THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEE COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 93-CP-31-169

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

Caption continues on subsequent pages.

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

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

Of whom:

Allendale County School District,
Dillon County School District 2,
Florence County School District 4,
Hampton County School District 2,
Jasper County School District,
Lee County School District,
Marion County School District 7,
Orangeburg School District 3,
Lena Manning, individually,

Carolina Senate; Robert W. Harrell, Jr., as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives, ... Respondents-Appellants,

and

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

BRIEF OF AMICI CURIAE EDUCATION JUSTICE AT EDUCATION LAW CENTER; THE NATIONAL SCHOOL BOARDS ASSOCIATION; AND THE NAT IONAL ACCESS NETWORK, TEACHERS COLLEGE, COLUMBIA UNIVERSITY, IN SUPPORT OF PLAINTIFF SCHOOL DISTRICTS

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STATEMENT OF AMICI CURIAE

Education Law Center (ELC) is a non-profit organization in Newark, New Jersey established in 1973 to advocate on behalf of public school children for access to an equal and adequate education under state and federal laws. ELC works to improve educational opportunities for low-income students and students with disabilities through policy initiatives, research, public education, and legal action. ELC represents the plaintiff school children in the Abbott v. Burke litigation and continues to advocate on their behalf to assure effective and timely implementation of the educational programs and reforms ordered by the New Jersey Supreme Court. Because of its nationwide expertise in school finance, preschool, facilities, and other areas of education law and policy, ELC has recently established Education Justice, a national program to advance educational equity and opportunity and narrow achievement gaps. Education Justice conducts and disseminates research, develops policy positions and strategies, and provides analyses and technical assistance to advocates in states across the nation on matters such as equity and adequacy litigation, high quality preschool and other proven educational reforms, and policies that help schools build the know-how to narrow and close achievement gaps.

all of the other issues – NSBA has participated as *amicus curiae* in state funding adequacy cases in Ohio, New York, and Maryland.

The Campaign for Educational Equity at Teachers College, Columbia University ("the Equity Campaign") is committed to expanding and strengthening the national movement for quality public education for all by providing research-based analyses of key education policy issues. The Campaign promotes educational equity through focused research, convening of major symposium and conferences, development of policy positions on major issues involving equity in education, and demonstrations of improved policy and practice. An affiliated project of the Equity Campaign, also based at Teachers College, Columbia University, is the National Access Network ("Access"). Access's mission is to provide up-to-date information on developments regarding fiscal equity reform, fiscal equity litigations and education adequacy litigations to researchers, policymakers, advocates and attorneys throughout the United States. Access operates a website (www.schoolfunding.info) which is the primary source in the country for up-to-date information on fiscal equity and educational adequacy litigation, remedies (including cost studies), and related reform issues. Access assists those promoting education and school funding reform through workshops, conferences, consultations, and periodic e-newsletters.

INTRODUCTION

The Amici seek to assist the Court in reviewing the trial court's interpretation of the "minimal adequacy" standard and the application of that standard to the evidence presented at trial. In applying the "minimal adequacy" standard, the trial court overlooked this Court's reliance on a rich body of decisions from sister states that describe a minimally adequate education in substantive terms. The trial court also misread decisions

from sister states that, like South Carolina, define adequacy primarily in terms of educational opportunity, not educational achievement or outcomes.

In

ARGUMENT

I – A RICH BODY OF DECISION S FROM OTHER STATES COULD HAVE ASSISTED THE TRIAL COURT IN ADDRESSING ISSUES OF MINIMAL ADEQUACY AND EDUCA TIONAL OPPORTUNITY.

A. The Need for a Well-Educated Populace to Preserve a Republican Form of Government Has Been a Cornerstone of American Democracy.

The Founding Fathers of the American Republic strongly emphasized the importance of schools in building the new nation. A new, broad-based approach to schooling was needed in order to develop "a new republican character, rooted in the American soil . . . and committed to the promise of an American culture." Lawrence A. Cremin, American Education: The National Experience 1783-1876 (1980). This "new republican character" was to have two primary components. First was the implanting of "virtue," as defined by the classical notion that citizenship required a commitment to a shared public life of civic duty. See Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1969). Second was the notion that all citizens must obtain the knowledge and skills needed to make intelligent decisions. As John Adams put it:

B.

In the early years, most of these cases, including Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988), were "equity" claims that challenged the disparities in the levels of expenditure among different school districts in the state on equal protection grounds. Since 1989, most of the cases have been "adequate education" claims stemming from clauses in state constitutions that, like Article XI, § 3, of the South Carolina Constitution, guarantee students some basic or "minimally adequate" level of public education. Since the current wave of adequacy litigations began, the courts have upheld plaintiffs' claims in about two-thirds (19 of 28) of the state court liability decisions.[4]

Plaintiffs' extraordinary success rate in these cases is even more remarkable when one realizes that defendants have *never* prevailed in any case in which the courts fully examined the evidence as to whether the states were providing their schoolchildren with

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[4] Specifically, plaintiffs have prevailed in major liability decisions of the highest state courts or final trial court actions in the following 19 states: Alaska (Kasayulie v. State, No. 3AN-97-3782 (Alaska Super. Ct. Sept. 1, 1999)); Arizona (Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994)); Arkansas (Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2000)); Idaho (Idaho Schs. for Equal Educ. Opportunity v. Evans, 976 P.2d 913 (Idaho 1998); Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993)); Kansas (Montoy v. State, 120 P.3d 306 (Kan. 2005)); Kentucky (Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989)); Maryland (Bradford v. Md. State Bd. of Educ., No. 94340058/CE189672 (Baltimore City Cir. Ct. 2000)); Massachusetts (McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993)); Montana (Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257 (Mont. 2005)); Missouri (Comm. for Educ. Equal. v. State, 878 S.W.2d 446 (Mo. 1994) (final trial court decision; appeal dismissed on procedural grounds)); New Hampshire (Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997)); New Mexico (Zuni Sch. Dist. v. State, No. CV-98-14-II (McKinley County Dist. Ct. Oct. 14, 1999)); New Jersey (Abbott v. Burke, 575 A.2d 359 (N.J. 1990)); New York (Campaign for Fiscal Equity, Inc. v. State, 801 N.E. 2d 326 (N.Y. 2003)); North Carolina (Leandro v. State, 488 S.E.2d 249 (N.C. 1997)); Ohio (DeRolph v. State, 677 N.E.2d 733 (Ohio 1997)); Texas (Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989)); Vermont (Brigham v. State, 692 A.2d 384 (Vt. 1997)); and Wyoming (Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995)).

an adequate education. Defendant victories occurred only when the courts in a particular state ruled that the issue was not "justiciable" or that because of separation of powers reasons a trial should not be held and the evidence of inadequacy should not even be considered.[5]

C. Like South Carolina, Sister States Also Use an Opportunity Standard.

The trial court misinterpreted or overlooked other state court decisions when it concluded that they used an outcome standard, not an opportunity standard.[6]

Constitution "guarantee[d] every child of [the] state an opportunity to receive a sound basic education in our public schools." Leandro, 488 S.E.2d at 255 (emphasis added).

Many other state courts throughout the country have also upheld students' rights to the opportunity for an education, including both states with general, open language like that in the state constitutions of South Carolina[7] and New York,[8] and states like Georgia,[9] North Carolina,[10] and Washington[11] that have more "substantive" or "qualitative" language. (See generally 12/29/2005 Order ¶ 41.) By sidestepping these relevant and

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[7] "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State[.]" S.C. Const. art. XI, § 3. "[T]he South Carolina Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education." Abbeville, 335 S.C. at 68, 515 S.E.2d at 540 (emphasis added).

[8] "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. art. XI, § 1. "A 'sound basic education' . . . affords New York City schoolchildren the opportunity for a meaningful high school education, one which prepares them to function productively asiSl vc eareticipnt ." (Co)(a)40(mpaignfor aFiscl AEquty sv.State[]TJ /TT621 Tf 15.13

pertinent decisions of sister state courts, the trial court overlooked significant and sound analyses and jurisprudence that would have assisted in limning the contours of the opportunity standard.

II – THE TRIAL COURT'S RULI NG DID NOT SATISFY THIS COURT'S MANDATE TO D ETERMINE WHETHER SOUTH CAROLINA PROVIDES EACH CH ILD THE OPPORTUNITY TO RECEIVE A "MINIMALLY ADEQUATE" EDUCATION.

A. This Court Provided Clear, Manageable Standards to Guide the Trial Court's Deliberations.

This Court's mandate was to ensure that the state of South Carolina "provides the opportunity for each child to receive a minimally adequate education," which it defined as an education that included:

> providing students adequate and safe facilities in which they have the opportunity to acquire:
>
> 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science;
>
> 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and
>
> 3) academic and vocational skills.

Abbeville v. State, 335 S.C. 58, 68-69, 515 S.E.2d 535, 540-41 (1999).

Despite this clear guidance, the trial court mainly looked to dictionary definitions in an effort to interpret the parameters of this Court's "minimally adequate" standard, (12/29/2005 Order ¶ 37), thereby overlooking prior judicial pronouncements of the standard.[12] Immediately following the three-point outline definition of "minimally adequate" quoted above, this Court cited a number of cases from other states, including decisions of the highest courts of Kentucky, Massachusetts, North Carolina, and West

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[12] No high court has relied solely upon "plain and ordinary" meanings or dictionary definitions to determine the scope of educational opportunity or the meaning of educational adequacy. Compare 12/29/2005 Order ¶¶ 30, 31, 34, 37, & 38.

Virginia.[13] The trial court, however, declined to utilize these decisions and their wisdom. (See 12/29/2005 Order ¶ 41.)

Nevertheless, to a degree, the trial court followed this Court's mandate and the applicable constitutional standards. The trial court heard evidence from the parties that should have enabled it to describe a minimally adequate education with more particularity and to evaluate whether the opportunity for such an education was available in the Plaintiff Districts. This evidence included the following educational inputs and outcomes, and evidence concerning the impact of poverty in the Plaintiff School Districts:

- Student demographics, including poverty and class size;
- Achievement scores;
- Per-pupil spending levels and district ability to raise sufficient revenue;
- Teacher quality issues, including sufficiency of licensing, salaries, experience, turnover rates, and professional development;
- Facilities issues, including safety, sufficiency, and suitability of buildings, classrooms, athletic fields, etc.; and
- Effects of early childhood educational interventions in prekindergarten through third grade programs.

(See 12/29/2005 Order ¶ 53 & passim.)

However, the trial court's ruling derived from this evidence misconstrued this Court's mandate and ignored the instructive precedents of courts in sister states. For example, the trial court lamented that "the *Abbeville* court did not specify the skill

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[13] *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Sec. of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Randolph County Bd. of Educ. v. Adams*, 467 S.E.2d 150 (W.Va. 1995).

level[s] necessary" to meet the standard of a "minimally adequate education." (12/29/2005 Order ¶ 28.) There was, however, sufficient and appropriate guidance from this Court. In fact, the trial court "considered evidence directed to [this Court's] insightfully articulated language," and in turn articulated its own well-crafted description of the scope of opportunities to be afforded all children in South Carolina:

> The opportunities described in Abbeville are intended to give each child in South Carolina a chance at life: the opportunity to be a productive citizen, to engage meaningfully in the political process, to be adequately informed to serve intelligently on juries, to know his place in the world and how he can, through education, exercise choices in where to live and perhaps raise a family—in short, to receive the opportunity for an education sufficient to join with all South Carolinians as they progress through school and life with an appreciation of this great state and nation.

(Id. ¶ 30.)

Thus, the court below recognized the constitutional standard—required opportunity to acquire necessary skills—in meaningful and substantive terms. (See Id. ¶ 27.) The court needed to apply this required level of opportunity and these substantive terms throughout its analyses—of school facilities and teaching quality, for instance—to properly evaluate whether the required opportunity was available or unavailable to students in these districts. The substantial evidence of educational insufficiencies, when scrutinized in accordance with the trial court's own findings about essential opportunities, cannot support the conclusion that the facilities, teachers, and educational inputs in the Plaintiff Districts "provide the opportunity

B. Rulings of Other State Courts Are Relevant to Establishing the Contours of a "Minimally Adequate" Education.

The relevance of sister states' decisions in education adequacy cases is well illustrated by the fact that one of the precise issues raised on this appeal—defining the contours of a minimally adequate education—has been considered at length by other state courts.

Contrary to the trial court's assertion, the "minimally adequate" standard is not "unique" to South Carolina as a legal standard. (12/29/2005 Order ¶ 36.) The terms "minimal" and "adequate" have acquired legal meanings in education adequacy litigation cases that focus on the same questions posed in Abbeville In one case in New York, Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y. 1995) (CFE I), the court of appeals specifically invoked "minimally adequate" as a standard for defining educational opportunity. Also, the educational opportunities described in the Leandro case in North Carolina (cited by this Court in Abbeville, 335 S.C. at 68-69, 515 S.E.2d at 540-41), are identical to those set forth in this Court's definition of "minimally adequate." Therefore, the jurisprudence of these sister states' decisions is relevant.

Campaign for Fiscal Equity v. State of New York

The CFE case in New York contains sound reasoning for giving "minimally adequate" a fuller meaning than "barely adequate." In New York, the court of appeals was working with filling in the contours of a constitution that merely requires "a system of free common schools, wherein all the children of this state may be educated."[15] The New York court found that the State was required to assure that children were afforded

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[15] N.Y. Const. art. XI, § 1.

"minimally adequate" facilities and "minimally adequate" instruction.[16] But it emphasized, as did this Court, that this instruction must provide students with the opportunity to acquire substantive academic and vocational knowledge and skills, or, as the New York court put it, with the skills that they need to "function productively as civic participants capable of voting and serving on a jury."[17]

After reviewing the trial record, the New York Court of Appeals amplified its initial definition. First, it held that to "function productively," students needed to have employment skills that prepared them for more than "the ability to get a job . . . and thereby not be a charge on the public fisc." Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 331 (N.Y. 2003) (CFE II). In fact, students needed a "meaningful high school level education," id. at 332, because "the record establishes that . . . a high school level education is now all but indispensable." Id. at 331. In terms of civic skills, the court held that "productive citizenship means more than just being qualified to vote or serve as a juror, but to do so capably and knowledgeably."[18] Likewise, the trial court here has

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16 CFE I, 655 N.E.2d 661, 666 (N.Y. 1995).

17 Id.

18 801 N.E.2d at 331. The trial court explained at length the broad, diverse educational grounding in multiple fields of study necessary for any citizen to become a capable voter and juror in the 21st century:

> An engaged, capable voter needs the intellectual tools to evaluate complex issues, such as campaign finance reform [and] tax policy . . . . Ballot propositions…can require a close reading and a familiarity with the structure of local government . . . . Similarly, a capable and productive citizen doesn't simply show up for jury service. Rather she is capable of serving impartially on trials that may require learning unfamiliar facts and concepts and new ways to communicate and reach decisions with her fellow jurors. . . .

written that Abbeville described "the opportunity to be a productive citizen, to engage meaningfully in the political process, [and] to be adequately informed to serve intelligently on juries." (12/29/2005 Order ¶ 30.) The comprehensive view of an adequate education found in CFE, like the opportunity described by the trial court in Abbeville, rises above any mere dictionary definition of "minimally adequate."[19]

Leandro v. State[20]

Leandro provides a helpful reference point for understanding the concept of the opportunity to obtain a "minimally adequate" education, and illuminates the Abbeville trial court's struggle with this definition. The North Carolina Supreme Court explained that: "An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is

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> [J]urors may be called on to decide complex matters that require the verbal, reasoning, math, science, and socialization skills that should be imparted in public schools. Jurors today must determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud, to name only three topics.

Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 485 (N.Y. Sup. Ct. 2001).

[19] In terms of inputs, the Court of Appeals specified in CFE I that :

> Children are entitled to minimally adequate physical facilities and classrooms that provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

CFE I, 655 N.E.2d 661, 666 (N.Y. 1995). In CFE II, after reviewing the evidence at trial, it amplified these requirements by stressing the importance of qualified teachers, CFE II, 801 N.E.2d at 333-34, appropriate class sizes, id. at 334-35, "'instrumentalities of learning,' including classroom supplies, textbooks, libraries and computers," id. at 335, and science laboratories. Id. at 334.

[20] 488 S.E.2d 249 (N.C. 1997).

dilapidated, crowded, and substandard facilities, and wholly unsuitable and inadequate curriculum, instruction, and materials—to persist.

C. Overwhelming Evidence Shows That Children in the Plaintiff Districts Do Not Have the Opportunity for a "Minimally Adequate" Education, a Situation the Trial Court Wholly Failed to Redress.

Surprisingly, despite pages of evidence detailing the gross shortcomings in the Plaintiff Districts in the areas of facilities, curriculum, instruction, teacher preparation, etc., the trial court determined that Article XI, § 3's requirement of a "minimally adequate education" was satisfied in these districts (except for a lack of high quality early interventions in Pre-K through Grade 3). This conclusion is at odds with the virtually unanimous approach to educational adequacy followed by all of the other state high courts that have examined the issue, the courts that have looked at the meaning of "minimal adequacy," and the courts that have examined the educational elements necessary to have the opportunity to a substantive education.

There is no need to detail here the systemic educational deficiencies in the infrastructure and program elements in the Plaintiff Districts, extensive evidence of which is set forth in the record and cited in Plaintiffs' brief. By way of illustration, however, some of these sub-par conditions correspond directly to factors that other courts have cited as key to minimal adequacy:

- Poorly trained, inexperienced, and insufficient teaching staff, low salaries and high turnover, and inefficient professiona

- Unsafe, inadequate, and poorly maintained facilities; reliance on portable and other makeshift classrooms; lack of properly equipped science laboratories, pervasive mold and mildew; urine smells; lack of sufficient heat and/or air conditioning; termites, bats, and snakes; plumbing and sewage problems; and asbestos. (Plfs.' Brief at 70-84.)[23]
- Lack of instructional materials and supplies. (Plfs.' Brief at 86-90.)[24] See, e.g., CFE I

Another facet of a minimally adequate education required by this Court is "the opportunity to acquire . . . vocational skills."[25] Ample evidence at trial showed that not only did Plaintiffs' districts not have the staff and facilities to provide suitable vocational training, but local businesses testified that graduating students were not sufficiently skilled to obtain and hold entry-level jobs. (See Plfs.' Brief at 67-69.)

Although the trial court's findings on facilities and teaching were not supported by the evidence, the court did conclude from the evidence that it is impossible to provide a minimally adequate education for students in the Plaintiff Districts without "effective and adequately funded early childhood intervention programs designed to address the impact of poverty on their educational abilities and achievements." (12/29/2005 Order at

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[23] See, e.g., CFE I, 655 N.E.2d at 666 ("Children are entitled to minimally adequate physical facilities and classrooms that provide enough light, space, heat, and air to permit children to learn."); Lake View Sch. Dist. No. 25, 351 S.W.3d at 498-99 (facilities that are

170.) The trial court understood that significant, intensive educational programs beginning in preschool are necessary to prepare students—particularly those living in poverty or otherwise "at risk"—to be capable voters, knowledgeable jurors, and productive citizens.

Having found that poverty has a profound negative impact on education, and that effective remedial interventions are essential starting before kindergarten to help narrow socioeconomic achievement gaps, does it make sense to provide these supports only through third grade? Economist and Nobel Laureate James Heckman has examined the importance of continuing educational interventions past the early years:

> [H]uman capital investments are complementary over time. Early investments increase the productivity of later investments. Early investments are not productive if they are not followed up by later investments.

Heckman, J.J. and Cunha, F., The Technology of Skill Formation, American Economic Review, 97(2), 31-47 (2007). As a matter of common sense—economic, social, and educational sense—these students need continued support throughout their elementary and secondary school experiences.

Furthermore, limiting remedies to "early intervention" does not address the educational needs of the thousands of students in South Carolina who have already entered kindergarten without the benefit of prekindergarten, or who have already passed the third grade. How will they ever be able to receive the constitutionally mandated opportunity for a minimally adequate education? For the remaining nine to thirteen years of their public school experience,[26] all these students will continue to be "denied the opportunity to receive a minimally adequate education because [they lacked] effective

[26] This is assuming that they remain enrolled in one of the Plaintiff Districts through the end of high school.

branches then fashion and implement laws and regulations that remedy the constitutional defects found by the courts.

A. Contemporary State Educational Standards Have Provided Courts Substantive Content for the Constitutional Right to a Minimally Adequate Education.

One of the reasons why so many of the state courts have enforced the constitutional right to an adequate education in recent years is that both the need to do so and the means to do so have been brought to the fore by "standards-based reform." Commencing with the 1989 National Education Summit convened by President George H.W. Bush, the governors of all 50 states, business leaders, and educators began to work to articulate specific state academic goals.[28] All 50 states have developed extensive, comprehensive curriculum standards.

State standards are built on substantive curriculum standards in English, mathematics, social studies, and other major subject areas. These curriculum standards

student testing, all coming together to create a coherent, integrated system that will result in significant improvements in achievement for all students.[30]

These standards also provide judges workable criteria for defining the constitutional parameters of the concept of educational opportunity, and they provide significant input for "judicially manageable standards" and practical resolution of these litigations. As the Idaho Supreme Court stated:

> Balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 § 1 with the political difficulties of that task has been made simpler for this Court because the executive branch of the government has already promulgated educational standards pursuant to the legislature's directive in I.C. § 33-118.

a sound basic education as defined by the Supreme Court. Hoke County Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004).

Across the country, curriculum standards developed by legislatures and/or state departments of education provide clear articulations of what children need to learn and important data on whether they have, in fact, learned this material. These standards also provide practical benchmarks for determining whether all schools have been provided with sufficient resources to provide their students with a reasonable opportunity to meet the standards that the states themselves have established.

The curriculum standards also put into focus the fundamental goals and purposes of our system of public education. The overwhelming majority of state high courts that have defined an adequate education have focused on the importance of preparing students to be effective citizens and competitive participants in the economy. For example, this Court has defined minimum adequacy, inter alia, in terms of "fundamental knowledge of economic, social, and political systems and of history and governmental processes . . . and vocational skills."

In this case, the trial court should have looked to the state's detailed and comprehensive curriculum standards to help articulate the parameters of the constitutional right to an oppor

(1) read, view, and listen to complex information in the English language;

(2) write and speak effectively in the English language;

(3) solve problems by applying mathematics;

(4) conduct research and communicate findings;

(5) understand and apply scientific concepts;

(6) obtain a working knowledge of world, United States, and South Carolina history, government, economics, and geography; and

(7) use information to make decisions.

ceiling, for a minimally adequate education in South Carolina.[32] Indeed, one purpose of the standards, according to the state's Education Oversight Committee, is "to promote educational equity for all." Id. ¶ 104. Also, the General Assembly established that the purpose of the standards is to "promote the goals of providing every student" with competencies in the full scope of academic skills and knowledge. S.C. Code Ann. § 59-18-300 (2004) (emphasis added).

In enacting § 59-18-300, the General Assembly outlined the specific parameters of the educational opportunities that it expected all school districts to make available to every child in the state—i.e., opportunities to achieve a minimally adequate level of education. In response, the Board of Education promulgated detailed academic curriculum standards to fill in the legislature's outlines. A "minimally adequate" education has thus already been defined by the legislative and executive branches. This Court need only require that the State create a system of educational funding sufficient for the Plaintiff Districts to provide every student the opportunity to receive the education already defined by the State.

B. Sister State Courts Have Devised Workable and Effective Solutions in Adequacy Cases.

The successes of the remedies implemented in adequacy cases brought in other states are evident from the long-term gains in student achievement scores and other academic outcomes. In Kentucky, where the legislature instituted extensive reforms immediately after the Court's decision in Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989), free and reduced lunch students outscored students from similar

[32] "Article XI, section 3 requires not a ceiling, but rather a floor upon which the General Assembly can build additional opportunities for school children in South Carolina." (12/29/05 Order ¶ 40.)

backgrounds nationally by seven points in 4th grade reading and five points in 8th grade reading on the 2007 NAEP tests.[33] In Massachusetts, where the Supreme Judicial Court issued an extensive education adequacy decision in 1993,[34] between 1998 and 2004 the failure rate of 10th graders taking the highly challenging Massachusetts Comprehensive Assessment System (MCAS) exams dropped dramatically from 45% to 15% in math and from 34% to 11% in English language arts, and Massachusetts became the highest scoring state on NAEP.[35] Improvements in student achievement in state assessments in New Jersey in the wake of the Supreme Court's decision in *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), have also been dramatic. From 1999 to 2005, for example, mean scale scores rose nineteen points in 4th grade mathematics, with the greatest increases occurring in the thirty low-wealth districts that were the focus of the *Abbott* litigation,

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[33] Susan Perkins Weston & Robert F. Sexton, *Substantial and Yet Not Sufficient: Kentucky's Effort to Build Proficiency for Each and Every Child* (2007, Working Paper) available at www.tc.edu/symposium/symposium07/resource.asp. The legislative reforms in Kentucky included State-funded preschool for four-year-olds from low-income families and three- and four-year-olds with disabilities; after-school, weekend, and summer support; a statewide technology system for classroom instruction, accountability, and communication; and Family Resource Centers and Youth Service Centers to address home challenges. Id. at 4.

[34] *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993). Legislative reforms implemented in Massachusetts in 1993 included implementation of curriculum standards, revised teacher certification standards, student assessments and remediation programs for low-performing students, accountability safeguards for schools and school districts, and a new school funding formula with increased state contributions. *See* Paul Reville, *The Massachusetts Case: A Personal Account* (2007, Working Paper) available at www.tc.edu/symposium/symposium07/resource.asp.

[35] *See* Reville, *supra* n.34, *The Massachusetts Case*.

and almost halving the mathematics achievement gaps between the lowest wealth districts and the rest of the state.[36]

Legislatures and governors have responded positively (albeit with varying levels of promptness and enthusiasm) to judicial decrees in almost all of the adequacy cases. Arizona is one example of the successful implementation of a remedy in an educational adequacy case in response to a judicial mandate. In Roosevelt Elementary School District No. 66 v. Bishop

built and renovated schools throughout Arizona ever since, including in rural, predominantly minority school districts similar to the Plaintiff Districts in this case.[38]

Another successful solution is found in Arkansas in the *Lake View* cases. Beginning with *Lake View School District No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002) (*Lake View III*), *cert. denied*, 538 U.S. 1035 (2003), the state Supreme Court defined educational adequacy and gave the legislature a deadline by which to remedy the constitutional deficiencies. The court reviewed the legislature's actions and praised its progress in bringing the funding system into compliance with the state constitution. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 189 S.W.3d 1 (Ark. 2004) (*Lake View IV*).[39]

Experience with successful education adequacy cases has shown that constitutional rights in this area can be vindicated through the efforts of a state court fulfilling its prime responsibility to interpret the state constitution and determine whether the state's education finance system passes constitutional muster. For example, in Arkansas, the state Supreme Court delineated the respective roles of the complementary branches of government:

> 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. . . . The trial court's role and this court's role, as previously discussed in this opinion, are limited to a determination of whether the existing school-funding system satisfies constitutional dictates and, if not, why not.

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[38] See *id.* at 196-197.

[39] *See also Lake View Sch. Dist. No. 25 v. Huckabee*, 220 S.W.3d 645 (Ark. 2005); *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139 (2007). Reforms implemented in Arkansas included a thorough assessment of school facilities needs; appropriations for facilities repairs and construction; increases in foundation aid; increases in categorical aid for districts educating ELL students, students from low-income families, and other at-risk students; increases in minimum teacher salaries; continuous assessment and evaluation; and a comprehensive system of accounting and accountability. Id.

Lake View III, 91 S.W.3d at 507-08. A similar process was undertaken in Arizona:

> There are doubtless many ways to create a school financing system that complies with the constitution. As the representatives of the people, it is

to carry out its obligation to determine whether South Carolina's educational system conforms to the state constitution. Plaintiffs in their briefs have provided ample details of the State's constitutional violation, demonstrated by the conditions of the schools and educational programs in the Plaintiff Districts. This Court should exercise its authority to direct the State to carry out its duty to legislate a public school system that conforms to constitutional mandates.

CONCLUSION

School children in the Plaintiff Districts, and the state itself, would benefit tremendously from educational opportunities that conform to the standards envisioned and mandated by this Court. The decision now on appeal falls far short of making these necessary opportunities possible. This Court now has the potential to make a difference and improve the futures of thousands of young lives in South Carolina. We join in the Plaintiffs' request that this require the Defendants to evaluate and reform the education finance system in a manner that ensures that all schoolchildren will have safe and adequate facilities and the teaching quality necessary to have the opportunity to acquire a minimally adequate education. The Court should further require the Defendants to comply with its Order within a specified time.

[Signature Page to Follow]

Abbeville, 335 S.C. at 69, 515 S.E.2d at 540-41.

Respectfully submitted,

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