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.: 2007-65159

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

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

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

Plaintiffs,

Of Whom

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

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

Appellants / Respondents,

vs.

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

Defendants,

Of Whom

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

Respondents / Appellants

and

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

Respondents.

REPLY BRIEF OF RESPONDENTS / APPELLANTS GLENN F. McCONNELL AND ROBERT WILLIAM HARRELL, JR.

Robert E. Stepp
Elizabeth Van Doren Gray
A. Jackson Barnes
Roland M. Franklin, Jr.
SOWELL GRAY STEPP & LAFFITTE, L.L.C.
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondents / Appellants Glenn F. McConnell and Robert William Harrell, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes

Miscellaneous

Statement of the Case

The Senate and the House adopt and refer the Court to the Statement of the Case set forth in their Initial Cross-Appeal Brief filed December 13, 2007. In their Statement of the Case, Plaintiffs persist in their assertions that student achievement is a function of race and that the relatively lower achievement in the Plaintiff Districts is because those districts have a relatively higher proportion of African-American students. (Pls.' Br. 9).[1] Plaintiffs therefore take issue with the Senate and the House's statement that "the trial court 'concluded that student achievement is not a function of race, but rather of poverty.'" (Pls.' Br. 9 (quoting Defs.' Cross-Appeal Br. 6, n.6)). Plaintiffs contend that "[a]t no point did the trial court conclude that student achievement is not a function of race." (Pls.' Br. 9). It is correct that the trial court may never have expressly stated so obvious a proposition, but the incontestable fact is that Plaintiffs did not prove that poor achievement *is* a function of race. For race to be relevant, Plaintiffs had the burden of establishing a link between race and achievement, which Plaintiffs contend is the proper measure of constitutional compliance. During the course of 102 days of trial, however, Plaintiffs did not make a proffer of any evidence establishing a racial explanation for achievement.

Moreover, although it is true that the trial court found race and poverty to be collinear, for the purposes of this case, the trial court rejected the issue of race in and of itself as being relevant:

> Plaintiffs contend race is a relevant factor to consider in determining whether an opportunity for a minimally adequate education exists.

---

[1] This position is startling in itself, and particularly so in light of Plaintiffs' characterization of many of Defendants' positions. (*See, e.g.*, Pls.' Br. 55 (suggesting that the Senate and the House claim that poor students cannot learn)).

* * * *

> There is no established constitutional standard that distinguishes between the instruction of poor African-American students and poor Caucasian students. Further, it is clear that any change in the Plaintiff Districts that benefits students in poverty will also benefit African-American students. For these reasons, and because the issue of race was injected late in the proceedings, this Court stands by its ruling as to the issue of race.

(REC000012 ¶29; REC000013 ¶31).[2] Instead, the trial court expressly recognized student achievement as a function of poverty. (REC000197 ¶419 ("Indeed the record in this case makes it clear that the principal factor that is directly associated with different levels of student achievement is poverty.").

Statement of Facts

The Senate and the House stand by the statement of facts set forth in their Brief. All of the purported "mis-statements" identified by Plaintiffs are (1) supported by the record; (2) refuted by the Senate and the House in either their Brief or this Reply Brief; or (3) as is set forth below, constitutes information of which this Court can clearly take judicial notice.

[2] Plaintiffs obviously understood this to be the case when they filed their Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rules 52 and 59 SCRCP. (*See* REC040650 ¶ 7 ("Race is an issue that must be considered. The Court excluded this evidence at trial, and Plaintiffs ask the Court to reconsider this finding.")).

Argument[3]

I. Post-Trial Initiatives Have, in Fact, Mooted This Case.

Plaintiffs spend much time in their Brief attempting to rebut the efficacy of the many education initiatives enacted by the General Assembly since the trial of this case ended. (*See* Pls.' Br. 14-40). Plaintiffs deride these efforts, arguing that the Senate and the House "have merely 'tinkered around the edges' of education funding reform," and assert that the Senate and the House "cannot use post-trial, piece-meal legislation to attempt to avoid or postpone a final decision on whether they have met their constitutional obligation under the Education Clause." (Pls.' Br. 16, 17). Plaintiffs would have this Court find that an existing constitutional violation exists despite the fact that legislation enacted subsequent to the trial court's orders may have in fact cured the alleged violation.

Plaintiffs' argument misses the point. Defendants do not seek to have this Court declare that the violation identified in the trial court's orders has been remedied. Rather, Defendants only ask this Court to recognize that the education system of today is far different from the education system considered by the trial court and that the changes affect directly some of the issues that were litigated and that formed the basis of the trial court's December 29, 2005 Order—*e.g.*, pre-school programs, the reliance on property taxes for school operating revenue, and the overall level of funding provided to the Plaintiff Districts. "[T]he central question in a mootness problem is whether a change in the circumstances that prevailed at the beginning of the litigation has forestalled the prospect for meaningful, practical, or effective relief." 5 Am. Jur. 2d *Appellate Review* §

[3] For purposes of this brief, references to Plaintiffs' response to the Senate and the House's Cross-Appeal Brief are cited herein as "Pls.' Br." References to Plaintiffs' appellate brief are designated as "Br. of Resp'ts/Appellants."

598 (2008). *See, e.g., McCoy v. McCoy*, 283 S.C. 383, 386-87, 323 S.E.2d 517, 519 (1984) (holding that "the fact that custody was subsequently changed from wife to husband renders this temporary order no longer effective and therefore moot"). The many changes that have been enacted since the trial ended have effectively rendered the trial court's judgment moot because that judgment no longer addresses the current system.

The changes cited by the Senate and the House do indeed lie at the heart of the issues about which Plaintiffs complain, however, and address the sole violation identified by the trial court. The only constitutional violation identified by the trial court, and the only reason judgment was entered for Plaintiffs, was due to the trial court's determination that the South Carolina General Assembly had not provided for and adequately funded early childhood intervention programs. That circumstance has unquestionably changed.

A. The Child Development Education Pilot Program directly addresses early childhood education, which the trial court identified as the constitutional violation in this case.

As noted in the Senate and the House's Cross-Appeal Brief, the new program that most directly relates to the trial court's ruling is the Child Development Education Pilot Program ("CDEPP") established by the General Assembly in the 2006-2007 General Appropriations Bill and continued into the current fiscal year. (See Part IB, Proviso 1.75, Act 397 of 2006 & Part IB, Proviso 1.66, Act 117 of 2007). According to Plaintiffs, CDEPP is only a "partial response to the trial court's identification of deficient early childhood intervention programs for children through grade three, is funded by non-recurring funds which do not cover the costs of a quality early childhood education program, does not reach all four-year-olds who need it, and is not a permanent part of the

public school system." (Pls.' Br. 19). Plaintiffs further characterize the Senate and the House's commitment to this program as "questionable." (Pls.' Br. 30). But Plaintiffs cannot dispute that this program is directly responsive to the one and only violation identified by the trial court.[4]

Moreover, the Senate currently has pending in the Senate Finance Committee, S. 815, a bill that would make the CDEPP pilot program permanent. The bill would build on the pilot program established and maintained by budget proviso for the past two years. The program would provide full-day four year old kindergarten services for children considered "at risk" of not graduating from high school, generally pursuant to the same requirements and conditions as the pilot program. A child would be considered "at risk" if their family income is less than 185% poverty or if the child is Medicaid eligible. S. 815 of 2007-2008.

The bill also provides annual funding targets to be implemented beginning in fiscal year 2009. The bill calls for $4,093 in annual per student funding and $550 per student in transportation costs. S. 815 of 2007-2008. The $4,093 per student funding represents a twenty-five percent increase over the original amount of $3,077 per student originally provided in the pilot program. Proviso 1.75, Act 397 of 2006. This increase was initiated after an Education Oversight Committee ("EOC") study of the pilot program found that the original amount was insufficient to adequately fund the program. *See Interim Evaluation Report on the First Year Implementation of the Child*

[4] Other claims made by Plaintiffs are to no avail. For example, Plaintiffs complain that "the most glaring example of the continuing viability of Plaintiffs' claims is Defendants' failure to enact any state-level mechanism to assist the school districts in building or maintaining school facilities." (Pls.' Br. 19). This assertion would have some merit if only the trial court had found that school facilities in the Plaintiff Districts were not safe and adequate. However, the trial court found just the opposite. (*See* REC000155 ¶ 262—REC000186 ¶ 393; REC000010 ¶ 23—REC000012 ¶ 28).

Development Education Pilot Program, *available at* http://eoc.sc.gov/NR/rdonlyres/0D0B40F9 -7CB3-4B68-9B40-6F8E38899CE1 /0/CDEPP Feb07.pdf. at 32 (last visited March 25, 2008); *also available at* REC042511 – REC042604 at 32.[5]

The bill also includes an inflation factor to ensure that per student funding will increase at a rate necessary to compensate for rising costs. S. 815 of 2007-2008. The bill also calls for $10,000 per classroom to fund new equipment costs, as well as $2,500 per year for classroom consumables and materials. *Id.*

Further, the bill requires the EOC to submit an evaluation of the program to the General Assembly every two years until fiscal year 2016 and every five years thereafter. S. 815 of 2007-2008. The evaluation must examine the program's quality and impact and make recommendations for program improvement. S. 815 of 2007-2008. The evaluation must focus "on lead teacher qualifications, student attendance, pupil-teacher ratio, parental involvement, accreditation, professional development, and school readiness." *Id.* Also, in order to evaluate the program's impact, the EOC also must evaluate "student test performance by content and developmentally appropriate measures of progress from kindergarten through twelfth grade." *Id.*

B. Act 388 directly addresses issues raised by Plaintiffs.

Act 388 of 2006 was never intended as a panacea for the Plaintiffs' perceived ills associated with education funding in this state. It is true that the Act was intended as a

[5] Contrary to the Plaintiff's assertions that the General Assembly has not acted quickly enough to make this program permanent, this study also recommended that the program remain in the pilot stage for an additional year "to better inform future legislation." Also, the EOC needed "more information on how school districts and private providers can meet the space and personnel needs resulting from expansion of the program, on what levels of funding are appropriate, on what teacher qualifications are needed, on how to ensure that the 'dollars follow the child,' and on how school districts and private providers can meet the needs of the clientele they are currently serving along with additional at-risk students, as well as what incentives for program expansion are needed." *Id.*

property tax relief measure effectuated by a one-cent increase in the state sales tax in exchange for the removal of the school operation portion of property tax on owner occupied homes. However, the benefits provided by the bill to the poorer school districts cannot be denied. The most notable benefit is that the bill sets a floor of $2,500,000 that counties must be reimbursed for the school operating millage on owner occupied homes. S.C. Code Ann. § 11-11-156(B) (Supp. 2007). For many districts, the Act results in more funding for school operations than the district would otherwise collect without the Act.

Plaintiffs' argument that this benefit is illusory because a school district's reimbursement is "frozen at the level of the district's respective local property taxes collected for operating expenses in 2006-07" is simply illogical. (Pls.' Br. 22). This fallacy is most obvious for those counties that collected less than $2,500,000 in school operating millage on owner occupied homes in 2006-07 because the Act provides these districts with an immediate increase in funding. Further, the Act guarantees that the amount reimbursed to each district can never decrease below the amount received in the previous year and insures this promise with the state General Fund. S.C. Code Ann. § 11-11-156(A) (Supp. 2007).

The original Act also provided that the total amount reimbursed to the districts must be increased annually by the percentage increase in the consumer price index ("CPI") plus the percentage increase in state population. Act 388 of 2006. This increase is also guaranteed by the general fund. *Id* The General Assembly amended this part of the Act during the current legislative session to provide that the increase in reimbursement must be the greater of the percentage increase in CPI plus population growth or four percent, whichever is greater. Act 57 of 2007. The CPI plus population

growth is still guaranteed by the General Fund and the four percent growth factor is guaranteed by the Homestead Exemption Fund. *Id.*

The poorer districts also receive an additional benefit because the percentage each district receives of the total growth in reimbursement is enhanced by weighted pupil units, including for the first time a weighting factor of 0.20 for children in poverty. S.C. Code Ann. § 11-11-156(A). This increase in funding for poorer districts not only increases at a rate greater than for districts with greater means, but also is guaranteed to never decrease.

Plaintiffs misconstrue the benefit Act 388 provides when they cite Dillon as an example of a county that will not really benefit from the $2,500,000 floor on reimbursements. (Pls.' Br. 24, n.7). They complain the benefit is only a temporary improvement until Dillon reaches the break point when they would have otherwise collected more than $2,500,000. However, there is no doubt that Dillon will be reimbursed immediately more than they would otherwise collect. Although this "windfall" only continues until Dillon reaches that break point, it is nonetheless a windfall until that point. Further, once this break point is surpassed the reimbursement will begin to grow, likely at a rate that far exceeds that which would otherwise be possible.

Ultimately, this portion of school operating funding will never be subject to changes in the housing market that cause assessed values to fluctuate. Instead, it provides a steady and secure source of revenue to the districts that, in the current economic climate, would otherwise be facing a decrease in the assessed value of their owner occupied property.

Plaintiffs further complain that the Act will have a negative impact on the poorer districts' ability to raise funds because the Act includes millage caps. The Act does limit the percentage that a district may increase millage to growth in entity population plus the growth in the consumer price index. S.C. Code Ann. § 6-1-320 (Supp. 2007). However, Plaintiffs fail to mention that prior to Act 388's passage, millage growth was simply limited to the growth in the consumer price index.[6] By providing the additional percentage factor of growth in entity population, the districts are given greater, not less, authority to increase their millage. Also, the millage caps do not and have never applied to millage imposed for bonded indebtedness to fund capital improvements or to make payments on a lease purchase agreement. *Id.*

Further, Plaintiffs argue that the problem with millage caps is further exacerbated by the expense associated with additional state requirements placed on the districts. However, the Act contains a section that provides the governing authority of a taxing entity with the ability to raise millage past the limit to comply with a new federal or state requirement for which there is no accompanying appropriation. *Id.*

In conclusion, although Act 388 was never intended as education funding reform, there is no doubt that the Act will ensure growth in a stable source of funding for all school districts, especially those district significantly impacted by the effects of poverty.

The adoption of the CDEPP pilot program and the current effort to make the program permanent is far more than mere "tinkering around the edges" of educational reform. Instead, the CDEPP program is directly responsive to the violation identified by the trial court.

---

[6] *See* http://www.scstatehouse.net/sess116_2005-2006/prever/4449_20060531a.htm for strike and insert version of Act 388 of 2006; *see also* REC042605—REC042627.

The Senate and the House do not ask this Court to determine the sufficiency of these and other education reforms or remedies for the constitutional violation found by the trial court.[7] Instead, the Senate and the House reference those reforms only to point out to this Court that the landscape has changed significantly since the trial of this case, and neither the parties to this action nor this Court can be certain of what the trial court's decision would have been if these reforms had been in place at the time of trial. The Senate and the House contend, however, that given that the evidence that was before the trial court is now "stale" and that the landscape has been altered considerably, this Court cannot affirm or reverse the orders of the trial court. Instead, the orders of the trial court should be vacated as moot, and all appeals should be dismissed.

II. The Trial Court Erred in Applying a Preponderance of the Evidence Standard.

As is established throughout this Reply, the suggestion that the Senate and the House rely on "select quotations" from various cases in support of their positions is incorrect. (Pls.' Br. 61). Plaintiffs concede that the unconstitutionality of a statute must be established beyond a reasonable doubt, but according to Plaintiffs, this burden does not apply in this case "because Plaintiffs are not seeking to have a statute declared unconstitutional." (Pls.' Br. 42). In making this argument, however, Plaintiffs have overlooked the allegations contained in their Fourth Amended Complaint wherein Plaintiffs allege that Defendants "have participated in the drafting of *unconstitutional statutes* and/or have failed subsequently to ameliorate the *unconstitutional aspects of those statutes* to the detriment of the Plaintiffs named herein" (REC000334 ¶ 72 (emphasis added)), and seek, among other things, a declaration "that *the current system*

[7] Indeed, the Senate and the House argue that the trial court erred in finding any violation of the education clause.

of funding and supporting education in South Carolina is inadequate to meet the minimum educational needs of the students in the Plaintiff districts . . . and *is therefore unconstitutional* under the Constitution of the State of South Carolina." (REC000336 ¶(b) (emphasis added)). It strains credulity to suggest that "[t]his does not amount to a request to find the laws governing the current educational system unconstitutional." (Pls.' Br. 43).

If this Court were to find that the current "system" is unconstitutional as urged by Plaintiffs, then the beyond a reasonable doubt standard must apply to this case because the system is entirely governed by statute. The essence of such a finding would necessarily be that the current system fails because the statutes that comprise the system fail to provide the opportunity for each student to acquire a minimally adequate education and are therefore unconstitutional. If Plaintiffs are not challenging the sufficiency of the current system, then the orders of the trial court should be reversed in part and judgment entered for Defendants.

The cases cited by Plaintiffs are in accord with the Senate and the House's position. In *Roosevelt Elementary School District Number 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994), the "critical issue" before the Arizona Supreme Court was whether funding disparities between school districts "are the result of the financing scheme the state chooses." *Id.* at 815.[8] The court continued:

> In short, the system the legislature chooses to fund the public schools must not itself be the cause of substantial disparities. There is nothing unconstitutional about relying on a property tax. There is nothing unconstitutional about creating school districts. But if together they produce a public school system that cannot be said to be general and

[8] This case is also instructive on the issue of causation. *See* discussion, *infra* at Section IV.

> uniform throughout the state, then the laws chosen by the legislature to implement its constitutional obligation under [the education clause] fail in their purpose.

Id. In other words, if the property tax and the school systems created by the legislature produce a school system that is not uniform as required by Arizona's education clause, then the statutes adopted by the legislature to implement its constitutional obligation are unconstitutional:

> The statutes are inherently incapable of achieving their constitutional purpose. Because the state's financing system is itself the cause of these disparities, the system, taken as a whole, does not comply with art. XI, § 1 of the Arizona Constitution.

Id.

A claim that "the system" is unconstitutional is nothing more than a claim that the various statutes comprising the system are unconstitutional. In *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court concluded:

> We have decided one legal issue—and one legal issue only—viz., that the General Assembly of the Commonwealth has failed to establish an efficient system of common schools throughout the Commonwealth.
>
> Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional. . . . This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. . . .

Id. at 215 (emphasis in original). The *Rose* court recognized that the educational system's deficiency or adequacy is a function of the deficiency or adequacy of the statutes that constitute the system. In fact, the court equated the educational system with legislative action: "The issue before us [is] the constitutionality of the system of statutes that created the common schools." *Id.* Thus, determining the constitutionality of South

Carolina's educational system requires this Court to determine the constitutionality of the statutes which comprise and define that system. By challenging the "system of funding and supporting education," Plaintiffs plainly challenge the *statutory* system which funds and supports education. There is no distinction between the educational system and the statutes that comprise the system. Such was also the case in *Rose*.[9]

Because an assessment of the constitutionality of the system as a whole necessarily entails an assessment of the constitutionality of various statutory components that make up the system, the trial court should have applied the beyond a reasonable doubt standard and thus erred in applying a preponderance of the evidence standard.[10]

---

[9] Plaintiffs' contention that "each statute enacted by the General Assembly that affects the system of public schools may be constitutionally valid and yet the system, as implemented, may be insufficient to meet the constitutional standard," (Pls.' Br. 44), is nonsensical. If each statute, whose constitutionality must be assessed by a reasonable doubt standard under South Carolina law, is constitutional, then the entire system is constitutional. *Rose* establishes that standing alone, some statutes may be constitutional, but when part of a system of statutes, those same statutes may be unconstitutional. Under either scenario, the only way to assess the system is with a reasonable doubt standard.

[10] It is uncertain how Plaintiffs contend that decisions from other jurisdictions support the trial court's burden of proof. (*See* Pls.' Br. 46). Plaintiffs contend that *City of Pawtucket v. Sundlin*, 662 A.2d 40 (R.I. 1995) and *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) are inapplicable because "both were equity cases requiring analysis of whether the educational systems at issue violated the state and federal constitutional guarantees of equal protection." (Pls.' Br. 44). This purported distinction is irrelevant. Like the present case, both *City of Pawtucket* and *Vincent* both challenged the state statutory school finance system. Moreover, all of the cases cited by Plaintiffs also involved an equal protection claim. *See Rose v. Council for Better Educ., Inc* , 7990 S.W.2d 186, 190 (Ky. 1989) ("The complaint included allegations that the system of school financing provided for by the General Assembly is inadequate . . . so as to result in an inefficient system of common school education in violation of . . . the equal protection clause . . . ."; *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994) ("[T]he districts argue that education is a fundamental right and the school finance system violates the state equal protection clause . . . ."); *State v. Campbell County Sch. Dist.*, 19 P.3d 518 (Wyo. 2001) (equality of education case).

III. This Court Should Take Judicial Notice of Post-Trial Legislative Enactments and the Plaintiff District Websites.

A. <u>This Court should take judicial notice of post-trial legislative enactments.</u>

According to Plaintiffs, the Senate and the House "have improperly introduced evidence of the Legislature's actions taken after the close of trial." (Pls.' Br. 47). Plaintiffs conflate "evidence" and "fact" with "law" in making this erroneous argument.

Under South Carolina law, "[f]or a fact to be subject to judicial notice, it must be so notorious that the court may properly assume its existence without proof." *Masters v Rodgers Dev. Group*, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984). Judicial notice may be taken at any time during the proceedings, including on appeal. *See id.* However, as the Court of Appeals has observed, "[n]otice of 'facts' for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record." *Id.* Therefore, South Carolina appellate courts limit judicial notice on appeal to "matters which are indisputable." *Id.*

Laws created by statute are an example of matters this Court has consistently deemed indisputable. "This Court may take judicial notice of a statute." *Porter v. South Carolina Pub. Serv. Comm'n*, 327 S.C. 220, 223, 489 S.E.2d 467, 469, n.2 (1997). Indeed, the courts of this state "*are required* to take judicial notice of the public laws or statutes." *Robert Trent Jones, Inc. v. B-F Ltd. P'ship*, 276 S.C. 469, 471, 279 S.E.2d 613, 614 (1981) (emphasis added). "[E]very statute is a public law, unless otherwise declared in the statute itself, and hence is within the knowledge of the court." *State v. Broad River Power Co.*, 177 S.C. 240, ___, 181 S.E. 41, 48 (1935). This fact should come as no

surprise to Plaintiffs. (REC012974, ll. 3-25; REC012975, ll. 1-8 (Plaintiffs' counsel) ("The court obviously has the opportunity under Rule 201 of the Rules of Evidence of South Carolina to take judicial notice of statutes . . . .").

The actions taken by the legislature are not "facts outside of the record."[11] Instead, they are legislative enactments—i.e., public laws, of which this Court must take notice.[12] The Senate and the House are not asking this Court to evaluate those public laws in light of *Abbeville County* and the trial court's orders. Instead, these enactments serve to undermine Plaintiffs' erroneous contention that the legislature is not committed to education and establish that the landscape has changed considerably since the trial court entered its orders in this case. There is no way of knowing whether the trial court would have reached the same result if these statutes were in effect at the time of trial.

B. This Court should take judicial notice of the Plaintiff District websites.

Plaintiffs assert that in addition to ignoring post-trial legislative enactments, this Court should deny the Senate and the House's request to take judicial notice of the fact that since trial, many schools in the Plaintiff Districts have been rebuilt or remodeled.

---

[11] Accordingly, the case law cited by Plaintiffs is inapposite. (*See* Pls.' Br. 48). The legislative enactments are not new facts. Instead, they are public laws of which "'[c]ourts will not profess to be more ignorant than the rest of mankind.'" *Broad River Power Co.*, 177 S.C. at ___, 181 S.E. at 48 (quoting *Fleischman, Morris & Co. v. So. Ry. Co.*, 76 S.C. 237, 241, 56 S.E. 974, 975 (1907)).

[12] Plaintiffs do not contend that this Court should not take judicial notice of improvements in achievement in the Plaintiff Districts as reflected in the yearly report card data. However, it should be noted that throughout this litigation, the trial court took judicial notice of those facts without reservation. (*See* REC000010—REC000011 ¶ 26, n.3 (taking judicial notice of 2004-2005 report card data and noting that "[b]oth plaintiffs and defendants requested this Court take judicial notice of the yearly report cards issued during the pendency of this litigation"); REC000104, n.21 (same); REC000107, n.22 (same); REC000111, n.23 (same); REC000114, n.24 (same); REC000119, n.25 (same); REC000122, n.27 (same); REC000126, n.29 (same); REC015590 (taking judicial notice of 2004 PACT scores and adequate yearly progress designations); REC015974—REC015975 (taking judicial notice of HSAP scores)).

(Pls.' Br. 49). In other words, Plaintiffs seek reversal of that part of the trial court's order finding the facilities in the Plaintiff Districts are safe and adequate based on facts that, even if once true, no longer exist. Thus, under Plaintiffs' theory, this Court could reverse the order of the trial court and find that the facilities in the Plaintiff Districts are neither safe nor adequate even though presently, the facilities are completely new. Such reasoning is as stunning as it is creative. Yet it finds no basis in reason or law.

"It is not uncommon for courts to take judicial notice of factual information found on the world wide web." *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) (citing cases). This is especially true of governmental agencies, "a source whose accuracy cannot reasonably be questioned." *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994) (finding that district court properly took judicial notice of FDIC insurance status; the FDIC, "the insuring agency itself, is a source whose accuracy cannot reasonably be questioned"); *Coleman v. Dretke*, 509 F.3d 665, 667 (5th Cir. 2005) (holding that district court could take judicial notice of state agency website); *In re Everglades Island Boat Tours, LLC*, 484 F. Supp.2d 1259, 1261 (M.D. Fla. 2007) (taking judicial notice of government website); *Mitchell v. Nix*, CV 105-2349, 2007 WL 779067 at *4 (N.D. Ga. Mar. 8, 2007) (taking judicial notice of release dates for former prisoners on state agency website); *In re Katrina Canal Breaches Consol Litig.*, C.A. No. 05-4182, 2008 WL 314396 at *14 (E.D. La. Jan. 30, 2008) (observing that "[t]he Fifth Circuit has determined that courts may take judicial notice of governmental websites"). Therefore, the only "dangerous precedent" this Court could possibly set would be to reverse the trial court's order with respect to facilities in the Plaintiff Districts while ignoring the fact that many schools in the Plaintiff Districts have been

rebuilt or renovated.[13] The fact that many of these schools have been rebuilt or renovated is found on the Plaintiff Districts' websites, a source whose accuracy one would think could not be reasonably questioned and which Plaintiffs should be estopped to deny.

Yet Plaintiffs contend that the information contained on their own websites is "not necessarily indisputable." (Pls.' Br. 50). This is surprising considering that with this assertion, Plaintiffs call into question the credibility of their own statements in an effort to exclude uncontroverted facts from being considered by this Court. Plaintiffs protest that judicial notice of their own websites would "strip Plaintiffs of their right to be heard and deprive them of the opportunity to present evidence rebutting Defendants' claims." (*Id.*) In other words,.Plaintiffs claim that if this Court takes judicial notice of the Plaintiff Districts' own websites, that would deprive Plaintiffs of the opportunity to disagree with themselves. The absurdity of this argument is readily apparent. Courts routinely take judicial notice of government agency websites, and Plaintiffs have presented no compelling reason why this Court should not do the same.

IV. Plaintiffs Failed to Prove the Causation Required to Establish a Constitutional Violation.

Plaintiffs mischaracterize the Senate and the House's argument regarding causation, calling it "novel" and construing it as requiring a sole causation standard. (Pls.' Br. 53). Plaintiffs also argue that this fundamental issue is somehow not before the Court. (*Id.* at 52). Plaintiffs' attack on what they call a "sole causation" standard, however, focuses on semantics rather than substance, and fails to address the fundamental absence of *any* meaningful causal relationship between the education policies and

[13] Indeed, the trial court notes that many schools in the Plaintiff Districts are new or have been renovated. (REC000010 ¶ 25).

funding provided by the General Assembly and the relatively lower achievement of students in the Plaintiff Districts.[14]

A. The alleged absence of the opportunity to acquire a minimally adequate education must be causally related to the policies for which the General Assembly is responsible.

Plaintiffs cannot establish a constitutional violation of the education clause in the absence of causation. As pointed out in the Cross-Appeal Brief of the Senate and the House:

> To prevail in this case, Plaintiffs were required to prove beyond a reasonable doubt that each child in the Plaintiff Districts did not have the opportunity to acquire a minimally adequate education, *and* that the absence of that opportunity was caused by some systemic failure of existing legislation as opposed to other causes. *Greer v. Spartanburg Technical Coll.*, 338 S.C. 76, 80, 524 S.E.2d 856, 858 (Ct. App. 1999) (stating that a causation test "distinguishes between a result caused by a constitutional violation and one caused by other factors"); *see also New York Civil Liberties Union v. State of New York*, 771 N.Y.S.2d 563 (S.D.N.Y. 2004) (dismissing amended complaint alleging failure to provide sufficient resources and facilities for a sound basic education because complaint did not allege a systemic failure).

(Cross-Appeal Br. of Resp'ts/Appellants 38-39). *Greer v. Spartanburg Technical College*, 338 S.C. 76, 80, 524 S.E.2d 856, 858 (Ct. App. 1999), sets the standard that governs this case. The Senate and the House also correctly pointed out in their Cross-Appeal Brief that *Greer* establishes a "but for" causation test. (*See* Cross-Appeal Br. of Resp'ts/Appellants at 38-40).

It is not "novel" or difficult to apply *Greer* to the present case. Because Plaintiffs contend that evidence of poor achievement establishes the absence of opportunity (a

[14] Plaintiffs frequently confuse causation and remedy in their arguments. Schools can and do affect achievement, although not to the extent suggested by Plaintiffs. That is not the same thing as saying that schools cause poor achievement, however.

proposition with which the Senate and the House disagree), Plaintiffs must also establish that the relatively lower achievement in the Plaintiff Districts would not have occurred but for a systemic failure of the policies and programs governing education in South Carolina. Not only is this requirement consistent with established law,[15] it is also consistent with logic and common sense. Any conditions that are used as the basis for a finding that the General Assembly has violated its constitutional duty as set out in *Abbeville County* must be conditions that were caused by some failure on the part of the General Assembly, and therefore can be corrected by subsequent action by the General Assembly. If a violation is predicated on conditions that the General Assembly cannot change, the violation would theoretically persist forever, and courts would assume perpetual jurisdiction over education. This is precisely what this Court cautioned against in *Abbeville County*. *See Abbeville County*, 335 S.C. at 68, 515 S.E.2d ay 540-41.

Thus, there is nothing unfair or novel about requiring Plaintiffs to establish that the conditions that they hold out as evidencing a constitutional violation would not exist but for acts or omissions of the General Assembly. Whether this is regarded as sole cause or not, there must at the minimum be some causal relationship so that a court can "distinguish[] between a result caused by a constitutional violation and one caused by other factors." *Greer*, 338 S.C. at 80, 524 S.E.2d at 858. As pointed out below, Plaintiffs have not shown any causal relationship between poor achievement and legislative policy. To focus on whether the causation standard is one of sole causation therefore misses the point.

---

[15] *See also Roosevelt Elementary*, 877 P.2d at 815 (noting that the issue is whether funding disparities are caused by legislative action).

B. Poor children can learn (and do under the existing system).

In their Brief, Plaintiffs deliberately mischaracterize the Senate and the House's position concerning the causes of poor achievement. As described by Plaintiffs, the Senate and the House "suggest that poor children cannot learn no matter what schools do and schools cannot be the cause of or contribute to poor achievement." (Pls.' Br. 55). It is ironic that Plaintiffs attempt to condemn the Senate and the House for what is actually Plaintiffs' position, rather than that of the Senate and the House.[16]

First, the Senate and the House have never argued that poor children cannot learn. Indeed, from the outset, the Senate and the House's principal position in this case has been that children in the Plaintiff Districts have the opportunity to acquire a minimally adequate education, and that most of them do so. It is the Senate and the House who have pointed out the numbers of students who pass the rigorous PACT test, who pass the HSAP on their first try, and who succeed on other achievement measures. (*See, e g.*, Cross-Appeal Br. of Resp'ts/Appellants at 47-49; Br. of Resp'ts/Appellants at 106-112). This is hardly an argument that poor children cannot learn.

On the other hand, Plaintiffs have continually sought to denigrate the achievement of students in their districts, to the point of even arguing that those who pass PACT have not really accomplished anything. (*See* Pls.' Br. 84-85). It is Plaintiffs who have argued that poor children must have "more" before they would even have the opportunity to learn, including twelve month education programs that begin shortly after birth. (REC012227—REC012244; REC012248—REC012250; REC012251A; REC012252—

[16] It is even more ironic that Plaintiffs criticize the Senate and the House for a position overwhelmingly established in the record, while Plaintiffs themselves argue without any evidence that students in the Plaintiff Districts do not do well because they are African-American. (*See* Br. of Appellants/Resp'ts 60-63).

REC012272; REC012275—REC012288 (Peterson); REC012291—REC012294; REC012298. It is Plaintiffs who argue that even $10,946 per pupil is not enough to provide poor students with even the opportunity to acquire a minimally adequate education. (*See* Br. of Appellants/Resp'ts 113; 123-128; 135-142; REC000100 – REC000101 ¶ 123).[17] It is Plaintiffs who argue that the existing teachers are incapable of offering even minimally adequate instruction, and that specially trained, super teachers are necessary if poor children are to learn. (*See* Br. of Appellants/Resp'ts at 16-54).

There is an incontestable reality reflected in the record of this case, however, which is that the achievement of students on free and reduced lunch is on average less than the achievement of students who pay for their lunches. This situation is true in South Carolina and everywhere else it has been studied. (REC002336, ll. 13-23). The evidence establishing the relationship between poverty and achievement is overwhelming (including evidence from Plaintiffs' own experts) and need not be reiterated here. Indeed, the trial court expressly found that poverty is a cause of poor achievement. (*See* REC000197 ¶ 419). This evidence is important, and Defendants do not apologize for it or for its very important implications in this case.

Thus, the record in this case clearly establishes that poor students can and do learn as a result of the existing education system in South Carolina. It is not inconsistent to also say, however, that on average the achievement of students on free and reduced lunch is relatively lower that the average achievement of others. This is not caused by the

---

[17] As the trial court observed, "Allendale has the second highest per pupil expenditure in the State, and the highest among the Plaintiff Districts." (REC000100—REC000101 ¶ 123 (citing REC038573)). Since trial, Allendale's per pupil expenditure has increased to $11,956. *See* South Carolina Department of Education, *available at* http://ed.sc.gov/agency/offices/finance/insite/ (last visited March 20, 2008); *also available at* REC042005.

school system. It is caused by poverty, as the trial court correctly found. It is also true that no one has yet been able to "construct[] a series of strategies and activities that would enable . . . [a] reasonable person . . . to assert that schools can overcome the effects of poverty in order to elevate achievement." (REC014435, ll. 5-25; REC014436, ll. 1-7). The fact that eliminating the achievement gap is beyond the current ability of education policymakers, however, is not the same thing as saying that "poor children can't ;earn" or any other pejorative attempt by Plaintiffs to confuse the issues.

One of the primary conclusions that must be acknowledged in the face of this uncontested evidence is that achievement is a poor measure of constitutional compliance because it is so dramatically affected by things that are not within the control of the legislature, such as poverty. Plaintiffs attempt to divert serious consideration of that problem by resorting to *ad hominem* attacks upon the Senate and the House, in this instance by accusing the Senate and the House of being biased against poor students. What is far more important than Plaintiffs' misplaced criticism, however, is the fact that the disparity in achievement decried by Plaintiffs is not caused by a failure of the educational system and cannot be eliminated by legislation. In the absence of an established relationship between measures that can be taken by the General Assembly and the conditions that are deemed to evidence the violation, no sufficient causation has been established, regardless of what standard is applied.

C. Plaintiffs have failed to prove any causal connection between poor achievement and poor policies.

Despite their protestations that the Senate and the House have argued for an incorrect standard for causation, Plaintiffs themselves state that "[t]o prove causation in an education adequacy case, a plaintiff must prove that the state provides deficient

inputs—teaching facilities, and other instrumentalities of learning—which lead to deficient outputs—such as test results and graduation rates—and that this failure is causally connected to the Defendants' system of educational policies and programs, including funding." (Pls.' Br. 61) (quoting *Paynter v. State,* 797 N.E.2d 1225, 1228 (N.Y. 2003)). A review of the record easily reveals that Plaintiffs have not met the burden they have proposed for themselves.

Plaintiffs' entire argument, labeled "Plaintiffs Satisfied Their Burden of Proving Causation," (Pls.' Br. 61), does not contain a single citation to the record. Plaintiffs do not point to a single exhibit, or even one line of testimony that the relatively lower achievement of poor students is caused by some policy or funding failure. Plaintiffs' failure in this regard is not an oversight. They fail to point out any such evidence because there is no such evidence. Indeed, the record is replete with contrary evidence that stands uncontradicted.

The record establishes and the trial court found that:

a) there is no relationship between teacher credentials and achievement, (REC000152 ¶ 253—REC000155 ¶ 261; REC000003 ¶ 2—REC000004 ¶ 5);

b) there is no relationship between spending and achievement, (REC000186 ¶ 394—REC000194 ¶ 411); and

c) there is no relationship between facilities and achievement, (REC000158 ¶ 268; REC000011 ¶ 27).

Nor is there any relationship between any other reasonable "input" and achievement. Plaintiffs themselves illustrated this point in their Exhibit 251C, which compares schools that are closing the achievement gap between students on free and reduced lunch and others. As the trial court found, it is apparent that the relatively better outcomes in these schools are not the result of greater resources. (REC000188 ¶ 399—REC000190 ¶ 403).

Plaintiffs can only generically refer to what they describe as "more than ample" evidence that the existing system of policies "did not enable Plaintiff Districts to provide adequate inputs" without even citing to that testimony or defending it in the face of the uncontroverted statistical analyses to the contrary. (Pls.' Br. 63). Because there is no evidence that establishes any causal link between the inputs provided by the General Assembly and the relatively poorer achievement in the Plaintiff Districts, Plaintiffs have not satisfied their burden.

D. *Abbeville County* does not impose strict liability.

Finally, Plaintiffs argue that programs and policies alone are not sufficient and that an adequate system must have adequate personnel with adequate training, adequate materials, adequate instructional time, adequate facilities, and other "educational services." (Pls.' Br. 62). Plaintiffs' argument overlooks the trial court's exhaustive analysis as to the adequacy of each of these requirements with the possible exception of "education services," since those are undefined in Plaintiffs' Brief or elsewhere. Plaintiffs are therefore reduced to arguing that the General Assembly is strictly liable for Plaintiff Districts' own failure to implement what they concede for argument's sake to be an adequate system of policies. But the education clause requires that the General Assembly establish a system of schools that provide the opportunities defined in *Abbeville County*. Neither the constitution itself nor *Abbeville County* requires the General Assembly to actually run the districts or the schools, or teach the classes or grade the tests. Moreover, for purposes of causation, it was incumbent upon Plaintiffs to show that there is a causal connection between some failure of implementation and

achievement, since that is Plaintiffs' measure of adequacy. Plaintiffs fail to point to any evidence that establishes such a connection, and indeed there is no such evidence.

As the Senate and the House have argued from the outset, there is no silver bullet to improve educational achievement in this state, and there is no magic legislation that will equalize achievement between students on free and reduced lunch and others. The current disparity is not the result of inadequate inputs, and Plaintiffs have failed to prove the causation necessary to support a finding of a constitutional violation.

E. The causation issue is properly before this Court.

Plaintiffs argue the requirement that they prove causation as an essential element of their claim is a new argument and has somehow been waived by the Senate and the House. (Pls.' Br. 52). Plaintiffs are incorrect. Causation has been an issue in the case throughout and has been properly preserved for appellate consideration to the extent that preservation is even required.

Nor have the Senate and the House changed their argument during the course of the case so as to make additional notice to the trial court or to Plaintiffs necessary. At the close of the Plaintiffs' case, the Senate and the House argued that Plaintiffs had failed to establish causation. (REC012601, ll. 16-25; REC012602, ll. 1-4; REC012633, ll. 20-25; REC012634, l. 1). The Senate and the House also argued causation at the close of all the evidence and in final arguments to the trial court. (REC016075, l. 8—REC016077, l. 4).

Plaintiffs contend that the Senate and the House should have raised a specific issue about causation in their statement of issues on appeal. (Pls.' Br. 52-53). The Senate and the House did not state a separate issue about causation, but the issue is included in issue III, which states: "Did the trial court err in using PACT scores to

establish the absence of the opportunity to acquire a minimally adequate education when the concept of opportunity is distinct from achievement and when the evidence establishes that PACT scores more are a function of socio-economic status than school quality?" (Cross-Appeal Br. of Resp'ts/Appellants at xv). As explained above, the reason that PACT scores (or any other achievement data) cannot be used to establish a violation is because of the absence of any causal relationship between the system of education policies and the relatively lower achievement of students on free and reduced lunch. Thus, issue III, when read in conjunction with the Senate and the House's argument, adequately raises the issue. *See Eubank v. Eubank*, 347 S.C. 367, 376, 555 S.E.2d 413, 417 (Ct. App. 2001). Moreover, although issue III does not mention causation explicitly it is the essence of the issue raised, and given the history of the case, Plaintiffs were well aware of it.

Finally, causation is an element of standing. Standing is the "irreducible constitutional minimum" necessary to make a justiciable case or controversy. *Lujan v Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Standing requires three things: injury in fact to the plaintiff, *causation of that injury by the defendant's complained-of conduct*, and likelihood that the requested relief will redress that injury. *Id.* (emphasis added). The *Lujan* standard has expressly been recognized in South Carolina. *See Smiley v. South Carolina Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007); *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. South Carolina Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). In South Carolina, standing (including causation) is a requirement for subject matter jurisdiction. *Richland County*

Recreation Dist. v. City of Columbia, 290 S.C. 93, 95, 248 S.E.2d 363, 364 (1986).[18] Because subject matter jurisdiction cannot be waived, causation may be raised as an issue at any time.

Thus, the question of causation has been before the court since the outset of this case and has been properly preserved on appeal to the extent that preservation was even necessary.

V. The Effect of Poverty on Achievement Must be Correctly Considered in Deciding this Case.

Plaintiffs consistently mischaracterize the evidence concerning the relationship between poverty and achievement, as well as the Senate and the House's argument based upon that evidence. In this Reply, the Senate and the House will undertake to set the record straight so that the issues and arguments are properly framed for this Court's consideration.

A. Why is the effect of poverty important?

Initially, it is vital to put the issue of poverty back in its proper context in this case. Poverty is important because it strongly affects achievement, and if the adequacy of the school system is determined on the basis of achievement, the effect of poverty must be considered. Plaintiffs correctly capture the appropriate question when they ask whether poor achievement in the Plaintiff Districts is the result of poverty or of "failed educational programs and policies." (*See* Pls.' Br. 66). It should be noted at this point, however, that if this Court agrees with the Senate and the House that the constitutional compliance should be measured primarily by inputs—*i.e.*, programs, policies, funding,

[18] *Bardoon v. Eidolon Corp.*, 326 S.C. 166, 485 S.E.2d 371 (1997) holds that one who lacks standing because he is not the real party in interest does not deprive the court of subject matter jurisdiction. *Id.* at 169, 485 S.E.2d at 373. Otherwise, standing remains an element of subject matter jurisdiction.

etc., then the connection between poverty and achievement is less important for this case, although it remains a central concern for education policy makers.

Plaintiffs, however, insist that a constitutional violation can be proven simply by pointing out that students in the Plaintiff Districts on average do not perform as well as students in other districts. Plaintiffs then ask this Court to require the General Assembly to enact policies and to provide funding until this disparity goes away. It is because of this position adopted by Plaintiffs that poverty has come to play such a central role in this case.

The relationship between poverty and achievement raises two questions that challenge Plaintiffs' reliance on achievement as the appropriate test for constitutional compliance. First, to what extent is achievement determined by school policies and programs, as opposed to other factors? This question was directly addressed by the Senate and the House in their Cross-Appeal Brief under the statement, "Bad achievement is not caused by bad schools." (Cross-Appeal Br. of Resp'ts/Appellants at 54-56). This is a fundamental question that must be considered and cannot be ignored. If poor achievement is caused by factors that are outside of the school system, the poor achievement reveals less about the schools than it does about other factors. The second question that must be addressed if a certain level of achievement is held to be the determinant of constitutional compliance is whether the General Assembly can remedy the problem through the enactment of different programs and policies than the ones currently in place. If the condition that is deemed to be the violation cannot be remedied by governmental action, this Court should think long and hard about whether the violation has been properly established.

These are the issues that require this Court to consider the evidence regarding the effect of poverty on achievement. The issue is not whether "poor children can learn," as Plaintiffs repeatedly suggest. Nor is it whether it is wise social policy to try to ameliorate the effect of poverty on achievement to the extent that it is possible. The issue is simply whether achievement is the appropriate measure of constitutional compliance, given that achievement is affected by many different factors, including poverty. Given the undisputed evidence in the record in this case, the Senate and the House urge this Court to reject Plaintiffs' attempt to impose equal achievement as the test of constitutional adequacy.

B. What is the evidence regarding the effect of poverty on achievement?

There is no conflict in the evidence regarding the effect of poverty on achievement. Every witness who considered the question agreed that poverty strongly affects achievement. (REC002283, l. 22—REC002284, l. 8 (Hawkins); REC 002336, ll. 13-23 (Hawkins); REC014026—REC014027 (Walberg); REC016005, ll. 14-20 (L. Anderson); REC014773—REC014775). This evidence is so powerful and persuasive that the trial court found a causal relationship between poverty and achievement. (See REC000200 ¶ 427). The fact that the Senate and the House cited only one exhibit in their Brief to illustrate the relationship is therefore a hollow objection. (Pls.' Br. 66).

It is important to note that the relationship between poverty and achievement is not a phenomenon that is peculiar to the Plaintiff Districts. The same relationship is true in every district in this state, and indeed in the nation. (REC002336, ll. 13-23; REC014773, l. 10—REC014774, l. 25). It is not surprising that the effect of poverty is more significant in the Plaintiff Districts because they have larger percentages of their

students who are on free and reduced lunch. Plaintiffs argue that their relatively lower achievement is the result of bad teachers and insufficient "resources." (*See* Br. of Appellants/Resp'ts 17-18; 113-118). Defendants point out, on the other hand, that this relatively lower achievement is principally a function of the number of students on free and reduced lunch. This relationship is not really in dispute. Plaintiffs' own expert Dr. Hawkins even testified that if he were told the percentage of students in a school on free and reduced lunch he could predict the PACT scores *without knowing anything more*, like the credentials of the teachers or the amount of money spent. (REC002341, l. 25—REC002342, l. 22). When so much of achievement is a function of demographic information alone *no matter the characteristics of the school, including how much is spent per pupil*, achievement obviously does not reveal much about the schools themselves.

Dr. Walberg's chart (REC038773—REC038774) illustrates the extent to which the factors inherent in poverty that affect achievement are not related to the education system. Plaintiffs object that the Senate and the House do not mention the effect of schools. (Pls.' Br. 66). Plaintiffs continue to miss the point. The question of the extent to which schools can overcome the effects of poverty on achievement is fully discussed below. The principal point of Defendants' discussion of Dr. Walberg's chart is that schools are not among the *causes* of poor performance by poor students. Poor performance is caused by factors such as family status, divorce, and frequent moving. As the trial court found, these issues lie outside of the scope of traditional education policy. (REC000200 ¶ 427). Therefore, as Defendants have consistently maintained, poor achievement is not the result of bad schools. Indeed, schools can do only so much to

remedy the effect of poverty on achievement, which is not the same thing as saying that schools *cause* poor achievement. That is not to say that schools have NO effect on achievement, but the extent of the effect of poverty overwhelms every other factor, as conceded by Plaintiffs own witnesses. (REC002266, ll. 6-16 (Hawkins); REC002283, l. 22—REC002284, l. 8 (Hawkins); REC002343, l. 16—REC002344, l. 5 (Hawkins); REC016004, l.1—REC016007, l. 8 (L. Anderson) (comparing the effect of poverty in various teacher variables)). Poor achievement therefore cannot and should not be used to establish a constitutional violation.

C. Controlling for poverty is appropriate and necessary.

Plaintiffs suggest that there is something insidious about controlling for poverty in certain statistical analyses in this case. (Pls.' Br. 71-72). Plaintiffs resort to the familiar straw man fallacy by citing Dr. Armor's testimony in another case (which is different from his testimony in this case) and then attacking it. Plaintiffs' objections to this non-controversial statistical technique are uninformed and unfounded. Plaintiffs' own expert Dr. Lorin Anderson controlled for poverty in his analyses and explained why it was necessary to do so:

> There is a vast body of research in this field that shows that socioeconomic status affects student achievement. And so if you don't take account of that when you are trying to determine the effect of any kind of school input, teacher, teachers on continuing contract, teacher experience, spending, teacher pay, whatever, if you don't take account or control for student S.E.S. [socioeconomic status] then you are going to get a bad estimate, a biased estimate of the effect of whatever input you are looking at. So that's just—*that's the rule one of education research is you must control for S.E.S. if you are to draw or even attempt to draw casual inferences about what the relationship between input and student achievement*

(REC012956, l. 12—REC012957. l. 10 (emphasis added)). This explanation is completely consistent with the explanation provided by the Senate and the House in their Brief to which Plaintiffs object because it does not cite any authority. (*Compare* Defs.' Cross-Appeal Br. 20-21 *with* Pls.' Br. 68, n.21). Plaintiffs' own expert is more than sufficient authority for the very non-controversial proposition that one must control for SES before examining the relationship between any other input and achievement. Consequently, Plaintiffs' request that this Court "disregard Section 9 of Defendants' 'Statement of Facts' with the exception of any direct quotes from the trial court" (Pls.' Br. 68, n.21) should be granted only to the extent Plaintiffs agree that the testimony of Dr. Lorin Anderson (and any other expert proffered by the Plaintiffs who controlled for poverty) should similarly be disregarded.

Thus, as the Senate and the House have always maintained, to determine the effect of teacher experience or any other independent variable on student achievement one must control for poverty or the result will not be accurate. Plaintiffs choose to ignore this necessity and prefer the more simplistic and fallacious approach of simply comparing raw achievement data with raw input information and then asking this Court to conclude that the poor achievement is because of the inputs and not the percentage of students on free and reduced lunch. (*See, e.g.*, Pls.' Br. 79).

D. To what extent can schools overcome the effects of poverty?

Relying on poor PACT scores, the trial court found that the education clause requires the General Assembly to enact programs and policies that will overcome the effect of poverty on achievement. (REC000200-REC000201 ¶ 428). The Senate and the House have appealed this portion of the trial court's order precisely because the evidence

establishes that the ability of policy makers to overcome the effects of poverty on achievement is limited. Plaintiffs have again departed from the appropriate issue and attacked the straw man by misconstruing Defendants' argument as being that schools have no effect on achievement. (Pls.' Br. 67). That is a patent misstatement of the Senate and the House's position and illustrates another attempt by Plaintiffs to argue against their own evidence.

Plaintiffs' expert Dr. Hawkins testified that two-thirds of all differences in PACT scores across the entire state are the result of socio-economic differences in the students taking the test. (REC002339, ll. 15-19; REC000198 ¶ 420). This is Plaintiffs' own evidence. Thus, according to Plaintiffs and agreed to by the Senate and the House, the range of differences in PACT scores would only be one-third as great as they currently are if each school had the same percentage of students on free and reduced lunch. This one-third difference can be attributed to many other factors, including individual aptitude, prior achievement, and school quality. (*See* REC016008, ll. 10-20; REC014364, ll. 3-12). Thus, although school factors play a role in achievement differences, Plaintiffs vastly overstate the significance of that role and, more importantly, the extent to which "resources" affect the role that schools do play.

This was established in part by Defendants' expert, Dr. Armor, who concluded, along with Dr. Podgursky, that teacher credentials have very little to do with how students perform. Plaintiffs attack Dr. Armor's analysis by saying that he "virtually eliminated the impact of teacher quality." (Pls.' Br. 72). Plaintiffs, however, ignore Dr. Lorin Anderson's own calculation of the effect of a composite of teacher quality variables on achievement. Contrary to Plaintiffs' contention, Dr. Anderson actually

concluded that the combined teacher effect had a 0.11 relationship to PACT scores. According to Dr. Anderson, that means that for every one percent improvement in the teacher quality variable, you expect to get a one tenth of one percent improvement in PACT scores. (REC016008, ll. 10-20). Therefore, to obtain a ten percent improvement in PACT scores, you would have to improve the teacher quality variable by 100%. To obtain even a ten percent improvement, one would have to double the number of teachers possessing the characteristics measured by Dr. Anderson. Moreover, Dr. Anderson also concluded that there was NO statistically significant relationship between teachers with advanced degrees, which is one of the inputs about which Plaintiffs have complained from the outset of the case, and student achievement. (REC016005, l. 1—REC016007, l. 8 (L. Anderson)). Defendants' experts Dr. Podgursky, Dr. Wolkoff, and Dr. Armor did not find any significant relationship between any teacher credential and achievement. (*See* REC035926 (teacher experience and achievement (math)); REC035911A (professional development days and achievement (math)); REC035927 (advanced degrees and achievement (math)); REC035928 (advanced degrees and achievement (language arts)); REC035929 (continuing contracts and achievement (language arts)); REC035930 (out-of-field certification and achievement (language arts)); REC035931 (teacher experience and achievement (language arts)); REC035932 (professional development days and achievement (language arts)); REC035934 ((continuing contracts and achievement (math)); REC035935 (out-of-field certification and achievement (math)); REC035936 (average teacher experience and achievement (math)). *See also* Defs.' REC040244 (teacher certification and achievement, grades 3-5 (2003)); REC040265 (teacher certification and achievement, grades 6-8 (2003)); REC040269

(teacher certification and achievement, grades 3-5 (2002)); REC040296 (teacher certification and achievement, grades 3-5 (2001); REC040282 (teacher certification and achievement, grades 6-8 (2002)).

This evidence, including Plaintiffs' own analysis, vividly illustrates the attenuated relationship between the inputs that the General Assembly can provide and the outcomes that can be obtained. Good achievement simply cannot be legislated or bought, even by the best intentioned policy maker or judge. With respect to overcoming the effect of poverty on achievement, the relationship is more remote. As Dr. Guthrie explained, education policy experts have not been able to come up with programs and policies that will accomplish that result. (REC014372, ll. 2-17). Dr. Walberg pointed out that among the strategies that work the best are accountability systems like the one already in place in South Carolina. (REC014061, l. 11—REC014063, l. 25; REC014064, l. 1—REC014066, l. 25; REC014067, l. 17—REC014069, l, 21). Additionally, as Plaintiffs go to lengths to highlight on pages 73-74 of their Brief, many of the things that improve achievement, such as assigning homework and using reinforcement in instruction, do not require any policy changes and can and should be employed at the present time and with the present resources. Dr. Guthrie pointed out the example of Peggy Stafford's leadership at South Elementary School in Dillon County. (REC014474, l. 8—REC014477, l. 6). Her school's students perform very well academically with very few resources. (REC014637, l. 11—REC014639, l. 10).

E. Equal achievement cannot be legislated.

In light of the evidence regarding poverty and achievement, it should be clear that this is not a problem that be legislated away. It is precisely because the imperfect ability

of the legislature to improve achievement generally and especially for student on free and reduced lunch, that achievement by those students should not be taken as establishing a violation of the education clause, and equalized or even improved levels of achievement should not be established as a benchmark against which to judge future constitutional compliance. That does not mean that such improvement should not be the goal, because it is. Nor does it mean that the issue is unimportant, because it is important. It only means that this is not the standard under which the intervention of the judicial branch into this distinctly legislative area should be triggered.

VI. Providing the Opportunity to Acquire a Minimally Adequate Education Does Not Require Equal Achievement.

Plaintiffs' position in this case can be easily summarized: Because the average achievement of poor students is not as high as the average achievement of other students, poor student do not have the opportunity to acquire a minimally adequate education. Plaintiffs quote from the trial court's order and argue that because evidence exists that certain programs can improve achievement for at-risk students, these programs are constitutionally required. (Pls.' Br. 64). Plaintiffs then again improperly accuse Defendants of arguing that "poor children can't learn," when in fact the opposite is true. (Pls.' Br. 65). Plaintiffs' argument makes three fundamental errors. First, neither Article XI, section 3 nor *Abbeville County* requires equal achievement as the standard for constitutional compliance. Second, the fact that not all at risk students do not achieve at desired levels does not mean that they did not have the opportunity to do so. Third, the fact that certain programs might improve the achievement of at risk students does not mean that they are required to create the opportunity to acquire a minimally adequate education.

A. Equal achievement is not the standard.

If *Abbeville County* required that the achievement of poor students equal the achievement of others in order to satisfy the constitutional requirement, this case could not be defended. It is inarguable that poor students on average do not achieve at the same levels as their more affluent peers. The Senate and the House have never denied this and have never tried to argue otherwise.[19] This fact is obvious from the data. This disparity, however, does not establish a constitutional violation.

In fact, achievement at any level is not the constitutional standard, which is expressly stated in terms of opportunity. *Abbeville County* does not establish an achievement standard in absolute, much less comparative, terms. Indeed, this Court dismissed the only equal protection claim ever advanced by Plaintiffs in the same opinion. It is therefore impossible to read *Abbeville County* to require equal achievement among all subgroups of students as the only appropriate evidence of constitutional adequacy.

Plaintiffs' position in this case, however, does exactly that. Time and again they return to the fact of unequal achievement as the justification for judicial intervention in the education system and then attempt to disparage any arguments suggesting that the legal standard is something else. Presumably, Plaintiffs would not accept any educational outcomes that do not equalize achievement between students on free and reduced lunch and other students. This simplistic analysis, however, misses the point entirely, and

[19] Plaintiffs are guilty of another gross mischaracterization when they assert that the Senate and the House argue that achievement is about the same after controlling for poverty. (*See* Pls.' Br. 66-69). As is discussed in the context of that portion of this Reply, that is not and has never been the Senate and the House's position.

Plaintiffs cannot and have not established a constitutional violation on the basis of unequal achievement.

B. Achievement and opportunity are different.

Plaintiffs fail to offer any reasoned analysis regarding the actual achievement that is obtained by students in the Plaintiff Districts. The Senate and the House challenged Plaintiffs to answer the following question: How do so many students in the Plaintiff Districts pass the rigorous PACT test if they do not have the opportunity to do so? (*See* Defs.' Br. 47-51). Plaintiffs have offered no explanation and attempt to dodge the issue by arguing that the Senate and the House rather than the Plaintiffs are inconsistent. (Pls.' Br. 65, n. 19 ("Defendants cannot have it both ways. Either schools make a difference or they don't.")). The Senate and the House do not want it both ways. The Senate and the House have consistently argued that students in the Plaintiff Districts have the opportunity to acquire a minimally adequate education in the existing school system with the existing policies, programs, teachers, and with the existing levels of funding. If that were not the case, then no student on free and reduced lunch would be able to pass PACT, pass the exit exam, graduate, go to college, or even get a job. Plaintiffs must necessarily concede that at least some portion of the students are acquiring at least a minimally adequate education in the existing schools.

Yet, Plaintiffs ignore the evidence of success and focus exclusively on those who fail and argue without any evidentiary support that "the abysmal educational results in the Plaintiff Districts are attributable to Defendants' failure to provide them with adequate educational opportunity." (Pls.' Br. 65). This statement cannot be supported by the evidence, which is uniformly to the contrary. (*See* Defs.' Br. 41-44). Plaintiffs did not

adduce any evidence of any student who failed because he or she was not provided the opportunity to acquire a minimally adequate education. It therefore cannot be said that all those who fail do so because they were not provided the opportunity to learn. As the Senate and the House have previously noted, if that were true, one would have to conclude that male students do not have the same opportunities that female student do, even though they sit in the same classes and are taught by the same teachers for the same amount of time using the same instructional materials. It would defy logic to conclude that their opportunities are different simply because their achievement is different. Plaintiffs have not carried their burden of proof, and the evidence in fact is that students have the opportunity to acquire a minimally adequate education, even though not all students do so. On the other hand, poor students in the Plaintiff Districts who acquire a minimally adequate education do so because they were provided that opportunity in the schools.

C. The possibility that certain programs might improve achievement does not mean that they are constitutionally required.

Plaintiffs argue that because certain programs might have beneficial effects on achievement of students on free and reduced lunch, they are therefore constitutionally required. (*See, e.g.,* Pls.' Br. 64). This fundamentally misconstrues the nature of the constitutional duty as set out in Article XI, section 3 and as explicitly interpreted by this Court in *Abbeville County.* The duty to create the opportunity for students to acquire a minimally adequate education is not the same as a constitutionally imposed duty to enact every program that might be desirable or that could arguably improve achievement. Plaintiffs fail to appreciate the difference and urge this Court to assume the responsibility that is expressly left to the General Assembly to determine the manner in which

educational opportunities shall be delivered to students in South Carolina. *Abbeville County*, 335 S.C. at 69, 515 S.E.2d at 540-541.

As the Senate and the House have repeatedly expressed throughout this case, South Carolina has high aspirations for student achievement. Failure to achieve those aspirational goals, however, is not a constitutional violation. *Abbeville County* sets the floor below which the General Assembly may not fall, but everything above that floor rests exclusively within the judgment of the legislative branch. Plaintiffs, however, fail to recognize this fundamental distinction and heap criticism upon the current educational system because it is not everything that Plaintiffs think it should be. For as the trial court correctly observed:

> This case is not a forum about what ought to be or what policy choices the Court would make if it were authorized to do so. Accordingly, this Court must decide this case not in terms of whether the Court believes that one policy is superior and another is wanting, but rather based on whether the system of education policies enacted by the General Assembly sufficiently provides the opportunity for students to acquire a minimally adequate education.

(REC000061 ¶ 47).

This distinction aptly summarizes the problem with much of Plaintiffs' arguments in this case. Plaintiffs focus on what they think should be done to improve education in South Carolina, rather than whether the existing system provides the opportunity for students acquire a minimally adequate education. The fact that certain programs might be regarded by Plaintiffs, or even by this Court, as beneficial does not mean that they are constitutionally required and does not mean that in their absence, students do not have the opportunity acquire a minimally adequate education. Nor does a determination that the education system is constitutional mean that it could not and should not be improved. As

is discussed below, however, it is doubtful that any set of programs exist that would accomplish Plaintiffs' goal of equalizing achievement. Equal achievement is not the standard for compliance with Article XI, section 3. Plaintiffs' arguments that are based upon an equal achievement standard must therefore be rejected out of hand.

VII. PACT Scores Establish the Presence of the Opportunity to Acquire a Minimally Adequate Education.

Plaintiffs argue that PACT scores are particularly significant in this case. (Pls.' Br. 81). Defendants agree. The fact that large percentages of students who are on free and reduced lunch in the Plaintiff Districts score at Basic or above on PACT establishes without question that the opportunity to acquire a minimally adequate education is present in the Plaintiff Districts for poor students. (*See* discussion in Defs.' Cross-Appeal Br. 40-52). Plaintiffs vainly attempt to deny the obvious and fail to offer any explanation as to how so many students pass the PACT test if they did not have the opportunity to acquire a minimally adequate education. Instead, Plaintiffs perpetuate the fallacy of examining raw PACT scores without regard to the socioeconomic characteristics of the students in their districts.

A. Socioeconomic characteristics of students must be taken into account when considering PACT scores.

Defendants claim in their Brief that the authors of the PACT test expressly cautioned that raw scores should not be used to make cause and effect statements about the effectiveness of instruction offered to different groups of students. (Defs.' Cross-Appeal Br. 46-47; *see also* REC037113). Plaintiffs argue that the omission of a sentence from the quoted material somehow changes the plain meaning of the statements quoted

by Defendants.[20] (Pls.' Br. 82). Plaintiffs quote the material in full, material which is directly contrary to the argument that Plaintiffs make in this case. As the PACT User Manual expressly states, "[c]omparisons of scores among schools or districts should not be made unless differences in the characteristics of the students are accounted for in those comparisons." (REC037113). Yet in this case, Plaintiffs argue that poor PACT scores are evidence of poor instruction and the failure of the entire system of educational policy. Plaintiffs cannot deny, however, that the PACT User's Guide expressly states that PACT scores "cannot and should not be used as a basis for making cause and effect statements about the effectiveness of instruction to different groups." Nor can Dr. Lindsay's self-serving effort to construe this language as applying only to individual students be taken seriously in light of the language used in the Guide.

Just as it is a "misuse" of the data "to equate high PACT scores with educational quality," (REC037113), it is also beyond debate that low PACT scores do not establish poor educational quality. As Defendants have previously demonstrated, PACT scores may be used to establish the presence of the opportunity to acquire a minimally adequate education.

B. Basic or above on PACT is at least a minimally adequate education.

Plaintiffs dispute Defendants' argument that those who scored at Basic or above on PACT may have obtained more than a minimally adequate education. (Pls.' Br. 84). In so doing, Plaintiffs continue their assertion that poor students cannot learn and make that charge even when it is obvious that those students have learned a great deal. (*See*

[20] The sentence reads: "Users of the data should remember that test data constitute a single source of information that should be used in conjunction with other relevant information to evaluate educational quality." Contrary to Plaintiffs' assertion, this hardly "changes the meaning of the excerpt." (Pls.' Br. 82).

REC000095—REC000096 ¶ 109; REC011124, l. 20—REC011125, l. 8; REC014392, ll. 2-21; REC014401—REC014402).

For purposes of this case, however, it really does not matter whether passing PACT scores represents more than a minimally adequate education because Plaintiffs concede that such a score is at least the equivalent of a minimally adequate education. (Pls.' Br. 84). There should therefore be no further issue about whether it is possible for poor students in the Plaintiff Districts to obtain at least a minimally adequate education. Likewise, there should be no further dispute about whether students in the Plaintiff Districts have the opportunity to acquire a minimally adequate education. Plaintiffs' argument to the contrary falls prey to the fallacy expressly cautioned against in the PACT User Guide. They cite data showing that students in the Plaintiff Districts score less well overall on PACT than students in other districts and conclude that the quality of instruction offered to the Plaintiff student is worse than the quality of instruction offered to other students. (Pls.' Br. 85). The data simply do not establish this conclusion. Moreover, *Abbeville County* does not require that at-risk students score the same as other students. *Abbeville County* only requires that students have the opportunity to acquire a minimally adequate education, which is clearly established by the PACT scores.

C. Opportunity is not subjective.

Plaintiffs make the argument that "opportunity is a subjective concept." (Pls.' Br. 86). By this, Plaintiffs suggest that the education clause requires the General Assembly to provide whatever individual programs are arguably necessary for individual students to insure that every student passes PACT. *Id.* This is a concept not expressed in the text of the constitution or in *Abbeville County* and represents a radical departure from any

ordinary standard of measuring opportunity. Under Plaintiffs' view, the General Assembly is responsible for insuring that every child passes PACT, no matter what may be required in a given case to make that happen. For example, if a student elects not to attend class during the school year, in Plaintiffs' view, he or she has not been provided the opportunity to learn and therefore must be provided with summer instruction. This argument is a blatant attempt to convert the opportunity standard of *Abbeville County* into one of achievement and to negate any responsibility on the districts, schools, parents, and students to see that students take advantage of the opportunities provided. This is not the law. More importantly, Plaintiffs have not proven that the failures of individual students are the result of the education system, which is certainly their burden if they seek to argue that the General Assembly must legislate on a student by student basis.

VIII. Early Childhood Education for Children Under Five Years Old is Not Within the Scope of the Education Clause.

A. South Carolina's constitutional and statutory history is a valid reference point for determining the scope of the current education clause.

In support of their contention that early childhood intervention for children under five years of age is within the scope of the education clause, Plaintiffs begin with the unremarkable observation that "[o]ne of the judicial branch's principal duties is to interpret the meaning of the constitution." (Pls.' Br. 88). The Senate and the House do not dispute this fact. Indeed, *Abbeville County* recites that very principle of law. *Abbeville County*, 335 S.C. at 66, 515 S.E.2d at 539 ("It is the duty of this Court to interpret and declare the meaning of the Constitution.").

Yet, in response to the Senate and the House's historical account of the development of the education clause, Plaintiffs assert, "Asking this Court to cast back to

1895 and rely on the intent of the framers of the 1895 Constitution, who explicitly rejected a 'uniform' education system in favor of a 'separate-but-equal' doctrine that purposefully provided substandard educational opportunities to black South Carolinians, to inform this Court's judgment as to the meaning of the Education Clause in today's world lacks persuasive power." (Pls.' Br. 91). This is nothing more than an effort to once again interject race into this case—despite the trial court's repeated admonishments that this case is not about race. (*See* REC008347, l. 16—REC008355, l. 9 (ruling that race would not be treated as a separate factor, but would only be treated as "a collinear to poverty, free and reduced lunch and things of that nature); REC004561, l. 11—REC004562, l. 13 ("This is as we have said earlier not a racial discrimination case for reasons that are already in the record . . . ."); REC003403, l. 21—REC003409, l. 6 (ruling that the unique perspective of educating African-Americans, if there is one "has very little . . . impact in the outcome of this case.").

The Senate and the House are in no way "resurrect[ing] the 1895 Education Clause" and suggesting that this Court should "disregard[] the long and difficult road that led to the enactment of the 1973 clause." (Pls.' Br. 89). As observed in the Senate and the House's Cross-Appeal Brief, the 1973 education clause is relevant but must be considered in light of its historical context and statutory enactments. Courts agree that consideration of the history of a constitutional provision is a valuable tool in divining the intent of the framers, especially in education clause cases. *See Neb. Coalition for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 179-180 (Neb. 2007) (considering the constitutional history of Nebraska's education clause to establish the framers of the state's 1875 constitution intentionally omitted qualitative education standards); *Lake*

View Sch Dist. No. 25 of Phillips County v. Huckabee, 91 S.W.3d 472, 490-492 (Ark. 2002) (considering the constitutional history of the state's education clause as a starting point of determining whether public school funding system was constitutional); *Campaign for Fiscal Equity, Inc v. State*, 655 N.E.2d 661, 672 (N.Y. 1995) (Levine, J., concurring) (observing that "the constitutional history of the Educational Article shows that the objective was to 'make[] it imperative on the State to provide adequate free common schools"); *Council of Orgs & Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208, 219 (Mich. 1997) ("This review of the history of the education article shows that there was never a requirement that the local school board had to be appointed by a public body . . . ."); *Jenkins v Leininger*, 659 N.E.2d 1366, 1373 (Ill. App. 1995) (observing that "neither the text nor the history of the education article of the Illinois Constitution of 1970 support a conclusion that the right to a high quality education is a 'fundamental right'"); *Skeen v. State*, 505 N.W.2d 299, 308 (Minn. 1993) (observing that in order to evaluate plaintiffs' claim that a funding differential violates the constitutional duty to provide a uniform system of public schools, "the structure and constitutional history of the Education Clause must be analyzed to determine the meaning of the word 'uniform'"); *Opinion of the Justices*, 624 So.2d 107, 157 (Ala. 1993) ("Given the history and text of Alabama's education article, the Court determines that the right to education is fundamental . . . .").

South Carolina's history of race relations is sordid and unfortunate. This does not mean, however, that this Court has to dispose of a perfectly legitimate tool of constitutional interpretation out of a fear of being viewed as less-than politically correct.

Nor does it mean that the Senate and the House are less-than politically correct for asking that this Court consider the education clause in its historical setting.

Plaintiffs then ask, "If looking back in history, why not consider the intent of the framers of the 1868 Constitution, who desired a liberal system of education available to all children, regardless of race, social status, or geographical residence[?]" (Pls.' Br. 91). Fair enough. But a review of the 1868 Constitution reveals that contrary to Plaintiffs' contention, the Constitution of 1868 did, in fact, contain an age limitation. Article X of the 1868 Constitution provides, in part, as follows:

* * * *

> **Section 3.** The General Assembly shall, as soon as practicable after the adoption of this Constitution, provide for a liberal and uniform system of free public schools throughout the State, and shall also make provision for the division of the State into suitable school districts. There shall be kept open at least six months in each year one or more schools in each school district.
>
> **Section 4.** It shall be the duty of the General Assembly to provide for the compulsory attendance, at either public or private schools, of all children *between the ages of six and sixteen years*, not physically or mentally disabled, for a term equivalent to twenty-four months . . . .

* * * *

S.C. Const. art. X, §§ 3, 4 (1968) (emphasis added). Thus, whether one considers the 1868 Constitution or the 1895 Constitution, as a matter of historical fact, both constitutions contained an age limitation, and this limitation remained in the education clause until it was amended again in 1973.

Although the drafters of the 1973 education clause removed the age limitation, it is important to note that from at least 1960 to the present, by statute, the General

Assembly has prescribed an age limitation for school attendance. *See* S.C. Code Ann. § 59-63-20 (Rev. 2004), hist. With little exception, the General Assembly has made it "unlawful for any person who is less than five or more than twenty-one years of age to attend the public schools of this State, *including kindergarten* . . . ." S.C. Code Ann. § 59-63-20 (emphasis added). This provision has never been challenged.

In sum, the applicable statutory and constitutional provisions reveal that from 1868 to the present, South Carolina has always had a legal age restriction for school attendance.

B. The trial court erred in interpreting the education clause to require the state to provide early childhood intervention.

1. The trial court's ruling concerning the appropriate age to attend school amounts to a political question.

As observed by Plaintiffs, the trial court's responsibility in this case "was to determine whether the State was complying with its obligation to provide each child with the opportunity to acquire a minimally adequate education." (Pls.' Br. 94). But in so doing, the trial court redefined the appropriate age for children to attend school. As was the case in *Hoke County Board of Education v. State*, 599 S.E.2d 365 (N.C. 2004), a review of the constitutional and statutory provisions leads to the inevitable conclusion "that the determination of the proper age for school children has indeed been squarely placed in the hands of the General Assembly." *Id.* at 391. The court continued:

> In our view, not only are the applicable statutory and constitutional provisions persuasive in and of themselves, but the evidence in this case demonstrates that the trial court was without satisfactory or manageable judicial criteria that could justify mandating changes with regard to the proper age for school children. . . . First, our state's constitutional provisions and corresponding statutes serve to establish the issue as the exclusive province of the

> General Assembly and, second, there was no evidence at trial indicating the trial court had satisfactory or manageable criteria that would justify modifying legislative efforts.

Id. Concluding that mandating changes with regard to the proper age for school children is a non-justiciable political question, the *Hoke* court held that "any trial court rulings that infringed on the legislative prerogative of establishing school-age eligibility were in error." *Id.* The same is true in this case.

Thus, contrary to Plaintiffs' contention, the fact that the constitution "does not contain language expressly requiring early childhood education" is telling. (Pls.' Br. 96). Nothing in the language of the constitution or *Abbeville County* intimates a constitutional requirement for early childhood education. But a review of South Carolina statutory law reveals that the appropriate age requirement for school attendance is the exclusive province of the General Assembly. The General Assembly has determined that children younger than the age of five do not have a right to attend public school in South Carolina.[21]

With regard to school attendance, age limitations have always existed in South Carolina either by express constitutional directive or statutory law. The fact that the education clause "has no language expressly requiring the State to provide school facilities, teachers, and instructional materials" is immaterial to the issue of whether a

[21] A four-year old student may enter kindergarten in the public schools of this state, however, "if they will attain the age of five on or before September first of the applicable school year or have substantially initiated a public school kindergarten program in another state that has a different attendance age requirement from South Carolina." S.C. Code Ann. § 59-63-20(3) (Rev. 2004).

court can decide the proper age of school attendance.[22] As *Hoke County* makes clear, such a determination is a non-justiciable political question.

2. The empirical data does not support an inference that implementation of early childhood intervention programs will improve achievement in the Plaintiff Districts.

Plaintiffs make reference to several of their witnesses who testified about the "critical importance" of early childhood education. (Pls.' Br. 95). None of the witnesses identified by Plaintiffs based their opinions on empirical research, however. Dr. Smith, a defense expert, admitted that while he is "still an advocate for early intervention," he is not convinced that it is beneficial or cost effective. (REC013824, ll. 4-23). These programs also are controversial because "a lot of working parents substitute these programs for childcare" and a lot of experts question whether it is "appropriate for children the age of three to be in institutional care or are they better off in a home setting. And there are people who—who believe strongly on both sides of that and who adduce evidence on both sides of that." (REC013595, l. 10—REC013596, l. 5). Indeed, recent research reveals that for whatever reason, "students . . . in preschool programs tend to have more behavioral problems as they go through school." (REC013825, l. 22—REC013826, l. 15). Thus, although the popular conception is that early childhood intervention programs are good ideas, the record reflects that the desirability of such

[22] Plaintiffs' attempt to distinguish *Washington v. Salisbury* is misplaced. (*See* Pls.' Br. 96). Plaintiffs correctly note that the court held that "[i]t is evident that the summer school was not part of the free public school system required by the State Constitution." 279 S.C. 306, 308, 306 S.E.2d 600, 601 (1983). Thus, the *Washington* court concluded, after a review of the state constitution and state statutes, that summer school is not constitutionally required, and Plaintiffs' attempt to suggest otherwise is somewhat convoluted. Moreover, even assuming that *Abbeville County* invalidated the purported presumption that "the Education Clause required whatever the General Assembly had chosen to require," (Pls.' Br. 97), *Abbeville County* no more holds that summer school is required any more than it holds that early childhood intervention programs are constitutionally required.

programs is certainly questionable. Even if such programs are important, *Abbeville County* makes clear that their critical nature left to the General Assembly, not a court, to assess.

IX. This Court Has Not Determined That Separation of Powers or the Political Question Doctrine Are Not Applicable to This Phase of the Case.

Contending that this Court has already resolved the issues of separation of powers and political question, Plaintiffs assert that the Senate and the House "have given this Court no reason to disturb its prior ruling on the issue." (Pls.' Br. 98). However, the Senate and the House are not asking this Court to disturb a prior ruling on this issue. This Court's prior ruling merely found that the trial court erred in using separation of powers and the political question doctrine as the basis for declining to give meaning to the education clause. *Abbeville County*, 335 S.C. at 66, 515 S.E.2d at 539. In *Abbeville County*, this Court provided that meaning and remanded this case to the trial court for further proceedings. *Id.* at 68-69, 515 S.E.2d at 540. Plaintiffs continually obfuscate a court's duty to say what the law is with a court's duty to abstain from matters clearly within the province of the legislative branch. Because the trial court overstepped well established restraints on judicial power—restraints recognized by this Court in *Abbeville County*—the trial court's order violates separation of powers and political question doctrines, and nothing in *Abbeville County* prohibits these doctrines from applying to the trial court's order.

A. <u>The trial court effectively ordered a specific remedy by defining a specific violation.</u>

According to the trial court, "[t]he indisputable relationship between poverty and academic achievement and the magnified impact of poverty on the abilities of the very

youngest, the most vulnerable, form the basis of the obligation" for the state to provide each child in the Plaintiff Districts with the opportunity to receive a minimally adequate education. (REC000200—REC000201 ¶ 428). Therefore, the trial court concluded, it is incumbent upon the state "to create an educational system that overcomes, to the extent that is educationally possible, the effects of poverty on the very young, to the pre-kindergarten and kindergarten, to enable them to begin the educational process in a more equal fashion to those born outside of poverty." (*Id.*)

At this point, the trial court has merely identified the problem—*i.e.*, "[t]he indisputable relationship" between poverty and low PACT scores, and identified those most impacted by problem—i.e., "the very youngest." But the trial court did not stop there. The court went on to find that "[o]ne factor that limits the ability of schools to overcome the effect of poverty on achievement is the limited amount of time that children are in at school relative to the time that they are in a different environment." (REC000202 ¶ 430). The trial court acknowledged that "Dr. Guthrie opined that the educational community has not 'constructed a series of strategies and activities that would enable me or any other reasonable person . . . to assert that schools can overcome the effects of poverty in order to elevate achievement," but found that this "does not mean that others have not developed specific programs and strategies that, appropriately funded[,] show considerable promise in ameliorating at least the effect of poverty on achievement." (REC000203 ¶ 432 (citation and footnote omitted)). The specific program the trial court identified as showing "considerable promise" and indeed "necessary" to cure the constitutional violation is early childhood education. (REC000203 ¶ 432; REC000205—REC000206). The trial court concluded that a

constitutional violation exists in the Plaintiff Districts "because of the lack of effective and adequately funded early childhood intervention programs . . . ." (REC000207).

It is therefore radiantly clear that, according to the trial court, the Senate and the House have to design, adopt, and adequately fund not just any specific program or strategy, but rather an early childhood intervention program—one choice out of a myriad of policy choices specifically selected by the trial court as a remedy to cure the existing alleged violation. It is not for the courts to say that early childhood intervention programs are the most effective way to ameliorate the effects of poverty and improve education in the State. This is why in *Abbeville County*, this Court acknowledged that the courts of this state "are not experts in education." *Abbeville County*, 335 S.C. at 69, 515 S.E.2d at 540. The finding of the trial court that early childhood education is necessary to cure the alleged constitutional violation is without question a violation of separation of powers principles.

B. Separation of powers is applicable to this phase of the case.

According to Plaintiffs, "this Court's previous ruling that judicial restraint, separation of powers, and the political question doctrine are inapplicable is the law of the case and not subject to challenge in this appeal." (Pls.' Br. 98). This is absolutely correct insofar as the question concerns the duty imposed upon the General Assembly by the education clause, which was "the heart of [the] controversy" before this Court in *Abbeville County*. *Abbeville County*, 335 S.C. at 66, 515 S.E.2d at 539. This Court concluded that the trial court erred in holding that the education clause imposes no qualitative standards, finding instead that it was the duty of the courts of this state "to interpret and declare the meaning of the Constitution." *Id.* at 67, 515 S.E.2d at 539. It

was the trial court's failure to give meaning to the education clause that led this Court to conclude that the trial court "erred in using judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause." *Id.* The Senate and the House do not challenge this holding.

But merely because this Court found that the trial court erred in using certain well established restraints on judicial power as the basis for declining to decide the meaning of the education clause does not mean that those restraints are inapplicable to this phase of the case. The heart of the controversy presently before the Court in this cross-appeal is whether the trial court overstepped its authority in finding that early childhood intervention programs are necessary to cure the alleged constitutional violation. This is a distinct question, separate and apart from the question of the interpretation and meaning of the education clause.

Cases cited by Plaintiffs illustrate this point. In *Board of Education, Levittown Union Free School District v Nyquist*, the New York Court of Appeals held that the word "education" in New York's education clause "connote[s] a sound basic education . . . ." *Nyquist*, 57 N.Y.2d 27, 48 (N.Y. 1982). Thirteen years later, in *Campaign for Fiscal Equity, Inc. v. State*, plaintiffs brought an action challenging the constitutionality of New York State's public school financing system. *Campaign for Fiscal Equality*, 655 N.E.2d 661 (N.Y. 1995) ("*CFE I*"). The court held, among other things, that plaintiffs had stated a cause of action under Title VI regulations. *Id.* at 667-68. In *CFE I*, the majority expressly stated that its decision "does not extend the State's funding obligations" and that "any discussion of funding or reallocation is premature," since "[t]he question of remedies is not before the Court." *Id.* at 666, n.4 (citation omitted).

Subsequently, in response to the plaintiffs' request that the court "initiate a legislative/judicial dialogue by issuing guidelines to the Legislature for restructuring the system and directing—with strict timetables—that the necessary resources be provided," the New York Court of Appeals respected the separation of powers doctrine by declining plaintiffs' request. *See Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 344-45 (N.Y. 2003) ("*CFE II*") ("We have neither the authority, nor the will, to micromanage education financing."). However, the court ordered the state to "ascertain the actual cost of providing a sound basic education in New York City" and to develop a scheme that includes an accountability system to ensure that every school in the city has the resources to provide a sound basic education. *Id.* at 348.

On remand, the New York Supreme Court, Appellate Division, considered the proposition that the state had to ascertain the cost of a sound basic education and noted that "[j]ust as the other branches of government may not compel the judiciary to perform nonjudicial functions of government, the courts must refrain from arrogating powers to themselves." *Campaign for Fiscal Equity, Inc. v State*, 814 N.Y.S.2d 1, 8 (N.Y. App. Div. 2006) ("*CFE III*"). "[W]ithout the ability or the authority to review the entire State budget," the court continued, "'it is untenable that the judicial process . . . should intervene and reorder priorities, allocate the limited resources available and in effect direct how the vast [City and State] enterprise[s] should conduct [their] affairs.'" *Id.* (quoting *Jones v. Beame*, 380 N.E.2d 277 (N.Y. 1978)).

The *CFE III* court observed that while it could compel the state to perform a legal duty, it could "not direct how it should perform that duty, since '[t]he activity that the courts must be careful to avoid is the fashioning of orders or judgments that go beyond

any mandatory directives of existing statutes and regulations [and constitutional provisions] and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches.'" *Id.* (quoting *Klostermann v. Cuomo*, 463 N.E.2d 588, 541 (N.Y. 1984)). Thus, the court concluded, even though "[i]t is undisputed that the State has failed to appropriate and adequate amount of funding to meet its educational mandate as outlined in *CFE II* . . . . that neglect does not give the Court the authority to participate in budget negotiations . . . . The fact that the other two branches of government have not remedied constitutional failings in the past does not authorize the courts to commit their own constitutional violations now." *CFE III*, 814 N.Y.S.2d at 11.

These principles clearly apply to the question of the appropriateness of the trial court's remedy because in *Abbeville County*, this Court made it clear that it did "not intend by this opinion to suggest to any party that we will usurp the authority of [the legislative] branch to determine the way in which educational opportunities are delivered to the children of our State." *Abbeville County*, 335 S.C. at 69, 515 S.E.2d at 541. As established below, by effectively ordering a remedy by defining the alleged violation, the trial court made a determination of just that—a political determination that early childhood education was necessary to cure the perceived constitutional violation. Therefore, merely because this Court found that separation of powers and the political question doctrine do not operate to prevent the courts of this state from deciding the meaning of a constitutional provision does not mean that the applicability of these principles is now non-existent.

C. The trial court overstepped its authority.

This Court has consistently held that the General Assembly has virtually unlimited discretion in the field of public education. *See Horry County Sch Dist. v. Horry County*, 346 S.C. 621, 632, 552 S.E.2d 737, 743 (2001) ("The legislature has wide discretion in determining how to go about accomplishing its duty to 'provide for the maintenance and support of a system of free public schools'"); *Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 472 (1988) (recognizing that our constitution "places very few restrictions on the power of the General Assembly in the general field of public education . . . the details are left to its discretion").

Plaintiffs incorrectly assert that because of this discretion, the Senate and the House "deny that the courts have the power and authority to review the constitutionality of the system of public education . . . ." (Pls.' Br. 99). Nothing could be farther from the truth. There is no question but that the courts of this state have the power to review the constitutionality of the system of public education. *Abbeville County* makes this clear. "However, such specific court imposed remedies are rare . . . ." *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 643 (N.C. 2004). As was the case in *Hoke County*, such a remedy is inappropriate at this phase of the case for two related reasons: (1) the subject matter of this case—public school education—is clearly designated in our constitution to be the sole province of the legislature; and (2) the evidence and findings of the trial court "do not support the imposition of a narrow remedy that would effectively undermine the authority and autonomy" of the legislative branch. *Id.* (footnote omitted). Thus, the only thing that will render *Abbeville County* meaningless is allowing the trial court's order mandating early childhood education to stand despite this Court's proclamation that

"[w]e do not intend the courts of this State to become super-legislatures or super-school boards." *Abbeville County*, 335 S.C. at 69, 515 S.E.2d at 541.

In support of their contention that courts in other states have rejected separation of powers arguments to ensure constitutional compliance, Plaintiffs rely on several cases including *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). In *Rose*, the sole issue before the court was "the constitutionality of the system of statutes that created the common schools." *Id.* at 209. The Kentucky Supreme Court held that it was its sworn duty to decide constitutional questions "when they are before us by applying the constitution." *Id.* "'Our functions are to determine the constitutional validity and to declare the meaning of what the legislative department has done. We have no other concern.'" *Id.* at 214. Consistent with this principle, the Kentucky Supreme Court concluded that requiring the state to report to the court on their progress in educational reform was "a clear incursion, by the judiciary, of the functions of the legislature." *Id.*

> Our job is to determine the constitutional validity of the system of common schools within the meaning of the Kentucky Constitution, Section 183. We have done so. We have declared the system of common schools to be unconstitutional. It is now up to the General Assembly to re-create, and re-establish a system of common schools within this state which will be in compliance with the Constitution. We have no doubt they will proceed with their duty.

Id. Thus, as was the case in *Abbeville County*, the Kentucky Supreme Court rejected separation of powers arguments only in terms of interpreting the constitution but found the doctrine applicable in the remedial phase of the case.[23]

[23] All other cases Plaintiffs cite are in accord. In *Columbia Falls Elementary School District No. 6 v. State*, the issue before the court was whether a challenge to the adequacy of the

Plaintiffs insist that in determining that "the term 'all children' as used in the Education Clause . . . include[d] children under the age of five," the trial court "did not substitute its judgment for that of the legislature regarding the value of early childhood education." (Pls.' Br. 101-02). Instead, Plaintiffs contend, "the court substituted its judgment for that of the legislature regarding a question of constitutional interpretation." (Pls.' Br. 102). Both contentions are without merit.

First, as set forth above, the proper age at which children are required to attend public school is a non-justiciable political question. *See Hoke County*, 599 S.E.2d at 391 (holding that the trial court erred in infringing on the legislative prerogative of establishing school age eligibility since "[f]irst, our state's constitutional provisions and corresponding statutes serve to establish the issue as the exclusive province of the General Assembly and, second, there was no evidence at trial indicating the trial court has satisfactory or manageable criteria that would justify modifying legislative efforts").

---

state's education funding system presented a non-justiciable political question—essentially the same issue before this Court in *Abbeville County*. Like this Court, the Montana Supreme Court held that consideration of this issue was not precluded by separation of powers or the political question doctrine. *Columbia Falls*, 109 P.3d 257, 310 (Mont. 2005). In *Lake View District No 25 of Phillips County v. Huckabee*, the state contended that legislation pertaining to education was "*per se* unconstitutional and not subject to judicial review" under the state constitution. *Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002). The court rejected this argument, holding that "[t]he judiciary has the ultimate power, and the duty, to apply, interpret, define, and construe all words, phrases, sentences and sections of the Kentucky Constitution." *Id.* at 485. Interestingly, in response to plaintiffs' contention that the trial court should have required the state to take specific steps to render school funding constitutional, the court did not see that as the trial court's function: "Development of the necessary educational programs and the implementation of the same falls more within the bailiwick of the General Assembly and the Department of Education." *Id.* at 507. Finally, in *Campbell County School District v. State*, one of the many issues before the court was "[w]hether the court's exercise of its judicial power to declare school finance system statutes unconstitutional violates the doctrine of separation of powers[.]" *Campbell County*, 907 P.2d 1238, 1244 (Wyo. 1995). Like this Court in *Abbeville County*, the Wyoming Supreme Court found that separation of powers plays no role in the constitutional interpretive phase of litigation. *Campbell*, 907 P.2d at 1265 ("[As the Kentucky Supreme Court held in *Rose v. Council for Better Education*], [o]ur proper role is interpreting the meaning of the language of §§ 1 and 9 of Art. 7 in order to determine the duties those provisions impose upon the legislature.").

Second, in concluding that students in the Plaintiff Districts were being denied the opportunity to receive a minimally adequate education "because of the lack of effective and adequately funded early childhood intervention programs . . . " (REC000207), the trial court did more than interpret the constitution. By determining that the absence of early childhood intervention programs—as opposed to, for example, a plethora of remediation programs implemented in the first grade—was the cause of poor achievement and the cause of the purported constitutional violation, the trial court effectively substituted its judgment for that of the General Assembly and ordered the General Assembly to implement such programs:

> The child born to poverty whose cognitive abilities have been largely formed by the age of six in a setting largely devoid of the printed word . . . is already behind, before he or she receives the first word of instruction in a formal educational setting. *It is for that reason that early childhood intervention at the pre-kindergarten level and continuing through at least grade three is necessary* . .

(REC000205 (emphasis added)). This is not merely "advising that early childhood education services must be provided." (Pls.' Br. 112).[24] Rather, this conclusion by the trial court requires that in order to fulfill its constitutional obligation under the education clause, the state must provide early childhood intervention at the pre-kindergarten level through grade three. As the Massachusetts Supreme Court found, that is a policy decision for the legislature:

---

[24] Plaintiffs' insistence that the trial court merely advised the Senate and the House that early childhood services must be provided, (Pls.' Br. 112), and that the court "declin[ed] to order the General Assembly to take any curative action," (Pls. Br. 99), is belied by the fact that in a separate section of their brief, Plaintiffs observe that "[s]itting as fact-finder and judge, the trial court found that additional educational programs are necessary and that, under the auspices of the Education Clause, Defendants *must implement programs for children under five years of age*." (Pls.' Br. 88 (emphasis added)).

> Other programs might be equally effective to address the needs of at risk students, such as remedial programs . . . nutrition and drug counseling programs, or programs to involve parents more directly in school affairs. Each choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political.

Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1157 (Mass. 2005) (footnote omitted). *See also Hoke County*, 599 S.E.2d at 395 (concluding that the trial court erred in concluding that the state must provide pre-kindergarten classes for all at-risk students in Hoke County because "such a remedy is premature and could undermine the State's ability to meet its educational obligations for 'at-risk' prospective enrollees by alternative means").[25]

Plaintiffs contend that *Gregory v. Rollins*, 230 S.C. 269, 95 S.E.2d 487 (1956), somehow supports the notion that a court may order the legislature to expend public funds. (Pls.' Br. 103-04). Plaintiffs make this contention notwithstanding the fact that *Rollins* expressly holds that courts "may not, by mandamus or otherwise, direct the appropriation of public funds, for to do so would trespass upon the legislative domain." *Id.* at ___, 95 S.E.2d at 491. The fact that the *Rollins* court found that "[t]he courts may, by mandamus, require the proper officials of a county . . . to include a proper claim

---

[25] Given this clear holding, it is baffling that Plaintiffs contend that "[t]he North Carolina Supreme Court in Hoke similarly concluded that North Carolina was required to offer early childhood education services to prepare children for school so that they would be able to avail themselves of the opportunity for a 'sound basic education' when of school age, as required by the North Carolina Constitution." (Pls.' Br. 111). The citation provided by Plaintiffs (*Hoke*, 599 S.E.2d at 642) certainly sets forth the trial court's conclusion that the state's efforts toward providing remedial aid to at-risk prospective enrollees was inadequate, but further review of the case reveals that the North Carolina Supreme Court concluded that in its view, "while the trial court's findings and conclusions concerning the problem of 'at-risk' prospective enrollees are well supported by the evidence, a similar foundational support cannot be ascertained for the trial court's order requiring the State to provide pre-kindergarten classes for either all of the State's 'at-risk' prospective enrollees or all of Hoke County's 'at-risk' prospective enrollees." *Hoke County*, 599 S.E.2d at 642.

against the county in their next budget for county expenses, to be submitted to the General Assembly" in no way means that a court can order the legislature to appropriate money for specific purposes. *Id.* A writ of mandamus is a coercive writ that orders a public official to perform a ministerial duty. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 39, 512 S.E.2d 106, 111 (1999). A duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts and an act that leaves nothing to the exercise of discretion. Toal, *et al.*, *Appellate Practice in South Carolina*, 270 (2nd ed. 2002). "When the legal right is doubtful, *or the performance of duty rests in discretion* . . . a writ of mandamus cannot rightfully be issued." *In the Interest of Lyde*, 284 S.C. 419, 421, 327 S.E.2d 70, 71 (1985) (emphasis added).

On the other hand, how the General Assembly sees fit to provide school-aged children with the opportunity for a minimally adequate education is completely discretionary as evidenced by the fact that the court defined minimally adequate education "within deliberately broad parameters." *Abbeville County*, 335 S.C. at 69, 515 S.E.2d at 540. Nothing in *Rollins* compels a different result.

D. Not every alleged right gives rise to a judicial remedy.

Where, as here, the remedy for an alleged educational deprivation would require a court to order the state to spend money that the General Assembly has not appropriated, judicial intervention is not permitted. *See Rollins*, *supra*. It should be noted that "[n]ot every violation of a legal right gives rise to a judicial remedy." *Hancock*, 822 N.E.2d at 1161 (quoting *Bates v. Dir. of the Office of Campaign & Political Fin.*, 763 N.E.2d 6, 24 (Mass. 2002), citing in turn *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). This is

not to say that this Court is completely and at all times powerless to compel the General Assembly to act. As noted above, however, such remedies are rare, and as noted in the Senate and the House's Brief, out of extreme respect for separation of powers principles, courts typically only impose such remedies after it has become clear that the legislature has willfully ignored prior orders of courts directing the legislature to act. (*See* Br. of Resp'ts/Appellants at 128-29). Moreover, such a remedy would certainly be at odds with this Court's admonition that the courts of this state are not to become super-legislatures. *Abbeville County*, 335 S.C. at 69, 515 S.E.2d at 541.

E. <u>The trial court's ruling improperly decides a political question.</u>

As is the case with their arguments concerning separation of powers, Plaintiffs' gravest error in responding to the political question argument is their persistent failure to recognize the distinction between saying what the law is and ordering a remedy. Separation of powers principles and the political question doctrine apply to the latter, but not to the former. Plaintiffs' attempt to establish that the trial court's remedy does not fall within the characteristics of a political question as identified in *Baker v. Carr*, 369 U.S. 186 (1962) fails, in large part because of Plaintiffs' failure to recognize the distinction.

First, Plaintiffs cannot seriously dispute the fact that the choice of educational programs is constitutionally exclusively delegated to the legislative branch of government. To be sure, the policy choices of the legislative branch may be subject to judicial scrutiny, but a court cannot substitute its judgment for that of the General Assembly. *Dantzler v Callison*, 230 S.C. 75, ___, 94 S.E.2d 177, 189 (1956) ("Where

the primary duty and responsibility for determining a question rests with the Legislature, this Court will not substitute its judgment for that of the legislative authority.")

Second, Plaintiffs correctly state that constitutional compliance is a question for the courts. (Pls.' Br. 112). The Senate and the House do not dispute this. Yet again, a variety of possible solutions exist to cure the alleged violation, and the trial court's finding that early childhood education is necessary represents far more than a "clear guidepost to constitutional compliance." (*Id.*) If the General Assembly determined, for example, that the better choice is extended daycare, Plaintiffs would certainly resoundingly proclaim that the Senate and the House violated the trial court's express mandate for early childhood intervention.

Finally, courts in other jurisdictions have seen the wisdom of eschewing from becoming entangled in "the thickets that can entrap a court that takes on the duties of a Legislature," especially where there are no judicially manageable standards. *City of Pawtucket v. Sundlum*, 662 A.2d 40, 59 (R.I. 1995); *see also Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So.2d 400 (Fla. 1996); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1192 (Ill. 1996) ("[W]e will not 'under the guise of constitutional interpretation, presume to lay down guidelines or ultimatums for [the legislature].'"). In American jurisprudence, the greatest successes occur when each branch of government respects the authority of the coordinate branches. *State ex rel. Emerald People's Util. Dist. v Joseph*, 640 P.2d 1011, 1013 (Or. 1982) ("'The success which our form of government has achieved in the past may be attributed largely to the fact that each coordinate branch has recognized the fundamental and salutary principle that there must be no encroachment upon the other.'").

Abbeville County holds that "the South Carolina's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education." *Abbeville County*, 335 S.C. at 68, 515 S.E.2d at 540. The trial court erred in specifically selecting early childhood education as the means to cure the alleged constitutional violation. Accordingly, that part of the trial court's order requiring the Senate and the House to fund early childhood intervention programs should be reversed and judgment entered for the Defendants.[26]

X. The Trial Court Erred in Finding That the Plaintiff Districts Have Standing.

According to Plaintiffs, the Plaintiff Districts have standing because "(1) they have suffered a particularized injury, (2) they are a real party in interest, and (3) their claims are critically important to the public." (Pls.' Br. 114). The problem with Plaintiffs' argument, however, is that this Court has already held that political subdivisions—*e.g.*, school districts, cannot sue their creator, and no amount of creative interpretation of this well established principle of law changes that result.

In *Richland County Recreation Dist. v. City of Columbia*, this Court noted that "[t]he power to 'sue and be sued' given to almost all political subdivisions does not extend to a challenge of the acts of the creator of those subdivisions." *Richland County*, 290 S.C. 93, 95, 348 S.E.2d 363, 364 (1986). This principle of law does not turn on any particular set of facts. But an analysis of this Court's rationale is revealing.

---

[26] Plaintiffs rely on *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998) in support of their contention that a court has the power to order specific remedies to cure alleged educational funding deficiencies. A review of *Abbott* reveals, however, that it does not exactly stand for the proposition that the court found that pre-school education was required for all three and four year olds. Instead, as the court noted, "[b]oth parties recommended full-day kindergarten for all *Abbott* five-year olds," and there was "no fundamental disagreement over the importance of pre-school education." *Id.* at 461. In fact, "the State wanted all *Abbott* schools to implement full-day kindergarten programs as part of whole-school reform, in lieu of the half-day program now provided." *Id.* at 489.

In *Richland County*, this Court found that "the officials of the Recreation District are in fact the District since they exercise all powers conferred upon the District." *Id.* Similarly, the Plaintiff Districts are in fact the state since they are subject to the plenary control of the legislature of the state. *See Miller v. Farr*, 243 S.C. 342, ___, 133 S.E.2d 838, 842 (1963) (observing that "under our Constitution school districts have no permanent existence inasmuch as the General Assembly has plenary power to create new school districts or to consolidate existing school districts with other school districts"). As was the case in *Richland County*, because the state created the Plaintiff Districts as entities capable of exercising limited powers on behalf of the state, the Plaintiff Districts and the state are one in the same. Therefore, by suing the state, the Plaintiff Districts are suing their creator, an act expressly prohibited under South Carolina law.

"A lawsuit must be brought by the real party in interest." *Richland County*, 290 S.C. at 95, 348 S.E.2d at 364. In the present case, the Plaintiff Districts have no greater or different interest from parents, their children, and the taxpayers in those Districts in ensuring that students in the Plaintiff Districts are receiving a minimally adequate education. *See id* ("noting that public officials 'have no greater or different interest in the constitutionality of this law than any other citizen'").[27] The Plaintiff Districts are

[27] While *Abbeville County* identifies "each child" and the public at large as beneficiaries to the education system, *Abbeville County*, 335 S.C. at 66, 515 S.E.2d at 539, where the minor children, their parents, and taxpayers in the Plaintiff Districts have standing to sue, those interests are greater than that of the Plaintiff Districts and the presence of those individuals encompasses the beneficiaries identified in *Abbeville County*. The Plaintiff Districts simply do not have a particularized interest in this case.

therefore not the real party in interest. Accordingly, Plaintiff Districts do not have standing to maintain this action.[28]

Conclusion

The trial court erred in finding a constitutional violation based upon relatively lower achievement in the Plaintiff Districts. Poor achievement in the Plaintiff Districts is the result of socio-economic circumstances, and is not caused by poor education policy. The General Assembly cannot legislate equal achievement, which is not constitutionally required in any event. Inadequate resources are not the cause of the problem and more spending will not make it go away. While everyone would like to see better achievement by students in the Plaintiff Districts, and indeed all school districts in South Carolina, the existing levels of achievement are more than sufficient to demonstrate that the General Assembly has complied with its constitutional obligation to provide each child with the opportunity to acquire a minimally adequate education. Plaintiffs have not proven otherwise, and the orders of the trial court should be reversed and judgment entered for Defendants.

[Signature page follows]

---

[28] The cases referenced by Plaintiffs are distinguishable. In *Idaho School for Equal Educational Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993), the Idaho Supreme Court had already held that the "sue and be sued" statutory provision "was intended to allow the school districts to 'prosecute any actions they might deem necessary for the protection and preservation of the school funds and property.'" *Id.* at 736. This is not this case in South Carolina. In *Harrisburg School District v. Hickok*, 762 A.2d 398 (Pa. 2000), the Pennsylvania State Department of Education stripped the local school board of its power. The court found that the school board was sufficiently affected by this action as to have an interest in the outcome of an action challenging the outcome of the Education Empowerment Act. *Id.* at 404. In *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court found that if the system of common schools created by the General Assembly is not efficient, "the local board's duty is to make every effort to remedy that situation." *Id.* at 202. In the present case, *Abbeville County* vests the duty to provide the opportunity for a minimally adequate education squarely with the General Assembly, not the Plaintiff Districts. If that were the case, the Plaintiff Districts should be realigned as Defendants.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

Robert E. Stepp
Elizabeth Van Doren Gray
A. Jackson Barnes
Roland M. Franklin, Jr.
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondents / Appellants Glenn F. McConnell and Robert William Harrell, Jr.

Columbia, South Carolina

May 1, 2008

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.: 2007-65159

Abbeville County School District, *et al.* Plaintiffs,

Of Whom

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

as Guardian ad Litem, are

Appellants / Respondents,

vs.

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

Defendants,

Of Whom

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

Respondents / Appellants

and

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

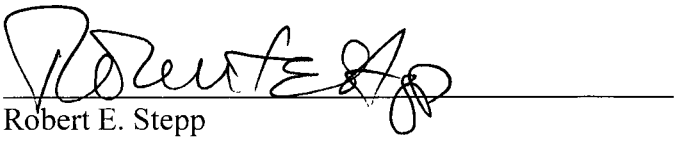
Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

[Signature page follows]

SOWELL GRAY STEPP & LAFFITTE, L.L.C.



Robert E. Stepp
Elizabeth Van Doren Gray
A. Jackson Barnes
Roland M. Franklin, Jr.
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondents / Appellants Glenn F. McConnell and Robert William Harrell, Jr.

Columbia, South Carolina

May 8th, 2008

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEE COUNTY
Court of Common Pleas
Thomas W. Cooper, Jr., Circuit Court Judge

RECEIVED
MAY 1 2008
S.C. SUPREME COURT

Case No. 2007-65159

Abbeville County School District, *et al.*,.....Appellants / Respondents

vs.

The State of South Carolina, *et al.*,.....Respondents / Appellants.

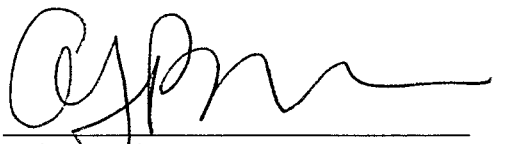
PROOF OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for the Respondents/Appellants, do hereby certify that on May 1, 2008 I have served all counsel in this action with a copy of the following by hand delivery :

1. Cross-Appeal Brief of Respondents/Appellants Glenn F. McConnell and Robert Willian Harrell, Jr.;
2. Reply Brief of Respondents / Appellants Glenn F. McConnell and Robert William Harrell, Jr.; and
3. Brief of Respondents / Appellants Glenn F. McConnell and Robert William Harrell, Jr.

Counsel Served: NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.
Carl B. Epps, III
Stephen G. Morrison
Laura Callaway Hart
Shelby K. Leonardi
Meridian, 17th Floor
1320 Main Street
Columbia, South Carolina 29201
Attorneys for Plaintiffs

OFFICE OF THE ATTORNEY GENERAL
Henry D. McMaster
J. Emory Smith, Jr.
Rembert Dennis Bldg.
1000 Assembly Street, Room 519
Columbia, South Carolina 29201



Robert E. Stepp
Elizabeth Van Doren Gray
A. Jackson Barnes
Roland M. Franklin, Jr.
SOWELL GRAY STEPP & LAFFITTE, L.L.C.
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondents/Appellants Glen F. McConnell and Robert William Harrell, Jr.

May 1, 2006