76564

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUL 09 2015
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate 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

# PETITION FOR REHEARING PURSUANT TO SCACR RULE 221(c)

July 9, 2015

Rhonda L. Meisner
Post Office Box 689
Blythewood, South Carolina 29016
(803)212-5407
pegasus333@icloud.com
Appellant

Other Counsel of Record:
Counsel for the Respondents
Tyler Turner
John Marshall Reagle
Kathryn Mahoney
Childs and Halligan, PC
PO Box 11367
Columbia, SC 29201-11367

The appellants Student #1, redacted name of student (hereinafter "Student #1) and Mother of Student #1, redacted name of mother (hereinafter "Mother ") respectfully submit this request for a petition for re-hearing based on the Order issued by this Honorable Court of Appeals on June 24, 2015.

## Background

This is an appeal of the decision of the Richland County School Board regarding the denial of the transfer of a highly gifted student (Student #1) to the school most appropriate for his "unique" gifts. After the School Board denied the transfer of Student #1 citing over 100 students were on the waiting list for Blythewood High School, Mother appealed the decision to the Circuit Court via S.C. Code Ann. §59-29-560. The Circuit Court dismissed the complaint pursuant to 12(b) (6) ; however, the Honorable Alison Renee Lee in the denial of the S.C. R. of Civ. P. Rule 59 -e motion by the Appellants, stated she reviewed the file in the case and therefore did not rely on just the pleadings. Mother argues reviewing the TRO testimony gives evidence that the de-facto segregated high school system was planned and orchestrated by the School Board intentionally.

**I. The statutory process for appealing adverse school board decisions require appellants to enter into the circuit court to pursue their rights of judicial review. Because Mother can represent Student #1 without an attorney at the local school and appellate school board level; Mother should be allowed to represent Student #1 as a continuation of the school board appeal in Order to avoid violating the due process and equal protection clause of the 14th amendment to the Constitution.**

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).(June 24, 2015 Order of the Court of Appeals )** 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 pursuant to the statute . **(R. p. 343, Lines 13-20)**.The Circuit Court considered the entire record in her ruling and therefore looked outside of the pleadings in the dismissal of the appeal. **( Order of the District Court).**

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).** Because Student # 1 relies on Mother for the transfer request and representation at the Richland County School Board phase of the appeal ( a phase that does not require representation by an attorney) Mother argues representation by an attorney should not be required to continue the appeal into the Circuit Court. Student #1 and Mother's rights to judicial review cannot be separated from each other and Mother argues she can represent both her interests and their joint interests in the Circuit and Appellate Courts as a continuation of the administrative appeals process.**( Final Brief of Appellant pp. 9,10)**

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. Rule 59-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 as well as in the original appeal

itself. **(R. p. 242 at no.2)**.

The process of appeals for school board decisions that South Carolina has implemented via state statute S.C. Code Ann. §59-19-560 requires appellants to enter the judicial system in the next phase of the appeal process; therefore to require parents to hire an attorney in order to pursue their rights would violate both the equal protection clause of the United States Constitution. **(R. p. 242, lines 10-23)**(.

This scenario of a school board appeal is entirely different from Mother representing Student #1 or attempting to represent Student #1 by *filing a new action* in Circuit Court. The inability of Mother (who is not an attorney) to continue to pursue Student #1's independent rights and her own rights violates the due process clause. The Statute that states no person may practice law on behalf of another who is not a licensed attorney S.C. Code Ann. § 40-5-80 (2011) is in conflict that with §59-19-560 because Student #1 cannot continue his appeal granted to him by the statute as the statute itself does not say adults or parents or students the plain language of the statute states "any aggrieved party". or parents who are attorneys there is no conflict they are free to continue their appeals into the circuit and appellate courts of South Carolina. However, parents that are not also attorneys even though S.C. Code Ann§59-19-560 allows any aggrieved party to appeal to the circuit Court but they cannot represent the Parents who are not attorneys must choose between abandoning their claims or hire an attorney not required by the first phases of the appeal.

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. Mother argues the gifted and talented statute and the associated regulations create independent enforceable rights like the IDEA as both are special education statutes. The rights of Mother and Student #1 cannot be separated.

Here, pursuant to South Carolina state statute construction appeals of school board decisions require entry into the Courts. In *Winkelman* parents rely on the IDEA for their substantive rights; here, Mother relies on S.C. Code Ann. §59-28-100, S. C. Code Ann. §59-29-170 for her parental rights to be involved with Student #1's education, including appealing a school board decision as a continuation of administrative remedies. Respondents 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).**

Additionally, Mother argues because she can pursue her rights and her rights and Student #1's rights are intertwined and cannot be separated then this gives credence to the argument she can continue to represent their joint rights like the *Winkelman* in the state statute controlled appeals process.

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 given the State Statute constructs for appeals of adverse school board decisions.

**II. 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 Cnty. Sch. Dist. v. State*, 335 S.C. 58, 65, 515 S.E 2nd 535, 539 (1999).**

The Supreme Court has outlined the steps of determining whether a statute creates a private cause of action or creates an implied private cause of action. As an initial matter, S.C. Code Ann. §59-29-170 is a special education statute and not a general education statute that benefits the *specific* individual students like Student #1 which qualify for entrance into the class of students mentioned in the statute as well as benefits the citizens of South Carolina generally. This is very important to Mother of Student #1 because she has 4 highly gifted boys in the school system, (her youngest completed the first part of the qualification) but scored, like his siblings, in the top 99% of the country. The replication of the treatment of Student #1, not as an individual, pursuant to the statute but as the collective "borg" of gifted students is at issue in this appeal. Mother argues the

gifted and talented statute should be read to provide programs for the individual needs of the student and if that need is satisfied by a transfer in schools then the need is a transfer. Mother argues the respondents confuse the need of the transfer to provide Student #1 with the programs for his unique talents with the remedy.

The South Carolina Supreme Court outlined a six-step process for identifying whether or not a private cause of action could be implied 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, giving "unique" meaning individual the plain and ordinary meaning of the word. The Legislature has "earmarked" special funds for the group of students, which can be withheld if the regulations are not followed. (**R.p.381**). As such because the gifted and talented statute was enacted for a specific set of individual students that qualify it was in essence created for the individuals in this class as each individual to be included must qualify individually by state designed program and must be individually elected into the class to receive the benefits the state must provide. Therefore unlike a general statute the gifted and talented statute is both for the individual student that qualifies like student #1 and for the citizens of South Carolina.

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. Stated another way, the particular harm the state attempts to avoid is the lost opportunities associated with "not developing" the states best and brightest students. The State's interest in these students can be found in various economic development analyses but is manifested in the "gifted and talented" legislation and associated regulations.

Second, the State via the gifted and talented legislation 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 administered by the state 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**).

The statute S.C. Code Ann. § 59-29-570 and the corresponding regulation 2 Regs 43-220 (2011) benefits both Student #1 as he was tested according to the state created tests and parameters and subsequently identified as gifted and talented as well as benefits the public at large including Mother of Student #1. 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**). Just as in *Bd. of Regents of State College v. Roth* , 408 U.S. 564, 577 (1972) and *Cleveland Board of Education v. Loudermill* 470,U.S. 532 (1985) once the State confers rights to the individual then the United States Constitution protects the rights. Here not only is Student #1 "tenured" pursuant to Roth when he was identified and admitted into the gifted and talented group of students but he also shares the expectation of being treated as an individual which is reflected in a plain reading of the language of the gifted and talented statute that the South Carolina legislature created for this group of students that refers to Student #1's "unique" gifts.

The Court of Appeals Order ruled that Mother and Student #1 did not allege that Student #1 as a gifted and talented student enrolled at Westwood High School was treated differently than the gifted and talented students at Blythewood High School. Mother respectfully submits she did allege this when she complained the district created a de-facto segregated school system. Separate but equal has already been determined to be unconstitutional when the United

States Supreme Court ruled over 50 years ago that separate is not equal in *Brown v. Board of Education* 347 U.S. 483 (1954) and Mother adequately alleged in the appeal that the District and the Board created a de-facto segregated school system that pursuant to Brown and the South Carolina Constitution is not allowed. She also specifically alleged the redrawing of the district lines violated Green. *Green v. County of New Kent* 391 U.S. 430 (1968). Green noted that a racial change of 20% violated the equal protection clause of the Constitution.

The Court also ruled that Student #1 could not be transferred because his transfer or the relief sought would exacerbate the alleged racial imbalance of the school pursuant to *Freeman v. Pitts,* 503 U.S. 467, 489 (1992) The South Carolina State Constitution specifically prohibits the creation of race based schools which pursuant Green as alleged in the complaint happened here. Additionally, according to Brown separate is not equal therefore Mother adequately alleged that Student #1 s did not have the same educational opportunities at Westwood as Blythewood including a German class or tennis program, both desired by Student #1.

**III. The Court ruled there was not a due process violation because Student #1 and Mother ultimately "had their day in Court".**

Mother argues the appeal adequately alleges the district was negligent in supervising and maintaining the computer records and Student #1 potentially would have received the transfer desired by participating in the lottery had the computer records at the middle school adequately reflected the change in assignment which the Order by the Court of Appeals did not address. While the

respondents argue Student #1 does not have a property interest in attending the school of his choice he did have the right to participate in the expanded choice lottery which *he would have done so if* the school district had the appropriate information in the school computers regarding his assignment. This was also adequately alleged in the complaint.

Correspondingly the complaint raised in the appeal gives a theory of recovery that should not be dismissed without a substantive review of the evidence. The district should be required to adequately plan and prepare for school changes as the construction for the schools in many cases take more than several years to complete. The district should not be given a "hall pass" to do as they want with attendance lines( particularly when they allegedly violated state law in doing so) and not maintain adequate computer record updates so Student #1 at least has the opportunity to participate in the choice lottery process.

Additionally, because the district admitted at the TRO hearing they were aware the lines they created violated Green and the Court of Appeals does a de-novo review the Court should consider the district's admissions in the TRO hearing.

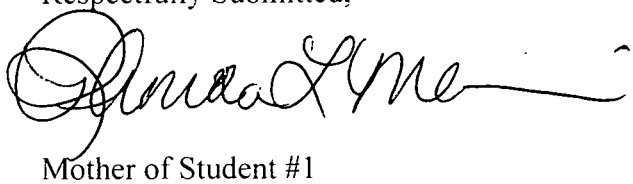
Whether or not there is a private cause of action for Student #1 as mother argues there is via the Gifted and Talented Statute, Student #1 was still deprived of the opportunity to participate in the choice because the district did not update the computers at the middle school prior to the close of choice to reflect the change in attendance lines which effectively eliminated Student #1's

opportunity to participate in the choice process.

**IV. The Court ruled there was no equal protection violation because Mother did not allege a disparate treatment between the assignment from Blythewood to Westwood.**

Mother argues the appeal adequately alleges a de-facto segregated student population between the two schools and as argued above the Supreme Court said separate is not equal more than 50 years ago in Brown v. Board of Education as argued above. For the above reasons and references to the briefs submitted Mother respectfully requests a review of this Honorable Court's Order.

Respectfully Submitted,



Mother of Student #1

P.O. Box 698

Blythewood, SC 29016

pegasus333@icloud.com

(803)960-3696

July 9, 2015

RECEIVED

JUL 09 2015

SC Court of Appeals

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 petition for rehearing 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

July 9, 2015

Mother of Student #1
PO Box 689
Blythewood, SC 29016
pegasus333@icloud.com
(803)212-5407