**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**APPEAL FROM CHARLESTON COUNTY**
**Court of Common Pleas**

**The Honorable J C Nicholson, Jr , Circuit Court Judge**

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**C A No 2010-CP-10-5197**

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Storm M H , a minor, by her parent, Gayla S L McSwain, and Gayla S L McSwain, pro se, Respondents/Appellants,

v

Charleston County Board of Trustees and Nancy J McGinley, in her official capacity as Superintendent of Charleston County School District, Appellants/Respondents

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# APPELLANTS' FINAL BRIEF OF APPELLANTS/RESPONDENTS

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CHILDS & HALLIGAN, P A

Kenneth L Childs, S C Bar No 1217
John M Reagle, S C Bar No 14185
Tyler R Turner, S C Bar No 78447
kchilds@childs-halligan net
jreagle@childs-halligan net
tturner@childs-halligan net
1301 Gervais Street, Suite 900
P O Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Appellants

John F Emerson
john_emerson@charleston k12 sc us

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jreagle@childs-halligan net
tturner@childs-halligan net
1301 Gervais Street, Suite 900
P O Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Appellants

John F Emerson
john_emerson@charleston k12 sc us

75 Calhoun Street
Charleston, SC 29401
(843) 937-6496

General Counsel for the Charleston County School District

Gayla S L McSwain, Esq
gayla@gaylamcswain com
[redacted]
Goose Creek, SC [redacted]
(843) 572-5803

Pro Se Respondent

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## I STATEMENT OF ISSUES ON APPEAL

Issues presented by this appeal from the order of the Honorable J C Nicholson, Jr are

(1) Whether the Circuit Court erred in determining that it had subject matter jurisdiction over the controversy alleged in Plaintiff's Complaint

(2) Whether the Circuit Court erred by abusing its discretion in exercising jurisdiction over the controversy alleged in Plaintiff's Complaint

(3) Whether the Circuit Court erred in determining that Board Policy JFAB and the Board of Trustees' admission requirements for the District's magnet schools violated S C Code Ann § 59-63-30(c)

(4) Whether the Circuit Court erred in lifting the automatic stay

## II STATEMENT OF THE CASE

The Appellants, Charleston County Board of Trustees and Nancy J McGinley (collectively referred to as "the Board of Trustees"), respectfully submit this brief seeking to reverse the Circuit Court's order authorizing Storm M H to attend Academic Magnet High School ("AMHS") in the Charleston County School District ("District") without establishing residency in the District

By way of background, this case arises out of a declaratory judgment action filed by Gayla McSwain ("Plaintiff") and her daughter, Storm M H ("minor Plaintiff"), on June 27, 2010 Plaintiff sought to have her daughter attend AMHS as a non-resident student, despite Board Policy prohibiting non-resident students from attending the District's magnet schools In response, the Board of Trustees filed a Motion to Dismiss, arguing (1) that the Circuit Court lacked subject matter jurisdiction over Plaintiff's

declaratory judgment action, (2) that Plaintiff failed to exhaust her administrative remedies, and (3) that Plaintiff failed to state facts sufficient to constitute a cause of action The Circuit Court heard the parties' arguments on July 19 and July 22 In an order dated July 28, 2010, the Circuit Court concluded that it had and would exercise jurisdiction to declare Respondents' rights under S C Code Ann § 59-63-30(c) (Order p 13 at R p 13 ) The Circuit Court then declared and ordered that Plaintiff's daughter was authorized to attend AMHS as a non-resident student under § 59-63-30(c) (Order p 13 at R p 13 )

The Board of Trustees received written notice of entry of the Circuit Court's order on July 30, 2010 The Board of Trustees filed the present appeal with the Court of Appeals of South Carolina on August 6, 2010

## III STATEMENT OF FACTS

Respondents are residents of Berkeley County, South Carolina In the fall of 2009, Plaintiff submitted an application for her daughter's admission to AMHS, a county-wide academic magnet school within the District AMHS is a prestigious magnet high school with a competitive admissions process Because of the limited capacity of the District's magnet schools and the high demand to attend them, the Board of Trustees limited attendance at the District's magnet schools to those students who are residents of the District See S C Code Ann § 59-19-90(9) ("The Board of trustees shall "determine the school within its district in which any pupil shall enroll ") Specifically, Board Policy JFAB provides that "[n]on-resident students may not attend magnet schools/programs "[1]

[1] Board Policy JFAB "establish[es] guidelines for admitting to Charleston County School District schools those students who do not reside in the District "

As a result of the policy, all students who attend AMHS reside in Charleston County [2] Further, at the time the Circuit Court ordered minor Plaintiff's admission to AMHS, approximately eighty students who resided in Charleston County were on the waiting list to enroll in the ninth grade at AMHS (Aff of Judith Peterson p 2 at R p 32 )

Consistent with Board Policy JFAB, the "Admission Requirements" that accompany the AMHS application explain to applicants that "Students must be residents of Charleston County" to attend AMHS (Aff of Judith Peterson Ex A, p 1 at R p 35 ) On minor Plaintiff's application for admission to AMHS, Plaintiff stated twice that minor Plaintiff's address was "currently" in Berkeley County, thereby acknowledging AMHS's residency requirement (Minor Plaintiff's Application to AMHS at R p 164 )

In January 2010, the District processed minor Plaintiff's application and admitted minor Plaintiff to AMHS for the fall of 2010, subject to minor Plaintiff establishing residency in Charleston County It is AMHS's practice to admit academically qualified non-resident students in the spring on the condition that such students become residents of Charleston County prior to enrollment in the fall In a form confirming minor Plaintiff's plans to attend AMHS in the fall of 2010, which was due to AMHS on January 28, 2010, Plaintiff wrote that she would provide AMHS with a Charleston County address of residence prior to minor Plaintiff's enrollment at AMHS (Aff of Judith Peterson Ex C, p 2 at R p 63 )

Rather than establishing residency in Charleston County as promised to the District in January 2010, in June 2010, Plaintiff requested that the Board of Trustees allow her daughter to attend AMHS as a non-resident Plaintiff asserted that minor

[2]Each year, students must verify their legal residence and domicile in an affidavit (Board Policy JFAAA and JFAAA-E at R pp 159-60 )

Plaintiff should be permitted to attend AMHS as a non-resident pursuant to S C Code Ann § 59-63-30(c), so long as Plaintiffs purchased real estate in Charleston County with an assessed value of $300 or more, and pursuant to § 59-63-490 (Compl ¶ 10 at R p 18 ) The Board of Trustees considered Plaintiff's request on June 14, 2010, and thereafter the Board of Trustees approved a motion allowing Plaintiff's daughter to attend AMHS if Plaintiff's legal residency was established in Charleston County before school began (Compl ¶¶ 11-12 at R p 18 )

On June 27, 2010, Plaintiff filed a declaratory judgment action in an effort to compel the District to enroll her daughter at AMHS as a non-resident (Summons and Compl at R pp 14-29 ) The next day, Plaintiff also filed an appeal of the Board of Trustees' initial decision with the Board of Trustees pursuant to S C Code Ann § 59-19-510 (Pet to Appeal at R pp 181-82 ) In response to Plaintiff's appeal to the Board, on July 20, 2010, the Board of Trustees offered Plaintiff an evidentiary appeal hearing before the Board concerning the Board of Trustees' initial construction and administration of § 59-63-30(c) and § 59-63-490, and initial decision concerning the placement of Plaintiff's daughter (Let Emerson to McSwain at R p 211-13 ) That same day, Plaintiff advised General Counsel for the District that she was taking the Board of Trustees' offer "under consideration " (Email McSwain to Emerson at R Appendix p _ ) Thereafter, Plaintiff pursued only her declaratory judgment action and not the Board of Trustees' offer for an evidentiary appeal hearing before the Board

In response to Plaintiffs' declaratory judgment action, the Board of Trustees moved to dismiss Plaintiffs' claim for a declaratory judgment on the grounds that, *inter alia*, the Circuit Court either lacked subject matter jurisdiction or should decline to

exercise jurisdiction over the action because Plaintiffs' petition to the Board of Trustees to have minor Plaintiff enrolled at AMHS was pending before the Board, and thus Plaintiffs had not exhausted their administrative remedies as required by S C Code Ann §§ 59-19-510 to -560 The Board of Trustees also argued that minor Plaintiff was not a resident of Charleston County, and thus, was not legally entitled to attend AMHS, pursuant to AMHS admission requirements, Board Policy JFAB, and S C Code Ann § 59-19-90(9), which gives the Board specific authority to "determine the school within its district in which any pupil shall enroll "

## IV ARGUMENTS

### A The Circuit Court Erred In Determining That It Had Subject Matter Jurisdiction Over The Controversy Alleged By Plaintiff In The Complaint

The Circuit Court held that the Uniform Declaratory Judgments Act gave the Court the power to declare Plaintiff's rights under § 59-63-30, regardless of whether Plaintiff satisfied the statutorily-required administrative review procedure set forth in S C Code Ann §§ 59-19-510 to -560 (Order p 7 at R p 7 ) However, it is well settled that the Circuit Court does not have jurisdiction over claims arising under a statutory scheme that includes a specific review or appeal procedure, until the statutorily required administrative review procedure has been completed *Adamson v Richland County Sch Dist One*, 332 S C 121, 128, 503 S E 2d 752, 756 (1998) In *Adamson*, which also involved a request for declaratory relief, the Court of Appeals of South Carolina stated

> We hold that inasmuch as Adamson seeks redress under the Act, she must follow the review route set forth in the Act Because there is no final board order, Adamson finds herself in the same posture as Andrews in *Andrews v Dorchester County School District Two*, 292 S C 392, 356 S E 2d 439 (Ct App 1987) Here, as in *Andrews*, there being no order for the circuit court to review, the court

> lacked subject matter jurisdiction over the case Adamson's remedy is to seek review from the District board

*Id*

Likewise, in *Andrews v Dorchester County Sch Dist No 2*, the Court of Appeals of South Carolina held, in a case involving a controversy regarding the construction or administration of school laws under §§ 59-19-510 to -560, that the Circuit Court lacked subject matter jurisdiction because the school board had not issued a final order under § 59-19-560

> We therefore hold that the court of common pleas lacked jurisdiction in the matter because there was no "order of the county board of education" on which Mrs Andrews could base an appeal to that court pursuant to Section 59-19-560

*Andrews*, 292 S C 392, 395, 356 S E 2d 439, 442 (Ct App 1987)

Here, Plaintiff relies on § 59-63-30 to challenge the Board's policy set forth in JFAB that "[n]on-resident students may not attend magnet schools/programs," and specifically the Board of Trustee's application of that policy to Plaintiff's daughter, in that she may attend AMHS if she is a legal resident of the District This policy and the Board's decision regarding Plaintiff's daughter were made pursuant to the Board's authority under § 59-19-90(9) and local legislation, Act No 340, 1967 S C Acts 470, § 5(8) (discussed *infra*), and concern the placement of Plaintiff's daughter at a school within the District Accordingly, Plaintiff's claim falls squarely within the appeal procedures set forth under § 59-19-510, which provides the following

> Subject to the provisions of Section 59-19-90, any parent aggrieved by any decision of the board of trustees of any school district in any matter of local controversy in reference to the construction or administration of the school laws or the placement of any pupil in any school within the district, shall have the right to appeal the matter in controversy to the county board of education

S C Code Ann § 59-19-510

Further, where a school district's board of trustees has been combined with the county board of education, as in the case of the District, § 59-19-520 provides as follows

> In counties where the functions of the boards of trustees and those of the county board of education have been combined, the appeal provided in Section 59-19-510 shall lie to the county board of education from its original action disposing of the matter in controversy before hearing

S C Code Ann § 59-19-520 Thus, § 59-19-520 expressly provides for the Board of Trustees to review its decision of June 14, 2010, respecting Plaintiff's daughter, upon an appeal being filed under § 59-19-510, and according to the specific procedures set forth in § 59-19-510 Such an appeal has been expressly provided for in order to afford Plaintiff with the due process she claims she was denied in paragraph 12 of her Complaint Moreover, § 59-19-550 requires the Board of Trustees to issue a written order disposing of the matter in controversy "after the parties have been heard " It is this order that is then properly appealable to the Circuit Court under § 59-19-560 *See Andrews v Dorchester County Sch Dist No 2*, 292 S C 392, 356 S E 2d 439 (Ct App 1987)

Plaintiff, in fact, had filed an appropriate appeal to the Board of Trustees under § 59-19-510 challenging its June 14, 2010, motion (Petition to Appeal at R pp 181-82 ) However, by filing this declaratory judgment action before the Board of Trustees had an opportunity to receive or hear Plaintiff's appeal and issue a final order, Plaintiff failed to follow the specific statutory review scheme relating to the admission or placement of any student within the District Therefore, the Circuit Court did not have subject matter jurisdiction over Plaintiff's claim for declaratory relief

**B Even Assuming, *Arguendo*, That The Circuit Court Had Subject Matter Jurisdiction Over Plaintiff's Claim, The Circuit Court Abused Its Discretion In Exercising Jurisdiction Over Plaintiff's Claim Because Plaintiff Failed To Exhaust Her Administrative Remedies**

The Circuit Court held that because Plaintiff failed to exhaust her administrative remedies, Plaintiff did not have a duty to exhaust her administrative remedies (Order pp 8-9 at R pp 8-9 ) It is beyond dispute that exhaustion of administrative remedies is generally required prior to commencing a legal action The rationale for the doctrine of exhaustion of administrative remedies was thoroughly discussed by the Supreme Court of South Carolina in *Stanley v Gary*, 237 S C 237, 116 S E 2d 843 (1960) (superseded in part by the Teacher Employment and Dismissal Act) As discussed in *Stanley*, the doctrine of exhaustion of administrative remedies is based on a policy of orderly procedure that favors a preliminary sifting process, particularly with respect to matters within the competence of the administrative authority, such as school laws, policies, and admissions procedures, and it serves to prevent attempts to swamp the courts by resort to them in the first instance *Id* at 247, 116 S E 2d at 848

The doctrine of exhaustion of administrative remedies is particularly applicable to controversies subject to the discretion of school boards Section 59-19-510 plainly reflects the legislative intent that school boards be afforded the opportunity to fully address and finally rule upon matters relating to the placement of any student in a school in the District Although Plaintiff contended it would be futile for her to pursue a full evidentiary hearing before the Board of Trustees prior to going to the Circuit Court, this is exactly what §§ 59-19-510 to -560 contemplate, even in situations where functions of the board of trustees and the county board of education have been combined *See* § 59-

19-520 Indeed, the opportunity for the Board of Trustees to conduct a full hearing prior to further legal action is particularly important with respect to the central unresolved factual issue under § 59-63-490 of whether AMHS can better accommodate Plaintiff's daughter than the Berkeley County School District [3] South Carolina's legislature has codified that this type of decision is best addressed and factually resolved in the first instance by the Board of Trustees, rather than by the Circuit Court *See* S C Code Ann §§ 59-19-510 to -560

Plaintiff also contended that exhaustion of administrative remedies would be futile in light of the Board's unanimous approval of the motion requiring her legal residency as a condition of attending AMHS However, there is no evidence that the Board of Trustees has a fixed position or view of this matter, or that following a full hearing before the board, any Board member would be unwilling to consider changing his or her position As noted in *Kizer v Dorchester County Vocational Educ Bd of Trs*, 287 S C 545, 552, 340 S E 2d 144, 148 (1986), "[s]chool board members are clothed with a presumption of honesty and integrity in discharge of their decision-making responsibilities," and in order to disqualify a hearing tribunal, "actual bias rather than a mere potential for bias must be shown " Here, Plaintiff offers no evidence that the Board of Trustees is incapable of fairly reviewing and considering the petition she filed with the Board of Trustees to appeal its motion of June 14, 2010

Accordingly, Plaintiff failed to exhaust available administrative remedies, and the Circuit Court abused its discretion in exercising jurisdiction over her claim

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[3]The Circuit Court below held that it now has appellate jurisdiction over Plaintiff's claim under § 59-63-490 (Order p 7 at R p 7 ), even though the Board of Trustees did not have an opportunity to hear Plaintiff's appeal or issue a final order on that claim

### C The Circuit Court Erred In Determining That Board Policy JFAB And The Board Of Trustees' Admission Requirements For The District's Magnet Schools Violated S C Code Ann § 59-63-30(c)

#### 1 Board Policy JFAB and the Board of Trustees' admission requirements, as a matter of law, do not violate § 59-63-30(c)

The Circuit Court erred in holding that Board Policy JFAB, which provides that "[n]on-resident students may not attend magnet schools/programs," violates § 59-63-30(c) The Circuit Court found that Board Policy JFAB violates § 59-63-30(c) "because domicile is not required by the statute [to attend a particular school], only property ownership is required " (Order p 10 at R p 10 )

However, § 59-63-30, on its face, only grants a non-resident child who owns real estate in the district having an assessed value of $300 or more the right to attend *some* school in the school district *See* § 59-63-30 (Children "shall be entitled to attend the public schools of any school district, without charge, only if ") Section 59-63-30 does not address which particular schools within a school district a child is eligible to attend or set forth any type of specific attendance criteria for particular schools The authority to set attendance criteria for particular schools and determine which school within a district a child shall attend is given explicitly by statute to the board of trustees of each school district § 59-19-90(9) ("The board of trustees shall determine the school within its district in which any pupil shall enroll ") Further, local legislation specifically gives the Board of Trustees the power to "provide for intellectually gifted children a program which shall challenge their talents " Act No 340, 1967 S C Acts 470, § 5(8) Thus, the Circuit Court erred in holding that Board Policy JFAB violates §59-63-30(c) because Board Policy JFAB is plainly authorized by § 59-19-90(9) and Act

No 340, 1967 S C Acts 470, § 5(8)

There is no authority that § 59-63-30(c) supersedes the power of the Board of Trustees to set admission criteria for its schools under § 59-19-90(9) and Act No 340, 1967 S C Acts 470, § 5(8), including legal residency in the District as an admission criteria for a particular school The precise issue of whether § 59-63-30 supersedes the Board of Trustee's power was thoughtfully, persuasively, and succinctly addressed by the South Carolina Attorney General in an opinion to Fred L Day, Representative 1988 S C Op Atty Gen 145 (1988), 1988 WL 383531 [4] This opinion states

> [Section] 59-19-90(9) empowers Boards of Trustees to determine the school within the district in which any pupil shall enroll " Giving § 59-19-90(9) its plain meaning requires the conclusion that the power of school districts to determine pupil assignments is not altered by the provisions of school attendance based upon property ownership under § 59-63-30 Therefore, property ownership within a district does not, in itself, entitle a student to demand attendance at a particular school within the district "

*Id* (Citations omitted ) Accordingly, as the Attorney General's analysis makes clear, even though a student may become eligible under § 59-63-30(c) to enroll in the District, the Board of Trustees still retains its general authority under § 59-19-90(9) and Act No 340, 1967 S C Acts 470, § 5(8) to determine which particular school the student will attend and to establish appropriate admission criteria for particular schools Here, one of the criteria for admission to AMHS is legal residency in the District, as set forth in Board Policy JFAB This admission criteria is above and beyond any residency requirements for mere eligibility to enroll in the District, such as those set forth in § 59-63-30

As noted in *TNS Mills, Inc v S C Dep't of Revenue*, 331 S C 611, 624, 503

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[4] In addressing the Attorney General's Opinion, the Circuit Court first discredited it (Order p 11 at R p 11), then attempted to distinguish it (Order p 11 at R p 11), then concluded that it supported the Plaintiff's position by implication (Order pp 11-12 at R pp 11-12)

S E 2d 471, 478 (1998), "[s]tatutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers " Here, it cannot be said that a practical and fair interpretation of § 59-63-30(c) prohibits a school board from imposing actual residency in its school district as an attendance requirement for a magnet school, especially since such a requirement would not defeat the patent purpose of § 59-63-30(c) to allow a non-resident student who owns real estate in a school district to attend a school in that district Further, the legislative intent in this regard is also informed by § 59-63-31(B) This statute does grant a child the right to attend a particular school under unique circumstances Likewise, § 59-63-490 does provide a mechanism for out-of-district students to attend a specific school Accordingly, the General Assembly clearly understands the distinction between authorizing a non-resident child to attend some school in a school district, subject to the district's determination and criteria for which school the child may attend (*e g* § 59-63-30(c)), from authorizing a non-resident student to attend a specific school in a district (*e g* § 59-63-31(B), § 59-63-490)

Plaintiff was plainly informed and understood that legal residency in the District was an admission requirement for attending AMHS In fact, Plaintiff promised in writing to provide AMHS with a Charleston County address of residence prior to minor Plaintiff's enrollment at AMHS Plaintiff's Complaint admits that Plaintiff's daughter did not meet the legal residency admission criteria required to attend AMHS Because Plaintiff's daughter did not met AMHS's residency admission requirement, established by the Board of Trustees pursuant to its authority under § 59-19-90(9) and Act No 340, 1967 S C Acts 470, § 5(8), Plaintiff's daughter is not entitled to attend AMHS Therefore, as a matter of law, the Circuit Court erred in declaring that the Board of Trustees' magnet school residency requirement violated § 59-63-30(c) and that Plaintiff

was entitled to enroll her daughter at AMHS as a non-resident

### 2 Local legislation supports the validity of Board Policy JFAB

The Board of Trustees has a long history of establishing and operating magnet schools The District's magnet schools arose out of the Board of Trustees' efforts to desegregate the District's schools and unify its eight constituent school districts *See e g United States v Charleston County Sch Dist*, 960 F 2d 1227, 1235 (4th Cir 1992) In *United States v Charleston County Sch Dist*, the Court generally described a magnet school as denoting "a public school of voluntary enrollment designed to further integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality " *Id* at n 4 The District has at least two academic magnet schools, which serve the residents of Charleston County Buist Academy is a county-wide magnet school established by the District for intellectually gifted children serving the primary and elementary grades, and AMHS is a county-wide magnet school for intellectually gifted children serving grades nine through twelve Both of these schools were established by the District pursuant to the authority of local legislation, Act No 340, 1967 S C Acts 470, § 5(8), which states that the Board of Trustees shall provide "for intellectually gifted children a program which shall challenge their talents " *See Stewart v Charleston County Sch Dist*, 386 S C 373, 688 S E 2d 579 (Ct App 2009)

In *Stewart*, the Court of Appeals of South Carolina established that Act No 340, 1967 S C Acts 470 § 5(8) grants the Board of Trustees ultimate authority to set attendance criteria for the District's county-wide magnet schools, including physical residency requirements *Stewart*, 386 S C at 379-80, 688 S E 2d at 582 Although *Stewart* dealt specifically with Buist Academy, the Court's rationale and holding applies fully to AMHS In this case, the Board properly established attendance criteria for the

District's county-wide magnet schools, including AMHS, pursuant to the Board's general authority under § 59-19-90(9) and Act No 340

The Court of Appeals of South Carolina clearly recognized in *Stewart* the District's ultimate authority with respect to setting attendance criteria for its magnet schools, and the Circuit Court below erred in abrogating this authority absent clear legislative intent to the contrary Indeed, in reading § 59-63-30(c) consistently with Act No 340, 1967 S C Acts 470 § 5(8) and § 59-19-90(9), the only reasonable legal conclusion is that the Board has the authority to establish attendance criteria, including an actual residency requirement or county-wide attendance zone, for the highly competitive spots at AMHS

### 3 Public Policy Supports the validity of Board Policy JFAB

Sound public policy supports upholding the Board of Trustees' authority to establish school attendance criteria In *Washington v Ladue Sch Dist Bd of Educ* , 564 F Supp 2d 1054 (E D Mo 2008), a civil rights case, the U S District Court considered whether to grant an injunction to a student who was removed from the student rolls at a school district on the grounds that he was not a resident of the school district In holding that the plaintiff would not suffer irreparable harm if he did not get to attend the school of his choice, the court found that "[n]owhere has it been presented that the Plaintiff has attempted to, and has been refused free public education in the district in which he actually resides " *Id* at 1058 "Moreover, because Plaintiff has not attempted to secure free public education in the district in which he actually resides, any injury Plaintiff may be experiencing is due entirely to his own actions, or inactions " *Id*

The *Washington* court went on to note

> It is obvious that the harm to Defendant greatly outweighs any injury its actions have caused Plaintiff Were the Court to issue a Temporary Restraining Order and Preliminary

> Injunction, Defendant would likely experience a flood of applications for enrollment based on dubious grounds of having resided in the district at any given time in the past or, for that matter, an intent to reside therein at some point in the future While the Court is mindful that every child is entitled to a free public education, nowhere in the Constitution nor any statute in the State of Missouri is a child entitled to choose, at whim, the location of that education were each child entitled to choose where to go to school, regardless of where that child lives, the structure of the free public school system would collapse into chaos, thereby resulting in an actual deprivation of the right to a free public education Plaintiff seeks more than a free public education He seeks a free public education at the school of his choice, regardless of where he may live

*Id See also G C III v Owensboro Pub Sch* , No 4 09CV-102-JHM, 2009 WL 3834096 (W D Ky Nov 16, 2009)

Although these cases do not interpret South Carolina law, the general principles certainly apply There is simply no right conferred by South Carolina law, including S C Code Ann § 59-63-30(c), to attend the school of one's choice *See* 1988 Op S C Att'y Gen 145, 1988 WL 383531 (1988) ("[P]roperty ownership within a district does not, itself, entitle a student to demand attendance at a particular school within that district ") To the contrary, S C Code Ann § 59-19-90(9) specifically authorizes the Board of Trustees to assign pupils to schools and to "determine the school within its district in which any pupil shall enroll " *See also Stewart v Charleston County Sch Dist* , 386 S C 373, 688 S E 2d 579 (Ct App 2009) (Charleston County School District had ultimate authority based on local legislation to set admission criteria for its magnet middle school, and regional constituent board within county had no authority to change criteria) Indeed, as recognized in *Stewart*, the District's ability to limit enrollment in its magnet schools to legal residents of the District is reasonably related to the fundamental purpose of the magnet schools of unifying the District's eight constituent districts Likewise, a student who can attend school where she resides is not harmed if she is not permitted to attend

the school of her choice in another school district This is especially true in the instant case, where Plaintiff's daughter has achieved great academic success where she resides in the Berkeley County School District, one of the largest school districts in the State

The public policy and legal rationale above are further reinforced by *Wharton v Abbeville Sch Dist No 60*, 608 F Supp 70 (D S C 1984), in which Judge G Ross Anderson, Jr held that

> South Carolina law grants a child of school age the right to a free education but does not confer a right upon pupils to attend a specific school In fact, South Carolina law gives the Board of Trustees exclusive authority to operate or not operate any public school or schools The Federal Court should not interpose and substitute its judgment and authority for that of local and state school authorities unless and until such actions by the Federal Court are clearly warranted to safeguard and protect rights guaranteed by the Constitution

*Id* at 75, citing *Bradford v Sch Dist No 20 Charleston, S C* , 244 F Supp 768 (D S C 1965) Judge Anderson went on to conclude that

> Pursuant to the provisions of S C Code Ann § 59-19-90 (1976), as amended, the authority to manage and control local educational institutions of this district and the sole and exclusive authority to operate any public school or schools within the district rests with the local school board, no statutory or property right is granted to anyone to select the school which they will attend

*Id* at 77 *Accord Stewart v Charleston County Sch Dist* , 386 S C 373, 688 S E 2d 579 (Ct App 2009) (Charleston County School District had ultimate authority based on local legislation to set admission criteria for its magnet middle school, and regional constituent board within county had no authority to change criteria), *Davis v Sch Dist of Greenville County*, 374 S C 39, 647 S E 2d 219 (2007) (school district had ultimate authority to transfer students to different schools within district for disciplinary

reasons and no appeal beyond the school board level to circuit court existed to challenge disciplinary transfer)

Also, for the reasons set forth in *Washington v Ladue Sch Dist Bd of Educ*, 564 F Supp 2d 1054 (E D Mo 2008), the Board of Trustees would be irreparably harmed if its power to assign pupils to magnet schools within the District is eliminated *See United States v Charleston County Sch Dist*, 960 F 2d 1227 (4th Cir 1992) ("No single tradition in public education is more deeply rooted than local control over the operation of schools, local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process ") The ability of the Board of Trustees to assign pupils to magnet schools within the District is a core function of the Board S C Code Ann § 59-19-90(9) *Wharton v Abbeville Sch Dist No 60*, 608 F Supp 70 (D S C 1984) This function is particularly important to the Board of Trustees as a result of the unique purpose and structure of the Charleston County School District and the role that magnet schools serve in unifying the District *See Stewart v Charleston County Sch Dist*, 386 S C 373, 688 S E 2d 579 (Ct App 2009), Act No 340, 1967, S C Acts 470, § 5(8)

Finally, to interpret § 59-63-30(c) as Plaintiff suggests would lead to at least two absurdities First, to interpret § 59-63-30(c) as granting a non-resident child who owns real estate in a school district the right to attend a particular school in that district without regard to attendance criteria, including attendance zones, would grant such child greater rights than a child actually residing in a school district In admitting a non-resident student, AMHS's attendance zone must be disregarded, however, there is no logical reason why one school's attendance zone (in this case, the county-wide attendance zone of AMHS) should be disregarded as opposed to any other school's attendance zone, and without regard to the Board's authority under § 59-19-90(9) School districts throughout

the United States limit the right of students eligible to enroll in a school district to attend specific schools within a district on the basis of their residency Plaintiff's proposed statutory interpretation would directly and adversely affect this standard practice of utilizing attendance zones based on residency

More significantly, perhaps, is the second absurdity that, with respect to a magnet school, reading § 59-63-30(c) as prohibiting residency as an attendance requirement could lead to the situation in which a magnet school's student population is comprised mostly, if not entirely, of students who do not actually reside in a school district and are not constituents of the school board With respect to a small, highly successful magnet school like AMHS, this absurdity could quickly become a reality, and thereby defeat the very purpose for the magnet school

For all of the reasons set forth in this Section, public policy does not support the Circuit Court's interpretation of § 59-63-30(c) and the minor Plaintiff's enrollment at AMHS as a non-resident

### D The Circuit Court Erred In Lifting The Automatic Stay

For the reasons set forth in the Board of Trustees' Petition For Review Of Order Lifting Automatic Stay and Reply To Return To Petition For Review Of Order Lifting Automatic Stay, the Circuit Court erred in lifting the automatic stay The Board of Trustees respectfully asks this Court to vacate the Circuit Court's order lifting the automatic stay

## V CONCLUSION

For the reasons set forth above, the Circuit Court erred in finding that it had subject matter jurisdiction over Plaintiff's Complaint, in exercising jurisdiction over Plaintiff's Complaint, and in declaring that Board Policy JFAB and the Board of Trustees' residency admission requirements for AMHS violated § 59-63-30(c) Therefore, the

Board of Trustees respectfully requests that this Court reverse the Circuit Court's order and dismiss Plaintiff's Complaint

Respectfully submitted,

CHILDS & HALLIGAN, P A

Kenneth L Childs, S C Bar No 1217
John M Reagle, S C Bar No 14185
Tyler R Turner, S C Bar No 78447

kchilds@childs-halligan net
jreagle@childs-halligan net
tturner@childs-halligan net

P O Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Appellants

John F Emerson
john_emerson@charleston k12 sc us
75 Calhoun Street
Charleston, SC 29401
(843) 937-6496

General Counsel for the Charleston County School District

April 25, 2010

Columbia, South Carolina

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**APPEAL FROM CHARLESTON COUNTY**
**Court of Common Pleas**

**The Honorable J C Nicholson, Jr , Circuit Court Judge**

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**C A No 2010-CP-10-5197**

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Storm M H , a minor, by her parent, Gayla S L McSwain, and Gayla S L McSwain, pro se, Respondents/Appellants,

v

Charleston County Board of Trustees and Nancy J McGinley, in her official capacity as Superintendent of Charleston County School District, Appellants/Respondents

**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies that the Appellants' Final Brief of Appellants/Respondents contains all material proposed to be included by any of the parties and not any other material

CHILDS & HALLIGAN, P A

Kenneth L Childs, S C Bar No 1217
John M Reagle, S C Bar No 14185
Tyler R Turner, S C Bar No 78447
kchilds@childs-halligan net
jreagle@childs-halligan net
tturner@childs-halligan net

1301 Gervais Street, Suite 900
P O Box 11367
Columbia, SC 29211
(803) 254-4035

John F Emerson
john_emerson@charleston k12 sc us
75 Calhoun Street
Charleston, SC 29401
(843) 937-6496
General Counsel for the Charleston County School District

Attorneys for Appellants/Respondents

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**PROOF OF SERVICE**

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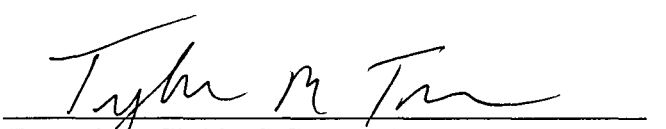
I certify that I have served the Appellants' Final Brief of Appellants/Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 25, 2011, addressed to the *pro se* Respondent/Appellant, Gayla S L McSwain, Esq , 105 Horncastle Place, Goose Creek, SC 29445

CHILDS & HALLIGAN, P A



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tturner@childs-halligan net
1301 Gervais Street, Suite 900

P O Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Appellants/Respondents

John F Emerson
john_emerson@charleston k12 sc us
75 Calhoun Street
Charleston, SC 29401
(843) 937-6496

General Counsel for the Charleston County
School District