

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

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**APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas**

**Allison Rene Lee, Circuit Court Judge**

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**Appellate Case No.: 2013-002436**

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Student #1 John Doe,  
Redacted Name of Student,  
Redacted Name of Mother of  
Student #1 John Doe

Appellant(s)

v.

Board of Trustees, Richland  
School District Two, Richland  
School District Two  
Superintendent, Dr. Katie  
Brochu, in her official  
capacity of School  
Superintendent

Respondent(s)

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**REPLY BRIEF OF APPELLANTS**

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

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**SC Court of Appeals**

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Appellants respectfully submit this reply brief in answer to the Respondents' initial brief. As a preliminary matter, the Court effectively converted the ruling of a SCRCR Rule 12 (b)(1)(9) motion into a ruling on a summary judgment. The Court made conclusions of law and interpreted the Gifted and Talented Statutes and ruled with prejudice in favor of the denial, which was a ruling greater than requested by Respondents in their motion. Respondents have never questioned Appellants' interpretation of the statutory appeals process; however, Appellants specifically questioned whether Respondents complied with the statute by notifying Mother via email rather than U.S. Mail to which the Respondents were silent. In an abundance of caution, Mother proceeded with the appeals process in the event the court ruled that email notification was sufficient via the statute. Appellants will assemble the reply brief behind Appellant's arguments in the final brief.

#### **Response to Respondents' Arguments**

**A. Respondents argue the Circuit Court correctly determined that there is no private cause of action under South Carolina's Gifted and Talented Statute or Regulation.**

Appellants agree with the Respondents that the Gifted and Talented Statute was created to benefit the public at large; however, Appellants argue the Statute was also created to benefit the individual, e.g. Student #1, who was identified by the statute as Gifted and Talented. It was only **after** Student #1 was identified as Gifted and Talented did Student #1 **become a member** of the protected class. **Absent identification and selection** of Student #1 by the State of South Carolina (using the guidelines created by the State Board of education),

Student #1 could not receive and the District **could not provide** the services the South Carolina legislature said "must" be provided. Therefore, without the individual benefit to "[d]evelop their unique talents" the benefit for the public at large of their developed unique could not be affected as argued by the Respondents.

Respondents suggest it is the "choice" of school assignment rather than the requirement to provide programs to "[d]evelop their unique talents in the manner the State Board of Education must specify." While "placement" at a particular school might be the mechanism of providing the programs to "[d]evelop their unique talents in the manner the State Board of Education must specify", it is the requirement to be evaluated as an individual pursuant to the regulation and statute that is the right in question. Mother of Student #1 testified at the TRO hearing that there were several "programs" that were not available to Student #1 at Westwood that were available at Blythewood, specifically German language classes and a Tennis Team, both unique programs Student #1 desired to "[d]evelop his unique talents".

**B. Respondents argue 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.**

Appellants agree with the Respondents' argument that they are unaware of any legal authority or Court that has evaluated the extent of the legislative intent in crafting the Gifted and Talented Statute or examining the relationship the State of South Carolina has with its Gifted and Talented Students. However, the

Amended Complaint/Appeal adequately alleges other groups of students were given preferential treatment due to their membership in "unprotected" groups such as culinary arts, students with siblings at Blythewood, and children of District employees. Some of those students were also Gifted and Talented Students. **(R. p. 44 at 16, p. 46 at 20).**

While Respondents argue that they cannot "cure" the defect they "created" in the de-facto segregated student populations, this is inaccurate. The Board and District re completely responsible for creating the "de-facto segregated student population" and could remedy the situation if the District so desired. However, in Ralph Schmitt's testimony at the TRO hearing the District was aware of the creation, making it a purposeful act likely to be corrected without intervention.

**C. Respondents argue that 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.**

Student #1 had a property interest in participating in the choice program once the District made the program available. The procedural due process violation was the District's failure to update the computers at the middle schools to accurately reflect the assigned school prior to the close of the choice process. **(R. p.48 at 28, p.48 at 31).** Once the District established the process for "all students" to participate in the lottery for the choice selection, the District created the property interest in participating in the choice program. By not updating the computers, Student #1 was denied the opportunity to participate based on the

"stale information" thereby depriving him of the opportunity without notice and without the opportunity to be heard. **(R. p.49 at 32).**

Appellants and Respondents both reference *Bd of Regents of State Coll. v. Roth*, 408U.S. 564, 577 (1972) for the proposition that Student #1 has a property interest in the benefits the State has conferred on Student #1 as a member in the Gifted and Talented class of students. In Roth, the Supreme Court said the benefit Roth was seeking was unavailable to him because he was not yet tenured. Mother, during the Motion to Dismiss hearing argued that Student #1 was tenured upon identification and acceptance into the Gifted and Talented program. **(R.p.362 lines 17-22).** Student #1's expectation of being evaluated as an individual to "[d]evelop his unique talents" cannot be categorized as unilateral because the South Carolina Legislature outlined the State's relationship with Student #1 via S.C. Code Ann. §59-29-170. Once the State confers a right or benefit, the United States Constitution protects that right. **(R. p. 381).**

Respondents attempt to confine Student #1's rights to the specific violation of his rights, e.g., the need to transfer to the school "most appropriate" for his unique needs. Respondents additionally argue the statute does not "confer the right to attend the school of his choice". However, the statute and regulation do in fact reference "placement" without limiting the placement to entry into the program. **(R. p. 425).** While the District is given the authority and duty to "transfer any pupil..." the District is also responsible for providing the services for the Gifted and Talented students like Student #1. **(R. pp. 381-397).** However, Roger Wiley, the District Registrar and the official in charge of student transfers,

was unaware of the Gifted and Talented Statutes and Regulations and did not consider Student #1 as an individual or his membership in the Gifted and Talented students. (R.p.264 lines13-15). The next step in the appeals process involved his supervisor Fred McDaniel, PhD who testified he also did not evaluate or know about the Gifted or Talented laws and regulations. (R.p.273 line 25 p.274 lines1-3).

**D. Respondents argue that Mother may serve as Next Friend For Her Child, but may Not Represent Student #1 and Litigate His Claims Without Counsel Because She is Not a Licensed Attorney.**

Mother represented Student #1's interests at the TRO hearing in the capacity of Next Friend via the engagement of Glenn Bowens, an attorney licensed to practice law in South Carolina. Respondents do not object to this form of advocacy by Mother of both her and Student #1's rights. However, they object to Mother representing Student #1 as a continuation of the administrative appeals process.

Mother raised the argument that her rights and Student #1's rights were inexplicably intertwined and could not be separated at the Judicial review phase of the appeal in both the TRO hearing and the Motion to Dismiss hearing. (R\_). Mother also represented to the Court that she responded promptly (within the 10 days required to appeal) to the email notice by the District (in the event email notice was sufficient) as opposed to the process requiring a mailed notice via the U.S. Mail as outlined in S.C. Code Ann. §59-19-560. (R\_). The District never argued Mother's appeal process was improper. However, Mother raised the issue

that the District did not respond within the 20 days required to the First Complaint/Appeal via the Statute and the Circuit Court considered the argument. (R.p.4). Mother also argued that the Respondents used email rather than U.S. Mail and she initiated the Appeal in the event the Court deemed email notification sufficient due to the statute's wording specifically referencing U.S. Mail. The Court then determined the Respondents were in compliance with the deadlines via the statute. The Court ruled once the amendment by the Appellant to the Complaint/Appeal was made this gave the District another 15 days to respond making District in compliance with the Statute. (R.p.4). Mother argues she should be able to represent both her and Student #1's interests as a continuation of the administrative appeals process. While the appeals process in the Circuit Court does not have the forms and processes that are outlined in the South Carolina Court of Appeals, the review is nevertheless an equitable de-novo review. (R.p.27).

### Conclusion

The statutory scheme for providing services for the Gifted and Talented Statutes rely on individual testing for identification and for provision of services; therefore, once identified, Student #1 should have been treated as an individual instead of the "collective Borg" of Gifted Students. For the above reasons, Appellants request that the Court rule that the Gifted and Talented Statute creates a private cause of action and therefore the dismissal of the Appeal was in error and remand for Appeal.

SIGNATURE LINE NEXT PAGE

August 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.

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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 REPLY 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

**CERTIFICATE OF APPELLANT**

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

August 19, 2014



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