

**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**

---

**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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**RESPONDENTS' FINAL BRIEF  
OF APPELLANTS/RESPONDENTS**

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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 properly determined that a non-resident child's offer to pay tuition to a district did not entitle the child to attend a particular school within the district in derogation of the Board of Trustees' authority under § 59-19-90, and

(2) Whether the Circuit Court properly determined that Board Policy JFAB and the Board of Trustees' admission requirements for the District's magnet schools did not violate the Equal Protection Clause

## **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 affirm the Circuit Court's holdings that Gayla McSwain's ("Plaintiff") offer to pay tuition to the Charleston County School District ("District") did not entitle her daughter ("minor Plaintiff") to attend Academic Magnet High School ("AMHS") in derogation of the Board of Trustees' authority under § 59-19-90, and that Board Policy JFAB and the Board of Trustees' admission requirements for the District's magnet schools, including AMHS, did not violate the Equal Protection Clause

By way of background, this case arises out of a declaratory judgment action filed by Plaintiff and her daughter on June 27, 2010 (Summons and Compl , R pp 14-29 ) 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 Plaintiff argued, *inter alia*, that by offering to pay tuition her daughter was entitled to enroll at AMHS, and that Board Policy and AMHS's residency requirement

violated the Equal Protection Clause. 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). However, the Circuit Court found that Plaintiff's offer to pay tuition to the District did not entitle minor Plaintiff to attend AMHS in derogation of the Board of Trustees' authority under S.C. Code Ann. § 59-19-90 (Order p. 12 at R. p. 12). The Circuit Court also found that Board Policy JFAB and the Board of Trustees admissions requirements for the District's magnet schools did not violate the Equal Protection Clause (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 an appeal with the Court of Appeals of South Carolina on August 6, 2010. Plaintiff filed this cross-appeal with the Court of Appeals of South Carolina on August 24, 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 "<sup>1</sup> As a result of the policy, all students who attend AMHS reside in Charleston County <sup>2</sup> 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

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

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

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. 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 pp 11-12 )

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 ) Plaintiff argued, *inter alia*, that by offering to pay tuition her daughter was entitled to enroll at AMHS, and that Board Policy JFAB and AMHS's admission requirements violated the Equal Protection Clause (Compl ¶ 10 at R p 18 )

On June 28, 2010, 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 its initial decision on 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 Properly Determined That A Non-Resident Child's Offer to Pay Tuition To A District Did Not Entitle The Child To Attend A Particular School Within The District In Derogation Of The Board of Trustees' Authority Under § 59-19-90**

Under South Carolina statutory law, a non-resident child's offer to pay tuition to a public school district does not entitle that child to attend the public schools of that district or a particular school within that district, much less a particular school within that district in derogation of the board of trustees' statutory authority under S C Code Ann §§ 59-19-90(9) and (10)

S C Code Ann § 59-63-30 (Qualifications for Attendance), in the relevant part, provides

Children shall be entitled to attend the public schools of

any school district, without charge, only if qualified under the following provisions of this section

- (a) Such child resides with its parent or legal guardian,
- (b) The parent or legal guardian, with whom the child resides, is a resident of such school district, or
- (c) The child owns real estate in the district having an assessed value of three hundred dollars or more

S C Code Ann § 59-63-45(A) (Reimbursement for Attending Another School

District) provides

Notwithstanding the provisions of this chapter, a nonresident child otherwise meeting the enrollment requirements of this chapter may attend a school district which he is otherwise qualified to attend if the person responsible for education the child pays an amount equal to the prior year's local revenue per child raised by the millage levied for school district operations and debt service reduced by school taxes on real property owned by the child paid to the school district in which he is enrolled. The district may waive all or a portion of the payment requirement by this section

S C Code Ann § 59-19-90(10) provides

The board of trustees shall prescribe conditions and charges for attendance in the public schools of the school district for

- (a) children of parents temporarily residing within the school district,
- (b) children whose parents or legal guardians live elsewhere but who are residing with residents of the school district, and
- (c) children of parents residing on Federal property or military or naval bases of the United States located within or adjacent to the boundaries of such school district, and
- (d) all other children specially situated and not meeting the eligibility requirements of § 59-63-30, but who shall have petitioned the trustees in writing seeking permission to attend the public schools of the school district

Finally, S C Code Ann § 59-19-90(9) provides that "the board of trustees shall also

determine the school within its district in which any pupil shall enroll "

"Statutory interpretation is a question of law " *S C Coastal Conservation League v S C Dep't of Health & Envtl Control* , 390 S C 418, 425, 702 S E 2d 246, 250 (2010)

"The primary rule of statutory interpretation is to ascertain and give effect to the intent of the legislature " *Id* "Unless there is something in the statute requiring a different

interpretation, the words used in a statute must be given their ordinary meaning " *Id*

"When a statute's terms are clear and unambiguous on their face, there is no room for

statutory construction and a court must apply the statute according to its literal meaning "

*Id* at 425-26, 702 S E 2d at 250

Under South Carolina law, a non-resident child who owns the requisite property

in a school district is entitled to attend the public schools of that school district S C

Code Ann § 59-63-30(c) However, the school district may require the non-resident

child's parent or legal guardian to reimburse the district for the assessed costs of

educating that child, to the extent that the child's property taxes do not cover such costs

S C Code Ann § 59-63-45(A) *See also* Op S C Att'y Gen , 2010 WL 3896171 (Sept

7, 2010) (§ 59-63-45 must be read in addition to § 59-63-30), Op S C Att'y Gen , 2009

WL 3208468 (Sept 1, 2009) (same), and Op S C Att'y Gen , 2005 WL 3463709 (Dec

8, 2005) (same)

Importantly, neither § 59-63-30 nor § 59-63-45 entitles a non-resident child to pay

tuition to attend the public schools of a school district, absent property ownership *See* §

59-63-30 (requiring property ownership) and § 59-63-45 (discussing payment by a non-

resident child who "otherwise meet[s] the enrollment requirements of this chapter")

Moreover, neither § 59-63-30 nor § 59-63-45 gives a non-resident child who owns the

requisite property the unfettered right to attend a particular school within a school district

See § 59-63-30 ("Children shall be entitled to attend the public schools of any school district ") (emphasis added) and § 59-63-45 ("a nonresident child may attend a school in a school district which he is otherwise qualified to attend ") (emphasis added)

Additionally, § 59-19-90(10) does not give any rights to students, as Plaintiff's strained construction of that statute would suggest. A plain reading of § 59-19-90 clearly illuminates its purpose—to set forth the general powers and duties of school trustees. Specifically, § 59-19-90(10) authorizes the board of trustees of a school district to prescribe conditions and charges for attendance in the public schools of that district. Nothing in § 59-19-90(10) prohibits school trustees from prescribing residency as a condition for attendance in the public schools of their district. Further, nothing in § 59-19-90(10) requires school trustees to accept tuition offered by a non-resident child for admittance to a district or a particular school. Rather, the Board of Trustees has the ultimate authority to "prescribe conditions and charges for attendance in the public schools of the school district" and to "determine the school within its district in which any pupil shall enroll." S.C. Code Ann. § 59-19-90(9) & (10).

In this instance, the Board of Trustees, pursuant to its statutory authority under § 59-19-90(9) & (10), prescribed residency as a condition for attendance in the District's magnet schools. No South Carolina statute or appellate judicial opinion gives a non-resident child a right to attend a particular school, via property ownership or tuition payment or both, in derogation of the Board of Trustees' statutory authority under § 59-19-90, as Plaintiff suggests. Moreover, if a non-resident child could simply pay tuition to attend the schools of an adjacent county, as Plaintiff suggests, § 59-63-480, which

requires children residing closer to schools in an adjacent county to go through an application process and pay tuition to the adjacent county, would be rendered meaningless. See *Foothills Brewing Co., Inc v City of Greenville*, 377 S C 355, 363, 660 S E 2d 264, 268 (2008) ("[T]he Court must presume the Legislature did not intend a futile act, but rather intended its statutes to accomplish something ") For the reasons set forth above, this Court should affirm the Circuit Court's holding that a non-resident child's offer to pay tuition to a school district does not entitle the child to attend a particular school within the district in derogation of the Board of Trustees' authority under § 59-19-90(9) & (10)

**B The Circuit Court Properly Determined That Board Policy JFAB And The Board Of Trustees' Admission Requirements For The District's Magnet Schools Did Not Violate The Equal Protection Clause**

Board Policy JFAB and the Board of Trustees' admission requirements for the District's magnet schools limit attendance at the District's magnet schools, including AMHS, to residents of the District. Plaintiff asserts that Board Policy JFAB and the Board of Trustees' admission requirements for the District's magnet schools treat residents and non-residents differently without a rational basis, and thus violate the Equal Protection Clause. However, the Circuit Court properly determined that AMHS's admission requirements were rationally related to a legitimate government purpose.

The Equal Protection Clause provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. See also S.C. Const. art. I, § 3 ("nor shall any person be denied the equal protection of the laws.") Because nonresident students do not constitute a protected class for equal protection analysis, minimal scrutiny applies to Board Policy JFAB and the Board of

Trustees' admission requirements for the District's magnet schools Board Policy JFAB and the Board of Trustees' admission requirements should be upheld because they are rationally related to the well-recognized legitimate government purpose of meeting local educational needs and maintaining community support for the quality of the District's educational program

Like AMHS, most schools determine attendance eligibility based in part on the residence of the student Residence requirements have long been upheld with respect to admission to public schools This issue is generally discussed at length by the United States Supreme Court in *Martinez v Bynum* *Martinez v Bynum*, 461 U S 321, 326 (1983) ("We specifically have approved bona fide residence requirements in the field of public education ") In reaffirming the constitutionality of bona fide residence requirements with respect to school attendance, the *Bynum* court discussed the rationale for such requirements

A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a state and to establish residence there A bona fide residence requirement simply requires that a person *does* establish residence before demanding the services that are restricted to residents

*Id* at 328-29 The *Bynum* court then further considered the justification for local residence requirements in the public school context, specifically stating

No single tradition in public education is more deeply rooted than local control over of 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 quality of the educational process      Local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence

*Id* at 329 (quoting *Milliken v Bradley*, 418 U S 717, 741-42 (1974)) "The provision of primary and secondary education, of course, is one of the most important functions of local government " *Bynum* at 329 "Absent residence requirements, there can be little doubt that the proper planning and operation of the schools would suffer significantly " *Id*

Likewise, the Fourth Circuit has recognized the validity of a residence requirement for attendance at public schools

This Court has on several occasions recognized that residence and aptitude or scholastic achievement criteria may be used by school authorities in determining what schools pupils shall attend, so long as racial or other arbitrary discriminatory factors are not considered

*Green v School Board of the City of Roanoke VA* 304 F 2d 118, 122 (4th Cir 1962)

Here, a residence requirement for attendance at AMHS is not applied in a racially or otherwise arbitrary or discriminatory manner. Instead, for precisely those reasons articulated by the Supreme Court in *Bynum* the Board of Trustees appropriately sought to reserve attendance at AMHS to bona fide residents of the District in an effort to ensure that the program meets local needs and maintains community support for the quality of the District's educational program <sup>3</sup>

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<sup>3</sup> Plaintiff has sought to characterize the Board's concern with enforcing the residence requirement as financial and has asserted that this concern is addressed through tuition payment by non-resident students. As *Bynum* makes clear, the concerns underlying the residency requirement are not primarily financial, but rather rooted in maintaining community support for the program and meeting the community's complex educational needs

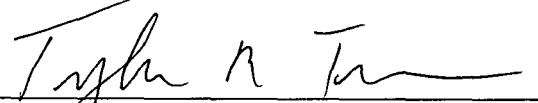
Accordingly, although AMHS' District-wide attendance zone does discriminate between non-resident students qualifying for eligibility to enroll in the District under § 59-63-30(c) and resident students who qualify under § 59-63-30(a) & (b), the distinction between these two classes of students is well-recognized as rational and consistent with important public policy. Therefore, this Court should affirm the Circuit Court's holding that Board Policy JFAB and the Board of Trustees' admission requirements for the District's magnet schools do not violate the Equal Protection Clause.

## V CONCLUSION

For the reasons set forth above, the Circuit Court properly held that a non-resident child's offer to pay of tuition to a school district did not entitle the child to attend a particular school within the district, and that AMHS's residence requirement does not violate the Equal Protection Clause. Therefore, the Board of Trustees respectfully requests that this Court affirm these holdings.

Respectfully submitted,

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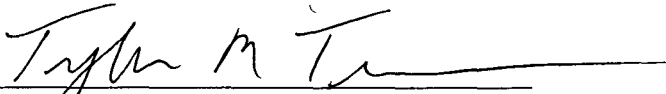
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**CERTIFICATE OF COUNSEL**

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

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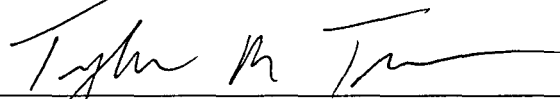
Charleston County Board of Trustees and Nancy J McGinley, in her  
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**PROOF OF SERVICE**

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I certify that I have served the Respondents' 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* Appellant/Respondent, Gayla S L McSwain,  
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