

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM LEE COUNTY  
COURT OF COMMON PLEAS

Thomas W. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2007-065159

RECEIVED

JUN 18 2015

S.C. Supreme Court

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

v.

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

and

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

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**MOTION OF APPELLANTS-RESPONDENTS  
FOR ENTRY OF A SUPPLEMENTAL ORDER**

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Appellant-Respondents (hereinafter referred to as "Plaintiffs" or "Plaintiff Districts"), in response to the Court's directive that the parties reappear before the Court and present a plan to address the constitutional violation announced in the Court's November 12, 2014 opinion, respectfully submit this Motion for Entry of a Supplemental Order. To move the State toward a cure of the constitutional deficiencies recognized by the Court in the system of public education in South Carolina, Plaintiff Districts request that this Court enter a Supplemental Order setting forth a process with reasonable timeframes to ensure State action within a reasonable period of time.

Prior to filing this motion with the Court, the Plaintiff Districts submitted their proposal for a Supplemental Order to the Respondents-Appellants (hereinafter referred to as the "Defendants" or collectively "the State"). The Defendants advised the Plaintiff Districts that they would not consent to Plaintiffs' proposal. For the Court's consideration, the Plaintiff Districts' proposed Supplemental Consent Order is attached hereto as Exhibit A.

### **BACKGROUND AND PROCEDURAL HISTORY**

This case began in 1993, when the Plaintiff Districts, taxpayers, parents and their children brought suit to secure constitutionally protected educational opportunities for the children living in the Plaintiff Districts. As this Court found in its November 12, 2014 opinion, these districts are some of the State's poorest and most isolated districts. Although the lower court initially dismissed their claims, this Court held in 1999 that the South Carolina Constitution includes a qualitative component entitling Plaintiffs to assert constitutional claims. *Abbeville Cnty Sch. Dist. v. State*, 335 S.C. 58, 68, 515 S.E.2d 535, 540 (1999) ("*Abbeville I*"). The Court held in *Abbeville I* that the students in the Plaintiff Districts, like all of South Carolina's students, are entitled to an opportunity to acquire a minimally adequate education

under Article 11, Section 3 of the South Carolina Constitution and further outlined the scope of that minimally adequate educational opportunity. The Court emphasized that its role was only to determine whether the educational offerings created by the General Assembly satisfied the Constitution and that the Court would not invade the General Assembly's province by dictating educational policy. The Court remanded the case to the trial court to determine whether the Defendants were meeting their constitutional obligation to provide an opportunity to acquire a minimally adequate education to each child.

The trial court conducted a bench trial over a period of 102 days during 2003 and 2004. The trial court received evidence and testimony from school personnel, educators, experts, policymakers, and others to resolve one question: Are students in the Plaintiff Districts being denied the educational opportunity recognized in *Abbeville I* and guaranteed to them under the Education Clause of the South Carolina Constitution? The trial court concluded, based on the evidence presented, that South Carolina's public school system was not providing the constitutionally required educational opportunity. The remedy it ordered, however, stopped short of providing sufficient relief. The trial court found that the State needed only to enhance its educational offerings to students in early childhood – grades three and below – to meet its constitutional mandate. Both sides appealed.

All parties filed briefs with this Court, and, in light of the magnitude and public importance of the issues at stake, this Court also received numerous amicus briefs. In May 2012, this Court invited the parties to submit supplemental briefings, specifically addressing the impact of post-trial legislation enacted by the General Assembly regarding public schools. The Defendants argued that numerous educational reforms implemented in the seven years since the trial court entered its ruling rendered the issues moot and, in any event, satisfied the

Constitution. The Plaintiff Districts argued that the constitutional deficiencies shown at trial were not resolved by the actions of the State since the trial, but would continue until the Defendants enacted a comprehensive reform of the public education system. The Plaintiffs also asked this Court to retain jurisdiction and require the State to act within a specified timeframe.

On November 12, 2014, this Court issued its opinion, finding that the State's system of education did not offer the constitutionally required educational opportunity to each student. *Abbeville Cnty Sch. Dist. V. State*, 410 S.C. 619, 767 S.E.2d 157 (2014) ("*Abbeville II*"). After reviewing all the evidence, the Court concluded that the measurable inputs and outputs showed that the Defendants have failed to provide students in the Plaintiff Districts the required educational opportunity. The Court further found that the specific amount of money spent in the Plaintiff Districts was not dispositive of the constitutional question, but, if anything, served to highlight the fact that, despite reforms and programming initiatives, the State's education funding system is based on a fractured formula denying students in the Plaintiff Districts the constitutionally required educational opportunity.

In its November 12, 2014 opinion, this Court did not prescribe a specific remedy for the constitutional violation. Instead, the Court directed the parties to work together towards identifying a solution and to return to the Court within a reasonable time to propose a method for resolution. The Defendants filed Motions to Reconsider the November 12, 2014 opinion. This Court denied those motions by Order dated January 23, 2015.

### **REFORM EFFORTS**

Following the Court's November 12, 2014 opinion, the Honorable James H. Lucas, Speaker of the South Carolina House of Representatives, formed the House Education Policy Review and Reform Task Force to address the Court's ruling and the lack of educational

opportunities offered children living in the Plaintiff Districts. The Task Force has held four public meetings to date, and is next scheduled to meet, either as a whole or by subcommittees, in August, 2015. In the South Carolina Senate, the Honorable Hugh H. Leatherman, Sr., President Pro Tempore of the South Carolina Senate, formed the Senate Finance Special Subcommittee for Response to the *Abbeville* Case. The Senate Special Subcommittee has met one time and has indicated that follow up meetings will take place this summer. For their part, immediately following denial of the Defendants' motions to reconsider, the Plaintiff Districts formed a committee of education experts and others to design initiatives needed to overcome the constitutional violations. The educational reforms developed by the Plaintiff Districts have been reduced to writing and presented to the House Task Force and the Senate Special Subcommittee.

Despite these efforts, the House and the Senate have not jointly announced a clear path forward, and the Plaintiff Districts respectfully submit that, consistent with the experience of courts in other states, a Supplemental Order is essential in this case to ensure that the work necessary to achieve constitutional compliance will proceed in a reasonable period of time. This Court has reiterated that it will not dictate the method of achieving constitutional compliance, and the Plaintiff Districts are not suggesting that the Court should infringe on the State's discretion in designing methods and means sufficient to cure the constitutional defects, so long as the methods and means chosen are reasonable and rational. Nevertheless, this Court has stated in clear terms that it will not abdicate its responsibility to ensure that violations of the constitutional rights of its citizens are addressed in a timely manner and therefore must balance its role as the third branch of government and guardian of the State's Constitution against the broad discretion afforded to the General Assembly to make policy decisions. The

Plaintiff Districts respectfully submit that a Supplemental Order is necessary to secure constitutional compliance in a reasonable timeframe, and request the Supplemental Order as described below.

### **CONSIDERATIONS FOR REMEDIAL FRAMEWORK**

While this Court found in its November 12, 2014 opinion that the State's education system as a whole is inadequate to provide the required educational opportunity, it declined to dictate the remedy needed to cure the constitutional failings. Instead, the Court suggested that the Defendants consider the experience of the courts and legislatures in New York and Wyoming for guidance in charting a path forward.

In *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 100 N.Y.2d 893, 760 N.Y.S.2d 106, 801 N.E.2d 326 (2003), New York's highest court advised the legislature to consider what the "rising generation" needs to become civic participants. Specifically, the court ordered the defendants to (1) ascertain the cost of providing a sound, basic education in New York City; (2) create a scheme which allowed adequate resources to every district to provide that education, and (3) ensure a system of accountability to measure whether the reforms provide the opportunity. Similarly, in *Campbell Cnty Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995), Wyoming's highest court ordered the legislature to (1) identify the "proper" educational package each student is entitled to have, (2) determine the cost of that educational package, and (3) take action necessary to fund that package.

#### **1. Assessing and addressing the needs of students in the Plaintiff Districts.**

In both New York and Wyoming, the courts held that the necessary first step to remediate the constitutional violations was for the legislature to determine the educational needs of the children in question. Likewise, in its November 12, 2014 opinion, this Court

recognized that constitutional compliance was unlikely to be achieved until the State determined the causes of the lack of educational opportunity offered children in these districts. In our state, as well as elsewhere, cases such as these have shown that the impact of poverty on students' educational needs is undeniably the single most permeating and negative influence on student achievement. It is also universally accepted that educational offerings must be designed to meet these students' needs if they are to be provided the opportunity to achieve in school and be educated. In the Plaintiff Districts, where approximately nine of every ten children live in poverty, the evidence indisputably confirmed that the students require different, sometimes greater, educational offerings than children born into more affluent families if they are to overcome the adverse circumstances making them "at risk" for educational failure. Any successful reform effort must take these considerations into account, and any program or educational offering provided by the State must be targeted to these students' needs as a first step.

**2. Determining the cost and ensuring consistent delivery of educational opportunity.**

The second step in curing the constitutional deficiencies in the system of education is to ensure delivery of the reforms to the children. Any educational reforms must be funded and implemented to have any effect. In its November 12, 2014 opinion, this Court urged the Defendants to take a broader look at how education was being delivered in the Plaintiff Districts, recognizing that the funding provided by the State bore little relation to the needs of the children in the State's schools, but were instead "based on a convergence of outmoded and outdated policy considerations." *Abbeville II*, 410 S.C. at 659, 767 S.E.2d at 178. As the Court acknowledged, without "a comprehensive effort by the Defendants to determine the

demands of providing the constitutionally mandated educational opportunity throughout the State . . . , it is near impossible for the Defendants to meet their constitutional obligation.” *Id.* Accordingly, it is critical that the State determine the cost of meeting the students' actual needs, so that the State can then know whether it is providing sufficient funding to enable the reforms necessary to meet those needs. This is the process followed in *CFE II* and *Campbell* and many other states that have travelled this road. It is also the most logical and effective approach to any remedial measures. Accordingly, this is a necessary and essential second step in the State's reform efforts.

**3. Establishing a system of accountability.**

The third issue addressed by other courts is that of accountability and efficiencies. The courts in many states have acknowledged that accountability is an important component of any education system and should, therefore, be incorporated into any comprehensive educational reform effort. Without resource accountability, educational reform efforts are subject to failure as new programs compete for resources necessary to accomplish educational objectives. Resource accountability will encourage assets to be properly distributed to ensure a secure and reliable source of funding over time, and will also encourage continuous assessments and improvements by the State to the system over time. Accordingly, providing for resource accountability on the part of the State is the third key step in the State's reform efforts.

**4. Drawing on the experience of educational experts.**

This Court has consistently recognized that it is not an expert in the field of education and must balance that knowledge against its duty to uphold and enforce our State's Constitution. The Plaintiff Districts' request for a Supplemental Order seeks to draw appropriately, for the benefit of this Court and the State, upon those who are experts in this

field. The experience in New York is again instructive. In response to the decision in *CFE II*, the New York Commission on Education Reform (“the Zarb Commission”) was appointed to recommend reforms, including funding reforms, that would cure the constitutional deficiencies in its educational system. New York’s highest court ultimately endorsed the State’s adoption of those reforms as a rational means of bringing the system into constitutional compliance. *Campaign for Fiscal Equity, Inc. v. State*, 828 N.Y.S.2d 235, 861 N.E.2d 50 (2006) (remedial phase of case). The court pointed out that it is not the role of the judiciary “to determine the best way to calculate the cost. . . , but to determine whether the State’s proposed calculation of that cost is rational.” *Id.* at 242, 861 N.E.2d at 57. Therefore, if the state’s proposals were a reasonable means of ensuring that schools have the resources necessary to provide a constitutionally compliant educational opportunity to students, and if the state incorporated those expenditures and reforms into legislation, judicial deference to the legislature required that the court defer to the state’s policy decisions. *Id.* at 244, 861 N.E.2d at 59. Like the court in New York, the Plaintiff Districts ask this Court to consider the conclusions of a panel of experts to assess whether the reforms proposed and enacted by the Defendants are a rational means of curing the constitutional defects in the system of public education.

### **PROPOSED FRAMEWORK**

The Plaintiff Districts, therefore, respectfully request that this Court issue a Supplemental Order, requiring the Defendants to comply with the following process, in order to ensure that the constitutional violations are remedied within a reasonable time. First, the State should determine, based on research and other available expertise, what must be included in the education system in order to ensure that the children in the Plaintiff Districts receive a constitutionally adequate opportunity to acquire an education. Once these reforms are

developed, the State should then determine the resources needed to ensure proper and consistent funding over time. Finally, a system of accountability to ensure the proper distribution of resources and continuous improvement over time should be a part of the reform package developed by the Defendants.

The Plaintiff Districts recognize that it will take time to implement the needed reforms. The Plaintiff Districts do not ask the State to provide each of the remedial programs or initiatives immediately, as a number of staffing needs and other resources, at the state and school district levels, will take time to fully engage. The State must, however, address the constitutional violations by designing rationally based programs and resources now, followed by supporting legislation, even though one or more of the remedies must be phased in over time.

For the reasons stated above, the Plaintiff Districts request a Supplemental Order from this Court, establishing the following framework and timelines, as set forth in the attached proposed consent order the Plaintiff Districts proposed for consideration by the State:

1. To facilitate the discussions and work of the House and Senate committees referred to above and to assist this Court, the parties will engage a panel of three experts (the "expert panel") by July 15, 2015. The panel will be tasked with the responsibility of identifying the educational needs of students in the Plaintiff Districts and matching remedies to these needs. The Defendants shall select one expert and bear the cost of that expert, the Plaintiff Districts shall select one expert and bear the cost of that expert, and the third shall be the State Superintendent of Education, who has agreed to serve on the panel. These experts will bring their expertise to bear and to serve as facilitators in helping marshal information and obtain proper input from the various stakeholders. The expert panel will be granted access to meetings with such office holders, school district, and state personnel as is necessary to help develop the remedies.
2. By November 1, 2015, the Defendants will present to the Plaintiff Districts and the expert panel their plan for implementing a constitutionally compliant educational system with provisions for legislation supporting the plan to be enacted by June 15, 2016. Staffing and other critical needs may require time to fully implement, but the plan and the legislation shall specifically provide dates for their full implementation.

3. By November 15, 2015, the expert panel will present a written report that includes its assessment of whether the Defendants have proposed a viable plan for remedying the constitutional violation and provide the report to the parties and the Court. The report will include a description of the panel's chosen methodology for assessing constitutional compliance. Should the experts disagree on parts of this report, the experts shall so note their disagreement in the report.
4. The Court will conduct a *de novo* review of the panel's report and recommendation, giving due deference to the General Assembly's prerogative to choose the methodology by which the constitutional violation shall be remedied and giving due deference to the expertise of the panel members chosen to assess whether the Defendants have a plan to implement an educational system that complies with constitutional requirements. The Court will issue an order after conducting this review with respect to whether the plan is a rational means to bring the system of public education in South Carolina into constitutional compliance and whether the Court's continued maintenance of jurisdiction is necessary.

Respectfully submitted,

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June 18, 2015

Columbia, South Carolina

**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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**APPEAL FROM LEE COUNTY  
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and

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

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**JOINT MOTION FOR ENTRY OF SUPPLEMENTAL CONSENT ORDER  
AND PROPOSED ORDER**

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The Appellant-Respondents (hereinafter referred to as "Plaintiffs" or "Plaintiff Districts") and the Respondents-Appellants (hereinafter referred to as "Defendants" or "State") respectfully submit this Joint Motion for Entry of a Supplemental Consent Order in response to the Court's directive that the parties reappear before the Court and present a plan to address the constitutional violation announced in the Court's November 12, 2014 decision.

In its November 12, 2014 Order, the Court directed the parties to work together to eliminate the constitutional deficiencies and return to the Court within a reasonable time to propose a solution. The parties present the following status report and Proposed Order for the Court's consideration.

#### STATUS OF REMEDIAL ACTION

Following the Court's ruling, the Honorable James H. Lucas, Speaker of the South Carolina House of Representatives, formed the House Education Policy Review and Reform Task Force to address the Court's ruling. It has conducted public hearings and is developing remedies addressing the findings of the Court. Similarly, the Honorable Hugh H. Leatherman, Sr., President Pro Tempore of the South Carolina Senate, formed the Senate Finance Special Subcommittee for Response to the *Abbeville* Case. It is also in the process of developing remedies addressing the Court's findings. The Plaintiff Districts also formed a committee of education experts and others following the ruling to develop remedies addressing the Court's findings. The remedies developed by the Plaintiff Districts have been reduced to writing and presented to the House Task Force and Senate Special Subcommittee.

With that background, this Joint Consent Motion and Consent Order will confirm the parties' agreement on the process and timeline to complete the State's response to the Court's decision and take remedial action.

#### ORDER

1. To facilitate the discussions and work of the House and Senate committees referred to above, and to assist this Court, the parties will engage a panel of three experts (the "expert panel") by July 15, 2015. The panel will be tasked with the responsibility of identifying the educational needs of students in the Plaintiff Districts and matching the remedies with these needs. The State shall select one of the experts and bear the cost of that expert. The Plaintiff Districts shall select one of the experts and bear the cost of that expert. The third expert shall be the State Superintendent of Education, who has agreed to serve on the panel. These experts will bring their expertise to bear and to serve as facilitators in helping marshal information and obtain proper input from the various stakeholders. The expert panel will be granted access to meetings with such office holders, school districts, and state personnel as is necessary to perform their work.
2. By November 1, 2015, the Defendants will present to the Plaintiff Districts and the experts their plan for implementing a constitutionally compliant educational system. Legislation supporting the plan shall be enacted by June 15, 2016. Staffing and other critical needs may require time to fully implement the plan, but the plan and enacting legislation shall specifically provide reasonable dates for their full implementation.
3. By November 15, 2015, the expert panel will present a written report that includes its assessment of whether the Defendants have proposed a viable plan for remedying the constitutional violations and provide it to the parties and the Court. The report will include a description of the panel's chosen methodology for assessing constitutional compliance. Should the experts disagree on parts of this report, the experts shall so note their disagreement in the report.
4. The Court will conduct a *de novo* review of the panel's report and recommendations, giving due deference to the General Assembly's prerogative to choose the methodology by which the constitutional violation shall be remedied and giving due deference to the expertise of the panel members chosen to assess whether the Defendants' plan to implement an educational system that complies with constitutional requirements.
5. The Court will issue an order after conducting its review of the plan and experts' findings stating whether the plan is a rational means of bringing the system of public education in South Carolina into constitutional compliance, and whether the Court's continued maintenance of jurisdiction is necessary.

AND IT IS SO ORDERED.

CERTIFICATE OF SERVICE

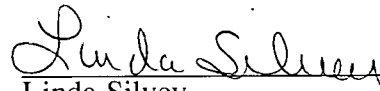
I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough L.L.P., attorneys for Appellants-Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by **hand delivery** to the following address(es):

Pleadings: Motion of Appellants-Respondents For Entry of a Supplemental Order

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