THE STATE OF SOUTH CAROLINA
In The Court of Appeals

69381

APPEAL FROM RICHLAND SCHOOL DISTRICT TWO BOARD
Court of Common Pleas

James R. Barber III, Circuit Court Judge

Case No. 2013-000532

STUDENT #1, JOHN DOE,REDACTED, NAME OF STUDENT,REDACTED NAME OF MOTHER OF STUDENT #1 JOHN DOE — Appellants,

v.

BOARD OF TRUSTEES, RICHLAND SCHOOL DISTRICT TWO, RICHLAND SCHOOL DISTRICT TWO SUPERINTENDANT, KATIE BROCHU, IN HER OFFICIAL CAPACITY AS SCHOOL SUPERINTENDANT — Respondents.

MEMORANDUM PURSUANT TO COURT ORDER OF JULY 30, 2013

Appellants submit this memorandum pursuant to Court Order of July 30,2013 received on August 1, 2013.

August 9, 2013

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Appellant, Mother of Student #1 John Doe (hereinafter "Mother") and Student #1 John Doe (hereinafter Student #1) (collectively Appellants) respectfully submits this memorandum in answer to the questions posed by the South Carolina Court of Appeals Order filed July 30, 2013 and received August 1, 2013. The order instructs the parties to further brief their position as to why this matter is immediately appealable. In the Order, the Court asked the parties to address two issues which relate to the appealability of the Temporary Restraining Order given:

(1) the motion for the temporary restraining order did not seek an order prohibiting action, as are injunctions, but sought an order compelling action

Background

The original action precipitating the need for issuance of a Temporary Restraining Order is an appeal of an adverse education decision by the Richland School District Two (hereinafter "District") and the affirmation of the decision by the Richland School District Two Board ("Board") under S.C. Code Ann. §59-19-560. The statute outlines the appeal process and directs "any party aggrieved to a review of the decision of the Board via an appeal to the Circuit Court for a judge alone de-novo review". The statute provides for a judge alone review in the same manner of all equity appeals. The Appellants argue the District violated Student #1's procedural due process rights by negligently maintaining the information stored in their middle school computers.[1] The right to a free education is provided to all of South Carolina Students via the S.C. Const. art XI§3. The Board offered the opportunity for students to "choose" the school of their

[1] Second Amended Complaint

choice via an "expanded choice" lottery process. Students who were not satisfied with their assigned school could request the school of their choice via the "expanded choice" process. The main source of information that is dissemination students is from the school the student's currently attend. The Richland School District Two Board approved the change in attendance lines for the new High School opening in Blythewood in December of 2011. The Choice program ran from Jan1-31, 2012. The middle school computers were not updated to reflect the new attendance lines until April of 2012, which was after the choice deadline.

Parents, like the Mother that called the school for the assignment of their child were given stale and erroneous information. Had the information stored in the school computers been accurate, Student #1 could have participated in the choice lottery. There is no need to participate in the lottery if their child was assigned to the appropriate school, which was the information received by Mother. Student #1 was assigned to Blythewood High School, the appropriate school for his gifts and talents until at least the April counseling sessions. Upon learning the information supplied by the school regarding assignment of Student #1 was erroneous, Mother requested his assignment be returned to Blythewood High School, the most appropriate school for his gifts and talents. Mother notified the District of both her and Student #1's request. She also notified the district that Student #1 was a member of the Gifted and Talented group of students and it was her opinion that his gifts would best be served at Blythewood High School due to a series of recent traumatic events requiring the comfort of his support group of friends. The District denied the request without considering Student #1's status as an individual member of the Gifted and Talented sub-group of students and recommended

his transfer request be denied to the Board without informing the Board the District did not consider his status in the Gifted and Talented program prior to the denial. Mother appealed the denial pursuant to 59-19-560 and requested a TRO to return him to the school that he was assigned prior to the controversy. This appeal follows:

Argument:

The Court has rightly characterized the confusion surrounding the "Order to Deny Temporary Restraining Order" ("hereinafter Order") as well as the finality of the Order, even if only temporarily. This is primarily due to three things : 1) the lengthy process of school board appeals 2) the fluid nature of the appeal of school board decisions and 3) the inability of parents to legally enroll their child in any school "not authorized" by the school district, creating a dynamic "status quo". While the Order tends to read like a mandatory injunction; it is in fact, a motion to restrain the compelled matriculation at a newly opened High School. Defendants argue the point in time the "status quo" begins is the time immediately preceding entry into the Circuit Court phase of the appeal and not "the last peaceable position" prior to the commencement of the transfer request. Appellants argue the "status quo" is Student #1's assignment to Blythewood High School.

Status Quo

To clarify Appellants position, it is first important to explain the "status quo" and the due process violations by the District from the Appellants position. The Status quo has been defined as the last peaceable uncontested status that proceeded the pending controversy. The last peaceable status was Student #1's assignment to Blythewood High

School. Student #1 was reassigned to Westwood High School and compelled to attend. Appellants claim the notice for the change in High School zoning was defective in that the middle school computers, the primary source of information for parents had Student #1 still assigned to Blythewood High School until well after April of 2012 which prevented his ability to apply for expanded school choice. Appellants argue that once the District developed a process for "choosing" a high school they should have in place a mechanism to ensure the correct information is available so students have the opportunity to participate in "choice", in this case Student#1.

This defective notice violated Student #1's procedural due process rights. Choice was available to all students; however, providing inaccurate information to Mother prevented Student #1's participation. Even though Student #1 was not guaranteed success in his participation he at least would have had the opportunity to participate with adequate notice; a central concept of due process violations.

Parental Rights/Substantive Rights

Additionally, Appellants claim the South Carolina Gifted and Talented Statutes creates a property interest in additional education benefits and therefore invokes a due process analysis which was not followed or even recognized by the District. All school age South Carolina residents have a right to a free education under S.C. Const. art XI § 3; those students who individually qualify and are accepted into the pool of gifted and talented students gain additional rights and services under S.C. Code Ann. § 59-29-170 and Regulation 43-220. The South Carolina legislature has made clear the ability of parents to participate in the their children's education via the enactment of the State

Statute S.C. Code Ann §59-28-100 entitled "Parents involvement in their children's education act" additionally, S.C. Code Ann. §59-29-170 also gives parents independent rights separate from S.C. Code Ann.§ 59-28-100. The participation in choice required both the Mother's involvement along with the Student #1's "choice" as students, without their parent could not apply for choice since the parents would be required to provide the transportation to the choice school. Here, like in the appeal of a Board decision; Mother and Student #1's rights are intertwined and cannot be separated.

The U.S. Supreme Court has cited a long history of their decisions upholding parental rights as fundamental.

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington v. Gluck berg, 521 U.S. 702, 719, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997).* The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *521 U.S. at 720;* see also *Reno v. Flores, 507 U.S. 292, 301-302, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993).*
>
> The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923),* we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925),* we again held that the "liberty of parents and guardians" includes the right "to direct the

> upbringing and education of children under their control." We explained in *Pierce* that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *268 U.S. at 535.* We returned to the subject in *Prince v. Massachusetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944),* and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *321 U.S. at 166.*

De-facto Segregated High Schools in Blythewood

The Second Amended Complaint alleges that the Richland School District Two Board created a de-facto segregated school system for the Blythewood High School students which is not allowed under the South Carolina State Constitution.[2] During the TRO hearing, Ralph Schmidt, principal at Westwood High School testified as follows:

> Q. Mr. Schmidt, when you first got the opportunity to open Westwood High School, were you surprised at the attendance of the students there?
> A. You know, I started working with this over a year ago, with Dr. McDaniel, as we started planning this, so as I watched the attendance lines, I kind of knew where we were going to be.
> Q. When you say you watched the attendance lines, what do you mean by that?
> A. Well, I mean, I attended all of the school board meetings and so I got to see the discussions and what was going through the school board.
> Q. So you knew the student population would be approximately 81% African Americans?
> A. That is correct.
> Q. And is that the same ratios in the other schools?

[2] Second Amended Complaint/Appeal ¶ #12 violating the holdings of *Green v. County School Board of New Kent County, 391 U.S. 430 (1968).*

A. No. I mean, there are some differences.

The Second Amended Complaint also alleges that the School District by redrawing the attendance lines coupled with the misapplication of choice created a de-facto segregated student population not allowed under the laws of this state.

> **S.C. Code Ann. 59-63-40 (2008).** Discrimination on account of race, creed, color or national origin prohibited.
>
> (1) No person shall be refused admission into or be excluded from any public school in the State on account of race, creed, color or national origin.
>
> (2) Except with the express approval of a board having jurisdiction, no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors, or national origins; **and no school district or attendance area, by whatever name known, shall be established, reorganized or maintained for any such purpose**, provided that nothing contained in this section shall prevent the assignment of a pupil in the manner requested or authorized by his parents or guardian, and further provided that nothing in this section shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its pupils exclusively or primarily from members of such religion or denomination or from giving preference to such selection to such members or to make such selection to its pupils as is calculated to promote the religious principle for which it is established. (emphasis added)

The District and Board has created a De-facto Segregated High School System via the redrawing of attendance lines and the inappropriate use of "expanded choice" in Blythewood not allowed under the laws of this state. Additionally ;after learning Student #1 was a member of the Gifted and Talented population they did not follow the Board of Education recommendations as outlined in 2 S.C. Regs. 43-220 (2011) referencing SC Best Practices for Gifted Education, 2006 (hereinafter "Board of Educ.") regarding

treatment of the Gifted and Talented Students as individuals and review his placement due to his "particular needs".

Gifted and Talented Statute: Property rights

Additionally, Appellants claim the South Carolina Gifted and Talented Statute creates a property interest in additional educational benefits and therefore invokes a due process analysis which was not followed or even recognized by the District. All school age South Carolina residents have a right to a free education under S.C. Const. art XI § 3; those students who individually qualify and are accepted into the pool of gifted and talented students gain additional rights and services under S.C. Code Ann. § 59-29-170 and 2 S. C. Regs 43-220 (2011)

The Gifted and Talented Statute S.C. Code Ann. §59-29-170 gives students participating in the program individual rights and therefore property interests in the furtherance of their education.

> SECTION §59-29-170. Programs for talented students.
>
> Not later than August 15, 1987, gifted and talented students at the elementary and secondary levels must be provided programs during the regular school year or during summer school **to develop their unique talents in the manner the State Board of Education must specify** and to the extent state funds are provided. The Education Oversight Committee shall study the implementation of this section and report its findings to the General Assembly by July 1, 1986. By August 15, 1984, **the State Board of Education shall promulgate regulations establishing the criteria for student eligibility in Gifted and Talented Programs.** The funds appropriated for Gifted and Talented Programs under the Education Improvement Act of 1984 must be allocated to the school districts of the State on the basis that the number of gifted and talented students served in each

> district bears to the total of all those students in the State. However, districts unable to identify more than forty students using the selection criteria established by regulations of the State Board of Education shall receive fifteen thousand dollars annually. Provided, further, school districts shall serve gifted and talented students according to the following order of priority: (1) grades 3-12 academically identified gifted and talented students not included in the state-funded Advanced Placement Program for eleventh and twelfth grade students; (2) after all students eligible under priority one are served, students in grades 3-12 identified in one of the following visual and performing arts areas: dance, drama, music, and visual arts must be served; and (3) after all students eligible under priorities one and two are served, students in grades 1 and 2 identified as academically or artistically gifted and talented must be served. All categories of students identified and served shall be funded at a weight of .30 for the base student cost as provided in Chapter 20 of this title. Where funds are insufficient to serve all students in a given category, the district may determine which students within the category shall be served. Provided, further, no district shall be prohibited from using local funds to serve additional students above those for whom state funds are provided. (emphasis added).

In the Gifted and Talented Statute, the Legislature provides funds specifically to "develop" gifted and talented student's "unique" talents. The operative words in the statute are "unique" and "develop". Here the legislature provides additional funds for the individual students that qualify. The wording in the statute coupled with the "individual" qualifications required to participate and receive services creates a property interest and therefore the right to object when the District does not follow the regulations as outlined by the Statute. The word develop as defined by Merriam-Webster's online dictionary is "to make active or promote the growth of".

The South Carolina Supreme Court stated in several cases :

> Where a statute does not specifically create a private cause of action, one can be implied **only if the legislation was enacted for the special benefit of a private party**. Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992) (emphasis supplied by the Court referencing this holding).

Here, the use of unique (meaning like no other; individual) and the use of the word "develop" refers to an individual right and the development of that right. Unlike the State Financing Act, a general statute; the Gifted and Talented Statute refers to individual Students by using the word unique. Respondents would like to "group" these students, once identified into a unidentified sub- group of the general student population; however, the statute directs the Board of Educ. to create a process to specifically identify the individual students in the group via testing. By using the Respondents method, the students if left unidentified, could not be provided the services the statute dictates. Respondents seem to argue that even though students qualify individually via test scores and are accepted into the program individually; once in the program, they are morphed into a creature like the fictional "Borg" operating as an" individual collective" and unable to be separated from the other members of their group. The analogy of the "borg" suggests that as individuals they cease to exist and only exist as a group of gifted and talented subjects.

Conclusion and Response to Court's First Question:

This appeal, while interlocutory due to the fact the main appeal was not ruled on; affects several substantial rights and therefore is immediately appealable. The Order is also the final determination of the issue of interrelated rights shared by Mother and Student #1

making the Order immediately appealable. The Order separates the rights of Mother from Student #1 thereby extinguishing some rights held by both Mother and Student #1 making the Order immediately appealable. Appellants argue the creation of the new high school violates the law by creating a de-facto segregated school system making the Order immediately appealable. The Order relied on S.C. Code Ann. §59-19-570 (2012) which States:

> "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."

Reliance on this statute further violates the due process arguments Appellants make in the appeal itself. It is axiomatic that if creation of the school student population violates the law, delaying the appeal via the reliance on a Statute in conflict with the facts further perpetuates the injury to Appellants. For the reasons stated above, the Appellants contend the Order is immediately appealable.

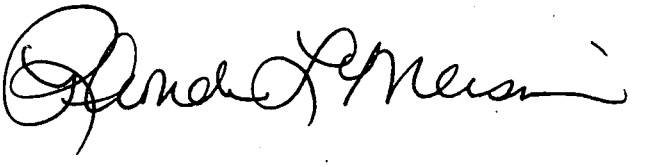
(2) the order, though labeled as an order denying a temporary injunction, actually denies the ultimate relief sought on appeal to the circuit court, even if only temporarily.

Appellants agree with the Court that the denial of the Temporary Restraining Order actually makes a conclusion on the merits of the appeal while never holding a "merits hearing". The Order does not reflect the evidence provided during the hearing and as such it was legal error to rely on S. C. Code Ann. 59-29-570 when substantial rights were affected. Judicial review of adverse education decisions that affect substantial rights

is critical to ensure that Boards do not overstep the authority the law conveys to them. Here, Appellants question both the legality of the school created, the system of notice to Mother and Student #1 and the District and Boards treatment of Student #1 as a member of the gifted and talented group of students. While Boards are given the exclusive authority to create schools and assign pupils; they are not given the right to violate the laws of the State of South Carolina and the rights of Student #1 and Mother. For the above reasons, Appellants suggest the Order from the TRO hearing is a final order and therefore ripe for Appellate review.

For the above reasons Appellants Respectfully submit the Denial of the TRO is immediately appealable.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

Rhonda Meisner certifies that she has mailed a copy of " memorandum pursuant to Court Order of July 30,2013 received on August 1, 2013" to Respondents Counsel by placing in the U.S. Mail postage prepaid to attorneys for Respondents as listed below.

August 9, 2013

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CERTIFICATE OF SERVICE PAGE TWO MEMORANDUM PURSUANT TO COURT ORDER OF JULY 30, 2013

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