

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J C Nicholson, Jr , Circuit Court Judge

Case No 2010-CP-10-5197

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

RESPONDENTS' FINAL BRIEF
of
RESPONDENTS/APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I Was the trial court correct in finding that it had subject matter jurisdiction to declare Plaintiffs' legal rights under South Carolina Code §59-63-30?
- II Was the trial court correct in finding that Charleston County School District's policy of excluding eligible and qualified nonresident children from its magnet schools violates South Carolina Code §59-63-30?
- II Was the trial court correct when it exercised its discretion to lift the automatic stay?

STATEMENT OF THE CASE

On June 28, 2010, Respondents/Appellants ("Plaintiffs") brought this lawsuit pursuant to S C Code Section 15-53-10 *et seq* (1976), as amended, commonly referred to as the Uniform Declaratory Judgments Act, to request the circuit court to declare the Plaintiffs' legal rights under S C Code Section 59-63-30(c) and Code Section 59-63-490 which are part of the Education statute. Specifically, regarding 59-63-30(c), Plaintiffs requested the lower court to declare whether they were required to move their residence and domicile from Berkeley County to Charleston County in order for Storm M H ("Daughter") to enroll in the Academic Magnet High School ("AMHS"), which is located in the Charleston County School District ("CCSD"), on or before August 9, 2010. Regarding 59-63-490, Plaintiffs requested the lower court to declare whether the Defendants abused their discretion by denying Daughter an inter-district transfer from the Berkeley County School District to the CCSD.

Pursuant to § 15-53-80, Appellants/Respondents ("Defendants") were named as parties to that action because the Declaratory Judgments Act requires that "[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected

by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. Defendants moved the lower court to dismiss Plaintiffs' request for declaration of their legal rights because they believed that the Plaintiffs must, but did not, exhaust administrative remedies and failed to state sufficient facts to constitute a cause of action and, therefore, the lower court did not have subject matter jurisdiction.

On July 19, 2010, the lower court began a non-jury trial. It continued the trial until July 22, 2010. On July 21, 2010, pursuant to Code Section 59-19-560, Plaintiffs appealed the Defendants' discretionary administrative decision to deny Daughter an inter-district transfer under Code Section 59-63-490 to the circuit court in its appellate capacity. After the second day of trial, July 22, 2010, the lower court took the case under advisement. On July 28, 2010, the lower court issued its order and took judicial notice of the fact that, on July 21, 2010, Plaintiffs had appealed the Board's discretionary administrative decision, made pursuant to Code Section 59-63-490, that denied Daughter an inter-district transfer, therefore, the lower court found that it no longer had original jurisdiction over that issue and could not make a declaration with respect to 59-63-490. The lower court granted Defendants' motion to dismiss regarding that issue.

However, the lower court found that it had jurisdiction to declare Plaintiffs' legal rights under Code Section 59-63-30 and concluded that the Defendants' policy that requires Plaintiffs to establish domicile in Charleston County before enrolling Daughter in the AMHS violates 59-63-30(c). On July 28, 2010, the lower court declared and ordered that Plaintiffs were not required to establish domicile in Charleston County and were entitled to enroll Daughter in the AMHS on or before August 9, 2010, so long as they purchased real property in the CCSD with a tax assessed value of \$300.00 or more not later than September 30, 2010.

On August 5, 2010, Defendants appealed the lower court's order. In accordance with S C Code Section 18-9-220 and Rule 241, SCACR, that appeal automatically stayed the relief given to the Plaintiffs by the lower court. Plaintiffs requested the lower court, by motion of August 9, 2010, to lift the automatic stay pursuant to Rule 241, SCACR. Also, on August 9, 2010, Daughter purchased real property in the CCSD with a tax assessed value greater than \$300 00. Quitclaim deed, R at 185

On Friday, August 13, 2010, five days before school was to start, the lower court lifted the automatic stay stating "Daughter has only one opportunity to attend the AMHS as a ninth grader. She, not the CCSD, will suffer irreparable harm if this court does not lift the automatic stay. If she prevails on appeal and this court does not lift the automatic stay, it will impossible for her to attend the AMHS in the ninth grade due to the time delay caused by Defendants' appeal. That opportunity will be lost forever and Daughter has no other legal remedies available to her to recover that lost opportunity." August 13, 2010 Order p 4. During that same hearing, Defendants then requested the lower court to stay its order lifting the stay while they petitioned this court to review the order lifting the automatic stay. The lower court denied that request. The AMHS enrolled Daughter on the afternoon of August 13, 2010.

On August 17, 2010, the day before school was to start, Defendants petitioned this court to review and revoke the lower court's August 13, 2010, order that lifted the automatic stay that was triggered by the lower court's July 28, 2010, Order. Daughter began attending classes at the AMHS on August 18, 2010, the first day of the 2010-2011 academic school year. By order of September 16, 2010, this court denied the Defendants' petition to revoke the trial court's order that lifted the automatic stay.

Plaintiffs received notice of the lower court's July 28, 2010, order on July 31, 2010, and notice of the Defendants' appeal of that order on August 7, 2010. Plaintiffs cross-appealed the lower court's order by serving notice of that appeal on Defendants on August 23, 2010.

STATEMENT OF FACTS

The Academic Magnet High School ("AMHS") is a taxpayer - funded school located in the Charleston County School District ("CCSD"). The attendance zone for this magnet school, as set up by the CCSD, is the whole of Charleston County, therefore, regardless of where a child lives in Charleston County, the child is eligible to attend the AMHS subject only to its academic admission criteria which is discussed *infra*. In December of 2009, a reputable, internationally distributed news magazine ranked the AMHS as the number one magnet high school, and as the 12th best public high school, in the United States. The AMHS's curriculum is very rigorous, with almost all of its courses being taught at the honors or college advanced placement level. It is the sole high school located in the tri-county area (Berkeley, Charleston, Dorchester Counties) that has only academically gifted and motivated students enrolled.

The AMHS has less than 600 students enrolled, has a 20:1 student - to - teacher ratio, and has class sizes with no more than 25 students with most classes having fewer than 25. Students must apply to attend the AMHS which enrolls only students who demonstrate exceptional academic ability and performance as shown by national and state standardized test scores, grades, courses taken, and teacher recommendations. Importantly, the Defendants cannot, and do not, transfer or assign students to the AMHS, a student must qualify for admission in accordance with the above referenced academic admission criteria. Applications for Academic Magnet High School, R at 175

The AMHS accepts students who are qualified for admission regardless of whether they live in the CCSD at the time of application Peterson *affidavit* p 1, R at 31 However, the Defendants have taken the legal position that the AMHS is reserved only for students who are physically domiciled in the CCSD (“resident child”) Therefore, Defendants refuse to allow an admitted student who does not live in the CCSD (“nonresident child”) to enroll in the AMHS unless the student and the student’s parent or guardian move to the CCSD after admission (June 7, 2010, letter from Emerson to McSwain, p 2 at R 199) The student’s parent or guardian must sign an *affidavit* stating that he or she and the child are domiciled in Charleston County before enrollment into the AMHS will be allowed (Affidavit of a Student’s Domicile at R 159)

Plaintiff Gayla S L McSwain (“Parent”) is the mother and guardian of minor Plaintiff Storm M H (“Daughter”) They live in an adjoining school district, Berkeley County School District (“BCSD”) Daughter applied to the AMHS in the Winter of 2009 At the time that Daughter applied to the AMHS, Parent assumed that it would be necessary for Plaintiffs to change their legal residency to Charleston County if Daughter were accepted for admission to the AMHS because the AMHS’s application stated that students must be residents of Charleston County (Complaint p 2 at R 17)

In January of 2010, Daughter was accepted for admission by the AMHS to begin the 9th grade on August 18, 2010 The AMHS required daughter to confirm her intention to enroll at the AMHS by January 28, 2010 The Confirmation Form asked for the student’s “Charleston County Residence Address ” (Confirmation Form at R 174) Upon seeing that request, Parent filled in all of the blanks of that form (please note those portions in blue ink) except the blank requesting a Charleston County address At some point later, Parent called the AMHS and spoke

with whoever answered the phone, explained that Parent could not provide a Charleston County address because “we don’t live in Charleston County yet ” (McSwain *affidavit* para 6 at R 67) The lady answering the phone stated something to the effect of “this issue comes up every year, you should just state that you’ll be providing the address sometime before she enrolls ” (Parent did not note the lady’s name because it wasn’t important at the time to do so, and, isn’t important or relevant now) (McSwain *affidavit* para 6 at R 67) Parent stated on the Confirmation Form that “we will provide [a Charleston County residence address] prior to enrollment ” At the time that Parent so stated, she intended to move (McSwain *affidavit* para 6, R at 67) (Please note that that information, along with Daughter’s signature, is in black ink) After mailing the Confirmation Form to the AMHS, Parent discovered that a number of children who she knew to be living in Berkeley County were attending magnet schools in the CCSD (McSwain *affidavit* para 6 at R 67-68)

In February of 2010, *via* letter, Daughter was released by the BCSD to attend school in the CCSD with the caveat that BCSD would not be responsible for any “tuition or transportation fees” that the CCSD might charge to Plaintiffs (BCSD letter to McSwain R at 188) Upon seeing the reference to “tuition” in the letter from BCSD, Parent researched the Education Statute and inquired of Defendants about their policy that would require Plaintiffs to move to Charleston County because Plaintiffs did not want to move if they could pay tuition instead (McSwain *affidavit* para 8 at R 68) Defendants, through their attorney, John F Emerson, initially indicated that Plaintiffs, to avoid moving to Charleston County, could pay tuition or buy real property in Charleston County with a tax assessed value of at least \$300 00 under Code section 59-63-30, or could get the consent of the CCSD Board of Trustees for an inter-district

transfer to enroll Daughter at the AMHS under Code section 59-63-490 (April 21, 2010, email from Emerson to McSwain at R 189, McSwain *affidavit* para 8 at R 68)

Plaintiffs offered to pay tuition but Parent never received a response from the Defendants about the amount of that tuition (March 24, 2010, email from McSwain to Emerson at R 189, McSwain *affidavit* para 9 at R 68) Plaintiffs also began negotiations to purchase real estate in Charleston County (McSwain *affidavit* para 10 at R 68)

Plaintiffs also requested the consent of the CCSD Board for an inter-district transfer pursuant to 59-63-490 by writing a letter to the CCSD's Superintendent in early May 2010 (May 11, 2010, McSwain letter to McGinley at R 194) In response to that letter, Defendant McGinley called Parent to inform Parent that AMHS is reserved for Charleston County residents only, and that she would recommend to the Board that it not allow Daughter attend the AMHS Parent inquired about being able to speak to the Board but Defendant McGinley stated that the Board would make its decision in a "closed" executive session, and that Parent could not appear or speak at that session Parent then asked about an appeal of that decision and Defendant McGinley stated that there would be no appeal from the Board's decision Parent explained that, although she did not want to do so, she most probably would have to ask a court of law to decide the issue to which, among other statements, Defendant McGinley responded, "Well, do what you gotta do" and "You will have to take it to court" and that she would let Parent know the Board's decision on June 8th after the Board meeting of June 7th (which did not actually occur until June 14th) (May 11, 2010, McSwain letter to McGinley with May 25, 2010, McSwain handwritten notes regarding call from McGinley at R 194, McSwain *affidavit* para 11 at R 68-69)

On June 11, 2010, Parent received a letter from CCSD's in-house attorney (dated June 7, 2010) which stated that it is the CCSD "staff position that Storm cannot be admitted to the Academic Magnet unless she actually resides in Charleston County, in compliance with 59-63-30 (a)-(b)" (June 7, 2010, Emerson letter to McSwain, p 2 at R 200) After further correspondence via email with CCSD's attorney and at his instruction, on June 12, 2010, Parent requested, by letter emailed to the CCSD's attorney, that the CCSD Board accept Daughter as an inter-district transfer student pursuant to Code Section 59-63-490 or as a student pursuant to 59-63-30(c) (June 12, 2010, McSwain letter to Emerson, p 5 at R 204) CCSD's attorney had earlier informed Parent that he might not be able to get Parent's June 12 letter to the Board prior to its June 14 meeting (June 9, 2010, Emerson email to McSwain at R 202) Parent requested that the Board's decision regarding Plaintiffs' request for an inter-district transfer be postponed until the Board's next meeting of June 28 if the letter could not be read by the Board before it made a decision on June 14, 2010 (June 12, 2010, McSwain email to Emerson at R 203)

On June 22, 2010, Parent received a letter from the CCSD's in-house attorney (that was dated June 16, 2010) that stated the Board "elected to take up the issue anyway," although that attorney had informed it that Plaintiffs had requested that the Board postpone its decision until after it had read the Plaintiffs' "detailed letter explaining [their] position" The letter from the in-house attorney continued by stating that the Board "voted unanimously in open session to admit Storm to the AMHS if your family establishes 'residence and domicile' in Charleston County before school starts" (June 16, 2010, Emerson letter to McSwain at R 209)

On June 25, 2010, Plaintiffs mailed a "Petition to Appeal Charleston County School District Order/Directive" to Defendants Although Plaintiffs had already requested to appear

before Board prior to the Board's rendering its decision that denied Daughter an inter-district transfer under 59-63-490, and only out of caution to protect their potential procedural due process rights while they pursued a declaratory judgment action in civil court, Plaintiffs petitioned Defendants for a *de novo* hearing regarding its decision. Petition, R at 181. At that time, Plaintiffs did not know that the Board, during its June 14, 2010, meeting, had, apparently, treated their request to the Board for a transfer as an appeal of Defendant McGinley's recommendation to deny an inter-district transfer to Daughter. Plaintiffs later learned, after a review of documents that they subpoenaed from Defendants, discussed *infra* that, indeed, the Board considered the request as an appeal by Plaintiffs.

On June 27, 2010, Plaintiffs filed a declaratory judgment action to have the court determine whether they must move to Charleston County to enroll Daughter in the AMHS. Complaint at R. 16. On June 28, 2010, the Plaintiffs served a *subpoena* on the CCSD requesting that it produce all documents that relate to the Defendants' decision that Daughter must move to Charleston County to enroll in the AMHS. Subpoena, R at 30. In response, on July 8, 2010, the Plaintiffs received the minutes of the Board's June 14, 2010, meeting. Those minutes show that "the Board approved [Daughter's] **Appeal**, subject to residency and domicile confirmation. The motion was approved 7-0." (June 14, 2010, CCSD Board minutes, p. 4 at R. 176. Emphasis added). The only reason that the Defendants have given for their decision is that the AMHS is reserved for students who are domiciled in Charleston County.

On Monday, July 19, 2010, the lower court began a non-jury trial but continued the trial until Thursday, July 22, so that the parties could be given a chance to settle the case. At just after 5 p.m., on July 20, 2010, CCSD's in-house attorney emailed a letter to Parent. That letter offered

to allow Plaintiffs to appear for a hearing before the Board Emerson July 20 email and letter to McSwain, R at 211 Pursuant to S C Code Section 59-19-560, July 20 was the last possible date that the CCSD could respond to Plaintiff's "Petition to Appeal CCSD Order/Directive" that Parent had mailed to the Board on June 25, 2010, had the CCSD not responded by July 20, it would have waived its right to contest the relief that Parent had requested in the Petition which was to enroll Daughter as an inter-district transfer student However, the offer for a hearing was for dates and in a manner that did not provide Plaintiffs with a meaningful hearing – one date was during the time that Plaintiffs would be vacationing in the Western part of the United States (and this fact was known to Defendants, June 28, 2010, letter from McSwain to Judge Dennis with copy to Emerson, R at 210) and was to take place by phone or video, and the other date was for the day after the last day to register for school (Emerson July 20, 2010, letter to McSwain at R 211) Plaintiffs declined the offer of a hearing under those circumstances and given the CCSD's decision having already been made

On July 21, 2010, pursuant to Code Section 59-19-560, Plaintiffs appealed the Defendants' decision to deny Daughter an inter-district transfer under Code Section 59-63-490 to the circuit court in its appellate capacity That appeal is pending as case number 2010-CP-10-005864 The parties were unable to settle the issues that were the subject of Plaintiffs' declaratory judgment action After the second day of trial, July 22, 2010, the lower court took the case under advisement On July 28, 2010, the lower court issued its order and took judicial notice of the fact that, on July 21, 2010, Plaintiffs had appealed the Board's administrative discretionary decision to deny Daughter an inter-district transfer under S C Code Section 59-63-490, therefore, the lower court found that it no longer had original jurisdiction over that

issue and could not make a declaration with respect to 59-63-490. The lower court granted Defendants' motion to dismiss regarding that issue.

However, the lower court found that it had jurisdiction to declare Plaintiffs' legal rights under Code Section 59-63-30 and concluded that the Defendants' policy that requires Plaintiffs to establish domicile in Charleston County before enrolling Daughter in the AMHS violates 59-63-30(c). On July 28, 2010, the lower court declared and ordered that Plaintiffs were not required to establish domicile in Charleston County and were entitled to enroll Daughter in the AMHS on or before August 9, 2010, so long as they purchased real property in the CCSD with a tax assessed value of \$300.00 or more not later than September 30, 2010.

Daughter did not purchase real estate in Charleston County until after the trial judge declared that she could enroll in the AMHS so long as she purchased that real estate by September 30, 2010 due to the Defendants' position that even if Plaintiffs made such a purchase, Defendants would not allow Daughter to enroll in the AMHS. (June 7, 2010, Emerson letter to McSwain, p. 2 at R. 200). Daughter purchased the requisite real estate on August 9, 2010 (Quitclaim deed at R. 185).

Defendants' written policy regarding the admission of nonresident children is as follows:

Policy JFAB Nonresident Students

Purpose: To establish guidelines for admitting to Charleston County School District schools those students who do not reside in the district.

Tuition

The district may charge tuition to certain non-resident students. Students who qualify for attendance under circumstances set out in Section 59-63-30 of the South Carolina Code of Laws shall not be charged tuition.

Examples of students who must pay tuition include: a person so situated as to be better accommodated by a school of an adjoining district (59-63-490).

The associate superintendent shall collect the tuition as specified in Section 59-63-480, South Carolina Code of Laws, 1976. In accordance therewith, the district shall determine the

monthly per student cost of all overhead expenses of the school, which shall include all expenses of the school not paid by the state and shall require that the parent/legal guardian make those monthly payments (CCSD Policy JFAB at R 161)

Children of employees

As a fringe benefit of employment, when space is available, children of district employees may be allowed to attend the school in which the employee works or a school convenient to the employee's place of work

Non resident students may not attend magnet schools/programs

ARGUMENTS

I The trial court was correct in finding that it had subject matter jurisdiction to declare Plaintiffs' legal rights under South Carolina Code §59-63-30

It is within the constitutional and statutory authority of a court, not a school board, to declare the meaning and application of statutes. The Declaratory Judgments Act states as follows:

Section 15-53-20 Courts of record may declare rights, status and other legal relations

Courts of record within their respective jurisdictions **shall have power to declare rights, status and other legal relations** whether or not further relief is or could be claimed. **The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.**

Section 15-53-30 Determination of questions under statute

Any person whose **rights, status or other legal relations are affected by a statute** may have determined any question of construction or validity arising under the statute and **obtain a declaration of rights, status or other legal relations thereunder.**

Defendants contend that the trial court had no jurisdiction to declare Plaintiffs' rights because

the Plaintiffs did not exhaust administrative remedies before the Board pursuant to

Code Section 59-19-510, et seq That argument fails because the exhaustion of administrative remedies doctrine is not applicable to this case Plaintiffs are entitled to request a court to declare their rights under a statute without first having to go before the School Board

Secondly, the Plaintiffs did not request the board to declare their rights under South Code Section 59-63-30 because the Board has no authority to make such a declaration On May 11, 2010, Parent wrote a letter to Defendant McGinley and requested that Daughter be granted an inter-district transfer pursuant to 59-63-490 which gives the Board discretion to accept a student from an adjoining school district under certain conditions not relevant to this appeal That is the only letter and request that was before the Board on June 14, 2010, when the Board voted unanimously to grant Daughter's Appeal so long as Plaintiffs moved to Charleston County before school started at the AMHS in August The only request that Plaintiffs made to the Board, via letter because that was all they were allowed to do, was for the Board to exercise its discretionary authority to grant Daughter an inter-district transfer which the Board denied Plaintiffs have appealed that denial to the circuit court for review in its appellate capacity which is pending as case number 2010-CP-10-005864

The declaratory judgment action was not an appeal for review of any administrative agency decision, it was brought as an original action in the trial court's original jurisdiction Therefore, Plaintiffs were not required to seek a hearing before the Board or to seek any type of remedy before that administrative agency before filing a declaratory judgment action

Furthermore, the declaratory judgment action was not brought *against* anyone, including the Defendants As § 15-53-80 required, Plaintiffs named Defendants as parties to the declaratory judgment action because "[w]hen declaratory relief is sought all persons shall be

made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding ” If the Plaintiffs had brought a lawsuit *against* the Defendants pursuant to an education statute under which the Board had abused its discretionary authority, then the Defendants might have a credible argument that Plaintiffs would have been required to exhaust administrative remedies before resorting to the court Here, the Board was not asked to exercise any discretion with respect to Section 59-63-30 because the Board has no discretion under that statute

The only South Carolina case that Plaintiffs have found that addresses the question of whether a party can bring a declaratory judgment action regarding an education statute without first requesting a hearing before a school board about that same statute is *Adamson v Richland County School Dist One*, 332 S C 121, 503 S E 2d 752 (Ct App 1998) In *Adamson*, an elementary school teacher brought a declaratory judgment action which sought to enjoin a school district from terminating her employment under the Teacher Employment and Dismissal Act This court found that the teacher could not bring that action until she had exhausted her administrative remedies under the Act by seeking review before the school board

Plaintiffs believe that this court’s decision in *Adamson* was incorrect The school district in that case had failed to meet a statutory deadline for providing Adamson with notice in writing that it planned to not renew her employment contract for the upcoming school year The *Adamson* Plaintiff, just as in this case, was not asking the circuit court to review a school board’s discretionary decision She was asking the court to declare whether that school district had the authority to terminate her employment after it had renewed her employment contract by operation of law That question was strictly a question of law, the facts, just as in the case at bar,

were undisputed. Regardless of whether this court got it wrong in *Adamson*, the language of that case is still instructive for the case at bar.

“The requirement of exhaustion of administrative remedies vis-a-vis a court’s authority to hear a case involving an agency, where a plaintiff has not asked the agency for relief, is often confused. The doctrine of exhaustion of administrative remedies is generally considered a rule of ‘policy, convenience and discretion, rather than one of law, and is not jurisdictional.’ *Vaught v Waites*, 300 S.C. 201 at 205, 387 S.E.2d 91 at 93 (Ct. App. 1989). See also *Ex parte Allstate Ins. v Co.*, 248 S.C. 550, 151 S.E.2d 849 (1966). The *Vaught* court, however, noted it expressed ‘no opinion whether failure to exhaust administrative remedies is jurisdictional under the Administrative Procedures Act. See D. Shipley, *South Carolina Administrative Law* at 7-42 (1983).’ *Vaught*, 300 S.C. at 205 n. 2, 387 S.E.2d at 93 n. 2. Professor Shipley states in his work

‘It must be noted that the APA and the Code’s general Declaratory Judgment Act arguably serve different purposes. The Code expressly states that the Declaratory Judgment Act is “remedial.” Its purpose is to “settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” The APA is procedural in that it sets forth a uniform method by which parties may participate in administrative proceedings and seek review of an agency’s action. The use of one form of review should in no way preclude or affect the use of the other (Footnote references omitted). *Id.* at 7-17. This view is arguably supported by S.C. Code Ann. § 1-23-380 (1986 & Supp. 1997), which provides that a party who has exhausted all administrative remedies may seek judicial review of a final agency decision, but further states

This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” (Emphasis added.)

Presumably, Plaintiff Adamson utilized the Declaratory Judgments Act to have the court declare her rights so that she would not have to bring a lawsuit against that school district because that is the intent of that Act. Had the court declared her rights, all parties would have known what their legal rights were and there would have been nothing to fight about before either a school board

or a court. The *Adamson* decision essentially defeats the very purpose of the Declaratory Judgments Act.

Here, Plaintiffs only requested that the Board consent to a transfer to the AMHS under its discretionary authority to do so under 59-63-490, Plaintiffs did not ask it to interpret 59-63-30 because it cannot do so – only the courts can. Plaintiffs did not request the Board’s consent to buy property or pay tuition because Plaintiffs did not need its consent to do that- they already had those rights, therefore, Plaintiffs had no legal obligation to request a hearing before the Board before bringing a declaratory judgment action under Section 59-63-30.

Moreover, even if Plaintiffs had been required to ask the Board to interpret 59-63-30 before asking the court to review that interpretation, the *Adamson* case is distinguishable from the case at bar. The *Adamson* court found “Under the unique facts of this case, there has been no final board action, rather, there is a suspension by and a recommendation from the Superintendent that Adamson be terminated. The board is free to reject the Superintendent’s recommendation for dismissal in which case Adamson would have no reason to complain.” *Adamson*, 332 S C at 128, 503 S E 2d at 756. The *Adamson* court went on to state that “there being no order for the circuit court to review, the court lacked subject matter jurisdiction over the case.” *Id*

Regardless of how Defendants want to couch it, there was a final board action for a trial court to review in this case even if Plaintiffs had been required to exhaust administrative remedies before bringing a declaratory judgment action. Defendant Superintendent McGinley called Parent and told Parent that she was going to recommend to the Board that it not approve Plaintiffs’ request for a transfer, that Plaintiffs would not be allowed to appear before the Board,

that she would let Parent know after the Board meeting how the Board voted, that there would be no appeal from that vote, and that Parent would have “to take it to court ” Parent requested again to appear before the Board, and the Board’s in-house attorney said she could not The attorney told Parent she could write a letter to the Board and she did, however, the Board chose not to read that letter before denying Daughter’s transfer request The Board met behind closed doors, with Defendant Superintendent participating and assumedly recommending that Daughter’s transfer request be rejected The Board then voted 7-0, publicly, to require Plaintiffs to move to Charleston County before they would be allowed to enroll Daughter in the AMHS which, in effect, rejected Daughter’s request for an inter-district transfer

Plaintiffs asked the trial court to declare the meaning of S C Code Section 59-63-30 with respect to their legal rights The purpose of the Declaratory Judgment Act is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations , The plain language of the statute gave the trial court the power to declare Plaintiffs’ rights under 59-63-30(c) which is the very definition of subject matter jurisdiction The Defendants had every right to appear before the trial court to state their position regarding how the court should interpret the statute but they had no standing to object to that court’s declaring Plaintiffs’ rights under 59-63-30

Defendants also argue that the trial court abused its discretion in declaring Plaintiffs’ rights under Section 59-63-30 because Plaintiffs did not exhaust administrative remedies before the Board “The decision to grant a declaratory judgment is a matter within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of abuse” See *Eargle v Horry County*, 335 SC 425, 517 SE2d 3 (Ct App 1998) And, “[w]hether

administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse " *Garris v Governing Bd of S C Reinsurance Facility*, 319 S C 388, 390, 461 S E 2d 819, 831 (1995)

Even if Plaintiffs did have to exhaust administrative remedies, the doctrine of exhaustion of administrative remedies is generally considered a rule of "policy, convenience and discretion, rather than one of law, and is not jurisdictional " *Vaught v Waites*, 300 S C 201, 205, 387 S E 2d 91, 93 (Ct App 1989), *see also Ex parte Allstate Ins Co* , 248 S C 550, 567, 151 S E 2d 849, 855 (1966) While exhaustion is an "inflexible" rule in some jurisdictions, in South Carolina it "is discretionary in nature " *Andrews Bearing Corp* , 261 S C 533 at 536, 201 S E 2d 241 at 243 (1973)

Also, South Carolina, like most jurisdictions, recognizes exceptions to the exhaustion of administrative remedies requirement The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule *Sharon Brown v William B James Superintendent for Cherokee County School District* 389 S C 41, 697 S E 2d 604 (Ct App 2010) However, one does not have to exhaust administrative remedies when it would be futile to do so *Ward v State*, 343 S C 14, 19, 538 S E 2d 245, 247 (2000) The legislature will not require a futile act, therefore, a commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act *Moore v Sumter County Council*, 300 S C 270, 273, 387 S E 2d 455, 458, *Ward v State*, 343 S C at 19, 538 S E 2d at 247 "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty'" *Law v S C*

Dep't of Corr, 368 S C 424, 438, 629 S E 2d 642, 650 (2006) (citing *Thetford Properties IV Ltd P'ship v US Dep't of Hous & Urban Dev*, 907 F 2d 445, 450 (4th Cir 1990))

Even if Plaintiffs had been required to seek an administrative remedy before the Board regarding the Board's interpretation of 59-63-30, that effort would have been futile. Defendants argue that "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." Appellants' Initial Brief of Appellant/Respondent p. 9. To the contrary. As noted *supra*, Defendant Superintendent McGinley called Parent and told Parent that she was going to recommend to the Board that it not approve Plaintiffs request for a transfer, that Plaintiffs would not be allowed to appear before the Board, that she would let Parent know after the Board meeting how the Board voted, that there would be no appeal from that vote, and that Parent would have "to take it to court." (May 11, 2010, letter from McSwain to McGinley with McSwain's handwritten notes of May 25, 2010, R at 194.) Parent requested again to appear before the Board, and the Board's in-house attorney said she could not. The attorney told Parent she could write a letter to the Board and she did, however, the Board chose not to read that letter before denying Daughter's transfer request. The Board met behind closed doors, with Defendant Superintendent participating and assumedly recommending that Daughter's transfer request be rejected. The Board then voted 7-0, publicly, to require Plaintiffs to move to Charleston County before they would be allowed to enroll Daughter in the AMHS which, in effect, rejected Daughter's request for an inter-district transfer.

Additionally, in his argument before the trial court to try to persuade that court that the Board might change its mind and grant an inter-district transfer, one of the Board's attorneys,

who had no choice but to be candid with the trial court, stated, “They [the Board] didn’t hear -- they didn’t hear all of her arguments. They didn’t have her well written lengthy letter. It’s conceivable that the Board can change its mind when they hear all that’s transpired here this morning and if they met and saw this parent. It’s conceivable. I don’t think so because of the political problem that I’ve already described [in chambers.]” Trial transcript, p. 13-14 at R 85-86. First, the Board did have knowledge of the Plaintiffs’ lengthy letter at its June 14, 2010, Board meeting, however, it chose to “take up the issue anyway” without reading the letter. June 16, 2010, Emerson letter to McSwain, R at 209. Secondly, the Board’s attorney, bound ethically to be candid with the court, even doubted that the Board would change its mind.

And, after receiving the Board’s decision that it denied the inter-district transfer on June 22, 2010, Parent then mailed an Appeal of that denial to the same Board but was never offered an opportunity for hearing before the Board until the day after the trial judge began the hearing to declare Plaintiffs’ rights under Section 59-63-30 and Section 59-63-490. Only after the Defendants participated in the declaratory judgment hearing did they offer the Plaintiffs the opportunity to exercise their procedural due process rights. And, that offer was for dates and in a manner that did not offer Plaintiffs a meaningful hearing – one date was during the time that Plaintiffs would be vacationing in the Western part of the United States (and this fact was known to Defendants) and was to take place by phone or video, and the other date was for the day after the last day to register for school. (Emerson July 20, 2010, letter to McSwain at R 211.) Plaintiffs declined the offer of a hearing, after the fact and under those circumstances, knowing that such a hearing would be an exercise in futility. See *Brown v James*, 389 S.C. 41 at 54, 697 S.E.2d 604 at 611 (Ct. App. 2010). “South Carolina, like most jurisdictions, recognizes

exceptions to the exhaustion of administrative remedies requirement. The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule.” *See also Ex parte Allstate Ins. Co.*, 248 S C 550 at 567, 151 S E 2d 849 at 855 (1966) “A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act.” *Id. citing Moore v Sumter County Council*, 300 S C 270 at 273, 387 S E 2d 455 at 458 (1990), *Ward v State*, 343 S C 14 at 19, 538 S E 2d 245 at 247 (2000)

Defendants offer came too late to ensure that Daughter would have had time to obtain a judicial remedy prior to school starting after the Board voted the same way again. And, critically, any appeal that Plaintiffs would have taken from the Board’s second vote to deny Daughter an inter-district transfer would not have stayed that decision. Daughter would not have been allowed to enroll while her appeal for review of the Board’s decision by the circuit court, in its appellate jurisdiction, was pending unless Plaintiffs moved to Charleston County. *See* § 59-19-570, Appeal shall not act as supersedeas. “Until the matter in controversy has been finally disposed of, no appeal shall act as a supersedeas or suspension of the order of the board having original jurisdiction of the cause.” Therefore, Daughter would not have had an adequate remedy. *See* Section 1-23-380 of the South Carolina Code (2005 & Supp. 2009) which states in part, “A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” *And see* Jean Hoefler Toal, et al. *Appellate Practice in South Carolina* 49 (2d ed. 2002)

Even if Plaintiffs had an obligation to seek a hearing before the Board prior to asking the court to declare their rights under 59-63-30, based upon the evidence before the trial judge, it was well within the trial court's discretion to find and conclude that Plaintiffs were not required to exhaust administrative remedies before the Board because it would have been a futile act

II The trial court was correct in finding that Charleston County School District's policy of excluding eligible and qualified nonresident children from its magnet schools violates South Carolina Code §59-63-30

Code § 59-63-30, in relevant part, states

Qualifications for attendance

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

“When the language of a statute is ‘plain and unambiguous, and conveys a clear and definite meaning,’ there is no need to employ rules of statutory construction, and [a] court ‘has no right to look for or impose another meaning’” *State v Jihad*, 339 S C 235 at 240, 528 S E 2d 696 at 698-699 (Ct App 2000) *re vd on other grounds* 347 S C 12, 553 S E 2d 249 (2001) *citing City of Columbia v American Civil Liberties Union*, 323 S C 384 at 387, 475 S E 2d 747 at 749 (1996) “[A] Court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope ” *City of Columbia* 323 at 388, 475 S E 2d at 749 “A court simply cannot ignore

such patent and definite statutory language in order to force a construction not intended by the legislature” *State v Jihad*, 339 S C at 249, 528 S E 2d at 699 *citing Whitner v State*, 328 S C 1 at 6, 492 S E 2d 777 at 779 (1997) (explaining "where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself ") *cert denied*, 523 U S 1145, 118 S Ct 1857, 140 L Ed 2d 1104 (1998)

The meaning of Code § 59-63-30(c) is plain and unambiguous. A child is entitled to attend a public school, without charge, if the child owns real estate having an assessed value of three hundred dollars or more within the school district. If the child does not so own, the child must pay to attend a school within the school district. If this were not the meaning, then the words “without charge” contained in 59-63-30 would be superfluous. *See State v Jihad*, 347 S C 12, 553 S E 2d 249 (2001) *citing In re Decker*, 322 S C 215, 471 S E 2d 462 (1995) (a statute should be construed so that no word, clause, provision, or part is rendered superfluous)

Moreover, the legislative intent behind Code § 59-63-30(c) is clear. “[W]here a court is called upon to interpret statutes, [it] must be mindful of the principle that the intention of the legislature is the primary guideline to be used.” *See Adams v Clarendon County School Dist No 2*, 270 S C 266 at 272, 241 S E 2d 897 at 900 (S C 1978) *citing e g Helfrich v Brasington Sand & Gravel Co* 268 S C 236, 233 S E 2d 291 (1977). Code Section 59-63-30(c) ensures that the school district receives payment for providing a nonresident child with an education *via* taxes from the nonresident child. *See S C Op Atty Gen 31 (1969-1970)* (explaining that school districts are authorized to impose a schedule of charges for attendance at

public schools if the residential requirements of Code Section 21-752¹ are not met by the child)

Code Section 59-19-90(9), in relevant part, states

General powers and duties of school trustees

The board of trustees shall also

- (9) Transfer and assign pupils Transfer any pupil from one school to another so as to promote the best interests of education, and determine the school within its district in which any pupil shall enroll

Based upon Code Section 59-19-90(9), Plaintiffs would agree that, subject to statutory and constitutional rights constraints, the CCSD has the right to assign a child, be they a resident or nonresident child, to a particular school so as to promote the best interests of education. See *Wharton v Abbeville Sch Dist No 60*, 608 F Supp 70 (D S C 1984)(The power of a local school board to assign students to school will not be disturbed unless in the exercise of their official duties such action rises to the level of a constitutional deprivation of rights under the equal protection clause of the Constitution)

However, construing Code § 59-19-90 and 59-63-30 together can lead to only one reasonable, logical conclusion. Because the CCSD has chosen to set up admission criteria for its magnet schools, i e , academic standards, which, in effect, “assigns” only the children who meet those criteria to those magnet schools, if a nonresident child qualifies for admission to a CCSD magnet school and chooses to establish statutory eligibility to attend a CCSD school by buying the requisite real estate within the school district, then the CCSD must enroll that nonresident child in the magnet school. “[It is] the elementary rule of [judicial] construction that all parts and

¹ Predecessor of Code Section 59-63-30

provisions of an enactment must be given effect, if reasonably and logically possible ” *Jolly v Atlantic Greyhound Corp* 207 S C 1 at 8, 35 S E 2d 42 at 44 (1945)

No matter how many times the Defendants say it, they do not assign pupils to magnet schools. Students, who are eligible to attend a magnet school, must also meet admission criteria to enroll at a magnet school, therefore, Defendants assertion that the Board of Trustees has the authority under 59-19-90(9) to assign students to magnet schools is disingenuous.

The Defendants cite to the case of U S v Charleston County Sch Dist , 960 F 2d 1227 (4th Cir 1992), as support for their assertion that the CCSD is allowed to exclude nonresident students from eligibility to attend its magnet schools under 59-19-90(9). However, the issue in that case is not the same as the issue before this court. In that case, the issue was whether the race of a resident child could be considered by the constituent school boards in deciding whether to grant an intra-district transfer from one school to another within the CCSD. The answer was “no ”. Although Defendants have implied that the Fourth Circuit’s reasoning in that case supports their alleged power to assign students to magnet schools, the Fourth Circuit was actually referring to a school board’s power to determine local attendance zones (and student discipline).

In the case before this court, Daughter is not questioning the Board’s power to determine attendance zones or the Board’s ability to set attendance guidelines and to assign students to non magnet schools, however, she is questioning the Defendants’ assertion that their ability to assign pupils to magnet schools within the District is a core function of the Board. The Board does not have that ability. And, the Board does not have the ability to determine who is eligible to attend CCSD schools, magnet or not, eligibility is determined by the statutes of South Carolina, and Defendants are not allowed to create policies that violate those statutes. U S v Charleston

County Sch Dist does not advance the Defendants' argument that they will lose their right to assign students to magnet schools if this court affirms the trial court's order -they never had that right

The Defendants rely heavily upon the holding and language of Washington v Ladue Sch Dist Bd of Educ , 564 F Supp 2d 1054 (E D Mo 2008) for the proposition that “[s]ound public policy supports upholding the Board of Trustees’ authority to establish school attendance criteria” (Appellants’ Initial Brief of Appellants/Respondents p 14) and cite to that case as holding that a child who cannot attend the school of his choice will not suffer irreparable harm. However, the facts of that case are not the same as the facts of the case before this court.

In that case, the school district removed a child from a school’s enrollment because the child was not a resident of the school district in which the school was located. The judge refused to grant an injunction against the school district finding that the child did not reside in that school district. Unlike the case before this court, the school involved in Washington was not a magnet school with a competitive admissions policy, and that case did not involve a nonresident child who paid taxes in that school district. And, importantly, the judge found that the child had made absolutely no showing of irreparable harm as required for injunctive relief. And, most importantly, the judge was interpreting a “residency” statute rather than a “non residency” statute like the one before this court.

The Washington court interpreted the following Missouri statute, in salient part

§ 167.020 R S Mo

2 In order to register a pupil, the parent or legal guardian of the pupil or the pupil himself or herself shall provide, at the time of registration, one of the following

(1) Proof of residency in the district Except as otherwise provided in section 167 151, the term “**residency**” shall mean that a person both physically resides within a school district and is domiciled within that district

Because the child in Washington did not “reside” in that school district, the court found that he was not entitled to attend a school in that district

Here, the South Carolina statute at issue states as follows, in salient part

§ 59-63-30 Qualifications for attendance

Children within the ages prescribed by Section 59-63-20 shall be entitled to attend the public schools of any school district, without charge, only if qualified under the following provisions of this section (c) The child owns real estate in the district having an assessed value of three hundred dollars or more

This statute addresses a child’s entitlement to attend a school district in which he or she does not reside but in which he or she owns real property, the Washington judge was not asked to determine whether that child, if he had owned real estate in that particular school district, was entitled to attend the involved school But, if that judge had been so asked, presumably he or she would have found that the child was so entitled because Missouri also has a “non residency” statute very similar to South Carolina’s In salient part

Title XI EDUCATION AND LIBRARIES

Chapter 167 Pupils and Special Services

§ 167 151 Admission of nonresident and other tuition pupils-certain pupils exempt from tuition-school tax credited against tuition-owners of agricultural land in more than one district, options, notice required, when

3 Any person who pays a school tax in any other district than that in which he resides may send his children to any public school in the district in which the tax is paid and receive as a credit on the amount charged for tuition the amount of the school tax paid to the district The school district of choice shall count the children in its average daily attendance for the purpose of distribution of state aid through the foundation formula

5 If a pupil is attending school in a district other than the district of residence and the pupil's parent is teaching in the school district or is a regular employee of the school district which the pupil is attending, then the district in which the pupil attends school shall allow the pupil to attend school upon payment of tuition in the same manner in which the district allows other pupils not entitled to free instruction to attend school in the district²

Based upon the language of §167 151, it would be fair to presume that the Washington judge, just as the trial court did so similarly in this case, would have found the Missouri child entitled to attend any school in any school district in which the child's parent or guardian paid a school tax if that court were interpreting §167 151 rather than §167 020, a statute that has no relevancy to either the facts or law of the case before this court

And, because the "non-residency" Missouri statute has been on the law books for a long time, just as has the South Carolina "non-residency" statute, it would be fair to presume that the Washington judge, if interpreting the Missouri "non-residency" statute so as to allow enrollment of the child, would not have found a speculative parade of horrors such as the school district "would likely experience a flood of applications for enrollment" and that "the structure of the free public school system would collapse into chaos" Washington, 564 F Supp 2d 1054 at 1058 The Washington case lends no support to the Defendants' argument that public policy supports the validity of the Board's policy of excluding nonresident children from its magnet schools

The Defendants, just as they did before the trial court, also attempt to rely upon a 1988 Opinion of the South Carolina Attorney General to show that they are allowed to exclude

² Interestingly despite the fact that Plaintiffs have repeatedly pointed it out to the Defendants Defendants continue to incorrectly represent to the courts that their Board Policy JFAB states that [n]on resident students may not attend magnet school/programs See Defendants Board Policy JFAB p 2 3 R at 161 Once again that policy refers only to the children of CCSD employees And Plaintiffs believe that policy violates S C Code 59 63 30 with respect to the children of CCSD employees

nonresident children from eligibility to attend CCSD magnet schools See 1988 Op S C Att’y Gen 145 This reliance is, again, misplaced The facts underlying that opinion are that a nonresident child who owned real property in a school district was demanding to attend a particular school within that district The AG opined that Section 59-19-90(9) allowed the district, not the child, to choose which school the child would attend That section states that the district is empowered to “determine the school within its district in which any pupil shall enroll ” Based upon that language, the AG concluded “[T]he power of school districts to determine pupil assignments is not altered by the provisions of school attendance based upon property ownership under 56-63-30 Therefore, property ownership within a district does not, itself, entitle a student to demand attendance at a particular school within that district ” (Emphasis added)

First, that AG opinion is just that - an opinion of the executive branch of government, therefore, it is not binding on this court Plaintiffs have not found a judicial interpretation of Section 59-63-30(c) with respect to enrollment at a magnet school, however, in 1950, before magnet schools existed, the SC Supreme Court, in Moseley v Welch, 218 S C 242, 62 S E 2d 313 (S C 1950) ordered that parents who owned and paid taxes on real estate in two adjoining school districts were entitled to send their children to school in either school district without being charged tuition or operating expenses³

It is argued that the intervenors acquired property in the Kingstree School District for the sole purpose of enabling them to send their children to the schools at Kingstree This may be true but it does not change the result They had the right to avail themselves of the

³ Moseley was decided pursuant to Section 5346 of the 1942 SC Code predecessor to 59-63 30(c) which stated Provided however that when either parent the guardian or other person having in charge any pupil and maintain any such pupil at his home shall own and pay tax on any property in a school district adjoining that in which any such person and pupil reside such pupil may be enrolled either in the district in which he resides or in any such adjoining district without being required to pay tuition fee or other operating expenses and shall be entitled to all of the privileges of such school as if he resided in such school district

privilege given by the statute. The suggestion is also made that the property owned by each of the intervenors is of comparatively small value upon which the yearly tax is only three or four dollars. But the Legislature has not seen fit to make the right given by this statute dependent either upon owning property of a certain value or upon holding it for any specified period. We are not at liberty to add to the statute any conditions of this nature. These are considerations that must be addressed to the law making body. It follows from the foregoing conclusions that the intervenors are entitled to send their children to the schools at Kingstree. *Id.* at 255, 319 respectively.

Secondly, the facts underlying that AG opinion are distinguishable from the facts before this court because Section 59-19-90(9), which is titled "Transfer and assign pupils," does not address enrollment in a magnet school. Section 59-19-90(9) gives a school board the authority to "[t]ransfer any pupil from one school to another so as to promote the best interests of education, and determine the school within its district in which any pupil shall enroll." In the case before this court, the Defendants cannot just assign or transfer a child to the AMHS, despite the language of Section 59-19-90(9), unless they were to violate the school's admission criteria, therefore, the AG opinion is simply not on point with the facts at hand.

Third, even if this court were to assume, *arguendo*, that the 1988 AG opinion were relevant to these facts, it supports Plaintiffs' position by implication. By stating that property ownership within a district does not, **itself**, entitle a student to demand attendance at a particular school, the AG opinion implies, conversely, that a nonresident child is entitled to enroll in a particular school based upon a reason other than property ownership. Here, Daughter is a nonresident child who is entitled to enroll at a particular school - the AMHS - based **not solely** upon property ownership but also based upon her having met the AMHS admissions criteria. Thus, insofar as the AG opinion applies to this case, if at all, it supports Daughter's position because she has reasons, other than property ownership, that entitle her to enroll in that particular

school The AG opinion does nothing to support Defendants' argument to exclude qualified, nonresident children from CCSD magnet schools

Next, the Defendants cite to Stewart v Charleston County Sch Dist , 386 S C 373, 688 S E 2d 579 (Ct App 2009) for the proposition that local legislation gives them ultimate authority to set "admission criteria" for its magnet schools,⁴ however, the issue in Stewart dealt with attendance guidelines and only with respect to resident students, not admission criteria which was competitively based A careful reading of that case shows that it is distinguishable from the case at bar not just in fact but also in law

In Stewart, the CCSD Board of Trustees, which oversees eight local constituent school boards, was fighting with the constituent school board for District 20 regarding which board had the authority to set attendance guidelines for one of CCSD's magnet schools, Buist Academy Eligibility for the openings available in that school was divided up equally amongst four groups of children "priority for one-fourth of available openings was given to students residing in District 20 where the school is physically located, priority for another one-fourth of openings was reserved for siblings of Buist Academy students, priority for one-fourth of openings was given to students who would otherwise attend low-performing schools, and priority for the final one-fourth of seats would be equal among students county-wide The applications for the school have always exceeded the available openings, and a lottery is used at the kindergarten level to select students who will be tested to determine if they meet the academic requirements for admission " Id. at 581

⁴ And Plaintiffs would agree that school districts should have such authority so long as the admission criteria do not violate attendance eligibility defined by state law

Local constituent school board for District 20 voted to give first priority to students residing in District 20 with all remaining openings prioritized for siblings of Buist Academy students. The CCSD believed that it had ultimate authority to set attendance guidelines for Buist Academy. This court agreed, however, Stewart did not involve a nonresident student who was both eligible and qualified to attend Buist Academy. If this court had had the issue of whether a nonresident child who owned real property in the CCSD was not allowed to participate in the lottery to attend Buist Academy because it is a magnet school, then Stewart might be relevant to the facts before the court in this case. As such, Stewart does nothing to help the Defendants advance their argument that they have ultimate authority to set admission criteria for CCSD magnet schools regardless of whether those criteria violate state law because it simply does not involve the same issue.

Lastly, the Defendants cite to Wharton v Abbeville Sch Dist No 60, 608 F Supp 70 (D S C 1984) as somehow helping them to argue that public policy supports their exclusion of qualified, eligible nonresident children from CCSD magnet schools. In Wharton, a factually well documented case, the court found that the Plaintiffs' civil rights were not violated when the school district board voted to close down Carver Middle School which was a historically segregated "black" school because the vote was based solely upon economic considerations, not illegal discriminatory reasons. Among other reasons, the Plaintiffs wanted the courts to keep that school open because it was of historical significance to the black citizens of that geographic area and because they believed they had a right to attend a "neighborhood" school.

While the Defendants are correct that the Wharton court found that "no statutory or property right is granted to anyone to select the school which they will attend," Id. at 77, the

court went on to state that the “power of the local school board [to assign students to schools] will not be disturbed unless in the exercise of their official duties such action rises to the level of a constitutional deprivation of rights under the equal protection clause of the Constitution or the Civil Rights Acts, as amended ” Id In other words, the student does not have the right to question the board’s assignment of her to a particular school unless that assignment violates her rights under law, including statutory law The Wharton court found no such violation in that case

The Wharton case is distinguishable from the case at bar That case does not involve a nonresident child who is both eligible, pursuant to state statute, and qualified, by meeting admission criteria, to attend a particular school In the case before this court, Daughter is claiming, and the trial court found, that the Defendants’ policy of excluding qualified nonresident students from eligibility to attend CCSD’s magnet schools violates S C Code Section 59-63-30 Unlike the facts of the Wharton case, Daughter questioned whether that exclusion violated her rights under law and the lower court answered in the affirmative The Wharton case lends no help to the Defendants’ argument that that their policy of excluding qualified and eligible nonresident from CCSD magnet schools does not violate Section 59-63-30 It would appear that it supports Plaintiffs’ position, instead

III The trial court was correct when it exercised its discretion to lift the automatic stay

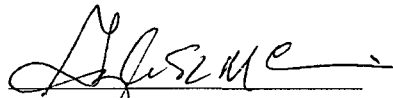
Based upon the foregoing reasons and upon those set forth in Plaintiffs’ Return to Petition For Review of Order Lifting Automatic Stay, the trial court was correct to exercise its discretion to lift the automatic stay because the Defendants did not make a strong showing that they were

likely to prevail on the merits of the appeal, that they would be irreparably injured if not given such relief, that the issuance of the stay would substantially harm other parties interested in the proceedings, and that the public interest would be served by granting the stay, therefore, the lower court did not abuse its discretion when it lifted the stay of its July 28, 2010, order because that decision was neither controlled by an error of law nor based on factual conclusions that are without evidentiary support

CONCLUSION

For the reasons stated, the trial court was correct in finding that it had subject matter jurisdiction to declare Plaintiffs' legal rights under South Carolina Code §59-63-30, in finding that Charleston County School District's policy of excluding eligible and qualified nonresident children from its magnet schools violates South Carolina Code §59-63-30, and when it exercised its discretion to lift the automatic stay, therefore, Plaintiffs hereby respectfully request this court to affirm the trial court's order based upon the foregoing reasons and upon any ground appearing in the Record on Appeal

Respectively submitted,



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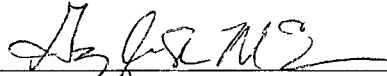
PROOF OF SERVICE

I certify that I have served Respondents' Final Brief of Respondents/Appellants, Appellants' Final Brief of Respondents/Appellants, and Appellants' Final Reply Brief of Respondents/Appellants on the attorneys for the Appellants/Respondents by depositing a copy of them in the U S Mail, postage prepaid, on April 25, 2011, addressed to Kenneth L Childs, Esq , at P O Box 11367, Columbia, SC 29211

And

CERTIFICATION

I certify that Respondents' Final Brief of Respondents/Appellants, Appellants' Final Brief of Respondents/Appellants, and Appellants' Final Reply Respondents/Appellants comply with Rule 211(b), SCACR



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