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 Superintendent,
Dr. Katie Brochu, in her official capacity as School
Superintendent .... Respondent(s).

FINAL BRIEF OF RESPONDENTS

CHILDS & HALLIGAN, P.A.

Kathryn Long Mahoney, S.C. Bar No. 65332
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I. STATEMENT OF ISSUES ON APPEAL

(1) Did the Circuit Court correctly determine that there is no private cause of action under South Carolina's gifted and talented statute or regulation?

(2) Did the Circuit Court correctly determine that the relief requested for an alleged equal protection clause violation cannot exacerbate the alleged violation?

(3) Did the Circuit Court correctly determine that John Doe's access to a public education in Richland School District Two was never restricted and that John Doe does not have a constitutional property interest in attending the school of his choice?

(4) Did the Circuit Court correctly determine that John Doe's mother may serve as next friend for her child John Doe, but may not represent John Doe and litigate his claims without counsel because she is not a licensed attorney?

II. STATEMENT OF THE CASE

The Respondents, the Richland School District Two Board of Trustees and former Superintendent Dr. Katie Brochu in her official capacity ("collectively referred to as the "District"), respectfully submit this memorandum of law to request this Court to affirm the Circuit Court's order granting the District's motion to dismiss the claims of the Appellants, Student #1 John Doe ("John Doe") and Mother of Student #1 John Doe ("Mother") (collectively referred to as the "Student").

The Student filed a complaint on October 19, 2012, and an amended complaint[1] on November 13, 2012, seeking a declaratory judgment that the District's denial of the Student's transfer request violated South Carolina's gifted and talented laws, the Equal Protection Clause of the United States Constitution, and the Due Process Clause of the United States Constitution. (Compl. at R. pp. 26-37; Am. Compl. at R. pp. 39-54.) On

[1] The Student's amended complaint is entitled "Second Amended Complaint."

November 14, 2012, the District moved to dismiss the Student's complaint on the grounds that it failed to state facts sufficient to constitute a cause of action and that Mother is not a licensed attorney and is therefore not authorized to represent John Doe in Circuit Court. (Mot. to Dismiss at R. pp. 152-154.)

In the interim, on November 26, 2012, the Student moved for a temporary restraining order to compel the District to immediately transfer John Doe from Westwood High School to Blythewood High School, which the Student alleged was "the school most appropriate for his gifts and talents." (Mot. for TRO at R. pp. 72-75.) On December 28, 2012, the Circuit Court issued an Order denying the Student's request for a temporary injunction. (Order at R pp. [Order to be included in Record on Appeal].)

The parties submitted memoranda of law concerning the District's motion to dismiss, and on January 30, 2013, the Circuit Court heard oral arguments from both parties concerning the District's motion to dismiss. On July 30, 2013, after carefully considering the memoranda and oral arguments of both parties, the Circuit Court granted the District's motion to dismiss the Student's claims. (Order at R. pp. 7-12.)

III. STATEMENT OF FACTS[2]

When the Student filed this lawsuit, John Doe was enrolled as a ninth grade student and attending Westwood High School in Richland School District Two. Westwood High School opened as a new school in the Fall of 2012 and is a state of the art school facility. (Am. Compl. ¶ 6 at R. p. 42.) The District opened Westwood High School to relieve overcrowding at Blythewood High School. (Am. Compl. ¶ 7 at R. p. 42.)

John Doe is zoned to attend Westwood High School based on his residence. John

[2] For purposes related to the District's motion to dismiss, the District has accepted the facts in the Student's complaint as true. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010).

Doe applied for a transfer to Blythewood High School, which the District denied primarily because of the high demand to attend Blythewood High School and the limited space available. (Am. Compl. ¶¶ 17, 46 at R. pp. 44, 52.) The Student filed this lawsuit in response to the District's denial of John Doe's transfer request.

IV. ARGUMENTS

A. The Circuit Court Correctly Determined That There Is No Private Cause Of Action Under South Carolina's Gifted And Talented Statue Or Regulation.

In the amended complaint, the Student seeks a declaratory judgment that the District's denial of John Doe's transfer request from Westwood High School to Blythewood High School violated South Carolina's gifted and talented statute and regulation. S.C. Code Ann. § 59-29-170 sets forth the establishment of gifted and talented programs in South Carolina. S.C. Code Ann. Regs. 43-220 provides a more detailed framework for the provision of gifted and talented programs in public school districts.[3]

Neither S.C. Code Ann. § 59-29-170 nor S.C. Code Ann. Regs. 43-220 gives an individual student a private cause of action, much less a right to attend any particular school. In *Abbeville County Sch. Dist v. State*, the Supreme Court of South Carolina explained that where a statute "does not specifically create a cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party." *Abbeville v. County Sch. Dist. v. State*, 335 S.C. 58, 65, 515 S.E.2d 535, 539 (1999) (citing *Citizens for Lee County v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)). In determining "whether a statute creates a special duty owed to individuals rather than to the public at large," the Supreme Court provided six factors to consider:

[3] The Student's amended complaint cites and quotes other purported gifted and talented "laws" (e.g. § 59-29-172, § 59-29-174, § 59-29-1702) that do not exist and therefore have no influence on this case. (Am. Compl. ¶¶ 2, 18-19, 21, 23-25, 27 at R. pp. 41, 45-48.)

> (1) an essential purpose of the statute is 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.

Abbeville, 335 S.C. at 65-66, 515 S.E.2d at 539.

In *Abbeville*, the Supreme Court concluded that the "purpose of providing a public education is to benefit not just the individual receiving it, but also the public at large." *Abbeville*, 335 S.C. at 66, 515 S.E.2d at 539. The Supreme Court held that since the Education Finance Act was not created for the special benefit of a private party, no private cause of action was implied in the Act. *Abbeville*, 335 S.C. at 66, 515 S.E.2d at 539.

In this case, South Carolina's gifted and talented statute and regulation do not explicitly or impliedly give a private party a private cause of action. S.C. Code Ann. § 59-29-170; S.C. Code Ann. Regs. 43-220. The gifted and talented statute and regulation do not even mention student transfers or a student's attendance at any particular school. S.C. Code Ann. § 59-29-170, S.C. Code Ann. Regs. 43-220. The essential purpose of providing gifted and talented programs as a part of a public education is not just for the benefit of a private party, but rather to benefit the public at large. Because South Carolina's gifted and talented laws were not created for the special benefit of a private party, no private cause of action impliedly exists. Therefore, this Court should affirm the Circuit Court's dismissal of the Student's alleged claim under South Carolina gifted and

talented laws.[4]

B. The Circuit Court Correctly Determined That The Student's Complaint Failed To State An Equal Protection Claim Because The Relief Requested By The Student Would Exacerbate The Alleged Equal Protection Violation.

The Student alleges that the District violated the Equal Protection Clause of the United States Constitution by creating "a de-facto segregated high school system" in which more African American students are enrolled at Westwood High School and more white students are enrolled at Blythewood High School. (Am. Compl. ¶¶ 19, 38-40, 43, 46 at R. pp. 46, 50-52.) The Student seeks to compel the District to transfer John Doe, a white student, from Westwood High School to Blythewood High School.

When a constitutional violation is proven, the Court must narrowly tailor the relief to remedy the violation. *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) ("Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.") *Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984) ("Although federal courts have broad equitable powers to remedy proven constitutional violations, injunctive relief must be tailored to fit the nature and extent of the established violation."); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1041 (5th Cir. 1982) ("Although a federal court has broad equitable powers to remedy constitutional violations, it must tailor the scope of injunctive relief to fit the nature and extent of the constitutional violation established.") *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977) ("[I]n equal protection cases ... relief must be carefully tailored ... to remedy proved constitutional violations.")

In this case, John Doe, who is white, seeks a transfer from the Westwood High

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[4] The Student's alleged claim under gifted and talented laws is also an impermissible educational malpractice claim because it appears to allege that John Doe was receiving an inadequate education at Westwood High School. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 457, 578 S.E.2d 711, 715 (2003).

School, which he alleges has a majority of African-American students, to Blythewood High School, which he alleges has a majority of white students. (Am. Compl. ¶¶ 12, 38-40, Wherefore at R. pp. 43, 50-51, 54.) The relief requested by the Student would exacerbate the alleged Equal Protection Clause violation by increasing the percentage of white students at Blythewood High School and also increasing the percentage of African American students at Westwood High School. Therefore, even if the Student could prove an Equal Protection Clause violation, a court could not grant the Student the relief requested in the amended complaint. Consequently, this Court should affirm the Circuit Court's dismissal of the Student's Equal Protection claim.

Additionally, the District does not believe the Student has or could state an Equal Protection claim based on his status as a gifted and talented student. The District is not aware of any legal authority supporting such a claim. Further, even if such a claim were viable, the Student's complaint does not allege that John Doe was treated differently than other gifted and talented students or that a class of gifted and talented students were treated differently than other students in a manner that could violate the Equal Protection Clause. *Lindsley v. Girard Sch. Dist.*, 213 F. Supp. 2d 523, 530 (W.D. Pa. 2002) ("[I]t is fundamental that in order to maintain an equal protection claim, a plaintiff must allege that he or she received different treatment from other similarly situated individuals or groups.") If anything, it appears the Student is attempting to state a private cause of action for violation of South Carolina's gifted and talented laws under the guise of an alleged Equal Protection violation. (Am. Compl. ¶¶ 44-49 at R. pp. 52-53.) Accordingly, this Court should affirm the dismissal of the Student's Equal Protection claim.

C. The Circuit Court Correctly Determined That The Student's Complaint Failed To State A Due Process Claim Because John Doe Does Not Have A Constitutional Property Interest In Attending The School Of His Choice.

The Student alleges that the District violated John Doe's Due Process rights by

denying his request for a transfer to Blythewood High School. (Compl. ¶¶ 41-49 at R. pp. 51-53.)

To state a claim for a violation of *procedural* due process, the Student must show that (1) John Doe has a constitutional property interest in attending Blythewood High School, (2) the District deprived John Doe of his property interest, (3) without due process of law (i.e. without notice and an opportunity to be heard). *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005). To state a claim for a violation of *substantive* due process, the Student must show that (1) John Doe had a constitutional property interest in attending Blythewood High School, (2) the District deprived him of his property interest, and (3) the District's action falls so far beyond the outer limits of legitimate governmental authority that no process could cure the deficiency. *Id. See also Dunes West Golf Club, LLC v. Town of Mount Pleasant*, No. 27208, 2013 WL 90419, at *10 (S.C. Sup. Ct. Jan. 9, 2013) (noting that a party must show a cognizable property interest as the first step under either type of due process claim).

To "have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it." *Henry-Davenport v. Sch. Dist. of Fairfield County*, 832 F. Supp. 2d 602, 610 (D.S.C. 2011) (quoting *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972)). "He must have more than a unilateral expectation of it." *Id.* "He must instead have a legitimate claim of entitlement to it." *Id.* Here, the Student alleges that John Doe has a legitimate claim of entitlement under South Carolina law to attend the school of the Student's choice, Blythewood High School. *See Henry-Davenport* at 610.

The Student acknowledges in the amended complaint that the District enrolled John Doe at Westwood High School and thus did not restrict John Doe's access to a public education. Nonetheless, the Student alleges that John Doe has a constitutional

property interest in attending Blythewood High School under South Carolina's gifted and talented statute and regulation. (Compl. ¶¶ 41-49 at R. pp. 51-53.) However, neither South Carolina's gifted and talented statute nor its regulation gives a student a private right of action, much less a right to attend any particular school. S.C. Code Ann. § 59-29-170; S.C. Code Ann. Regs. 43-220. In fact, neither the gifted and talented statute nor regulation even mentions an individual student's attendance at any particular school or student transfers. S.C. Code Ann. § 59-29-170; S.C. Code Ann. Regs. 43-220. Thus, John Doe does not have a constitutional property interest in attending the school of his choice under South Carolina's gifted and talented laws.

Additionally, in *Wharton v. Abbeville Sch. Dist. No. 60*, 608 F. Supp. 70 (D.S.C. 1984), Judge G. Ross Anderson, Jr. held that "South Carolina 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." *Id.* Rather, South Carolina statutory law specifically gives the District the authority and duty to "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). If all South Carolina students had a constitutional property interest in attending the school of their choice, school districts across the state would be unable to manage student attendance in the best interests of public education. Therefore, the Student cannot establish a constitutional property interest in attending the school of his choice. Accordingly, this Court should affirm the dismissal of the Student's Due Process claim.

D. The Circuit Court Correctly Determined That Mother May Serve As Next Friend For Her Child John Doe, But May Not Represent John Doe And Litigate His Claims Without Counsel Because She Is Not A Licensed Attorney.

Under South Carolina law, a person may prosecute or defend "his own cause, if he so desires." S.C. Code Ann. § 40-5-80. However, 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.

Under these statutes, the Supreme Court of South Carolina has held that a non-lawyer cannot represent a corporation in circuit or appellate courts. *Renaissance Enters., Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 515 S.E.2d 257 (1999) (holding that non-lawyer president and shareholder of corporation cannot represent the corporation *pro se* in circuit or appellate courts). The Supreme Court has also held that a non-lawyer executor or personal representative cannot represent an estate in legal matters. *Brown v. Coe*, 365 S.C. 137, 616 S.E.2d 705 (2005). The Supreme Court explained that the "goal of the prohibition against the unauthorized practice of law is to protect the public from incompetent, unethical, or irresponsible representation." *Renaissance Enters, Inc.* at 652, 515 S.E.2d at 258. Specifically, the prohibition against the unauthorized practice of law protects the public "from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law." *Brown* at 139, 616 S.E.2d at 707.

While a parent may assert claims on behalf of his or her minor child as next friend, Rule 17(c), SCRCP, a non-lawyer parent serving as next friend cannot litigate a minor child's claim without legal counsel. *Meyers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 400 (4th Cir. 2005) (non-attorney parent of minor children not authorized to litigate pro se the claim of his minor children); *Blue v. People*, 585 N.E.2d 625, 626 (Ill. Ct. App. 1992) ("A next friend is not a party to a suit but represents the real party, who, as a minor, lacks the capacity to sue in his own name"); *Yulin Li v. Rizzio*, 801 N.W.2d 351, 360 (Iowa Ct. App. 2011) (Rule authorizing father "to bring suit on behalf of his son as next friend, did not authorize [father] to advocate his son's claim before the district court without the aid of counsel."). Courts have repeatedly held that a non-lawyer parent

or guardian cannot sue on behalf of his or her minor child without securing legal counsel. *Meyers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 399-401 (4th Cir. 2005); *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); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2d Cir. 1990); *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876 (3d Cir. 1991); *Shepherd v. Wellman*, 313 F.3d 963 (6th Cir. 2002); *Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147 (7th Cir. 2001); *Johns v. County of San Diego*, 114 F. 3d 874 (9th Cir. 1997); *Meeker v. Kercher*, 782 F.2d 153 (10th Cir. 1986); *Gallo v. United States*, 331 F. Supp. 2d 446 (E.D. Va. 2004); *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168 (E.D. Va. 1994); *A ex rel. F.P.J. v. Davis*, 86 So. 3d 394 (Ala. Ct. App. 2011); *Byers-Watts v. Parker*, 18 P.3d 1265 (Ariz. Ct. App. 2001); *Lowe v. City of Shelton*, 851 A.2d 1183 (Conn. Ct. App. 2004); *Blue v. People*, 585 N.E.2d 625 (Ill. Ct. App. 1992); *Yulin Li v. Rizzio*, 801 N.W.2d 351, 360 (Iowa Ct. App. 2011); *Goodwin v. Hobza*, 762 N.W.2d 623 (Neb. Ct. App. 2009); *Chisholm v. Rueckhaus*, 948 P.2d 707 (N.M. Ct. App. 1997); and *In re D.L.*, 937 N.E.2d 1042 (Ohio Ct. App. 2010).

The purpose of the rule prohibiting non-lawyers from representing others has been explained in detail:

> The near uniform proscription on non-lawyers representing others in court is soundly based on two separate, but complementary policy considerations. First, there is a strong and compelling state interest in regulating the practice of law. Regulation that excludes non-lawyers from representing others reflects that the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents, but also for his adversaries and the court. The lay litigant frequently files pleadings that are awkwardly drafted, motions that are inarticulately presented, [and] proceedings that are needlessly multiplicative. In addition to lacking the professional skill of a lawyer, the lay litigant lacks many of the attorney's

> ethical responsibilities, including, importantly, the duty to avoid litigating unfounded or vexations claims.
>
> . . .
>
> The second reason unlicensed laymen are not typically permitted to represent others in court concerns the importance of what is at stake for the litigant, and the final nature of the adjudication of the rights in question. Thus, a party may be bound, or its rights waived, by its legal representative. When that representative is a licensed attorney there are grounds to believe that the representative's character, knowledge, and training are equal to the responsibility. In addition, remedies and sanctions are available against the lawyer that are not available against nonlawyers, including ethical misconduct sanctions and malpractice suits.

Brown v. Ortho Diagnostic Sys., Inc., 868 F. Supp. 168, 171-72 (E.D. Va. 1994) (citations and footnotes omitted).

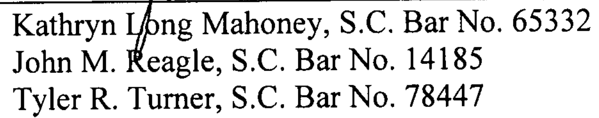
The reasons for the rule prohibiting non-lawyers from representing others are readily-apparent in the present case. The Student's "Second" Amended Complaint, which was prepared and signed by Mother, is incorrectly titled and numbered, contains averments in question form, and quotes statutes that were never enacted. The Circuit Court correctly held that Mother may bring claims on John Doe's behalf as his next friend, but may not represent John Doe and litigate his claims without counsel because Mother is not a licensed attorney.

V. CONCLUSION

For the reasons set forth above, this Court should affirm the Circuit Court's dismissal of the Student's complaint.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

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Attorneys for Richland School District Two Board of Trustees, Richland School District Two, and Dr. Katie Brochu

August 1, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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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
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CERTIFICATE OF SERVICE

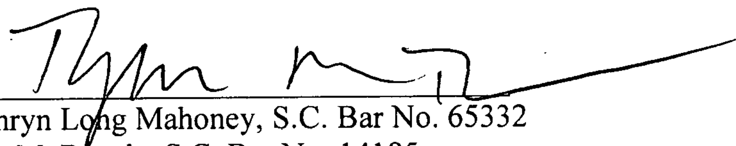
The undersigned hereby certifies that he has served Respondents' Initial Brief and Designation of Matter to be included in the Record on Appeal by depositing a copy of the same in the U.S. Mail service, postage prepaid and addressed as follows:

Ms. Rhonda Meisner
P. O. Box 689
Blythewood, SC 29016

This 1st day of August, 2014

RECEIVED
AUG 01 2014
SC Court of Appeals

CHILDS & HALLIGAN, P.A.



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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.

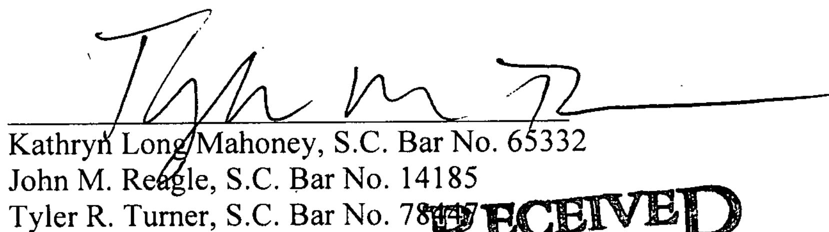
Board of Trustees, Richland School District Two,
Richland School District Two Superintendent,
Dr. Katie Brochu, in her official capacity as School
Superintendent .... Respondent(s).

CERTIFICATE OF COUNSEL

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

August 1, 2014

CHILDS & HALLIGAN, P.A.



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