THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison Rene Lee, Circuit Court Judge

Appellate Case No.: 2013-002436

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
Superintendant, Dr. Katie
Brochu, in her official
capacity of School
Superintendent — Respondent(s)

FINAL BRIEF OF APPELLANTS

Student #1 John Doe and Mother of Student
#1 John Doe
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Appellant(s)

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I. Did the Circuit Court err in finding that Student #1 John Doe's Mother could not represent both Mother and Student #1's interests in the Courts of South Carolina as a continuation of the administrative appeals process?

II. Did the Circuit Court err by dismissing the de-novo appeal of Student #1 John Doe and Student #1 John Doe's mother?

III. Did the Circuit Court err in finding the Gifted and Talented Statute does not create a private cause of action.

Background

This action is an appeal of a Richland County School District two (hereinafter "District Two") and the Richland County School District Two Board (hereinafter "Board") of education decision concerning the education, placement and transfer rights of a "Gifted and Talented" student pursuant to S.C. Code Ann. §59-29-170; Regulation 43-220 and South Carolina Best Practices for Gifted Education Manual prepared by the South Carolina Board of Education in 2006. In 2012, Richland School District Two opened a new state of the art high school in northeast Richland county and named it Westwood High School (hereinafter "Westwood"). In part, the purpose of the school was to relieve overcrowding at the nearby Blythewood High School (hereinafter "Blythewood").

Prior to opening the new school, officials began the process of re-drawing the attendance lines as well as providing a "lottery" process for the those students interested in continued matriculation at Blythewood. As part of the attendance plan, the district drew up attendance lines. Some neighborhoods located in the Westwood zoned attendance area were allowed to choose between two or three

different schools. The District also implemented a program of " choice" for students that wished to remain at their previously assigned school. Several groups of students were allowed to automatically choose the school of their choice, without participation in the lottery system. While these were administrative decisions of the school district and board, none of these excepted students were legislatively identified or protected. The excepted student included 1) students with older siblings already attending Blythewood, 2) children of parent employees of Richland School District Two 3) students enrolled in the culinary school at Blythewood.

The lines for attendance included several neighborhoods that were allowed to choose between two or three different schools. The district advertised the lottery choice system in several ways including mailing a postcard to affected families; however, the District did not update the information stored in the middle school computers prior to the close of the "choice" lottery program. The computers were not updated until April of 2012. Even then, in April of 2012 , the computers housed both the previous school assignment and newly assigned school for students.

Student #1 John Doe (hereinafter Student #1) zoned residence was changed to Westwood from Blythewood along with the new lines; however, the middle school computers still had him assigned to Blythewood up to and after the state law required counseling session in April. The Westwood counselors, including Dr. Tyson were unable to complete Student #1's legally required counseling session , because Dr. Tyson, the Westwood representative did not have

the school records necessary to do so since according to the computers, Student #1 was still assigned to Blythewood. After attending the counseling session, Student #1 requested to remain at Blythewood High School; however the choice program was over and this option was not longer available. Student #1's mother called the school principal at Westwood concerned that Student #1's education would be disrupted; however, Mother was reassured that there would be equal numbers of students from Blythewood Middle School (Student #1's former school) and Muller road Middle School (Student #1's current school) to ease the transition into high school. The opening of Muller Road Middle School in Student #1's eighth grade year had already caused a change in his assigned school. Additionally, in the year leading up to his eighth grade year, Student #1 had been witness to two separate tragic and very severe accidents that resulted in the deaths of two of the drivers, one of which was his long time nanny. These events were emotionally devastating to Student #1 and as a result, mother of Student #1 was concerned about his socio-emotional well being and his ability to perform academically by losing his peer support group coupled with the rigorous study of all honors classes. After beginning matriculation at Westwood High School, Student #1 was failing to thrive and was deeply saddened as he had lost his peer support group coupled by the demands of a rigorous course schedule.

Mother of student #1 requested an immediate transfer to his previously assigned school Blythewood high school via Roger Wiley, the official in charge of school transfers specifically noting his "gifted" status. Mr. Wiley refused the transfer request and the request went to Fred McDaniel, PhD, who also refused

the transfer. Dr. McDaniel's recommendation to the Board indicated that he had reviewed the transfer request from a legal standpoint as well as all laws associated with the transfer request. After hearing from Mother of Student #1, the Board denied the transfer request based on Dr. McDaniel's recommendation. Roger Wiley informed mother of Student #1 via email of the decision of the Board. Mother of Student #1 then filed an appeal of the decision within ten days pursuant to S.C. Code Ann. §59-29-560 to the Circuit Court which functions as the Appellate Court.

Mother also filed a motion for a Temporary Restraining Order (hereinafter "TRO") to return Student #1 to his formerly assigned high school Blythewood High School which was Student #1's last peaceable assignment. In the interim, the School Board and District filed a motion to dismiss the appeal for failure to state a claim. The TRO was denied. The Court relied on S.C. Code Ann. §59-19-570 which states that no appeal should act as supersedes of the Board decision.

Mother then filed a S.C. R. Civ. P Rule 59-e motion to reconsider and a Rule 60 motion for relief based on the language in the denial of the Temporary Restraining Order. The Court denied the Rule 59-e motion to reconsider and stated in the Order that the Rule 59-e motion was not timely filed because the Court had deposited a copy of the denial in Glenn Bowens', the attorney retained to represent Student #1 at the temporary restraining order hearing, box at the Courthouse. The S.C. Rules of Civ. P. Rule 59-e motion was timely filed by Mother within 10 days of her receipt of the Order. Additionally, while the Court did deposit the Order into the mailboxes of the attorney's on file representing the

school Board; Mr. Bowens did not maintain a mailbox at the clerk's office nor was he copied by mail until mother was copied. Mr. Bowens submitted an affidavit that neither he nor his former firm Pope and Bowens, PC ever maintained a mailbox at the Clerk's office. Mother filed a S.C. Code of Civ. P. Rule 60 motion for relief of judgment along with an additional Rule 59-e motion to correct the fact the Rule 59 e motion was timely filed; thereby preserving the issues for Appellate review. Subsequently, the Circuit Court granted the District's motion to dismiss with prejudice, thereby making the appeal to the South Carolina Court of Appeals ripe for consideration.

INTRODUCTION

The Richland School District Two Board is responsible for attendance lines and gains this authority through S.C. Code Ann. §59-63-40. Richland School District Two Board is responsible for the assignment of students to their respective schools. (§59-19-90(9)). **(R.p. 115 lines 6-8).** Richland School District Two is one of the largest growing Districts in the State. **(R.p.41 at No 1).** The District and Board are not authorized to violate the State Constitution or state statute law as part of their assignment of students or the creation of attendance zones.**(R.p.48 at No. 30)** . As part of the process for opening new schools and recognizing the disruption of the process, the District after confirming the attendance lines in December of 2011 created a "lottery choice system" that ended within one month on January 31, 2012.**(R p. 48 at No.30).**

The attendance lines were advertised by the District in a variety of ways; however, the school District did not update their own computers at the middle

schools until after the close of choice. **(R.p. 48 at No. 27)** Mother of Student #1 was told by Muller Road middle school authorities that Student #1 was assigned to Blythewood High School for the 2012-2013.(**R.p.48 at No. 28)** Student #1 was in fact assigned to the newly opened Westwood High School. Mother was assured after finding the new assignment to Westwood High School, that both schools would have the same educational opportunities and similar " Gifted and Talented" student populations by Ralph Schmidt, the principal of Westwood High School because both schools had the same feeding schools. **(R. p. 132 lines 20-23.)**However, Westwood did not have a similar "Gifted and Talented" population , nor did it offer German classes or have a tennis team. **(R. p. 276 lines 16-23.)**

Mother was extremely concerned about the education of Student #1 in high school years and the information in the community about the significant differences in the student populations at Westwood High School.**(R. p. 303 lines 14-25.)** Student #1 while living in the same house for his entire life, was forced to change schools four times in four years. Two times were due to changes in attendance lines while in the public school system. Each time was disruptive to his education and his social system. Prior to entering high school, Student #1 was involved in tow tragic automobile accidents that resulted in the deaths of passengers in both accidents. **(R. p. 303 lines 1-9.)** In the second accident, Student #1 's long time caretaker was killed leaving him to care for his three younger brothers on the side of a highway. **(R. p. 303 lines 5-9).** Student #1 loved his nanny and was extremely upset over witnessing the accident.(**R. p. 303 lines 12-17).** Student #1 was then separated from his student peer support system.

(R. p. 303 lines 16-24.) Mother testified Student #1 was not thriving with this assignment to Westwood.(**R. p. 305 lines 3-10).** Father testified that Student #1's academic success was affected by his stress level. **(R. p. 136 last paragraph.)** Mother testified she witnessed student #1 running from Westwood to the car instead of waiting in the carpool line due to his discomfort in his surroundings. **(R. p. 308 lines 11-20.)** The Davidson Institute specifically discusses cognitive dissonance issues related to students' school environment that can negatively affect the "highly gifted" student. (**R. p. 503).**

Student #1 has a special relationship with the State of South Carolina due to his acceptance in the "Gifted and Talented " pool of students and the legislative statutes and regulations attempting to "develop his unique" gifts. **(R. p. 381 lines 1-4.)** Mother argues the State impetus behind supporting and developing the State's brightest students is both economic and individual in nature. The legislature has allocated separate and special funds to educate Student #1. **(R. p. 381 lines 9-15).** The Statute and Regulations implemented to protect the "Gifted and Talented" students specifically mention the placement of students. **(R. p. 425 lines 9-38.)** The placement designation is not limited to entry into the program. **(R. p. 425 lines 9-38).** Mother specifically requested a transfer back to Blythewood High School based on Student #1's "Gifted and Talented" status. **(R. p. 125 lines 1-8)** The District has interpreted the "placement" of students is only considered during the entry of students in the program **(R. p. 501 lines 5-11)** Mother interprets 2 Regs 43-220 and the word placement as ongoing as the wording in S.C. Code Ann. §59-29-170 seeks to "develop the unique talents". **(R.**

p. 425, number 1 and number 2) The School Board denied Mother's request for transfer based on the District's recommendation to deny the transfer request. **R.p.124** Fred McDaniel, PhD represented to the Board prior to their vote that he had reviewed the request in light of policy and the law.**(R.p. 129 lines 30-35)** Based on Mother's observations of Student #1's grades and attitude directed at his school environment, she requested Student # be immediately re-assigned to his originally assigned school via a Temporary Restraining Order to restrain the compelled matriculation at Westwood.(**R.p.71-77)** Dr. McDaniel testified at the TRO hearing that he did not consider Student #1's "Gifted and Talented" status prior to denying the transfer request.**(R.p.273 line 25 p.274 lines 1-3)** He further testified he was unaware of the "Gifted and Talented" statutes or the regulations regarding "Gifted and Talented" students. The Court denied the Temporary Restraining Order based on reliance on State Statute S.C. Code Ann. §59-19-570 Mother argues reliance on this State Statute further violated the equal protection and due process claims raised in the appeal.

ARGUMENT

The Circuit Court functions as the Appellate Court for adverse school decisions via S.C. Code Ann. §59-19-560 **(R. p. 39, p. 59, Lines 12-16).** Mr. Wiley, the Richland School District Two Registrar confirmed the District's understanding of the appeals process through the District and Board levels in an email to Mother of Student #1. **(R. p. 130, Lines 38-44, p. 131, Lines 1-6)**. The

South Carolina Legislature has outlined the appeals process for any party aggrieved by a decision of the School Board via S. C. Code Ann§ 59-19-560. The statute provides that "any aggrieved party" of a school Board decision can appeal that decision to the Circuit Court which then performs a "de-novo" review of the decision by the school Board. Since the review is "de-novo" new information as well as the information originally provided to the Board can be considered by the Circuit Court in the appeal. **(R. p. 343, Lines 13-20)**. Importantly, Student #1 is not permitted to independently request a transfer to a more appropriate school for his gifts and talents other than his assigned school per District policy. **(R. p. 261, Lines 19-25, p. 262, Lines 1-4)** This is due to several reasons.

First, as a minor, Student #1 cannot legally request a transfer. Second, the District does not provide transportation to schools other than Student #1's assigned school, so Mother of Student #1 would have to arrange for transportation, since Student #1 cannot drive, if the transfer request was approved. Last, it is possible that Student #1's transfer request could be in conflict with the wishes of the Mother, the party responsible for the Student #1's education and transportation. It is for the above reasons, both the Mother and Student #1's participation in transfer requests are required. here, both Student #1's participation in transfer requests are required. Here, both Student #1 and Mother of Student #1 agree that the transfer request is in the best academic interests of Student #1 and as such have jointly made the request to transfer to the school most appropriate for Student #1's talents and gifts, as required by policy.

I. Because Student #1 and Mother's rights were interdependent with each other in the request for transfer at the school board and district levels;

their rights to judicial review cannot be separated from each other in this appeal and Mother can represent both her interests and their joint interests in the Circuit Court as a continuation of the administrative appeals process.

Mother represents Student #1's interests and her own interests as Student #1's Mother, as his legal guardian as his advocate and next friend. **(R. p. 38, p. 71, p. 76, p. 324)**. The District asserts Mother cannot represent the interests of her son because a "next friend status" still requires the engagement of an attorney. **(R. p. 328, Lines 19-25, pp. 329-332, p. 333, lines 1-18)** Mother did engage Glenn Bowens, Esquire, to represent Student #1's interest in the Motion for Temporary Restraining Order because Mother would be required to testify and the main purpose of the hearing was an expedient resolution to the status quo for Student #1's last peaceable position, which was his assignment to Blythewood High School. **(R. p. 251).** South Carolina recognizes a parent's ability to initiate proceedings in family Court for their children under S. C. Code Ann. §§63-3-550 **(R. p. 157, lines 5-9)**. Parents can be held liable if they in fact fail their duties to provide for adequate education and health care pursuant to S.C. Code Ann §63-7-20(c) and 10(b) **(R. p. 157, lines 10-17)**. A harsh reading of the Statute would suppose parents have abandoned their child if they do not provide adequate healthcare and educational benefits. Health care under the Statute is defined as medical and non medical health care. **(R. p. 157, lines 20-21)**.

The United States Supreme Court, in Winkelman ruled that parents had independent rights under the IDEA and FAPE which therefore enables them to represent their interests as a continuation of the 'administrative remedies" in Federal Court. *Winkelman v. Parma City School Dist.* (No. 5-983) 2007 While all

children have the right to a Free Appropriate Public Education (FAPE) under the State Constitution, the Gifted and Talented Statutes provide special services for those students. **(R. p. 159, lines 13-26. p. 160, p. 161, lines 1-4)**. The Federal law for Students with disabilities (IDEA) has similar appeals language with the language in South Carolina statutory construct for school board appeals. Both the federal statutes and the school board appeals process permit "any aggrieved party" to appeal decisions administratively and then enter the courts for judicial review.

Here, mother derives her independent rights from S.C. Code Ann. §59-28-100 (parental rights in their children's education act). The S.C. Code Ann. § 59-29-170 (Gifted and Talented Education) and 2 Regs 43-220 (2011) (State school board regulations for implementation of the "Gifted and Talented " statute) which convey independent rights of parents whose children have been accepted into the "Gifted and Talented" pool of students by the state standards. **(R. p. 167, lines 2-10).** Importantly, both groups of special education students (disabled students via the IDEA and "Gifted and Talented" students via S. C. Code Ann. §59-29-170) have a notice requirement for the parents of students regarding the students eligibility and any changes in their status in the respective programs. **(R. p. 173, line 15, p. 231, lines 4-16).**

Defendants have argued in their motion to dismiss the second amended complaint/appeal "[t]his Court should dismiss the plaintiffs second amended complaint, **without prejudice,** to the extent that legal counsel licensed to practice law in South Carolina is not representing plaintiff John Doe or has not adopted the second amended complaint, which was prepared and signed by Plaintiff John

Doe's mother." **(R. p. 181, lines 13-20).** They further contend "[n]o 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. **(R. p. 181, lines 16-20)**. Defendants do admit Mother has the right to pursue her own claims under S.C. Code Ann. §40-5-310. **(R. p. 181, lines 17-20).** While Defendants give credence to the well accepted notion that one cannot initiate proceedings for or on behalf of another entity, the examples Defendants cite fail to address the due process rights of "any aggrieved party" to continue their appeal into the Circuit Court for Judicial review pursuant to S.C. Code Ann. §59-19-560. **(R. p. 181, p. 98, lines 1-9)**.

The Honorable Alison Lee ruled that Mother could not represent Student #1's interests as a next friend because Mother is not a licensed attorney. **(R. p. 11)**. Mother argued in the S.C. Rules of Civ. P. Rule 12(b)(1) and 12(b)(6) hearing and her S.C. Rules of Civ. P. Rule59-e motion to alter and amend the Honorable Alison Lee's ruling that she has the right to continue representation of Student #1's right of the School Board decision into the Circuit Court as a continuation of the administrative appeals process. **(R. p. 242 @ no.2)**. Mother argues judicial review of the School Board is necessary especially when Constitutional rights are in question regarding the Board's decision. **(R. p. 243 @ no. 4)**.

The South Carolina legislature has created a process for School Board appeals which necessarily requires the residents of the state of South Carolina to enter the Circuit Courts as a continuation of the appeals process; if the Appellants

desire judicial review of the Board's decision. **(R. p. 242, lines 10-23)**. Once the State has conferred a right or process via a State Statute, the United States Constitution protects the access to that right. **(R. p. 362, lines 16-25, p. 363)** The statutory construct for School Board appeals in South Carolina via S.C. Code Ann. §59-19-560 provides that "any party aggrieved" can appeal a school board decision to the Circuit Court that functions as the Appellate Court for a de novo review of the decision. Here, an education placement and transfer request is being appealed. Mother, as an aggrieved party independent of Student #1 of a school District decision, has the right to represent and advocate on her own accord both her rights and Student #1's rights to the School Board under S.C. Code Ann. §59-19-540 and consequently, continue that representation into the Circuit Court. **(R. p. 40, lines 7-18)**.

> The Statute states that, "[A]t any hearing provided for in Section S. C. Code Ann. §59-19-530, the parties may appear in person or through an attorney licensed to practice in South Carolina and may submit such testimony, under oath, or other evidence as may be pertinent to the matter in controversy".

To require Mother to hire an attorney to represent either her interests or the interests of Student #1 at the Judicial phase of the appeals process would violate the due process clause of the 14th Amendment of the United States Constitution. **(R. p.)**. Respondents also argue that Mother cannot represent Student #1 in the Circuit Courts because she is not a licensed attorney. To require mother to be a licensed attorney or to pay for the services of a licensed attorney to continue a School Board appeal into the Circuit Court review phase would also violate the equal protection clause of the 14th Amendment to the United States

Constitution as only those parents and students able to afford the services of an attorney would have access to Judicial review. In this event, Mother and Student #1 would be deprived of this statutory right of review by the Judiciary.

The South Carolina Legislature has made the substantive rights of parents to be involved in their children's education clear with their enactment of S.C. Code Ann. §59-28-100 which is aptly entitled "Parental Involvement in their Children's Education Act". Additionally, parents maintain independent rights via the Gifted and Talented statutes, S.C. Code Ann. §59-19-170 and 2 S.C. Code Regs 43-220 (2011), referencing the SC Best Practices for Gifted and Talented Education Manual, 2006. Mother has the rights to counseling and the right to be informed if Student #1 is in danger of being removed from the Gifted and Talented program. **(R. p. 160).** Mother also has the right to request a "placement review". **(R. p. 425).** The word Placement is not defined as only entry into the program. **(R. p. 425).** As such, these independent rights cannot be separated from the rights of the Student in an appeal of the School Board decision. **(R. p. 262, lines 10-24).** Importantly, School Board appeals are individual and the results of the appeal affect only Student #1 and Mother in a very defined way. Continuation of the administrative appeals process as compared with other types of entry into the Circuit Court system provides judicial review of the District and Board's decision and is an important part of the administrative process. **(R. p. 59, lines 11-20, p. 172, line 10, p. 173, lines 11-12).** The Defendants cite numerous examples of cases where a non-lawyer parent cannot sue on behalf of his or her child without securing counsel; however, the cases cited are either not a

continuation of an appeals process into the Circuit Courts of South Carolina or occurred prior to the Supreme Court decision in Winkelman. **(R. pp. 118-119).**

The United States Supreme Court also addressed whether States were required to provide attorneys to litigants in civil procedure if the civil procedure could require possible incarceration. *Turner v. Rogers, et al.,* No. 10-10 Decide June 20, 2011 387 S.C. 142, 691 S.E. 2d 470. In the case of Turner, the U.S. Supreme Court ruled it would tip the balance of scales against the Mother attempting to collect on past due child support if the State were to be required to "provide an attorney to the father" without the same provision for the Mother. The Court did however, state an important caveat, that the State must nevertheless create a process that determines "a fair determination" of the issues. In the current statutory process, it would be manifestly unfair to require the engagement of an attorney for Judicial review.

Additionally, the South Carolina Supreme Court has stated the main purpose of requiring the services of an attorney is to protect the public. *Matrix Financial Services Corp. v. Frazier*, 394 S.C. 134,714 S.E.2d 532 (S.C. 2011). However, in an appeal of a School Board decision for a student the appeal is based on individual, private facts and the public is not involved. As such, Mother advocates only for her own children. Here, Mother advocates only for Student #1. While Mother may not be the best advocate for Student #1 she is the only advocate available to him.

II. Because the allegations in the "Second Amended Complaint" adequately allege several constitutional violations of Richland School District

Two, District employees and the Board of Trustees, the Circuit Court erred in dismissing the de-novo appeal with prejudice.

In Pro Se Appellant pleading the standards for pleadings are not as rigorous as that required for an attorney. It is well accepted that mistakes by laypersons filing an appeal do not dismiss the appeal, as such a harsh requirement would violate their equal chance for justice and Judicial review. **(R. p. 185, lines 5-9)**. For the reasons below Mother argues the appeal should not have been dismissed with prejudice via the Rule 12(b)(6) ruling.

A.) Decisions by the School Board gives the Circuit Court subject matter jurisdiction, as the appellate Court pursuant to S.C. Code Ann. §59-19-560.

A S.C. Rules of Civ. P Rule 12(b)(1) motion provides for dismissal of a Complaint/Appeal if the Circuit Court does not have jurisdiction over the subject matter. Here, this complaint/review of the School Board and District decision falls within the process instituted by the Legislature in the appeal of adverse School Board decisions. **(R. p. 156, lines 3-12)**. School boards are specifically entrusted by statute with decisions concerning the transfer and the determination of the school within the district in which any student shall enroll. (§59-19-90(9).) **(R. p. 115, lines 5-7)**. However, once that decision is made, the Circuit Court has subject matter jurisdiction over the decision because the Circuit Court functions as the appellate Court. (§59-19-560). Consequently, a motion by the Defendants to dismiss the appeal to the Circuit Court via a Rule 12(b)(1) motion is misplaced because the appeals process has been sanctioned by the Legislature as a continuation of the administrative appeals process.

The Board had already denied the transfer, making the review by the Circuit Court ripe. **(R. p. 123)**. In a review of the final decision by a School Board, the Circuit Court reviews the decisions regardless of the subject matter as the appellate Court because the administrative remedies available have been exhausted. There would be no benefit for the Board to entertain additional "fact finding" since the Board has already made their final decision. *Betterson v. Stewart*, 238 S.C. 574, 121 S.E. 2d 102 (1961).

B.) Dismissal of the Complaint/Appeal under S.C. Code Ann. Rule 12 (b)(6) motion would likewise be inappropriate for an appeal of an adverse school Board decision when constitutional violations are adequately alleged/pled.

In evaluating the grant of a S.C. Rules of Civ. P Rule 12(b)(6) motion for dismissal, the same logic would apply. In an appeal of a school District and Board decision, a dismissal pursuant to S.C. Rules of Civ. P Rule 12(b)(6) motion of the "de novo review" would not be appropriate when constitutional violations are adequately pled. The dismissal of the appeal without review of the decision would be a continuation of the due process/equal protection violations of the Constitution alleged in the appeal. The School District is responsible for the assignment of students to schools within the District; however, this assignment by the District cannot violate State law in forming a segregated student population via the attendance lines and the "school choice program" for the School. **(R. p. 243, No. 3)**. Nor can it evaluate race in the decision for the denial of a transfer request. **(R. p. 244, lines 13-29)**. *Tuttle v. Arlington County School Bd*, 195 F3d 698, 701 (4th Cir. 1999) and *Eisenberg v. Montgomery County Public Schs.* 197 F3d 123, 125-127 (4th Cir. 1999). It is well settled that a "segregated high school

system" violates the Equal Protection clause of the 14th Amendment to the United States Constitution and State law at both campuses. **(R. p. 41, lines 1-2)**. This is true whether the segregation occurs by the creation of orchestrated attendance lines or by the creation of the attendance lines coupled with the implementation of an unmonitored "school choice" system. **(R. p. 43, No. 12)**. The Complaint/Appeal adequately alleges a de-facto segregated school system which would create an illegal student body population at both campuses. **(R. p. 43)**. Compelled matriculation because of race at either campus would be contrary to State law. **(R. p. 244, lines 13-29)**.

The Constitutional allegations are adequately pled and should have been evaluated as part of the appeal. Since the Court considered information outside the pleadings and made findings of fact outside the pleadings, then the Court converts the S.C. Rules of Civ. P Rule 12(b)(6) motion to a motion for summary judgment. In doing so, the Court should have reviewed evidence from the Temporary Restraining Order Hearing. **(R. pp. 7-12)**. Ralph Schmidt acknowledged the District was aware of the racial composition of Westwood and there were no other attendance zones with the same racial composition in Richland School District Two as the segregated high school system. **(R. p. 320, lines 9-25)**. Additionally, the Honorable Alison Lee made a determination that the "Gifted and Talented" statute S.C. Code Ann. §59-19-170 did not create a private cause of action and in doing so, effectively converted the S.C. Rules of Civ. P Rule 12(b)(6) motion into a motion for summary judgment without the benefit of evidence in support of the claims in the appeal. **(R. p. 8)**.

While Defendants argue they could not grant the requested relief of a transfer to Blythewood from Westwood because the requested relief would exacerbate the Constitutional violation **(R. p. 336, lines 19-25, p. 337, lines 1-14)**, Appellants argue that once the District created the illegal segregated school system, they cannot then restrict transfer requests arguing an exacerbation of the Constitutional violation. **(R. p. 360, lines 22-25, p. 361, lines 1-3)**. The District cannot refuse to allow any student to transfer to or prevent any student from receiving a transfer based on the race of the student. *Eisenberg v. Montgomery County Public Schs.* 197 F3d 123, 125-127 (4th Cir. 1999). This becomes the age old question of the chicken and the egg. **(R. p. 361, lines 4-9)**. The District in their Memorandum in Opposition to Plaintiff's Request for a Temporary Restraining Order cite multiple cases where pupils cannot "request the school they prefer to attend; however, none of the examples cited involve "Gifted and Talented" students or an alleged "de facto" segregated high school population in violation of State and Federal law. **(R. p. 222, lines 1-25)**.

The District further argues that Mother cannot challenge Student #1's school assignment because if Student #1 is within the minority of the assigned school, the transfer would exacerbate the racial imbalance created by the District. State law specifically makes it illegal to prevent transfer (or admittance) based on race without District approval. While State law allows Districts and Boards to draw attendance lines, the process of doing so cannot violate State law. An unconstitutional student population allows all parents and students the right to oppose the District's school attendance decisions. Whether the parents choose to

do so is a personal decision. The Defendants suggest the flood gates would be open for transfer requests if students were allowed to choose their school based at whim. The District recognizes that some transfers are appropriate with the implementation of the "Choice" program. **(R. p.124)**. Additionally, the Second Amended Complaint adequately alleges the creation of a "de-facto" segregated high school, hardly a "whimsical" request for a lawful transfer.

C.) The Second Amended Complaint adequately alleges a due process/equal protection violation regarding the District's duty to update their computers to allow all parents to participate in the District sanctioned and created "School Choice" program, whether or not such participation would be successful.

The computers housing the information regarding school assignments at the middle schools were not updated until after the school choice program ended. **(R.48 at 30)**. Mother was told by Muller Road Middle School that Student #1 was assigned to Blythewood high school for the coming year, so there was no reason to participate in the school choice program. While the District publicized new attendance lines in several public ways, the District did not update the computers at the middle schools to reflect the changes in Student #1's assigned school until after the close of choice. **(R p.48 at 31)**.

The middle school is the major source of information for Student #1 and Mother. **(R.p.48,49 at 31)** Fred McDaniel, PhD, testified that the computers housed both stale and updated information. **(R.p.281 p.10-25)**. Mother testified she specifically asked the middle school employees about Student #1's high school assignment for the coming year. **(R.p.17-25)**. The District also verified that the information housed on the middle school computers was not updated prior

to the counseling sessions because the Westwood counselors including Dr. Tyson did not have access to Student #1's files. (**R.p.302 6-13**). The District then tried to "re-create" the statutory required counseling session expo facto after the filing of this appeal.

D.) The Second Amended Complaint adequately argues an equal protection violation of Student #1 with regard to other "Gifted and Talented" students that may also be a member of one of the groups of students not required to participate in the lottery choice program, e.g., students with parents that are teachers, students in the culinary school or students with siblings already attending Blythewood High School.

It is undisputed that certain groups of students were not required to participate in the lottery system for school choice. Some of those students were also "Gifted and Talented" students, which means that some "Gifted and Talented" students were treated differently than Student #1 based on un-legislated qualities. The School District and Board should have recognized the possibility of the equal protection violations because all "Gifted and Talented" students did not receive the same treatment based on the arbitrary designations of exempted students from the lottery process by the District. Student #1, as a member of the "Gifted and Talented" population should have had the same considerations and the other "Gifted and Talented" students, such as children of teachers, siblings of other students attending Blythewood High School, and students in the culinary school. (**R.p.29 at16**).

Student #1 should have also received, at a minimum, the same consideration as the groups of students previously identified without the special relationship the State of South Carolina has formed with Student #1 as a member

of the "Gifted and Talented" students via the implementation of S.C. Code Ann. §59-29-170 and 2 Regs 43-220 (2011). The Legislature made clear the relationship of the Student #1 with the State via the South Carolina Board of Education's publication Best Practices for Gifted Education, 2006 indicating Student #1 should have been evaluated as an individual.

E.) The Second Amended Complaint adequately requests a declaratory judgment by the court to interpret whether the "Gifted and Talented" Statute and whether the statute and the accompanying Regulation creates a private cause of action.

The Court ruled that the "Gifted and Talented" Statute on the declaratory judgment cause of action does not create a private cause of action. This ruling effectively changed the Motion to Dismiss to a Motion for Summary Judgment without the opportunity for the Appellant to submit the necessary evidence from which to make a summary judgment ruling. The Appellants argue this was an error for the reasons below.

III. Because Student #1 has been identified as "Gifted and Talented" by State standards, the Gifted and Talented Statutes (S.C. Code Ann. §59-29-170) and the accompanying Regulation (2 Regs. 43-220, 2011) creates a private cause of action with regard to Student #1's education pursuant to the criteria for statute interpretation outlined by the South Carolina Supreme Court in Abbeville County School District v. State.

Defendants argue that the "Gifted and Talented" Statute does not create a private cause of action pursuant to the holdings in *Abbeville County Schl. Dis. v. State*, 335 S.C.58,515 S.E. 2d 535 (1999). **(R.p.176 at A)**. This appeal is distinguished from the Abbeville County case in that the Court in Abbeville

County reviewed the application of a **general statute** to a particular group of state students who happened to reside in Abbeville County. Here, the Gifted and Talented Statute is a **specialized education statute created specifically for a class of individual students, each of whom must qualify and is identified individually prior to acceptance into the program. (R.243 at 5)**. The Statute specifically purports to require the school District to "develop their unique gifts **(R.p.401)**. The statute references "develop" and "unique" to indicate not only an ongoing progress for "Gifted and Talented" students like Student #1, but also by using the word "unique" the statute applies to each individual student and not the "collective Borg" of "Gifted and Talented" students. **(R.p.401)**. Merriam Webster's online dictionary defines "develop" as the act or process of growing or causing something or someone to grow or become larger or more advanced. McMillan's online dictionary gives the transitive definition of "develop" as to improve one's abilities, skills and knowledge. Merriam Webster's online dictionary defines "unique" as used to say that something or someone is unlike anything or anyone else. Additional definitions define "unique" as being the only one; individual. McMillan's online definition of "unique" is "not the same as anything or anyone else." Clearly the Gifted and Talented Statute is different from the Educational Finance Act as it relates to the education of South Carolina students.

In the Abbeville County case the Court found the Education Finance Act did not create a private cause of action. The South Carolina Supreme Court outlined a six-step process for identifying whether or not a private cause of action

could be inferred within a State statute. (**R.p.243 at 5**). Here, the Gifted and Talented statute uses the words "develop" and "unique" to describe the gifts of the members of the "protected" class of students in the Gifted and Talented program. (**R.p.381**). The language of the statute applies to individual students and suggests an individual approach based on the language of the statute. The Legislature has "earmarked" special funds for the group of students, which can be withheld if the regulations are not followed. (**R.p.381**).

In evaluating a statute for interpretation, we must first look to the language and most importantly to the intent of the legislature. In Construing statutes, the terms of the statute must be confined to their ordinary and popular meaning. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E. 2d 206 (1964). When the terms are clear and unambiguous courts are required to use the literal meaning. Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 161 S.E 2d 822 (1968). Courts must presume that the "legislature say in a statute what it means and means in a statute what it says there." Dodd v. U.S., 545 U.S. 353, 357 (2005). In Abbeville County, the Supreme Court ruled in order to infer an implied right to a cause of action it was first necessary for the Legislature to have enacted the statute for the special benefit of a private party. Here, it is obvious that the legislature intended the "Gifted and Talented" Statutes to benefit only those students who were designated "Gifted and Talented" via individual State sanctioned testing. (**R.p.386-388**).

The South Carolina Supreme Court then stated once this threshold matter has been met; whether the statute then creates a private cause of action depends

on a six prong test the Supreme Court elucidated in Abbeville County. First, the essential purpose of the statute is to protect against a particular harm. In the case of S.C. Code Ann. §59-29-170 that harm is to prevent the lack of development of the unique talents of the "protected class" of Gifted and Talented students. The State's interest in these students can be found in various economic development analyses. Second, the State imposes a duty on a particular public officer or a group of public officers. Here, the State Board of Education (headed by the State Superintendant of Education) is required to create regulations for the implementation of the Statute (**R.p.381**) which is sent to the Districts (overseen by the District Superintendant) which is required to follow the regulations. (**R.p.381**). Third, the regulations outline the entry into the "protected population" via standardized testing and procedure which identify specific students in the class prior to entry into the class. (**R.p.386-87**). Fourth, Plaintiff is a member of the protected class. (**R.p.501**). Fifth, the District Superintendant is aware of her responsibilities due to not only the guidelines but also the production of the Best Practices for Gifted Education, 2006 Manual referenced in the regulations. (**R.p.397 at 1-3**). Additionally, State funds can be withheld if the Superintendant does not adhere to policy. (**R.p.381**). Sixth, the District Superintendant supervises all employees involved in the transfer and education of identified class students in the District and can therefore overrule any infractions prior to submission to the Board. (**R.p.274 lines17-20**).

Section 59-29-170. Programs for talented students.

> Not later than August 15, 1984, 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 Educational 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 the students in a given category, the district may determine which students within the category may 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. And Regulation 43-220. Additionally, the statute references the regulation which in turn references the Guidelines for Gifted Education published by the South Carolina Board of Education in 2006.

The relevant portions of the regulations for Gifted and Talented students regarding Student #1's education is found in 2 Regs 43-220 (2011):

> 2. To provide curriculum, instruction, and assessment that maximize the potential of the identified students, educational

programming for academically gifted and talented students must reflect the following characteristics:

(a) content, process, and product standards that exceed the state-adopted standards for all students and that provide challenges at appropriate levels for strengths of individual students;

(b) goals and indicators that require students to demonstrate depth and complexity of knowledge, creative and critical thinking, and problem-solving skills;

(c) instructional strategies that promote inquiry and accommodate the unique needs of gifted and talented learners;

(d) a confluent approach that incorporates acceleration and enrichment;

(e) opportunities for the critical consumption, use, and creation of information using available technologies; and

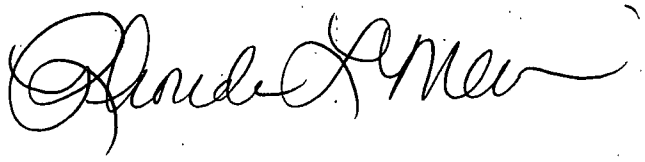
(f) evaluation of student performance and programming effectiveness.

Another confounding issue in the request to remain at Student #1's originally assigned school Blythewood High School was an individual requirement of Student #1 as outlined in 2 Regs 43-220 Regulation 2(c) [i]nstructional strategies that promote inquiry and accommodate the **unique needs** of gifted and talented learners. Here in the appeal Mother made the District and Board aware that Student #1 due to two tragic accidents had **"unique needs"** which both the District and Board ignored. (**R.p.425**). As evidence of Student #1's needs of continuity of his support system of friends Mother submitted the analysis of Father, a medical doctor. (**R.p.135-137**) Mother also testified at the Temporary Restraining Order Hearing. (**R.p.301 lines23-25 p.302-305**)

Mother also presented information and evidence of Student #1's individual needs due to the recent tragic events in Student #1's life requiring continuity of student relationships. (**R.p.309 line 25 p.310 1-6**). The District and the Board ignored Mother's evidence of Student #1's individual needs pointing instead to a wait list of 100 students not designated as "Gifted and Talented" and not before the Board as the reason for denial of the transfer request. (**R.p.124**). If the parents of the 100 students on the wait list were sufficiently motivated to protect their children's rights they would have at a minimum appealed to the Board the decision. The Board was also told by Dr. McDaniel that he had reviewed Student #1's request in light of policy and law; this apparently was not true. (**R.p.129**). Dr. McDaniel, during the Temporary Restraining Order hearing, then testified he did not consider Student #1's "Gifted and Talented" status prior to denying the transfer. (**R.p.272 lines 1-12**). He further testified prior to Mother giving Dr. McDaniel information on "Gifted and Talented" students he had not been educated by the District on "Gifted and Talented" legislation. (**R.p.274 lines 17-24**). The appeal adequately pleads the District was negligent in the supervision of their employees in their denial of Student #1's transfer requests. (**R.p.43 at15 p.44 at 15 and16**). This is direct evidence that not only did the District not follow the Regulation 43-220 requirements of placement, they did not follow the requirements regarding informing their employees of laws regarding "Gifted and Talented" students.

For the above reasons, Mother and Student #1 request the Court of Appeals to reverse and remand the decision of the Honorable Alison Lee and make a ruling that Mother can represent her and her son's interests in the Courts of South Carolina as a continuation of the Administrative Appeals process and that the "Gifted and Talented" statute creates a private right of action regarding the education of students in the program. Finally, Appellant requests the Court of Appeals to rule the Richland County School District Two District and Board violated Student #1's rights by not considering Student #1 as an individual and injured him by denying his transfer requests without evaluating the laws protecting "Gifted and Talented" students, specifically Student #1.

Respectfully Submitted,



Aug 19, 2014

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY SCHOOL DISTRICT TWO BOARD

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
James R. Barber III, Circuit Court Judge Presidency
Alison Renee Lee, Circuit Court Judge Presiding Judge

Case No. 2013-002436

Student #1 John Doe, REDACTED NAME OF STUDENT; Mother of Student #1 John Doe, REDACTED NAME OF MOTHER — Appellants,

v.

Board of Trustees, Richland School District Two; Superintendant of School District Two, Dr. Katie Brochu, in her official capacity — Respondents.

PROOF OF SERVICE

I certify that I have caused a copy of the final brief and the reply brief to be served on respondents by placing a copy of the motion in the U.S. mail postage pre-paid to Tyler Turner Attorney for the Respondents at Childs and Halligan, PA post office box 11367 Columbia, SC 29201-11367

August 19, 2014

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CERTIFICATE OF APPELLATE IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND SCHOOL DISTRICT TWO BOARD OF EDUCATION
RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2012-002436

STUDENT #1 JOHN DOE;
MOTHER of Student #1 John Doe — Appellants,

v.

Richland School District Twooard of Trustees; Katie Brochu, PhD in her official Capacity as District Superintendant — Respondents

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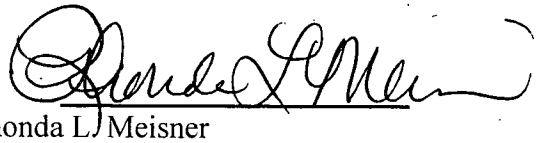
CERTIFICATE OF APPELLANT

The undersigned certifieS that this Final Brief complies with Rule 211(b), SCACR.

August 19, 2014



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