

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Judge James E. Barber, III, Circuit Court Judge

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Appellate Case No. 2013-000532

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Student #1 John Doe  
REDACTED NAME OF STUDENT  
REDACTED NAME OF MOTHER OF Student #1 John Doe.....Appellant(s)

v.

Board of Trustees, Richland School District Two;  
Richland School District Two, Superintendent  
Dr. Katie Brochu, in her official capacity as School  
Superintendent ..... Respondent(s).

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RESPONDENTS' MEMORANDUM OF LAW ON APPEALABILITY  
AND SUGGESTION OF MOOTNESS

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CHILDS & HALLIGAN, P.A.

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**RECEIVED**

AUG 06 2013

**SC Court of Appeals**

By Order dated July 30, 2013, this Court requested the parties to serve and file memoranda addressing the appealability of the Circuit Court's denial of Appellant's motion for a temporary restraining order compelling Appellant's attendance at Westwood High School. That same day, the Circuit Court issued an Order granting Respondents' motion to dismiss Appellant's action with prejudice, thereby rendering Appellant's motion for a temporary restraining order and this appeal moot.<sup>1</sup>

An appeal becomes moot when an intervening event renders a case nonjusticiable and a decision by the reviewing court would have no practical legal effect on the existing controversy, thus making it impossible for the reviewing court to grant effectual relief. *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 122 (1999)). Where the issue on appeal involves a temporary injunction, the appeal is rendered moot by a final judgment. *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) ("Temporary injunctions remain in force only until, and expire upon, the entry of the final judgment and are not enforceable after the final judgment has been entered.").

Because the Circuit Court issued a final adjudication in this case, any decision by this Court on Appellant's motion for a temporary restraining order would have no practical legal effect. Accordingly, this appeal is moot and should be dismissed.

Notwithstanding the Circuit Court's Order dismissing this action with prejudice, if this Court would like the parties to proceed in addressing the appealability of the Circuit Court's order denying Appellant's motion for a temporary restraining order,

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<sup>1</sup>Judge Lee's Order granting Respondents' Motion to Dismiss is attached as Exhibit A.

please let us know and we will submit a memorandum addressing the issue.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

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Attorneys for Respondents

August 6, 2013  
Columbia, South Carolina

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

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Court of Common Pleas**

**Judge James E. Barber, III, Circuit Court Judge**

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REDACTED NAME OF STUDENT  
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v.

Board of Trustees, Richland School District Two;  
Richland School District Two, Superintendent  
Dr. Katie Brochu, in her official capacity as School  
Superintendent ..... Respondent(s).

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that he has served **RESPONDENTS'**  
**MEMORANDUM OF LAW ON APPEALABILITY AND SUGGESTION OF**  
**MOOTNESS** by depositing a copy of the same in the U.S. Mail service, postage prepaid  
and addressed as follows:

Ms. Rhonda Meisner  
PO Box 689  
Blythewood, SC 29016

This 6th day of August, 2013.

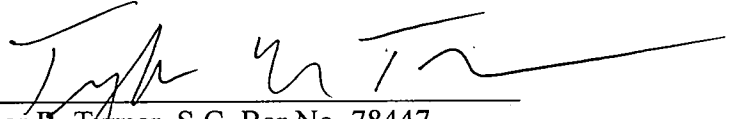
**RECEIVED**

AUG 06 2013

**SC Court of Appeals**

# **Exhibit A**

CHILDS & HALLIGAN, P.A.



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## STANDARD OF REVIEW

In ruling on a motion to dismiss a cause of action under Rule 12(b)(6), the court must look only to the allegations of the Plaintiff's complaint. *State Board of Medical Examiners v. Fenwick Hall, Inc.*, 300 S.C. 274, 387 S.E.2d 458 (1990). The court must deny the motion if the facts and inferences, when viewed in the light most favorable to the Plaintiff, show that the Plaintiff could prevail under any theory. *Murrow Crane Co v. T.R. Trucker Construction Co.*, 296 S.C. 427, 373 S.E.2d 701 (Ct. App. 1988).

## DISCUSSION

The Defendant raises the following issues to support the motion:

### A. GIFTED AND TALENTED STATUTE AND REGULATION

Plaintiff John Doe seeks a declaratory judgment indicating that Defendant's denial of his transfer request from Westwood High School to Blythewood High School violated South Carolina's gifted and talented statute and regulation, codified in S.C. Code Ann. § 59-20-170 and S.C. Code Ann. Regs. 43-220, respectively. Section 59-20-170 establishes programs for talented students in public school districts and S.C. Code Ann. Regs. 43-220 explains the framework of the program in more extensive detail. Defendant asserts Plaintiff's action is barred because no private cause of action exists under the statute or regulation.

To determine if the gifted and talented laws create a private cause of action for Plaintiff the Court follows the reasoning of *Abbeville County Sch. Dist. v. State*. In *Abbeville*, the South Carolina Supreme Court used a six part test to examine whether the Education Finance Act created a private cause of action. 335 S.C. 58, 515 S.E.2d 353 (1999). The test determines whether the legislature identified a duty of a public officer to a particular class of persons, thereby creating a private cause of action. The six part test requires consideration of the following factors:

- (1) is an essential purpose of the statute to protect against a particular kind of harm;
  - (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause harm;
  - (3) the class of persons the statute intends to protect is identifiable before the fact;
  - (4) the plaintiff is within the protected class;
  - (5) the public officer knows or has reason to know the likelihood of harm to member of the class if he fails to do his duty;
  - and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.
- Id.* at 539.

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In *Abbeville*, the Court found a private cause of action did not exist because the statute created no special duty to individuals by the public officer. "[T]he purpose of providing a public education is to benefit not just the individual receiving it, but also the public at large. Since [the statute in question] was not created for the special benefit of a private party, no private cause of action is implied." *Id.* at 66.

The essential purpose of the law in *Abbeville* mirrors the purpose of the laws at issue in this case. The purpose of providing a public education is not for the benefit of a private party; it is to benefit the public at large. Because the gifted and talented laws were not created for the special benefit of a private party, no private cause of action exists. In addition, there is no specified public officer charged with carrying out any duty established in the laws. Therefore, Plaintiff's claim fails to pass the six part analysis, and the Plaintiff does not possess a private cause of action under S.C. Code Ann. § 59-20-170 or S.C. Code Ann. Regs. 43-220.

#### **B. EQUAL PROTECTION CLAUSE**

Plaintiff claims that Defendants violated the Equal Protection Clause of the United States Constitution's Fourteenth Amendment by segregating Blythewood's high school system. Plaintiff alleges that Westwood High School enrolls more African American students while Blythewood High School enrolls more white students. Defendants argue that Plaintiff's complaint fails to state facts sufficient to constitute an equal protection claim because the relief requested would not remedy the alleged constitutional violation.

When a constitutional violation is proven, the remedy must be designed to redress the difference. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766 (1977); *Freeman v. Pitts*, 503 U.S. 467, 1445, 112 S.Ct. 1430, (1992) ("A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation."). Plaintiff's requested relief would require Defendant to grant Plaintiff's transfer request to move from Westwood High School to Blythewood High School. Because Plaintiff John Doe is a white student, a transfer to Blythewood High School would not provide a remedy to the alleged Equal Protection Clause violation. Instead, a transfer to Blythewood High School would exacerbate the alleged violation while adding to the alleged racial imbalance. Since Plaintiff's request as stated in the complaint would intensify the alleged constitutional violation, Plaintiff's equal protection claim fails.

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### **C. DUE PROCESS CLAUSE**

Plaintiff's third claim involves the Fourteenth Amendment's Due Process Clause. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security interests that a person has already acquired in specific benefits." *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972). A student has a legitimate entitlement to a public education as a property interest, secured by the Due Process Clause. *Goss v. Lopez*, 419 U.S. 565, 582, 95 S.Ct. 729, (1975). Due process of law is required when an institution deprives a student of the property interest, amounting to a "total exclusion from the educational process for more than a trivial period." *Id.* at 576.

Plaintiff alleges that the denial of the transfer request to Blythewood High School constituted a violation of due process. (Compl. ¶¶ 43.) Based on the complaint, Defendant changed the location of Plaintiff's assigned public high school, but the Defendant did not deny Plaintiff a public education that constituted a "total exclusion" from receiving an education. Despite the changes to the zoning policy, Plaintiff was free to receive an education at Westwood High School. Because Plaintiff's access to education was never restricted, Plaintiff's due process rights have not been violated by Defendant's actions.

Furthermore, Plaintiff lacks the individual right to choose the location of her child's school within the public education system. "The local autonomy of school districts is a vital national tradition." *Dayton Bd. Of Education v. Brinkman*, 433 U.S. 406, 410, 97 S.Ct. 2766 (1977). In South Carolina, "[the] law grants a child of school age the right to a free education but does not confer a right upon pupils to attend a specific school." *Wharton v. Abbeville Sch. Dist. No. 60*, 608 F. Supp. 70 (D.S.C. 1984). Moreover, the Defendant controls the placement of students and shall "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." S.C. Code Ann. § 59-19-90(9). Therefore, Defendant maintains authority over student placement.

Based on the facts included in Plaintiff's complaint and South Carolina case law, Defendant did not violate Plaintiff's property interest. Plaintiff's due process argument is barred.

### **D. NEXT FRIEND**

Defendants argue Plaintiff John Doe's mother is not a licensed attorney and cannot legally represent him pro se. "No person may either practice law or solicit the legal cause of

another person or entity in this State unless he is enrolled as a member of the South Carolina Bar..." S.C. Code Ann. § 40-5-310. Plaintiff's mother argues that she may represent her child in the present case, pursuant to Rule 17(c), SCRCPP, which states, "If a minor or incompetent person does not have a duly appointed representative he may sue by his next friend or by guardian ad litem."

Although the state courts have been silent as to this particular issue, the federal courts have shown the limitations of next friend representation. The Fourth Circuit held that a non-attorney parent of minor children is not authorized to litigate pro se the claim of his minor children. *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 400 (4<sup>th</sup> Cir. 2005). "The right to litigate for oneself... does not create a coordinate right to litigate for others." *Id.* at 401. In this decision, the *Myers* Court aligned itself with the majority of federal circuits that disallow non-attorney representation of children by their parents. See *Shepherd v. Wellman*, 313 F.3d 963, 970 (6<sup>th</sup> Cir.2002); *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147, 1149 (7<sup>th</sup> Cir.2001); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581 (11<sup>th</sup> Cir.1997); *Johns v. County of San Diego*, 114 F.3d 874, 877 (9<sup>th</sup> Cir.1997); *Osei-Afryie v. Med. Coll.*, 937 F.2d 876, 882-83 (3d Cir.1991); *Cheung*, 906 F.2d at 61; *Meeker v. Kercher*, 782 F.2d 153, 154 (10<sup>th</sup> Cir.1986). The South Carolina District Court has also held that parents may not litigate the claims of their children pro se. See *Nelson v. AVX Corporation*, No. 4:11-01598-RBH-TER, 2011 WL 4904440; *Booker v. Sullivan*, No. 8:11-1131-HMH-JDA, 2011 WL 3555718 (D.S.C. July 21, 2011); *Foley v. Town of Nichols*, No. 4:09-1217-TLW-TER, 2010 WL 424142 (D.S.C. Feb. 1, 2010); *Bardes v. Magera*, No. 2:08-CV-487-PMD-RSC, 2009 WL 3163547 (D.S.C. Sept. 30, 2009). (D.S.C. Aug. 12, 2011.) In *Nelson*, the District Court dismissed the pro se litigant's claims on behalf of her children, and repeated the *Myers* policy that "children should not be prejudiced by their well-meaning, but legally untrained parents." *Nelson* at 1.

This Court follows the federal court's reasoning. A parent may assert claims on behalf of their minor child as next friend, pursuant to Rule 17(c), SCRCPP, but a parent cannot litigate a minor child's claim without legal counsel. As her son's next friend, Plaintiff's mother may bring claims to sue Defendant on behalf of her minor child; however, Plaintiff's mother may not litigate her son's legal claims because she is not a licensed attorney.

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**ORDER**

For the reasons set forth above, it is **ORDERED** that the Defendant's Motion to Dismiss is **GRANTED** and the complaint is **DISMISSED WITH PREJUDICE**.

**AND IT IS SO ORDERED.**



ALISON RENEE LEE  
Presiding Judge

July 30, 2013  
Columbia, South Carolina



STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

CASE NUMBER: **2012CP4007122**

Student Number One John Doe

Board Of Trustees Richland School District TWO

Jane Doe

Calvin Jackson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court

**ORDER INFORMATION**

This order  ends  does not end the case.  
Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of July 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Jane Doe

Tyler Ryan Turner

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W. McBride

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August 6, 2013

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## VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

Re: Student Number One John Doe v. Richland School District Two Board of Trustees; Richland School District Two Superintendent, in her official capacity, Katie Brochu, PhD  
**Appellate Case No. 2013-000532**

Dear Ms. Kitchings:

We represent Respondents Richland School District Two Board of Trustees and Katie Brochu, in her official capacity as Richland School District Two Superintendent, in the above-referenced appeal. Enclosed for filing please find the original and two copies of Respondents' Memorandum of Law on Appealability and Suggestion of Mootness. Please return the extra copy with our courier. We appreciate the Court's assistance with this matter.

With kind regards, I am

Sincerely yours,

  
Tyler R. Turner  
tturner@childs-halligan.net

/slw

Enclosures

c: Ms. Rhonda Meisner (w/enclos.)  
Kathy L. Mahoney, Esq. (w/o enclos.)  
John M. Reagle, Esq. (w/o enclos.)

**RECEIVED**

AUG 06 2013

**SC Court of Appeals**