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SC SUPREME COUR

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEE COUNTY
Court of Common Pleas

Thomas W Cooper, Jr , Circuit Court Judge

Case No 93-CP-31-169

Abbeville County School District, Allendale County School District, Bamberg County School District 1, Bamberg County School District 2, Barnwell County School District 19, Barnwell County School District 29, Barnwell County School District 45, Berkeley County School District, Chesterfield County School District, Clarendon County School District 1, Clarendon County School District 2, Clarendon County School District 3, Dillon County School District 1, Dillon County School District 2, Dillon County School District 3, Florence County School District 1, Florence County School District 2, Florence County School District 3, Florence County School District 4, Florence County School District 5, Hampton County School District 1, Hampton County School District 2, Jasper County School District, Laurens County School District 55, Laurens County School District 56, Lee County School District, Lexington County School District 4, Marion County School District 1, Marion County School District 2, Marion County School District 7, Marlboro County School District, McCormick County School District, Orangeburg Consolidated School District 3, Orangeburg Consolidated School District 5, Saluda County School District and Williamsburg County School District, Lena Manning, individually, and as a taxpayer residing in Allendale County and as Guardian ad Litem of Courtney V , Courtney V , a minor, by and through Lena Manning, as Guardian ad Litem, William L Mills, individually, and as a Taxpayer residing in Allendale County and as Guardian ad Litem of Waylon P , Waylon P , a minor, by and through William Mills,

as Guardian ad Litem, Betty Bagley, individually, and as a taxpayer residing in Bamberg County and as a parent and Guardian ad Litem of Tyler B , Tyler B , a minor, by and through Betty Bagley, as Guardian ad Litem, Evert Comer, Jr , individually, and as a taxpayer residing in Bamberg County and as parent and Guardian ad Litem of Kimberly C , Kimberly C , a minor, by and through Evert Comer, Jr , as Guardian ad Litem, Marla Q Jameson, individually, and as a taxpayer residing in Barnwell County, and as a parent and Guardian ad Litem of Eleanor J , Eleanor J , a minor, by and through Marla Q Jameson, as Guardian ad Litem, Victor M Lancaster, Sr , individually, and as a taxpayer residing in Barnwell County, and as parent and Guardian ad Litem of Christie L , Christie L , a minor, by and through Victor M Lancaster, Sr , as Guardian ad Litem, Dr Charles Clark, individually, and as a taxpayer residing in Chesterfield County, and as parent and Guardian ad Litem of Candace C , a minor, by and through Dr Charles Clark, as Guardian ad Litem, Colonel Larry Coker, individually, and as a taxpayer residing in Clarendon County, and as a parent and Guardian ad Litem of Corrie C , Corrie C , a minor, by and through Colonel Larry Coker, as Guardian ad Litem, Pamela Williams, individually, and as a taxpayer residing in Dillon County, and as parent and Guardian ad Litem of Katisha W , Katisha W , a minor, by and through Pamela Williams as Guardian ad Litem, Eddie Wright, individually, and as a taxpayer residing in Florence County, and as parent and Guardian ad Litem of Brandon F , Brandon F a minor, by and through Eddie Wright as Guardian ad Litem, John Whiteside, individually, and as a taxpayer residing in Florence County and as Parent and Guardian ad Litem of Joel W , Joel W , a minor, by and through John Whiteside as Guardian ad Litem, Dr Francis Mills, individually, and as a taxpayer residing in Hampton County and as a parent and Guardian ad Litem of Amy M , Amy M , a minor, by and through Dr Francis Mills, as Guardian ad Litem, Brenda Brooks, individually, and as a taxpayer residing in Hampton County, and as parent and Guardian ad Litem of Tyrin B , Tyrin B , a minor, by and through Brenda Brooks as Guardian ad Litem, Marva Tigner, individually, and as a taxpayer residing in Jasper County, and as parent and Guardian ad Litem of Bryan

T and Bradley T , Bryan T , a minor, by and through Marva Tigner as Guardian ad Litem Bradley T , a minor, by and through Marva Tigner as Guardian ad Litem, Robert Elisha Short, individually, and as a taxpayer residing in Laurens County and as parent and Guardian ad Litem of Robert B S , Robert B S , a minor, by and through Robert Elisha Short, as Guardian ad Litem, Dr Keith A Bridges, individually, and as a taxpayer residing in Laurens County and as parent and Guardian ad Litem of Jorgana Ranson B , Jorgana Ranson B , a minor, by and through Dr Keith A Bridges, as Guardian ad Litem, Gail Y Harriott, individually, and as a taxpayer residing in Lee County and as parent and Guardian ad Litem of Rashade H , Rashade H , a minor, by and through Gail Y Harriott, as Guardian ad Litem, Linda Carraway, individually, and as a taxpayer residing in Marion County, and as parent and Guardian ad Litem of Kimberly W , Kimberly W , a minor, by and through Linda Carraway as Guardian ad Litem, Dr John Nobles, individually, and as a taxpayer residing in Marlboro County and as parent and Guardian ad Litem of Erin N , Erin N , a minor, by and through Dr John Nobles, as Guardian ad Litem, Patricia Hampton, individually, and as a taxpayer residing in McCormick County and as parent and Guardian ad Litem of Krystle H , Krystle H , a minor, by and through Patricia Hampton, as Guardian ad Litem Bernice Profit, individually, as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Russell H , Russell H , a minor, by and through Bernice Profit, as Guardian ad Litem, Matlin P Brown, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Tanisha P B , Tanisha P B , a minor, by and through Matlin P Brown, as Guardian ad Litem, James Berry, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Dondrea B , Dondrea B , a minor, by and through James Berry, as Guardian ad Litem Gerald Smith, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Brenda S , Brenda S , a minor, by and through Gerald Smith, as Guardian ad Litem, Thomas Shealy, individually, and as a taxpayer residing in Saluda County and as parent and Guardian ad Litem of Thomas S , Jr , Thomas S , Jr , a minor,

by and through Thomas Shealy, as Guardian ad Litem,

Plaintiffs,

Of whom

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

Appellants-
Respondents,

Glenn F McConnell, as President *Pro Tempore*
of the Senate and as a representative of the South
Carolina Senate, Robert W Harrell, Jr , as
Speaker of the House of Representatives
and as a representative of the South Carolina
House of Representatives,

Respondents-
Appellants,

and

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

Respondents

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
STATEMENT OF THE ISSUES	ix
STATEMENT OF THE CASE	1
BURDEN OF PROOF AND STANDARD OF REVIEW	3
BURDEN OF PROOF	3
STANDARD OF REVIEW	3
I INTRODUCTION	4
II THE TRIAL COURT ERRED IN EVALUATING THE ADEQUACY OF INDIVIDUAL COMPONENTS OF THE EDUCATION SYSTEM RATHER THAN EVALUATING THE OPPORTUNITY PROVIDED BY THE SYSTEM AS A WHOLE	11
III THE TRIAL COURT ERRED IN FINDING THAT INDIVIDUAL COMPONENTS OF THE EDUCATIONAL SYSTEM MET A MINIMALLY ADEQUATE STANDARD FOR EACH CHILD, INCLUDING THOSE CHILDREN FROM DISADVANTAGED BACKGROUNDS	16
A The teacher workforce and quality of instruction in the Plaintiff Districts is not minimally adequate	17
1 <u>The teacher workforce in the Plaintiff Districts is not minimally adequate</u>	18
2 <u>Curriculum and teacher instruction in the Plaintiff Districts is insufficient to create the opportunity for each child to acquire a minimally adequate education</u>	49
B The Trial Court Erred In Finding That Physical Supports Were "Safe And Adequate" And That They Did Not Impede Education	70
1 <u>The facilities in Plaintiff Districts are not safe and adequate</u>	70
2 <u>Transportation is not safe and adequate</u>	84
3 <u>Instructional materials and supplies do not provide the opportunity for a minimally adequate education</u>	86

C	The Trial Court Erred By Finding That "Time-On-Task" Programs Are Not Required To Provide The Opportunity To Receive A Minimally Adequate Education	90
1	<u>The Abbeville decision does not exclude time-on-task programs</u>	90
2	<u>More time-on-task programs are necessary for at-risk children to make up deficits</u>	91
3	<u>The General Assembly recognized at-risk students' need for more time-on-task programs</u>	93
4	<u>After-school programs are essential components for providing the opportunity to receive a minimally adequate education</u>	94
5	<u>Summer programs are essential components for providing the opportunity to receive a minimally adequate education</u>	94
VI	THE TRIAL COURT ERRED BY FAILING TO ANALYZE "INPUTS," "OUTPUTS," AND THE EFFECTS OF POVERTY ON THE STATE'S PUBLIC SCHOOL SYSTEM AS A WHOLE	95
A	The effects of poverty must be considered when determining the sufficiency of educational inputs required in the Plaintiff Districts	96
B	The level of student achievement (outputs) is insufficient	98
1	<u>Palmetto Achievement Challenge Test (PACT)</u>	100
2	<u>High School Assessment Program (HSAP)</u>	101
3	<u>SAT/ACT Scores</u>	102
4	<u>Graduation Rates</u>	102
5	<u>Other Indicators</u>	102
C	The trial court, having recognized that the outputs were insufficient, erred in finding the system as a whole to be constitutional	103
VII	THE TRIAL COURT ERRED IN FINDING THAT FUNDING FOR PUBLIC SCHOOLS WAS ADEQUATE EXCEPT FOR EARLY CHILDHOOD EDUCATION WHEN THE ENTIRE SYSTEM AS A WHOLE IS INADEQUATE	104

A	South Carolina’s funding programs, including chronic under-funding of established programs, are unconstitutional	105
	1 <u>The EFA has not been revised to address current educational needs</u>	106
	2 <u>Defendants have rarely fully funded their EFA requirements</u>	108
	3 <u>The State is well aware of its failure to fund its EFA obligations</u>	109
	4 <u>The State refused to embrace need-based education financing recommended by the State Superintendent of Education</u>	110
	5 <u>State studies conclude that the State is under-funding education</u>	110
B	State funding lacks a rational basis because it is not based on a determination of current needs	112
C	Inadequate funding cannot be limited to early childhood programs because it ignores most of South Carolina’s students	113
	1 <u>A correlation exists between spending and achievement</u>	114
	2 <u>Plaintiffs are not required to place a dollar amount on what is required to provide an opportunity for a minimally adequate education</u>	118
	3 <u>Defense expert witness James Smith’s testimony on funding should have been excluded because it was based on an unreliable report of “professional judgment panels ”</u>	119
D	Higher-than-average per-pupil expenditures do not provide adequate funding	124
	1 <u>In\$ite data as to per-pupil <i>expenditures</i> are not evidence of <i>revenues</i> available to provide the opportunity to receive a minimally adequate education</u>	124
	2 <u>In\$ite per-pupil expenditure summaries do not account consistently for the funding of facilities</u>	128
	3 <u>In\$ite data on per-pupil expenditures includes federal funding, which is inadmissible to prove State support of education</u>	129

	4	<u>In\$ite per-pupil expenditures are misleading because they do not factor in diseconomies of scale</u>	131
	5	<u>In\$ite per-pupil expenditures are necessarily and properly higher in the Plaintiff Districts</u>	131
E		The State does not put education as its top priority	132
F		The State’s education funding has not increased relative to other spending	133
G		Inadequate funding has long-term effects on children in the Plaintiff Districts	136
	1	<u>Funding for additional time-on-task</u>	136
	2	<u>Funding for instructional materials</u>	137
	3	<u>Funding for teacher salaries and professional development</u>	139
	4	<u>Funding for facilities</u>	139
	5	<u>Funding for transportation</u>	141
	6	<u>Summary of funding for components of education system</u>	143
VIII		THE TRIAL COURT ERRED IN FASHIONING AN INADEQUATE REMEDY FOR THE STATE'S CONSTITUTIONAL VIOLATION	143
	A	The trial court should require the General Assembly to address the unconstitutionality of the educational system as a whole	144
	B	The trial court has authority to require the General Assembly to design, fund, and implement an adequate system of education	145
	C	The trial court provided no remedy for students beyond early childhood education	147
		CONCLUSION	148

TABLE OF AUTHORITIES

CASES

<u>Abbeville County School District v State,</u> 335 S C 58, 515 S E 2d 535 (1999)	passim
<u>Abbot ex rel Abbot v Burke,</u> 693 A 2d 417 (N J 1997)	146
<u>Abbott v Burke,</u> 575 A 2d 359 (N J 1990)	4
<u>Allgeier v United States,</u> 909 F 2d 869 (6th Cir 1990)	57
<u>Bennett v Kentucky Department of Education,</u> 470 U S 656 (1985)	129
<u>Bismarck Public School District #1 v State,</u> 511 N W 2d 247 (N D 1994)	113
<u>Brown v Board of Education,</u> 347 U S 483 (1954)	4, 5, 6
<u>Campaign for Fiscal Equity, Inc v State,</u> 861 N E 2d 50 (N Y 2006)	113
<u>Campaign for Fiscal Equity Inc v State,</u> 801 N E 2d 326 (N Y 2003)	17, 99, 115, 146
<u>Campbell County School District v State,</u> 19 P 3d 518 (Wyo 2001)	113, 115, 120
<u>Chinle Unified School District No 24 v Bishop,</u> No 92-15325, 1992 WL 336956 (9th Cir Nov 13, 1992)	129
<u>Claremont School District v Governor,</u> 703 A 2d 1353 (N H 1997)	48, 49
<u>Danson v Causey,</u> 399 A 2d 360 (Pa 1979)	4
<u>DeRolph v Ohio,</u> 78 Ohio St 3d 193 (1997)	49

<u>DeRolph v State,</u> 780 N E 2d 529 (Ohio 2002)	147
<u>Fuller v United States,</u> No 00-2791, 2002 U S Dist LEXIS 3775 (E D La Feb 26, 2002)	57
<u>Hoke County Board of Education v State,</u> 599 S E 2d 365 (N C 2004)	99, 147
<u>Hornbeck v Somerset County Board of Education,</u> 458 A 2d 758 (Md 1983)	4
<u>Horton v Meskill,</u> 376 A 2d 359 (Conn 1977)	4
<u>Jauch v Corley,</u> 830 F 2d 47 (5th Cir 1987)	57
<u>Lake View School District No 25 v Huckabee,</u> 210 S W 3d 28 (Ark 2005)	146
<u>Lake View School District No 25 v Huckabee,</u> 220 S W 3d 645 (Ark 2005)	146
<u>Lake View School District No 25 v Huckabee,</u> 91 S W 3d 472 (Ark 2002)	99
<u>Leandro v State,</u> 488 S E 2d 249 (N C 1997)	4
<u>McDaniel v Thomas,</u> 285 S E 2d 156 (Ga 1981)	4
<u>Montoy v State,</u> 112 P 3d 923 (Kan 2005)	99, 146
<u>Montoy v State,</u> 102 P 3d 1160 (Kan 2005)	112
<u>Napier v Bossard,</u> 102 F 2d 467 (2d Cir 1939)	55
<u>Opinion of the Justices,</u> 624 So 2d 107 (Ala 1993)	99, 129, 130
<u>Parker v State,</u> 216 S C 52, 56 S E 2d 723 (1949)	48
<u>Roosevelt Elementary School District No 6 v Bishop,</u> 877 P 2d 806 (Ariz 1994)	4

<u>Rose v Council for Better Education,</u> 790 S W 2d 186 (Ky 1989)	146
<u>Shealy v Laidlaw Brothers, Inc ,</u> No 83-1099-1, 1984 U S Dist LEXIS 17799 (D S C April 9, 1984)	55, 56
<u>Shepherd v Godwin,</u> 280 F Supp 869 (E D Va 1968)	129
<u>State v Council,</u> 335 S C 1, 515 S E 2d 508 (1999)	119, 122
<u>State v Quattlebaum,</u> 338 S C 441, 527 S E 2d 105 (2000)	130
<u>Stell v Savannah-Chatham County Board of Education,</u> 255 F Supp 88 (S D Ga 1966)	56
<u>Sugarhill Records Ltd v Motown Record Corp ,</u> 105 F R D 166 (S D N Y 1985)	55
<u>Townes Associates, Ltd v City of Greenville,</u> 266 S C 81, 221 S E 2d 773 (1976)	3, 136

STATUTES

20 U S C § 1412	129
20 U S C § 6321(b)(1)	129
S C Code Ann § 12-37-251(F)	133
S C Code Ann § 59-150-350(D)	106
S C Code Ann § 59-18-1910	93
S C Code Ann § 59-18-1920	93
S C Code Ann § 59-18-500	93
S C Code Ann § 59-19-80	55
S C Code Ann § 59-20-10	1, 105
S C Code Ann § 59-20-20(1)	106
S C Code Ann § 59-20-20(2)	84, 106, 109, 141
S C Code Ann § 59-20-20(5)	107

S C Code Ann § 59-20-20(6)	107
S C Code Ann § 59-20-30	72
S C Code Ann § 59-20-40(1)	107, 108
S C Code Ann § 59-20-60(9)	109
S C Code Ann § 59-21-10	106
S C Code Ann § 59-21-320	139
S C Code Ann § 59-25-410	31
S C Code Ann § 59-6-10	110
S C Code Ann § 59-67-420	141
S C Code Ann § 90	55
S C Code Ann Regs 43-161	56
S C Code Ann Regs 43-165 1	56
S C Code Ann Regs 43-240	93

RULES

S C Rule of Civil Procedure 32	57
S C Rule of Civil Procedure 32(a)	ix, 54
S C Rule of Civil Procedure 32(a)(3)(E)	57

OTHER AUTHORITIES

S C Const art V, § 5	3
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STATEMENT OF THE ISSUES

- 1 Did the trial court err in concluding that the State's public education system was constitutionally inadequate only with respect to early childhood education when the evidence established that the entire system was constitutionally inadequate?
- 2 Did the trial court err in evaluating the constitutional "adequacy" of the State's public education system by analyzing individual components, instead of analyzing the system as a whole, and by employing the wrong standard, contrary to this Court's instruction in Abbeville?
- 3 Did the trial court err in concluding that individual components of the State's public education system were adequate when the evidence established that they were insufficient to overcome the effects of poverty on the children in the Plaintiff Districts?
- 4 Did the trial court err in concluding that teacher quality in the Plaintiff Districts was "minimally adequate" when the evidence established that the Plaintiff Districts lack a sustained teaching force with the qualifications, training, skills and experience necessary to deliver the curriculum he constitutionally required educational opportunity to the children?
- 5 Did the trial court err in concluding that the curriculum standards exceed constitutional requirements when the evidence established that the state curriculum standards encompass the skills and knowledge necessary for productive citizenship?
- 6 Did the trial court err in concluding that curriculum and instruction were "minimally adequate" when the evidence established that the curriculum and quality of instruction delivered to the students was not sufficient to provide each child with an adequate educational opportunity?
- 7 Did the trial court err in admitting discovery deposition testimony of the superintendents and principals of the Plaintiff Districts as direct evidence when the deposition testimony was inadmissible as direct evidence under Rule 32(a), SCRPC?
- 8 Did the trial court err in excluding evidence of race when evidence of the importance of culturally relevant pedagogy to the African-American children raised in these rural communities would have impacted the court's findings as to the effective delivery of instruction to minority children?
- 9 Did the trial court err in finding that children receiving special education services are not entitled to the same minimally adequate educational opportunity as all other South Carolina children, contrary to the State's Constitution?

10 Did the trial court err in finding that vocational education opportunities were sufficient when the evidence established that the Plaintiff Districts lack sufficient funding to provide students with the opportunity to acquire even the minimal skills necessary to succeed in vocational education?

11 Did the trial court err in concluding that the facilities in the Plaintiff Districts are sufficiently safe and adequate when the greater weight of the evidence demonstrated that numerous facilities in Plaintiff Districts are unsafe and inadequate?

12 Did the trial court err in concluding that instructional materials were “minimally adequate” when the court disregarded the greater weight of the evidence to the contrary?

13 Did the trial court err in concluding that transportation for public school students was adequately funded when the greater weight of evidence established that the Plaintiff Districts lack adequate resources to provide needed transportation?

14 Did the trial court err in concluding that instructional time other than early childhood was adequate when the greater weight of the evidence established that additional time on task programs are essential to providing at-risk students a minimally adequate educational opportunity?

15 Did the trial court err by concluding that the State’s education funding system is constitutionally adequate except with respect to early childhood education where the greater weight of the evidence established that education in the Plaintiff Districts is chronically underfunded and the funding that is provided is not properly allocated to meet the educational needs of the children?

16 Did the trial court err in concluding that local districts or state agencies could be held responsible for providing educational opportunities to the children in the Plaintiff Districts where the State’s constitutional responsibility to provide adequate educational cannot be abdicated?

17 Did the trial court err in limiting the remedy for the State’s constitutional violation to providing early childhood intervention programs where this remedy excluded children currently in public school who are older than third grade and where the evidence established that early childhood education programs are necessary but not sufficient to overcome the effects of poverty for the children in the Plaintiff Districts who would be affected?

18 Did the trial court err by failing to require the General Assembly to take the actions necessary to remediate the State’s constitutional violation within a specified period of time when it had both the authority and the responsibility to require the General Assembly to correct its failure to provide each child in the Plaintiff Districts with the opportunity to acquire a minimally adequate education?

STATEMENT OF THE CASE

In November 1993, twenty-nine mostly rural, poor school districts and their taxpayers filed this lawsuit against the State of South Carolina and individual representatives of governmental bodies. Plaintiffs sought a declaratory judgment that the South Carolina education funding system violated the education and equal protection clauses of the South Carolina Constitution, the Fourteenth Amendment to the U S Constitution, and the South Carolina Education Finance Act of 1977 (“EFA”) (S C Code Ann. §§ 59-20-10, et seq.)

In separate motions filed during 1994 and 1995, Defendants moved to dismiss all claims based on standing, capacity to sue, and separation of powers, which were the same issues they asserted throughout the case. On September 20, 1996, the trial court granted Defendants’ motions and dismissed Plaintiffs’ complaint for failure to state a claim. Plaintiffs appealed.

On April 22, 1999, this Court reversed in part, finding that Plaintiffs had stated a valid claim for inadequate educational opportunity under the education clause of the South Carolina Constitution. In Abbeville County School District v. State, 335 S C 58, 515 S E 2d 535 (1999), this Court remanded the case to the circuit court.

On June 23, 2003, the trial court granted Plaintiffs’ motion to bifurcate claims and agreed that only the claims asserted by eight of the thirty-six Plaintiff Districts (additional Plaintiffs joined after the original filing) and five of the individual Plaintiffs would be tried at that time. The eight Plaintiff Districts whose claims were tried are Allendale, Dillon 2, Florence 4, Hampton 2, Jasper, Lee, Marion 7 (comprised of the

former Marion 3 and Marion 4 districts), and Orangeburg 3 (6/20/03 Order) Claims of the remaining school districts and individuals were reserved for trial at a later date

Trial began on July 28, 2003 At issue were the educational needs of the children in the Plaintiff Districts, the sufficiency of their schools, and whether the State has satisfied its constitutional mandate to provide each child in the Plaintiff Districts with the opportunity to acquire a “minimally adequate education ” Over the course of 102 days of trial between July 2003 and November 2004, the parties called 70 witnesses, generated over 23,000 pages of transcribed testimony, introduced approximately 2,200 exhibits and submitted extensive pre-trial motions and briefings to the trial court

After hearing all the evidence, the trial court issued an order on December 29, 2005, in favor of Plaintiffs on the ultimate issue in the case that the State was not satisfying its constitutional obligation to provide each child in the Plaintiff Districts with the opportunity to acquire a minimally adequate education However, the court held that the State s constitutional violation was limited to its failure to provide early childhood intervention programs and that the sole remedy was to require the State to fund and implement early childhood intervention programs designed to address the impact of poverty on the educational abilities and achievements of the students in the Plaintiff Districts

Both sides moved for reconsideration on January 11, 2007 By written Order dated July 12, 2007, the trial court denied both motions On August 9, 2007, Plaintiffs filed a Notice of Appeal of the December 29, 2005 and July 12, 2007 trial court orders Plaintiffs originally filed the appeal on behalf of all Plaintiffs, but withdrew those

whose claims were not tried. Also, state representatives' names were changed for those whose offices had changed.

On August 15, 2007, Defendants Glenn F. McConnell and Robert W. Harrell, Jr. filed a Notice of Cross-Appeal of the same orders in their official capacities and on behalf of the South Carolina Senate and House of Representatives.

BURDEN OF PROOF AND STANDARD OF REVIEW

BURDEN OF PROOF

The burden of proof in this case is preponderance of the evidence. Defendants argue that the appropriate standard of review is proof beyond a reasonable doubt. That standard would have been correct if Plaintiffs sought to have legislative enactments declared unconstitutional. Plaintiffs, however, do not claim that the **statutes** governing education in South Carolina are unconstitutional. Instead, they contend that the **system of public schools** in the Plaintiff Districts is unconstitutional because it does not provide an opportunity for each child to receive a minimally adequate education. See Abbeville County Sch. Dist. v. State, 335 S.C. 58, 67, 515 S.E.2d 535, 539 (1999) (stating that “[a]t the heart of this controversy is the question of the duty imposed upon the General Assembly by this constitutional provision”).

STANDARD OF REVIEW

Because this is a case in equity, the standard of review is *de novo*, in which this Court makes its own findings of fact after reviewing the evidence. S.C. Const. art. V, § 5, Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Courts from around the country have uniformly ruled that a case challenging the adequacy of funding for education is a challenge in equity and a non-

jury action See, e.g., Roosevelt Elementary Sch Dist No 6 v Bishop, 877 P 2d 806 (Ariz 1994), Horton v Meskill, 376 A 2d 359 (Conn 1977), McDaniel v Thomas, 285 S E 2d 156 (Ga 1981), Hornbeck v Somerset County Bd of Educ, 458 A 2d 758 (Md 1983), Abbott v Burke, 575 A 2d 359 (N J 1990), Leandro v State, 488 S E 2d 249 (N C 1997), Danson v Causey, 399 A 2d 360 (Pa 1979)

I INTRODUCTION

Education is perhaps the most important function of state and local governments. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v Board of Education, 347 U S 483, 493 (1954)

This declaration by our nation's highest court over fifty years ago is even more compelling today, and the State owes no less of a duty to educate its children. When Brown was decided in 1954, the uneducated had opportunities exceeding those in today's global marketplace, and our State's constitutional obligation to educate its children has not been diminished by time or by circumstances. Instead, the responsibility has become more pronounced if its children are to have a chance in life. All parties agree that, as stated in Brown, the very purpose of education in South Carolina is to prepare South Carolinians to become productive citizens, to participate in a democratic society, and to succeed in life.

The trial court therefore correctly found that Abbeville led inextricably to the conclusion that a "minimally adequate education" requires an education sufficient to meet Brown's legacy and Abbeville's charge. Upon that foundational bedrock, the trial court held that the level of student achievement must be one that prepared a child to succeed in life (12/29/05 Order ¶ 30). Under the evidence presented at trial, the court could reach no other conclusion. In Abbeville this court left no doubt that obligation rests squarely upon the shoulders of the State and not the districts, schools, or parents.

The economic health of South Carolina depends on the state's success in educating its children, and a grim picture was presented of the state of education in South Carolina and in the Plaintiff Districts. For example, Don Herriott, President of Roche Carolina and Chairman of the Board of the South Carolina Chamber of Commerce, testified that South Carolina's economic system was in a "death spiral" and that if it did not improve its educational system, South Carolina could become a "third world economy" (Tr (8/14/03) 240 5-9, 245 18-25).

Let us, therefore, be certain of the significance of this appeal. The question before the Court is whether children in the Plaintiff Districts will be afforded a chance at life, whether they can become productive citizens and engage in a meaningful way in a democratic society, enjoying the rights and privileges of citizenship, and whether the mandate of this Court's Abbeville decision will be met. Although both sides of this controversy raise a number of legal questions, all important, the Court's decision will determine the future of not only all children in the Plaintiff Districts.

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 the policymakers. Were it not for the State Constitution, this would be correct. Under the facts and law of this case, however, the Court cannot abstain or defer. It must uphold the Constitution by providing each child in the Plaintiff Districts the opportunity for a minimally adequate education, preparing him for later professional training, and “awakening the child to cultural values.” Brown, 347 U.S. at 493.

Having correctly determined the educational outcomes required under Abbeville, the trial court also correctly found that children in the Plaintiff Districts have not been provided their constitutional opportunities. The court failed, however, to provide the correct remedies. Its remedy—to provide funding only for early childhood education—contradicts its fundamental findings. For that reason, Plaintiffs appeal. Without an adequate remedy, the trial court's correct conclusions provide no relief to the majority of the children in the Plaintiff Districts and inadequate relief to all.

This Court might begin its inquiry by asking the question, “What about the children who are in grade four and beyond?” The trial court found that they have not been offered the opportunities prescribed by Abbeville but, having found their constitutional rights had been violated, still offered them no relief. The testimony and evidence showed that these at-risk children could be helped with a variety of educational “inputs” (such as skilled teachers and instructional materials), more “time on task” (more time to study and learn such as through summer school or after-school programs) and broadened experiences, however, the court provided none of these remedies. In fact, the trial court did not even mention these children or their plight after finding that their constitutional rights had been violated. Their “outcomes” (levels of achievement) are certain to be as dismal as the trial court found in its December 29,

2005 Order They will not become productive citizens and enjoy the lives other South Carolinians take for granted Their futures are bleak, and the trial court erred in not offering them, as well as all other children in the Plaintiff Districts, the quality of education to which they are entitled under our State Constitution

Fundamental to this case, and permeating all testimony and evidence, is what the trial court called “the dark specter of poverty ” Eighty-six percent of the children in the Plaintiff Districts are eligible for free and reduced lunch, which is a surrogate for poverty, against a statewide average of forty-eight percent ¹ Their poverty is generational poverty, meaning these children come from families who have always lived in poverty Their parents and their parents’ parents lived in poverty Their poverty is not caused by their father’s temporary lack of employment, but to mere fortuity of birth ² Specifically, their poverty is due to their parents’ lack of educational opportunities and consequential inability to escape poverty’s dark specter Moreover, these children are not mobile They and their parents have lived in the same area for generations, just as they have lived in poverty

If nothing else, evidence from both sides confirmed that if these children are to escape this cycle of poverty, they must do so through education As stated at trial, “It is the only way, the only opportunity that one who has no bootstraps will be able to pull himself or herself up and out ” (Tr (5/3/04) 117 13-25) Unless these children are offered the opportunity for an adequate education, they will not acquire the skills

¹ (See Pls Ex 154 at SDE 11309 SED 11312)

² (See e.g Pls Ex 153 at SDE 10909 SDE 10923 SDE 10927 SDE 10931 SDE 10933 SDE 10937 SDE 10940 and SDE 10944 (2002 County Profiles) Pls Ex 157 at 14 17 92 93 95 97 114 115 122 123 146 147 150 151 158 161 176 179 196 197 202 205 218 221 (2001 County and District Profiles))

necessary to enter the workforce, care for themselves and their families, and become productive citizens. They are destined to live out their lives in this never-ending cycle of debilitating poverty. The State has the responsibility to ensure that they get that opportunity.

Thus, this Court has the profound responsibility to determine what the State must provide these children to offer them the opportunities to break loose from the manacles of generational poverty. In resolving this issue, the trial court found and Defendants conceded that poor children can learn and achieve at high levels. The court also correctly determined that it must view the opportunities for an education through the children's eyes, including those in poverty.

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

(12/29/05 Order ¶ 35) The court then recognized that the State's responsibility to provide opportunities to children raised in poverty was not only constitutionally mandated, it was enhanced. (Id. ¶ 428, 07/12/07 Order ¶ 53)

Without question, children raised in poverty require educational offerings greater than those born into more affluent families. They face unique learning difficulties that place them "at-risk" for educational failure. Their homes are not print-rich, their parents are generally uneducated, and their communities cannot provide exposure to culturally enriching experiences. As characterized by several witnesses, they are "school dependent." They are behind when they enter school and fall further

behind with each passing year. To view education through these children's eyes, their needs must be considered in determining whether they have been offered their constitutional opportunities. Former Superintendent of Education Inez Tenenbaum confirmed that at-risk children need the most capable and qualified teachers, better physical supports (facilities, instructional materials and supplies, and transportation), and more instructional time.

Educators also agree that for a child to learn, she must have a connection between the educational offering and her life experiences and needs. Educating children, including the gifted and most talented as well as the most challenged, requires skill. The instruction must be delivered in a manner meaningful to the child based on his background and life experiences. A certain beauty is associated with observing a skilled teacher and witnessing a child learn by making the connection, based on his learning needs, and the teacher's instruction. Education is like much in life: it is built one block at a time until the education is complete, and through education, the child is prepared to become a continuous learner. The child is then prepared for life. Minimally adequate teachers, physical supports, and instructional materials do not offer these children an opportunity for an education. This is but one of the trial court's errors when it reached the correct fundamental finding—that education must be viewed as seen through the child's eyes—but incorrectly determined that minimally adequate teachers and other offerings can deliver the required opportunities. South Carolina has used this standard throughout its history, and history tells us clearly that it has failed. Minimally adequate offerings to these children mean no opportunity at all.

Considering the needs of children at-risk from poverty, the constitutional floor of the opportunities that must be provided these children—and their dismal record of academic achievement—the trial court reached the only conclusion possible the children in the Plaintiff Districts are not receiving the opportunity to obtain a minimally adequate education (12/29/05 Order ¶ 160) The trial court thus answered the ultimate question correctly It mistakenly limited its remedy to early childhood education programs Certainly, early childhood education is an important step, however, it is only one step The ruling ignores the needs of children in the school system who are already past early childhood—children whose prospects in life are bleak but who are excluded from the court’s remedy This was error

The court also failed to recognize the importance of creating an **integrated system of education** that includes educational inputs adequate to meet the needs, however challenging, of the children it serves—both as a matter of sound educational policy and, more importantly, as a matter of constitutional duty “Minimally adequate” components of an educational system do not offer these children the opportunities required by Abbeville

In summary, the State has failed the children in the Plaintiff Districts, a fact admitted by the Defendants’ expert—in an attempt to blame the schools—when he testified that schools in the Plaintiff Districts have failed their children³ For the reasons set forth below, this Court should find for the Plaintiffs and direct the State to provide remedial relief to meet the needs of all children in the Plaintiff Districts

³ (See Tr (9/22/04) 17 25 18 9 (Guthrie))

II THE TRIAL COURT ERRED IN EVALUATING THE ADEQUACY OF INDIVIDUAL COMPONENTS OF THE EDUCATION SYSTEM RATHER THAN EVALUATING THE OPPORTUNITY PROVIDED BY THE SYSTEM AS A WHOLE

The Education Clause of the South Carolina state constitution requires the state to provide “a **system** of free public schools ” The Abbeville Court interpreted the Education Clause to require that system to provide each child the opportunity to acquire a minimally adequate education Instead of evaluating whether the educational system **as a whole** provided the constitutionally required educational opportunity, however, the trial court made a piece-meal evaluation of whether **individual elements** of the education system were constitutionally adequate and concluded that each separate component (with the exception of early childhood education) was minimally adequate The trial court’s examination of individual components of a system to determine whether they were “minimally adequate” was flawed, 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 Accordingly the trial court mistaken approach to its duty resulted in error in its ultimate conclusions

This flawed approach infected the entire decision, leading the trial court to conclude erroneously that virtually all individual elements of the education system were “minimally adequate ” When judged against the correct constitutional standard, the greater weight of the trial evidence compels the conclusion that each component of the State’s public education system in the Plaintiff Districts is inadequate, and clearly so considering the needs of the children in the Plaintiff Districts As a whole, these components create a system that has no hope of delivering the opportunity to acquire a

minimally adequate education as shown by 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

The outcomes are so abysmal, in fact, Dr James Guthrie, one of the three State experts who visited schools in the Plaintiff Districts, testified that the schools are “failing” the children (Tr (9/22/04) 18 8-9 (Guthrie)) He blamed the schools’ management or instruction, and testified that something with the capacity of the schools was not being done as well as it should be (Id at 22 1-6) A second expert for Defendants who visited the schools in the Plaintiff Districts, Dr James Smith, testified that far too many of the teachers in the Plaintiff Districts were “at the bottom of the bag,” and that children in the Plaintiff Districts were not being “taught,” and that is why they were not learning (Tr (7/1/04) 29 6-9 (Smith)) As he reflected back on his observations of the “teachers not teaching and students not learning,” he agreed having stated during his pretrial deposition that it ‘ breaks my heart ’ (Id at (6/30/04) 173 4-8) Guthrie and Smith agreed that the State should intervene in these districts (Tr (9/22/04) 14 4-16 7 (Guthrie), (6/30/04) 173 20-24 (Smith)) Smith testified that these schools needed “radical intervention” and that “wished the State would do more to intervene” and help these children (Tr (6/30/04) 173 20-174 2 (Smith)) The third expert who visited schools in the Plaintiff Districts, Dr Herbert Walberg, agreed with Smith and Guthrie that “what led [him] to be concerned about the quality of teachers in the Plaintiff Districts was the poor teaching that he observed on many occasions ” (Tr (9/28/04) 109 14-17 (Walberg)) Walberg also testified that if he were a parent of a

child in the Plaintiff Districts he would be concerned (Id. at 110 17-111 1)
Therefore, all three of Defendants’ finance and teacher quality experts who visited schools in the Plaintiff Districts identified systemic and disabling instructional problems that kept children from learning. Accordingly, the trial court should have similarly determined that the system was defective and not providing the opportunities mandated by Abbeville. Unfortunately, and quite remarkably, the trial court ignored even the testimony of the Defendants’ and found teachers in the Plaintiff Districts to be at least minimally adequate, and limited its relief to the area of early childhood education.

In choosing a method to apply that standard to this case, the trial court noted that “inputs, outcomes, and the impact of poverty must be taken into account in determining whether or not the State has fulfilled its constitutional obligation ” (12/29/05 Order ¶ 53, see also 7/12/07 Order ¶ 51) Notwithstanding this express recognition that its task was to examine the educational system as a whole (7/12/07 Order ¶ 48 (at issue is the “constitutionality of the educational system as a whole”)), the court instead examined the ‘minimal adequacy’ of the inputs in isolation from one another. Also, the trial court did not consider whether the inputs—either in isolation or collectively—met the students’ needs. For example, the court concluded that the major components of the education system (funding, curriculum, teacher quality, physical supports, and “time on task” for at-risk students) each individually satisfied minimum “constitutional” standards in some respect (See Record Compilation 1 quoting 12/29/05 Order ¶¶ 204, 206, 214, 217, 219, 222, 274, 296-98, 393, 7/12/07 Order ¶¶ 17, 19) Except for finding that increased support for early childhood education was

necessary, the trial court expressly or implicitly found that no individual factor or component was “constitutionally” inadequate

The trial court then reasoned that because the individual components (with the exception of early childhood education) were constitutionally “adequate,” the State had satisfied its constitutional obligation. In other words, the trial court evaluated the education system as the “sum of its parts” and concluded that because each **individual component** of the education system was constitutionally adequate, then the system as a **whole** was necessarily adequate as well.

The error in this approach was two-fold. First, the trial court failed to apply the Abbeville standard, which requires the State to provide a minimally adequate educational opportunity through its **system** of free public schools. In Abbeville, this Court did not ask the trial court to consider whether individual components of the education system passed constitutional muster and did not provide a constitutional standard to measure the adequacy of the individual components. Second, the trial court ignored the great weight of evidence establishing that the availability of adequate educational opportunities in the Plaintiff Districts can only be determined with reference to the system as a whole.

This Court in Abbeville instructed the trial court to determine if the State, through its system of public schools, had provided the children in the Plaintiff Districts with the opportunity to acquire a “minimally adequate education.” The trial court correctly interpreted this Court’s guidelines in Abbeville to mean that an adequate educational opportunity was “intended to give each child in South Carolina a chance at life” and to become a productive member of society. Thus, the trial court was required

to view the education “system” through the students' eyes and whether it offered them a “real chance” to become productive citizens. Furthermore, the trial court recognized this requirement by stating that “poverty dramatically affects the efficacy of ‘inputs’ offered by the process” and that “any analysis of the presence or absence of ‘opportunity’ must be determined against the backdrop of poverty.” (12/29/05 Order ¶ 52.) Accordingly, analyzing inputs—without considering whether they, as part of a “system,” are sufficient to provide the requisite educational opportunity—was in error.

To further compound this error, the trial court judged the “minimal adequacy” of individual components against an incorrect standard of basic functionality. The court defined “minimally adequate” to mean “the least possible quantity of a thing that is suitable for the occasion” and “something less than the most or best that could be done.” (12/29/05 Order ¶¶ 38-39.) The trial court incorrectly interpreted “minimal adequacy” to mean that Abbeville established a “very low standard” for the educational opportunities that must be provided to each child and judged the adequacy of the educational inputs accordingly. (Id. ¶ 39.) Under this Court’s Abbeville decision, however, “minimally adequate” is a relative term. The more difficult the challenge, the more that is required to be “minimally adequate” to accomplish that goal. As the trial court itself recognized, in Abbeville this Court established the standard for a minimally adequate education as one that provides educational skills and knowledge at a level sufficient to enable a child to become a productive citizen and have a chance at life. The “least” that can be done to provide this opportunity for at-risk students requires more than what must be done to provide this same opportunity to more affluent students. Thus, finding a facility or teacher to be minimally adequate without reference

to the needs of the students does not address the question whether those components are sufficient to provide children in the Plaintiff Districts the level of opportunity required by this Court's decision in Abbeville

Second, educational experts for all parties who testified at the trial agreed that the quality of education results from the interplay of the many components of an educational system. The **cumulative effect** of individual factors determines the availability of educational opportunities in schools, not whether an **individual** policy or program is "minimally adequate" to serve some educational benefit. (See Record Compilation 2 quoting Tr. (5/26/04) 23 1-6, 10 1-2 (Peterson), (2/24/04) 199 8-25 (J Anderson), (2/25/2004) 23 20-24 2 (J Anderson), (8/16/04) 237 8-24 (Harrell), (9/30/03) 200 15-201 5, 129 14-23 (Harris), (6/16/2004) 39 4-12 (Podgursky)) Thus, the trial court erred by ignoring the cumulative effect of the interplay of educational inputs and concluding that the educational system as a whole was adequate because its individual parts were basically functional.

III THE TRIAL COURT ERRED IN FINDING THAT INDIVIDUAL COMPONENTS OF THE EDUCATIONAL SYSTEM MET A MINIMALLY ADEQUATE STANDARD FOR EACH CHILD, INCLUDING THOSE CHILDREN FROM DISADVANTAGED BACKGROUNDS

Although ruling that the State had not provided its public school children with the opportunity to acquire a minimally adequate education, the trial court limited the failure to inadequate early childhood intervention programs. This Court should reverse the trial court's Orders to the extent the trial court found that other components of the state public education system—including teacher quality, physical supports, and additional time-on-task—are minimally adequate.

A The teacher workforce and quality of instruction in the Plaintiff Districts is not "minimally adequate "

An opportunity to learn and acquire a minimally adequate education requires that the opportunity "be placed within reach of all students " Campaign for Fiscal Equity, Inc v State, 801 N E 2d 326, 337 (N Y 2003) The purpose of a teacher is to deliver the opportunity to learn through instruction, but if a teacher is incapable of delivering instruction to the children in a way in which they can access it, the opportunity to learn is meaningless The trial court erred in not addressing the mismatch between the teaching of the subject matter and what the children were able and prepared to learn Dr Lorin Anderson testified that an evaluation of instructional quality must be focused on the child, what he perceives and is able to access, not merely what is "in the air," so to speak (See generally Tr (7/29/03) 127 10-131 5) Dr Anderson testified that opportunity to learn does not derive merely from a set of things in a classroom, but "is the degree of fit between the demands that you place on the student and the ability of the student to meet those demands " (Id at 128 23-25)

[A] textbook that they can't read does not provide opportunity Showing slides to visually impaired students because the slides are there without taking into consideration the visual impairment is not opportunity Playing auditory tapes to people who have auditory deficiencies even though the tapes look like an opportunity but for those students it's not an opportunity

(Id at 130 10-20, see also id at 129 15-19)

A teacher knowledgeable and capable of helping children bridge the gap between what they know and what they need to know is essential to providing "each child" with the opportunity to learn (Tr (7/29/03) 136 4-12) In addition, a sufficient and stable infrastructure capable of supporting the efforts to helping children bride that

gap over time is necessary (Id. at 136 13-20) The larger the gap between the difference in the academic demands and the children's ability to meet those demands, "the greater resources that are needed and the greater the need for a stable infrastructure so that these resources are not here today, gone tomorrow " (Id. at 136 21-25)

In other words, providing a meaningful opportunity for each student to acquire a minimally adequate education requires more than merely the teacher characteristics and curriculum standards considered by the trial court. It requires a consideration of whether students are provided with meaningful access to the knowledge and skills they are expected to acquire, through adequate instruction by the teacher, supported by adequate resources and infrastructure. The trial court erred in finding that Defendants' procedures and regulations applicable to teachers are minimally adequate, in that it failed to consider how essential access to knowledge on the students' terms is to the overall educational process. The evidence in this case clearly establishes that too many teachers in Plaintiff Districts are not qualified or capable of delivering meaningful instruction to each child in Plaintiff Districts, and the children, therefore, are not receiving the opportunity for a minimally adequate education.

1 The teacher workforce in the Plaintiff Districts is not "minimally adequate "

(a) A multitude of factors combine to define what is "minimally adequate" for different situations

In finding that individual components of teacher quality and instruction were adequate, the trial court did not consider its own finding about the impact of the students' poverty or the fact those at-risk students need teachers who are better than

minimally adequate to provide them with the opportunity to achieve a minimally adequate education. Further, the court did not consider whether teacher and school characteristics (i.e., licensing, experience, advanced degrees, selectiveness of colleges, salary, turnover, and professional development) affected the students' educational opportunities in the aggregate.

Instead, the trial court focused largely on "empirical evidence," state-wide proficiency requirements, and statistical figures (See, e.g., 12/29/05 Order ¶¶ 253, 202-204, 213-214.) Specifically, the court focused on individual factors that influence teacher quality and delivery of instruction and then pronounced each of those factors minimally adequate and "not unconstitutional" (See, e.g., id. ¶¶ 204, 206, 214, 217.)

The trial court's piece-meal examination of issues, without considering the whole of the record and, even without considering its own findings, was error. The greater weight of the evidence at trial requires a finding by this Court that the teacher characteristics are not minimally adequate, either individually or in the aggregate.

(b) At-risk students require teachers with more than minimally adequate competence, skills, and knowledge.

Witnesses for both sides testified that teacher quality is the most important factor in a child's education (See Record Compilation 3 quoting (Tr (6/29/04) 118 21-23 (Smith), (9/21/04) 138 12-19 (Guthrie), (1/6/04) 134 21-22 (Longshore), (2/9/04) 56 23-57 4 (Harrison), (9/22/03) 76 21-22 (Poda), (4/1/04) 10 4-5 (Lord), (7/31/03) 36 14-17 (Dean), (10/8/03) 227 1-5 (Thompson), (3/4/04) 172 12-17 (Townes), (5/4/04) 147 4-10 (Tenenbaum), (9/12/03) 102 24-103 15 (Ladson-Billings), (4/20/04) 97 10-14 (Berry).) Moreover, numerous witnesses testified that teacher quality is an essential component in providing a minimally adequate education (Tr

(7/31/03) 77 17-78 4, (9/30/03) 108 5-9, (1/6/04) 115 7-10, (3/4/04) 172 12-17, (2/9/04) 42 14-24, (8/11/03) 34 5-17)

Plaintiff and defense witnesses also agreed that the need for quality teachers is amplified for students from poverty (See, e g, Tr (10/2/03) 144 4-14, (9/28/04) 71 20-72 1, (8/11/03) 40 14-17, 40 18-20, 38 20-21, 37 24-40 7, (9/23/03) 10 1-12 4, see also (5/4/04) 26 16-18 (former State Superintendent Tenenbaum testifying, “The most capable, best qualified teachers are needed to help raise the academic standards when children come from impoverished backgrounds ”), (9/21/04) 185 16-19 (defense expert Guthrie testifying, “I would do all—do all within my capacity to have the most able teachers aligned with the hardest to teach students ”)

Students in the Plaintiff Districts are unquestionably among the neediest in South Carolina (See, e g, Tr (9/29/03) 111 20-112 14, 114 17-117 6, (9/30/03) 4 21-6 11) For such students in poverty, schools are the primary conduit for education and enrichment (See, e g, id at (1/7/04) 33 22-34 8, (1/6/04) 125 9-126 21) To understand and retain information, a student must be able to connect it with something in his or her life experience (Id at 132 19-24, 133 19-21) To accomplish that connection with students from disadvantaged backgrounds, schools must have effective teachers who have that talent and skill (Id at 134 3-11) Providing this connection is a challenging task that requires experienced teachers (See Record Compilation 4 quoting Tr (8/5/03) 49 8-14 (Smith), (9/21/04) 186 19-187 3 (Guthrie), (7/29/03) 177 14-19 (L Anderson), (9/30/03) 5 2-5, 5 17-6 11 (Levin), (9/30/03) 108 5-9 (Harris), (9/12/03) 100 24-101 21 (Ladson-Billings)) The absence of highly qualified and skilled teachers can doom a student who needs an effective teacher to bridge the

gaps between an impoverished background and education. Even one ineffective teacher can significantly damage a student's educational opportunity, not only for the year the student is in that classroom, but also for ensuing years. (See Record Compilation 5 quoting Tr (1/6/04) 184 6-16 (Longshore), (6/11/04) 188-192 3 (Tigner))

(c) Individual teacher characteristics in the Plaintiff Districts are not minimally adequate

Standard measures of teacher quality include (1) teacher licensing and certification (including substandard certificates, out-of-field permits, PACE teachers, foreign teachers, and long-term substitute teachers), (2) experience, (3) advanced degrees, (4) competitive colleges, and (4) "continuing contracts." (See generally Tr (8/11/03) 32 5-37 7, (8/11/03) 35 17-36 20, 136 3-137 6, (9/22/03) 67 23-68 13) Teachers in Plaintiff Districts have less favorable percentages of teachers in all areas.

The education profession uses this "basket" of characteristics to evaluate the quality of a teaching force. (Tr (9/30/03) 44 23-47 2, see also (8/11/03) 32 5-37 7) This does not mean that an individual teacher who lacks all or even many of the positive characteristics cannot be an effective teacher or that a teacher with all of the positive characteristics cannot be a poor teacher. However, experienced, well-trained teachers and teacher workforce stability are indicators of the quality of teaching taking place in that school or district. (Id. at (7/29/03) 217 11-218 7, (9/29/03) 137 1-25)

Moreover, and contrary to the trial court's finding (12/29/05 Order ¶ 253), evidence shows that negative outcomes in student achievement are correlated to negative characteristics in the teacher workforce and that a stable teacher workforce with the necessary training, experience, and skills can indeed improve the chance a poor child has of acquiring the opportunity for a minimally adequate education. (Tr

(8/11/03) 65 19-69 17 and 70 18-72 1) Dr Lorin Anderson’s statistical analysis demonstrates that negative teacher characteristics—such as teacher turnover rates, low percentages of experienced teachers, and low percentages of teachers with advanced degrees—are correlated with low levels of student achievement, even aside from poverty levels (Tr (11/5/04) 72 20-75 19, 76 6-78 21, Pls ’ Ex 6835)

(i) *Teacher Licensing and Certification*

The trial court erred in finding that teacher certification procedures in South Carolina are sufficient to “ensure” that teachers in South Carolina schools are “at least minimally competent to deliver instruction compatible with the constitutional requirements,” (12/29/05 Order ¶ 204), and that once certified, teachers “must be regarded as sufficiently competent to create the opportunity for their students to acquire a minimally adequate education ” (Id ¶ 214 (emphasis added)) To the contrary, teacher licensure procedures and processes in South Carolina fall far short of the trial court’s standard

Teacher certification is merely a starting point, and too many teachers in the Plaintiff Districts are not even fully certified Because of the Plaintiff Districts’ difficulty in attracting and retaining certified teachers, they have been forced to hire large numbers of teachers who (1) have substandard certification, (2) teach outside their area of certification and knowledge, (3) teach under the PACE program, are foreign teachers, or are long-term substitute teachers, who may teach with no certification at all

Certification is the statewide assessment of general teacher preparation and licensing. Certification is not intended to measure, and does not measure, a teacher's effectiveness in the classroom, it merely indicates that a person has met a minimum threshold for entering the profession (Tr (8/11/03) 54 20-55 17, Tr (9/22/03) 131 6-15 (Poda)) Further, these certification requirements do not ensure that teachers are adequately trained and prepared when they assume the heavy responsibility of educating a room filled with students (Tr (8/11/03) 48 6-49 12, (9/24/03) 103 21-104 3)

To be fully certified, a teacher candidate must pass the Praxis qualifying exams, which are designed to assess minimal levels of content knowledge and pedagogy⁴ Even Defendants' expert, Dr Podgursky, admitted that the Praxis qualifying tests required for teacher certification eliminate only "demonstrably incompetent" prospective teachers from the classroom (Tr (6/16/04) 66 1-7, Pls ' Ex 6144) Although the rigor of Praxis examinations is described as being "shockingly low," teachers across South Carolina fail them The rate of failure in the Plaintiff Districts is almost double that of the state as a whole (Pls ' Ex 6857X) In addition, of those teachers who fail the Praxis II exams at least once, the average number of failures in the Plaintiff Districts (3 2 times) exceeds that of the average number of failures in the state at large (2 39) (Pls ' Ex 6857Y) The fact that teachers in the Plaintiff Districts

⁴ There are two sets of Praxis examinations. A teacher candidate must pass Praxis I before entering a teacher education program in college. It is a minimum level basic skills examination in mathematics, reading, and writing that tests college students on a high school skill level (Tr (9/22/03) 101 24 103 6 (Poda)) To qualify for an initial teaching certificate, a teacher candidate must also pass Praxis II content area examinations, which are usually taken during an education major's senior year of college (Id. at 103 7 15) The difficulty level of the content area Praxis II examinations are also at a high school level or, at most, a level corresponding to the second year of college (Id. at 110 10 111 1) Finally, a candidate must also pass the Praxis II Principles of Learning and Teaching, a test intended to assess the taker's pedagogical skills within the first three years of teaching. A teacher must pass both parts of the Praxis II exam to be fully certified (Id. at 103 16 23)

fail the Praxis examinations at virtually twice the rate as the remainder of the state, and those who fail repeated their failures more often, is evidence that teachers in the Plaintiff Districts are not as qualified, as a group, than those found outside the Plaintiff Districts

(ii) *Substandard certification and out-of-field permits*

Moreover, “substandard certification” is available to teachers who are unable to demonstrate the necessary competence or training for full certification. Substandard certifications include out-of-state, temporary, transitional, temporary proviso, interim, out-of-field permit, permit proviso, special subject, graded/regular, and warrant certifications. (See Pls ’ Ex 6127, Tr (9/22/03) 134 23-139 14) Teachers holding substandard certificates do not meet the definition of “highly qualified” under the federal No Child Left Behind Act (id at 140 5-142 1, 182 2-183 5) because they generally lack the content knowledge and pedagogical skills that fully certified teachers are expected to possess. (Tr (9/22/03) 197 15-17) This lack of knowledge and skills is evidenced by data showing a correlation between substandard certificates and failure rates on the Praxis examinations. Of the 527 substandard certificates issued in South Carolina during 2003-04, 202 teachers (38 3%) in the Plaintiff Districts who held substandard certificates failed Praxis at least once, as compared with 15 1% of the teacher workforce statewide. (Pls ’ Ex 6857W and 6857X, Tr (11/4/04) 115 17-116 2, 116 14-19) In addition, some substandard certificate holders have multiple failures of the Praxis exams, those teachers in the Plaintiff Districts fail an average of 4 75 times, whereas statewide, the average number of multiple failures is 2 39. (Id 116 14-22, see also Pls ’ Ex 6857Y)

"Out-of-field permits" are issued to certified teachers who teach outside the subject area in which they trained and were certified (Id. 187 19-188 7) With the exception of Dillon 2, Plaintiff Districts have higher percentages of teachers with substandard certificates and out-of-field permits compared with the state average (See Pls ' Ex 6152G, Poda, Tr (9/22/03) 175 14-176 12) For example, a full 20% of Allendale's teachers hold substandard certificates or out-of-field permits, compared to the state average of 6.6% The percentage of substandard certificate teachers in Jasper is 19.8%, Lee has 18.5%, and Hampton 2 has 17.7% Although the Plaintiff Districts employ only 2.8% of the statewide teaching force (see Pls ' Exs 6857B and 6857V), 60 of the 527 substandard certificates issued in South Carolina in 2003-04, 11.4% were issued to teachers in the Plaintiff Districts (Pls ' Exs 6857U and 6857V, Tr (11/4/04) 113 21-114 13 and 126 14-23 (Poda)) Clearly, students in the Plaintiff Districts have a far greater chance to be taught by someone holding a substandard certificate and, therefore, lacking either content knowledge or pedagogy skills or both

(iii) PACE teachers

The State allows teachers with no certification at all to teach through South Carolina's Program for Alternative Certification for Educators ("PACE"), an alternative route to the profession PACE allows college graduates without an education degree to teach in their degreed area Because PACE teachers have little-to-no training in pedagogy prior to entering the classroom, they frequently do not know how to meet the needs of children (Tr (10/2/03) 172 6-13, 171 21-172 3 (8/11/03) 88 20-90 11)

(iv) *Foreign teachers*

In addition, the Plaintiff Districts' inability to attract and retain teachers frequently forces them to hire foreign teachers who are not required to pass the Praxis exam (Tr (9/22/03) 227 20-228 1) Although they are typically well versed in content knowledge, foreign teachers bring with them two barriers language and culture (Id at 228 3-5) Students are unable to understand the teacher because of the language differences (Id at 228 13-15, 230 6-11, 230 14-19) The language differences also create a barrier separating them from the children in the classes they teach, which frequently include core classes in mathematics and science (Tr 9/22/03 230 20-231 5) Further, foreign teachers have trouble relating to students and have difficulty with classroom management (Tr (9/30/03) 220 8-12)

Approximately 16.5% of all foreign teachers teaching in South Carolina are teaching in the Plaintiff Districts, a disproportionately high percentage because only 2.8% of South Carolina's total teaching staff is in these districts (See Pls ' Ex 6135) This is yet another indicator of the lack of opportunity available to each child

(v) *Long-term substitute teachers*

When the Plaintiff Districts are unable to fill their vacancies with certified teachers, whether domestic or foreign, they are forced to place long-term substitutes in the classrooms (Tr (9/23/03) 67 22-68 2 (Poda)) South Carolina has no state policy governing educational requirements for long-term substitutes, and the Plaintiff Districts only require high school diplomas (Id at (9/23/03) 68 10-15) In most instances, long-term substitutes do not have college degrees (Tr (10/2/03) 175 1-6 (J Franchini)) These ill-prepared "teachers" often serve for a full semester or full school

year Because education is cumulative, the children in their classes are likely to be perpetually behind in the ensuing years (Id. at (1/5/04) 191 22-192 3)

(vi) *Teacher experience*

The trial court found that no “particular level of teacher experience is constitutionally necessary” and essentially gave no credence to the evidence that the Plaintiff Districts had larger percentages of inexperienced teachers than other districts (12/29/05 Order ¶ 219) However, teacher experience is another indicator of teacher quality, validating the proposition that teachers—like all professionals—frequently require several years’ experience to achieve competency (Tr (7/31/03) 169 9-18)

Although experience does not indicate teacher quality in every instance, trial evidence established that experienced teachers generally develop a wider repertoire of skills to better handle the teaching challenges in the Plaintiff Districts (Tr (9/30/03) 206 3-15, see also (9/22/03) 158 1-159 18, 160 14-161 23, 163 20-164 6) Expert witnesses for both sides agreed on this issue (Id. (Poda), (6/21/04) 217 17-218 9 (Wolkoff), (10/09/03) 11 15-23 (Thompson), (9/12/03) 105 5-19 (Ladson-Billings)) In fact, testimony consistently confirmed that experience mattered (See Record Compilation 6 quoting Tr (9/22/03) 158 7-10 (Poda), (9/29/03) 106 2-10 (Levin), (3/4/04) 231 10-14 (Townes), (1/6/04) 182 17-20 (Longshore), (8/1/03) 64 1-5 (Dean)) Evidence shows that teachers with fewer than three-to-five years of experience are generally still developing and building their “tool boxes” of knowledge and techniques, and are generally not as effective as more experienced teachers (Tr (9/30/03) 206 2-15, (11/5/04) 140 13-21)

A disproportionate number of first-year teachers work in the Plaintiff Districts. Although Dillon 2 and Marion 7 do not have the same high percentages of first-year teachers as the other six districts, the group as a whole hired much higher percentages of first-year teachers than the state average. Four of the districts had approximately double the 4.9% state-wide average percentage of first-year teachers. Allendale's is 11.9%, Lee's is 10.4%, Hampton 2's is 10%, and Jasper's is 9.5%. (See Pls.' Ex 6152I.) Although some first-year teachers are effective, in general they simply have not yet developed their teaching techniques and lack the skills to be effective.

Also, beyond first-year teachers, Plaintiff Districts have too many inexperienced teachers—induction teachers, long-term substitutes, teachers on goals-based improvement plans, PACE teachers, and teachers with fewer than three-years experience or who are new to the district and are on a full evaluation plan. In Allendale for example, 55 of 140 teachers—or 39%—were inexperienced (Pls.' Ex 6166E.) In Hampton 2, 38.9% of its teachers had fewer than five years experience (Pls. Ex 6152H.) In general, teachers in the Plaintiff Districts tend to have fewer years' experience than teachers in the remainder of the state. (Id.)

(vii) *Advanced degrees*

The trial court did not separately consider advanced degrees, but when it incorrectly found “no empirical evidence” tying teacher characteristics (which would include advanced degrees) to student achievement (12/29/05 Order ¶ 253), in effect, this factor was also dismissed. When advanced degrees are in the field taught in which the teacher is teaching, the teacher is more likely to have deeper content knowledge, enhancing their effectiveness in the classroom.

At a minimum, merely obtaining an advanced degree shows that the teacher is willing to put forth the professional effort to obtain it (Tr (9/30/03) 238 2-12) Moreover, teachers with advanced degrees are positively correlated with student achievement—that is, the fewer the teachers with advanced degrees, the lower the student achievement—an effect that is quite statistically significant (Tr (8/11/03) 48 2-8, (11/5/04) 73 7-10) Composites of high-poverty schools include not only fewer teachers with advanced degrees but also fewer continuing contract teachers and fewer teachers returning to their jobs—all of which lead to higher teacher turnover and, thus, greater instability This combination of factors results in a more substantial correlation with student achievement (Tr (11/5/04) 73 7-75 19, 76 6-21)

Plaintiff Districts have fewer teachers with advanced degrees, with the statewide average at 47.2% and the Plaintiff Districts at 38.6% (Pls ' Ex 5007J) In a comparison of low- and high-poverty districts, high-poverty districts had approximately 14% fewer teachers with advanced degrees, a “very highly significant” difference (Tr (8/11/03) 42 22-43 1, 47 17-19, Pls ' Ex 5007A)

(viii) Competitive Colleges

Witnesses described non-competitive colleges as being colleges or universities with low admissions criteria (Tr (8/11/03) 45 8-25) Non-competitive colleges provide less rigorous course work and assessments of their students' work (Tr (9/22/03) 90 13-18, 90 25-92 3, 92 10-25) Teachers who obtained their degrees from such colleges frequently lack the verbal skills and content knowledge needed to become effective teachers (Id at 85 7-86 1, 89 6-9, 89 16-21) Students in classes conducted by those teachers are much less likely to have an opportunity to acquire a minimally

adequate education because the teachers are not well-prepared to meet the needs of students in general and, particularly, the needs of at-risk students (Id. at 94 6-95 17, 96 23-97 7, 101 3-19) Even defense expert Michael Podgursky conceded that the selectivity and quality of the institution of higher education could be a predictor of student performance and that it impacts the teacher's content knowledge and verbal skills (Tr (6/16/04) 17 23-18 17)

Further, contrary to the trial court's finding, empirical evidence supported the testimony that teachers with degrees from non-competitive colleges lack content knowledge and are not adequately prepared for the classroom (Tr (11/4/04) 118 22-25) Their failure rate on the Praxis II examinations required for certification—examinations that merely test knowledge at or below the second year of college—is distressingly high Dr Janice Poda⁵ explained that prospective teachers from competitive colleges,⁶ failed 27 2% of the Praxis tests they took, (Pls ' Ex 6857Z , Tr (11/4/04) 123 4-124 2), yet, by contrast, prospective teachers from non-competitive colleges failed a full 53 9% of Praxis II tests taken between 1999 and 2004 (Pls Ex 6857AA, 6857BB), a failure rate that Dr Poda called “alarmingly” high

The percentage of teachers in the Plaintiff Districts graduating from non-competitive colleges is 42% compared with 29 6% of such teachers in non-plaintiff districts (Pls ' Ex 5007N) The difference among such teachers in high- poverty and low-poverty districts is even greater 41 7% of teachers in high-poverty districts have

⁵ At the time of her testimony Dr Poda was Director of the Division of Teacher Quality at the State Department of Education and in charge of teacher preparation and licensing programs in South Carolina (Tr (9/22/03) 49 24 25)

⁶ Dr Poda testified that some of the competitive colleges should have been classified as non-competitive because of low admission standards and overall academic rigor (Tr (11/4/04) 123 4 17)

degrees from non-competitive colleges, compared with 17.4% of those teachers in low-poverty districts (Pls ' Ex 5007E) All except Dillon 2 and Marion 7 (which had a number of highly qualified teacher specialists assigned to it (Tr (3/31/04) 54 2-7, 73 6-11 (Suber)) exceed the state average of 29.6% (Pls ' Ex 6152E)

(ix) Continuing contracts

Teachers who hold continuing contracts have passed the Praxis qualifying exams, have taught for at least three years (first under an induction contract and then under annual contracts), and have passed a formal evaluation process, thus demonstrating that they have minimal competency and at least three-years experience in the classroom. Continuing contract teachers enjoy due process and employment rights under the Teacher Employment and Dismissal Act, S C Code Ann §§ 59-25-410, et seq (1976 & Supp 2006) (See Tr (9/22/03) 134 17-20, 142 22-144 5, 152 14-19 (Poda), Pls ' Ex 6128) Although other kinds of contracts and certifications exist, continuing contract teachers have demonstrated a level of knowledge, skills, and experience that others have not (See id at 142 8-148 2)⁷

Only 62.2% of teachers in Plaintiff Districts have qualified for and hold continuing contracts, a much smaller percentage than the average of 81.4% in non-plaintiff districts in the state (Pls ' Ex 5007K)

⁷ As of 2001 these teachers are also labeled professional teachers. Prior to 2001 any teacher holding a certificate was labeled a professional teacher even without the evaluations and experience of a continuing contract teacher (Tr (11/4/04) 81 8 82 12)

- (d) Disproportionate clustering of negative teacher characteristics in the Plaintiff Districts prevents the opportunity for a minimally adequate education

Despite credible testimony explaining that the aggregate of negative teacher characteristics in the Plaintiff Districts negatively affects teacher quality and prevents children in the Districts from their required learning opportunity, (Tr (11/5/04) 72 20-78 21), the trial court did not consider the net effect the high percentage of teachers with such characteristics has on the Plaintiff Districts and their children. Rather, the court only considered the teacher characteristics on an individual basis, never considering the harm caused by the aggregation of multiple negative teacher characteristics in the Plaintiff Districts, including the cumulative effects of higher percentages of teachers who

- are not fully certified, including foreign, substitute teachers, and special needs teachers,
- have substandard certificates and licenses,
- lack needed experience,
- are teaching out of their licensed field,
- received their training at non-competitive colleges,
- have higher failure rates on teacher licensing examinations,
- do not have advanced degrees

All of these negative characteristics and related circumstances have a debilitating effect on teacher and instructional quality provided to the students in those high-poverty schools (See Record Compilation 7 quoting Tr (8/11/03) 46 21-47 10, 53 6-16

(Darling-Hammond), (9/29/03) 111 24-112 5, 114 17-115 10 (Levin), see also Pls ' Exs 5007A-5007O)

The whole is greater than the sum of the parts, and the accumulation of these negative teacher characteristics evidence a lack of essential instructional quality in the Plaintiff Districts (Tr (11/5/04) 74 18-75 2, (11/4/04) 129 12-23, 131 18-22, 133 24-134 10) Clearly a disproportionate number of such teachers work in the Plaintiff Districts Contrary to the trial court's method, the aggregation of negative factors, not the individual factors standing alone, are the problem (Tr (11/5/04) 72 20-78 21) Once again, the trial court erred by failing to consider the aggregate effect of these characteristics

- (e) Low teacher salaries and high turnover prevent a better workforce

The trial court acknowledged that teacher salaries in Plaintiff Districts are lower than those in other districts and the rate of teacher turnover is higher than that in other districts, which creates "something of a management and planning problem for the Plaintiff Districts " (12/29/05 Order ¶¶ 208, 213, 217) Nevertheless, the court stated that it "cannot conclude that teacher compensation in South Carolina represents a constitutionally defective barrier to the attraction of qualified teachers into the profession " (Id ¶ 206) It also found that the higher teacher turnover rate "is not itself a violation of the State Constitution" and does not "itself create[] the absence of the opportunity for a child to receive a minimally adequate education " (Id ¶ 217) Aside from the multiple flaws in this logic, the evidence did not support findings that the lower teacher salaries and higher teacher turnover have no effect on the Plaintiff

Districts' ability to provide each child with adequate educational opportunities through properly trained and skillful teachers

Furthermore, the trial court erred in relying on unreliable evidence regarding teacher salaries and their effects on the hiring efforts of Plaintiff Districts. Defendants presented flawed statistical analyses offered by two economists, Michael Wolkoff and Michael Podgursky. These economists, who had never even visited any of the schools in Plaintiff Districts, used flawed and incorrect data⁸ and inappropriately compared (1) South Carolina teacher salary averages with other states' averages and (2) employment conditions and salaries in Plaintiff Districts with those in other labor markets that do not compete with them for teachers.

(i) *Salaries the most important factor in hiring and retaining teachers*

Teacher salary is unquestionably an important factor in attracting and retaining quality teachers. (Tr. (8/11/03) 59 7-11, (9/23/03) 27 25-28 3) On this issue, defense experts also agreed. (Id. at (7/1/04) 19 19-22 (defense expert Smith testifying that “[i]f in fact, it were the case that the school districts were unable to attract qualified staff, one of the things that you would look at is, are the salaries adequate”), see also Tr. (9/21/04) 178 2-3, 180 10-19 (Guthrie), (6/21/04) 163 14-19 (Wolkoff

⁸ Dr. Wolkoff excluded 8,000 classroom teachers in his analysis of 37,000 classroom teachers, reducing the pertinent group by almost 18%. Among the teachers excluded in his analysis are those not coded as Code 08 Classroom Teachers in the State Department of Education coding system. The other classroom teachers that they excluded from their analysis included special education teachers (Codes 03, 06, and 07), four-year-old preschool and five-year-old kindergarten teachers (Codes 04 and 05), and foreign teachers (Code 46). (Pls. Ex. 6857A Tr. (11/4/04) 72 19 74 14.) These teacher groups have high percentages of uncertified teachers or teachers with out-of-field permits and substandard certifications. (See id. at 73 3 6 74 7 75 4 (approximately 85% of teachers teaching out of field are in the special education area) (2/10/04) 130 70 131 8 (2/11/04) 202 23 203 9 Pls. Exs. 6399C 6399D 6400 (substantial percentages of special education teachers do not hold standard certifications).)

testifying that, absent other differentials, “money matters” in the area of recruiting and retaining teachers), (6/16/04) 35 7-36 1 (Podgursky))

Further, Plaintiffs presented evidence at trial that the children’s greater needs can make the actual job of teaching is more difficult in high-poverty schools, which, in turn, may require higher teacher salaries to staff Plaintiffs’ schools (Id at (8/11/03) 58 14-25, (9/29/03) 96 18-25)

(u) Effect of salary and other factors on hiring teachers

Because Plaintiff Districts are unable to pay larger salary supplements like more affluent districts, the salaries they offer are lower than those offered by other districts, thus, limiting the size and quality of the applicant pools for the Plaintiff Districts (Tr (7/30/03) 182 2-14, see also (8/1/03) 182 4-9) (recounting instances of one district’s having zero or one qualified candidates and when it had several applicants but only one who was qualified for position), (4/2/04) 61 1-6) With such a limited applicant pool, the districts frequently are forced to hire and retain substandard applicants out of desperation to have a teacher in the classroom (Tr (1/6/04) 165 17-19, (7/31/03) 78 9-16, (9/30/03) 92 10-13, (4/2/04) 21 20-22 1)

Plaintiff Districts’ constrained budgets also limit their ability to hire teachers with more experience or advanced degrees even when available (Tr (10/9/03) 15 12-16 2, (1/5/04) 189 10-25 (Estill High School principal describing being told to see if less credentialed candidates were available before he was given authority to hire two candidates with Ph D degrees)

Even Defendants' expert Michael Podgursky agreed that higher salaries increase the applicant pool of prospective teachers from which a district may choose the applicant best suited for the District's needs (Tr (6/11/04) 116 1-117 1) Without competitive salaries to create an adequate pool of candidates from which to choose, a district may not be able to hire effective teachers to replace ineffective teachers or fill vacancies (Id at (9/23/03) 28 23-29 13)

Plaintiff Districts fall at or near the bottom of the state in their ability to pay competitive compensation⁹ Districts with higher salaries have larger applicant pools, districts with low salary levels have few-to-no choices since lower-quality candidates are often the only applicants (Tr (9/23/03) 73 3-15, (8/11/03) 58 6-13) Lower teacher salaries attract only teachers without other options (Id at (9/23/03) 29 6-8, (9/30/03) 215 19-216 14)

Further, last-minute or late hires are common in Plaintiff Districts (See, e g , Tr (4/21/04) 108 3-109 6) Many positions are filled at the last moment with almost anyone who is available, substantially increasing the chances that the new hires do not have the qualifications or skills needed for at-risk children (Id at (4/2/04) 81 10-

⁹ The trial court erred by stating that it had no evidence of actual salary differentials and that Plaintiffs relied only on evidence of average teacher salaries in their arguments of their competitive disadvantage in hiring and retaining the teachers they need (See 12/29/05 Order ¶ 208 7/12/07 Order ¶ 11) To the contrary Plaintiffs proved that actual salary levels for teachers in Plaintiff Districts are lower than those for teachers with the same experience and education in other districts (Tr (9/23/03) 29 25 35 10 Pls Exs 6138 6152A 6152B (showing the state minimum salary or base cell amounts for different levels of experience and education compared with that of Plaintiff Districts after inclusion of their local salary supplements) see also Defs Ex 3225 (2001 2002 Rankings) at pp 221 28 and Defs Ex 2907 at pp 223 30 (2000 2001 Rankings) (showing base cell amounts of all districts in the state) Tr (8/7/03) 97 3 18 (9/30/04) 66 18 22)) In addition Bill Johnson a former teacher in Dillon 2 testified that he left his position there to cross the county line and work in Horry County for the sole purpose of increasing his salary by \$10 000 per year (Tr (9/24/04) 158 7 160 18 (Johnson)) Plaintiffs also proffered the entire salary schedules from other districts showing their complete pay scale for comparison with the salary schedules of Plaintiff Districts but they were excluded on the erroneous ground that absent an equal protection claim differences among districts are irrelevant Plaintiffs contend that this was error and that such evidence should have been admitted

82 16) The Superintendent of Marion 7 testified that he was often asked to decide whether the district should hire a clearly under-qualified teacher applicant or start the school year without a teacher and hope that a qualified candidate came along (Tr (7/30/03) 191 19-192 7) Too often, the Plaintiff Districts cannot find any appropriately certified teachers and must resort to foreign teachers, PACE teachers, or even long-term substitutes with only a high school diploma (See, e g , Tr (9/30/03) 92 10-13) In addition to salary, poor facilities in the Plaintiff Districts are an impediment to attracting qualified teachers to the Plaintiff Districts (Tr (7/31/03) 68 10-69 2)

(iii) Effect of salary and other factors on teacher retention and turnover

High turnover in the Plaintiff Districts results from the same factors that obstruct their attempts to attract quality teachers lower salaries, poor facilities, lack of support, and an overall more challenging teaching situation (Tr (01/05/04) 187 20-188 9 (principal noting that teachers accept entry-level job in his district only to move to a position closer to their homes, “particularly if that job pays them more”) (1/6/04) 173 8-12 (superintendent noting that the district lost a lot of teachers who were commuting, “you get them in, keep them a couple of years, and if they can get closer to home they go”), (10/9/03) 4 10-20 (superintendent finding that his high teacher turnover rates was due in part, to poor working conditions, poor housing, and dissatisfaction with available amenities, “it's the inconveniences a lot of times [are the] reasons why they go ahead and decide to leave”))

In addition to low teacher salaries, witnesses identified a lack of support as a reason that the districts have difficulty attracting and retaining quality teachers Lack of support comes in many forms lack of administrative support for discipline

problems, lack of resource teachers to assist children who are behind, lack of supplies necessary to make concepts more understandable, or lack of time during the day to adequately prepare their lessons because of bus duty, lunch duty, and hall duty. When teachers are forced to spend much of their time with issues other than teaching, they become frustrated and disenchanted.

Higher-paying neighboring districts compete for teaching talent in other ways as well. Some of those districts have “nice, new shiny building[s]” and offer shorter working hours (Tr (9/30/03) 202 10-203 03), leaving Plaintiff Districts with teachers who were unable to find jobs elsewhere (Tr (8/11/03) 60 20-61 10)

(iv) Turnover in the Plaintiff Districts

The Plaintiff Districts essentially have become a training ground for new teachers. Nearly one-fourth of all teachers in those schools leave every year (Tr (8/5/03) 69 24-70 3 (ten of twenty-four teachers starting the school year in Marion 7 in 2003-04 were new), (1/5/04) 186 6-16 (Principal Specialist Archie Franchini noting that 25-38% of teachers in Estill High School were replaced during the year of trial), Pls ’ Ex 6152I) If the Plaintiff Districts are fortunate enough to hire qualified teachers, they frequently lose them within a year or two to neighboring districts paying higher salaries or with better working conditions. The three-year average teacher turnover rate in each of the Plaintiff Districts, including Dillon 2 with its history of staffing stability, exceeds the state average (Pls ’ Ex 6152C)¹⁰

¹⁰ Michael Wolkoff’s statistical analysis showing otherwise was fatally skewed by his failure to include 202 or 16% of classroom teachers in Plaintiff Districts who worked less than the contracted full year of 190 days (Tr (11/4/04) 82 13 85 11 Pls Ex 6857CC) These are all turnover teachers because in either arriving late or departing early in the school year they either replaced a departed teacher or left a vacancy in their schools. Eliminating those teachers from his analysis of teacher turnover clearly biased

(v) *Negative effect of turnover in the Plaintiff Districts*

The trial court incorrectly found that the teacher turnover in Plaintiff Districts actually resulted in an increase in teacher education levels and experience (12/29/05 Order ¶ 215) In so finding, the court erred in relying on Dr Wolkoff's skewed data analysis,¹¹ (id), and ignoring the overwhelming evidence to the contrary

The reality in Plaintiff Districts is that excessive teacher turnover has multiple harmful effects on the instruction delivered to the children Too often the Plaintiff Districts' only choices are to replace departed teachers with new teachers, foreign teachers, PACE teachers, or even long-term substitutes with only a high school diploma Replacing a teacher with one who is less experienced or qualified negatively impacts the students

Moreover, turnover negatively affects trust from at-risk students and their parents, who often distrust schools and teachers Stability of teaching staff is instrumental in gaining their trust, and teacher turnover undermines whatever trust has been built (Tr (8/5/03) 71 11-24) Parents trust is also important if teachers are to effectively teach (Tr (9/30/03) 206 16-25) Stability breeds parental involvement, student cooperation, and, ultimately, increased achievement The constant churning of

the results and the trial court's reliance on this analysis was error (See 12/29/05 Order ¶¶ 213 214 215 217)

¹¹ Dr Wolkoff's erroneous inclusion in his data analysis of 202 teachers who worked fewer than 190 days ignores the fact that someone had to step in and lead those teachers' classes for those additional days and that substitute was more than likely not a qualified teacher or necessarily even a college graduate In Plaintiff Districts substitute teachers for the most part have achieved no more than a high school diploma or a G E D (Tr (11/4/04) 84 20 85 16) Drs Wolkoff and Podgursky attempted to show that teachers taking the place of those who had left Plaintiff Districts actually enhanced the teacher quality in Plaintiff Districts a point the trial court apparently adopted However since the replacement was probably a substitute teacher with only a high school diploma teacher quality in Plaintiff Districts was not improved but was harmed

teachers detrimentally interrupts the students' educational program (Tr (7/31/03) 78 9-12)

High teacher turnover also results in higher costs Replacing departed teachers requires additional time and manpower to locate, recruit, and orient new teachers and, for beginning teachers, induct them into the profession In addition, time spent on training and professionally developing these teachers is lost instructional time When teachers leave, the result is a cycle of continual re-training with its attendant costs (Tr (10/9/03) 6 3-8) Factoring-in lost training and professional development efforts results in a cost of about \$20,000 "every time a teacher turns over " (Tr (9/23/03) 48 1-9) The constant turnover also diminishes the effectiveness of the teacher and principal specialists whose efforts are frustrated because of the continual training and re-training of new teachers each year rather than being able to work within a base of experienced teachers (E g, Tr (2/12/04) 146 11-21)

Initiatives that can make a difference in Plaintiffs' abilities to attract and retain teachers include (1) increasing local salary supplements, (2) giving signing bonuses, (3) improving teacher housing options, (4) improving working conditions, including facilities and access to instructional materials, and (5) increasing support through additional staff and strong principals to enable teachers to focus on their jobs of teaching children Unfortunately, the low-wealth Plaintiff Districts lack the resources necessary to implement any of these initiatives

(f) Corrective actions do not remedy recognized inadequacies

The trial court acknowledged evidence of incompetent teachers and poor quality instruction, yet excused these failures on the premise that the problematic teachers were

“capable of correction and corrective action was underway ” (12/29/05 Order ¶ 225)

The court's conclusion was not supported by any proof that corrective action had indeed resulted in adequate correction of teacher performance

Following is a summary of such evidence

- **Allendale County** Despite evidence of inadequate teachers who were not offered contracts to return or who did not meet ADEPT¹² requirements, the court's finding that “corrective action was underway” was inexplicably deemed to be sufficient to ignore the inadequate instruction those teachers had given prior to the necessity for corrective action (12/29/05 Order ¶ 225) Further, the State presented no evidence that teacher performance in Allendale improved following such corrective action
- **Dillon 2** By way of excusing the existence of poor instruction in Dillon 2, the court similarly noted that the district was “working, as would be expected, to improve any problems of teachers within the ADEPT system ” (Id ¶ 226) The State presented no evidence that teacher performance in Dillon 2 improved as a result
- **Florence 4** Acknowledging that multiple teachers in Florence 4 were placed on ADEPT improvement plans because of deficiencies, the court did not question the effects of teacher inadequacy on the students (Id ¶ 231) The State presented no evidence that teacher performance in Florence 4 improved as a result of the ADEPT improvement plans
- **Hampton 2** The court noted that Hampton 2 did not offer returning contracts to two inadequate teachers, but did not find an adverse effect on the students' opportunity to obtain a minimally adequate education (Id ¶ 233) The State presented no evidence that the two teachers were replaced with teachers who were capable of delivering minimally adequate educational opportunities to the children of Hampton 2
- **Jasper County** Although the trial court noted thirty-two teachers “with problems” were employed in Jasper County, it inconsistently found no issue with the teaching force because the district placed them on ADEPT or did not offer contracts for them to return (Id ¶ 237) The State presented no evidence that the performance of the teachers placed on ADEPT improved

¹² The court described the Assisting Developing and Evaluating Professional Teaching Program (ADEPT) as a South Carolina program that adopts certain standards for teaching effectiveness which shall serve as a foundation for all processes used for assisting developing and evaluating teachers throughout the State (12/29/05 Order ¶ 98) Codified at S C Code Ann § 59 26 20(B) ADEPT sets out standards for reviewing teachers performance (See id ¶¶ 99 100)

or that teachers capable of delivering minimally adequate educational opportunities to the children of Jasper County replaced any of the departing teachers

- **Lee County** Disputing the argument that large percentages of teachers were incompetent, the trial court asserted that “no principal [in Lee County] was able to name an inadequate teacher” (id. ¶ 240), however, deposition transcripts reveal that none of the principals were asked that question. Further, the court described one Lee County teacher as being placed on an improvement plan, (id. ¶ 240), but still found that teacher quality was not constitutionally deficient, thereby disregarding the poor performance that led to the necessity of taking such action with respect to that teacher. The State presented no evidence that the teacher’s performance improved as a result of the improvement plan.
- **Marion 7** The trial court noted that principals only identified one teacher as “incompetent or inadequate ” (Id. ¶ 244) The court also referenced the testimony of Principal Rex Whitcomb in which he described seven teachers as incompetent (Id. ¶ 245) Disregarding this evidence of inadequate teacher quality, the court found that the teacher quality and instruction in Marion 7, as in the other Plaintiff Districts, met the constitutional requirement of minimally adequate (Id. ¶ 252)
- **Orangeburg 3** The trial court found that Orangeburg 3 “is not overly burdened with bad teachers,” (id. ¶ 251) excusing the performance of the incompetent teachers in the district. The court disregarded Dr. Longshore’s testimony that a full third of his teachers were essentially unsalvageable and another third needed improvement (Longshore, Tr 1/06/04 158 19-159 11)

Such evidence of deficient teachers cannot be neutralized by a hypothetical reference to a potential for the teachers to cure their deficiencies in the future. The trial court erred by dismissing evidence of incompetent teachers so readily. Even if the teachers’ problems were corrected later, the trial court’s handling of its findings completely disregarded the harm to students before and during the correction period.

(i) *The need for corrective action shows that the teachers are deficient*

The trial court's findings on the adequacy of teacher quality and performance in the Plaintiff Districts is based, paradoxically, on the evidence of teacher inadequacies and programs to address inadequacies. Such reasoning defies logic. The record contains no evidence that the teachers who were placed on ADEPT ever became effective and adequate teachers. Likewise, the record contains no evidence that the teachers who were not offered contracts to return to teach the following year were replaced by effective and adequate teachers. The trial court's findings that real teacher quality issues could be disregarded because they could, or were, being corrected, was speculative at best. The court's rulings were in error. Furthermore, the "corrective actions" relied upon by the court—the teacher evaluation program ADEPT and professional development programs—are ineffective.

(ii) *The State's corrective action programs do not properly police teacher inadequacies*

(a) *ADEPT is ineffective*

Adopted by the State Board of Education, ADEPT is the primary means by which teachers are mentored and evaluated. (Tr. (9/23/03) 95-5-96-12, 96-22-97-10, (9/22/04) 102-17-107-11, see also generally Pls.' Ex. 6099.) The trial court's reliance on the districts' hypothetical use of the ADEPT program to correct inadequacies in teacher quality and performance was erroneous not only because of its speculative nature, but also because the ADEPT program in which the court placed so much faith, is not effective to remedy teaching inadequacies in the Plaintiff Districts. Though the court was quick to rely on ADEPT as a panacea to correct real instances of teacher

inadequacies, the court never examined how the program actually works or how it is implemented and funded. In failing to consider the relative merits of ADEPT as a corrective program, the court ignored substantial record evidence demonstrating that the program does not work efficiently or effectively and that ineffective teachers in South Carolina school districts are neither mentored nor helped to improve their performance through ADEPT.

Further, wide disparities exist in how ADEPT is implemented in the districts. For example, some teachers are regularly evaluated for ADEPT by individuals who have little-to-no knowledge of the subject or grade level being taught, limiting the depth of evaluation on some occasions to non-substantive review of whether the students sat quietly in their seats. (Tr. (9/23/03) 99:16-100:21.) Another part of ADEPT requires mentoring for new teachers, but that is often non-existent or ineffective because of a lack of resources—at a minimum, funding to pay a substitute teacher for the induction teacher's class while she is observing another. (Id. at 110:3-111:1.) Indeed, 40% of new teachers, many of them in the Plaintiff Districts, were unaware that they had mentors. (Id. at 109:1-110:2.)

Though her testimony regarding ADEPT is not referenced by the court at all, Dr. Janice Poda described at length the weaknesses in implementation of ADEPT. (See generally id. at 108:1-111:3, 111:11-114:5, 115:20-117:15.) Dr. Poda testified that ADEPT as implemented simply provides no assurance that potentially good teachers are properly inducted and mentored into the system or that bad teachers are eliminated from the system. (Tr. (9/23/03) 122:11-20.) She also explained that implementation difficulties are even more acute in poor districts, because of the districts' insufficient

funding and personnel (Id. at 117 16-120 2) Defendants provide the school districts with only about \$40 per teacher to induct and evaluate them through this extensive, paperwork-heavy and time-intensive program (Id.) The Superintendent of Marion 7 wrote the State Department of Education outlining the many real-life staffing and funding problems in rural, poor districts created by ADEPT, including costs of substitute teachers for three to five days for each assessment team member for each evaluation, the sheer numbers of assessments of new teachers in rural districts with high teacher-turnover rates, difficulties in finding qualified mentors for new teachers, and the additional burden ADEPT places on the few experienced and competent teachers, who are already tapped for many extra responsibilities (Pls ' Ex 6143, Tr (9/23/03) 130 20-134 25)

Further, one of the principals described the long and arduous process required by ADEPT and the Teacher Employment and Dismissal Act, explaining that the process required observation, evaluation, and remediation of a teacher, sometimes on a repeated basis, prior to a principal's being in a position to recommend non-renewal of a contract. The process consumes from two to five years, and it includes a presentation to and approval by the superintendent and the school board. While the process percolates, that teacher is able to continue teaching—delivering several years of inadequate instruction to the students in her classroom. (Trial (8/1/03) 176 3-179 22)

The trial court does not mention the testimony of these district faculty members in its discussion of the ADEPT program or in connection with its finding that ADEPT demonstrates that Defendants have “a strong commitment to educating the children of this State ” (12/29/05 Order ¶ 101) The court's finding, based only on recitation of

the statute and regulation, offers no more than a “paper” analysis of the corrective action program, the finding is contrary to the weight of the record evidence

(b) Professional development programs are ineffective

Defendants’ professional development programs for teachers in the Plaintiff Districts are also ineffective. Although the trial court found no “impediment that prevents the Plaintiff districts from providing higher quality, ‘sustained’ professional development for their teachers,” (12/29/05 Order ¶¶ 220, 221), this finding is against the weight of the evidence and should be reversed.

At trial Plaintiffs introduced evidence that the State Board of Education adopted its Professional Development Standards, but that such standards have never been fully implemented. Importantly, however, this failure to fully implement the standards does not stem from the districts’ simply choosing not to implement them, as the trial court implied in its finding that there were “no impediments” to high quality professional development (12/29/05 Order ¶ 221). Dr. Poda testified that consistent implementation of the standards is “almost nonoccurring” (Tr. (9/23/03) 160 11-14), but also explained the reasons for the lack of implementation. First, although teacher contracts funded by Defendants require and pay for five days of professional development, the time is not sufficient to follow up on and institutionalize strategies learned through professional development.¹³ (Id. at 160 17-161 4.) Second, the money for professional development is typically grant money, earmarked for particular limited programs, and cannot be used in other ways that might be more beneficial to the teachers in the district receiving

¹³ The EAA requires five additional days to be added to teachers’ contracts to allow for more professional development time, but the General Assembly has never funded the additional five days. (Tr. (6/17/04) 201 15 202 8 (S. Smith); Tr. (1/09/04) 206 11 17 (Wilson).)

the funds (Id at 161 5-18) Finally, most districts do not have personnel on staff with the expertise to follow-up and coach teachers in a sustained way that would institutionalize the changes and improvements “so that change occurs and the learning occurs ” (Id at 161 19-162 6) They “would be time consuming and expensive to do them right or more than we are spending today anyway ” (Id at 162 7-13)

One district superintendent confirmed that although her district endeavors to follow the Professional Development Standards, it struggles with compliance because of high teacher turnover and lack of opportunity to revisit, coach, and institutionalize the changes desired (Tr (10/2/03) 118 17-25) On many occasions, there is a “disconnect between receiving the staff development and the application of those skills in the classroom ” (Id at 120 2-4) “It’s the difference between presenting what you are asked to present, the person you’re presenting it to, understanding it, internalizing it, and then being able to move to the application phase effectively would be the difference ” (Id at 120 17-21) In addition to more expense for the intensive training needed, it’s not like you are trading sort of bad equally priced professional development for good uses of the same money It does require more infrastructure to do the more intensive work ” (Tr (8/11/03) 171 22-172 1, see also id at 170 25-171 22) Even the extra funding pursuant to EAA for professional development is “a very tiny drop in the bucket” compared to what the districts need, according to Dr Darling-Hammond (Id at 131 12-24) Effective professional development requires funding, talent, and time that the Plaintiff Districts do not have (Tr (8/7/03) 100 21-102 10 (Rogers), (1/7/04) 21 20-23 10 (Longshore), Tr (1/14/04) 101 15-102 5 (Lee), (2/9/04) 107 1-109 14)

The trial court's findings imply that providing effective professional development, by the Standards is a matter of simply "doing it" (See 12/29/05 Order ¶ 221) The court's findings do not focus on, or really even acknowledge, the real-world difficulties with implementing the professional development standards This was error

Moreover, the State cannot escape responsibility for failing continuing education programs by blaming the school districts for failing to provide sustained and effective professional development If the districts are failing in any task delegated to them by Defendants, then Defendants are obliged to ensure funding and support to succeed in all of those tasks This Court recognized that the General Assembly is ultimately responsible for ensuring that each child receives the opportunity for a minimally adequate education The General Assembly, therefore, has the responsibility if the constitutionally required opportunity is not provided to each child, including at-risk children Although the State may delegate its duties under the education clause to other bodies politic or state-created agencies, it remains accountable and must take the required actions to ensure that its subdivisions or agencies are meeting the State's constitutional mandate Parker v State, 216 S C 52, 59, 56 S E 2d 723 726 (1949) see also Claremont Sch Dist v Governor, 703 A 2d 1353, 1359 (N H 1997) This Court made clear in the Abbeville case that deficiencies created by local control, shortages in local funding, or any other local district failure provide no excuse for the State's failure to provide students in the Plaintiff Districts with the opportunity for a minimally adequate education "[W]e emphasize that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government" Abbeville, 335 S C at 69, 515 S E 2d at

541 Therefore, if for any reason the system of free public schools in South Carolina does not “ensure the provision of a minimally adequate education to each student in South Carolina,” the State is responsible and, through the General Assembly, has the duty to remedy the situation. See Claremont, 703 A 2d at 1360 (declaring “the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy”), DeRolph v Ohio, 78 Ohio St 3d 193, 211 (1997) (holding that if a local school district falls short of the constitutional requirements for any reason the state has the obligation to rectify the situation)

Therefore, the trial court’s considering the Plaintiff Districts as the parties at fault for failing to provide effective professional development runs afoul of the Abbeville ruling that education is, at bottom, Defendants’ responsibility

2 Curriculum and teacher instruction in the Plaintiff Districts is insufficient to create the opportunity for each child to acquire a minimally adequate education

(a) State curriculum standards do not exceed the requirements of a minimally adequate education

The instruction that teachers are expected to deliver to children must be aligned to the South Carolina Curriculum Standards because these standards, developed pursuant to the requirements of the EAA, encompass the knowledge and skills that Defendants expect public school children to acquire (Tr (10/7/03) 81 15-24 (Lindsay)) The trial court correctly found that because the curriculum 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 ” (12/29/05 Order ¶ 102) PACT test scores, which are intended to test whether

children have successfully learned the material covered by the curriculum standards (12/29/05 Order ¶ 103), offer an important metric to be considered in determining whether the children in the Plaintiff Districts are being provided with the opportunity to acquire a minimally adequate education

Against this backdrop, the trial court surprisingly adopted Defendants' argument that the EAA standards create only aspirational goals for South Carolina's children. Notably, they are the only standards that Defendants imposed on a mandatory basis on all students, schools, and school districts in South Carolina. In the absence of other statements by the State or the General Assembly regarding what students need to know and be able to do, the Court should properly use the EAA standards, and the PACT test results assessing children's mastery of them, as manageable standards against which the constitutionality of South Carolina's system of education can be measured.

The trial court's finding that the EAA standards "go far beyond the knowledge and skills comprising a minimally adequate education as defined in Abbeville County," (12/29/05 Order ¶ 109), is entirely without factual support. In making this finding, the trial court referred only to detailed quotations from selected curriculum standards. Importantly, however, the trial court did not reference any of the testimony regarding the meaning of the curriculum standards from those persons charged with developing them. As a result, the trial court mischaracterized the practical levels of knowledge and skills the standards are intended to convey.

Several witnesses familiar with the state curriculum standards testified at trial that the standards encompass the skills and knowledge the State deemed necessary for productive citizenship. (Tr. (9/10/03) 158 5-7, (8/13/03) 77 14-19, (2/24/04) 15 10-

15) Dr Sandra Lindsay, Deputy Superintendent for the Division of Curriculum Services and Assessment, and others testified that, though the curriculum standards developed pursuant to the EAA accountability system are “rigorous,” the standards are necessary to ensure that children in South Carolina are taught and tested on what they need to know and accomplish (Tr (10/6/03) 112 12-114 5, (10/7/03) 105 23-25) Dr Lindsay further explained that South Carolina’s levels of performance (Below Basic, Basic, Proficient, and Advanced) match the national levels of performance set by the United States Department of Education for the National Assessment of Educational Progress (NAEP) tests—meaning that a South Carolina child who tests at the Proficient level on PACT would be judged as being proficient elsewhere in the country Similarly, a South Carolina child who tests at the Below Basic or Basic level on PACT would be considered to have less than basic or minimally basic knowledge and skills elsewhere (Id at 105 13-109 5)

Dr Lindsay went on to explain that the EAA curriculum standards are not a new concept, nor are they any more rigorous than what our schools have faced in the past “The rigor of the current EAA standards is virtually unchanged from the earlier “curriculum frameworks,” that were in existence since the early 1990s and from which the current standards were derived ” (Tr (10/6/03) 103 9-14, 108 4-109 15)

The state curriculum standards and PACT scores are ways of measuring whether children have been provided an opportunity for a minimally adequate education The court erred in finding the standards are not metrics for this measurement The abysmal performance by children in the Plaintiff Districts on the PACT tests, designed to test their knowledge and skills against the curriculum

standards, are clear evidence that they are not provided the opportunity to master the curriculum standards or, by extension, the opportunity to acquire a minimally adequate education

(b) Alignment of curriculum and delivery of instruction in the Plaintiff Districts is insufficient

Developing and disseminating South Carolina Curriculum Standards is but one step in the process of delivering to students the knowledge and skills they need. Dr. Lindsay referred to the curriculum standards as “the overarching pieces” from which the school districts then must develop a curriculum that sets out the scope and sequence of what must be taught, from which in turn teachers must develop daily lesson plans, including materials and other resources needed, for each individual standard. (Tr. (10/6/03) 37-12-38-12.) The trial court erred by finding that the Plaintiff Districts are all adequately delivering the State’s curriculum standards to their students. (See, e.g., 12/29/05 Order ¶¶ 118, 119, 129, 130, 139, 148, 158, 167, 177, 188, 7/12/07 Order ¶ 16.)

Translating the standards into daily lesson plans is at the heart of providing good instruction. The process is time-consuming and requires long-range planning. Of course, the teacher must determine how to convey the learning encompassed within the curriculum standards through lesson plans and pacing. In developing each lesson plan, teachers must also consider the children they are to teach and ensure that the children develop the necessary subskills and precursor skills, specifying particular activities and instructional materials, and including assessments of the efficacy of the plan. This planning becomes even more challenging if a teacher must instruct students who range

in ability levels (Tr (10/6/03) 41 3-42 8, 43 17-45 18) Through this process, referred to as aligning the curriculum to the curriculum standards, the instruction should convey what is intended by the curriculum standards and, by extension, should provide a minimally adequate education

Impoverished districts like Plaintiffs often seek assistance in many areas, including helping their teachers to better understand the curriculum standards and what levels of knowledge are expected at various grade levels, and in developing and writing a curriculum that can be used in their schools (Id at 196 11-199 3, see also (2/12/04) 114 6-10) More affluent districts do not require such outside assistance—they have the expertise and the staffing to accomplish these things on their own (Id) Unfortunately for the Plaintiff Districts, the State Department of Education is not resourced appropriately to provide the services the Plaintiff Districts need to adequately deliver the standards-based curriculum (Id at 211 4-7)

Even a well-conceived curriculum, aligned with strong standards, is not sufficient to provide an opportunity for students to learn the standards (Tr (10/7/03) 47 7-10 (testifying that standards will get the schools only part of the way towards reform and that the affluent districts stood in "stark contrast" to the poor ones)) To effectuate standards-based reform, quality teachers must be delivering the curriculum (Id at 45 20-21) “[I]f the teacher doesn’t know what she is doing wrong or doesn’t have an understanding of what the translation from the standard to a lesson to an assessment is, she can’t deliver it and certainly the youngsters don’t get the opportunity to learn it ” (Id at 208 5-10) Based on the evidence of teacher characteristics introduced by Dr Poda, Dr Lindsay testified that she was “very concerned about the

ability of the teachers in these areas to be able to deliver the curriculum ” (Id at 203 25-204 13)

Additionally, the existence of a written curriculum standard does not ensure that the curriculum is being delivered well (or even at all) Dr Lorin Anderson observed numerous classrooms in which the same curriculum was to be implemented and noted “huge differences implementation ” (Tr (7/29/03) 83 25-84 11)The implementation or delivery of instruction in the classroom, not the existence of a written curriculum, is what controls access to learning and, thus, student achievement The court erred in finding that the Plaintiff Districts are adequately delivering the State-required curriculum to their children The greater weight of the evidence demonstrates otherwise—the teachers in the Plaintiff Districts are not delivering instruction that is aligned to curriculum standards

- (c) Deposition testimony of school principals regarding alignment of curriculum and delivery of instruction should not have been admitted

The trial court relied on testimony of school principals in discovery depositions to support its findings that the curriculum alignment and classroom instruction were sufficient to give students an opportunity to acquire a minimally adequate education (See, e g , 12/29/05 Order ¶¶ 118, 119, 129, 130, 139, 148, 158, 167, 177, 188, 7/12/07 Order ¶ 16) Plaintiffs objected on several grounds to admitting the depositions, including that these witnesses were neither parties nor managing agents of a party and that they either were available to testify at trial or did testify at trial, at which time they could have been questioned on these matters in court and the judge could have observed their demeanor Rule 32(a), SCRCF, see also Napier v Bossard,

102 F 2d 467, 469 (2d Cir 1939) (finding deposition is “**not to be used when the original is at hand**”) (emphasis added)

(i) *The principals were not managing agents*

The trial court ruled that the principals were managing agents of Plaintiff Districts, and therefore, the depositions were properly admissible for any purpose at trial (Tr (7/28/03) 30 23-31 5) The key to whether one is considered a “managing agent” is the character of the individual’s control “whether the individual is invested with general powers allowing him to exercise judgment and discretion” in the matters at issue and “whether any person or persons are employed in positions of higher authority in the area regarding which the information is [being] sought” See Sugarhill Records Ltd v Motown Record Corp, 105 F R D 166, 170 (S D N Y 1985), see also Shealy v Laidlaw Bros , Inc , No 83-1099-1, 1984 U S Dist LEXIS 17799, at *6 (D S C April 9, 1984) (interpreting equivalent federal rule, requires court ‘to consider who, among corporate employees, are so closely identified with the interests of the corporate party as to be indistinguishable from it”)

Plaintiff Districts are the named parties Under South Carolina law, principals do not have the power to hire or fire teachers, to promulgate rules for scholastic standards of achievement or standards of student conduct or behavior, or to manage or control local educational interests in their district School Boards of Trustees (“Boards”) are the only entities with those general powers to exercise judgment and discretion for the districts S C Code Ann §§ 59-19-80, -90 (2004)

Further, the district superintendent—not the principal—is the chief administrative officer of the school district, executive officer of the Board, and

professional leader of the district (S C Code Ann Regs 43-161) In other words, the superintendent of schools is a "managing agent," but other lower ranking personnel are not See Stell v Savannah-Chatham County Bd of Educ , 255 F Supp 88, 93 (S D Ga 1966), see also Laidlaw Bros , 1984 U S Dist LEXIS 17799, at *7

In contrast, a principal's duties are to serve as the administrative leader of the school, facilitating stakeholders, teachers, employees, and students "buying into" the rules and curriculum that the board has set and overseeing the logistics of operations at the school, such as dealing with teacher absences, scheduling, supplies, and the like (S C Code Ann Regs 43-165 1) A school principal has no authority for district-wide funding, hiring teachers, facilities for schools other than his own, or other matters outside the confines of the one school to which he is assigned In fact, Defendants objected to Plaintiffs' questioning principals who appeared at trial on district-wide issues or conditions on the grounds that they were not "qualified" to speak for the district, and the trial court ruled at various points during the trial that principals could not testify about district-wide issues or conditions, but were limited to testimony about their own schools (see, e.g. Tr (8/1/03) 193 4-16 (Whitcomb), (2/12/04) 99 20-22 (Kirby)) The court erred in considering the principals' depositions as to select issues

(ii) *The principals were available to testify in court*

Because the principals are not managing agents, and were available to testify at court, the only other means under which their depositions could properly be admitted into evidence was if "such **exceptional circumstances** exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony

of witnesses orally in open court, to allow the deposition to be used ” Rule 32(a)(3)(E), SCRCPP (emphasis added)

(a) *No exceptional circumstances existed to allow the depositions in lieu of live testimony*

For this exception to apply, the presentation of live testimony must be “virtually impossible ” Jauch v Corley, 830 F 2d 47, 50 (5th Cir 1987), see also Allgeier v United States, 909 F 2d 869, 876 (6th Cir 1990) (finding that, to excuse live testimony, the witness must be “dead, at a great distance, aged, ill, infirm, or imprisoned, or unprocurable through a subpoena”)

The only “exceptional circumstances” asserted by Defendants—and cited by the trial court—as grounds for allowing them to introduce the principals’ depositions was that calling the principals to testify at trial would lengthen the trial (Tr (10/10/03) 13 15-14 3) Increasing the length of trial, however, is not an exceptional circumstance sufficient to overcome the judicial system's preference for live testimony Fuller v United States, No 00-2791, 2002 U S Dist LEXIS 3775, at *3 (E D La Feb 26, 2002) The trial court erred by permitting the depositions so that trial would not be further lengthened (See 7/12/07 Order ¶ ¶ 39, 41)

(b) *The court did not give due regard to the importance of presenting live testimony*

Further, in determining whether “exceptional circumstances” exist, the court must give “due regard to the importance of presenting the testimony of witnesses orally in open court ” Rule 32(a)(3)(E), SCRCPP Though parroting a portion of the applicable Rule (id at ¶ 40), the court erred by permitting consideration of deposition excerpts in this instance Had the court correctly applied Rule 32 and required live

testimony, the court, as fact-finder, court would have had the advantage of hearing the tone of the testimony and observing the witnesses. For example, the court could have observed that several of the principals were reluctant to speak negatively about their schools—a reluctance that is not manifest by reading the transcript.

Admitting the depositions rendered the court's findings unreliable and prejudiced Plaintiffs. Further, the court considered much of the principals' deposition testimony out of context, confused some of the issues, and attributed testimony to the various principal depositions that it did not actually contain.

(iii) The court cited deposition testimony for propositions that were not covered in the deposition and for propositions that the witnesses denied or qualified.

In some instances, the court cited deposition testimony for a proposition that was not asked of the witnesses in their depositions. In most such cases, the principals were not questioned about whether their teachers were delivering instruction aligned with the state curriculum standards, although the trial court cited their depositions as support for its finding that instruction in Plaintiff Districts was properly aligned (See, e.g., 12/29/05 Order ¶¶ 119, 167, 177, 188)

Additionally, contrary to the court's conclusions, most principals cited in the Order as agreeing that their school's curriculum was aligned with the standards set out by Defendants, actually testified that there were teachers within their schools who did not properly follow the curriculum and accompanying pacing guides, that their schools' curriculum was only "somewhat" aligned to the state standards, that their school did not have a curriculum as such for each subject area being taught, or that the teaching in the

classrooms was inadequate to convey the appropriate content (See, e.g., Lamback Dep (4/25/03) 80 25-81 4, 86 22-87 9, 88 10-13, Monahan Dep (4/22/03) 76 14-17, A Franchini Dep (4/15/03) 10 11-24, 19 11-13, Bull Dep (4/30/03) 72 2-8, Burnes Dep (5/1/03) 63 10-13, 63 25-64 24, Caesar Dep (4/30/03) 74 12-14, McClary Dep (5/7/03) 50 22-25, 51 1-9, 54 16-55 7, Rivers Dep (4/28/03) 49 21-51 6, 54 17-55 15, Burgess Dep (4/28/03) 50 5-25, Pearson Dep (4/8/03) 34 5-35 1, 47 15-21, Bell Dep (4/7/03) 71 19-24, Dease Dep (3/20/03) 17 16-19 24, Shuler Dep (3/21/03) 25 6-3, 27 13-25, 28 1-7, 122 23-123 2) Moreover, one principal one actually said the **complete opposite** (G Edwards Dep (5/14/03) 21 1-3)

(iv) *The court mischaracterized or misstated testimony from the depositions*

In some instances, the trial court actually mischaracterized or misstated the actual testimony For example, the court found that Allendale principals testified that the “curriculum being taught in their schools was aligned to the State uniform curriculum standards ” (12/29/05 Order ¶¶ 119) (citing to several principals’ depositions, including that of Judy Franchini)) Not only was Dr Franchini “available” to testify at trial, she **did** testify at trial ¹⁴ During her testimony, Dr Franchini explained that Allendale did not yet have a uniform curriculum in place and that the teachers were following an old curriculum guide that was aligned to old standards that were no longer in effect (Tr (10/8/03) 19 1-3, 20 2-9 (J Franchini)) The trial court made no reference to Dr Franchini’s clear trial testimony, relying

¹⁴ The trial court improperly relied on the deposition testimony of other witnesses as well Again the court’s sole reliance on the depositions of witnesses who appeared live and were thoroughly cross examined at trial by Defendants was error Those witnesses included Polly Elkins Ja Novice Greene Richardson Peggy Stafford Larry Monahan Vickie Kirby Earline McClary Burnie Bell Jean Pearson and Rex Whitcomb

entirely on questionable inferences drawn from her deposition. Similarly, the court relied on the deposition testimony of Estill High School Principal Specialist Archie Franchini for the finding that Hampton District 2 was complying with state curriculum standards (12/29/05 Order ¶ 148), despite Dr. Franchini's trial testimony that his school had not yet developed curriculum guides for use by the teachers that were aligned to the state curriculum standards in social studies or other subject areas. (See also Tr. (1/6/04) 55:20-56:9 (A. Franchini)). This discrepancy, which was apparently ignored by the trial court, magnifies the error of relying on the principals' depositions.

The court erroneously permitted deposition testimony, despite Plaintiffs' valid objections and the availability of the witnesses, and relied on the testimony out of context and incorrectly. The trial court erred, first, in admitting the deposition testimony and, second, in misconstruing or misstating the testimony.

- (d) The importance of culturally relevant pedagogy must be considered in making findings on the quality of instruction in the classroom.

The trial court wrongly excluded consideration of race as a factor in determining whether the Defendants are providing the opportunity for a minimally adequate education in Plaintiff Districts, districts that are both predominantly poor and predominantly black. (Pls.' Ex. 153 at SDE-11265—SDE-11268). As a result, the court disregarded the importance of culturally relevant pedagogy in the effective delivery of instruction to minority children. Without instruction that is relevant to children's lives and linked to what they know and understand, children do not respond and learn, resulting in disastrous consequences to their futures.

The trial court shifted its ruling on this issue over the course of the case, initially recognizing that if minority children “have needs that are peculiar for some reason that are not being met, then that’s relevant ” (Hr’g Tr (7/3/03) 49 13-15) Defendants attempted to exclude evidence on race and cultural needs with the unfounded implication that it was offered to prove past and current racial discrimination and racism, however Dr Gloria Ladson-Billings emphatically rejected that notion, presenting expert testimony establishing that teacher quality in largely minority classrooms, not racism and discrimination, was the focus of her opinions (See, e g., Tr (9/12/03) 75 4-17, 77 3-78 19) The trial court accepted Dr Ladson-Billings’ testimony on the grounds that consideration of race and culture are pertinent to an evaluation of instructional quality—the very point Plaintiffs were making (Id at 71 25-72 18, 79 23-85 10)

Subsequently, the court modified its ruling and held that because poverty and race were collinear, evidence of race would only be admissible to the extent it was related to poverty (See, e g., Tr (9/8/03) 144 7-12, (9/29/03) 99 5-8, (1/9/04) 40 15-22, (2/13/04) 105 6-10)) Further, the trial court refused to allow Plaintiffs to demonstrate that the educational achievements of African-American children were lower than other cultural groups (Tr (2/13/04) 176 18-201 9) or to argue that this was a result of their not being provided culturally relevant instruction Ultimately, the trial court ruled that it would only accept racial evidence as a proffer and would not consider race as a separate factor (See Tr (2/13/04) 200 18-20, (5/5/04) 61 14-16, (5/5/04) 63 14-17) This was error

Race and cultural heritage are vitally important to this case because ethnic minorities have particular needs that are not being met in the Plaintiff Districts. Although poverty and race are related, the needs of poor children and the needs of black children are not the same. The instructional challenge with poor children is finding a way to expose them to learning experiences they have been deprived of as a result of their poverty. In contrast, the culture of minority children has shaped and influenced what they know, and the instructional challenge is finding a way to connect new learning to that cultural background.

One important “truism” of teaching is that “you have to know the children that you are teaching. And one of the ways you know them is that you know about their backgrounds, you know about their culture so you can make appropriate references.” (Tr (9/12/03) 100 6-10)¹⁵ Teachers also must have a sensitivity and awareness of different accents and use of different vernacular in language, so that they can work with children on literacy skills. (Id. at 117 19-118 12)

Culturally relevant pedagogy has been used successfully in the Plaintiff Districts. Ms. Blue Higgins, a literacy coach and former teacher specialist in Dillon School District 2, testified that Dr. Ladson-Billings’ book taught her the importance for teachers to understand the culture of the children they teach. (Tr (9/26/03) 164 9-12) Ms. Higgins offered a specific example of her success, describing her use of a book called We Had a Picnic this Sunday Past and how it demonstrated her use of a

¹⁵ One real life example used by Dr. Ladson Billings involved a teacher teaching poetry through analysis of the meter and verse in rap music, eventually getting a child’s comment accompanied by a groan: “Oh Mrs. Millard, now you got me liking poetry.” (Tr (9/12/03) 100 24 101 20)

culturally relevant pedagogy for the small-town and rural, mostly minority children in her classroom

It depicts, you know, African-American families in, you know, family reunions, in picnics and things that our kids in Dillon know about I mean, I gave these kids a book of a little white child on a ferry going across the water, I would have a ton of blank looks in the room They can't connect to it And to understand and to gain comprehension and to learn better, you have to make connections, connections to yourself, connections to the world, connections between text

(Id. at 218 17-23) She further explained how successful teaching depends on understanding what a child knows from his background and culture, but that teachers in general were not aware of the importance of understanding the children's culture (Id. at 217 6-17)

Because cultural factors create specific educational needs and because a culturally relevant pedagogy would address these needs and, therefore, help provide the opportunity for a minimally adequate education, the trial court's initial ruling in the July 3, 2003 hearing that race is relevant was the proper decision Unfortunately, though, the trial court erred by subsequently excluding evidence of the negative impact that a lack of culturally relevant instruction in Plaintiff Districts has on racial and cultural minorities, and Plaintiffs request that this Court reverse the decision to exclude such evidence Race is a factor independent of poverty that bears on the determination of whether each child in Plaintiff Districts is provided an opportunity to receive a minimally adequate education

- (e) Children receiving special education services are entitled to the opportunity to receive minimally adequate instruction

Without any support or justification, the trial court incorrectly found that this Court's reference in Abbeville to "each child" did not include special education students (12/29/05 Order ¶ 53 n 10)¹⁶ At-risk students are not the only children who experience gaps between the demands placed on them in terms of what they are expected to learn and what they are capable of learning South Carolina has 111,000 special education children, fewer than 20% of whom have mental disabilities and are not intellectually intact The remaining children do not have impaired intellectual ability, but do have a variety of disabilities that interfere with their education unless they are provided appropriate supports and services (Tr (2/10/04) 56 3-18 (Durant), see also 75 16-25, 76 13-84 3, Pls Ex 6042 at 4-22 for description of disabilities that do not involve impaired intellectual ability) Like at-risk children, children with disabilities must be offered the chance to obtain a minimally adequate education

As with children raised in poverty, disabled students have extra requirements to level the playing field "so they can progress in the general curriculum, commensurate with their peers and so that they will receive educational benefit from the instruction that they receive " (Tr (2/10/04) 73 1-7) Providing access and an opportunity to acquire an education to disabled students may require specialized instruction or assistive devices, such as a voice activator for a child who does not have the use of his hands,

¹⁶ The terms special education students special needs students students with disabilities exceptional students and exceptional needs students are used interchangeably in the field (Tr (2/10/04) 56 19 57 13 (Durant))

reading materials in Braille for a visually impaired child, or an interpreter for a student who is hearing impaired (Id at 58 25-59 11)

If appropriate supports and interventions are provided to students classified as special education students, they should perform on PACT or other assessments commensurate with their peers because they have been provided access, or an opportunity, to acquire the same education as their peers (Id at 86 5-20, 100 22-101 16, 104 13-105 9) However, South Carolina special education students do not perform commensurate with their peers (Id at 96 1-14, 97 2-19, 105 6-9, 107 12-108 5, Pls ' Exs 6399A, 6399B) In addition, graduation rates for South Carolina students with disabilities lag far behind graduation rates for students without disabilities (Tr (2/10/04) 231 18-232 6 (Durant)) State and federal funds available for special education students have never been enough to pay for the required services, which could range from a minimal amount to over \$40,000 for a single student (Id at 110 3-111 13, 112 23-114 3, 114 25-115 15)

In addition, many teachers assigned to teach special education are not properly certified, trained, or experienced One-fifth (21%) of special education teachers in South Carolina do not hold standard certifications, and the percentages in Plaintiff Districts are higher, ranging from 29 3% to 55 5% (Tr (2/10/04) 130 7-131 8, (2/11/04) 202 23-203 10, Pls ' Exs 6399C, 6399D, 6400) Certification of special education teachers requires not only knowledge and skills for the specialized instruction required, but also an ability to modify the general curriculum to provide access to the opportunities to learn that are available to other students Special education teachers must also have a working knowledge of the many laws applicable to

that area, as well as diagnostic and consultative skills to ensure that the students are appropriately placed and taught (Tr (2/10/04) 123 21-126 2) The high percentages of out-of-field and substandard certificated special education teachers in Plaintiff Districts substantially decrease the chance that special education students in Plaintiff Districts are receiving the quality of instruction necessary to provide an opportunity to learn and acquire a minimally adequate education (See id at 118 25-119 18, 132 14-25)

Finally, children in Plaintiff Districts are disproportionately classified as in-need-of special-education (Tr (2/10/04) 179 8-14, 183 25-184 10, 185 8-18, Pls ' Exs 6399E, 6399G, 6399I), not because they are disabled, but because they cannot read or their behavior in the classroom is poor or disruptive (Tr (2/10/04) 164 4-20, 167 12-18, (8/13/03) 59 1-10, 60 14-19) As explained at trial, schools faculty and staff often lack training and knowledge in both special education and reading difficulties and frequently misdiagnose students (Tr (2/10/04) at 184 16-185 7, 237 6-20 (Durant)) For example, one teacher in Dillon 2 recognized, only after she had gone through an intensive three-year training in teaching reading, that 95% of the children she had previously referred to special education had reading problems, not learning disabilities (Tr (9/26/03) 162 4-166 2) Additionally, a disproportionate number of children in Plaintiff Districts are incorrectly identified as educable mentally disabled and placed in special education programs because their performance on I Q tests is skewed downward because they do not have a basic understanding of language (Tr (2/10/04) 178 14-179 14, 182 8-183 2)

Likewise, children without literacy skills—those who are not fluent in reading or who have limited vocabularies—are often identified as speech and language impaired and unnecessarily placed in special education programs (Id. at 162 25-163 13, 183 25-184 15) Children in poverty typically have these literacy limitations and may not know how to behave appropriately in the classroom (Id. at 162 10-24) As a consequence, these students are provided special education services, which do not address their real problem an inability to read or lack of behavioral training

If a child is incorrectly placed in special education, he gets instruction that does not help him and may harm him because he is not getting the instruction he needs on the curriculum standards in a general education setting (Id. at 210 9-13, 211 1-212 16) Lower PACT performance and lower graduation rates for special education students as compared with general education students in South Carolina demonstrate that rather than performing at levels at least commensurate with their peers, they are performing below those levels “Each child” in South Carolina is entitled to the opportunity to obtain a minimally adequate education—children requiring special educational instruction are no exception The court erred by holding otherwise

(f) Vocational education opportunities are insufficient

In Abbeville this Court remanded this case to the trial court for hearings consistent with its opinion, and expressly held that a minimally adequate education includes “the opportunity to acquire vocational skills ” 335 S C at 68, 515 S E 2d at 540 At trial, Plaintiffs introduced evidence that in the Plaintiff Districts, vocational skills are especially important because many of the students do not go on to post-secondary education and these skills would give them the foundation to be

employable in their community (Tr (1/16/04) 95 9-14) Despite the need, however, Plaintiff Districts do not have enough funding to provide students with the opportunity to acquire even the minimal skills necessary to succeed in vocational education Nevertheless, the trial court incorrectly found that Plaintiff Districts' failure to offer particular courses was not "a constitutional violation " (7/12/07 Order ¶ 22)

Many students in the Plaintiff Districts come to high school vocational programs reading well below the eighth-grade level and having only the most rudimentary mathematical skills—skills they must have to be successful in vocational courses (Tr (8/6/03) 79 23-80 8, (8/6/03) 105 20-106 8, (8/7/03) 85 10-14, (10/1/03) 77 20-78 2) Jerry Pace, Agriculture Education Instructor for Marion 7, testified, "[i]f these kids do not have adequate skills knowing formulas and know how to manipulate formulas, use them in the every day aspects of solving financial problems as it would be related to an agricultural business or even to their own financial affairs, they cannot be successful " (Id at 82 2-7, see also Tr (8/14/03) 242 8-10 (president of Roche Carolina in Florence County describing workplace requirements "I need people who can think and I need people who can do I have to have both, not with one or the other ")) These districts simply do not have enough vocational education "completers " (Tr (8/6/03) 95 4-98 21, 100 9-24) "Completers" are defined as students who go through vocational courses and then succeed in the ultimate goal of becoming employable (Tr (10/01/03) 78 3-79 21)

Unfortunately, the Plaintiff Districts are unable to offer some of the vocational programs that would make their students employable in their communities For example, Florence 4 is unable to provide vocational training in carpentry or brick

masonry, two skills in demand in the local area, because it lacks the necessary facility, resources, and teaching staff to provide that training (Tr (02/09/04) 126 19-127 10)

As a result, students in Florence 4 are denied the opportunity to acquire vocational skills that would help them to become productive citizens in their community

Witnesses from other districts offered similar testimony regarding the inability of the Plaintiff Districts to provide their students with the opportunity to acquire vocational skills (See, e g., Tr (10/1/03) 75 2-78 2)

As a result of the lack of support from Defendants, the Plaintiff Districts often must rely on federal grants to fund and support their vocational programs This reliance on funding through grants creates uncertainty in the Districts' ability to offer vocational courses from year to year In addition, the Plaintiff Districts have a difficult time finding persons with vocational expertise who are willing to settle for the low pay the Districts must offer or who have the teacher training necessary to handle a classroom effectively (See Tr (10/01/03) 78 3-78 22)

As with many other educational components, financial and teacher-quality issues prevent the Plaintiff Districts from consistently offering vocational training that provides each student an opportunity for a minimally adequate education Defendants are responsible for this deficiency Defendants' failing to provide the opportunity for students to acquire vocational skills means that Defendants have failed to provide each child with the opportunity for a minimally adequate education

B The Trial Court Erred In Finding That Physical Supports Were "Safe And Adequate" And That They Did Not Impede Education

Physical components of the educational system—including **facilities, instructional materials, and transportation**—are also critical to the educational process. The trial court erred in finding that these physical supports in Plaintiff Districts are minimally adequate to provide the opportunity for a minimally adequate education despite testimony of teachers, principals, and superintendents who are intimately familiar with the supports and their impact on learning.

1 The facilities in Plaintiff Districts are not safe and adequate

“[P]roviding students adequate and safe facilities” is essential to fulfill constitutional responsibilities to our children in public schools. Abbeville, 335 S C at 68, 515 S E 2d at 540. The trial court found that facilities in Plaintiff Districts are safe and adequate to provide the opportunity for a minimally adequate education to each student. In so finding, the trial court used a flawed methodology and disregarded the massive amount of testimony from witnesses who work every day in the schools, as well as photographic evidence of unsafe and inadequate conditions. Instead, the trial court relied almost exclusively on the observations of defense expert James Smith, who spent only minutes in each classroom he visited.

The court also incorrectly found that the facilities did not impede educational outcomes, most particularly with respect to J V Martin Junior High School in Dillon. Indeed, even Defendants’ expert admitted that J V Martin was neither safe nor adequate. (Tr (6/28/04) 193 11-194 12.) Nevertheless, the court disregarded the

testimony of all witnesses and found J V Martin to be safe and adequate The trial court's findings on facilities have no credible factual support

Further, the trial court admitted that Smith did not inspect West Hardeeville School in Jasper County (12/29/05 Order ¶¶ 271, 350) Nonetheless, citing only to photographs of the school and a fire marshal's report, the trial court held that the school was "safe and adequate " (12/29/05 Order ¶¶ 348-351) Photographs of West Hardeeville School clearly reveal that conditions at that school are anything but "safe and adequate " (Pls ' Exs 1573DK-GC, Pls ' Exs 1566 AT-AX) Juxtaposed against a few scant fire marshal reports images of the school's condition, as well as the testimony of witnesses who are familiar with the school demonstrate that the trial court's finding was in error (See, e g , Tr (4/21/04) 138 1-2, 28 16-25)

Further, the trial court's findings are directly inconsistent with the trial court's ultimate holding as to inadequate early childhood intervention For example, in finding that East Elementary School in Dillon 2 is both safe and adequate, the trial court erred by failing to consider uncontroverted evidence from the school's principal that it does not offer kindergarten to four-year-olds because its space is inadequate (Tr (9/25/03) 52 9-11) The district superintendent further explained that the school was forced to reuse money from First Steps to fund a four-year-old kindergarten class because the school did not have adequate space in which to house such a class (Tr (8/6/03)198 7-12, 199 12-15)

- (a) The trial court's methodology in analyzing facilities was flawed

The trial court's methodology regarding facilities in Plaintiff Districts was flawed The July 12, 2007 Order incorrectly stated that Plaintiffs sought a blanket

condemnation that the schools in Plaintiff Districts were generally unsafe and inadequate. Identifying schools that were recently built or renovated, the court concluded that a blanket finding was unwarranted. The trial court's reasoning is flawed because although Plaintiffs recognize that (1) some schools are safe and adequate and (2) some schools are new or recently renovated, the evidence does not justify a finding that all schools in Plaintiff Districts are safe and adequate.

Rather than focusing on "good" facilities, the court should have considered those schools that are crumbling, do not have sufficient space, and are not equipped with the infrastructure necessary to deliver a modern education. Plaintiffs are not required to show that *all* schools in the Districts are unsafe and inadequate, they must only show that *some* schools are unsafe and inadequate. Indeed, even if only one school in Plaintiff Districts is unsafe and inadequate, the State has failed its constitutional mandate to "each student" for access to a safe and adequate facility in which to learn. See S C Code Ann § 59-20-30 (1990), Abbeville, 335 S C at 69, 515 S E 2d at 541 ("Finally, we emphasize that the constitutional duty to ensure the provision of a minimally adequate education to **each student** in South Carolina rests on the legislative branch of government ") (emphasis added). Therefore, the trial court's findings on this issue are not supported in fact or law.

- (b) The trial court ignored the weight of the evidence showing that facilities are unsafe and inadequate.

In concluding that facilities in all schools in the Plaintiff Districts are "safe and adequate," the trial court improperly considered only selected portions of the evidence. Specifically, the trial court based its conclusions regarding the safety and adequacy of

facilities on three categories of evidence (1) testimony of defense expert James Smith, based on his very brief visits to schools in Plaintiff Districts, (2) fire marshal reports, and (3) the Districts' facilities certifications to the State Department of Education. The trial court, however, ignored testimony of the numerous teachers, principals, and superintendents—the educators who deal with the problematic conditions in their schools every day—and photographs showing these shameful conditions in which our children attend school. Therefore, the greater weight of the evidence clearly requires a finding that the facilities were not safe and adequate.

(c) Even the limited evidence that the trial court relied upon does not show that facilities are safe and adequate.

The limited evidence upon which the court relied in determining the facilities are safe and adequate—nearly all of which was introduced by the defense—does not support the trial court's finding that all facilities are "safe and adequate." For example, the court relied heavily on defense expert James Smith (See, e.g., 12/29/05 Order ¶¶ 271, 278). Noting that Smith visited all but one school in the Plaintiff Districts, the court cited Smith's opinion that the facilities he visited were "adequate for instructional purposes." (Id. ¶ 271). When considering Smith's testimony in its entirety, however, the fallacy of the trial court's reliance on his opinion becomes clear. Consider the following:

- Smith admitted that in each school he "visited," he spent only "a minute or two" in each classroom. (Tr. (6/30/04) 138:22-24.)
- He would "scan" the classroom, count the number of students in the room, note the presence of computers or instructional materials, look for "obvious health and safety hazards," and then move on. (Id. at (6/28/04) 185:4-10, 185:15-20.)

- He **did not** review the materials to determine whether they were appropriate or sufficient for the instruction offered in each classroom (Id at (6/30/04) 139 7-140 9)
- He **did not** investigate the adequacy of the supporting technology infrastructure or the software and programs available (Id at (6/30/04) 142 4-15)
- His testimony on each school typically was that the space, instructional materials, and technology appeared sufficient for instructional purposes, and with few exceptions, he saw no “obvious” safety or health hazards For example, at the time of his visit to Dillon 2’s East Elementary School, he did not even realize that a ceiling had fallen in one of its classrooms (Id at 147 7-18)
- He admittedly is neither an architect nor an engineer, and he never designed or built a school building (Id at (6/28/04) 48 4-11)
- Importantly, his opinion for nearly every school was that he saw no “obvious” safety or health hazards “I made no judgments about the architectural integrity, structural integrity of the building and I offer no opinion about that ” (Id at 48 25-49 3)
- He did not conduct an assessment of each District’s facilities needs (Id at 49 12-15)
- Smith admitted that his sole focus in visiting the facilities was to determine whether the facilities impeded instruction at the schools (Id at 48 23-24)

Smith’s 60-to-120-second classroom review to look for any obvious safety or health hazards and to note whether the rooms contained computers or any instructional materials was too limited to be reliable to support a finding that all facilities are “safe and adequate ”

The fire marshal reports upon which the court relied are similarly unpersuasive (See 12/29/05 Order ¶ 273) Those reports have one central focus in mind—fire safety The fire marshal neither inspects nor approves the total safety of a building, nor does he address the adequacy of the building for educational purposes Furthermore, marshals in Plaintiff Districts often give leeway in correcting problems (Tr (8/07/03)

18 20-19 1) The trial court's noting that "[n]o facility was required to close due to its failure to correct citations shown in the Fire Marshal records" (12/29/05 Order ¶ 273) misses the point of both the reports' purposes and the court's mission to determine whether the facilities were "safe and adequate" for education, not whether the facilities were such a fire hazard that they be closed

Even more troublesome is the trial court's reliance on statements in SDE accreditation reports that the facilities in their jurisdiction are safe and adequate. The SDE certifications are necessary as part of the yearly accreditation process and are merely a form of "check-the-box" compliance necessary to keep the school doors open. Educators who were responsible for the reports testified that failure to meet accreditation requirements could result in a discontinuation of funding for the school, so the districts have no choice but to certify that their facilities meet the SDE requirements (Tr (1/15/04) 67 13-16, 76 22-77 4, 85 20-86 9, (10/9/03) 106 5-18, (8/12/03) 107 18-108 3, 108 9-109 4)

Further these accreditation assurances are sometimes made on the basis of obsolete regulations and requirements that are "grandfathered-in" for older facilities and are made with the knowledge that in older buildings, undiscovered safety conditions may exist (Tr (8/12/03) 12 9-20, 114 17-115 4) The trial court, however, did not even mention testimony from the people who are closest to the accreditation reports in their districts (12/29/05 Order ¶ 269)

Thus, the trial court's finding as to the adequacy and safety of facilities is not supported by the record because of undue emphasis on the defense expert's opinion, inapposite fire marshal records, and select SDE reports to the exclusion of critical evidence from educators with first-hand, expansive knowledge about the facilities

- (d) The overwhelming weight of the evidence shows that facilities are not safe and adequate

When considering the details of the facilities issues at several schools in several of the Plaintiff Districts, the manifest error of the trial court's nearly rote acceptance of Defendants' version of the condition and adequacy of the facilities becomes clear. Some schools have serious safety issues—such as lack of heat, leaking roofs, falling ceiling tiles, and inadequate electrical wiring to accommodate computers. Some lack adequate space for children to gather and be taught. Some are examples of years of deferred or sub-standard maintenance. Specific testimony as to the schools' conditions—conditions that the trial court found acceptable—are as follows¹⁷

ALLENDALE DISTRICT

Allendale Elementary School

- Caving, leaking ceilings in literacy room and book-damaging leaks in media center (Tr (10/2/03) 186 1-10, (10/7/03) 173 16-174 8, (10/2/03) 189 13-24)
- Leaking windows, rotten windowsills, peeling paint, and a bulge in the brick's façade because of a roof leak of building that houses Montessori classes, preventing children from leaving building in that area because of the potential of falling bricks (Tr (10/2/03) 188 14-189 1, (10/7/03) 181 5-13, (10/2/03) 189 2-6, Pls ' Ex 1570-DS, 1570-DT)

¹⁷ Plaintiffs object to the trial court's finding that all facilities satisfied Abbeville's 'safe and adequate' standard. Highlighted here are some of the more egregious examples of unsafe, inadequate, and poorly maintained schools.

- Cracked bricks in several buildings (Tr (10/2/03)189 25-190 4, Pls ' Ex 1570-ED), portables with leaky roofs, doors that are difficult to open, "and the light fixtures could drop at any moment " (Tr (10/7/03) 174 1-5), classrooms with water leaking through light fixtures (id at (10/2/03) 190 11-21, Pls ' Ex 1570-EI), damaged ceiling in gym, often causing flooding during heavy rains (Tr (10/2/03) 190 22-191 9, Pls ' Ex 1570-EJ), leaks in cafeteria during rain storms (Tr (10/7/03) 174 9-25), and some doors too heavy for children to open (id at (10/7/03) 165 6-15)
- 600 children in pre-kindergarten through fifth grade housed in four 1930s-era buildings and several portable classrooms, some classes being held on the stage and in anterooms to stage, some teachers forced to alternate days teaching in portable trailer because of space constraints, three-block spread of campus that increases travel time between classes and reduces available classroom instruction time (Tr (10/2/03) 148 3-9, 184 11-185 23, 186 12-22, (10/7/03) 170 23-171 19, (10/1/03) 34 22)

Fairfax Elementary School

- Roof leaks, interior water damage, plumbing problems found in "new wing" (added in 1970) of 1950s school building (Tr (10/1/03) 36 1-5, 38 23-39 1, 40 10-18, Pls ' Exs 1563AN, 1563BE)
- Insufficient infrastructure to support computers, because of too few outlets, with everything is "daisy-chained" together to provide power for computers, although fire marshal "frowns on" this practice (Id at 38 14-22, Pls ' Ex 1563AM)
- Library that is "way too small" and electrical requirements for computers and technology that are "a challenge" (Id at 36 6-14)
- Outdoor playground equipment so unsafe that removal was required (Id at (10/1/03) 37 6-7)

Allendale Fairfax Middle School

- Area of school are unstable and have water damage and significant structural problems, which school renovations could not remedy (Tr (10/1/03) 43 24-25, 45 14-25, 46 22-47 3, Pls ' Ex 1563O (describing and depicting crumbling ceiling in art room caused by leaking roof))

Allendale Fairfax High School

- Water problems contributing to leaking and destroyed ceiling tiles (Tr (10/1/03) 49 22-50 1)

- Un-air-conditioned gym with water damage to roof (Id at 50 4-51 1, Pls ' Ex 1563F, 1570B, 1563H)
- Insufficient number of science labs (Tr (10/1/03) 54 24-55 4)
- No gas for Bunsen burners or chemical eye wash needed in labs (Id at 55 5-15, 58 15-59 7)
- Water damage on bathrooms ceilings, toilet stall doors need repair and replacement, sinks need replacement (Id at 51 7-18, Pls ' Ex 1570AD, 1570W, 1563I)

DILLON DISTRICT 2

- Leaky roofs in all six schools (Tr (8/07/03) 62 18-23, 49 17-21) (“All over the district on continuously rainy days you will see trash cans, you will see coffee cans, you will see mop buckets in the areas of the roofs that are deteriorating and leaking ’)
- Prevalent mold and mildew, causing health problems to students and teachers (Id at 69 8-10, 71 13-18)
- No space to hold classes, forcing superintendent to turn away funding offer for additional kindergarten teachers (Tr (8/06/03) 198 7-12, 199 12-15)

South Elementary School

- Numerous leaks in roofs of the main building and portable units leading to persistent mold and mildew (Tr (9/26/03) 53 12-20, Pls ' Ex 5033C, 5033I)
- “Awful smell” caused by drainage system that empties into pit in front of building (Tr (9/26/03) 56 5-15)
- Exposed wiring throughout the campus (Id at 43 1-10, 56 20-22, Pls ' Ex 1571FY)
- No central heating or cooling in the building because of inadequate wiring therefore, bathrooms and hallways are not heated or cooled (Id at 62 25-63 2)
- Art, physical education, music, guidance, and Title One instructors forced to share one portable unit because of inadequate space (Id at 49 5-13, Pls ' Ex 5033B)

East Elementary School

- Ceiling collapsed in first-grade classroom in the middle of school day (Tr (9/25/03) 31 10–36 23), an alert teacher heard cracking sounds in the ceiling and immediately hurried six-year-old students out of the room, and moments later, cement ceiling fell directly on top of the students’ metal desks, flattening several of them, collapse caused sparks and fire as tiles, light fixtures, and beams fell from the ceiling (id, see also Tr (8/07/03) 61 14-17) (superintendent testifying, “If it hadn’t been for a very smart, dedicated, hard-working teacher, we would have lost, the way it looked from the desks, at least five kids ”)
- Conditions extremely unsafe for children, for example, pieces of slate roof on the 1926 building have fallen, causing injury to students (Tr (9/25/03) 17 5-9)
- Bats and pigeons prevalent a first-grade student presented dead bat found in the classroom when asked for an object that starts with the letter “B” (Id at 47 19–48 12), bats and pigeons have chewed through the ceiling in the 1926 building, causing electrical wires to be exposed (Id at 20 17-24, Pls ’ Ex 1571CE)
- Old heating and cooling units placed in school, dilapidated, boarded-up windows posing fire hazards (Tr (9/25/03) 17 18-24, Pls Ex 1571BZ)
- Hazardous air quality inside building, basement retaining water, fostering growth of mold and causing air to smell like mold and mildew (id at 43 22 – 44 1, 17-18, Pls ’ Ex 1571BY), numerous students and a teacher who suffered asthma attacks at school, asthma incidence significantly increased (Id at 46 1-15)
- Auditorium divided in half by a partition to allow two classes to be taught in the room simultaneously because school has so little space (Id at 21 14-25)
- Lack of space preventing school from offering four-year-old kindergarten (Id at 52 9-11)
- Closets housing nurse’s station and guidance counselor’s office (Id at 54 25–55 3)

J V Martin Middle School

- Persistent roof leaks causing “massive deterioration” of ceilings throughout buildings (Tr (8/07/03) 30 13-14 31 5-6, Pls ’ Ex 1571AJ, 1571AN, 1571AO, 1571AP, 1571AQ, 1571AV2)

- Ceiling collapsed during trial in school office of school building built in 1896, causing light fixtures, ceiling tiles, and light bulbs to fall onto desks and chairs (Tr (9/25/03) 82 7-12, 83 20-84 3, Pls ' Ex 6154)
- No heat in the halls, no hot water for students, water in commodes sometimes freezes (Tr (8/07/03) 34 8-12, 40 20-22)
- Deteriorated mortar on the exterior of the building, causing bricks to fall off (Id at 16 11-15, Pls ' Ex 1571W)
- Deterioration of building caused classroom floor to drop a foot (Tr (8/07/03) 29 12-18, Pls ' Ex 1571AH)
- Because of inadequate wiring and fire alarms, school employees given whistles to alert the student population of smoke or fire (Tr (8/07/03) 19 10-13)

HAMPTON DISTRICT 2

Estill Middle School

- Serious structural problems indicated by separation of foundation floor and block wall in main building (Tr (10/8/2003) 200 19-23, Pls ' Exs 1572-CJ, 1572-CO)

Estill Elementary School

- Insufficient power outlets for proper operation of computers, fire hazard increased because wooden school building has no sprinkler system (Tr (10/8/2003) 190 12-22, 193 2-8, 196 17-20, Pls ' Ex 1572AT)

Estill High School

- Leaks from roof and heating and air conditioning system in main building, causing damaged, sometimes falling ceiling tiles and air quality issues from mold and mildew (Tr (1/5/2004) 177 1-12)
- Serious roofing problems in gymnasium/music building used for classrooms, causing severe problems with mold and mildew and also causing buckling floor tiles (Id at 177 13-24, 173 14-20, Pls ' Exs 1572BW, 1572BX, 1572BY)
- Roof-leak and serious plumbing/septic-tank problems (Tr (1/5/2004) 175 14-176-5)

- Space constraints require the school to utilize an “annex” building located approximately three miles from the main campus, causing students to lose approximately ten to fifteen minutes of instruction time in transport every day (Id at 172 6-7, 173 6-7, 175 5-13)
- Inadequate space, causing some teachers to share classrooms or move from room to room (id at 180 23-25), math teacher takes work from room to room on a cart because he is forced to use a different room for each class (id at 180 11-20), language instructors forced to teach in school media center, which was originally intended to be storage room (Id at 181 23-25)
- Science class taught in art classroom, preventing science experiments (id at 181 6-22), another lab without gas or water available at the students’ work stations (Tr (1/6/2004) 16 21-25, 17 1-11)
- Special needs class is conducted in windowless former storage room (Tr (1/5/2004) 182 1-3, 5-25)

JASPER COUNTY SCHOOL DISTRICT

Ridgeland Elementary School and Ridgeland Middle School

- Tutors must teach in hallways because no available classroom space (Tr (4/2/04) 32 17-23)
- No science labs in either school (Id at 34 23-35 7)
- Raw sewage sometimes backs up from a drain in hallway outside classes, forcing students to abandon school until it can be cleaned and sanitized (Id at 25 5-26 6)

West Hardeeville School

- No science labs, although subject matter tested by PACT (Tr (4/2/04) 34 23-35 7)
- Chronic mold and mildew problems (Tr (4/21/04) 138 1-2), "old and dilapidated" roof causes leaks (Id at 28 16-25)
- No heat or air conditioning in gym, which is infested with termites (Id at 134 19-135 11)
- Snakes infested classroom building (Id at 26 22- 27 6, 33 20-6)

- Smell of urine in the school is so pervasive that teacher had to learn to "breathe through [her] mouth" so she would not be overwhelmed (Id at 111 1-5)
- Inadequate electrical infrastructure cannot support computers and other electrical needs at the same time, although the District used some grant funding to purchase two or three computers in each classroom, classrooms have only two electrical plugs (Id at 30 11-30 25)

LEE COUNTY SCHOOL DISTRICT

- Old, worn, and cracked floor tiles in halls and classrooms exposing children and teachers to asbestos (Tr (03/05/04) 33 15-34 2, Pls ' Exs 1574BX, 1574BM, Tr (02/12/04) 177 3-6)
- Entire wing of school condemned because of electrical dangers of old wiring (Tr Trans (03/05/04) 30 10-12), exposed electrical wiring in gym poses safety risk (Tr (02/12/04) 178 12-20, Pls ' Ex 1574BR)

Bishopville Primary School

- Mold on ceiling tiles, poor air quality in whole building (Tr (03/05/04) 35 20-36 5, Pls ' Ex 1574G)
- Exposed electrical wiring, creating danger (Id at 36 6-12, Pls ' Ex 1574O)

Lower Lee Elementary

- Asbestos prevalent throughout school problem is so severe that portion of building is posted as off-limits ((Id at 41 3-16, Pls ' Ex 1574EF)

Mount Pleasant Middle School

- Mold/air-quality problems and structural damage (Tr (03/05/04) 42 2-9)
- Very poor lighting (id at 30 17-18), big pot holes around exterior of building (Id at 30 5-9)
- Operating at well over capacity, originally built for 250–280 students from local area, now is the only middle school in Lee County (Id at 42 10-25)

MARION SCHOOL DISTRICT 7

- Buildings' infrastructures insufficient to support needs of modern education, even with renovations, given age of the two elementary schools (Tr (07/31/03) 66 23-67 17)

- Students still affected by problems from previous facilities, as old facilities interfered so much with the student's education to cause gaps in the students' learning, leaving them even further behind (Tr (08/01/03) 115 7-116 6)

Britton's Neck Elementary

- Problems with the existing restrooms (Tr (07/31/03) 62 6-8), mold and mildew (id at 62 10-18, 63 23-25, 64 10-17), loud, inefficient window-unit air conditioning and heating (id at 63 5-19), and too small cafeteria continue to plague school despite renovations (Tr (08/04/03) 196 27-31, Pls ' Ex 1575AG-1575AU)
- Sewage problems (id at 195 25-39), standing water (id at 195 41-49), and animals, snakes, insects, and other infestations continue (Id at 196 7-13, Tr (08/05/03) 78 21-79 9, Pls ' Ex 1575AG-1575AU)
- Science labs are insufficient inadequate space, no exhaust or fume hoods, lack of exhaust ventilation, and no safety shower (Tr (08/05/03) 34 9-35 8, Pls ' Ex 1575AG-1575AU)

Rains-Centenary Elementary School

- Cramped, inadequate library (Tr (07/31/03) 59 3-7, 100 23-25), portable classrooms (id at 59 9-12, 59 24-60 2), and problems in the gym continue despite limited renovations (id at 60 10-61 3, Pls ' Exs 1575W-1575AF)
- Art and music classes continue to be taught in dressing rooms of old gym, with tile floors and walls, showers, sinks and other bathroom fixtures located in makeshift classroom (Id at 68 23-25, 70 16-18, Pls ' Exs 1575W-1575AF)

Creek Bridge Middle/High School

- Insufficient space already in new building (Tr (08/04/03) 27 17-23), continued maintenance problems due to a lack of appropriate manpower (Id at 29 19-30 31)
- No labs for shop classroom for vocational classes and lack of necessary equipment missing from lab provided those classes (Tr (08/06/03) 118 14-25)

In summary, the overwhelming weight of evidence demonstrates that some of the facilities in the Plaintiff Districts are not uniformly safe and adequate and that extensive facility problems negatively impact and impede students' education Plaintiffs

ask the Court to consider all the evidence in the record and reverse the trial court's finding that all facilities in all of the Plaintiff Districts satisfy the constitutional mandate

2 Transportation is not safe and adequate

Without school buses, some children have no means of gaining access to an education. Therefore, transportation is an essential part of delivering an opportunity for a minimally adequate education to the children of this state. (Tr (6/7/04) 101 14-18) The trial record contains substantial testimony showing how transportation problems contribute to the overall unconstitutionality of the educational system. The court's December 29 2005 Order, however, did not even address transportation issues. Further, upon reconsideration, the court devoted only a single paragraph to this issue and improperly narrowed its focus to only one issue presented—whether the State's shifting of the costs of transportation to Plaintiff Districts amounted to a constitutional violation—and held that the cost-shifting was not unconstitutional. (7/12/07 Order ¶ 17) The court erred in three respects: (1) limiting its ruling to cost-shifting, (2) finding that cost-shifting was not unconstitutional, and (3) failing to find that transportation in the Plaintiff Districts was inadequate.

The trial court erred by not finding that transportation problems affect the constitutionality of the system as a whole. South Carolina law requires Defendants, not the school districts, to pay for transportation. S C Code Ann § 59-20-20(2) (2004), see also Tr (6/8/04) 154 8-155 20, 157 12-158 1. Nevertheless, the State has increasingly shifted more and more costs to the schools to pay from their own funds. Forcing the Districts to pay for transportation costs siphons scarce funds—funds that

should be going to other important areas such as teacher salaries, students' materials, facilities' upkeep, and other critical requirements

The court acknowledged the adverse impact transportation problems have caused on Plaintiff Districts when it correctly noted that large portions of the budgets of the Plaintiff Districts are necessarily spent on transportation costs and that “[a] greater cost is borne by the children who have to spend far too much time riding to and from school, time that is largely wasted, since it can not be devoted to any useful endeavor ” (07/12/07 Order ¶ 17) The court, however, did not take the next step in finding that this negative impact directly contributed to a constitutional violation The escalating cost of transportation that Plaintiff Districts are forced to bear, combined with the admittedly negative impact that transportation problems have on the children, negatively affect the constitutionality of the overall system

Further, Defendants’ cost-shifting has real-world consequences For example, the bus system in Marion 7 was inadequate because the routes were too long and the buses broke down on a regular basis (Tr (8/1/03) 120 6-122 11) The breakdowns caused students to miss classes or stranded them at school long after classes were dismissed (Id , see also Tr (7/30/03) 211 17-212 17) Also, some elementary school students in Marion 7 are on school buses for as long as four hours each day, an unconscionable length of time for a young child (Tr (7/30/03) 211 17-212 17) In Marion 7, lack of adequate bus transportation causing some students to leave home at 5 45 a m and take two-hour ride to school, meaning they are on bus half as much time as they are in class (Tr (4/2/04) 45 10- 46 25)

The bus shortage also prevents the district from taking students on field trips to expose them to places outside the rural area of Marion County, a serious need for many of the students in that district (Id., see also (9/26/03) 92 16-22) Additionally, older buses require expensive repairs or lack recommended safety equipment (Tr 4/20/04, 199 19-204 15, 220 3-222 18) The same circumstances are prevalent in the other Plaintiff Districts (See, e.g., Tr (9/26/03) 92 2-4, (8/06/03) 181 17-19, (4/2/04) 44 1-15, (03/30/04) 148 1-149 3)

The evidence at trial established that funding for transportation is inadequate and unreliable and that those failures prevent the Plaintiff Districts from providing necessary opportunities to their students to allow them to access an opportunity for a minimally adequate education The trial court erred by not looking at the educational system as a whole and how failure to provide funding for transportation creates a constitutional violation when looking at the

3 Instructional materials and supplies do not provide the opportunity for a minimally adequate education

South Carolina's schools must have instructional materials to provide their students the opportunity for a minimally adequate education Instead of addressing the constitutional issue of whether Defendants are providing such materials, though, the trial court limited its analysis to whether the Districts received adequate revenues to buy these materials The court then decided that Defendants had adequately funded for these materials a finding that was based entirely upon a snapshot of per-pupil spending and ignored overwhelming evidence to the contrary (7/12/07 Order ¶ 21)

- (a) The trial court incorrectly framed the issue of instructional materials as one of funding

As an initial matter, the trial court's framing of the issue as merely one of funding was itself error¹⁸. In interpreting the Education Clause of South Carolina's Constitution, this Court found that the legislature's duty to provide each child with a minimally adequate education does, in fact, contain a qualitative component. See Abbeville, 335 S.C. at 68, 505 S.E.2d at 540. The Court went on to define, in broad parameters, the minimum type of educational opportunities that the legislature must offer to each child. Id. Importantly, the Court did not hold that the legislature's duties under the Constitution could be satisfied by merely providing x number of dollars to each school district so that the districts could decide what books, computers, and other supplies it was going to provide to its students. As such, the Court's abbreviated treatment of the instructional materials issue by focusing only the amount of money the Plaintiff Districts receive for supplies, without considering whether the Plaintiff Districts actually had access to adequate instructional material at all, was error.

- (b) Failure to provide access to instructional materials denies children the opportunity to receive a minimally adequate education

The trial court relied solely on Defendants' evidence on this issue and ignored all other evidence related to the inadequacy of instructional materials—demonstrative exhibits and testimony of teachers, principals, superintendents, and SDE personnel. Witnesses repeatedly stated that instructional materials help bring the subject matter to life for students and are particularly beneficial for students living in poverty. (See

¹⁸ Plaintiffs also appeal the trial court's finding that they receive adequate funding to purchase adequate instructional materials.

Record Compilation 8 citing Tr (9/25/03) 58 14-25 (Elkins), (4/2/04) 38 2-12, 40 6-20 (Singleton), (9/29/03) 77 24-79 3 (Levin), (2/24/04) 48 3-18 (J Anderson)

Defendants cannot satisfy the constitutional mandate that they must provide each student with the opportunity for a minimally adequate education simply by imposing statewide curriculum standards without providing the materials and equipment required by those standards Without the necessary equipment and supplies required to teach and learn the curriculum standards, Defendants cannot be said to be meeting their constitutional obligation (Tr (4/2/04) 29 18-30 7, 36 10-37 25, (3/4/04) 81 21-24, (7/29/03) 229 11-24, (9/29/03) 138 10-24, (10/6/03) 231 1-17)

Plaintiff Districts lack even the most basic materials such as chalk boards, copy paper, calculators, or classroom sets of books to read (Tr (2/12/04) 121 12-24, (4/21/04) 113 22-25) Shortages of textbooks, library books, laboratory materials, and classroom supplies are widespread (Tr (8/4/03) 128 10, (1/16/04) 23 1-10) Further, Plaintiff Districts do not have basics such as paper towels, hand soap, chalk, paper, desks, chairs, science lab supplies, math manipulatives, and calculators (See Tr (1/13/04) 177 24-178 11 ("I have my own stash of hand soap and paper towels because the bathrooms are not stocked "), (1/6/04) 18 9-19, (1/16/04) 42 12-45 4, (8/1/03) 166 9-16, (4/2/04) 40 15-20, (4/21/04) 116 16-122 3, 3/30/04) 185 15-186 3, (2/12/04) 122 7-124 15, (9/24/03) 168 15-169 2 (10/8/03) 68 1-19)

Some science labs are not functional because of inadequate ventilation and safety equipment (Tr (4/2/04) 34 15-19, 38 22-39 3, 41 7-17, (1/14/04) 194 25-195 4) For example, Allendale had to disconnect the gas in its labs because it lacked

ventilation hoods, and now Bunsen burners also cannot be used (Tr (10/1/03) 55 5-17)

Libraries in most of the Plaintiff Districts contain ragged, out-of-date books, and many bare shelves (Tr (10/2/03) 204 5-15) (principal specialist testifying that when she arrived in Allendale, library books were so outdated that they discussed “someday” sending a man to the moon), see also id (1/6/04) 9 5-19, (10/1/03) 39 2-16, 54 3-23, (10/8/03) 65 1-66 24, (1/13/04) 156 18-157 18)

School technology, particularly computers, is especially important for at-risk students (Tr (9/24/03) 188 15-20, 195 25-196 6) Defendants require that all students have an e-mail address, but a large majority of students in the Plaintiff Districts have no access computers outside of the school (Tr (9/25/03) 163 1-4) Even though school is the only place many of these students could access a computer, making it more crucial for the Plaintiff Districts to have computers, the Plaintiff Districts have far fewer computers than the other districts (Tr (9/24/03) 163 8-13, 168 15-17) The computers they do have tend to be older and less capable of handling sophisticated educational software Further at least one school lacks adequate wiring and electric systems, causing computers to go down approximately 30% of the time they are supposed to be used (Tr (4/2/04) 30 13-25)

Defendants defended their provision of instructional materials through the unreliable testimony of their expert, Dr James Smith By his own admission, Smith merely “scanned” the classrooms and noted whether they contained computers or instructional materials (Tr (6/28/04) 185 4-10 and 15-20) Importantly, he did not examine the materials to determine what they were or whether they were appropriate or

sufficient for the instruction offered in each classroom, nor did he determine if the computers in the rooms even worked, let alone investigate the adequacy of the supporting technology infrastructure or the software and programs available (Tr (6/30/04) 139 7-140 9, 142 4-15) He testified that the instructional materials “appeared” sufficient for instructional purposes, but that superficial observation does not outweigh testimony from the Districts’ educators that their instructional materials often were not usable because of their poor condition (Tr (2/12/04) 20 20–22 21)

Moreover, in contrast to school districts’ witnesses who gave extensive testimony about the inadequacies of computers and the supporting technology infrastructure, hardware, software, and teacher training on integrating computers into instruction Smith did not even consider those issues Computers are of no benefit to students if they cannot be used reliably and satisfactorily

C The Trial Court Erred By Finding That "Time-On-Task" Programs Are Not Required To Provide The Opportunity To Receive A Minimally Adequate Education

The trial court held that time-on-task programs that assist poor children in learning—such as summer school and after-school programs—are “supplements to the normal school day and school year” and are not constitutionally required (7/12/07 Order ¶ 19) This was error

1 The Abbeville decision does not exclude time-on-task programs

In Abbeville this Court defined the constitutional standard with “deliberately broad parameters” for the trial court to follow The Abbeville decision does not provide a “check-list” of mandatory programs that Defendants are obligated to provide Therefore, the court erred by finding that summer school, after-school care, and similar

additional time-on-tasks programs are not required because Abbeville did not specifically mandate them

Further, this ruling 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 (12/29/05 Order at 160) The necessity of early childhood intervention programs flows from the requirement that the State has a constitutional duty to provide **each child** with the opportunity to acquire a minimally adequate education The trial court recognized this requirement "The State's obligation to provide an opportunity for a minimally adequate education is, in no way, reduced to children born in poverty **It is, in fact, enhanced for such children** The indisputable relationship between poverty and academic achievement and the magnified impact of poverty on the abilities of the very youngest, most vulnerable, form the basis of the obligation " (12/29/05 Order ¶ 428 (emphasis added))

2 More time-on-task programs are necessary for at-risk children to make up deficits

Both Plaintiffs' and Defendants' experts agree that all students—including at-risk students—can learn, although the at-risk student may require additional educational interventions to assist in the learning process The experts testified that providing at-risk students with more instructional time is one of the most effective educational interventions in teaching those students and that providing such programs often results in a boost in academic performance (See Tr (6/29/04) 117 2-18 (J Smith), (9/28/04) 71 21-25 (Walberg), (02/09/04) 34 15-35 6 (Harrison), (05/04/04) 158 8-21 (Tenenbaum), (6/7/04) 18 5-12 (Peterson), (3/3/04) 164 13-23 (J Anderson))

Further, witnesses for both parties agree that effective after-school programs will improve student achievement by closing academic gaps between where they are and where they should be and preventing any academic gaps from widening (Tr (09/28/04) 114 14-19, (06/16/04) 40 8-19, (6/29/04) 114 11-115 5, (02/09/04) 43 11-44 2, (5/26/04) 146 5-25) The trial court erred by failing to require appropriate after-school programs and the funding for those programs After-school programs in the Plaintiff Districts provide one opportunity for students to recover from the lack of pre-kindergarten or early childhood interventions, in addition to providing additional instruction to catch students who have fallen behind

Also, at-risk students benefit from more time at school and more time-on-task (Tr (9/21/04) 156 23-157 22, (1/7/04) 34 2-8) Dr Terry Peterson, former Chief Education Advisor for former Gov Dick Riley, observed that additional time is needed to educate some children because students enter the school system “with different levels of readiness, different levels of interest and support at home[]” and that without the needed additional time, those students will just suffer from “more failure ” (Tr (5/26/04) 144 25-145 11)

Based on the overwhelming evidence from witnesses for Plaintiffs and Defendants alike, the trial court erred in finding that additional time-on-task interventions, specifically including after-school and summer school programs, were not constitutionally required

3 The General Assembly recognized at-risk students' need for more time-on-task programs

Under the Education Accountability Act of 1998 (EAA), the General Assembly authorizes school districts to provide extended learning time, including **summer school**, e.g., S C Code Ann § 59-18-500 (2004) and S C Code Ann Regs 43-240 (Supp 2004)), **after-school programs**, e.g., S C Code Ann § 59-18-1910 (2004), **extended day or year schedules**, id § 59-18-1920 (2004) or other arrangements. Even before the EAA, the General Assembly included various avenues of providing extra instructional time when necessary. In the Education Improvement Act of 1984, the legislature authorized after-hours or summer-school remedial education services, which were designed for students who had not adequately mastered the skills and concepts presented in the classroom and had developed gaps in their learning that impeded their educational progress. (Pls ' Ex 5035 (EIA) at 13) Defendants' own witness agreed that providing additional learning time when needed is the policy of the State. (Tr (6/17/04) 89 13-90 15 (S Smith))

The court recognized that Defendants have enacted several pieces of legislation to "enhance educational achievement, especially for at-risk children " (12/29/05 Order ¶ 96) The court also recognized that the Legislature had provided for several supplemental time-on-task programs including summer school, homework assistance, reading recovery assistance, and other similar programs the very programs that the trial court held were not constitutionally required. Therefore, the court erred by not affording this evidence its appropriate weight.

4 After-school programs are essential components for providing the opportunity to receive a minimally adequate education

An ideal and effective after-school program for at-risk students meets five days a week, two-to-three hours a day (Tr (5/26/04) 162 2-163 17) Programs are staffed to match the students' needs, and teachers and/or paraprofessionals are trained in the subjects that they are teaching (Id) The program would be designed so children would be interested in coming, and they would return to school each day better prepared for the subject matter, with a renewed interest in learning, and knowing that achievement is expected of them (Id)

These programs are sparsely available if available at all, in the Plaintiff Districts (Tr (8/4/03) 148 19-21, 149 16-24, 212 14-213 9, (5/25/04) 88 3-19, 158 16-160 10) Because of lack of funding, quality teacher shortages, and transportation problems, students in the Plaintiff Districts are not receiving these much needed, and constitutional mandated, after-school programs The weight of the evidence leads to only one conclusion children in the Plaintiff Districts require additional time-on-task throughout their public-school education The trial court's ruling that afforded the necessary additional time and concomitant funding only to children through grade three is incorrect and contrary to the overwhelming record evidence

5 Summer programs are essential components for providing the opportunity to receive a minimally adequate education

All children in the Plaintiff Districts, regardless of age or grade, need access to summer school opportunities Again, both Plaintiffs' and Defendants' experts agree with this concept "[S]tudents, particularly those from lower income families, lose ground every summer because while some students are going ahead and getting

additional enrichment activities during the summer, students who don't have that opportunity may actually lose, forget a fair amount of what they learned during the school year " (Tr (8/11/03) 73 23-74 3, (2/13/04) 95 24-97 5) Research shows that low income children lose up to 30% of reading and math skills over a summer, which amounts to 3 6 years of loss over twelve years ((Id at (6/7/04) 5 22-6 7, 6 17-7 2, (3/4/04) 15 24-17 3)

Importantly, summer school and after school programs also provide avenues through which students may recover from a lack of pre-kindergarten or early childhood interventions (See Record Compilation 9 citing Tr (05/26/04) 144 25-146 8, 146 10-15 (Peterson), (6/7/04) 17 19-18 12 (Peterson), (05/04/04) 160 13-2, 198 1-10 (Tenenbaum))

Therefore, the court erred by not recognizing the testimony of experts from both sides that show that summer school is an essential component of the opportunity for a minimally adequate education

IV THE TRIAL COURT ERRED BY FAILING TO ANALYZE "INPUTS," "OUTPUTS," AND THE EFFECTS OF POVERTY ON THE STATE'S PUBLIC SCHOOL SYSTEM AS A WHOLE

Before analyzing whether individual components of the State's public education system were "minimally adequate," the trial court stated that "inputs, outcomes and the impact of poverty" must all be taken into account in determining whether or not the State has fulfilled its constitutional obligation " (12/29/05 Order ¶ 53) Plaintiffs agree The trial court, however, erred in failing to view the system as an **integrated series** of educational inputs Educational opportunity must be measured by whether the system as a whole is meeting the students' needs When the goal is to provide each

child the opportunity to learn the skills necessary to become a productive and contributing member of society, educational inputs must be sufficient to deliver this opportunity to children in the Plaintiff Districts despite the learning challenges they face. Thus, while the trial court correctly concluded that the children were not getting the constitutional opportunity for a minimally adequate education, it erred in concluding that the State's educational "inputs" are constitutionally sufficient except for lack of early childhood development programs.

A The effects of poverty must be considered when determining the sufficiency of educational inputs required in the Plaintiff Districts.

As the trial court expressly recognized, poverty is an everyday reality in the lives of the Plaintiff Districts' students that profoundly and adversely affects their ability to progress through school as more affluent children can. Whether "opportunity" exists for these students depends on whether the schools address learning challenges faced by children raised in poverty. As the trial court correctly noted

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

(12/29/05 Order ¶ 35) The effects of poverty thus cannot be disregarded when considering the adequacy of the inputs and the significance of the outputs. Adequate inputs for at-risk children must be of a higher quality: they need **better** teachers, **better** physical supports, and **more** time than students in the more affluent districts to compensate for what they lack in their homes and communities. (See Tr (10/2/03))

144 4-14) (J Franchini) (children in poverty, like any child who comes to school with enormous deficits, need highly skilled teachers, (5/4/04) 26 16-18 (State Superintendent Tenenbaum testifying that “[t]he most capable, best qualified teachers are needed to help raise the academic standards when children come from impoverished backgrounds[]”), (9/28/04) 71 21-25 (Defense expert Herbert Walberg agreed that at-risk students need the most capable teachers), (9/21/04) 185 16-19 (Defense expert James Guthrie stated that “the most able teachers [should be] aligned with the hardest to teach students ”), (2/24/04) 48 3-19 (J Anderson) (at-risk students need more instructional materials—particularly print material—because they don’t have access to them at home and often lack transportation to get to county libraries), (6/7/04) 18 5-7 (Peterson) (at-risk students start “behind the game” and need more instructional time to catch up), (6/29/04) 117 2-18 (Defense expert testifying that at-risk students often require more instructional time than other students to master their grade level and PACT), (9/28/04) 71 21-25 (Walberg) (same)

Further, as the trial court correctly found, the educational system has the clear responsibility to overcome the effects of poverty to the extent possible (12/29/05 Order ¶ 428) The cycle of poverty **will not be broken** without better education (Tr (5/3/04) 117 13-25 (“an education is the only way, the only opportunity that one who has no bootstraps will be able to pull himself or herself up and out [of poverty] ”), (01/09/04) 43 4-10) (“So unless we prime the pump some way to get better education resources to those areas we are going to continue to have this cycle of poverty that we have seen for as long as anybody can recall in South Carolina ’) **All** experts and the trial court agreed that the effects of poverty **can** be overcome As each and every

one of the Defendants' witnesses confirmed, **all** children—including poor children—can learn (See Record Compilation 10 citing Tr (9/29/03) 79 13-15, 84 19-85 19 (Levin), (7/29/03) 50 2-51 4 (Edgar), (1/14/04) 77 18-24 (Lee), (9/12/03) 115 4-13 (Ladson-Billings), (1/07/04) 34 2-8 (Longshore), (5/25/04) 113 2-18 (Peterson), (2/13/04) 130 11-14 (J Anderson), (6/18/04) 124 1-13 (S Smith)) Unfortunately, the Plaintiff Districts' record of educational achievement demonstrates that the system is not breaking the cycle of poverty and delivering on the constitutional promise to give each and every child the opportunity for a chance at life

B The level of student achievement (outputs) is insufficient

As the trial court recognized, the level of student achievement (educational outcomes or “outputs”) in the Plaintiff Districts proves the ineffectiveness of the education system Every objective standard of measurement of student achievement consistently places the students in the Plaintiff Districts on the bottom rung of the ladder of educational achievement

- Consistently, between 40% and 70% of the students do not receive high school diplomas
- Students score at the bottom of both national and state standardized tests
- PACT performance is well below the state average with students' scores dropping as they advance through the grades
- HSAP/Exit Exam passage rates are among the lowest in the state
- SAT and ACT scores are some of the lowest in the country
- Fewer students are identified as gifted and talented, pass Advanced Placement exams, or attend schools with ratings higher than Below Average

The importance of these outputs in evaluating the effectiveness of an education system is undeniable, as even defense witnesses conceded (See, e.g., Tr (08/17/04) 117 11-19 (Harrell), (9/21/04) 87 24-88 2 (Guthrie)) State policy-makers from the State Department of Education also testified that student performance on state tests is an indicator of whether schools are providing their students with the opportunity to acquire a minimally adequate education (Id at (09/08/03) 15 5-16 (“The General Assembly defined by statute what is the minimum adequate standard that you must meet is basics If you don’t meet basics on our PACT test, you’re not meeting our standards ”), 05/03/04) 39 15-53 (Rep Gilda Cobb-Hunter testifying that test results and report cards issued for Orangeburg 3 demonstrated that the children in that district, who are her constituents, are not receiving the opportunity for a minimally adequate education))

Other courts around the country have specifically considered state education goals, standards, performance assessments, graduation rates, and post-secondary experience in determining whether or not the state is living up to its constitutional obligations See e.g., Hoke County Bd of Educ v State, 599 S E 2d 365, 384 (N C 2004) (concluding opportunity was not available where the numbers of children failing to perform at expected or required levels was unacceptably high), Lake View Sch Dist No 25 v Huckabee, 91 S W 3d 472, 488-90 (Ark 2002) (same), Opinion of the Justices, 624 So 2d 107 127-128 (Ala 1993), see also, Montoy v State, 112 P 3d 923, 937 (Kan 2005) (finding state did not meet its constitutional obligation to provide an education after considering many of the above factors), Campaign for Fiscal Equity v State of New York, 801 N E 2d 326, 332 (N Y 2003) (same) After hearing this evidence, the trial court correctly held that educational outcomes were an important

indicator showing that the constitutionally-mandated educational opportunity was not available in the Plaintiff Districts (12/29/05 Order at 159-60)

1 Palmetto Achievement Challenge Test (PACT)

PACT assesses whether students in grades 3 through 8 have mastered Defendants’ curriculum standards for each grade and are prepared for work at the next grade PACT includes tests in four subject areas English language arts, mathematics, science, and social studies Under the Abbeville ruling, 335 S C at 68, 515 S E 2d at 540, students must possess knowledge or fundamental knowledge of all these areas Students can score *Below Basic*, *Basic*, *Proficient*, and *Advanced* Performance at the “Below Basic” level means the student has not met minimum expectations for student performance based on state curriculum standards and is not prepared for work at the next grade Performance at the “Basic” level means a student passed the test and met minimum expectations for student performance based on the state curriculum standards and is minimally prepared for work at the next grade level The State’s long-term goal for student performance is for students to perform at the ‘Proficient’ level, meaning the student has met expectations for student performance based on the state curriculum standards and is well prepared for the next grade (Tr (1/09/04) 76 19-77 5)

As the following chart illustrates, each year from 2001-2004, nearly half of the students in the Plaintiff Districts were scoring *below basic* on the PACT

District	2001 % Below Basic	2002 % Below Basic	2003 % Below Basic	2004 % Below Basic
Allendale				
ELA	52	50	57 1	49 1
Math	55	60	49 5	47 8
Dillon 2				
ELA	44	40 8	42 2	38 5

District	2001 % Below Basic	2002 % Below Basic	2003 % Below Basic	2004 % Below Basic
Math	53	44 6	38 3	37 5
Florence 4				
ELA	57 6	51	50 4	43 4
Math	63 4	51	48 5	45 3
Hampton 2				
ELA	55	50 1	54 3	47 4
Math	68	65 6	59 4	46 3
Jasper				
ELA	55	53	53 2	51 9
Math	68	65	54 5	53 1
Lee				
ELA	58	52	51 5	49 6
Math	69	61	51 0	46 7
Marion 7				
ELA		44	54 7	48 2
Math		50	52 3	53 5
Orangeburg 3				
ELA	43 6	40	44 7	38 0
Math	52 6	52	44 5	41 6

(Pls ' Exs 1320E, 1321, 6231, 6236, 1343, 6080, 6243, 6247, 6081, 6082, 6251, 6434, 1377, 6257, 1429, 6264, Defs ' Exs 313, 327, 1363, 1387, 1893, 3318-3325)

Further, the evidence showed that as the students in the Plaintiff Districts progress through school, their scores continue to decrease (Pls Exs 6612X and Z)

Accordingly, by Defendants' own measure, and as their own witnesses conceded, the majority of students in the Plaintiff Districts are not meeting minimum expectations

(Tr (6/30/2004) 173 15-19 (Smith))

2 High School Assessment Program (HSAP)

HSAP is a three-part exit exam that students must pass to graduate HSAP is a basic skills assessment test administered to tenth-graders, but is measured against eighth-grade achievement levels The current version of the exit exam, which was instituted in

spring 2004, shows that in 2004, more than 55% of students in the Plaintiff Districts taking the exam failed (See Pls ' Ex 6859E)

3 SAT/ACT Scores

Scores on the SAT and ACT college entrance exams again place students in the Plaintiff Districts well below the state and national medians (Pls ' Exs 1321, 6231, 6236, 6080, 6243, 6247, 6082, 6251, 1377, 6257, 6264, 6077, 6269, Defs ' Exs 327, 1387)

4 Graduation Rates

Low graduation rates in the Plaintiff Districts raise serious questions about the effectiveness of the education system for these students Based on data compiled by the National Center for Educational Statistics (NCES), between 40 to 70% of students in the Plaintiff Districts do not graduate (Pls ' Exs 221, 6858) An abysmal 68% of students do not graduate in Orangeburg 3 (Pls ' Ex 6858)

5 Other Indicators

Other indicators of student performance—students identified as Gifted and Talented, students taking AP courses and passing AP tests, and school quality ratings—repeatedly place the Plaintiff Districts as the lowest in the state (See Pls ' Ex 153 (AP), Pls ' Ex 1600 (Gifted & Talented) For example, in 2003, 75 percent of schools in the Plaintiff Districts were rated Unsatisfactory or Below Average, as compared to 17 4 percent of schools state-wide (Pls ' Ex 6352B)

The only conclusion to be reached from these poor achievements is that the trial court was correct in finding that the State's education system is not effective for the

students in the Plaintiff Districts and, consequently, Defendants are failing to provide these students with the opportunity to acquire a minimally adequate education

C The trial court, having recognized that the outputs were insufficient, erred in finding the system as a whole to be constitutional

The trial court expressly recognized that its ruling on opportunity resolved the ultimate issue in this case

The foregoing factual findings provide an appropriate and necessary context for resolution of the ultimate issue in this case Have the Defendants provided the children in the Plaintiff Districts the opportunity to acquire a minimally adequate education? **I find they have not**

(12/29/05 Order ¶ 433 (emphasis added)) Therefore, having found that Defendants were not providing the requisite constitutional opportunity to children in the Plaintiff Districts, the trial should have held the system as a whole to be unconstitutional By concluding that Defendants' constitutional violation was limited to early childhood education, the court contradicted itself and the greater weight of evidence

When the system of public schools is not delivering the requisite opportunity, as the trial court found was true in the Plaintiff Districts, the system is constitutionally insufficient The trial court, however, contradicted itself by concluding both that the State had not provided the educational opportunity and that the system—or at least the educational inputs, with the exception of early childhood education—were sufficient to satisfy the constitutional requirement Although the lack of early childhood education fails to deliver an adequate educational opportunity, early childhood is only one piece of an unconstitutional system

The greater weight of evidence establishes that the system is not working (as proved by the outputs poor achievements) and that the educational inputs in the

Plaintiff Districts ((lower quality teaching force, inadequate facilities, widespread shortages of instructional materials and insufficient time on task) are insufficient to deliver the required educational opportunity to children in the Plaintiff Districts. As a matter of law, the trial court’s factual finding that the system is failing in its ultimate responsibility cannot be reconciled with the trial court’s legal conclusion that the individual components of the state’s education system (except for early childhood education) were minimally adequate and that, as a result, the system as a whole is not unconstitutional. The trial court’s failure to consider the educational system **as a whole** led to the incorrect conclusion that the system was constitutional.

V THE TRIAL COURT ERRED IN FINDING THAT FUNDING FOR PUBLIC SCHOOLS WAS ADEQUATE EXCEPT FOR EARLY CHILDHOOD EDUCATION WHEN THE ENTIRE SYSTEM AS A WHOLE IS INADEQUATE

In response to what the trial court set out as the question it was charged with answering—whether Defendants’ “current funding and policies are sufficient to provide the opportunity for South Carolina students to acquire a minimally adequate education” (12/29/05 Order ¶ 43)—the court properly answered, no ” (Id. at 162) (“[T]constitutional requirement of adequate funding is not met by the Defendants

”) Unfortunately, however, the court improperly limited its holding to a specific area—the “failure to adequately fund early childhood intervention programs ” (Id.) Further muddying the waters, the trial court also found that “**generally** there is sufficient money available to achieve the educational outcomes identified in Abbeville County ” (Id. ¶ 408) (emphasis in original)

Even if the finding of “general” adequacy were supported by sufficient record evidence (which it is not), the finding is incongruous with the court’s finding that Defendants are not satisfying their constitutional duty of funding education and does nothing to address the most important issue before the court—that children in the Plaintiff Districts are still lacking educational opportunities. The mandate of the Abbeville Court plainly requires that Defendants provide the children with these opportunities. The State cannot hide behind an assertion that the money is available but is not spent as it should be. (See, e.g., 12/29/05 Order at 160 (noting that Plaintiff Districts have received “substantial amounts” of funding “as a response to the poor academic performance[,]” but that expenditures have been “largely ineffective because they [came] too late”), id. ¶ 221 (noting that Plaintiff Districts received grant money for additional professional development programs and suggesting that Plaintiff Districts should “focus their efforts” to find programs that meet their teachers’ needs).) The court’s requiring additional funding or other support, but then limiting the requirement to early childhood interventions was error. Though additional funding is required for early childhood education, this limited remedy not only fails to address the systemic lack of opportunities present in the Plaintiff Districts, it also fails to provide any relief to children beyond grade three, who by definition have not received the Abbeville opportunities.

A South Carolina’s funding programs, including chronic under-funding of established programs, are unconstitutional.

Schools receive revenues from state, local, and federal sources. The basic state funding for all districts is through the 1977 Education Finance Act (“EFA”), and is what is known as “foundation funding.” See S.C. Code Ann. §§ 59-20-10, et seq.

The only state funding mechanism that is wealth-sensitive,¹⁹ the EFA formula is based on the assumed costs of certain designated programs compiled in 1977 and referred to collectively as the Defined Minimum Program (“DMP”) ²⁰ Other state funding comes from specific programmatic provisions that are funded by the 1984 Education Improvement Act (“EIA”) penny sales tax, codified at S C Code Ann §§ 59-21-10, et seq , the lottery, codified at S C Code Ann § 59-150-350(D), or the now-essentially-ended Barnwell fund (Tr (9/11/03) 25 22-28 6, (8/17/04) 146 10-147 2)

1 The EFA has not been revised to address current educational needs

The EFA, patterned after a study ordered in 1975 by Governor James Edwards (Pls ’ Ex 287), is now outdated and has not properly been updated by the State. Importantly, the EFA has never addressed the quality of the educational components required in the DMP, nor have Defendants ever attempted to define, calculate, or fund the cost of what comprised a constitutionally “minimally adequate” education (See Pls ’ Ex 389 at 23)

Moreover, though the thirty-year-old EFA formula has been reviewed and found lacking on multiple occasions, the State continues to position it as the cornerstone of education finance—all other state funding is built on the EFA. Although the State has

¹⁹ The EFA provides funds to school districts based on a sliding scale—districts with less fiscal capacity receive more EFA funds than districts with higher fiscal capacities

²⁰ The Defined Minimum Program now called the Defined Program is a set of elements compiled in 1977—such as course offerings, numbers of teachers and other staff, teacher qualifications, class sizes, and days and minutes of instruction—considered basic components each school should have (See Pls Ex 6312 (1999 Stds for Elem Schools), Pls Ex 6313 (1999 Stds for Middle Schools), Pls Ex 6314 (1999 Stds for Secondary Schools), Pls Ex 6315 (1999 Stds for Occupational Centers)) The DMP sets out the existence, not the quality, of the basic components (Pls Ex 389 at 23) Funding for the DMP specifically excludes costs for facilities, transportation, employee benefits, textbooks, adult education, and food services. S C Code Ann § 59-20-20(1) and (2) (2004)

enacted additional educational programs that school districts are required to provide,²¹ neither the DMP nor the EFA's base student cost (“BSC”)²² have been adjusted to keep step with the additional requirements. Of specific importance in this litigation, although the State admits that it costs more to educate poor children, the EFA has never included a poverty weighting to reflect the indisputable difference in those students’ needs.²³ As such, it is elementary that the EFA formula is not sufficient to cover the programs and services required and needed by schools and students in South Carolina. (Tr. (9/11/03) 19:10-13, 23:25-24:12.)

Evidence at trial included a great deal of testimony explaining that changed program requirements, effected by statutory mandate or by modern society, must be factored into the basic foundation funding if the State is ever to provide appropriate education for her children. (Tr. (6/8/04) 163:20-164:23, 180:1-15, see also (2/25/04) 210:13-21.) Dr. Terry Peterson, one of the EFA drafters, put it well: “[I]n 1975, who would have thought that computers would be used in a day-to-day basis. The expectation of breadth and depth [of] knowledge that you now expect of students is dramatically different, deeper and higher and yet those foundation elements are weaker

²¹ For example, additional government mandated changes in schools (e.g., additional staffing requirements, higher credentials, increased number of high school credits needed for graduation, additional special needs accommodations) and societal changes (e.g., more reliance on computers and technology, increased numbers of children in poverty or who do not speak English) add to the cost of education but have not been reflected by a change in the DMP or the base student cost (BSC) derived in part from the DMP.

²² The BSC is the funding deemed necessary to provide the elements of the Defined Minimum Program to the most economically educated pupil (defined at the time the EFA was enacted as those in grades four through twelve in regular classroom settings). S.C. Code Ann. § 59-20-20(6).

²³ Students are weighted according to different classifications—elementary school, high school, physically or mentally handicapped, vocational education students, etc.—and the weights are applied to the BSC, yielding different sums of money per student based on the different relative cost of their educational programs. S.C. Code Ann. §§ 59-20-20(5) and 40(1) (2004). These are known as weighted pupil units (WPU). The total WPUs in a district is multiplied by the BSC to determine a district's base amount of funding from the EFA.

and eroded away ” (Tr (6/8/04) 161 3-14) In other words, the once-cutting-edge EFA formula is now obsolete and insufficient to support a minimally adequate education

2 Defendants have rarely fully funded their EFA requirements

Not only has Defendants’ principal funding mechanism failed to keep up with current educational requirements, Defendants have rarely funded even the existing elements of the formula promised to the districts by the EFA. The EFA formula has been fully funded only three times in its history. At trial, Budget Director of the State Department of Education, John Cooley, presented a summary of the systematic and chronic under-funding of the EFA through budget caps, vetoes caps placed on the BSC, and failure to follow the statutory inflation factor²⁴ (Tr (9/11/03) 11 18-14 11, Pls ’ Ex 6020). Incredibly, the State under-funded its EFA commitment to the districts by approximately \$621,000,000 between 1979 and 2003 (Tr (9/11/03) 14 15-24)

Under-funding of the EFA particularly affects poor districts like Plaintiffs’ because their low fiscal capacities cause them to receive a proportionately larger share of the EFA funding. As such, the Plaintiff Districts are more heavily dependent on the EFA foundation funding than wealthier districts²⁵. The Plaintiff Districts are also less able to compensate for EFA funding shortfalls from their local revenues, which are quite limited. Chronic under-funding of the EFA formula undercuts the basic funding

²⁴ The State Budget and Control Board provides an inflation factor to the General Assembly each year and the EFA requires the BSC to be adjusted annually to incorporate the inflated cost of providing the DMP. S.C. Code Ann. § 59-20-40(1)(b) (2004).

²⁵ The EFA is a shared funding formula with the State paying approximately 70% of the formula and the districts paying approximately 30%. However, districts with low fiscal capacities and therefore low tax paying abilities receive larger percentages of the EFA formula funding from the State than do districts with higher tax paying abilities. Consequently, when the EFA formula is not fully funded, the poorer districts feel the loss more acutely than do districts that receive a lesser percentage of the EFA formula from the State.

for Plaintiff Districts, preventing them from providing the minimally adequate opportunities required by the Constitution

3 The State is well aware of its failure to fund its EFA obligations

The General Assembly has been on notice of its failure to fund the EFA for decades. In 1988, the South Carolina Legislative Audit Council (“LAC”), which by law was required to conduct an annual review of the EFA (Pls ’ Ex 5034 at 377), reported the EFA’s failure to address student needs²⁶. Among its findings, the LAC pointed out that

A periodic review by an independent consultant of the base student cost and its weighting system is needed. The base student cost and its assigned weights determine the amount of EFA funds needed for the Defined Minimum Program (DMP). An independent base student cost study completed in 1982 found that the DMP was underfunded by \$7.3 million. However, no changes in the base student cost or weights have been made as a result of the study.

(Pls ’ Ex 389 at 2-3) The only action the General Assembly took after receiving the LAC report underscoring funding short-falls in poorer districts was to amend the EFA to delete the requirement that annual audits be conducted, (see S C Code Ann § 59-20-60(9) (2004)), the LAC now audits the EFA only on the request of the General Assembly.

²⁶ The report did not address funding for transportation capital outlay (facilities) pilot programs adult education textbooks food services and employee (fringe) benefits since the EFA expressly excludes those costs from its formula. S C Code Ann § 59-20-20(2)(2004). Although the costs for transportation and employee benefits were borne exclusively by the State at the time the EFA was enacted, the State has passed more of those costs on to the districts over time. (Tr (6/7/04) 100 11 19 (4/20/04) 118 21 120 3 see also Pls Exs 6374B) (transportation) Tr (6/8/04) 155 21 157 11 (benefits)) The assumption made by the drafters of the report was that the State would continue to pay the entire costs and they therefore deliberately left those costs out of the shared formula. This assumption proved to be incorrect.

4 The State refused to embrace need-based education financing recommended by the State Superintendent of Education

In 1995, then-State Superintendent of Education Barbara S Nielsen proposed a new system of funding to address some of the funding deficiencies described above. Dr Nielsen recommended “that K-12 funding start at the schoolhouse level—that our priorities reflect a zero-based process which focuses on the basics needed by every classroom and school in order to prepare our young people to live, work and raise a family in the 21st century ” (Pls ’ Ex 545) Senator John Matthews testified at trial and noted that Dr Neilson’s recommendations and observations are even more to the point today than when she made them in 1995 (Tr (9/9/03) 14 12-16 4) Nonetheless, the General Assembly has never accepted the obvious notion that funding should be based on need and actual costs (See id at (9/8/03) 223 19-224 23)

5 State studies conclude that the State is under-funding education

More recently, in 1998, the General Assembly created the Education Oversight Committee (“EOC”) and tasked it with overseeing the Education Accountability Act and the EIA, as well as with making programmatic and funding recommendations to the General Assembly S C Code Ann § 59-6-10 (2004) As a result, the EOC has studied and issued multiple reports on education funding In 2003, the EOC performed an adequacy study and issued a “Progress Report on the Study of Sufficient Funding” in July 2003 (Pls ’ Ex 253)²⁷ Dr Jo Anne Anderson, Executive Director of the EOC, described the report’s three approaches to evaluating school funding in South

²⁷ The EOC study is only the latest of many reports The General Assembly has created other committees task forces and business partnerships to oversee education funding (see e.g. Pls Ex 5035 at 28) many of which have provided reports noting issues of under funding and recommending changes in funding mechanisms and priorities Most of the reports have gone unheeded if not unread

Carolina (1) a state requirements model that estimated the cost of the statutory and regulatory requirements placed on districts and schools by the State, (2) a standards-based model that estimated the cost of providing an education considered adequate for students to meet the EAA learning standards imposed by the State, and (3) a national median model that used the national median of per-pupil expenditures as the base student cost (Id., Tr (2/25/04) 156 15-157 6)

A comparison of current funding compared with each of the three models demonstrates that Defendants are under-funding education. Calculations under the state requirements model, even without accounting for the cost of transportation, textbooks, professional development, capital improvements, or “implied costs,” such as computers, revealed that South Carolina needed an additional \$755,244,423 to fund education (Pls ’ Ex 253 at 4) The standards-based model identified a revenue shortfall of \$478,054,176, (id. at 27), and the national median model showed a funding shortfall of \$1,063,580,664 (Id. at 29)²⁸ Again, Defendants have not heeded these recommendations (Tr (8/16/04) 97 21-98 17) The unfunded needs continue

Defendants did not contend that the EOC models were flawed in any regard, nor did they introduce countervailing evidence of the actual costs of an adequate education. Thus, the record is clear that South Carolina is under-funding education. Even the State’s expert agreed, stating that, “After going through the schools and seeing what

²⁸ Plaintiffs do not necessarily endorse the amounts of under funding found in the report but use them as examples of how Defendants have failed in their constitutional obligations. The calculations included some assumptions not applicable to Plaintiff Districts and the report was not designed to identify all educational needs and specifically excluded many. The report says nothing of needed capital improvements in the Plaintiff Districts which is a growing and pressing issue. It also excludes transportation professional development textbooks and technology. Most importantly it does not consider the Plaintiff Districts most fundamental need their ability to attract and retain qualified teachers. Until this fundamental and unrelenting problem is solved adequate educational opportunities will not be offered in the Plaintiff Districts.

[he] had seen in the school systems, that if given the opportunity [he] would tell the State of South Carolina to redeploy its assets ” (Tr (9/22/04) 18 10-15) Despite this overwhelming evidence that Defendants are not adequately funding their education requirements, the trial court found that funding was “generally” adequate and did not require the State to revisit or recalibrate its funding mechanisms This was error

B State funding lacks a rational basis because it is not based on a determination of current needs

Throughout the trial, Defendants maintained that education funding was sufficient Logically, then, Defendants should know how much it costs to educate children in the Plaintiff Districts However, the State has not sought the answer to that question²⁹ and has ignored statewide funding needs and cost estimates when reported As such, South Carolina’s education funding is not based on actual needs or costs Rather, it is based on former budgets and legislative compromise, (see Tr (9/9/03) 13 7-16, (1/5/04) 9 19-11 5, (8/16/04) 38 15-19), a foundation that other courts have found to be unconstitutional See, e g, Montoy v State 102 P 3d 1160, 1164 (finding educational funding system unconstitutional because it was “not based upon actual costs to educate children but instead based on former spending levels and political compromise, ’ further ruling in 112 P 3d 923, 927 (Kan 2005) (finding a subsequently passed education finance bill did not fund the actual costs of a constitutionally suitable education), see also Campaign for Fiscal Equity, Inc v State, 861 N E 2d 50, 53

²⁹ At trial Defendants finance expert James Guthrie agreed that a state should determine the cost of educating children and attempted to claim that the professional judgment panels assembled by M A P as discussed in more detail below constituted a cost study Guthrie admitted however that the study was performed for the purposes of this litigation and was not shared with any State representatives (Tr (9/21/04) 162 15 163 15)

(N Y 2006), Campbell County Sch Dist v State, 19 P 3d 518, 539 (Wyo 2001),
Bismarck Pub Sch Dist #1 v State, 511 N W 2d 247, 259 (N D 1994)

South Carolina's education financing scheme, based on compromise and prior figures, is not constitutional. Additionally, some programs and services are funded through yearly provisos, further fragmenting the funding system by injecting yearly fluctuations into the budgeting process and eroding the programs. (Tr (9/9/03) 9 21-10 9, 11 14-24)

Though charged with providing educational funding sufficient to provide each child with the appropriate educational opportunity, the State has not considered how much such an educational opportunity costs. Rather, the State addresses how much money it has to spare for education. The court's error in finding this politically driven, sometimes ad-hoc system to be constitutional in all but early childhood education funding is clear.

C Inadequate funding cannot be limited to early childhood programs because it ignores most of South Carolina's students.

Plaintiffs agree with the trial court's determination that Defendants have failed to support early childhood development in the Plaintiff Districts. Plaintiffs also agree that additional funding—without focused direction toward the specific needs of the students in the Plaintiff Districts—would not necessarily result in increased educational opportunities. However, the record is replete with evidence that the Plaintiff Districts' funding is sorely lacking in many areas targeted to older children who are not able to take advantage of the trial court's prescribed remedy. The trial court's finding that funding, with the exception of early childhood programs, is "generally" sufficient, and

that increased funding will not enhance student achievement, is erroneous (See 12/29/05 Order at 149-50)

Plaintiffs proved, and Defendants' witnesses admitted, that additional assistance in areas such as "time-on-task," teacher quality, facilities, leadership, and remedial reading programs were interventions that would make a difference in the Plaintiff Districts—this proof was not limited to children in the early childhood years of learning³⁰ Under the court's ruling, most students in the Plaintiff Districts will remain deprived of the opportunity of a minimally adequate education since they are too old to take advantage of the limited early childhood interventions that the court ruled were required

1 A correlation exists between spending and achievement

The trial court found that money spent without identifying student needs and employing funds to address those needs would make no difference in student achievement (12/29/05 Order ¶¶ 410-11 , Plaintiffs do not dispute the general truth that money must be spent wisely, however, this "truth" does not excuse the court's error of finding that the funding of education in the Plaintiff Districts is "generally" adequate The premise that money must be spent wisely may not be turned on its ear to somehow mean that money does not make a difference in educating children Without question, money matters in education, so long as it is spent on practices and programs that address recognized needs

Quality teachers, additional time for learning, adequate and safe spaces for learning, focused interventions, and materials and experiences to make learning real to

³⁰ The trial court defined the early childhood years as from the pre kindergarten years through third grade (12/29/05 Order at Appendix pp 163 167)

children are essential to the provision of an opportunity for a minimally adequate education to at-risk or disadvantaged students. Undisputedly, those components of education require money (See, e.g., Tr (6/16/04) 43 12-15, 116 6-117 1) (defense expert Podgursky admitting that higher salaries are frequently necessary to hire and retain high quality teachers)) Plaintiffs lack the funding necessary to provide those components at sufficient levels in their schools, resulting in a lack of student achievement

This concept—that more needs require additional targeted resources to meet them—is not new. As New York’s highest appellate court recognized, “inputs should be calibrated to student need and state aid should increase where need is high and local ability to pay is low.” Campaign for Fiscal Equity v State, 801 N E 2d 326, 348 (N Y 2003). Even the State’s own experts are on record as acknowledging that targeted efforts to reach at-risk children require additional funding. Campbell County Sch Dist, 19 P 3d at 545 (noting that consulting firm owned by defense experts Smith and Guthrie found that at-risk students need additional funding to improve their academic achievement’)

Now in a different state, Guthrie and Smith espouse a different opinion—they now opine that there is little relationship between spending and achievement. Focusing on Dillon District 2’s South Elementary School, Defendants claim that that school’s PACT results demonstrate that money does not matter. Teacher pay in that district is among the state’s lowest, yet their PACT results exceed the state average for an elementary school. Unfortunately, the trial court accepted that argument (12/29/05 Order ¶ 402), failing to credit the real reasons behind the success of South Elementary

South Elementary School's student achievements are well above the average achievements for other schools in the Plaintiff Districts, but the success of one school does not prove that money is unimportant in delivering adequate educational opportunities. Rather, South Elementary demonstrates what low-wealth schools can achieve if provided with the proper resources: strong leadership, good teachers, and a stable teaching staff, all of which require increased spending.

South Elementary School's principal, Peggy Stafford, testified at length as to the work she does with her teachers and students. She holds weekly teachers' meetings to address problems, share strategies, and continually improve instruction. (Tr. (9/25/03) 192:15-19, 247:10-249:7.) Unlike many teachers in other Plaintiff schools, South's teachers are, largely, natives or long-time residents of Dillon with family ties in the community. (Id. at 232:8-22.) Turnover is rare and occurs only when other choices are available and turnover is desired. (Id. at 235:9-14.) Mrs. Stafford's teachers are experienced, dedicated, and share the same ideals as Mrs. Stafford. (Id. at 233:13-234:13; 250:21-251:2, (9/26/03) 138:16-24.) South Elementary also had two reading specialists in addition to Mrs. Stafford, a key resource for children with reading problems.³¹ (Id. at (9/26/03) 11:22-25.)

Plaintiffs agree that if the remaining Plaintiff Districts were able to attract principals and teachers like those found at South Elementary School, their students also could perform at high levels.³² However, abundant record evidence reveals that most

³¹ Mrs. Stafford described striking reading gains by low achieving students over a twelve week period when they were placed in a small class taught by a reading specialist. (See Pls. Ex. 6119A-B; see also Tr. (9/26/03) 38:2-39:1.)

³² Evidence established that strong and accomplished principals like Mrs. Stafford in schools with high percentages of poor children are critical to the success of those schools. (See Tr. (4/22/04) 27:14-18; 90:2-7 (Robert Staton, then chairman of the EOC) (9/29/03) 103:18-104:15 (Dr. Henry Levin, these

schools in the Plaintiff Districts simply cannot attract and retain such faculty and staff. Schools cannot attract similar leaders and teachers with the resources they have available, and they cannot rely on the “missionary spirit” of enough high quality leaders and teachers to commit to their schools in the absence of adequate salaries. (See Tr (9/29/03) 102 9-103 14) South Elementary is an exception to the rule and is fortunate to have a principal and teachers like Mrs. Stafford and her home-grown staff. South Elementary’s strong leadership, qualified teachers, stable teaching force, and consequently higher student achievement are a boon to Dillon 2, unfortunately, it is an anomaly in the Plaintiff Districts.³³ The court’s improper focus on the success of South Elementary as being directly related to its low spending was error.

In addition to misconstruing the success of one Dillon school, the court also discounted evidence from Plaintiffs that demonstrate a positive correlation between money properly spent and student achievement. Plaintiffs introduced an EOC report entitled, “The Performance of Historically Underachieving Groups of Students in South Carolina: Small Steps Forward” (Pls. Ex. 251). The report, intended to determine how to change the achievement level of an Unsatisfactory school to that of a Good or

principals have to find ways to replace with parents can’t do) (9/20/04) 163 10 166 8 (defense expert James Guthrie describing and praising Mrs. Stafford’s skills and leadership)) Principals for these schools must be willing and able to contact and use community resources, work closely with parent groups, and be very talented, ambitious, and committed to the schools. Principals with these qualities are not readily available for the salaries Plaintiff Districts are able to pay. (Tr (9/29/03) 103 25 104 17)

³³ The testimony of Dr. Jim Ray, Superintendent of Spartanburg County School District No. 3, was proffered to the Court. Tr (6/11/04) 3 2 7 21 10 18 11 9) to underscore the point that more money spent on targeted personnel and programs results in higher achievement by disadvantaged children. Dr. Ray’s testimony was ruled inadmissible by the trial court on the grounds that it tended to prove a claim that Plaintiff Districts were entitled to the same programs and resources as any other district (id. at 11 14 13 9) and that would, in the court’s opinion, be an equal opportunity claim barred by the Abbeville Court’s dismissal of Plaintiffs’ claims under the EFA. see Abbeville 335 S.C. at 65 515 S.E.2d at 535. The trial court erred in not admitting this evidence because Plaintiffs did not offer it to prove an equal protection claim but to prove the relationship between increased targeted spending and increased student achievement, and it was relevant to that point.

Excellent school, considers the academic achievement gap between various student demographic groups and focuses on closing the gap between impoverished and non-impoverished children, using factors reported on school report cards (Tr (2/24/04) 153 10-14) Table 8 of the report compares characteristics of the “gap-closing” schools such as teachers with advanced degrees, student/teacher ratios, teacher satisfaction, and principal's years at the school with the same characteristics of “all schools” and of schools rated Good and Excellent on school report cards ³⁴ (See Pls ’ Ex 251 at 24-26) The comparison of the gap-closing schools with the schools in the Plaintiff Districts demonstrates a significant disparity in the quality of the inputs in the Plaintiff Districts (Pls ’ Exs 251B, 251C) For example, though the gap-closing schools have only 1 4% of teachers teaching out of field, the Plaintiff Districts have 5 53% of teachers teaching out of field (Pls ’ Ex 251C) This evidence, which took into account all schools in the Plaintiff Districts, is persuasive evidence that properly marshaled resources do make a difference in a student’s ability to learn The court erred by discounting this evidence

2 Plaintiffs are not required to place a dollar amount on what is required to provide an opportunity for a minimally adequate education

The trial court faulted Plaintiffs for not “placing a dollar amount on what was needed ” (12/29/05 Order ¶ 410) However, Plaintiffs do not bear the burden of proving “what particular level of spending is necessary,” (id) nor is it the

³⁴ Defendants argue that this data is not compelling because the percentages reflected for all schools Good and Excellent schools and the gap closing schools are very similar in most categories The all schools number is skewed high because there are many more Good and Excellent schools in the state than there are schools rated Unsatisfactory and Below Average Consequently a comparison of the gap closing schools and the schools in the Plaintiff Districts presents a more accurate picture of the disparities between them

responsibility of the judiciary to make such a determination. The specific determinations of how education is to be delivered and at what cost is the province of the legislative branch. The issue before the trial court was to decide whether the educational system, designed and funded as it is, is constitutionally sufficient.

3 Defense expert witness James Smith's testimony on funding should have been excluded because it was based on an unreliable report of "professional judgment panels."

Over Plaintiffs' objection, the court permitted Defendants' expert, James Smith, to render the opinion that Defendants' funding was sufficient to meet Abbeville's criteria. Smith utilized the report of "professional judgment panels" convened by his consulting firm, Management Analysis and Planning ("MAP"), in forming his opinions. Because the protocol MAP established under Smith's supervision lacked sufficient reliability to be used by Smith, the court should not have permitted any opinions based on the panels under the guidelines of State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

Smith and MAP selected "well-respected," "successful professional educators" with proven track records for the panels (Tr. (6/28/04) 58:7-21). These panels were given certain assumptions and asked to design instructional and support programs that would meet the expectations found in Abbeville. The funding for these programs was based on expenditure data from the State Department of Education (Tr. (6/28/04) 113:17-18) for the state and for two hypothetical districts. Dr. Smith admittedly based his judgment in part on the opinions of these panels (Id. at 60:11-16).

- (a) The "professional judgment panels" report does not establish the adequacy of funding

Smith's method does not have sufficient indicia of reliability to be admissible and should have been excluded by the trial court. First, neither Smith's program nor its design has been peer-reviewed (Tr (6/28/04) 63 9-16) (Smith admitting that the program has been "described and mentioned in various publications but as far as process being peer reviewed like a medical review or something like that, it has not been ") Moreover, Smith admitted that a New York court did not allow him to introduce evidence of professional judgment panels because the opinion was one of others, and not his own (Id at 66 12-21) In addition, the Wyoming Supreme Court found that similar professional judgment panels convened by Smith "can hardly be considered unequivocal endorsements of the adequacy" of the funding system because of "the theoretical nature of the exercise, the inaccuracy of some of the assumptions, and the conclusion that more teachers and smaller class sizes were necessary " Campbell County Sch Dist 19 P 3d at 539 The Wyoming court found the panels' results to be "of little probative value " Id The exercise supervised by Smith in South Carolina for this case suffers from the same problems

Further, the data and the assumptions utilized by the panels in designing the instructional programs were invalid. The "resources" or funding data that Smith provided the panels, (Tr (6/28/04) 127 25-128 8, 128 21-24, 130 8-131 6), were taken from the SDE In\$ite expenditure data, (id), which is not the same as revenues available for discretionary spending by school districts. In\$ite reports expenditures, not revenue, and includes categorical money, which can only be used for specific

purposes³⁵ Smith's panels were permitted to use all of the In\$ite funds for any purpose, although that is not true of real In\$ite funds

Smith also required the panelists to accept a number of assumptions, some of which were false and are certainly at issue in this case, including (1) that personnel in the schools were competent, (2) that salaries in the schools were adequate to attract and retain a qualified faculty and staff, (3) that facilities were already in place and adequate, and major maintenance and repairs were adequate, (4) that the district budget—including funding for district leadership, business services, building upkeep and maintenance, safety, and transportation—was adequate and could not be changed or reallocated, (5) that supplies and equipment, including technology, were adequate, and (6) that funding for special education was adequate and could not be reallocated (Tr (6/28/04) 93 7-100 8, see also Defs ' Ex 2775) Two South Carolina panelists, Dr George Hood and Dr Curtis Brantley, both of whom have served as the superintendent of Jasper County School District, testified that the underlying assumptions were not true in Jasper County, or in other districts with which they were familiar (Tr (9/29/04) 15 3-18 70 1-8, Brantley Dep (11/1/04) 12 10-16 13 22-14 1)

The court shared Plaintiffs' concerns with Smith's methodology and assumptions, however it considered the evidence and noted that its concerns with Smith's panels could affect the weight given the testimony Giving Smith's opinion undue weight the court relied on the opinions to reach its conclusion "that **generally**

³⁵ For example In\$ite expenditure data includes EIA and federal grant money which can only be spent for particular curriculum development programs and professional development programs (See e.g. Pls Ex 6834 at 25 28 29 (showing Marion 7 expenditures as example) see also Tr (10/1/04) 75 23 76 17) In addition In\$ite data includes money attributed to districts that is paid directly to principal and teacher specialists as salaries Principal and teacher specialist salaries are paid by the State and though reflected in the In\$ite data as being district expenditures the district cannot access that money to use as it chooses (Id at 25 15 26 22)

there is sufficient money available to achieve the educational outcomes identified in Abbeville County ” (12/29/05 Order ¶ 408 (emphasis in original))

The non-peer-reviewed, invalid-data, and false-assumption-laden opinion of Dr Smith, based in large part on the professional judgment panels, does not satisfy the requirements of State v Council and should have been excluded by the court. Even if properly considered, the opinion based on the professional judgment panels’ work does not support the court’s finding that sufficient funding “generally” was available in the Plaintiff Districts. These relatively simplistic measurements by the panels are outweighed by the detailed explanations of funding deficiencies by Dr Terry Peterson,³⁶ the State Department of Education witnesses, and the superintendents of Plaintiff Districts, particularly Dr Dean of Marion 7 who gave a detailed explication of his district’s revenues and expenditures. The clear weight of evidence showed that these districts lack funding to provide the opportunities required by at-risk children. The court’s finding to the contrary was error.

- (b) If the professional judgment panels’ report is admissible, it establishes the need for programs that do not currently exist in the Plaintiff Districts.

Although the assumptions Smith instructed his panels to use invalidate the evidentiary value of their conclusions regarding what South Carolina school districts **are now able to provide** under the existing funding scheme, the panels’ work does provide powerful evidence of what **is needed in the Plaintiff Districts** to provide the opportunities required by Abbeville. Each of the four panels designed instructional programs and opportunities that Plaintiffs argued throughout the trial were needed in

³⁶ Dr Peterson was deeply involved in the crafting of two of the four revenue sources for education: the Education Finance Act (EFA) and the Education Improvement Act (EIA)

their districts. The emphasis among the panels was to provide students with ample time-on-task, remediation for students who fall behind, staffed summer school and after school programs, and specialists to teach reading and literacy. The panels' creations required teamwork and collaboration among teachers, freeing teachers to work on essential matters and professional development during parts of the school day, and staffing the school with extra "resource" teachers to allow classroom teachers time to learn and prepare. The programs also emphasized art, music, and physical education to enhance their learning experiences in the core subject areas.³⁷ (See Defs' Ex 2775.)

Tellingly, the comprehensive programs the panels included in their designs do not actually exist in the Plaintiff Districts. The question before this Court is whether the programs **that are in place** in the Plaintiff Districts are sufficient to satisfy Defendants' duty to provide adequate educational opportunities. They are not. The trial court's holding that the Plaintiff Districts' funding was generally sufficient to provide those opportunities was error.

³⁷ Although art, music, foreign language, and physical education are not specifically listed by the Abbeville Court, those disciplines are important ingredients in delivering the knowledge and skills included in the Abbeville definition. As this Court stated, the list of knowledge and skills in Abbeville is merely the outline of what is required. The individual components that Plaintiffs' witnesses described at trial (high quality teachers, extended learning time, fine arts labs, field trips, and other exposures to the world at large) are necessary to facilitate learning, particularly for disadvantaged students. (Tr (5/24/04) 199-25-205-1.) In addition, each of Smith's panelists who testified stated that art, music, foreign language, and physical education are critical to academic achievement. The trial court therefore erred in finding these disciplines were outside the mandate of Abbeville. (See 12/29/05 Order ¶ 42.)

D Higher-than-average per-pupil expenditures do not provide adequate funding

1 In\$ite data as to per-pupil *expenditures* are not evidence of *revenues* available to provide the opportunity to receive a minimally adequate education

The trial court improperly found that because the Plaintiff Districts spend more money on education than some other schools, funding allocated to the Plaintiffs is “adequate ” (12/29/05 Order ¶ 402) This finding makes the mistake of comparing apples to oranges A district’s “expenditures” do not equate to that district’s “available revenues” when considering whether the districts’ schools can provide the opportunity for a minimally adequate education for each child Brief examination of the types of funds available to school districts makes this distinction clear

School districts pay their expenditures from either discretionary funds or categorical funds A large percentage of a district’s categorical funds—so-called because they may only be spent in very specific categories, for particular items or programs—are obtained from grants or programs provided by the State, the federal government, or private sources Other categorical funds are derived from specific functions, such as student activity fees or lunch money These restricted, categorical funds may not be counted on by the districts from year to year, and districts are reluctant to rely on them for ongoing funding needs for that reason (Tr (10/1/04) 15 8-11, 102 17-23, see also id at 15 22-37 (discussing various categorical funds))

Discretionary funds, or “general funds,” on the other hand, are unrestricted in the sense that they are not tied to any particular service or need Districts may typically use general funds on any category of their educational programs General funds pay for

operating costs, including salaries for teachers and other personnel, unless particular positions are funded by grants. The EFA foundation funding, is discretionary, general funding and is intended to cover the Defined Minimum Program (DMP). Other general fund revenues are raised from local sources³⁸ and are used to support capital expenditures, debt service, local teacher salary supplements,³⁹ and other costs passed from Defendants to the local districts, including increasingly large amounts for transportation and fringe benefit expenses.

As a method of tracking and reporting on spending, the State Department of Education uses In\$ite, a reporting tool by which district expenditures are summarized and placed in five categories: Instruction, Instructional Support, Operations, Other Commitments, and Leadership. In\$ite per-pupil expenditures include both categorical and general funds. Neither capital expenditures nor debt service is included in the per-pupil calculations. In\$ite does not categorize revenue, nor does it reflect sources of or limitations on revenues. (See, e.g., Pls.' Ex. 6622.) In\$ite is correctly viewed as expenditure data, not revenue data.

Dr. Everette Dean, Superintendent of Marion 7, provided a detailed overview of the 2001-02 finances in his district, including both revenues and expenditures. (See Pls.' Ex. 6834.) By breaking the district's revenues and expenditures into categories, Dean showed how every restricted and unrestricted dollar was spent. (See Tr. (10/1/04) 62-77 (description of exercise), 917-1315 (general description of

³⁸ Taxes on real and personal property assessed by or for local school districts comprise the bulk of local revenues available to augment the funding school districts receive from the state and federal governments. Fees, tax penalties, and interest add much smaller amounts to local revenues used for the public school system. (See e.g., Pls.' Ex. 6834 at slide 4) (Marion 7).)

³⁹ Local teacher salary supplements are paid by districts to help them be competitive in hiring and retaining teachers.

revenues), 14 24-17 18 (local restricted revenues), 17 21-35 10, 36 12-37 1 (state restricted revenues), 38 2-41 14 (federal restricted revenues), 45 5-46 13 and Pls ' Ex 6834 at slide 12 (summary of revenue sources), Tr 10(10/1/04) 46 14-48 1 (InSite expense data is derived from audited financial statements), 48 2-51 14, 57 1-58 5, Pls ' Ex 6834 at slides 13-16 (expenditures paid from general fund revenues, by InSite categories), 58 11-59 9, 60 4-86 19, Pls ' Ex 6834 at slides 17-39 (expenditures paid from restricted revenues, by InSite categories and by line item), Pls ' Ex 6834 at slides 40-42 (expenditure summary, from general funds and from restricted funds)) More than half of Marion 7's total district revenue in 2001-2002—\$5,258,696 of the total \$10,121,173—was restricted and could be used only for certain purposes, and Dean testified that the restricted revenues were used only as allowed for those specific programs (See id at slide 11) Marion 7 had less than half of its total revenues, or \$4,862,477, available for discretionary spending (See id at slides 9-11)

By reviewing revenues and expenditures, Dean demonstrated how per-pupil expenditures as reported on InSite do not provide a true picture of the funding realities in school districts For example, when asked about teacher salaries and whether the district could find money in its budget to offer higher salaries to teachers and be competitive with other districts, he explained that the money was “just not there ” (Tr 10(10/1/04) 111 4-19, see also id at 51 15-54 18, 96 19-97 1 and 97 22-110 12 (explaining that district cannot use state “reduce class size” funds or federal Title 1 funds to increase teacher salaries across the board, but only to pay salaries for teachers in specific small classes))

In addition, some state expenditures, such as salaries and benefits for principal and teacher specialists in Marion 7, were attributed to Marion 7 for purposes of the InSite summaries, but never “belonged” to Marion 7, the district was simply the disbursing agent (Tr (10/1/04) 25 15-26 22, 62 5-9, 85 2-8, 85 19-86 7, 142 12-21 (Dean)) The district did not have access to that money

Moreover, the trial court found that the funding provided by the State for EAA technical assistance includes “millions of dollars spent each year on the Plaintiff Districts [with] no empirical or statistical evidence to suggest that those monies had any appreciable impact on improving student achievement ” (12/29/05 Order ¶ 431) Plaintiffs agree with this finding However, Defendants—not Plaintiffs—made the decision to on how much money to spend and for what purposes Plaintiffs’ evidence during trial demonstrated that until the Plaintiff Districts’ underlying problems are addressed, specifically hiring and retaining qualified teachers with the skills to offer an education to the Plaintiffs’ students, and offering needed time-on-task and other learning opportunities, the technical assistance offered by the State has little if any value Although the Plaintiff Districts are charged with receiving this money for purposes of calculating their per-pupil expenditures and revenues Defendants directed its use The Plaintiff Districts should not be penalized for the State’s mistakes For Defendants now to claim that the Plaintiff Districts had sufficient per-pupil funding to do what they needed to do to educate their children and that the Districts could have done so if they had been smarter about their spending decisions, is nothing short of hypocritical

Though the In\$ite data is helpful in understanding, in a general sense, how districts spend their operating money, (see Dean, Tr (10/1/04) 121 8-21), it is misleading if it is used as a representation of available per-pupil revenues⁴⁰ By simply considering figures on a spreadsheet of how much each district spends for operating expenses, without reference to the sources of and limitations on their revenues, the trial court failed to properly weigh the evidence on funding availability This failure caused the trial court to improperly conclude that Defendants are “generally” adequately funding the Plaintiff Districts’ educational needs

2 In\$ite per-pupil expenditure summaries do not account consistently for the funding of facilities

Another reason that In\$ite data do not offer a true snap-shot of what a district spends on each pupil is that the In\$ite per-pupil figures do not include capital expenditures or debt service Districts with new buildings may have expended substantial sums in building, furnishing, and equipping new schools, but those expenditures are excluded from the calculation of the In\$ite per-pupil expenditure amounts because they are capital expenditures Repair and maintenance expenses for old buildings (for example, patching roofs, repairing, plumbing or heating and air issues), on the other hand, are categorized as operating expenses and are included in In\$ite per-pupil calculations Expenditures to repair and maintain old buildings, such as are in many of Plaintiff Districts, are typically high and cause In\$ite per-pupil expenses in those districts to increase (Tr (6/7/04) 226 1-10, (2/25/04) 204 5-19) In

⁴⁰ This is another reason that the results of Dr James Smith s professional judgment study are unreliable The conclusions drawn by the professional judgment panels and by Dr Smith were based on comparisons with per pupil expenditures under three scenarios derived from In\$ite expenditures and were not based on what funding was actually available for the uses the panel recommended

evaluating what is offered to students in the system of public schools, one must consider facilities and capital improvements as an integral part of the system. Excising facilities and capital improvements expenditures from an analysis of how much a district or the State spends on a per-pupil in support of education is not appropriate (Tr (6/7/04) 224 21-225 10)

When capital expenditures and debt service are added back into the total In\$ite calculations for purposes of calculating per-pupil spending, the average per-pupil spending in the state as a whole exceeded that of the Plaintiff Districts in 2001 and in 2002 (Id at 233 5-234 18, Pls ' Exs 6625A, 6626A, 6730, 6731) This marked contrast to the per-pupil expenditures as defined and reported on the In\$ite data pages—the data considered by the court—reveals the impropriety of exclusive reliance on such data

3 In\$ite data on per-pupil expenditures includes federal funding, which is inadmissible to prove State support of education

Another problem with wholesale use of the In\$ite expenditure summaries is that although the In\$ite data include expenses paid from federal funds, (Tr (10/1/04) 70 23-71 08), federal funds can be used only to supplement, not supplant, state and local educational obligations. See, e.g., 20 U S C § 6321(b)(1) (No Child Left Behind Act), 20 U S C § 1412 (Individuals with Disabilities Education Act (“IDEA”)), Bennett v Ky Dept of Ed, 470 U S 656 (1985), Chinle Unified Sch Dist No 24 v Bishop, No 92-15325, 1992 WL 336956, at *1 (9th Cir Nov 13, 1992), Shepherd v Godwin, 280 F Supp 869, 874 (E D Va 1968) (“[C]ommandeering of credit [by the state] for the Federal moneys severely injures both the community and the pupil ”), Opinion of the Justices, 624 So 2d 107, 117 (Ala 1993) (“The issue before the Court

is whether the **state** meets constitutional mandates in providing public schools, not the federal government ”) (emphasis added)) Allowing Defendants to claim credit for federal monies spent for supplemental programs—programs that supplement, not supplant, the education the State is bound to provide – provides an inaccurate and misleading picture of the funding available to meet the State’s constitutional obligations

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 ” (12/29/05 Order ¶ 58) Additionally, the court noted that this case “does not involve even an allegation that the State of South Carolina has supplanted State funds with federal aid ” (Id.) The court misconstrues the issue The 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 for certain supplemental purposes as evidence that it is meeting its obligations to provide constitutionally adequate basic education Evidence of federal money is not relevant to the ultimate issue of whether the State has met its constitutional obligation of providing sufficient funding to provide the opportunity for each child to receive a minimally adequate education See State v Quattlebaum, 338 S C 441, 454, 527 S E 2d 105, 111 (2000) (finding that evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy) The amount of these federal monies has no direct bearing upon nor does it tend to establish or make more or less probable, the issue of whether the State has met its constitutional obligations Opinion of the Justices, 624 So 2d at 117 (holding it

proper to exclude evidence of any federal aid from the analysis of whether the state is allocating sufficient funds to provide an adequate education)

The amount of federal funding available to Plaintiff Districts should not have been admitted and relied upon as evidence that the Defendants have met their constitutional obligations (Tr (6/8/04) 31 1-25)

4 In\$ite per-pupil expenditures are misleading because they do not factor in diseconomies of scale

Per-pupil spending figures are further misleading because they do not take into account the diseconomies of scale operating in the Plaintiff Districts. As explained by Dr. Jo Anne Anderson, per-pupil spending figures were not accurate indicators of whether sufficient funds are available. Because Plaintiff Districts are smaller than some of their more affluent peers, the Districts' fixed overhead for expenses such as maintenance, utilities, debt service, and administrative costs must be spread over fewer numbers of students. Further, small districts necessarily have fewer students in advanced or specialized, but nevertheless state-mandated, high school classes. Fewer students over whom to spread fixed costs and teachers' salaries for specialized classes results in higher per-pupil expenditures (Tr (2/25/04) 205 15-206 7)

5 In\$ite per-pupil expenditures are necessarily and properly higher in the Plaintiff Districts

The Plaintiff Districts have almost twice the number of at-risk students than statewide averages, making their educational needs greater than other schools. Witnesses for Plaintiffs and Defendants alike agreed that it costs more to educate at-risk children because of the additional programming necessary to help them achieve. Defense witnesses Guthrie and Smith both testified that it takes more money to provide

clusters of at-risk students with educational opportunities (Tr (9/21/04) 138 6-11, Tr (6/29/04) 100 10-21) Dr Jo Anne Anderson of the EOC agrees with this principle (Tr (2/25/04) 167 7-168 8)

Dr Anderson testified that schools in rural areas have needs that are not existent in less isolated locations Because of the aggregation of poverty and the relative isolation of these schools, they need to provide more transportation and other services in order for students to have the additional time—in early childhood programs, in summer school, after school or otherwise—that they need to close the gaps in their learning (Id at 207 7-208 9, see also id at 206 18-207 6)

A school district with these needs must spend more per pupil simply to provide these services and programs on an adequate basis A school district without the same needs will not have to spend money on them, and its per-pupil spending would, of course, be lower Although mildly interesting, a comparison of the per-pupil spending of a rural district with large numbers of at-risk children to the per-pupil spending of a suburban district with far fewer students on free or reduced lunch programs and a smaller gap between what they know and what they need to learn proves little Per-pupil spending is not an accurate measure of whether the students in those two very different school districts are being provided educational services and programs appropriate to their needs

E The State does not put education as its top priority

In addition to wrongly focusing on per-pupil spending, the trial court also erred by relying on a finding that Defendants have increased spending on education to support its conclusion that Defendants provided adequate funding of the education system in the

Plaintiff Districts The trial court erroneously found that the Defendants' commitment to education is their "number one priority," based in part on a finding that public education's share of the State's budget has increased over the years, with the percentage of the General Fund allocated to education having increased from 33% in 1994 to 36% in 2004 (12/29/05 Order ¶ 395)

In finding education funding to be the State's "number one priority," the court cited to the testimony of Representative Robert Harrell (12/29/05 Order ¶ 395) The court seemingly disregarded testimony of two long-time state senators—John Matthews and John Land Senators Matthews and Land, both of whom have served in the legislature for over thirty years, each testified that education was given no higher priority than any other agency (Tr (9/9/03) 31 5-15, (1/5/04) 14 12-17) The court's finding was contrary to the greater weight of the evidence ⁴¹

F The State's education funding has not increased relative to other spending

Although the court found that the State has made "substantial increases" in the funding of education by citing to general fund contributions, in reality, the proportion of general funds going to "K-12 education" has remained relatively steady over the years No significant increases in the public schools' share of the general fund have

⁴¹ Further the General Assembly has demonstrated that it considers tax relief more important than education spending as demonstrated by the Property Tax Relief Act's effect on education funding Originally the Act required that the EFA be fully funded before the property tax relief could take effect S C Code Ann § 12 37 251(F) Pls Ex 6461) In 2001 however the General Assembly passed a proviso requiring funding for tax relief to be no less than the level of funding in the prior year (Pls Ex 6462 Tr (4/19/04) 45 18 46 19) In 2003 the Senate defeated an amendment to increase the EFA's base student cost (BSC) the increase would not have resulted in full funding of the EFA but it would have improved the situation Despite not fully funding the EFA as required by the Property Tax Relief Act the Senate funded the property tax relief (Id. at 49 6 17) Some senators went on record as being forced to table the amendment to raise the BSC because it would jeopardize the homestead exemption and because they were unwilling to risk not providing the tax relief that we promised to the people of South Carolina (Pls Ex 6464 at 14 15 see also Tr (4/19/04) 52 18 56 7)

occurred since at least 1992, education's share ranging from 33% to 36% over that time period (Pls ' Ex 6034P) Additionally, the general fund is only one of the State's funds The total of state funds from all sources, including the general fund, was approximately \$15,000,000,000 in 2003 The public school system's share of all state appropriations was, and has consistently been, approximately 20% of all state appropriations, far less than that appropriated to Health and Human Services (Tr (9/10/03) 208 5-24, Pls ' Ex 6014 at 3) Thus, although the total dollars going to the public school system has increased, the share of funding appropriated to the public school system from both the general fund and from the State's total appropriations has remained essentially static (Pls ' Ex 6030) The State has not increased its financial commitment to public education relative to other areas In fact, no significant funding initiative has been passed since the Education Improvement Act of 1984 ⁴²

Further analysis of the increases in spending cited by Defendants demonstrates that the increases have not been to improve education, but essentially to maintain the status quo More actual dollars from the State's general fund were put into public schools through the EFA formula because the inflation rate which is applied annually to the EFA's BSC caused it to increase from \$665 in 1976 to \$1,777 in 2004 In addition, the weighted pupil units ("WPU's") also increased, requiring additional dollars from the general fund to go into public schools The total increase in general fund dollars for public schools from 1992 through 2003 was approximately \$695,000,000

⁴² Since the EIA was enacted only the lottery the Children s Education Endowment Fund (the Barnwell radioactive waste money) and the one time state bond issue for school facilities have provided funding dedicated to the public school system and those sources offered a much more limited degree of funding than either the EFA or the EIA None of the many other education initiatives enacted by the General Assembly and imposed on the public schools were accompanied by any new sources of funding (See Pls Ex 6034L)

\$415,000,000 of this total can be attributed directly to inflation and increased enrollment of students of varying EFA weights (increases in the BSC and WPU's). The remaining \$280,000,000 rise in funding is attributable to standard rising employer contribution costs such as increases in health insurance (Tr (9/11/03) 92 7-93 18, Pls ' Ex 6034K) Defendants' suggestion that it has allocated more funding to education in order to improve educational quality is simply untrue

In reality, the State has actually cut funding to the Districts in the past several years. For example, beginning in fiscal year 2000-01, the General Assembly imposed mid-year education funding cuts, causing a \$192 per-pupil decrease in the BSC. School districts were already obligated to annual contracts with teachers and other personnel—obligations the districts expected to be able to fund for the year based on the BSC in effect at the year's beginning. In a small district with 2,000 students, a decrease of \$192 per student results in a shortfall of \$384,000. Mid-year budget cuts were also imposed by the State on school districts in 2002-03 (BSC reduction of \$363) and in 2003-04 (BSC reduction of \$424) (Pls ' Ex 6015)

The gap between the recommended EFA base student cost and the amount actually funded has increasingly widened (Pls ' Ex 6612QQ, see also Tr (9/11/03) 3 11-4 12, Pls ' Exs 6015, 6017) This widening gap harshly affects poorer districts, such as the Plaintiff Districts, because the less-affluent districts obtain a larger portion of their BSC from State funds, by operation of the wealth-sensitive provisions of the EFA. The larger impact of a reduced BSC, combined with the fact that the poorer districts have fewer local revenues available to fill the gaps in their budget, magnify the funding problems in the Plaintiff Districts. For example, Hampton School District

Two's Superintendent noted that his district must be conservative with spending for programs such as summer school in order to have some flexibility in spending state money to cover regular operating costs during the school year (Tr (10/9/03) 61 11-22)⁴³ The court's finding that the State has properly discharged its obligations to the public school system through increased funding was error

G Inadequate funding has long-term effects on children in the Plaintiff Districts

The combined effects of the funding problems and inadequacies have real world consequences to the children in the Plaintiff Districts Generally, because Plaintiff Districts have low fiscal abilities and are limited in their capacity to raise money from local sources, they are heavily dependent on state funding and on categorical funding, which is only available for limited periods and cannot be counted on from year to year (See Record Compilation 11 citing Tr (5/26/04) 169 21-170 12, 172 14-173 1 (Peterson), (9/30/03) 155 6-11 (Harris), (3/5/2004) 47 14-19 (Townes), (8/4/03) 124 3-22 (Whitcomb), (1/6/2004) 21 11-19 (Franchini), (2/9/04) 134 6-20 (Harrison))

1 Funding for additional time-on-task

Effective summer school and after-school programs must be offered consistently, for long enough periods of time, and with qualified teachers and other staff prepared to extend the learning time to enable struggling students to catch up (Tr (8/11/03) 197 24-198 12, (6/7/04) 8 21-9 9, see also 6 10-14 ("[I]f you don't provide summer learning opportunities for low-income children, they actually lose

⁴³ The General Assembly utilized annual provisos to allow districts more flexibility in spending during this time This temporary arrangement did permit some school districts to fill the holes in their budgets created by the mid year slashing of state funds by transferring some EIA or other categorical funds to pay the teacher salaries or other recurring expenses (Tr (10/1/14) 162 16 163 16) However there is no evidence that additional flexibility allowed any districts to increase salaries or improve their services in any way as Defendants implied at trial

ground So it's of double importance to have high quality programs for them "))
These elements of effective additional time on task are frequently not available in
Plaintiff Districts because of inconsistent and insufficient funding (See Record
Compilation 12 citing Tr (10/9/03) 61 11-22 (Thompson), (3/5/04) 47 13-49 2, 47 14-
19 (Townes), (4/2/04) 54 20-55 24 (Singleton), (1/6/2004) 21 11-17 (A Franchini),
(10/8/03) 5 7-10 (J Franchini), (5/26/04) 169 2-21, 169 2-170 12, 172 14-173 1
(Peterson), (6/7/04) 7 14-8 2, 8 21-9 9 (Peterson)) Some of the districts are not able
to provide summer school to any students (Tr (1/6/2004) 24 6-9, (10/9/2003) 60 23-
61 3) Others are, at best, only able to offer limited programs (Tr (6/7/04) 7 9-8 2,
39 17-21, (10/9/03) 59 23-60 15, (4/2/04) 54 15-55 1, (02/09/04) 135 19-136 20)

Moreover, even Plaintiff Districts that may have fashioned some means to fund
after-school and summer school programs still face difficulty in providing
transportation for their students Transportation costs are high and rising, and the lack
of funds to pay for transportation has dramatically limited some of the Districts'
abilities to transport their students to and from summer school and after-school
programs, although the rural nature of the community and the socio-economic status of
the children make transportation essential (See Record Compilation 13 citing Tr
(5/26/04) 170 16-19 (Peterson), (8/11/03) 168 7-11 (Darling-Hammond), (8/12/03)
127 10-188 (Rogers), (8/6/03) 181 19-182 4 (Rogers), (3/30/04) 144 20-145 2, 148 1-
149 3 (McClary))

2 Funding for instructional materials

Ready availability of effective instructional materials is also essential to bring
concepts in math and science to life (See Tr (8/5/03) 50 14-51 1 (Huggins), (9/25/03)

58 14-25 (Elkins)) An abundance of reading materials of varying literacy levels is essential to children learning to read, and sufficient numbers of more advanced reading materials, such as entire classroom sets of novels, are necessary to build literacy and critical thinking skills for high school students (See (8/13/03) 114 14-117 6 (Lee), (9/26/03) 61 12-19 (Stafford), (10/1/03) 54 3-6 (Harris))

Despite the importance of instructional materials, Defendants have failed to adequately provide them to the Plaintiff Districts Inez Tenenbaum testified that textbooks had not been fully funded at any time during her tenure as State Superintendent (Tr (05/04/04) 36 18-20) The State's continual failure to fund textbooks has resulted in a deficit for routine textbook replacement of from \$10 million to \$15 million per year (Tr (10/06/03) 232 13-19), and the English language arts area alone needs \$43 million for books (Id at 227 3-7) One principal testified that he could not teach the curriculum because his school was unable to afford novel sets (Tr (8/4/03) 128 10) (Marion 7), and another testified that some students were unable to do their homework because the school could not provide books for the students to take home (Id at (1/16/04) 23 1-10) (Orangeburg 3)) In Jasper County, eighth-grade students were taught out of seventh-grade math textbooks for more than half the school year because the district did not have eighth-grade textbooks (Id at (4/21/04) 113 6-8, 189 5-190 13)

Senator John Matthews testified that in 1991 the General Assembly evaluated the cost to adequately stock school libraries, but failed to follow through on funding that cost (Tr (9/8/03) 120 13-121 25) Defendants also regularly fail to fund the SDE's requests for library books and supplies This has a particularly harsh effect in

poor rural schools located in areas where there is no community library and the homes have little to nothing in the way of reading material (Tr (10/1/03) 53 22-54 23)

Inadequate funding by the Defendants of textbooks and other instructional materials, even those required by the curriculum standards, prevent Plaintiff Districts from providing the opportunity for a minimally adequate education to their students

3 Funding for teacher salaries and professional development

Inadequate foundation funding of the EFA and scant local resources prevent Plaintiff Districts from raising teacher and staff salaries to the levels necessary to be competitive resulting in an inability to hire and retain the high quality teachers needed for the disadvantaged children in their classrooms They also lack sufficient funding to provide effective professional development for their teachers or to implement the ADEPT program as it is designed Consequently, they are unable to improve the quality of their teaching force

4 Funding for facilities

The Plaintiff Districts, like others in the state, must rely almost exclusively on local revenues, no matter how limited, to construct and maintain their facilities Defendants have provided only intermittent funding of capital expenditures over time, and Plaintiff Districts lack the fiscal ability to underwrite this massive expense The EIA included a provision that sent some funds to every district on a per student basis, with no reference to actual facility needs or ability to raise local funds S C Code Ann § 59-21-320 (2004) This was commonly called the “30/15 money,” (Tr (8/17/04) 145 16-22 (Harrell)), and Plaintiff Districts typically used that money to help

with repairs and maintenance of their existing buildings. The Districts have not received that funding for the last few years. (See Pls ' Ex 6108)

The General Assembly also set up the Children's Education Endowment Fund, commonly known as the Barnwell fund, to provide funds from the operation of the Barnwell nuclear waste site to school districts for facilities and equipment. In fiscal year 2003, the total distributed to all 85 school districts in the state from this fund was approximately \$21,000,000, roughly the cost of building one high school. Distributions from the Barnwell fund are not correlated to needs or to the costs of school construction. (Tr (8/17/04) 146 14-147 12, Pls ' Ex 6108) This money is no longer available.

The General Assembly authorized the issuance and sale of \$750,000,000 in bonds in 1999, the proceeds of which were distributed to all 85 school districts in the state over three years. The distribution was on a per-pupil basis. This funding has now been depleted. (Tr (8/17/04) 148 2-12, Pls ' Ex 6108)

Though these efforts by the State to assist the local school districts with facility needs are no doubt helpful and welcomed by the districts, they do not constitute a reliable source of funding for the continuing facility issues experienced each day in local districts. Additionally, under the funding scheme through which the State distributed the funds, the Plaintiff Districts received insufficient funds to construct new facilities. Districts must handle and pay for these problems on a consistent basis. They must set aside some of their local tax revenues for this purpose and must embark on campaigns to pass local bond referenda in order to fund most of their facility needs. The State is not a consistent partner in these efforts.

Defendants have been made aware on multiple occasions over many years of the dire condition of many school facilities and the inability of the Districts to bear the burden of facility construction, maintenance, and repair on their own (See Pls ' Ex 287 at 26-27, Pls ' Exs 113, 306, 111) Defendants are well-aware of the capital funding shortfalls in the Plaintiff Districts and have been aware of the problem for decades, yet have largely left the burden of paying for these expenses on the local districts, including the Plaintiff Districts, which are among those least able to bear that burden

5 Funding for transportation

Transportation is a necessary element of providing the opportunity for an education to children in the Plaintiff Districts, but Defendants have shifted so much of its cost to the districts, that the districts are unable to provide the children sufficient basic access to schools Section 59-67-420 of the South Carolina Code requires Defendants to pay costs of transporting students to regularly scheduled instructional classes in their attendance zones The EFA is intended to cover costs to the Districts of the basic education program, but it has never included any costs for transportation Indeed, when the EFA was enacted, all costs of transportation were paid by the State, it was never intended that the Districts would fund transportation out of their EFA foundation funding S C Code Ann § 59-20-20(2) (2004), see also Tr (6/8/04) 154 8-155 20, 157 12-158 1

Nevertheless, over the years, the State began shifting increasingly large portions of transportation costs to the districts, to be paid with whatever money the districts could find Thus, the State does not pay transportation costs to and from school as it is

required to do by law, and it has ignored the fact that the Districts have insufficient funding on their own to cover the costs. Indeed, funding is based in part on what the General Assembly decides to allocate to school districts, without reference to its actual costs, and in fact does not cover the districts' costs. (Tr. (4/20/04) 152:19-153:2, 112:6-113:4, 113:22-114:12 (Tudor)). Defendants pay only \$43 million of the \$109 million that school districts spend on driver salaries, leaving the districts to pay approximately 60% of that necessary cost from their local revenues. (Id. at 116:20-117:2, 125:12-126:24, Pls.' Exs. 6374A, 6374C). Defendants did not dispute at trial that they failed to bear all the costs of transporting students to regularly scheduled instructional classes, as required by law.

Inadequate state support for transportation has progressively worsened every year for the last twenty years. (Id. at 119:6-11, Pls.' Ex. 6375). Other increases in costs for fuel, buses, safety and training, record keeping, licensing, and certification requirements have increased financial pressures on SDE and school districts. (Id. at 121:7-122:20). Even so, the State has made no consistent effort to cover those increased costs. (Id.)

The transportation-related problems resulting from Defendants' failure to fully fund transportation contribute to the inadequacy of the educational system as a whole. Because the State repeatedly violates the law by not bearing the costs of transporting students to regularly scheduled instructional classes in their school attendance zones, Plaintiff Districts must divert funding from other needs, such as teacher salaries, in order to pay those costs. Further, because Defendants do not adequately provide

transportation, many children miss classes or special programs such as instruction in English as a second language or summer school, and thus are denied access to learning

Without any available funds ear-marked for transportation costs, Plaintiff Districts must fund transportation with their limited local revenues (Tr (6/8/04) 39 18-40 11) Because these local revenues are already stretched to cover other costs, this cost-shifting forces the Plaintiff Districts to cut or curtail other necessary expenses to get their students to school (Tr (6/7/04) 98 4-99 5) The court erred by failing to find that the current cost-shifting practice does not contribute to a constitutional violation

6 Summary of funding for components of education system

This overwhelming evidence—from witnesses for both Plaintiffs and Defendants alike—leads to the undeniable conclusion that Defendants are shirking their constitutional duty to the state’s children by not properly funding multiple components of the education system Defendants failings in their duties affect numerous areas, including but not limited to teachers salaries and fringe benefits, instructional materials, facilities, transportation, and additional effective time-on-task

VI THE TRIAL COURT ERRED IN FASHIONING AN INADEQUATE REMEDY FOR THE STATE'S CONSTITUTIONAL VIOLATION

After hearing all the evidence, the trial court found that “the opportunity to acquire a minimally adequate education does not exist for every student in the Plaintiff Districts ” (12/29/05 Order ¶ 433) Having recognized that this factual finding resolved the ultimate issue in the case, the 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. Instead, the court held that the State's constitutional violation was limited to the failure to provide early childhood intervention programs and that the sole remedy for this failure was to require the State to fund and implement early childhood intervention programs designed to address the impact of poverty on the educational abilities and achievements of the students in the Plaintiff Districts (12/29/05 Order at 162). The court erred because its remedy does not address the lack of opportunities for all students in the Plaintiff Districts.

A The trial court should require the General Assembly to address the unconstitutionality of the educational system as a whole.

The trial court's incorrect approach to the ultimate issue in this matter caused it to fashion an inadequate remedy. Specifically, rather than viewing the constitutional adequacy of the education system as a whole, the court considered only whether individual component parts of the system were adequate. Concluding that one particular component of the education system was deficient (early childhood education), the trial court naturally required Defendants to remedy that particular deficiency. Providing such a limited remedy, however, did not address the essential question presented in this litigation—whether the system **as a whole** is providing an adequate educational opportunity to each and every child in the Plaintiff Districts. If the system as a whole is not providing such an opportunity for each and every child, then the system as a whole is failing to satisfy the constitutional standard.

Although the early childhood education component of the public education system is inadequate to meet the needs of the students in the Plaintiff Districts, that

component is but one part of South Carolina’s public education system—a system that, as a whole, is failing to provide adequate educational opportunities to these children. With due respect to the trial court’s opinion that a change in one component completely resolves this monumental problem, the education experts who testified at trial do not share that opinion. Witnesses opined that early childhood education programs are but one necessary component of the type of education system that can provide the educational opportunities promised to all of South Carolina’s children. (See Record Compilation 14 citing Tr. (02/09/04) 44 18-45 3 (Harrison), (05/04/04) 49 7-24, 196 4-7 (Tenenbaum), (4/1/04) 147 1-9 (Singleton), (9/30/03) 122 22-123 2 (Harris), (10/2/03) 151 6-14 (J. Franchini).) The experts agreed that there is no one “silver bullet” to solve the State’s education problems because the system’s rise or fall depends upon the interplay of the various parts that make up the system as a whole. (Tr. (5/26/04) 9 18-22, 10 1-2, (2/24/04) 199 8-200, (8/16/04) 237 8-24.)

B. The trial court has authority to require the General Assembly to design, fund, and implement an adequate system of education.

As a remedy for Defendants’ failure to provide a constitutionally adequate educational opportunity to the children in the Plaintiff Districts, Plaintiffs requested an Order requiring Defendants to design, fund, and implement a new education system in South Carolina. The trial court stated that it lacked authority to provide such a remedy in light of this Court’s admonition against straying into the General Assembly’s domain and refused to require Defendants to take any specific action to address their constitutional failure to provide an adequate educational opportunity. (7/12/07 Order ¶¶ 43-45.)

The trial court, however, misinterpreted this Court’s cautionary language. The 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. Courts hearing education funding cases in other jurisdictions have not hesitated to require state legislatures to remedy constitutional deficits in those states’ education programs. See Lake View Sch. Dist. No. 25 v. Huckabee, 210 S.W.3d 28, 29-30 (Ark.) (state supreme court reasserting jurisdiction to ensure that lawmakers bring state’s education system into compliance with constitution as set forth by earlier decision declaring educational system unconstitutional), further ruling in 220 S.W.3d 645, 657 (Ark. 2005) (“[T]he *State* [] must provide a general, suitable, and efficient system of public education to the children of this state under the Arkansas Constitution. The roles of the executive and legislative branches are integral to assuring that this transpires. But it is also the duty of this court to assure constitutional compliance when compliance is challenged.”) (emphasis in original), Montoy v. State, 112 P.3d 923, 930, 940 (Kan. 2005) (ordering an immediate school funding increase of at least \$285 million and refusing to abdicate court’s “constitutional duty”) Rose v. Council for Better Educ., 790 S.W.2d 186, 209 (Ky. 1989) (stating that avoiding the decision of the constitutionality of the school funding system because of “legislative discretion” would be a denigration of court’s constitutional duty), Abbot ex rel. Abbot v. Burke, 693 A.2d 417, 445 (N.J. 1997) (refusing to continue the “profound constitutional deprivation that has penalized generations of children” and ordering a study of the needs of plaintiff districts, programs required to meet these needs, and creation of a plan for implementation of the needed programs), Campaign for Fiscal Equity, Inc. v.

State, 801 N E 2d 326, 348-49 (N Y 2003) (ordering state to commission a study of the actual cost of providing a sound education to its children and to enact necessary reforms to provide such an education), Hoke v County Bd of Educ, 599 S E 2d 365, 389-91 (N C 2004) (finding trial court struck proper balance by ordering state to examine and find a resolution to the problems identified by court, imposing general guidelines for doing so, and requiring state to keep court advised of its remedial actions through regular written reports), DeRolph v State, 780 N E 2d 529, 530 (Ohio 2002) (requiring General Assembly to perform “a complete systematic overhaul” of the school funding system)

C The trial court provided no remedy for students beyond early childhood education

After concluding that the State failed to provide **each child** with a minimally adequate educational opportunity, the trial court then fashioned a remedy that ignored the plight of every child currently in school beyond the third grade. By rough estimate, more than 10,000 children are currently enrolled in grades 4-12 in the Plaintiff Districts, so the court’s ruling left those children without a remedy. The system has failed these children for too long, and the court’s decision implicitly approves this failure and assures its perpetuation.

Children in the Plaintiff Districts are entitled to the same “chance at life” as all other students whom our public schools hold in trust, and Plaintiffs provided ample support that money well spent will give them the educational opportunities absent during the remainder of this state’s history.

For these reasons, the trial court's conclusion that the only remedy necessary for the failures of the State's education system is for the State to provide early childhood education intervention programs should be reversed. As have other courts around the country, this Court should retain jurisdiction over this case and require the State to act within a specified timeframe to evaluate and reform the entire system in a manner that ensures that each child is provided safe and adequate facilities in which he has the opportunity to acquire a minimally adequate education.

CONCLUSION

For these reasons, the trial court erred in finding that the only action required to remedy the Defendants' failure to provide children in the Plaintiff Districts the opportunity for a minimally adequate education in safe and adequate facilities is for Defendants to offer and fund early childhood education programs and interventions. The remedy provided by the trial court should be reversed. As have other courts around the country, this Court should retain jurisdiction over this case and require the Defendants to evaluate and reform the entire system in a manner that ensures that each child is provided safe and adequate facilities in which he has the opportunity to acquire a minimally adequate education. The Court should further require the Defendants to comply with its Order within a specified time.

Respectfully submitted,

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Record Compilation 1

- The “[teacher licensing] process is more than sufficient to ensure that teachers who are certified in South Carolina are at least minimally competent to deliver instruction compatible with the constitutional requirements ’ (12/29/05 Order ¶ 204)
- “[T]he Court cannot conclude that teacher compensation in South Carolina represents a constitutionally defective barrier to the attraction of qualified teachers into the profession ” (Id ¶ 206)
- “Turnover is certainly a problem in the Plaintiff Districts but the fact that the percentages of returning teachers are lower in the Plaintiff Districts than in other districts is not itself a violation of the State Constitution, and does not mean that students who are taught by teachers who are new to a school or district do not receive the opportunity to acquire a minimally adequate education ” (Id ¶ 214)
- “Thus, while teacher turnover may present something of a management and planning problem for the Plaintiff Districts, the Court cannot and does not conclude that the quality of instruction necessarily suffers as a result, or that turnover itself creates the absence of the opportunity for each child to receive a minimally adequate education ” (Id ¶ 217)
- “[T]he Court declines to find that any particular level of teacher experience is constitutionally necessary ’ (Id ¶ 219)
- “[T]he Court declines to find that teacher quality in South Carolina is so low that a constitutional violation exists (Id ¶ 222)
- “Obviously many of the facilities because of age and maintenance problems, were certainly not optimum nor ideal However, that is not the standard of Abbeville County and the facilities in the Plaintiff Districts meet the Abbeville standard ’ (Id ¶ 274)
- “Dr Smith testified that the layout of J V Martin was problematical for student management issues While the Court finds that the layout of J V Martin is not optimal the Constitution does not require the General Assembly to appropriate money to remedy this problem The Court finds that, although there are problems with certain buildings on this campus, this facility as a whole is safe and adequate and is sufficient to provide students the opportunity to acquire a minimally adequate education ” (Id ¶¶ 296-98)
- “[T]his Court finds that any deficiencies in the facilities are currently being remedied by the school district and those not being replaced or repaired are safe and

adequate and are sufficient to provide students the opportunity to acquire a minimally adequate education ” (Id. ¶ 393)

- “This Court cannot find that the necessary shifting of some of the cost of the transportation of students to the local districts rises to the level of a violation of the Constitution ” (7/12/07 Order ¶ 17)
- “[T]he lack of [extended learning programs] does not amount to a constitutional violation ” (Id. ¶ 19)

Record Compilation 2

- Plaintiff's expert Dr Terry Peterson, Senior Fellow for Education Policy and Partnerships at the University of South Carolina and Senior Advisor to the Dean of Education, testified "[T]he total is greater than the sum of the pieces so each one is important on their own, but the--the collection of pieces reinforce each other and increases the odds, the chances, the opportunity that children will acquire the abilities and skills and fundamental knowledge they need " (Tr (5/26/04) 23 1-6 (Peterson))
- Dr Peterson also stated that "the pieces [of education programs] are essential and how they fit together are essential " (Id at 10 1-2 (Peterson))
- Plaintiff's expert Dr Jo Anne Anderson, Executive Director of the South Carolina Education Oversight Committee, testified as follows

Well, and I have no surprise, I don't believe in silver bullets I think that, I think that good sound core teaching strong expectations for young people, all of these are what we have to persist at over time Too often and it becomes very easy, is to, is to reach out and grab that, that miracle program that is going to fix everything And we we look for these programs There are vendors who get rich selling these programs And we--when we use the programmatic approach often because I think we are just so hungry for achievement, we may not make certain that what we are doing in reading complements what we are doing in math or that our teacher evaluation system is coordinated with our instructional design And so what happens is something some writers talk about as, as we fame[sic] to achieve coherence among the programs

(Id at (2/24/04) 199 8-25 (J Anderson))

- Dr Anderson also testified as follows

From its inception members of the E O C have been concerned with school governance They really say that if you re going to change any other kind of organization, if you want to change a bank, you don t, you don't just look at what the teller is doing, you look at the whole system, the framework for policies, what's the culture how it's implemented, and so there has been a strong interest in governance

(Id at (2/25/2004) 23 20-24 2 (J Anderson))

- Defense witness Bobby Harrell, Chairman of the House Ways and Means Committee at the time of trial, stated

First of all there is no silver bullet I mean you can't--there is no magical program that you can create and all of a sudden everybody learns and, you know, we're happy because the achievement is finally there because we did X That just isn't—that just isn't reality

(Id at (8/16/04) 237 8-24 (Harrell))

- Dr Paula Harris, Superintendent of the Allendale School District, testified

In my opinion the students are not doing better because we have not been able to present them a complete package of instruction, and that complete package would include a teacher who is highly skilled, facilities that are adequate and that are wired for technology that are wired for your electrical needs, that -- I like this from this morning -- that are wired like this courtroom is Materials that meet their specific needs, a wealth of materials My children needs [sic] books like you wouldn't believe We are getting there with the curriculum but having the curriculum and not being able to deliver it efficiently doesn't help a lot, so my take on that is we haven't been able to present a complete package that would allow our children to be successful

(Id at (9/30/03) 200 15-201 5 (Harris))

- Dr Harris also testified that

[W]hat it takes to turn the district around is a compilation of many things I think everyone thought that if all we did was give someone a curriculum it would get better or if all we did was to provide computer enhancements the scores would get better Turns out that there are a whole lot of things that have to be done in order for those scores to get better, and to have systemic change at the level that she has set forth as a benchmark takes a lot of work

(Id at (9/30/03) 129 14-23 (Harris))

- Defense expert Dr Podursky testified

It's going to be a challenge for the school system but you know there are a lot of things that the schools do It could be a different curriculum It could be after-school tutoring It could be a pullout class It -- it could be something else So I, you know I just -- I don't

like -- I m uncomfortable when people say one thing because I don t
know that it's one thing

(Id at (6/16/2004) 39 4-12 (Podgursky))

Record Compilation 3

- Defense expert James Smith testified “I think in the context of education that probably that resource that has the—the greatest leverage is the quality of the teacher ’ (Tr (6/29/04) 118 21-23 (Smith))
- Defense expert James Guthrie testified “ I believe that it is remarkably important that any student have an able teacher in the classroom ” (Id_ at (9/21/04) 138 12-19 (Guthrie))
- Dr David Longshore, Superintendent of Orangeburg Consolidated School District Three testified “[T]he teacher, in my judgment, is the single most important element in a child's learning environment ” (Id_ at (1/6/04) 134 21-22 (Longshore))
- Dr Valerie Harrison, Superintendent of Florence School District 4, testified ‘ [T]he key to it, to making sure that students learn is in every classroom to have a teacher that is skilled not only in working with the students but also skilled in, with the content knowledge and the content basis ” (Id_ at (2/9/04) 56 23-57 4 (Harrison))
- Dr Janice Poda, the Senior Director of the Division of Teacher Quality at the South Carolina State Department of Education, testified “[T]he teacher is the most important factor in a child's education ” (Id_ at (9/22/03) 76 21-22 (Poda))
- Wayne Lord the Program Manager of the Gifted and Talented Division at the South Carolina Department of Education testified “[T]he teacher is the one of the critical factors in the classroom ” (Id_ at (4/1/04) 10 4-5 (Lord))
- Dr Everette Dean, Superintendent of Marion School District Seven, testified “A key component of whether this program is effective as it could be is whether we could have fresh ready to go quality teachers in the after school program ” (Id_ at (7/31/03) 36 14-17 (Dean))
- Dennis Thompson Superintendent of Hampton 2, testified ‘ The most important thing that I feel that we can offer a child is – come into Hampton Two Schools is a good quality teacher ” (Id_ at (10/8/03) 227 1-5 (Thompson))
- Dr William Townes District Superintendent for Lee County Public Schools, testified

Q Give us an idea of the kind of resources that you use or would like to use in Lee County School District to address the needs of those children that are enrolled there

A First of all I would like to have a highly qualified and competent teacher in each classroom for each student

(Id at (3/4/04) 172 12-17 (Townes))

- Superintendent of Education Inez Tenenbaum testified “Well, teachers are the – without teachers and high quality teachers you cannot produce high academic achievement Other than the parent a teacher is the single most important person in the child's life regarding academic progress ” (Id at (5/4/04) 147 4-10 (Tenenbaum))
- Plaintiffs’ expert Gloria Ladson-Billings testified “They need the teacher We can factor in lots of things But we know when, you know, when you think of I guess in the business world term is point of service It's the teacher ” (Id at (9/12/03) 102 24-103 15 (Ladson-Billings))
- Dr Barnett Berry, Education Researcher at the Southeast Center for Teacher Quality, testified

Q The last subject and—excuse me—is teacher quality in your view the greatest point of emphasis that could and should be made in schools to improve student performance?

A Yes It's what we can actually control more than almost any other variable that can increase student achievement

(Id at (4/20/04) 97 10-14 (Berry))

Record Compilation 4

- Meredith Smith, a science teacher in Marion 7, testified

[O]ur students don't have the experience base that's needed to draw connections. You know, part of the learning process is that we take what we have already experienced in life and what we observed and learned through life already and then we are supposed to take what we learn in school and try and make connections and parallels from what we have experienced in our every day life

The problem is if I try and explain something to students, you know, if you do this and you've seen this, well this is just like such and such, I get a blank look from my students

(Tr (8/5/03) 49 8-14 (Smith))

- Defense expert James Guthrie testified

Q Now, if a teacher is to go into a high poverty school do you think that a program should be offered to the teacher either through some professional development program that's sufficient or through some college level course or what have you, that acclimates the teacher to reaching out and connecting with concentrations of students who live in poverty?

A I believe that would be a very useful deployment of the professional development time that is available in South Carolina

(Id at (9/21/04) 186 19-187 3 (Guthrie))

- Dr Lorin Anderson, a professor with the Department of Education Leadership and Policies at the University of South Carolina testified "The curriculum then comes in as the vehicle connecting the students with this minimally adequate education. In other words, the curriculum as delivered by the teacher unique to the needs of the students, students have to be in here okay. That defines what I see as opportunity to acquire "

(Id at (7/29/03) 177 14-19 (L Anderson))

- Dr Henry Levin, the William Herd Kilpatrick Professor of Economics in Education at Columbia University testified

Q So what I'm trying to get from you now is what would these Plaintiff school districts need in place in order to provide their students with the opportunity for a minimally adequate education?

A You need very talented teachers, that is with very strong skills in terms of being able to understand the needs of a group of students and being able to understand their strengths, their challenges and being able to build enrichment programs that tie into those challenges. These enrichment programs would include projects, research, creative activities. They would include activities that use communication skills across the spectrum, a lot of writing, a lot of verbal presentation, a lot of work with ideas including debates and discourses, a lot of connecting dilemmas in daily life to dilemmas in classical literature that we find for example, Shakespeare, and it's the plays of Shakespeare one finds a great number of the kinds of conflicts and issues that we face on a daily basis. It would be a very rich education. Quite frankly, you need very talented teachers to pull that off. You need teachers who are highly prepared, teachers with very strong verbal, analytic skills, teachers with creativity, so I would begin there.

(Id. at (9/30/03) 5 2-5, 5 17-6 11 (Levin))

- Dr. Paula Harris, Superintendent of the Allendale School District, testified. High quality teachers meaning teachers with exceptional skills, meaning teachers who relate well to the children, understand child development, can put things in a context with—context where children can grasp them and hold on to them.” (Id. at (9/30/03) 108 5-9 (Harris))
- Dr. Barnett Berry, Education Researcher at the Southeast Center for Teacher Quality, testified.

Q Dr. Berry you know considering your testimony about children's different learning styles and effective teacher and the necessity of connecting the instruction to something the child can put into context considering this testimony, if teachers in the Plaintiff school districts are unable because of lack of training, lack of time or lack of experience or for whatever reason if they are unable to make this connection, do the children who are being taught by that teacher have the opportunity for a minimally adequate education?

A They do not have an opportunity to have a minimally adequate education. They do not—they do not have teachers who can adapt instruction, to figure out why children are learning and why they are not learning.

(Id. at (4/19/04) 210 23-211 11 (Berry))

- Plaintiffs expert Dr Gloria Ladson-Billings, a professor at the University of Wisconsin, testified

Another example is a teacher who was trying to teach a unit on poetry And the first thing she got was a big groan, you know, I don't want to learn any poetry She said how many people are interested in rap music? Okay Now, what's interesting I think about rap music when you track the sales of rap music it couldn't possibly be bought by only African-Americans There's not enough of us to make these people millionaires So it's a very kind of widespread youth culture phenomenon, but these youngsters were really keyed into rap, so what the teacher did is had some kind boundaries you know, it can't have any obscenities, it can't have any sort of sexist, misogynist lyrics, but give me an example of a rap When she laid that out she could show the youngsters things like meter and verse and then she could show them something more traditional and so, you know, what this is not new to you You have been doing poetry a long time and one of my favorite quotes from the data is a little kid who in the beginning groaned said to the teacher oh, Mrs Milliard, now you got me liking poetry But the kids often have to be connected in

(Id at (9/12/03) 100 24-101 21 (Ladson-Billings))

Record Compilation 5

- Dr David Longshore, Superintendent of Orangeburg School District 3, testified

I described earlier you know, our students as being school dependent in this three-legged arrangement that provides the context for their education. Therefore, in [sic] these kids can ill afford to have gaps as far as ineffective teachers in that progression through the system. And one ineffective teacher one year and an ineffective teacher, you know, can derail these children. So we, we need effective teachers throughout our system in my judgment in order to be able to provide a minimally adequate education for the children that we serve.

(Tr (1/6/04) 184 6-16 (Longshore))

- Marva Tigner, Director of Curriculum for Jasper County and a parent of public school students, testified

A Brian and Bradley are truly gifts, special gifts. They were fraternal twins. They are 16. They are complete opposites. Bradley has been tested as state identified gifted and talented. Brian is a very creative determined young man very charismatic. They have good work ethics. They are just basically good kids. They're athletes. And they are just -- I think they are wonderful children.

Q I want to talk to you a little bit about their school and what they have been through.

A Sure.

Q Have you noticed the difference a teacher could make?

A Oh, yes, I have.

Q What do you mean by yes, I have?

A In the primary and early elementary grades, Brian and Bradley were blessed to have instructors who had been a part of Jasper County School District for a while. In my opinion I would consider them to be average or above average teachers. So in their primary elementary grades, they really excelled. They were enthusiastic. They were just bubbling with curiosity and they loved going to school. Then in fourth grade Bradley was placed in the gifted program. He was placed with a dynamic innovative teacher focused on high-ordered thinking. They did performance tasks. They were just into all sorts of things that required

them to really think and use abstract thought processes. When Brian -- Brian was not in the gifted class and Brian had a teacher that was totally skill and drill. Everyone got the same thing the same way every day. Didn't matter if it was in style or if there were state standards or whatever. If it was in the textbooks that's what you got and Bradley started to excel and Brian started to become an unhappy child.

Q Let me back you up for just a second.

A Sure.

Q What do you mean by skill and drill?

A A lot of repetitious type things like workshop, worksheets that would ask you after reading a story it would ask you to recall basic details which is at -- a reading and knowledge level that you could just go back into the textbook and say okay. There's the answer. No really higher-leveled thinking. And it was just worksheets, workbooks, you know, write the definitions, write these words, copy the sentences, those type things.

Q And what was the effect of this on Brian?

A Brian lacked motivation. He was not very enthused about attending school. And as a result we had to make sure that we were giving him a lot of support at school to make sure that he was getting things that he needed to in order to be successful.

Q What do you mean by a lot of support?

A A lot of support being that I work with him with English, language arts. His father work with him at mathematics. If we were not available, we had family members to work with him to always give him support that he need[sic]. And if he felt that -- if we felt that he was having difficulties in a particular area, we made sure that we reviewed what he was taught in school that day and explained it to him or clarify it so that he would understand what was going on.

Q Were you able to make up everything that was not happening in the classroom?

A No. They -- that's impossible. You know as a parent I make myself available for my children. But to go back and re-teach the entire school day, that's impossible.

Q What happened to your sons in the fifth grade?

A In the fifth grade Bradley had the -- the good fortune of remaining with Miss Carol because it was a four, five young scholars class So he was with Miss Carol, this really dynamic teacher for another year Brian had another teacher that I would -- that I would consider in my personal opinion to be a below-average teacher

Q What makes a teacher in your opinion a below-average teacher?

A A teacher not being -- that as a below-average teacher is one that does not address the needs of the students that the instructional program or the instructional delivery does not have any consideration for the students' needs but what's printed in a textbook practices or instructional delivery that is -- that has proven to be ineffective were being used in the classroom on a regular basis And these were some of the reasons that I thought that this was an ineffective teacher

Q Well, based on your experience how many Sherril Carols do you have in your school district?

A Not enough I cannot give you an exact number but I can say without a doubt not enough

Q And what effect does it have on your children and the other children in your district by not having a Sherril Carol?

A Not having a Sherril Carol in there -- in every one of their classroom, it results in achievement gaps They are not being able to reach their full potential And with that they may never reach their full potential because the achievement gap can continue to widen if they continuously have these type teachers

(Id. at (6/11/04) 188 192 3 (Tigner))

Record Compilation 6

- Plaintiff's expert Dr Janice Poda, Senior Director of the Division of Teacher Quality at the State Department of Education testified "Experience is a key in being effective in a classroom, the more experience you have, the better chances are that you are going to be an effective teacher " (Tr (9/22/03) 158 7-10 (Poda))

- Plaintiff's expert Dr Henry Levin testified

[I]n general, experience is very important for again learning I always equate experience with learning You need experience, you need- the richer the experience is the more that you learn The more intense the experience is typically, the more that you learn And so having experience you learn how to address the needs of children, but the problem is that very often in these kinds of schools the experience may be different for some people

(Id at (9/29/03) 106 2-10 (Levin))

- Dr William Townes, District Superintendent for Lee County Public Schools, testified

Q Well let's talk about teaching experience and how that contributes to effectiveness in the classroom Do you think that teaching experience is important in making an effective teacher?

A I think it is, yes

Q How long does it take for a teacher in your view to gain enough experience to become effective in the classroom?

A If I can get first-year teacher and if that teacher can stay with me and avail him or herself of the professional opportunities, come back, put into place good classroom practices I believe in one in two to three years that teacher can be very, very effective

(Id at (3/4/04) 231 10-14 (Townes))

- Dr David Longshore Superintendent of Orangeburg Consolidated School District 3, testified "In our judgment with few exceptions, when we get people in that have an immediate impact on positive impact on test scores they are somewhere in the range of five years or better in terms of experience " (Id at (1/6/04) 182 17-20 (Longshore))
- Dr Everette Dean, Superintendent of Marion District 7 stated 'I think with more experience, more greater education, those type of factors usually result in the teacher

being more effective and being able to engage students to a greater degree ” (Id at (8/1/03) 64 1-5 (Dean))

Record Compilation 7

- Dr Linda Darling-Hammond, professor at Stanford, testified

[T]eacher quality is defined in a lot of different ways by a variety of folks. And so we wanted to see whether there is a pattern in the distribution of teachers and what we basically see here is that by any standard of quality, by any measure of quality there are over and over again less well qualified teachers in the high-poverty districts, although based on the characteristics of students in those districts one would perhaps expect that you ought to have even more highly skilled teachers in those districts if we are going to catch those kids up and enable them to meet the standards.

So the teacher labor market is obviously operating so that in a sense the rich get richer and the poor get poorer in terms of access to qualified teachers.

(Tr (8/11/03) 46 21-47 10 (Darling-Hammond))

- Dr Darling-Hammond testified

[T]hat the plaintiff districts have a smaller proportion of teachers on continuing contracts as even smaller than the high poverty districts as whole, it's only about 69 percent of teachers who are in this position of being stable renewable every year because they actually have their credential they have actually finished their probationary period. So this is a large proportion of teachers who are not able to be on a continuing contract because they haven't completed their training or they haven't completed their probationary period.

(Id. at 53 6-16)

- Plaintiff's expert Henry Levin testified

Q So would it be fair then to say that in your opinion the—well, strike that. In your opinion does a teaching out of field create a larger problem for children from an at-risk situation than other children not from such a situation?

A Yes, but I would qualify that by saying it's bad for all children.

(Id. at (9/29/03) 111 24-112 5 (Levin))

- Dr Levin testified

Q Doctor if there is high quality professional development such as you just described, is it more important or less important to the teachers given the task of providing an opportunity to acquire a minimally adequate education to at-risk situation children?

A I'm sorry More important or less important than

Q Than for other children In other words, is it more important for those teachers?

A Well, to the degree that teachers of children in at-risk situations seem to be farther from the skills that they need in comparison with teachers in the mainstream, I would say it's more important I would say all kinds of training, including the quality of the training that they receive as undergraduates becomes more important

Q Okay Is it your experience that teachers who are aggregated in a district where at-risk children are aggregated to be educated have more or less of the type of professional development that they need?

A My experience is that they have less

(Id at 114 17-115 10)

Record Compilation 8

- Polly Elkins Director of School Reform, Dillon County School District Number Two testified Kids learn better or they retain more when they are able to touch things and to absorb it into real life components (Tr (9/25/03) 58 14-25 (Elkins))
- William Singleton, Superintendent of Jasper County School District testified “Some students learn very differently and some you can teach with a textbook other[s] you have to show, they have to feel and touch And that's not happening ” (Id at (4/2/04) 38 2-12 (Singleton))
- Mr Singleton testified “No sir, we do not have the resources to purchase the resources we need The only things that we can do is whatever we can scrape up from you know the outside sources or teacher may bring in road kill or something that show some parts of what's going on, but nothing purchased materials like the – the buckets of frogs and scaffolds and other things like that almost nonexistent ” (Id at 40 6-20)
- Plaintiff's expert, Henry Levin, testified

[T]he impact is to provide less rich experiences, that lead to high learning outcomes Typically poverty is not isolated in itself but it's only one factor in communities and in families that are affected by other types of conditions as well

Often the families are not intact, that is, there's a single parent the education is relatively low on the part of the parent often there is another language spoken or a dialect of Standard English spoken

So these characteristics tend to come together and what they do is they create a situation in which the child doesn't have the same experiences that children in the socioeconomic mainstream have

Families, for example, that expose their children to relatively few words and relatively little language and relatively little decision making are unlikely to have children who have very large vocabularies and who use language in a very rich way and who are able to do so called higher ordered thinking and use of language

And the same is true with some of the other conditions The poverty itself means that the material conditions by definition are poor there are fewer materials in the home, fewer books, fewer rich experiences that the child is exposed to

And since learning comes out of experience, if you have a poor set of experiences with regard to learning, then the outcomes are predictability going to be poorer than when you are exposed to a richer set of learning experiences and resources

(Id at (9/29/03) 77 24-79 3 (Levin))

- Plaintiff's expert, Jo Anne Anderson, testified “Well, they are going to need more [instructional materials] because they are going to, you are going to have to appeal to a variety of levels What you have got to understand is that they are not being, this is their only source It's not happening at home Because of difficulties with transportation they may not be able to, to get to the county library and in a lot of these rural counties the county library may not be open every often either ’ (Id at (2/24/04) 48 3-18 (J Anderson))

Record Compilation 9

- Plaintiff's expert, Dr Terry Peterson testified “We have got to change what goes on during the 180 six or six-and-a-half hour day but we also have to do something about time, because students are coming in with different levels of readiness, different levels of interest and support at home And by just keeping timeness [sic] in with adding all these requirements and with all this increase in knowledge, it will just lead to more failure So time has to be adjusted for – for many of our students ” (Tr (05/26/04) 144 25-146 8 (Peterson))
- Dr Peterson testified “Clearly [after school] is a good time to help students both catch up and keep up And there's sort of two different notions Students who have fallen behind may need extra tutoring, help individual attention perhaps even some small group direct instruction after school hours to catch up from where they have fallen behind ” (Id at 146 10-15)
- Dr Peterson testified ‘ In addition to starting behind, your students don't have early childhood programs, then they fall further behind over the summer if they do not have summer learning opportunities”

Q So if we have a gap in the pre-kindergarten services which is reflected in this chart –

Right

Q – And we – we want to catch the kids up, the goal is to – the goal is to provide them the opportunity to be productive citizens at the end of their education right?

A That is absolutely correct

Q Do we have to provide the additional time on task including the Summer

A Absolutely

Q Okay And if we – if we don't, is there an opportunity to acquire a minimally adequate education for that child?

A No, there is not Plus this evidence is so powerful, to not address it is – is just a big mistake

(Id at (6/7/04) 17 19-18 12 (Peterson))

- Superintendent of Education, Inez Tenenbaum, testified “If you are a poor child in a county and you don't have books in your homes, in your home, or have books in

your homes, in your home, or have parents who are there with you a large, most of the day, you don't have content-rich materials, early childhood development toys books you are in a severe disadvantage You can't make up these deficits just by remedial education alone A child who comes into, say, the Allendale County Schools needs that – that extra time during the day, needs that really rich after-school program ” (Id_ at (05/04/04) 160 13-2 (Tenenbaum))

- In response to an inquiry whether a child who did not receive early childhood education programs could achieve, Ms Tenebaum further observed “[the child] could if the programs were available, high quality programs were available to – to catch the child up to grade level where his or her peers are ” (Id_ at 198 1-10)

Record Compilation 10

- Plaintiff's expert Henry Levin testified ' With a very rich schooling experience we can make up a lot of any kind of lag in development, in learning development ' (Tr (9/29/03) 79 13-15 (Levin))
- Plaintiff's expert Henry Levin also testified

Well, I think that there are existence groups That is, we know of schools in such communities that have been able to get the job done I might add that they are not just -- that we are not talking about a few isolated examples The achievement council in Washington which is dedicated to the education of children in at-risk situations did a study It came out, I believe about 18 months ago, and what they did is they simply took the state reports on achievement and looked for schools that were, as I recall, 50 percent or more minority and or low income as evidenced by eligibility for a free or reduced cost lunch And they tried to find schools where these students were performing in the upper third on the national norms And my recollection is they found some somewhere between four and 5 000 schools nationally that met these criteria So this is -- this is hardly an isolated instance It appears that states and school districts and individual schools that commit themselves to those kinds of outcomes are able to achieve those kinds of outcomes but I can also tell you situations in terms of schools that I have worked with visited and so on and rather the rather extraordinary results that they have been able to achieve [sic] well documented

(Id at 84 19- 85 19)

- Plaintiff's expert Dr Walter Edgar testified

Q Okay Now, can you tell us the history of this comment all -- we believe that all children can learn at high levels in terms -- can you place that in a historical context?

A That -- in historical context that certainly is a change and we have superintendents of education reporting well into the 20th century that certain children should not be educated because they were good field hands or they were a good mill hand In fact, Charlie Williams who was state superintendent of education made a comment upstate at a speech that the state had always undereducated, had --excuse me -- it's a paraphrase That he only wanted to educate -- only wanted to educate many just to put them in the mills and keep them on the farms By the time he got back to Columbia he was putting spin control on that, but it -- other superintendents earlier in the century had been pretty blunt I

was -- I did not know this when I had written my history but as late as the 1950's in Rock Hill of course there were segregated schools for black and white children but within the white school buildings mill children were put in separate classrooms

Q And so since 1993 when this suit was brought the superintendent says all children can be educated at high levels?

A Yes, sir

(Id at (7/29/03) 50 2-51 4 (Edgar))

- Ms Suzette Lee who was the coordinator of K-12 English, Language Arts Services and the Coordinator of the Governor's Institute of Reading at the State Department, testified

[C]ertainly the English, language arts team at the State Department of Education believe that all children can learn to read with the exception of a very small percentage of students that have learning disabilities such that they will never be able to learn to read or they will only be able to learn to read with limited proficiency

(Id at (1/14/04) 77 18-24 (Lee))

- Plaintiffs' expert Dr Gloria Ladson-Billings testified

Q And if you provided the resources necessary to bring this type of teacher the kind of teacher you are describing with these three stools into one of the Plaintiffs' districts with very high poverty rates and very high rates of minority students from poverty, could they in your judgment lift these children to true academic excellence?

A We could expect to see an upward trend If they persist I would, I would venture that they would demonstrate excellence

(Id at (9/12/03) 115 4-13 (Ladson-Billings))

- David Longshore, Superintendent of Orangeburg Consolidated School District Three testified ' [F]or those children it takes more to provide them a minimally-adequate education I do want to say in saying it takes more, much more of a challenge, but we can do it (Id at (1/07/04) 34 2-8 (Longshore))
- Plaintiff's expert Terry Peterson Senior Fellow for Education Policy and Partnerships at the University of South Carolina and Senior Advisor to the Dean of Education, testified

They can achieve It takes the essential opportunities for them to have them and then to be provided by competent, caring teachers, a great deal of involvement of the family and the parents, both in the school and at home, and with community support and the types of strategies that we are going to talk about later, but they can achieve

(Id at (5/25/04) 113 2-18 (Peterson))

- Plaintiff's expert Dr Jo Anne Anderson testified

Q And so if given the opportunity the children in our districts, the Plaintiff districts in your opinion can or cannot meet the standards?

A They can meet the standards given the opportunity

(Id at (2/13/04) 130 11-14 (J Anderson))

- Defendant's expert Dr Sandra Smith testified

Q The purpose of Act 135 here, it says, it is the purpose of the General Assembly in this Chapter to – and then go with me to number three, the third purpose

A Yes

Q To establish the expectation that by providing extra assistance and learning time that enables young students attain essential skills and success all children will be prepared for the fourth grade and all students will graduate from high school with their peers You see that?

A Yes, sir, I do

Q That is the public policy of the state of South Carolina right?

A That expectation

(Id at (6/18/04) 124 1-13 (S Smith))

Record Compilation 11

- Plaintiff's expert Dr Terry Peterson, Senior Fellow for Education Policy and Partnerships at the University of South Carolina and Senior Advisor to the Dean of Education, testified

If they have funding, let's say from 21st century it's good But a number of the sites indicate the funding is running out so they may have had it last year, not going to have it this year So the funding is very transitory It doesn't assure the consistency of -- of programming and that's also a double problem

So instead of worrying about let's say now, next fall, in -- who is going to be the teachers, what's the curriculum going to look like, how can we get more community tutors involved The question is, I don't know if we are going to have a program and here it is you know the end of May That's typical And so the quality won't be there because of that And then in high school frequently there's no program and if -- if there are they are out of the -- very infrequent

(Tr at (5/26/04) 169 21-170 12 (Peterson))

- Dr Peterson also testified as follows

And -- and -- and I failed to mention that the state does provide in terms of state policy some money for homework centers, it's called but it's very little compared to what is needed to operate a true after-school program and in the last couple of years because of budget cuts the districts have had the flexibility of the homework money for basic operations and a number of them have had to do that So there's a recognition that's important but the funding is -- is very inadequate, coverage is very inadequate But you need -- it can contribute, but it can't carry the load by itself

(Id at 172 14-173 1)

- Dr Paula Harris Superintendent of the Allendale School District testified as follows

Now the wonderful thing about being aggressive about getting these grants is you get to provide programs that normally you would not have the finances to provide Unfortunately, when they run out, there is no money to continue those programs So I lost that afterschool[sic] tutorial program and that summer school program

(Id at (9/30/03) 155 6-11 (Harris))

- Dr William Townes, District Superintendent for Lee County Public Schools, noted

We have -- this year we have the after-school homework center That's about the only program that we are able to offer at this particular time In the past we have had after-school programs when times were better and when we were able to get partnerships, you know, grants and so forth We had the communities and schools program

(Id at (3/5/2004) 47 14-19 (Townes))

- Rex Whitcomb a former principal specialist at Marion School District 7 with over 32 years of experience noted

When you talk about providing extended day program, if you're going to hire four, six teachers to run an after school program with snacks and transportation, you are talking about a substantial contribution of funds Now those funds may not come directly out of the district office's general operating fund which is the local tax money, but nonetheless if we are spending E I A money or any other kind of dollars on that kind of program, those are dollars that are not going to something else that we might find later as equally as important as what we are doing here So it becomes a matter of taking the resources and spreading them out to try to cover all the basis and spreading them so thin This is the problem with your -- some of these evaluations that we go through We take our resources, we cover -- at least touch as many of the bases as we can, but then we are talking about a shallow implementation

(Id at (8/4/03) 124 3-22 (Whitcomb))

- Archie Franchini a Principal Specialist at Estill High School in Hampton School District 2, noted

Q Why don't you have more children attending the homework center?

A Well, we can't afford to serve any more students The state has limitations as far as the number of students that can be served by an individual It has to be a ratio of ten to one And with the funds that they provide us we are not able to serve any more students than that

Q Now the homework center is an after school?

A It's an after-school program

(Id at (1/6/2004) 21 11-19 (Franchini))

- Dr Valerie Harrison Superintendent of Florence School District 4, testified

Q All right Your after-school program, your 21st Century grant, when does it expire?

A It expires in May May of 2004

Q All right Do you have any funds currently allocated or currently known to be available to run your summer school for this coming school year?

A We will use the funds that we have available for, comprehensive remediation funds that we have available to offer summer school if possible

Q Okay Now how about after-school programs?

A After school programs will have to be modified somewhat next year if we are not able to find additional funding We do receive funding for homework centers from the state department of education, for Johnson Middle School and for Timmonsville high school

(Id at (02/09/04) 134 6-20 (Harrison))

Record Compilation 12

- Dennis Thompson, Superintendent of Hampton School District 2 testified

Q Have you budgeted money for summer school this summer?

A I have not thus far no, sir

Q As your plans currently stands, do you plan to have a summer school this summer?

A At this time no there s no plans at this time

Q And why is that, please?

A Because the monies that are available from the state for summer school can fall into the flexibility code, so we may, depending on what cuts are down the line or where are with the budget itself, we may have to utilize those funds from the state to operate during the year

(Tr (10/9/03) 61 11-22 (Thompson))

- Dr William Townes, District Superintendent for Lee County Public Schools testified

Q Do you have any after-school programs?

A We have -- this year we have the after-school homework center That's about the only program that we are able to offer at this particular time In the past we have had after-school programs when times were better and when we were able to get partnerships, you know, grants and so forth We had The Communities and Schools Program

Q What grant was that?

A That was Communities and Schools, that's a separate organization

Q Let me rephrase That s not what I meant to ask What I meant to ask was what -- what -- where did those funds come from was it local state or federal?

A This was -- they did not come through the Lee County School District I think schools and communities may be an arm of the state This was a state organization

Q All right

A So I think they had some funds but they did not have the partner with the school district to use them

Q All right But that --

A It just so happened that we identified at-risk students for an after-school program

Q Was that a -- that was a grant?

A Yes

Q Do you still have that grant?

A No

Q It ran out?

A That is correct

Q Okay Did you have any other grants for after-school programs?

A Lee County, I would say approximately five years ago, six years ago, five or six years ago, was among the first wave of recipients for the 21st Century Community Learning Grant that was under President Clinton's administration

Q That was a federal grant?

A That was a federal grant That was I would say, a very good grant But here again we were not fortunate when we reapplied for the grant after the three-year period was up, we were not fortunate enough to get it again so we don't have that

(Id. at (3/5/04) 47 13-49 2 (Townes))

- Dr Townes further stated "This year we have the after-school homework center That's about the only program that we are able to offer at this particular time In the past we have had after-school programs when times were better when we were able to get partnerships, you know grants and so forth " (Id. at 47 14-19)
- Dr William Singleton, Superintendent of Jasper County School District testified

Q All right Now the summer program ran for how many weeks?

A Four weeks

Q In your view, Dr Singleton, is that a sufficient amount of time to give the children the remedial instruction that they need to be successful in school?

A No, sir That's not sufficient time

Q Who paid for the summer school?

A State funding Got funds from the State

Q All right Who paid for the 21st Century Grant?

A All right State funding and 21st Century Funds we use a compilation of funding

Q I misspoke I was looking at a note Who paid -- you used state funding and federal funds for the summer program?

A That is correct

Q How about your after-school program?

A That's the -- also a combination of those funding sources

Q All right Now, how many weeks do you think that you need to have an effective summer school program?

A We need more than four weeks We have had as high as eight weeks of summer school in the past Each year -- I believe last year we had five weeks This year -- two years ago we had eight weeks and then five weeks and four weeks last year And we are projecting to have four weeks this year based on the funding that we have

Q Why did you cut back from eight weeks to five weeks to four weeks?

A We did not have the dollars

(Id. at (4/2/04) 54 20-55 24 (Singleton))

- Mr Archie Franchini Principal Specialist at Estill High School, explained

"Well we can't afford to serve any more students The state has limitations as far as the number of students that can be served by an

individual It has to be a ratio of ten to one And with the funds that they provide us, we are not able to serve any more students than that "

(Id at (1/6/2004) 21 11-17 (A Franchini))

- Dr Judith Franchini, Principal Specialist at Allendale Elementary School testified

Q [D]oes Allendale Elementary have a homework center or an afterschool[sic] program?

A Not this year It was due to budget cuts, we had to cut the homework center – due to budget cuts

(Id at (10/8/03) 5 7-10 (J Franchini))

- Dr Terry Peterson, Plaintiffs' expert offered the following

Well, the -- the duration [of the after school programs] was insufficient The – I don't believe any of the districts at any level had 180 days full two and a half, three hour programs, five days a week They tend to be piecemeal And that's -- that's a double problem So the duration in terms of it s too short the percentage of students [served] ranges all over the map depending on the funding source they have that year

(Id at (5/26/04) 169 2-21 (Peterson))

- Dr Peterson explained

Well, you see that actually in the state policy There's money for summer school, learning here in South Carolina but the – the amount of money is totally insufficient for the amount of children who need summer school The duration of the summer school when it's offered is very short So we see it in South Carolina policy The Southern Regional Education Board which is a consortium of a state legislators and governors from the southern states, they put out publication about the importance of summer learning So it's – it s widely now realized that if you don't address this you're basically going to have children starting school further behind than when they left school

(Id at (6/7/04) 7 14-8 2 (Peterson))

- Further elaborating, Dr Peterson noted

It's very important that summer learning be of a sufficient duration to make a difference Typically, it's offered in the state because of lack of

funding, maybe three weeks for – or four weeks for four hours a day That doesn't really add up to much And what the center at Johns Hopkins has found is that you need at least six- weeks, probably seven or eight That may seem like a lot except think about the loss The loss is two to three-tenths of a year That's basically two or three months loss Aren't going to counteract that loss by going for three-quarters of one month So the program has to be of sufficient duration to really provide the – the learning opportunities that are needed

(Id at 8 21-9 9)

- Dr Peterson also testified

Well, the -- the duration was insufficient The -- I don't believe any of the districts at any level had 180 days full two and a half, three hour programs, five days a week They tend to be piecemeal And that's -- that's a double problem It's not just they are not offering it That's time lost in learning, but if you can't commit on every day a parent's perspective who has to find other childcare arrangements or teachers who may be the day that you are -- some of your students need extra help is the day the program is not meeting and from a student's perspective it looks like it's not really serious So you really -- it really has to be serious and the program evaluations from around the country indicate that those that are serious every day are the ones that get results because kids come because they know it's part of the -- it's part of the learning process So the duration in terms of it's too short the percentage of students ranges all over the map depending on the funding source they have that year If they have funding, let's say from 21st century it's good But a number of the sites indicate the funding is running out so they may have had it last year, not going to have it this year So the funding is very transitory It doesn't assure the consistency of -- of programming and that's also a double problem So instead of worrying about let's say now, next fall, in -- who is going to be the teachers, what's the curriculum going to look like, how can we get more community tutors involved The question is, I don't know if we are going to have a program and here it is, you know the end of May That's typical And so the quality won't be there because of that And then in high school frequently there's no program and if -- if there are, they are out of the -- very infrequent

(Id at (5/26/04) 169 2-170 12 (Peterson))

- Dr Peterson continued

They become even more important but they can't compensate for the loss of these other important opportunities because of the increased requirements that students have to meet just -- they need multiples of these opportunities, reinforcing each other and after school is one very important piece. And -- and -- and I failed to mention that the state does provide in terms of state policy some money for homework centers, it's called, but it's very little compared to what is needed to operate a true after-school program. And in the last couple of years because of budget cuts the districts have had the flexibility of the homework money for basic operations and a number of them have had to do that. So there's a recognition that's important, but the funding is -- is very inadequate, coverage is very inadequate.

(Id. at 172-14-173 1)

Record Compilation 13

- Plaintiffs' expert Dr Terry Peterson testified 'Transportation is a – an issue with after-school programs and particularly in rural communities and that has to be part of the – of the package is programming and the transportation (Tr (5/26/04) 170 16-19 (Peterson))
- Plaintiffs' expert Dr Linda Darling-Hammond testified "So there are constraints in the resources available and there are also costs that don't particularly help the effectiveness of education like transportation costs in sparsely populated rural districts that unfortunately are kind of subcosts " (Id at (8/11/03) 168 7-11 (Darling-Hammond))
- Ray Rogers, Superintendent of Dillon District 2, testified

Q All Right So the State then is paying for the transportation of all of your remedial programs gives you \$10,000 Does that pay for your remedial programs or the transportation I should say for your remedial programs?

A No that wouldn't pay for all of it

Q Would it come close if you ran a good summer school or a good after hours program?

A Not if we served all the students that we need to serve, No

(Id at (8/12/03) 127 10-188 (Rogers))

- Superintendent Rogers further testified "If we don t offer transportation then whatever programs we are trying our best to give or to offer is a waste of time because the parents – we have 64 percent single parent homes We have – in those homes we have older siblings that are raising or looking after their younger brothers or sisters Our parental input is very low from parents If we have meetings or if we have things that we have to do with parents we have had to purchase or lease vehicles, we have to go pick them up – big part of it " (Id at (8/6/03) 181 19-182 4 (Rogers))
- Principal Earline McClary testified 'Initially we did not have a homework center, but we asked teachers to stay after school to be there to assist students, but it didn't pan It didn't work as if we planned it simply because we are out in the country and a lot of kids had difficulties, parents picking them up, bringing them back and forth, so that homework center, just asking teachers to volunteer, stay after school did not work well for us ' (Id at (3/30/04) 144 20-145 2 (McClary))
- Principal McClary testified

Q Okay What about – you mentioned transportation as a problem Where did your kids come from?

A Lee County is a rural area and they com from all corners of Lee County We are just one central high school now in Lee County, so the students are bused in from the all - all the other parts of Lee County into Lee Central High School

Q Okay So at the present time they come from all over Lee County?

A Exactly

Q If you - if you put together a homework center at Lee County Central High School, how would you get the kids home?

A Busses in the afternoon

Q So - and do you have the buses necessary to get kids home at two different times a day?

A No sir, we do not

Q Do you have the funds necessary to do that even if you could get the buses?

A We do not

Q If the kids can t get home or can't get to the homework, I guess its self-evident, but I mean, can they take advantage of the extra help?

A They cannot

Q Can they take advantage of having more time on task without the transportation needs being filled?

A They cannot

(Id at 148 1-149 3)

Record Compilation 14

- Dr Valerie Harrison, Superintendent of Florence School District Four, testified “[Early Childhood Development Programs are] essential because children in our district generally come into the system from environments that are not print rich, they don't have a lot of literature there, a lot of opportunities to learn to read and to learn letters and those kinds of things So it is essential to get the students on, on track early so that as they move through the grades they will have less problems ” (Tr (02/09/04) 44 18-45 3 (Harrison))
- Plaintiff's expert, Inez Tenenbaum, testified ‘Well, chances are that many of these children have not had access to early childhood education and many children are coming from families that there are—not a high level of education in the families – in that family, that they have – that they don't have resources like books and computer and technology, they don't have access to libraries in many of these areas or enriched programs that our children in urban setting or – or more affluent setting have And they come to school with less verbal ability than those children who had access to print rich and verbal – rich environments These conditions “require early childhood intervention (Id at (05/04/04) 49 7-24 (Tenenbaum))
- Ms Tenenbaum further testified that the research demonstrates that it is possible that children in high poverty areas given the opportunity to have high quality early childhood education can overcome the disadvantages of poverty ’ (Id at 196 4-7)
- Mr William Singleton, Superintendent of Jasper Court School Districts, testified “[Early Childhood Education Programs are] of the utmost importance If you fix a problem and – I'm going to put it this way If you fix the problem down there at the early age at the early grades, you don t have the problems as you move through the system ” (Id at (4/1/04) 147 1-9 (Singleton))
- Ms Paula Harris Superintendent of Allendale School District testified ‘Well, the smart money is on the fact that you don't allow the achievement gap to open and that way you don't deal with trying to close it further down the road when there is more distance to deal with, so that's why we focus so much of our attention on early childhood programs ” (Id at (9/30/03) 122 22-123 2 (Harris))
- Dr Judith Franchini, Principal Specialist Allendale Elementary School testified “Early childhood education is important no matter what children you are dealing with, but in particular in Allendale County because of the deficits and the needs those children come to school with early childhood education is of the utmost importance If we can help those children overcome those language deficits with which they come to school than the children will be able to – they have a much greater chance of success later in life (Id at (10/2/03) 151 6-14 (J Franchini))