial Tr. (04/02/04), p. 111, ll. 14-25, Defs.’ Ex. 3149). Plaintiffs refer to the testimony of a Jasper County teacher who said that she did not have an eighth grade math book in an eighth grade math class for a portion of the school year. (Pls.’ Br. 138). However, that very same teacher testified that Jasper County made a decision to purchase a \$2000 large screen television for her classroom that did not have a volume control and had not worked from the first day it was placed in her classroom—the very same classroom where she taught math allegedly without the textbook. (Trial Tr. (04/24/04), p. 191, l. 12—p. 192, l. 15).

Overall, there is no basis to conclude that Plaintiff Districts do not have adequate funding for instructional materials and supplies.

c Professional development

Plaintiffs complain further that the Plaintiff Districts lack sufficient funding to provide effective professional development for teachers in the Plaintiff Districts. (Pls.

Br at 139) With the exception of Dillon 2 and Jasper, Plaintiffs already generally spend more on professional development than the state average (*See* Defs ' Ex 3254R "Per Pupil Expenditures In-Service and Staff Training 2001-02") In addition to those sums, Plaintiffs were provided an additional \$700,000 *in one year alone* in retraining grant interventions under the EAA (Trial Tr (03/31/04), pp 78-80, Defs ' Ex 3131, p 41) Pursuant to the EAA, retraining grants are given to the districts for every teacher in an underperforming school *every year*

d Technology

Finally, Plaintiffs contend that funding for technology in the Plaintiff Districts is not adequate (*See* Pls ' Br 121) Contrary to Plaintiffs' assertions, the record establishes that technology is more than adequate in the Plaintiff Districts (*See* Trial Tr (08/12/03) (Ray Rogers), p 21, ll 11-18 (testifying that Dillon High School receives technology grants), Elkins Dep (04/23/03), p 90, ll 2-10 (testifying that East Elementary in Dillon County has at least "three student computers in every classroom and one teacher computer which is four total"), p 104, ll 10-25 (testifying that Dillon schools have access to high-speed internet connections and computers are networked), Trial Tr (01/06/04) (Archie Franchini), p 13, ll 12-21 (noting that each classroom in Estill High School has 1-2 computers and although some computers are not functioning well, the school has received a grant to replace computers), Trial Tr (01/14/04) (Jackie Shuler), p 203, ll 11-14 (testifying that Elloree High School recently received new computers and training on computers), Trial Tr (01/16/04) (Jackie Shuler), p 40, ll 8-17 (testifying that in the 2002-2003 school year there are two computers in each classroom, p 41, ll 17-18 (testifying that school received grant for five more classroom computers,

p 141, ll 7-11 (testifying that school recently spent \$50,000 grant on graphing calculators and Microsoft Word licenses), Trial Tr (03/03/04) (Jo Anne Anderson), p 22, ll 24-25, p 23, ll 1-12 (testifying that South Carolina ranks second in percentage of elementary and secondary school library media centers with internet connections), p 23, ll 13-24 (testifying that South Carolina ranks fifth in the nation in percentage of public school fourth graders with access to computers all the time in classrooms), Trial Tr (04/02/04) (William Singleton), p 175, ll 11-19 (testifying that Jasper School District spent \$10 4 million upgrading technology in schools for computer and technology infrastructure), Trial Tr (06/28/04) (James Smith), p 189, ll 9-22 (testifying that his observations reveal Stewart Heights Elementary High School had “plenty of supplies, plenty of computers, plenty of overhead projectors, television set in every room”), p 193, ll 12-21 (testifying that by his observations, computers, technology and instructional supplies in Dillon 2 are adequate), p 195, ll 1-13 (testifying that Dillon High School had “lots and lots of technology” and “computers in all the rooms”), p 207, ll 12-21 (testifying that in his observations of South Carolina schools he saw “lots more computers than we saw kids using them”), p 210, ll 15-25 (testifying that technology in South Carolina schools is abundant), Trial Tr (06/29/04) (James Smith), p 16, ll 10-14 (testifying that Estill Elementary School in Hampton 2 had “lots of computers in each room, so [the school has] adequate technology”), p 16, ll 10-14 (testifying that instructional materials and supplies at Estill are sufficient to create the opportunity for a minimally adequate education), p 20, ll 17-22, p 22, ll 17-24 (testifying that Jasper County’s elementary and high schools have an abundance of computers), p 26, ll 1-12 (testifying that West Lee Elementary has computers in every room), p 29, ll 1-9

(testifying that Mount Pleasant Middle School has sufficient computers), p 36, ll 21-25 (testifying that Holly Hill Elementary has multiple computers in most rooms), p 46, ll 1-8 (testifying that Fairfax Elementary has multiple computers in every room, sufficient for a minimally adequate education), p 46, ll 24-25, p 47, ll 1-6 (testifying that Allendale-Fairfax Middle School has adequate computers), p 57, ll 17-23 (testifying that no research exists confirming that the level of technology is in any way related to student achievement), Trial Tr (08/06/03) (Jerry Pace), p 79, ll 1-12 (observing that “[i]f there is one thing that we do have that has been an [sic] abundance has been technology, and a lot of that has been due to grants that have been written locally by some of our teachers”), Trial Tr (08/12/03) (Suzette Lee), p 62, ll 24-25, p 63, ll 1-7 (testifying that district has received technology and training for staff and instructional material for teacher use, and Dillon 2 has received \$300,000 in grants for computers and staff development), Trial Tr (09/26/03) (Peggy Stafford), p 119, ll 2-8 (testifying that students in four-year-old kindergarten at South Elementary School have computers to learn keyboarding), p 121, ll 13-17 (testifying that there are twenty-five computers in the library available with internet access), Trial Tr (09/30/04) (Thomas Monahan), p 17, ll 9-25 (testifying that J V Martin has fifty computers for two keyboarding classes and 25-30 computers in the computer lab), p 18, ll 1-2 (testifying that J V Martin has 15-20 computers available for use in library), Trial Tr (10/02/03) (Judy Franchini), p 202, ll 15-18 (testifying that school recently spent \$10,000 on new computers and \$5,000 on supplies))

Moreover, Plaintiffs cannot prove any connection between the purported absence of technology and the absence of the opportunity to acquire a minimally adequate

education Even if the Plaintiff Districts had no technology, no constitutional violation would exist unless Plaintiffs established a causal relationship

8 The trial court correctly allowed defense expert James Smith's testimony

Plaintiffs object to the introduction of the professional judgment adequacy study conducted by Dr James Smith (See Pls ' Br 119-123) The admission of this evidence was within the discretion of the trial court, and should not be disturbed unless that discretion was abused *Fields v J Haynes Walters Builders Inc* , Op No 26443, slip op at 56 (S C filed Feb 25, 2008) (Shearouse Adv Sh No 37), *Fields v Reg l Med Ctr Orangeburg*, 363 S C 19, 25, 609 S E 2d 506, 509 (2005) There is no abuse of discretion in this case

The premise behind a professional judgment (or adequacy) study is that the people most likely to know the cost of a minimally adequate education are those who are successful at providing one (Trial Tr (06/28/04), p 29, ll 19-25, p 30, ll 1-25) Thus, in performing this study, Dr Smith and his colleagues “attempted to systematically gather the judgment of knowledgeable individuals and ask them to develop a program” (Trial Tr (06/28/04), p 30, ll 23-25) For purposes of this litigation, Smith was asked to perform an adequacy study to determine whether the amount of money available in the Plaintiff Districts was sufficient to provide the opportunity for a minimally adequate education” (Trial Tr (06/28/04), p 31, ll 24-25, p 32, ll 1-3) Smith and his team put together four panels of individuals who were “members of the profession and who have experience in designing and implementing high quality instructional programs,” and who “have led a school district that has high performance, have a good track record or have been identified as—as an exceptional educator” (Trial Tr (06/28/04), p 32, ll 14-

25, p 33, ll 1-25, p 34, ll 1-5) Two of the individuals on these panels, Dr George Hood and Dr Curtis Brantley, later became witnesses for the Plaintiff Districts

Once assembled, the panels were provided with certain assumptions, including specified outcomes, the student population, and a budget Smith and his colleagues then asked the panelists whether they could design an instructional program for the identified student population that would produce a specified outcome within a certain budget (*See generally* Trial Tr (06/28/04), p 36-42) After the panelists had completed this assignment, each member of the panel was asked to indicate how confident he or she was that the instructional program they designed would produce the specified outcome for the specified student population (Trial Tr (06/28/04), p 36, ll 4-25, p 37, ll 1-11) Based on this study, Dr Smith was able to conclude that there are sufficient resources in the Plaintiff Districts to provide students with the opportunity for a minimally adequate education (Trial Tr (06/28/04), p 127, ll 16-24)

Plaintiffs contend that the trial court erred in admitting, over their objection, the testimony of Dr Smith, who, based on his research, concluded that funding was sufficient in the Plaintiff Districts to provide the opportunity for a minimally adequate education (Pls' Br at 119) According to Plaintiffs, the trial court should not have admitted Dr Smith's professional judgment panel reports because (1) the trial court gave undue weight to the panels, (2) the methodology used in compiling the reports have not been peer reviewed, (3) the data used by the panels was invalid because it includes categorical money and InSite expenditure money, and (4) the report contains a number of

assumptions²⁹ Each of these objections is without merit and not supported by the record³⁰

a The trial court did not give undue weight to the professional judgment panels

At trial, Plaintiffs unsuccessfully objected to Dr. Smith's testimony on the ground that Dr. Smith's "testimony of necessity by definition is in reliance on the judgment of his panelists and if indeed that is going to be the basis of his testimony, I think it's improper for him to rely on the opinions of others as the basis for that testimony" (Trial Tr. (6/28/04) at p. 60, ll. 23-25, p. 61, ll. 1-4). After Dr. Smith testified to the trial court's satisfaction that professional judgment panels have been used by others in the field, (Trial Tr. (6/28/04) at p. 62, ll. 7-25), have been the subject of articles of publication in education journals, (Trial Tr. (6/28/04) at p. 63, ll. 9-17), have been allowed in other courts where Dr. Smith has testified as a witness, (Trial Tr. (6/28/04) at p. 63, ll. 17-22),

²⁹ As is established throughout, each "assumption" made by the panelists concerning facilities, technology, teacher competency and teacher salaries is fully supported by the record, and therefore cites to the record supporting the assumptions will not be repeated in this section of the brief again.

³⁰ Plaintiffs contend that two of the panelists, Dr. George Hood and Dr. Curtis Brantley, testified that the underlying assumptions were not true in Jasper County, or in other districts of which they were aware (Pls.' Br. at 121). After completing Dr. Smith's project, both Dr. Hood and Dr. Brantley strongly agreed that the programs developed by their respective panels "would be realistic in the context of the school district where I work" (See Defs.' Ex. 3346, Defs. Ex. 3350). At the conclusion of the project, each participant was asked to independently complete an evaluation form and answer certain questions, ranking each question on a scale of 1 to 5, with 5 indicating that the participant strongly agrees with the statement. When asked whether "[t]he programs developed by my team would be realistic in the context of the school district where I work," Dr. Hood ranked the statement "5", (Defs.' Ex. 3346), and Dr. Brantley ranked the statement "4.5" (See Defs.' Ex. 3350). The fact that Dr. Hood later testified at trial that the assumptions relied on by the panelists were not true for any of the districts in South Carolina in which he had worked, after previously certifying that the assumptions were realistic, was certainly an issue before the trial court regarding the credibility of Dr. Hood, but does not provide a sufficient basis upon which to exclude the testimony of Dr. Smith. Dr. Hood amusingly explains his sudden change of heart by stating that at the time he filled out Dr. Smith's evaluation form, "I had the feeling it was going to be something else in this for me except today." Trial Transcript (09/29/04), p. 133, ll. 16-23.

are subject to quality control procedures to ensure reliability, (Trial Tr (6/28/04) at p 64, ll 1-18), and are the type of procedure generally relied upon by experts in the field of education in making judgments, (Trial Tr (6/28/04) at p 64, ll 19-25, p 65, ll 1-9)³¹, the trial court correctly determined that Dr Smith's testimony, based on the findings of the professional judgment panels and his judgment is admissible under *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) factors (See Trial Tr (6/28/04) at 67, ll 18-25, p 68, ll 1-19) Even assuming, as Plaintiffs do, that the basis of Dr Smith's testimony is somehow problematic, this Court has noted that "vigorous cross examination, [and] presentation of contrary evidence are the traditional appropriate means of attacking [purportedly] shaky but admissible evidence" *Council*, 335 S C at 21-22, 515 S E 2d at 519 (citing *State v Dinkins*, 319 S C 415, 418, 462 S E 2d 59, 60 (1995))

Dr Smith's testimony was subject to both vigorous cross examination and the presentation of contrary evidence by able counsel The only question before the trial court was the weight to be given to Dr Smith's testimony in light of contrary evidence put forth by Plaintiffs In its order, the trial court notes that it appreciated Plaintiffs' concerns about professional judgment panels but that those concerns "[do] not render them inadmissible, or require the Court completely to disregard the panels' findings" (Order dated Dec 29, 2005 ¶ 408 (citing *Small v Pioneer Mach Inc* , 316 S C 479, 489, 450 S E 2d 609, 616 (Ct App 1994)) For the trial court, "the most important conclusion

³¹ In fact, Plaintiffs' expert, Dr Terry Peterson, endorsed and used this approach to identify the resources needed to improve student achievement (See Trial Tr (06/09/04), p 74, ll 6 10, p 80, ll 4-25, p 81, ll 1 25 p 82 ll 1-25, p 83, ll 1 2 (agreeing that professional judgment reports are the kind of study that can be used to determine the components necessary to acquire the opportunity for a minimally adequate education)) Therefore, by Plaintiffs' own admission, use of professional judgment panels as a methodology is a proven, tested, accepted, and professionally established technique in the field of education research

that could be drawn from the panels' reports is that **generally** there is sufficient money available to achieve the educational outcomes identified in *Abbeville County*" (Order dated Dec 29, 2005 ¶ 408 (emphasis in original)) Thus, contrary to Plaintiffs' contention, the trial court did not give the panels' results undue weight Instead, the trial court properly considered Smith's testimony along with all of the other evidence in this case in reaching its conclusion ³²

b Categorical funding offers school districts flexibility

Plaintiffs further object to the use of Dr Smith's testimony because the panel members were only permitted to use In\$ite funds, which purportedly offers school districts little flexibility and can only be used for specific purposes (Pls ' Br 120-21) However, as Dr Smith testified, categorical funds do not, in fact, tie the hands of school districts

Q Well, Dr Smith, if you have categorical funding, for example federal funding that's categorical, how does that dovetail with this experience?

A Well, a couple of points on that [C]ategorical programs only tie your hands if you haven't thought about it because, take Title One One—first of all, Title One is the largest federal program for disadvantaged kids, is highly, is highly flexible particularly when you have concentrations greater than 50 percent you can do what's called school-wide projects [and] basically treat the money as general funds

But even if you don't, these categorical programs are for specific purposes or specific populations How else would you use them? *So it s not like they tie people s hands*

³² As an additional basis for excluding the findings of the professional judgment panels, Plaintiffs point to the fact that a court in New York and the Wyoming Supreme Court excluded them The fact that different courts excluded different studies, however, does not mean that the trial court abused its discretion in admitting Dr Smith's study in this case

It's—it's been my experience that when people complain about categorical programs tying their hands it's because they haven't thought of the instructional program first. They thought about the rules before they thought about the kids.

(Trial Tr (06/28/04) p 82, ll 7-25, p 83, ll 1-7 (emphasis added), *see also* Trial Tr (06/28/04) p 124, ll 18-21 (testifying that he examined the programs designed in the panel exercise to see if there were conflicts with any major categorical programs and found none), p 119, ll 19-23 (testifying that the problem is not with categorical programs, but rather how the school districts treat the program), p 213, ll 4-7 (testifying that the constraints from categorical funding are self-imposed), p 213, ll 15-18 (testifying that people “have a tendency to view their base program and their categorical program as two separate things rather than one integrated whole”))

The data and funding the panelists used in designing the instructional programs were valid. Accordingly, the trial court properly admitted testimony regarding the panelists' conclusions.

c The professional judgment panels do not establish the need for additional programs in the Plaintiff Districts

After dismissing the findings of the professional judgment panels as “non-peer-reviewed,” and “false-assumption-laden[ed],” Plaintiffs then contend that the reports are “powerful evidence of what is needed in the Plaintiff Districts to provide the opportunities required by Abbeville” (Pls ' Br 122 (emphasis omitted)). However, in designing their programs, the panelists were given different budgets. (Trial Tr (06/28/04), pp 37-41). Dr. Smith testified that “it was not like [the panelists] said we have to have these things. They said these are the best things that we can provide in their opinion for the amount of money that was available.” (Trial Tr (06/28/04), p 11, ll

9-20) “[I]f there had been more money there would have been more enrichment, more bells and whistles ” *Id* Thus, given their specified budget, the panelists were “trying to *maximize* educational opportunities There are lots of different ways to do that ” (Trial Tr (06/28/04), p 11, ll 21-25 (emphasis added))

The fact that the panels deployed the available resources in a particular way does not mean that the programs of each panel selected are necessary to create the opportunity to acquire a minimally adequate education That is obvious from the fact that different panels selected different programs (Trial Tr 06/28/04), p 94, ll 8-23, p 123, ll 5-16) Nor, as Dr Smith points out, is there any real impediment to the Plaintiff Districts using the same programs selected by the panelists

III The Court Correctly Admitted and Considered the Deposition Testimony of Principals of the Plaintiff Districts Concerning the Facts Existing Within Their Schools

The trial court correctly allowed Defendants to introduce excerpts from depositions of various principals from schools in the Plaintiffs Districts These principals were questioned at length concerning (1) classes taught at their schools, (2) their teachers, (3) whether their curriculum was aligned to the state curriculum guidelines, (4) interventions for teachers who were not considered satisfactory, (5) their professional education programs, (6) their textbooks, (7) their classrooms, (8) their technology, (9) parental involvement, (10) their student performance, (11) their buildings, and (12) other information relating to their individual schools to ascertain whether students were receiving an opportunity to acquire a minimally adequate education Most of the principals were not called as witnesses by the Plaintiffs at trial because their pre-trial testimony did not corroborate the other testimony presented at trial Therefore, the

Senate and the House proffered, and the trial court accepted, the designations of these depositions under Rule 32(a)(2) of the South Carolina Rules of Procedure, over the objections of Plaintiff (Trial Tr (06/22/04), p 74, ll 25—p 78, ll 9) The trial court ruled that the principal depositions were admissible as the depositions of managing agents of the Plaintiff Districts, and therefore the depositions could be used by the Defendants for any purpose under Rule 32(a)(2), SCRPC

Plaintiffs argue that their own school principals—who direct the operations and affairs of their schools, including supervising teachers and staff, determining which teachers to retain or not to renew, managing ADEPT, directing curriculum instruction, directing maintenance in their facility, and who are the individuals responsible daily for the safety and instruction of all students who attend their schools—are not managing agents for purposes of Rule 32(a)(2), SCRPC (Pls ' Br 54-59) But who better than the principal to speak for the specific school?

Our appellate courts have not defined “managing agent” for the purposes of Rule 32(a)(2), SCRPC Other courts, however, have stated that the test to be applied in determining whether a deponent is a managing agent is as follows

The test as to whether one serves in such capacity to a party so that the party may be deposed through him as managing agent is not title, but the functions performed in furtherance of the party's activities and interests If the person has general powers to exercise his judgment and discretion dealing with corporate matters he may be deemed a managing agent

Scott County Sch Dist 1 v Asher, 312 N E 2d 131, 135 (Ind Ct App 1974) Pursuant to this definition, the Indiana Court of Appeals held that both a school superintendent and shop teachers were managing agents within the meaning of the deposition rules *Id*

Similarly, the Maryland Court of Special Appeals found that a city day camp director, who had been the director of the day camp for 14 years, promulgated and enforced the rules of the day camp, hired employees, scheduled trips and obtained transportation for the trips, was a managing agent of the city so far as the camp was concerned, even though she worked under the supervision of superiors *Mayor & City Council of Baltimore v Austin*, 392 A 2d 1140, 1144 (Md Sp App 1978) The court concluded that even though the day camp director had superiors, her “knowledge of the day-to-day operation of the [day camp] was far more direct and superior to that of the Superintendent ” *Id*

Similarly, the principal is the most responsible and knowledgeable individual to testify about the details of the schools In many instances, the superintendent would not be as knowledgeable as the principal is about all of a particular school’s facts, as well as teachers’ performance on a daily basis in the classrooms The principals revealed a thorough command of the details of the qualifications of their teachers, the classes taught at their school, the materials utilized, and the facilities available

The principal’s availability to testify at trial is of no consequence under Rule 32(a)(2), SCRCP The deposition of a managing agent can be used for any purpose by the opposing party

Even though the trial court correctly determined that the principals were managing agents, another provision of the Rule would also justify their admission Rule 32(a)(3), SCRCP authorizes the use of a deposition by a party for any purposes if the court finds that “upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the important of presenting the testimony of witnesses orally in open court, to allow the deposition to be

used ” Rule 32(a)(3)(E), SCRCP Exceptional circumstances clearly existed to justify the admission of the deposition testimony of the principals in this case The unprecedented, non-jury trial of this case stretched the limits of the court’s resources The trial spanned 102 days over seventeen months Defendants’ case only lasted twenty-one of those days, while Plaintiffs’ case lasted eighty days The trial court was justified in allowing the deposition testimony through designation when, had the live testimony of thirty-six more witnesses been required, the parties would have been in trial for at least another six months, based upon the track record of the case The preference for live testimony is diminished in a non-jury trial, as fact finding courts frequently resolve cases on a partially written testimonial record The trial court, over the course of a lengthy trial, had absorbed enough live testimony in this case to be quite familiar with the subject matter contained in the depositions In reality, much of the testimony was a catalogue of conditions and teacher qualifications which the Court readily understood

Plaintiffs’ vigorous objections to the deposition testimony of their own principals underscore the fact that those principals contradicted the testimony of the superintendents and certain selected district employees While Plaintiffs protest that the testimony of the principals was mischaracterized in the trial court’s findings, such is hardly the case, and the trial court was justified in relying on and considering this evidence ³³

³³ Plaintiffs argue that the trial court mischaracterized certain of the principals’ testimony in its Order, yet a closer examination of the testimony refutes that criticism For example, Plaintiffs’ claim that Allendale’s Principal, Dr Judy Franchini, testified that teachers in Allendale Elementary School were following an old curriculum guide aligned to standards no longer in effect (Pls ’ Br 59 (citing to Trial Tr (10/08/03), p 19, ll 1-3)) and criticize the trial court for relying on a questionable inference from her deposition to find that the teaching in Allendale was pursuant to the current curriculum standards However, Dr Franchini could not have been clearer in her deposition concerning her teachers following the curriculum standards in Allendale “Q Do you in all respects

IV Teacher Issues in the Plaintiff Districts Do Not Deprive Students of the Opportunity to Acquire a Minimally Adequate Education

Despite the uncontestable adequacy of South Carolina's system of teacher training, certification and licensing, Plaintiffs nonetheless argue that teachers in the Plaintiff Districts are inadequate (See Pls' Br 19-49) Plaintiffs claim that their teachers were "newer," "younger," less experienced, possessed "substandard" certifications, attended "non-competitive" colleges and universities, had fewer graduate degrees, stayed in their districts for less time, and were paid less Thus, Plaintiffs contend that the absence of "quality" teachers in their districts explained why their students underperform on the state's PACT tests Plaintiffs argue that because the state is not able to pay its teachers substantially more, the state deprives students in the Plaintiff Districts the opportunity to acquire a minimally adequate education (Pls' Br 33-38) This flawed rationale, of course, assumes a causal relationship between teacher characteristics and achievement that does not exist and ignores the powerful relationship between poverty and achievement that does exist

conform the curriculum in Allendale to the state standards? A Yes Q And you are satisfied that your teachers are following those curriculum standards? A Yes" (Franchini Dep , (10/03/03), p 59, ll 16-21) This is the same testimony that Plaintiffs describe as only raising "questionable inferences"

Plaintiffs then complain that the trial court mischaracterized Dr Archie Franchini's testimony concerning Estill High School's curriculum guides At trial, Dr A Franchini testified that his school had not yet developed curriculum guides for use by the teachers that were aligned to the state standards Yet in his deposition, Dr A Franchini testified as follows "Q [T]oday, as we sit here do you have curriculum guides at Estill High that are aligned to state standards? A Yes, we do " (A Franchini Dep , p 11, l 21-23) Dr A Franchini testified in his deposition that curriculum guides were complete for English/language arts, math and science and that curriculum guides for social studies would be completed in time for the school year 2003-2004 (*Id* at p 15, l 23—p 16, l 16) This occurred before he testified at trial As is evident, these principals' deposition testimony is certainly not "questionable " Rather, it is unequivocal and the trial court was entitled to rely on this sworn testimony

The trial court thoroughly analyzed the testimony offered on the issue of teacher quality in the Plaintiff Districts (Order dated Dec 29, 2005 ¶¶ 196-261) The evidence establishes (1) that the distinctions between the characteristics of the teachers in the Plaintiff Districts and the rest of the state, while slightly different, are not enough to explain the differences in student performance, and (2) in fact, when SES is controlled for in the analysis, there is no significant impact on student performance when teacher characteristics are controlled and considered

Despite Plaintiffs' repetitive and subjective testimony concerning the quality of the teachers in their districts, the principals in these same schools stated that while not all teachers in their schools were performing as desired, those underperforming were either invited not to return, or were working through the ADEPT process

Plaintiffs complain that the trial court "focused largely on 'empirical evidence'" in reaching its conclusions instead of relying on the "whole of the record " (Pls ' Br 19) But the empirical data establishes that there is no statistical association between teacher characteristics and achievement The trial court therefore properly concluded that based upon a variety of reasons and objective analyses supported by the record, teachers in the Plaintiff Districts did not deprive students the opportunity for a minimally adequate education

A Disparities in teacher characteristics between Plaintiff Districts and the rest of the state are minimal

1 Average compensation

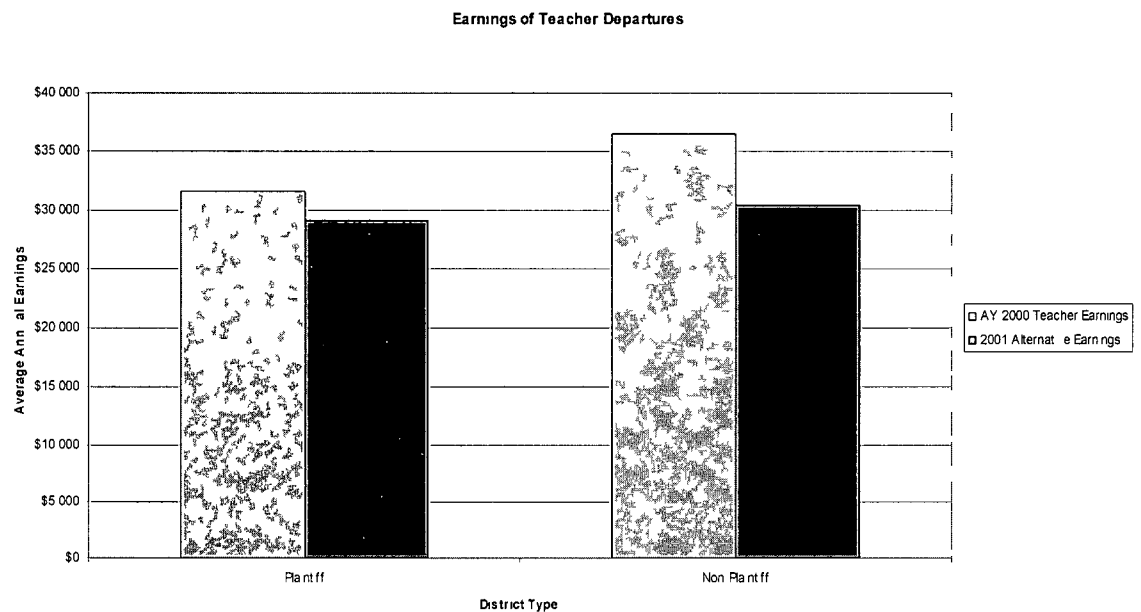
Plaintiffs contend that teacher salaries are inadequate to permit the Plaintiff Districts to attract and retain qualified teachers (Pls ' Br 33-38) As Dr Podgursky observed based on his research, however, teacher pay in the Plaintiff Districts is not out

of line compared to other professions in the Plaintiff Districts and as compared to other labor markets in other states (Trial Tr (06/15/04), p 37, ll 4-18) Based on his research on teacher pay in the Plaintiff Districts as compared to other states, Dr Podgursky concluded that “as compared to other states teacher pay looks competitive and based on my general examination I think it’s—it’s adequate to—to produce an adequate supply of teachers” (Trial Tr (06/15/04), p 53, ll 21-25, p 54, ll 1-23, *see also* Trial Tr (09/24/03) (Janice Poda), p 43, ll 13-20 (testifying that South Carolina’s average teacher salary tracks the southeastern average teacher salary), Trial Tr (08/17/04) (Robert W Harrell), p 71, ll 1-25, p 72, ll 1-2 (testifying that teacher salaries in South Carolina are close to the national average))

Plaintiffs argue that salaries in their districts are directly related to their inability to keep teachers in their districts, who leave, allegedly, for higher salaries paid by other districts (Pls’ Br 33-38) However, the evidence shows that teachers leave the profession for reasons other than money (Trial Tr (06/21/04), p 104, ll 1-12, Defs’ Ex 3183) Additionally, the principals testified that they had teachers in their schools who lived in other counties and even out of state Thus, Plaintiff Districts would appear to be able to attract teachers to their districts, which is just the opposite of what they complain (*See* Monahan Dep (04/22/03), p 86, l 6 – p 87, l 6, Weatherford Dep (05/02/03), p 62, l 15 – p 63, l 20, Elkins Dep (04/23/03), p 77, l 23 – p 78, l 13, Stafford Dep (04/21/03), p 50, l 16 – p 51, l 22, Lee Dep (04/23/03), p 61, l 20 – p 62, l 21, Green-Richardson Dep (04/23/03), p 55 l 18 – p 57, l 5)

Admittedly, some teachers in the Plaintiff Districts leave the profession completely, as is the case in every district According to Dr Wolkoff, the percentage is

approximately 10-12% and that is consistent with the national figures for teacher departure (Trial Tr (06/21/04), p 93, l 17—p 94, l 1) But compensation does not appear to be the principal reason that teachers in the Plaintiff Districts leave the profession. Certainly, they are not crossing state lines uniformly seeking higher pay (Trial Tr (06/15/04), p 19, ll 20-25, p 20, ll 1-17) As analyzed by Dr Wolkoff, in both Plaintiff and non-Plaintiff Districts, teachers who left teaching on average made less money in their post-teaching employment than they had made as teachers

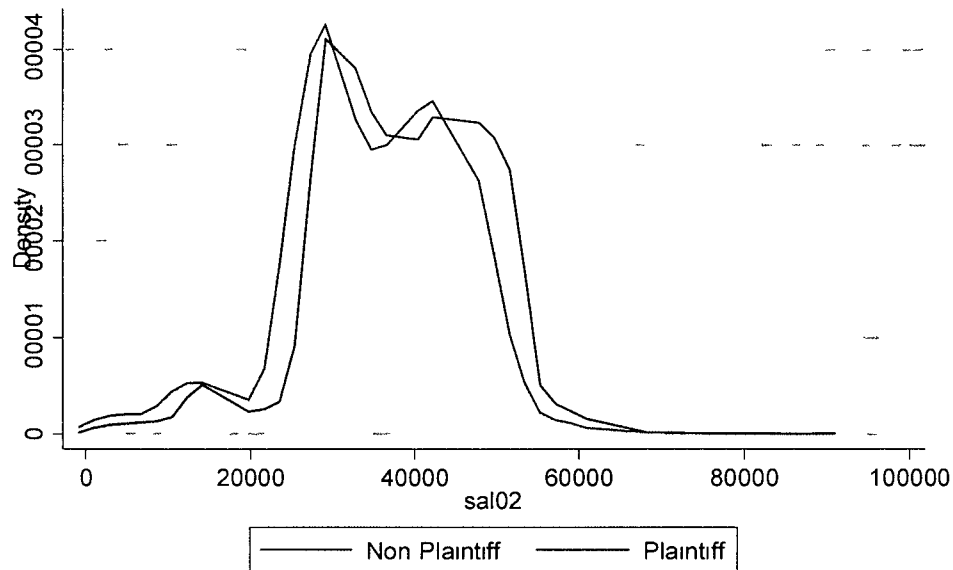


(Def's ' Ex 3195, Trial Tr (06/21/04), pp 120–122) Thus, it is clear that issues other than compensation affect the decision to leave teaching for other employment, and therefore increasing teacher pay would be unlikely to have a significant effect on the issue, even if it were a constitutional violation

Although the average teacher salaries in the Plaintiff Districts are generally less than the average salaries in other districts, a comparison of the averages does not reveal how compensation compares for any given teacher. In fact, Dr Wolkoff's analysis

establishes that there are teachers in the Plaintiff Districts who are earning more than teachers in the non-Plaintiff Districts and that salary ranges are comparable in both types of districts

Distribution of Full Year Classroom Teacher Salaries by District Type
AY 2003



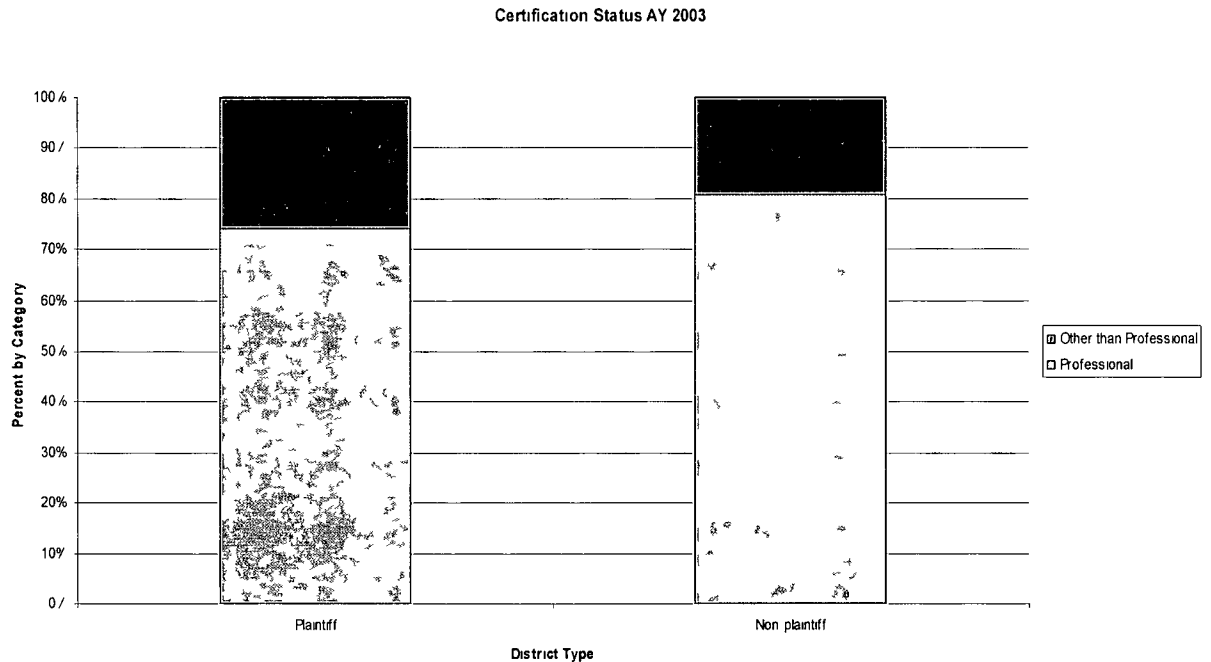
(Defs ' Ex 3204, Trial Tr (06/21/04), p 46, l 24—p 50, l 13)

Nor is higher teacher pay necessarily an indicator of higher teacher quality. The salary scale for teachers is largely governed by years of employment and graduate degrees more than any other factor. (Trial Tr (06/15/04), p 11, ll 17-25, p 12, ll 1-11)

2 Professional Certification

Professional certification “is a standard that [a] teacher would achieve after three years, conditional upon appropriate performance reviews and also passing the exams that are required” (Trial Tr (06/21/04), p 78, ll 6-25, p 79, ll 1-2). Dr. Wolkoff considered the percentage of teachers certified in the Plaintiff Districts and in the non-

Plaintiff Districts and found the differences to be minimal. For example, in 2003, the differential was only about 8%.



(Defs' Ex. 3170, *see also* Defs' Ex. 3167, 3168, 3169, Trial Tr. Trial Tr. (06/21/04), pp. 77-83). Thus, there is not a substantial difference between the percentages of teachers with professional certificates in the Plaintiff Districts than in the non-Plaintiff Districts.

According to Plaintiffs, many teachers in the Plaintiff Districts fail the Praxis test at least once (Pls' Br. 23). These individuals are certified, however, because they passed the test on another attempt (Trial Tr. (9/22/03), p. 133, ll. 1-25, p. 134, ll. 1-2, Trial Tr. (11/04/04), p. 164, ll. 23—p. 165, l. 18). Plaintiffs further suggest that the average number of failures in the Plaintiff Districts exceeds that of the average number of failures in the state at large (Pls' Br. 23). However, when this amount was actually quantified in the Plaintiff Districts, Dr. Poda testified that only 0.7% (7/10 of a percent) of teachers in the Plaintiff District has failed ADEPT and Praxis (Trial Tr. (11/04/04), p.

181 ll 8-14, p 186, ll 11-15) Put another way, of the approximately 1100 teachers in the Plaintiff Districts, only 9 teachers failed ADEPT and Praxis (*Id*) If teachers who fail Praxis on one occasion are not qualified to teach, then the SDE can and should withdraw their certification No legislation and no order from this Court is required, and certainly, no constitutional violation exists

3 Advanced degrees

Dr Armor compared teachers with advanced degrees in the Plaintiff and non-Plaintiff Districts and found the differences to be minimal For example, in elementary schools, 37 percent of the teachers in the Plaintiff Districts have advanced degrees, while 49 percent of the teachers in elementary schools in the rest of the state have such degrees (Defs ' Ex 3342, p 112, *see also* pp 114, 116) It is therefore apparent that the actual differences between Plaintiff and non-Plaintiff Districts in this area are not very great, and the fact that there are relatively fewer teachers with advanced degrees in the Plaintiff Districts does not constitute a constitutional violation This is especially so when one considers that there is no relationship between the percentage of teachers with advanced degrees and achievement *See* discussion, *infra* at Section V(F)

4 Teacher Experience

Plaintiffs complained of the relatively lower experience levels of their teachers when compared to teachers in non-Plaintiff Districts (Pls ' Br 27) But in reality, for the 2000-2001 school year, the average experience of teachers in the Plaintiff Districts was over 13 1 years, compared with 13 6 years in the non-Plaintiff Districts (Defs ' Ex 697) This is hardly a difference worth noting

B Teacher turnover in the Plaintiff Districts is not caused by inadequate compensation or low property tax wealth

Plaintiffs further contend that the rate of turnover itself denies students in the Plaintiff Districts the opportunity to acquire a minimally adequate education, and that the higher turnover rates in their districts are caused by lower salaries relative to other districts in the State, particularly salaries provided in adjoining districts (*See* Pls ' Br 33-38) Additionally, the superintendents in the Plaintiff Districts all testified that they are unable to pay salary supplements at a level consistent with other districts because they have fewer local dollars available for that purpose (Trial Tr (07/30/03), pp 161-164) Thus, Plaintiffs argue that they are constantly losing their best teachers to other districts in the state Neither of these contentions is correct

1 Turnover is not substantially greater in the Plaintiff Districts than in other districts

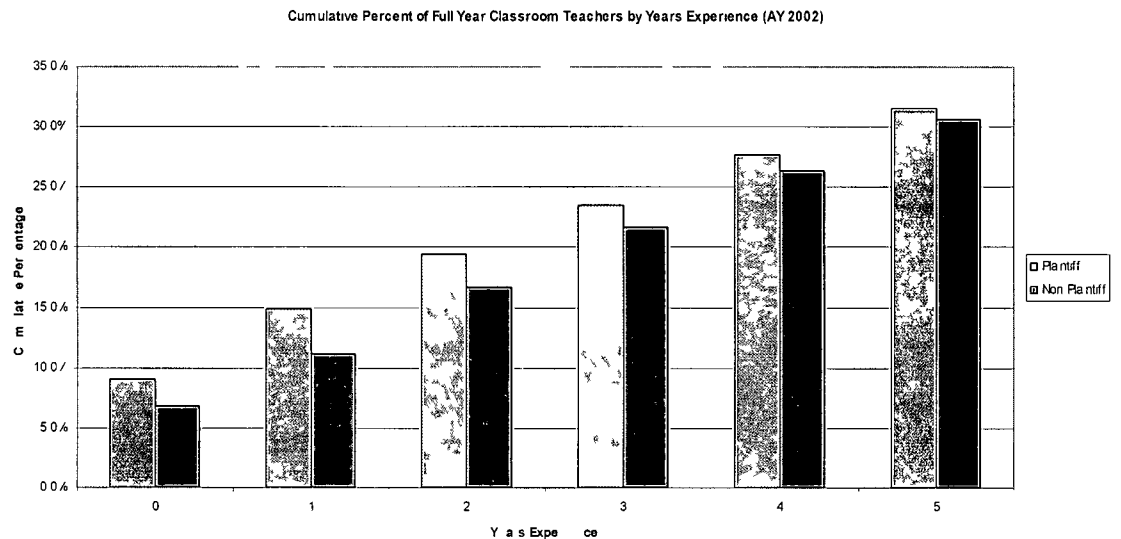
"Turnover" refers to the percentage of "new" teachers employed at a school or district each academic year In the statistics, however, "new" does not necessarily mean inexperienced It only means that the individual was not at that school the year before Thus the use of "new" in this context is somewhat misleading

Teacher turnover in the Plaintiff Districts is only about ten percent higher than in other districts This difference does not mean that the Plaintiff Districts have less qualified, less educated, or less experienced teachers, however

2 Turnover does not result in less qualified teachers

Dr Wolkoff examined the experience level of "new" teachers in the Plaintiff Districts and compared their experience to "new" teachers in non-Plaintiff Districts His conclusion from that comparison is that the experience level of "new teachers" in both

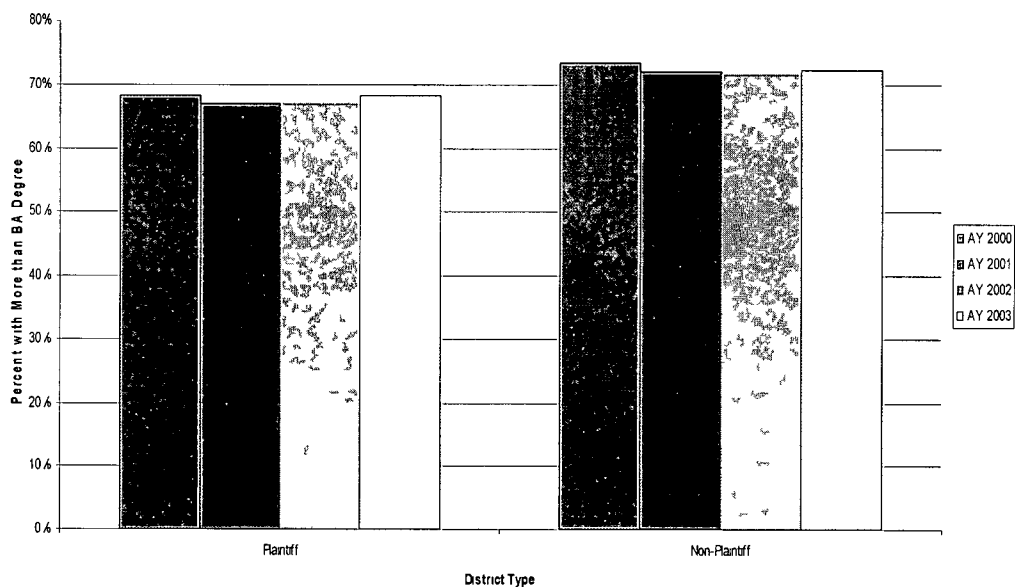
the Plaintiff and the non-Plaintiff Districts is fairly evenly distributed between 1 and 5 years



(Defs ' Exs 3283, 3217, 3284, 3285, 3286, 3287—3294) Plaintiffs have about 2-3% more teachers with less than three years experience, but that small percentage is insufficient to support a finding that Plaintiffs' teachers are inadequate

The same is true of the education levels of teachers in the Plaintiff and non-Plaintiff Districts

Full Year South Carolina Teachers with More than BA Credits

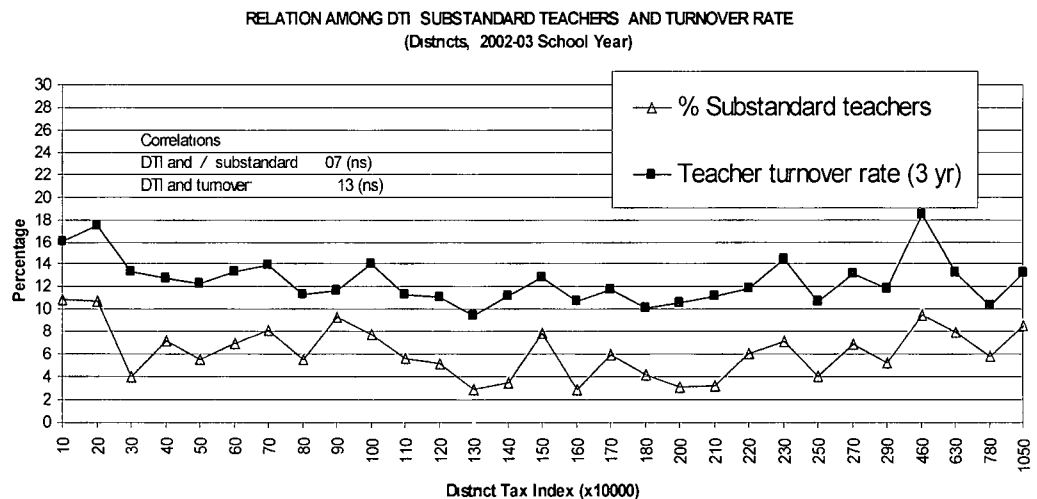


(Defs ' Ex 3164 See also Defs ' Ex 297, 3166, 3170, 3187, Trial Tr (06/21/04), p 111, ll 7-11 (establishing that teachers moving into Plaintiff Districts had on average more education than teacher moving out of the Plaintiff Districts), p 116, ll 5-18, Defs ' Ex 391 (establishing that new and returning teachers in Plaintiff Districts and non-Plaintiff Districts have, on average, the same amount of experience), p 117, ll 17-p 118, l 1 (establishing that "new and returning" teachers in the Plaintiff Districts have similar education levels), p 123, ll 3-16, Defs ' Ex 3185, 3186 (establishing that the flow of teachers from the Plaintiff Districts has decreased over time), p 124, ll 13-25—p 125, l 1, Defs ' Ex 3183 (establishing that teachers who moved into the Plaintiff Districts had more education and more experience than the teachers who moved from the Plaintiff Districts into the non-Plaintiff Districts and those teachers who left teaching altogether, earned less in the following year than they were earning as a teacher))

Thus, Plaintiffs' assertion that teacher turnover results in less qualified teachers in the Plaintiff Districts is not borne out by the evidence

3 Turnover is not related to compensation or property wealth

Nor is it apparent that the higher levels of turnover in the Plaintiff Districts result from lower local revenues from which salary supplements can be paid. Dr. David Armor specifically looked at this issue by correlating the rate of teacher turnover and the rate of "substandard" teaching certificates with the "DTI," which is used by the SDE to determine the percentage of EFA funds allocable to each district based on its property wealth. (Defs' Ex. 3342, p. 118). If higher turnover and fewer "standard" certificates are the necessary result of lower local revenues, there should be a direct statistical relationship between turnover and certification rates on the one hand, and property wealth on the other. Dr. Armor's analysis, however, reveals that there is no such relationship.



(Defs' Ex. 3342)

It is not necessary to perform a statistical analysis, however, to understand that there are factors other than money that affect the ability of any district to attract and

retain teachers. As many witnesses testified, the Plaintiff Districts lack housing, shopping, entertainment, and other amenities that would make them more attractive to teachers. (Trial Tr (09/23/03), p. 25—p. 27). No doubt at least some of the turnover problem is the result of factors outside of the salary schedule and the local supplements paid by the Plaintiff Districts.

C Professional Development in the Plaintiff Districts is adequate and poor programs are not caused by lack of money or poor policies

Plaintiffs then argue that continuing professional development for teachers in their districts is ineffective, (Pls.’ Br. 46-49), and cannot remedy poor teacher quality. However, it must be noted that professional development is a function of the district which makes it available to its teaching staff.

Further, although there is a statistical association between the number of professional development days and achievement, schools in the Plaintiff Districts get more days of professional development than schools in the non-Plaintiff Districts. (Trial Tr (06/15/04), p. 133, ll. 2-25, p. 134, ll. 1-9).

The Plaintiff District superintendents testified that the professional development programs that they employed in their Districts were indeed “spray and pray,” and therefore could not improve the quality of their teaching forces. (*See, e.g.*, Trial Tr (07/30/03), p. 110, ll. 15-18, (08/7/03), p. 98, l. 9 – p. 99, l. 25, (09/30/03), p. 18, ll. 3-16). Plaintiffs seek to avoid all responsibility for poor professional development programs and attempt to transfer responsibility for it squarely with the state, which only funds the professional development programs. (Pls.’ Br. 48). However, if Plaintiffs lack effective professional development programs, they cannot blame it on a lack of funding. Under the EAA, when a school or a school district has a “below average” or

“unsatisfactory” rating on the report cards, they receive additional “retraining grants” for their teachers in the form of additional funding for professional development (Defs’ Ex 3131, p. 40). In the school year 2002-2003, John Suber, Director of the Office of School Quality, with the SDE and in charge of interventions under the EAA, testified that in one year alone, Plaintiffs received *an additional* \$700,000 earmarked for *additional* professional development in twenty-eight schools, or \$25,000 per school. Suber acknowledged that his office was responsible for supervising the retraining grant program, distributing the funds, and providing the guidelines for appropriate use of those funds (Trial Tr. (03/31/04), p. 12, ll. 8-11).

Moreover, the trial court correctly observed that Plaintiffs did not establish evidence of any impediment that prevents the Plaintiff Districts from providing higher quality, “sustained” professional development for their teachers (Order dated Dec. 29, 2005 ¶ 221). There was no evidence offered that high quality programs are more expensive, or more difficult to obtain. To the extent that the professional development provided by the Plaintiff Districts is not helpful, the Plaintiff Districts can and should focus their efforts on programs that are calculated to meet the needs of their teachers. The superintendents testified about the type of programs that are more beneficial, and therefore they know what to do (*See e.g.*, Trial Tr. (07/30/03), p. 110, ll. 4-25, p. 111, ll. 1-3, Trial Tr. (10/02/03), p. 179, ll. 12-25, p. 180, ll. 7-24, (Trial Tr. (08/07/03), p. 99 ll. 9-25, p. 100, ll. 1-10, Trial Tr. (04/02/04), p. 57, ll. 15-25, p. 58, ll. 1-5, Trial Tr. (01/07/04), p. 19, ll. 11—p. 21, l. 10, Trial Tr. (03/04/04), p. 173, ll. 6-14, p. 195, ll. 5-25, p. 196, ll. 1-3, p. 226, ll. 5-22, Trial Tr. (03/05/04), p. 18, ll. 1-25, p. 19, ll. 1-14). They should implement the programs they believe would be more effective.

D The relatively lower achievement levels in the Plaintiff Districts is not attributable to disparities in teacher characteristics

The small differences in teacher characteristics between the Plaintiff Districts and the non-Plaintiff Districts do not explain the relatively lower levels of achievement in the Plaintiff Districts. Dr. Michael Podgursky and Dr. David Armor, who analyzed student achievement in depth through PACT scores and teacher characteristics from a number of different perspectives, determined that there were no significant achievement differences attributable to teacher characteristics. (Trial Tr. (06/15/04), p. 97, l. 5—p. 113, l. 21, Defs.' Ex. 3342, pp. 39, 51, 64, 77, 91, 104 (no statistical association between teacher certification and achievement), p. 124, l. 21—p. 127, l. 4, p. 141, ll. 2-22, p. 146, l. 22—p. 147, l. 11, Defs.' Ex. 704, 709, 713 (no statistical association between percentage of teachers on continuing contracts and achievement), p. 127, l. 5—p. 130, l. 11, p. 141, l. 23—p. 142, l. 21, p. 147, ll. 12-19, Defs.' Ex. 705, 710, 714 (no statistical association between out-of-field teaching permits and achievement), p. 12, ll. 7-23, p. 131, l. 12—p. 133, l. 1, p. 143, ll. 8-16, Defs.' Ex. 706, 711, 715 (no statistical association between teacher experience and achievement), p. 140, l. 14—p. 141, l. 1, p. 145, ll. 1—p. 146, l. 21, Defs.' Ex. 703, 708 (no association between teachers with advanced degrees and achievement), Trial Tr. (09/20/04), p. 125, ll. 14-24, Defs.' Ex. 3342, pp. 33, 34, 45, 58, 71, 85, 98 (no statistical association between teacher pay and achievement), Trial Tr. (09/20/04), p. 138, ll. 3-14, Pls.' Ex. 251-C (no statistical association between teacher turnover and achievement))

At the end of the case, the objective evidence left no debate that teacher characteristics could not explain the disparity in student achievement existing between the Plaintiff Districts and the non-Plaintiff Districts. The trial court therefore correctly

ruled that the Plaintiff Districts' teachers did not deprive students of the opportunity to acquire a minimally adequate education

V Achievement in the Plaintiff Districts Demonstrates That the Opportunity to Acquire a Minimally Adequate Education is Present

A PACT scores demonstrate opportunity is present in the Plaintiff Districts

According to Plaintiffs, in each year from 2001-2004, nearly half of the students in the Plaintiff Districts were scoring below basic on PACT, and therefore a majority of students in the Plaintiff Districts are not meeting minimum expectations (Pls.' Br. 100-101). As has been previously pointed out, the vast majority of students in the Plaintiff Districts are on free and reduced lunch. According to the 2003 district report cards, those percentages are as follows:

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

(Defs.' Ex. Nos. 2971, 2976, 2983, 2987, 2991, 2997, 3004, 3009). Notwithstanding the high incidence of poverty, however, approximately half of the students in these districts

have scored basic or above on PACT For years 1999 through 2007, the percentages scoring basic or above are as follows³⁴

PACT SCORES 00-07

	2000	2001	2002	2003	2004	2005	2006	2007
Allendale								
ELA	36 3	48	49 3	42 9	49 5	53 2	55 5	51 2
Math	32 9	45	40 5	50 5	52 9	54 8	49 2	53
Dillon 2								
ELA	70 4	56	68 5	47 8	59 9	60 3	61 3	58 8
Math	66 9	47	54 7	61 7	62 5	60 9	63 9	62 2
Florence 4								
ELA	49 4	43	49 8	49 6	59	49 7	57 2	54 2
Math	46 6	37	47 9	51 5	58 7	53 4	55	49 2
Hampton 2								
ELA	42 9	45	43 1	45 7	62 5	55 6	59 6	53 4
Math	30 1	32	29 7	40 6	56 6	54	60 4	53 5
Jasper								
ELA	48 3	45	46 1	46 8	49 8	55	52 4	50 7
Math	56 5	32	35 4	45 5	47 1	50 5	44 9	44 8
Lee								
ELA	58 9	42	48 5	48 5	55 4	54 7	57 3	51 4
Math	43 9	31	39 5	49	51 7	54 9	51 8	47 1
Marion 7								
ELA	66	39 6	54 8	45 3	54 8	52 4	60 8	57 4
Math	65 6	55	48 9	47 7	49 1	53 7	51 6	52 2
Orangeburg 3								
ELA	62 6	57	59 9	55 3	65 3	63 4	65 7	59 8
Math	53 8	47	48 7	55 5	61 4	63 3	66 3	64 6

Thus, a significant percentage of students on free and reduced lunch in the Plaintiff Districts have “passed” the PACT test

As is fully developed in the Senate and the House’s Cross-Appeal Brief, the fact that such large percentages of students who are on free and reduced lunch score basic or

³⁴ The PACT scores referenced from 2000 to 2004 were admitted in evidence at trial and are reflected in the trial court’s order at pp 62-89 The PACT scores from 2005-2007 are from the South Carolina Department of Education’s website, <http://ed.sc.gov/agency/offices/assessment/pact/scores.html>, and Defendants ask this Court to take judicial notice of those scores

above on PACT absolutely establishes that the opportunity for at-risk students to acquire a minimally adequate education is present in the Plaintiff Districts. Moreover, as Dr Guthrie notes, PACT scores are improving in the Plaintiff Districts over time. (See Trial Tr (09/21/04), p 3, ll 9-25, p 4, ll 1-14, p 10, ll 16-25, p 11, ll 1-25, p 12, ll 1-14, p 14, ll 2-25, p 15, ll 1-4). This increase in the Plaintiff Districts is a result of South Carolina's EAA. As Dr Guthrie testified, this explains why "the percent meeting standards in the early grades is higher than the percent meeting standards in the—in the later grades because the accountability system has been in place but for a relatively short period of time." (Trial Tr (09/21/04), p 12, ll 15-25, p 13, ll 1-25, p 14, l 1). This improvement in PACT scores for young students in the Plaintiff Districts and steady rise in achievement as a result of the EAA is seen in every Plaintiff District. (See Trial Tr (09/21/04), p 15, ll 5-25, p 16, ll 1-25, p 17, ll 1-20 (noting general improvement in PACT scores in Marion 7 due to the accountability system), p 17, ll 21-25—p 19, ll 1-9 (noting general improvement in PACT scores in Lee County due to the accountability system), p 19, ll 10-25, p 20, ll 1-19 (noting general improvement in PACT scores in Jasper County due to the accountability system), p 20, ll 20-25, p 21, ll 1-25, p 22, ll 1-5 (noting general improvement in PACT scores in Hampton 2 due to the accountability system), p 22, ll 6-25, p 23, ll 1-21 (noting general improvement in PACT scores in Florence 4 due to the accountability system), p 23, ll 22-25—p 25, ll 1-5 (noting general improvement in PACT scores in Dillon 2 due to the accountability system), p 25, ll 6-25, p 26, ll 1-25 (noting general improvement in PACT scores in Allendale due to the accountability system)).

Better achievement is a goal to be sought, but the current levels of PACT scores are more than sufficient to satisfy the constitutional requirement

B The High School Assessment Program (HSAP) passage rate establishes that opportunity is present in the Plaintiff Districts

The same is true for the HSAP. The HSAP is an exit exam adopted for use in South Carolina in 2004. (Trial Tr. (02/24/04), p. 57, ll. 13-25, p. 58, ll. 1-15). Students have three opportunities to pass the HSAP. (Trial Tr. (02/24/04), p. 59, ll. 8-15). According to Plaintiffs, in 2004, “more than 55% of students in the Plaintiff Districts taking the [HSAP] exam failed.” (Pls. Br. at 101-102). This is incorrect. To the contrary, the exhibit cited by Plaintiffs shows that with the exception of Hampton 2 and Jasper County, more than 55% of students in the Plaintiff Districts in 2004 *passed* the HSAP on the *first* attempt while they were in the *tenth* grade. (See Pls.’ Ex. 6859E). In each Plaintiff District, this percentage increases on average to over 85% when students who initially fail the HSAP in the tenth grade take the test again.

	2004 Percent of Tenth Grade Passage of HSAP on first attempt	2004 Exit Exam Passage Rate by Spring 2004
Allendale	58%	85.3%
Dillon 2	66.7%	93.1%
Florence 4	63.4%	85.5%
Hampton 2	44.9%	88.9%
Jasper	48.8%	94.2%
Lee	55.3%	78.9%
Marion 7	62.5%	83.7%
Orangeburg 3	64.7%	87.0%

The fact that a majority of students pass the HSAP on their first attempt, and the fact that over 85% of students eventually pass an exit exam conclusively establishes that the opportunity to acquire a minimally adequate education is present in the Plaintiff Districts³⁵

C SAT/ACT scores

According to Plaintiffs, SAT and ACT scores for students in the Plaintiff Districts are well below state and national medians (Pls ' Br 102) While that is true, it does not establish that students do not have the opportunity to acquire a minimally adequate education First, as Dr Guthrie testified, the SAT and ACT "are not generally accepted to be measures of a state's overall education system They are taken to be predictive measures of how seniors will perform in college They—they are not measures of a state's education system " (Trial Tr (09/21/04), p 83, ll 22-25, p 84, ll 1-12)

Second, low SAT and ACT scores in the Plaintiff Districts are a reflection of the fact that a large majority of students are on free and reduced lunch (Trial Tr (09/20/04), p 89, ll 19-25—p 92, ll 1-18) These test scores, however, do not mean that students in the Plaintiff Districts do not have the opportunity to learn (Trial Tr (09/20/04), p 92, ll 19-25, p 92, ll 1-2)

Finally, these low scores reflect the fact that as of the time of trial, "the accountability mechanisms have been in place but for a relatively short time" and have not "taken hold in a manner which would be reflected on graduation or completion rates or A C T scores or S A T scores " (Trial Tr (09/21/04), p 80, ll 6-25—p 83, ll 1-21)

³⁵ The trial court took judicial notice of the Plaintiff District's 2004 report cards in its order dated December 29, 2005 (See Order dated Dec 29, 2005, n 20-25, 27, 29)

Again, the goal is to improve SAT and ACT scores for all students in South Carolina. The current scores cannot be taken, however, as proof that the opportunity to acquire a minimally adequate education is absent.

D Graduation rates are not evidence that the opportunity to receive a minimally adequate education is lacking

Plaintiffs complain further that low graduation rates “raise serious questions about the effectiveness of the education system” for students in the Plaintiff Districts (Pls.’ Br. 102). But again, low graduation rates are not enough to prove that the state has failed to provide students in the Plaintiff Districts with the opportunity for a minimally adequate education. As Plaintiffs’ expert Dr. Terry Peterson testified, students drop out of high school for many reasons—reasons unrelated to education such as dropping out to work, pregnancy and child care, and criminal conduct. (Trial Tr. (06/10/04), p. 38, ll. 7-11).

But even given this fact, a review of the 2004 report cards³⁶ establishes that an overwhelming majority of students in the Plaintiff Districts graduate within four years³⁷.

	2004 Graduation Rate
Allendale	83.3%
Dillon 2	69.2%
Florence 4	64.4%

³⁶ See note 34, *supra*.

³⁷ The South Carolina Education Oversight Committee defines “graduation rate” as “[t]he percentage of original ninth-grade students who earn standard high school diplomas who graduate in four years or less.” See <http://www.sceoc.org/CmsPortal/AgencyHomePageTemplate.aspx?NRMODE=Published&NRNODEGUID={6D239C2F-64A3-42EE-A813-8D57402F6EFC}&NRORIGINALURL=/glossaryofterms/&NRCACHEHINT=NoModifyGuest#GraduationRate>

Hampton 2	68 1%
Jasper	83 4%
Lee	77 2%
Marion 7	80%
Orangeburg 3	77 3%

Graduation rates in South Carolina and in the Plaintiff Districts need to be improved. But if the opportunity to acquire a minimally adequate education did not exist in the Plaintiff Districts, no one would graduate. The fact that nearly 70% of students in each of the Plaintiff Districts graduated in 2004 compels the conclusion that students in the Plaintiff Districts have the opportunity to acquire a minimally adequate education.

E Other indicators

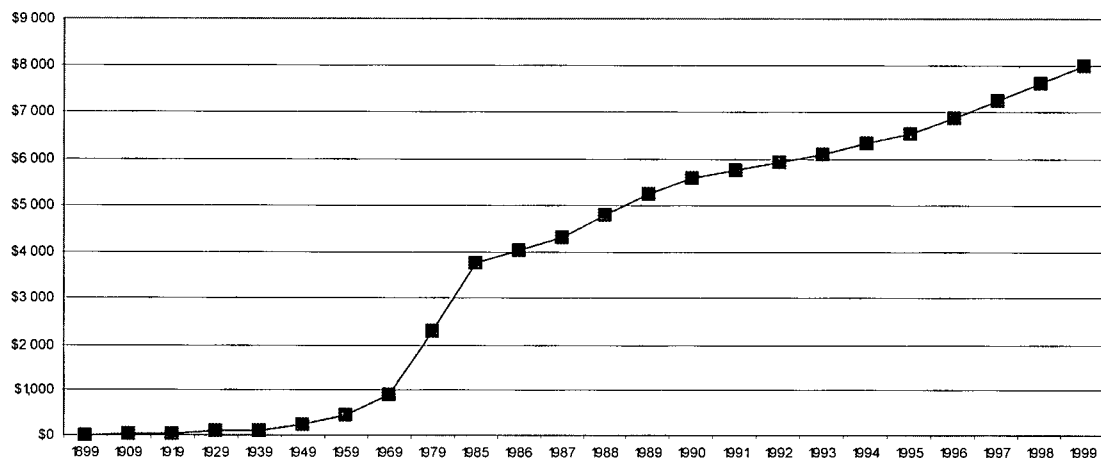
Finally, Plaintiffs contend that “in 2003, 75 percent of schools in the Plaintiff Districts were rated Unsatisfactory or Below Average, as compared to 17 4% of schools state-wide” (Pls.’ Br. 102). But what is striking is that between 2001 and 2003, the number of unsatisfactory schools in the Plaintiff Districts decreased by 27 2%, while the number of unsatisfactory schools in the state as a whole decreased only 13%. (See Pls.’ Ex. 6352A)³⁸ Thus, the level of improvement in school rankings in the Plaintiff Districts more than doubled between 2001 and 2003 as compared to the state as a whole. The Senate and the House submit that this improvement is attributable to the EAA, and will continue without intervention of the courts. (See discussion, *supra* at Section II (C)(3))

³⁸ This percentage was calculated as follows. In 2001, the number of unsatisfactory schools in the Plaintiff Districts was 247, and in 2003, the number of unsatisfactory schools was 180. 180 is 72 8% of 247. 72 8% minus 100 is 27 2%.

F No correlation exists between spending and achievement

Plaintiffs attempt to perpetuate the myth in this Court that better achievement can be bought by more spending. The trial court rejected this myth, and this Court should do the same. The empirical evidence in this case demonstrates beyond any doubt that there is no positive association between spending and achievement. That is true nationally and historically, as is vividly illustrated by pages 13-18 of Defendants' Exhibit 3307. That exhibit traces the meteoric rise in per pupil expenditures for education nationally over the entire twentieth century.

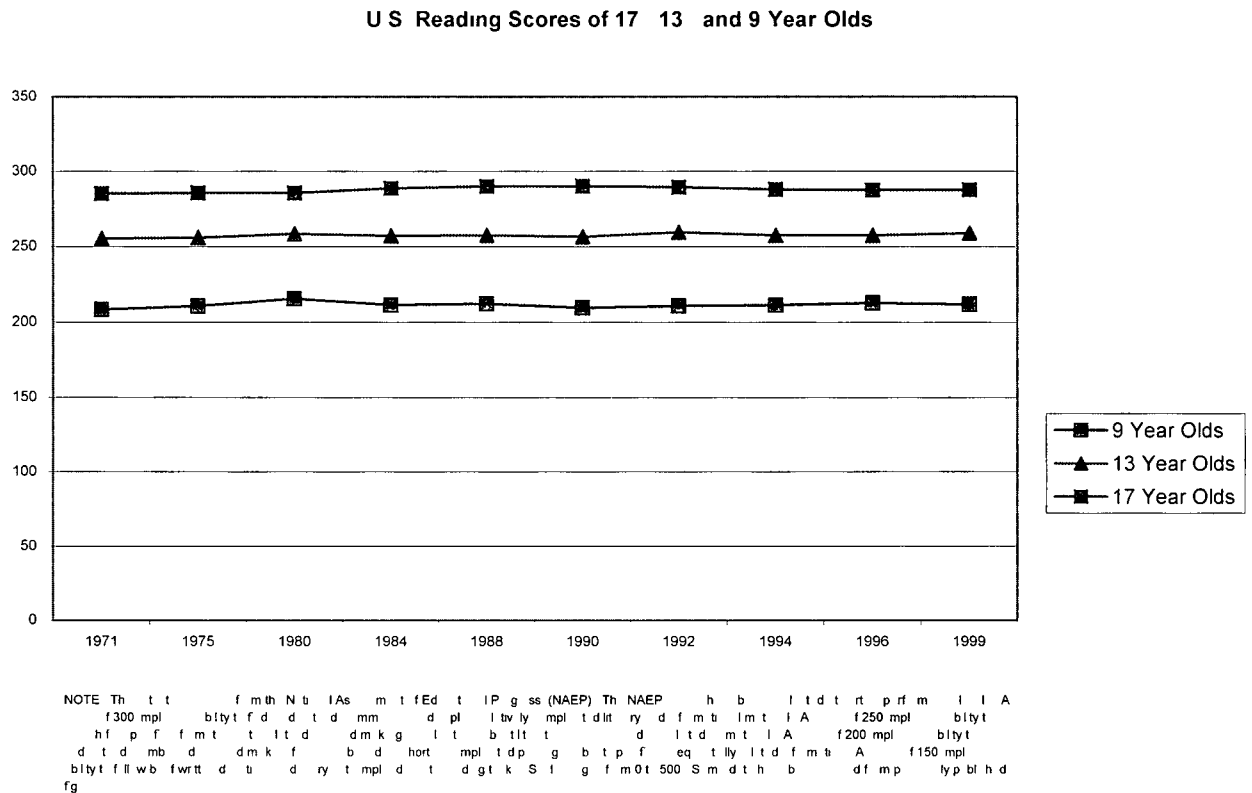
U.S. Per Student Spending in Current Dollars in Public Schools



Source: U.S. Department of Education; National Center for Education Statistics. Notes: Figures before 1985 are irregularly collected.

(Defendants' Exhibit 3307, page 13). During that time, the most accelerated increase in spending occurred in the thirty-year period from 1969 to 1999. However, the uncontested data shows that there was no corresponding increase in student achievement at any grade or in any subject during that same time period. (*Id.*) For example, the chart below shows the

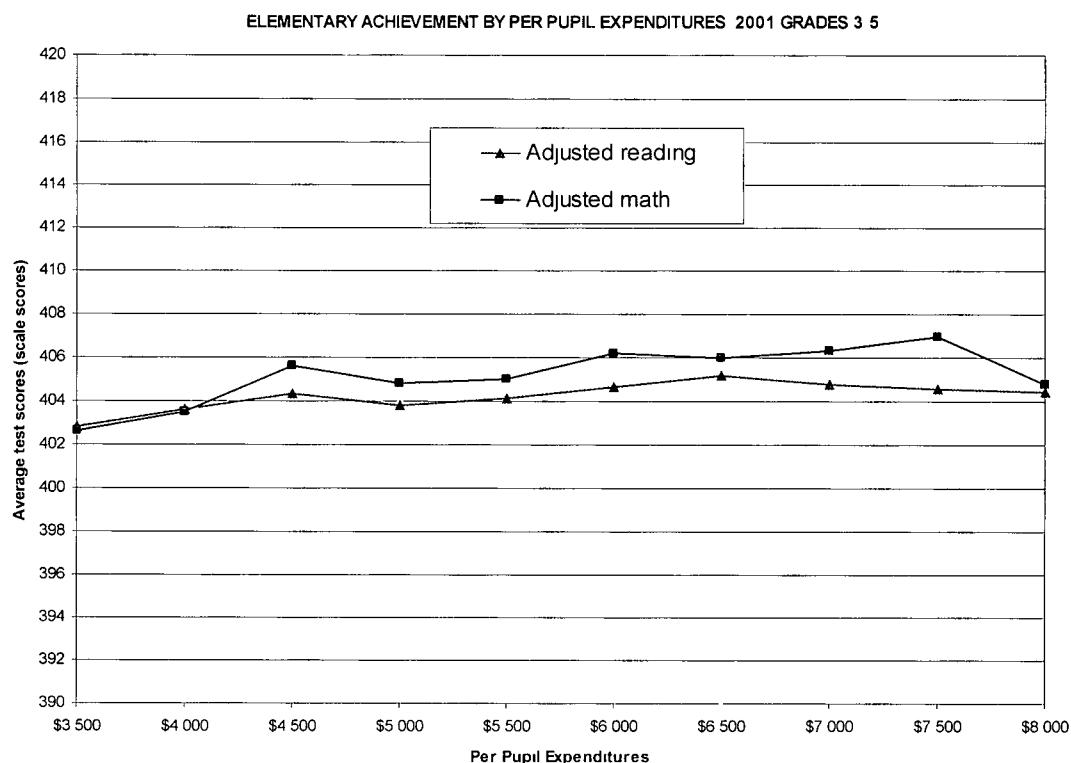
performance of nine, thirteen, and seventeen year old students on reading tests from 1971 through 1999



(Defendants' Exhibit 3307, p. 15) The scores of similar students in different subjects are not any different. This flat line of achievement nationally for over thirty years should put to rest any notion that better student achievement can be bought with money, and therefore legislated in an appropriation bill.

Nor does the history of spending and achievement in South Carolina tell a different story. One of Defendants' expert witnesses, Dr. Armor, examined this relationship in detail. Dr. Armor used South Carolina data to track spending and achievement in both elementary and middle schools. Defendants' Exhibit 3342, p. 84

tracks test scores (controlled for poverty so that they can be fairly compared)³⁹ in reading and math as per pupil spending in those grades increases



(Defs ' Ex 3342, p 84)

Just as the national data does not show any increase in achievement over time as expenditures have increased, the South Carolina data does not show any better achievement in the same year in schools with higher per pupil expenditures. The absence of any connection between more spending and better achievement is consistent across grades, subjects, schools, and years. (Defs ' Ex 3342, pp 57, 70, 84, 97)

Dr. Armor's analysis goes further, however, and demonstrates that there is no positive association between individual inputs that cost more money and better achievement. For example, Defendants' Exhibit 3342 compares achievement with

³⁹ As discussed above, controlling for poverty permits achievement to be compared as if the percentage of students in poverty were the same in every school.

average teacher salary (See Defs ' Ex 3342, p 58) Plaintiffs argue that more money can allow higher teacher salaries to be paid and therefore attract "better" teachers (Pls ' Br 35-36) But Dr Armor's analysis conclusively shows that there is no increase in achievement in schools with higher average teacher salaries (Defs ' Ex 3342, p 58) The same is true in schools with lower teacher/student ratios, *id* p 59, and schools with higher percentages of teachers with Master's degrees *Id* p 37 Fewer students per teacher and teachers with higher levels of education ostensibly cost districts more money because more teachers are required with smaller class size and because the pay scale favors teachers with advanced degrees Neither results in better student achievement and these conclusions are true across grades, subjects, schools, and years (Defs ' Ex 3342, pp 33, 59, 86 (no statistical association between pupil teacher ratio and achievement, elementary school, grades 3-6, 2003, 2002, 2001), pp 37, 62, 89 (no statistical association between teacher education and achievement, elementary school, grades 3-6, 2003, 2002, 2001), pp 46, 72, 99 (no statistical association between pupil teacher ratio and achievement, middle school, grades 6-8, 2003, 2002, 2001), pp 49, 75, 102 (no statistical association between teacher education and achievement, middle school, grades 6-8, 2003, 2002, 2001))

Thus, Plaintiffs offer only the illusion that better achievement is merely a function of more money As Defendants have consistently argued and proved, however, achievement cannot be bought, and it cannot be legislated

VI The Trial Court Correctly Concluded That Time-On-Task Programs are Not Required to Provide the Opportunity to Receive a Minimally Adequate Education

The trial court correctly found that *Abbeville County* does not mandate “supplemental interventions” such as summer school and after school learning programs (Order dated July 12, 2007 ¶¶ 18-19) As the court concluded, while these programs may be beneficial to at-risk children, “the lack of such programs does not amount to a constitutional violation ” *Id* ¶ 19

Plaintiffs contend that this finding was in error for several reasons, none of which are valid First, Plaintiffs contend that “[i]n *Abbeville* this Court defined the constitutional standard with ‘deliberately broad parameters’ for the trial court to follow” and that the *Abbeville* decision “does not provide a ‘check-list’ of mandatory programs that Defendants are obligated to provide ” (Pls ’ Br 90) Indeed, this Court did not (nor should it) provide a “check list” of specific programmatic choices that are necessary for the provision of the opportunity for a minimally adequate education because this Court wisely recognized “that we are not experts in education, and we do not intend to dictate the programs used in our public schools ” *Abbeville*, 335 S C at 69, 515 S E 2d at 540

Therefore, the Court defined “the outlines of the constitution’s requirement of a minimally adequate education” within “deliberately broad parameters” so that *the General Assembly*, not the courts of this state, could flesh out the details and adopt specific programs to ensure that the constitutional requirement is met *Id* at 69, 515 S E 2d at 540 Plaintiffs’ effort to suggest that this language somehow bestowed upon the trial court “deliberately broad remedial power” renders meaningless principles of separation of powers expressed in *Abbeville County* as well as countless other

pronouncements of the appellate courts of this State. See *State v. Yonce*, 274 S.C. 81, 88, 261 S.E.2d 303, 306 (1979), *Horry County Sch. Dist. v. Horry County*, 346 S.C. 621, 632, 552 S.E.2d 737, 743 (2001) (‘The legislature has wide discretion in determining how to go about accomplishing its duty to ‘provide for the maintenance and support of a system of free public schools ’’), *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625 (1936), *Culbertson v. Blatt*, 194 S.C. 105, 110, 9 S.E.2d 218, 220 (1940) (finding that “it is beyond the power of [the Supreme Court] to direct the Legislature to perform any duty it may have” with respect to the election of a board of trustees to the University of South Carolina), *State ex rel. Edwards v. Osborne*, 195 S.C. 295, 301-02, 11 S.E.2d 260, 262 (1940), *superseded by constitutional amendment as stated in Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993) (“Our duty is to refrain from interfering with legislative action which involves no clear constitutional infirmity ”), *Shasta Beverages v. South Carolina Tax Comm’n*, 280 S.C. 48, 56, 310 S.E.2d 655, 659 (1983) (observing that “[i]t is not the role of [the] Court to advise the legislative or executive branches how to proceed ’) Thus, *Abbeville County* does not empower this Court to require additional time on task programs.

Second, Plaintiffs contend that the trial court’s ruling that the lack of time-on-task programs does not amount to a constitutional violation “contradicts the court’s correct finding that Defendants are required to provide additional programs targeted at the children of pre-school years through grade three ” (Pls.’ Br. 91). Indeed, this conclusion is erroneous, but not for the reasons the Plaintiffs suggest.⁴⁰ The trial court’s conclusion that early childhood intervention programs are necessary to provide the opportunity for a

⁴⁰ The Senate and the House maintain that the trial court exceeded its scope of judicial authority in requiring that the State fund early childhood intervention programs. See The Senate and the House’s Cross Appeal Brief, previously filed with this Court.

minimally adequate education does not mean that the court therefore was required to find that a smorgasbord of utopic time-on-task programs were also constitutionally required as part of the court's remedy. The trial court based its finding that early childhood intervention programs were necessary on the fact that to the extent there is a relationship between poverty and achievement, the evidence contained in the record tended to show that this relationship "would appear to be greater in the very young" (Order Dated Dec 29, 2005 ¶ 422). As the court noted,

Since so much of a child's intellectual capacity and ability is formulated during within the first four to six years of life, as testified by Dr. Wallberg, and since poverty, especially at a young age, accounts for more than 2/3's of the difference in academic achievement, as measured by test scores, as testified to by Dr. Hawkins, the overlay of poverty on the very young appears to create a template for poor academic achievement and intellectual ability that is very difficult to break. That is why it is essential to address the impact of poverty as early as possible in the lives of the children affected by it.

Id. ¶ 431. After considering all of the evidence, the trial court concluded that unlike other proposed remedies, including additional time on task programs, the record establishes that early childhood intervention programs are the only interventions that "show considerable promise in ameliorating at least the effect of poverty on achievement." *Id.* ¶ 432.

1 The evidence establishes that time-on-task programs are not necessary to create the opportunity for a minimally adequate education

Time-on-task programs and after-school programs are arguably "good ideas" (Trial Tr. (06/29/04), p. 70, ll. 15-35, p. 71, ll. 1-3, Trial Tr. (09/20/04), p. 113, l. 25, p. 114, ll. 1-4). However, the evidence at trial established that that these programs (1) are

not necessary to create the opportunity for a minimally adequate education, (2) are not necessary to create the opportunity to learn, (3) and that the absence of these programs does not account for the alleged poor achievement in the Plaintiff Districts (Trial Tr (06/29/04), p 70, ll 15-35, p 71, ll 1-7, Trial Tr (09/20/04), p 114, ll 2-22) Moreover, the record establishes that the implementation of additional time-on-task programs in the Plaintiff Districts is “not going to have a dramatic effect” on achievement in the Plaintiff Districts (Trial Tr (09/20/04), p 114, ll 23-25, p 115, ll 1-4) Thus, as is established below, not only are time-on-task and after school programs not constitutionally required, but also the evidence establishes that their impact on achievement is minimal at best

2 The General Assembly’s recognition of time-on-task programs does not translate into a constitutional duty to provide such programs

Plaintiffs contend that because the General Assembly has recognized at-risk students’ need for more time-on-task programs, the trial court erred “by not affording this evidence its appropriate weight” (Pls’ Br 93) Moreover, Plaintiffs confuse constitutional rights with statutory privileges While provisions of the state constitution “shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory,” *Abbeville County*, 335 S C at 67, 515 S E 2d at 540 (quoting S C Const art I, § 23), statutes do not confer constitutional rights In other words, there is nothing mandatory about what statutes confer See e g, *Parker v Ariz Interscholastic Ass’n Inc*, 59 P 3d 806, 811 (Ariz Ct App 2002) (holding that the mere fact that the legislature placed statute concerning interscholastic athletics in chapter on educational curriculum “does not render participation in interscholastic athletics a constitutionally protected component of the right to an education”), *People v Owens*, 214 N E 2d 749,

750 (Ill 1966) (holding “statute[s] cannot confer constitutional rights), In interpreting and declaring the meaning of the education clause, this Court held that the education clause constitutionally requires that students have safe facilities in which they have the opportunity to acquire certain defined areas of knowledge *Abbeville County*, 335 S C at 68, 515 S E 2d at 540 Nowhere did this Court intimate that constitutionally, students are entitled to summer school programs or any other form of time-on-task program

That the General Assembly has recognized that these programs may be beneficial as a matter of public policy does not elevate them to a constitutional minimum requirement *See e g Turner v City of N Charleston*, 675 F Supp 314, 319, n 2 (D S C 1987) (“A state statute, by itself, cannot create a substantive constitutional right), *Parker*, 59 P 3d at 811 If that were true, then this Court should hold as a matter of law that the state has already fulfilled its constitutional duty because its duty would be co-extensive with its legal action

3 After-school programs are not essential to providing the opportunity for a minimally adequate education

Plaintiffs assert that after-school programs are “essential components” for providing the opportunity to receive a minimally adequate education (Pls ’ Br 94) But the evidence in this case establishes (1) that South Carolina “has adopted state-of-the-art techniques to offer an opportunity for a minimally adequate education” (Trial Tr (09/21/04), p 72, ll 1-8), (2) that sufficient resources exist in the Plaintiff Districts to create the opportunity to receive a minimally adequate education, (*see* Trial Tr (07/28/04), p 127, ll 16-24, p 132, ll 18-23), (3) that each child in the Plaintiff Districts currently has the opportunity to receive a minimally adequate education, (*see* Trial Tr (09/20/04), p 60, ll 5-11, Trial Tr (09/24/04), p 234, ll 1-23), and (4) no one knows

exactly which components or combination of components would enable learning deficits attributable to poverty (Trial Tr (09/20/04), p 118, ll 2-17) The suggestion that pre-school programs or after-school programs are “essential components” to providing the opportunity for a minimally adequate education is not supported by the evidence contained in the record Again, they may be “good ideas,” but they are not constitutional requirements

Moreover, to the extent that these “good ideas” affect achievement, it is noteworthy that Plaintiffs’ reference to “[a]n ideal and effective after-school program for at-risk students,” (Pls ’ Br 94), is devoid of any reference to the record concerning how such programs will actually affect achievement Again, as defense expert Dr Guthrie testified, “they’re not going to have a dramatic effect ” (Trial Tr (09/20/04), p 115, ll 1-3)

4 Summer school programs are not essential components for providing an opportunity for a minimally adequate education

The same is true with respect to summer-school programs Even if it can be said that pre-school programs have a marginal effect on student achievement, the “research around summer school and extended school days— isn’t as extensive or persuasive ” (Trial Tr (09/20/04), p 113, ll 16-24) Indeed, the evidence establishes that the provision of mandatory summer-school programs may have an unintended consequence Conventional wisdom is that summer-school programs provide a way for students to catch up and improve achievement The reality is, however, that such programs may cause some students to drop out (Trial Tr (06/29/04), p 116, ll 6-25, p 117, ll 1)

More importantly, not only are summer-school programs not essential components of the opportunity for a minimally adequate education, this Court has already

determined that they are not constitutionally required under the education clause in *Washington v Salisbury*, 279 S C 306, 306 S E 2d 600 (1983) In *Washington*, plaintiffs brought suit against the superintendent of Beaufort County schools contesting the imposition of an \$80 00 per course summer school tuition fee *Id* at 308, 306 S E 2d at 601 The trial court entered an order enjoining the collection of the tuition fee and defendants appealed *Id*

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

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

Id (emphasis added)

In sum, in the present case, a search of the constitution and this Court's interpretation of the education clause reveal no provision or requirement explicitly mandating the establishment of time-on-task programs Just as was the case in *Washington*, it is evident that time-on-task programs, including summer school, are not part of the free public school system required by the state constitution The fact that time-on-task programs may arguably be beneficial does not mean that they are constitutionally required The order of the trial court should therefore be affirmed

VII To the Extent the Record Establishes any Constitutional Violation Beyond a Reasonable Doubt, the Remedy Adopted by the Trial Court is Sufficient

According to Plaintiffs the trial court “should have concluded that the State’s education system *as a whole* was constitutionally inadequate and should have granted Plaintiffs’ prayer for an order requiring the Defendants to propose, fund, and support a new system of education that is constitutionally sufficient to meet the educational needs of the students in the Plaintiff Districts ” (Pls ’ Br 143-44 (emphasis added))

In contending that the trial court should have ordered Defendants to “propose, fund and support a new system of education” in South Carolina, Plaintiffs have reduced this case to the issue of how much money to spend on education in South Carolina and how best to spend it (*See* Pls ’ Br 143)

The issue of public education is thus no different from our political controversies concerning whether we should invest more money in our public transportation system or our roads, how much money we ought to allocate for environmental preservation, and the amount we should provide in public assistance to low-income individuals and families In other words, the controversy is largely a funding debate

Hancock v Comm r of Educ , 822 N E 2d 1134, 1164 (Mass 2005) (Cowan, J, concurring)

The same is true in the present case In South Carolina, the General Assembly has ““the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated money shall be spent ”” *State ex rel Condon v Hodges*, 349 S C 232, 244, 562 S E 2d 623, 630 (2002) (quoting *State ex rel McLeod v McInnis*, 278 S C 307, 313-14, 295 S E 2d 633, 637 (1982)) *See also Gilstrap v South Carolina Budget & Control*

Bd , 310 S C 210, 216, 423 S E 2d 101, 105 (1992) (“The appropriation of public funds is a legislative function”), *Clarke v South Carolina Pub Serv Auth* , 177 S C 427, ___, 181 S E 2d 481, 485 (1935) (“[T]he Legislature has *full authority* to make such appropriations as it deems wise in the absence of any specific constitutional prohibition against such appropriation[]”) (emphasis added) Thus, in South Carolina, choices regarding how much money to spend and how to spend it are political decisions that in every instance are left to the General Assembly, not the courts

In *Abbeville County*, this Court declared that it would adhere to this time-honored principle when it stated that “[w]e do not intend by this opinion to suggest to any party that we will usurp the authority of [the legislative branch] to determine the way in which educational opportunities are delivered to the children of our State” *Abbeville County*, 335 S C at 69, 515 S E 2d at 541 This Court emphasized “that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government” *Id* As recently noted by the Massachusetts Supreme Court, valid reasons exist counseling caution in education funding cases

The courts, insulated from the political fray as we are for good reason, are ill suited to craft solutions to complex social and political problems Unlike State legislatures and their staffs, judges have no special training in educational policy or budgets, no funds with which to hire experts in the field of education, no resources with which to conduct inquiries or experiments, no regular exposure to our school system, no contact with the rank and file who have the task of implementing our lofty pronouncements, and no direct accountability to the communities that house our schools Had this lawsuit been successful and this court were once again to fashion a judicial remedy, the elected officials who, pursuant to our Constitution, ought to bear the

ultimate burden of resolving our current educational debate
would have been insulated from public accountability

Hancock, 822 N E 2d at 1165 (Cowan, J , concurring)

This is precisely why this Court stated that in the course of trying this case and deciding issues pertinent to this case, the courts of this state were not to become “super-legislatures or super-school boards” *Abbeville County*, 335 S C at 69, 515 S E 2d at 541. The Court defined the constitution’s requirement in “deliberately broad parameters” so that those accountable to the public—i.e., members of the General Assembly, not the trial court or this Court, could fill in details. This Court, therefore, recognized that a fine line exists between determining that a violation of the education clause exists and setting education policy for the state. Unfortunately, Plaintiffs fail to recognize this distinction.

According to Plaintiffs, “[t]he power to determine the constitutionality of State action would be meaningless if not accompanied by the power to require the State to cure the violation” (Pls.’ Br. 146). The Senate and the House do not disagree, but there is a fundamental difference between requiring the state to remedy a constitutional violation and prescribing the remedy and ordering that specific legislation be adopted. Plaintiffs argue for the latter under the guise of the former. In order to accept Plaintiffs’ conclusion that the power to determine the constitutionality of state action means that the trial court had the power to specify a remedy, this Court would have to overlook both the state constitution and well-established judicial opinions from this Court.

The same constitution that mandates that the “General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state,” S C Const. art. XI, § 3, also constrains this Court’s role in South Carolina’s governmental framework. S C Const. art. I, § 8, provides as follows

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other

The rationale for the separation of powers doctrine was set forth in *State ex rel Condon v Hodges*

‘One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws, the executive department carries the laws into effect, and the judicial department interprets and declares the laws.’

State ex rel Condon, 349 S C at 244, 562 S E 2d at 630 (quoting *State ex rel McLeod*, 278 S C at 312, 295 S E 2d at 636). This “elementary constitutional doctrine puts it beyond the power of this court on a mere allegation that the Legislature has violated a constitutional mandate, to issue a prohibitive or other injunctive or mandatory decree which would have the effect of undoing such violation.” *Culbertson v Blatt*, 194 S C 105, ___, 9 S E 2d 218, 219 (1940). Accordingly, “[j]ust as it is not within the power of the General Assembly to reverse a judicial decision by retroactive legislation, or to otherwise interfere with or nullify the judicial process, so it is not within the power of this court to impinge upon the exercise by the Legislature of a power vested in that body, merely because the exercise of or failure to exercise that power, some constitutional provision has been violated.” *Culbertson*, 194 S C at ___, 9 S E 2d at 220. Contrary to Plaintiffs’ contentions, this Court’s remedial power in this matter is quite limited under our state system of government.

At best, Plaintiffs only cite to cases in other jurisdictions in support of their contention that the trial court and this Court can somehow ignore the separation of powers doctrine and impose its will on the General Assembly. Moreover, the cases cited by Plaintiffs either do not stand for the proposition cited or reveal that the court reluctantly intervened after many years of legislative inaction. See *Lake View Sch. Dist. No. 25 v. Huckabee*, 210 S.W.3d 28, 29-30 (Ark. 2005) (“This court’s determination that Arkansas’ public school funding system does not pass constitutional muster dates back twenty-two years. Resolution of the issue has moved at glacier speed.” (citation omitted)), *Montoy v. State*, 112 P.3d 923, 940 (Kan. 2005) (“The legislature has known for some time that increased funding of the financing formula would be necessary”), *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209 (Ky. 1989) (“Our job is to determine the constitutional validity of the system of common schools within the meaning of the Kentucky Constitution. We have done so. We have declared the system of common schools to be unconstitutional. It is now up to the General Assembly to re-create and re-establish a system of common schools within this state which will be in compliance with the Constitution. We have no doubt they will proceed with their duty.” (emphasis added)), *Abbott ex rel. Abbott v. Burke*, 693 A.2d 417, 445 (N.J. 1997) (abandoning what it termed the “prudent and preferred” wait-and-see approach applied in its three previous decisions only after years of continuous inaction on the part of the legislature), *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003), *reversed in part*, 814 N.Y.S.2d 1, 11 (N.Y. 2006) (holding that the failure of the General Assembly to appropriate an adequate amount of funding for education as outlined in the previous case “does not give the Court the authority to participate in budget negotiations

or, absent a constitutional failing, to exercise a veto power over the State's calculations of the cost of a sound basic education. The fact that the other two branches of government have not remedied constitutional failings in the past does not authorize the courts to commit their own constitutional violations now"), *Hoke v County Bd of Educ*, 599 S E 2d 365, 389-91 (N C 2004) (affirming trial courts order requiring the General Assembly to "reassess" education funding noting that the trial court demonstrated "admirable restraint by refusing to dictate how existing problems should be approached and resolved. In our view, the trial court's approach to the issue was sound. "), *DeRolph v State*, 780 N E 2d 529, 532 (Ohio 2002) (Resnick, J , concurring) ("It appears that much of what this Court stated in *DeRolph I* and *II* has fallen on deaf ears. It is not likely that stating at length the same message once again would have much of an effect, rather, it probably would be preaching to the choir, in that only those with viewpoints align with mine would listen, and the rest of the members of the General Assembly would continue to do nothing ")

In sharp contrast, this appeal represents the first time this Court has had an opportunity to review this case and the trial court's remedy. As the trial court correctly found, education is a top priority in the State of South Carolina, and in fact is the first item taken up in the budget every year. (Order dated Dec 29, 2005 (citing Trial Tr (08/16/04), p 38, l 20—p 40, l 6, p 47, ll 10-25, p 48, ll 1-8)) Rather than await review by this Court, in 2006, the General Assembly enacted several provisions aimed at addressing the educational needs of "at-risk" children, including the Child Development Education Pilot Program, an early childhood education program aimed at improving "the developmental and learning support that children must have in order to be ready for

school ” (Part IB, Proviso 1 75, Act 397 of 2006 & Part IB, Proviso 1 66, Act 117 of 2007) This program incorporates, among other things, parenting education (Part IB, Proviso 1 66, Act 117 of 2007) In addition, the 2006-2007 appropriations bill sets aside \$300,000 for the SDE “to institute a plan for reviewing, on a district basis, early childhood assets of schools and districts ” (Part IB, Proviso 1A 63, Act 397 of 2006) Further, the General Assembly has appropriated funds through the Parenting/Family Literacy Initiative to be allocated “to school districts that provide comprehensive family literacy programs which address intergenerational cycles of poverty through adult education, early childhood education and parenting programs ” (Part IB, Proviso 1A 26, Act 117 of 2007) In the 2007-08 budget alone, \$6 1 million was appropriated to this initiative to provide districts with these programs a minimum of \$35,000 each (*Id* and Part IA, Section 1, XI(B), Act 117 of 2007)

The trial court suggested that the General Assembly reassess its commitment to early childhood intervention programs, programs that were already in existence, but not funded, when this case began The General Assembly’s response to the specified deficiency identified by the trial court, along with its continued commitment to education as demonstrated in the record and reflected in the trial court’s order, (*see* Order dated Dec 29, 2005 ¶¶ 394-400), distinguishes this case from those relied on by Plaintiffs While there may in fact be occasion for this Court to intervene into the affairs of the legislative branch, those circumstances are not present in this case, and this Court’s precedent counsels against such intrusion under the facts of this case The order of the trial court should therefore be affirmed

Conclusion

Plaintiffs' arguments stray far from the course charted by this Court in *Abbeville County*. They ignore the opportunity standard announced in the opinion, and seek to replace with it one of achievement. They read this Court's definition of a minimally adequate education to require a perfect education. They convert this Court's admonition to the courts into a call for judicial usurpation of legislative powers. They insist that better achievement is simply a matter of more money, when the record proves just the opposite. They seek to turn the education clause into a strict liability scheme in which this Court will dictate programs and spending by fiat until better, although presently unspecified, levels of achievement are reached, regardless of the cost.

These arguments are not justified under either the evidence or the law. Plaintiffs have completely failed to prove that a constitutional violation exists. To the contrary, the extensive and detailed record in this case makes clear that the opportunity to acquire at least a minimally adequate education as defined by this Court already exists in the Plaintiff Districts, and indeed across the state. This Court should therefore unequivocally reject Plaintiffs' invitation to the Court to rewrite *Abbeville County* to create a standard more to their liking, and to sit as a super legislature to determine what educational policies should be adopted in this state.

[Signature on following page]

SOWELL GRAY STEPP & LAFFITTE, L L C

A handwritten signature in cursive script, reading "Elizabeth Van Doren Gray", written over a horizontal line.

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