THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2019-001603
Case No. 2019-CP-40-01615

T.D., by and through his guardians, A.D. and J.D.,

Appellants,

v.

Richland County School District Two,

Respondent.

FINAL BRIEF OF APPELLANTS

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August 14, 2020

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II. Did the circuit court err in ruling that an expulsion hearing provided a student due process of law, where (a) the accused Student was not advised of the specific facts or evidence against him before the evidentiary hearing; (b) the Student was deprived access to the records used against him during the evidentiary hearing; (c) administrators, with the Hearing Officer's knowledge, altered and misrepresented the content of the evidence during the hearing; (d) administrators provided the hearing officer with *ex parte* information, which the Hearing Officer introduced *sua sponte* against the student; (e) the administrators and the Hearing Officer withheld evidence favorable to the Student's case; (f) the Hearing Officer refused to answer student's questions about the evidence; (g) the Hearing Officer exhibited overt bias against Student; (h) the Hearing Officer incorporated *ex parte* information into her decision; and (i) the Hearing Officer and counsel prepared and submitted false and incomplete hearing transcripts to the reviewing Board.

III. Did the circuit court err in ruling that the School Board's non-evidentiary hearing and substantial evidence review of a hearing officer's expulsion decision cured the due process violations of the prior hearing where (a) multiple members of the Board openly refused to consider Student's due process arguments on appeal; (b) the Board refused student the right to introduce favorable evidence that was previously withheld by the administrators and Hearing Officer; (c) the Board refused the student the right to question administrators about the previously withheld evidence; (d) the Board refused to consider newly revealed records contradicting the evidence presented at the prior hearing; and (e) the Board acknowledged that records were withheld and improper records were included in the prior hearing, but refused to remand the case for a new evidentiary hearing.

IV. Did the circuit court err in ruling that Richland County School District Two's practice of denying students the right to ask questions of all witnesses in expulsion hearings is consistent with the South Carolina Constitution, S.C. Code Section 59-63-240 and district policies which expressly provide that students and parents in expulsion hearings have a right to "ask questions of all witnesses."

V. Did the circuit court err in ruling that School District's policies, practices and actions comply with South Carolina Code Sections 63-19-810(c), 63-19-2020(E) and 63-19-2030(E), which require school districts to have policies limiting access and use of juvenile law enforcement records, where the district's policies do not contain the mandatory language required by statute and the district used student's confidential juvenile law enforcement records for purposes other than monitoring, supervision and serving the educational needs of the child?

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Introduction

This case is about fundamental fairness. This is an appeal of a school district's decision to expel a student who was charged by law enforcement with allegedly making threats over social media.[1] Students facing expulsion are guaranteed basic constitutional and statutory rights.

This case also involves two novel questions of law. This Court is free to determine novel questions of law with no particular deference to the lower court. State v. Sweat, 379 S.C. 367, 665 S.E.2d 645, 648-649 (Ct. App. 2008). Appellants ask this court to interpret and apply the state's expulsion procedures statute (S.C. Code Ann. § 59-63-240), in which the General Assembly expressly provided that parents "shall have the right to legal counsel and to all other regular legal rights including the right to question all witnesses." Do students and parents have the right to question all witnesses as guaranteed by the General Assembly?

Appellants also ask this court to interpret and apply statutes related to the confidentiality of juvenile records at S.C. Code Ann. §§ 63-19-810(C), 63-19-2020(E) and 63-19-2030(E). The statutes require school districts to have policies restricting how school principals may access and use juvenile law enforcement records. The policies must limit access and use to supervision, monitoring and serving the educational needs of the child. S.C. Code Ann. §§ 63-19-810(C) and 63-19-2020(E). Are school authorities permitted to conduct recorded cross-examinations of children using piecemeal information gleaned from confidential juvenile law enforcement records without providing the records to the student?

[1] At the time of the initial expulsion hearing, December 12, 2018, Student and Family were not aware of any pending criminal charges. [R. p. 194; Hearing Audio 2, 5:31-6:31; R. pp. 222, line 17 - p. 226, line 24]. All criminal charges against the student were dismissed by the Fifth Circuit Solicitor's Office on August 7, 2019.

These questions are of great importance as the nexus between schools and the criminal justice system, known as the "School to Prison Pipeline," has been at the forefront of public discourse nationally and locally.

Note on the Record: Throughout this brief, Appellants will refer to the Hearing Audio files from the evidentiary hearing before Hearing Officer, Lottie Chishom, on December 12, 2018. [R. p. 194; Hearing Audio 1 and 2, Exhibits 34 and Exhibits 35; R. pp. 212-262]. According to Respondent's policy AR-JKE-R, the audio file of the hearing is the official record in an expulsion proceeding. [R. p. 492, "the established record . . . will consist of the tape of the hearing, including any documentary evidence presented by either party."]. Appellants submit that the audio of the hearing is the most important and overlooked piece of evidence in this case.[2] Citations to the administrative record will include references to both the audio files and the transcripts, with the major and meaningful discrepancies noted. Appellants pray that this Court will review the actual record instead of relying exclusively on the incomplete and inaccurate transcripts of the lower proceedings. Compare Audio Files R. p. 194; R. pp. 212-26; and R. pp. 31-32, 196-201 and 202-210.

STATEMENT OF THE CASE

This is an appeal of a school expulsion by Richland County School District Two ("School District" or "Respondent"). T.D. ("Student") was suspended from school and recommended for expulsion by Respondent after the Richland County Sheriff's Investigators informed school administrators that T.D. was accused of sending a threatening message.

The message itself, was actually a picture of a phone screen showing a message on a blue background, which stated:

[2] After Respondent's counsel declined to file the audio recordings with the Clerk of Court with its Answer and Return, its Certified Record or its Amended Certified Record, Appellants filed copies of the audio files with the Circuit Court on June 5, 2019. Letter of D. Michael Mathison and Disc, June 5, 2019. [R. pp. 118-119].

> I want my shit on Monday or all I know is u and him is getting shot in school . . . I don't give a fuck. I want my shit Monday...my pistol is coming to school with me...and if I don't get my juul I'm shooting both of y'all and a ton of other people.

[R. p. 449; R. p. 419]. The picture does not show any name, screenname, username, phone number, cellular data or other identifying feature. Id.

Student attended a hearing on December 12, 2018, before district Hearing Officer, Lottie S. Chishom ("Chishom" or "Hearing Officer"). [Amended Certified Record ("A.R.") R. p. 194; December 12, 2018, Hearing Audio 1 and 2[3]; R. pp. 212-262]. Before the hearing, the Student's grandfather stated he was not sure why the expulsion was going forward because there were no charges or proof. [R. p. 194, Hearing Audio 2, 2:00-6:41 (Not transcribed by Respondent); R. p. 214 line 1-p. 227 line 17]. The Hearing Officer instructed the administrator to have a conference to disclose the information in the district's possession. Id. The administrator did not disclose any of the documentary evidence. Instead, she told the family:

> At this point, all I can say is, that because of the alleged threat that was made against the students and against the school we did go ahead and make the recommendation for expulsion based off what was shared with us in the incident report that we received. Based on that it would be up to Ms. Chishom to make her determination. Everything else will be up to the police department at this time as far as the paperwork.
> **A.D.:** Did they send y'all a police report on that?
> **Mazyck:** I have an incident report, but they would have to be the ones to give you all any additional information.

[3] According to district policy AR-JKE-R, the audio recording of an expulsion hearing is the official record of the hearing. [R. p. 492] To ensure the audio files were actually available to the court, Appellants Counsel filed copies of the audio recordings with the Clerk of Court on June 5, 2019. [R. p. 118]. The Respondent's counsel submitted the Amended Certified Record to Judge Manning with a Motion to Seal on July 15, 2019. [R. p. 120] A portion of the audio of the hearing on December 12, 2018, was not preserved for reasons that have never been explained. The Audio appears as two separate recordings. [R. pp. 217] Exhibit 34 is four minutes and fifty-five seconds long and ends abruptly while Appellant A.D. is speaking. Exhibit 35 begins with the end of Appellant J.D.'s objection to the proceedings: "... when he ain't been found for nothing." [R. pp. 217, lines 10-16].

[R. p. 225, line 9- p. 226, line 18; Hearing Audio 2, 7:41-7:30; (Not transcribed by Respondent)]. During the hearing, administrators read a disciplinary referral, a police incident report, and three student witness statements which were not previously disclosed to the Family and were not provided to the Family during the hearing. The administrators did not read any names of the witnesses, including adult witnesses, nor did they use any anonymous identifiers. The Student and Family denied student's guilt and the testified that Student had sold his phone the day after Thanksgiving, a week before the investigation began. The Hearing Officer had additional evidence, including a screenshot of the message, which was not part of the administration's case. [R. p. 194; Hearing Audio 2, 29:26 to 30:30; R pp. 246, line 14 – p 248, line 18]. The Hearing Officer would not answer Student's questions about the image. Id. After the family continued to deny the charges, and Student's brother testified about how anybody could create a SnapChat account, the Hearing Officer decided to introduce her own evidence, which administrators had provided to the Hearing Officer but not the family. [R. p. 194; Hearing Audio 2, 29:00-42:00; R. pp. 209-211; R. pp. 247 line 14 – 257, line 23; R. p. 417]. The Hearing Officer cross-examined student using portions of an anonymously-authored investigation report, which purported to contain a confession from T.D. Id. She refused to answer the Family's questions about the report, telling them to "talk to the cops" about it. Id. Chishom expelled student by letter dated January 11, 2019. [R.p. 29].

A.D. and J.D., as guardians for their minor grandson, T.D. (collectively, "Appellants" or "Family"), appealed the decision to the Richland County School District Board of Trustees. On January 14, 2019, after the family retained counsel, the district produced the records they had received from law enforcement before the December 12, 2019, hearing. [R. p. 462]. The

district did not produce the student statements read at the December 12th hearing until February 1, 2019. [R. p. 86]. The documents revealed the following:

- The offending message discussed in the December 12, 2018, hearing did not have Student's name, screenname, account name or any other identifying information on it. [R. pp. 380, 419, 449]

- The district actually received dozens of confidential law enforcement records on December 4, 2018, including a total of thirteen screenshots with differing screennames and usernames. [R. pp. 355-406, 419-430]

- The student (K.M.) who initially reported receiving the message from T.D., later told law enforcement that he actually received the message from other students, not T.D. – a direct contradiction of the student's statement read at the hearing and the incident report. [Compare R. pp. 412 and 414 and R. pp. 362-63, 417-418]

- Another student (C.G.) who claimed to be the recipient of the message, told police that the message did not come from T.D.'s SnapChat account, which he had blocked. Instead the message came from "a new snapchat" that was created on the night of the incident. Notably, that witness also said that the message was sent on a completely different day than the day claimed by law enforcement. [Compare R. pp. 366, 435 and 417].

In its appeal to the Board, Student requested an in person appearance before the Board and an opportunity to reopen the record and cross-examine witnesses based on the previously withheld information and numerous due process violations. [R. pp. 36, 39-48, 56-57; R. p. 483]. On appeal, the Family argued (1) the procedures used by the administrators and hearing officer violated student's due process rights; (2) the Hearing Officer was overtly biased against Student; (3) the administrator and hearing officer misused student's confidential juvenile records in violation of student's statutory rights under S.C. Code Ann. § 63-19-810(c), 63-19-2020(E) and 63-19-2030(E).

Jasmine Drain of Halligan Mahoney & Williams, informed the family that the Board had granted the family a personal appearance by email dated February 8, 2019. [R. p. 484]. Board policy allows for in person appearances, but does not provide any procedures for those

hearings. On the same date, the Family submitted an additional request for clarification of procedures before the Board and requested that the record be opened and that witnesses who were not disclosed or available at the hearing on December 12, 2018, be available for questioning in accordance with S.C. Code Ann. § 59-63-240. [R. pp. 56-57].[4] On February 12, 2019, counsel for the administration, Vernie Williams, also of Halligan, Mahoney & Williams, advised that the Board would have to vote on procedural questions, including the Family's requests to open the record and cross-examine witnesses. [R. pp. 58-59].

Family appeared before the Board on February 12, 2019. [R. p. 194; Board Audio; R. pp. 262-308]. The day of the Board hearing, February 12, 2019, Vernie Williams, of Halligan, Mahoney & Williams, notified the Family's counsel that the Board would have to vote on whether the record would be opened to allow new evidence or testimony at the Board hearing. [R. pp. 58-59]. Unbeknownst to the Family, the administration had submitted dozens of additional documents that were not introduced in the hearing on December 12, 2018, including Mr. Williams' letter. The documents included dozens of images of statements that were not part of the hearing on December 12, 2018. [Compare R.pp. 419-430, A.R. Exhibit 18 containing twelve images *with* statement of Chishom; Hearing Audio 2, 31:00 – 31:17, R. pp. 248, line 2-15: "T.D.: Do you have screenshots of the messages? Chishom: … I've got one, it says I want my shit Monday"]. Without notice to the Family, the "administration" was also submitting correspondence to the Board related to settlement negotiations. [*See, e.g.,* R. pp. 58-59]. Family was not copied on any of the administration's submissions to the Board. [R. p. 87; Answer, ¶ 32]. Family did not learn of what was

[4] The Family also objected to the two inaccurate and incomplete transcripts of the hearing on December 12, 2018, prepared by Respondent's counsel. [R. p. 56-57, objecting to transcripts at R. pp. 196-201 and R. pp. 202-211]. Respondent's counsel submitted them *ex parte*, over the Family's objection. [R. pp. 58-59]. All of Family's submissions to the Board were sent through Respondent's counsel, Halligan, Mahoney & Williams.

actually in the record before the Board until May 1, 2019. No member of the Board, including the Chairwoman or Secretary, has certified the Amended Certified Record in accordance with Rule 75, SCRCP.

During the Board Hearing on February 12, 2019, just hours after Mr. Williams had advised that the Board would have to vote on procedural questions, the Chairwoman of the Board introduced Mr. Williams as "our attorney" and referred those procedural questions directly to him:

> **Chairwoman**: Want me to share this with you? What we typically do is we have students explain what happened we allow statements from people that he has with him. However, we have two attorneys present. We will defer to the advice of our attorney as to how to proceed. This is what we do without attorneys, so what you are asking for I would have to defer to legal advice. That's why we have our attorney here.
> **V. Williams**: Again, we are representing the administration . . .

[R. p. 194; Board Audio, 7:56 to 8:25; R. pp.272, lines 9-22]. Mr. Williams attempted to make a distinction between the "Board" and the "Administration;" however, Boardmembers continued to refer to Mr. Williams as "our counsel" throughout the hearing and the Chairwoman continued to ask him for legal advice.

The Board refused to allow the Family the opportunity to introduce documentary evidence to meet the allegations against Student. [Board Audio 5:24-7:56, R. pp. 270, line 1- p. 274, line 23; Board Audio, 9:11-10:10, R. pp. 273, line 20- p. 274, line 21; Board Audio 12:28-16:01, R. pp. 277, line 3 – R. pp. 280, line 16; Board Audio 16:00-22:40, R. pp. 280, line 17- p. 288, line 9; Board Audio 23:50-26:00 R. pp. 289, line 11 – page 291, line 15]. The Chairwoman and other Boardmembers stated that they would not allow any additional evidence, except direct testimony from T.D. and his grandparents. [Board Audio, 21:30-22:40; R. p. 287, lines 1-23; Board Audio 29:10-30:00; R. p. 295, line 25- p. 296, line 24.].

Family's counsel was denied the right to ask questions of Chishom or Mazyck, who were in attendance. During the hearing, the Chairwoman and other board members indicated that they would not entertain the Family's arguments about the Hearing Officer's inappropriate conduct or impartiality. [*See, e.g.* Board Audio 16:00-16:20; R. p. 280, line 17-R. p. 281, line 12; Board Audio18:50-19:55; R. p. 283, line 19 - 285, line 1].[5] Despite Family's request that the Board consider the audio, which is the official record under Board Policy, at least one Boardmember stated that the Board would only consider written materials. [Board Audio, 38:48-39:16; R. p. 306, lines 4-14; ("We're just seeing what we read.")].

During the hearing, Vernie Williams of Halligan, Mahoney & Williams, proposed that the Board remand the matter to a different hearing officer. [Board Audio, 19:55-20:56; R. p. 285, line 3- p. 286, line 9]

> Boardmember Manning: "...[O]ne thing our legal counsel [sic] keeps bringing up is this remand. I am hearing Mr. Shadd saying typically we deny or uphold the appeal, but it sounds like we might have another thing that we've never done before but it is an option to remand it, which means that we would begin the process over . . .
> V. Williams: We would ask for the third option. We essentially are proposing a third option of remand, in addition to the traditional deny or uphold . . .."

[Board Hearing: 22:00-23:55; R. p. 287, line 25 – p. 289, line 10]. Mr. Williams advised the Board that it had no authority to order student witnesses to attend the hearing on remand. [Board Hearing, 4:00-5:25; R. p. 268, line 9 – p. 269, line 25].

The Family's position was that any remand would have to comply with S.C. Code Ann. § 59-63-240, which expressly provides parents and legal guardians with the right to ask

[5] Chairwoman: "It sounds like the hearing officer is on trial now, that's not what we are here for . . ." [Board Audio, 16:00-16:25; R. pp]. Boardmember Cheryl Caution-Parker: "The child needs to speak on his behalf what he feels. And shares his story and what he feels happened to him. How he was involved. How he was supported or not supported. That's what we pretty much base our decision on, not all this esoterical [sic] stuff. . . So, basically what I would like to do is to carry on like we always do, without all this other stuff. I have no idea, it just doesn't matter. ..." Board Audio 19:00-19:55].

questions of all witnesses. Mr. Williams conceded that inappropriate law enforcement information was included in the record before the Hearing Officer. [Board Audio, 26:42-27:10; R. p. 292, line 11 - 25].

After the Chairwoman interrupted Student's presentation and suggested to end the hearing for the third time,[6] Student's attorney asked if any member of the Board was familiar with the Student's Supplemental Appeal dated February 5, 2019. The Board Secretary, Christine Agostini, stated that she had read "the hearing" and that they received a "lot of documents," but did not confirm that she had read Student's appeal. No member of the Board verified that they were familiar with the Student's written Appeal, but the Chairwoman interrupted the Secretary to say that they had received it. [Board Audio, 28:52 – 30:10; R. p. 296, lines 1 - 24].[7] The Board did not vote on any of Student's procedural requests. The board denied the appeal by a single vote that night. The Director of Administrative Services for Respondent signed a letter dated February 18, 2019, stating some of the grounds for the Board's decision.[8] In pertinent part, the decision stated:

> "[T]he Board found that there was sufficient and substantial evidence to support the expulsion recommendation without consideration of the law enforcement records to which you objected. In addition, the Board found that to the extent the student was deprived of the opportunity to review any evidence prior to the hearing, it was subsequently provided and he was given an opportunity to respond to that information on appeal."

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[6] In the middle of Student's presentation related to Chishom's conduct, the Chairwoman interrupted to say the Hearing Officer was not on trial, and circled back to the issue of witnesses, stating " . . . it sounds like you are not willing to go forward," [Board Audio: 15:00 to 16:52; R. p. 279 line – R. p. 281, line 15]; Chairwoman: [To V. Williams] "So, are we wasting our time here, are we not going to be able to talk to him. What's the bottom line." [Board Audio: 19:55 to 20:56; R. p. 285, line 3 – R. p. 286, line 21]; Chairwoman: "Yeah, Can we be done? If [T.D. is] not going to say anything then I think our purpose here is done." [Board Audio: 29:10 -29:29; R. p. 296, line 10, R. p. 296, line 24].

[7] The Report submitted to the Board through BoardDocs *ex parte*, was last updated on February 1, 2019, prior to Student's supplemental appeal, the production of the revised transcript and several other documents included in the record. [R. p. 60].

[8] The letter makes no findings of fact and cites "other reasons" for denying the appeal which were not stated. [R. pp. 27-28].

[R. pp. 27-28]. The Board did not address hearing officer bias, nor did the Board address its failure to promulgate juvenile records policies consistent with the mandatory provisions of S.C. Code Ann. § 63-19-2020(E). On April 30, 2019, the Board subsequently voted to amend its student records policy JRA to reference the juvenile records law. [R. p. 111, fn. 3].

The Family timely appealed to the Court of Common Pleas for Richland County on March 20, 2019, arguing that the Student was denied due process before the Hearing Officer and that the substantial evidence review of the Board did not cure the structural defects of the prior hearing. [Summons, Complaint and Notice of Appeal ("Appeal and Complaint"); R. pp. 62-78]. The Family asked the Circuit Court to find that Respondent violated statutes relating to the confidentiality of juvenile records; to enjoin Respondent from further violations of the juvenile confidentiality statutes; and to require the School District to promulgate policies consistent with South Carolina Code Sections 63-19-810(c), 63-19-2020(E) and 63-19-2030(E). The Family also requested declaratory relief asking the Circuit Court to find that the Respondent's practice of prohibiting students and parents from asking questions of witnesses in expulsion hearings to be in violation S.C. Code Ann. § 59-63-240 and the South Carolina Constitution. A hearing was held before the Honorable L. Casey Manning on July 26, 2019.[9] Judge Manning signed an order prepared by Respondent's counsel on August 16, 2019, and filed it on August 21, 2019. [R. pp. 8-26, ("Order")].

The Family timely filed this appeal on September 20, 2019.

[9] The "Amended Certified Record" was never actually filed with the Clerk of Court, but provided to Judge Manning as an attachment to a Motion to Seal by Letter dated July 15, 2019 [R. p. 120]. The "Amended Certified Record" was never "certified" by any member, clerk or secretary of the School Board as required by Rule 75, SCRCP, despite Defendant's requesting an extension for that express purpose. [R. p. 105]. Nevertheless, references to the Amended Certified Record are cited as "A.R."

STANDARD OF REVIEW

"This Court's scope of review when reviewing decisions of school boards is governed by the Administrative Procedures Act (APA), S.C. Code Ann. § 1–23–380." Young v. Charleston County Sch. Dist., 393 S.C. 303, 725 S.E.2d 107, 108, *quoting* Lee Cnty. Sch. Bd. of Trs. v. MLD Charter Sch. Acad. Planning Comm., 371 S.C. 561, 565, 641 S.E.2d 24, 26 (2007); [R. p. 68; Appeal and Complaint, p. 7, ¶ 38; R. pp. 49-55]. In cases where a court is not called to review the substantive determinations of the Board, but only whether appellant was afforded the procedural due process prescribed by our laws and our constitution, the court may reverse or modify the decision if substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; or (c) made upon unlawful procedure. Young, 393 S.C. 303, 725 S.E.2d 107, 108, *citing* S.C. Code Ann. § 1–23–610(B). Claims that require this court to interpret statutes and decide whether a lower tribunal's actions violated due process are questions of law, which the court may decide without deference to the rulings of the lower tribunals. McIntyre v. Sec. Comm'r of S.C., 425 S.C. 439, 443-444, 823 S.E.2d 193, 195 (Ct. App. 2018), cert. denied June 28, 2019.

ARGUMENT

I. The Court Erred in applying a Substantial Evidence of review to questions of law and statutory interpretation.

The Circuit Court erred in applying a substantial evidence standard to Student's arguments on appeal, which were questions of law. Student appealed this action pursuant to S.C. Code Ann. § 59-63-240; Rule 74, SCRCP and Floyd v. Horry County School District, 569 S.E.2d 343, 351 S.C. 233 (2002). Student claimed that the district violated his rights by failing to comply with statutes and due process procedures. Section 59-63-240 does not

provide a specific standard of review. Student argued that the circuit court should review the decision under S.C. Code Ann. § 1-23-380. [R. p. 68; Appeal and Complaint, ¶ 38].

This court and the circuit court reviews student claims according to the nature of the claim. Appeals from school administrative decisions based on due process violations are not dismissed based on a threshold finding of substantial evidence. *See, e.g.*, Floyd, supra (Holding that Circuit Court can review school suspension for compliance with federal due process standards). Furthermore, when an appeal of a school board decision turns on the interpretation or application of a statute, the court applies the appropriate *de novo* standard of review used in actions at law. *See*, e.g. Smith v. Wallace, 295 S.C. 448, 369 S.E.2d 657 (Ct. App. 1998) (reviewing and reversing school district and Circuit Court's misapplication of statute to deny student's admission to district). Courts review the application of the wrong standard of review as a matter of law without deference to the lower court. *See*, e.g. Cruz-Quintanilla v. Whitaker, 914 F.3d 884 (4th Cir., 2019) ("[W]hether the [agency] has applied the proper standard of review is a question of law"); McIntyre, *supra*; Gray v. Club Group, Ltd., 339 S.C.173, 528 S.E.2d 435 (Ct. App. 2000) (reviewing character of claim *de novo* to determine appropriate standard of review); *see also,* Pruitt v. Med. Malpractice Liability, 343 S.C. 335, 540 S.E.2d 843 (2001)(Court of Appeals used wrong standard of review).

School districts are not exempt from South Carolina case law. This case does not turn on substantial evidence review, because the procedural defects at the Hearing Office level and the Board level prevented Student from receiving a full and fair hearing. *See*, McIntyre v. Sec. Comm'r of South Carolina, 425 S.C. 439, 823 S.E.2d 193, cert denied June 28, 2019. [R. pp. 72-73]. The deferential review used by the Court was contrary to the Court's holding in McIntyre, in which the court reaffirmed that harmless error analysis is impossible and

unnecessary when structural defects infect the hearing process. McIntyre, 425 S.C. at 451-452. In short, "substantial evidence" review is inadequate and inappropriate when procedural due process violations have limited a party's ability to receive a fair hearing at a lower level. Id. 425 S.C. 439, 823 S.E.2d 193.[10]

II. The Court Erred in Finding the District provided Student with Due Process during the December 12, 2019, and ruling that the failure to provide access to the evidence and a Biased Hearing Officer were "not prejudicial."

The Circuit Court ruled that Student was provided with Due Process on December 12, 2018. [R. pp. 17-18]. This ruling is not grounded in what actually occurred before, during or after the hearing on December 12, 2018. This court should reverse the Circuit Court, because the actions of the administrators and hearing officer were in violation of constitutional and statutory provisions and made upon unlawful procedure. The procedures below did not comply with the basic constitutional requirements to provide notice of the allegations and an explanation of the evidence required by Goss v. Lopez, 419 U.S. 565, 581 (1975)(Student being suspended has a right to an explanation of the evidence), even after the Family requested the information and even after the Hearing Officer instructed the administrator to provide the information. Moreover, the hearing did not provide student with the basic procedural safeguards provided by S.C. Code Ann. § 59-63-240 and district policies JKE and AR-JKE-R [R. pp. 489-494].

Relevant Facts: On Sunday, December 2, 2018, Richland County Sheriff's Investigator C. Truluck notified Principal Karis Mazyck of Blythewood Middle School ("Mazyck") about the allegation that Student sent a SnapChat message threatening to shoot up

[10] While it is not a school case, there are uncanny similarities in the facts, including the refusal to provide rules or procedures during appeal and a disregard for statutory requirements. The Securities Commissioner failed to promulgate rules of procedure for hearings causing prejudice to McIntrye and used an internal review procedure to override the Hearing Officer's recommended findings. The court held that judicial review at the Circuit Court was inadequate because substantial evidence standard review could not cure the prior due process deprivation.

the school. The report was made by the parent of a female student ("the girl"), who received the message from Student K.M. The threatening message is actually a picture of a phone screen with no name, account information, phone number, cellular carrier information or other identifiable feature.

According to the incident report [R. p. 360], K.M. told "the girl" that T.D. sent him the message. Investigators then spoke to K.M., who then denied receiving the message from T.D., claiming instead, that the messages were originally sent to two *other* students, C.G. and H.G., who subsequently sent the messages to K.M. [R. pp. 362-3, 417-8]. Investigators then visited C.G., who claimed that he received the message during a sleepover on Friday, November 30, 2018. [R. pp. 366]. C.G. also told investigators that the message did not come from T.D.'s account, but from a "new snapchat" created that night. Id.

Investigators then visited T.D.'s house. T.D. refused to give a written statement to police. [Hearing Audio 1, 3:20-3:57; R. pp. 215, line 15 - p. 216, line 4; R. p. 368]. According to J.D. and T.D., Student denied involvement. [R. pp. 351-354] Student's grandmother consented to a search of the home for a phone and a pistol, but neither were found. [Hearing Audio 2, 4:30-5:00; R. p. 222, line 5- R. p. 223, line 18; 32:23-32:40; R. pp. 249, lines 18-25]. Investigators told student not to return to school until contacted by administrators.

Two days later, on Wednesday, December 4, 2018, around 9:00 a.m. Mazyck called Student's grandfather, J.D., and asked that Student be brought in to give a statement to the school. The grandfather advised Mazyck that Student denied any involvement and would not

write a statement for the school. He further advised that Student had not given a statement to law enforcement. [R. pp. 351-352;[11] 1:56-3:50; R. p. 214, line 3-p. 216, line4].

At the December 12, 2018, hearing Mazyck referenced that the December 4th telephone call to J.D. as the prior notice provided to the family about the expulsion. It was only after that telephone call that Mazyck requested records from law enforcement. [R. pp. 351-54]. Immediately after speaking with J.D., Mazyck texted law enforcement and requested incident reports. Id. That evening, Sgt. Truluck sent Mazyck "the whole file" on Student, which included dozens of pages of confidential law enforcement records, including student witness statements, juvenile petitions, incident reports, investigation notes, medical records and other confidential information, much of it totally irrelevant to the current case. [R. pp. 351-354, R. pp. 355-406].

After receiving the records, Mazyck prepared a referral for expulsion citing the incident report and conversations with law enforcement. [R. p. 411]. Subsequently, Mazyck shared the confidential records with the district Hearing Officer, Lottie Chishom ("Chishom"), to support her recommendation to expel T.D. from the schools of Respondent. [R. p. 353-354].

The following day, December 5, 2018, Mazyck and administrators collected different statements from students K.M., H.G. and C.G. [R. pp. 414-416, each dated December 5, 2018].

When the family arrived at the hearing on December 12, 2018, the Hearing Officer inquired if the Family knew why they were there. J.D. stated that he did not understand why

[11] Respondent's counsel did not transcribe any portion of Hearing Audio 1, or the first ten minutes of Hearing Audio 2. Notably the Hearing Officer went on the record at the 1:56 mark of Hearing Audio 1 [R. p. 214, lines 5-15], and never went back off. The sixteen minutes of information pertinent to this Appeal was collapsed into the phrase "Introductions and Procedures." *Compare* Hearing Audio 1 and Hearing Audio 1, 0:00-11:00; R. pp. 212-p. 230, line 7; *with* R. pp. 196 and 202.

the expulsion proceedings were going forward when there were no charges and no "proof." Chishom instructed Mazyck to divulge the evidence to Appellants:

> Chishom: ". . . [T]he administrator is going to do just what they would do if there was a problem at the school level, where you were involved, they would bring you in, and they would say, [T.D.], look, this is what we have received in the office and they will tell you what they have received, give you the information, then you will just respond to that information, 'Yes that did happen,' 'No, that didn't happen.'"

[Hearing Audio 1, 1:33 - Hearing Audio 2-2:55 (not transcribed by Respondent); R. pp. 214, line 4 – p. 221, line 4]. Instead of disclosing the evidence as instructed, Mazyck advised the family that she received a call from investigators who told her that T.D. had sent some threatening messages to other students. Id. T.D. denied sending the messages. [Hearing Audio 2, 1:33-3:00; R. pp. 220, line 1-p. 221, line 4]. J.D. and A.D. told Mazyck about the investigators coming to the house and showing T.D. some pictures on a phone. They also stated that the investigators did not find a phone or a pistol during a consent search. The family told Mazyck that they had not heard anything else from the investigators or the Family Court. [Hearing Audio 2, 4:01-5:30(not transcribed by Respondent); R. pp. 222, line 11 – p. 224, line 5].

J.D. continued to object to the proceedings based on the lack of evidence:

> "So, I don't know why we sitting here? Because, somebody, you gotta be guilty of something, somebody got to have some proof on you before you get charged for something. That's just like one of your grandkids or one of your kids, you would want to know what's going on. I mean, its like, what everybody at school, what he hangs around with, got his little thing he can text from."

[Hearing Audio 2, 4:30-6:41(not transcribed by Respondent); R. p. 223, line 2 – p. 225, line 16]. Even after T.D. expressly denied involvement and J.D. expressly inquired about the "proof," Mazyck did not disclose the (1) contents of the police incident report; (2) law

enforcement records (3) statements given to law enforcement; (4) witness statements given to the school; (5) the disciplinary referral; or (6) any allegation of a confession. Mazyck disclosed only that she received an incident report, but told the family they would have to get all records from the police. She also told Appellants that there were no criminal charges, despite having already received notice of the charges. Mazyck's exact words in response to the grandfather's requests for proof were:

> "**Mazyck**: At this point, all I can say is, that because of the alleged threat that was made against the students and against the school we did go ahead and make the recommendation for expulsion based off what was shared with us in the incident report that we received. Based on that it would be up to Ms. Chishom to make her determination. Everything else will be up to the police department at this time as far as the paperwork.
> **A.D.:** Did they send y'all a police report on that?
> **Mazyck:** I have an incident report, but they would have to be the ones to give you all any additional information.
> **A.D.:** What I'm saying is that they sent the school an incident report?
> **J.D.:** Did they press charges against him?
> **Mazyck:** No. Not to my knowledge.
> **A.D.:** That's what we're saying. We didn't even know.
> **J.D.:** That's what I said.
> **A.D.:** We don't even have the incident report. That's why I'm asking you. Because, I mean, I was like, shocked.

[Hearing Audio 2, 6:00 – 7:40 (Not transcribed by Respondent); R. p. 225, line 20- p. 226, line 24].

A. The Administrators and Hearing Officer failed to provide adequate notice, an explanation of the evidence or access to the evidence as required by law and district policy.

Students have a protected constitutional right to a public education and a protected interest in their reputation. S.C. Const. art. XI, Sec. 3; Goss v. Lopez, 419 U.S. 565 at 575 (Noting student's property interest in education and liberty interest in reputation). Even in cases of short term suspension, a student who denies misconduct is entitled to an explanation of the evidence. Goss, 419 U.S. 565, 581. In an administrative proceeding, the accused has a

right to receive and review the state's evidence, so that the accused has an opportunity to show it is untrue. Brown v. S.C. Dep't of Education, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990). Respondent - and this Hearing Officer in particular - have previously been found to have violated a student's rights by failing to provide the Student with the evidence used against the student in an expulsion hearing. Doe v. Richland County School District Two, C/A 2006-CP-40-06545, Order of Hon. J. Michelle Childs dated February 16, 2007; aff'd 677 S.E.2d 610, 382 S.C. 656 (available at Court of Appeals). The district's own expulsion policy requires the hearing officer to send a letter to the parents identifying the rules infraction, a "summary of the evidence against the student," and detailing the right to request copies of witness statements and records. [Board Policy AR-JKE-R; R. p. 491]. The key question is whether a student receives some form of notice sufficient to permit the student to respond to the charges. Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647 (W.D. Tex. 2007).

Prior to the Hearing in this matter, Mazyck consciously withheld the evidence to be used against Student and misinformed the Family that they did not have a right to review the evidence.[12] Contrary to the Circuit Court's statement that the family did not take advantage of all rights afforded (Order p. 11; R. p. 18), the Family was simply misled about the facts, the evidence and their procedural rights.

B. The Administrators Concealed material facts and altered the evidence.

The administrators took advantage of the Family's inability to review the documents during the hearing. Facts and information were omitted from reading of the documentary

[12] *See,* Goss v. Lopez, 419 U.S. 565(1975) (Due Process under the Fifth and Fourteenth Amendment to the U.S. Constitution require an explanation of the evidence even for a short-term suspension when a student denies misconduct); S.C. Code Ann. § 59-63-230 (requiring written notice of suspension); Board Policy JKE-R (requiring Hearing Officer to send written notice to parent that includes, *inter alia*, rules infraction, "summary of the evidence against the student," and right to request copies of witness statements.)

evidence, including any reference to "the girl," who was the complaining witness. [Hearing Audio 2, 12:20-13:20; R. p. 231, line 17- p. 232, line 15; Hearing Audio 2, 24:32-25:22; R. p. 241, line 18- p. 242, line 12]. Chishom, the Hearing Officer, was fully aware of the alterations and even engaged in a side-bar conference with the administrator about the witness who had been whitewashed from the presentation:

> Chishom: "Where is my report, the girl, the girl, something about the girl. . . "
> Administrator: "She was in that report [inaudible], but I changed his name on that [inaudible] . . ."

[Hearing Audio 2, 34:30-35:06 (Not transcribed by Respondent)]. It is a significant fact that none of the alleged victims (K.M., C.G. or H.G.) reported the incident to a parent or the school, but sent the message to a teen-aged girl. Student was prejudiced by not being able to show that the school's witnesses never reported this incident to any authority.

Administrator Greta Carter also altered the student statements to eliminate conflicts between the incident report and the student statements. Student C.G. wrote that messages were initially sent to K.M., but the offending message for which student was being expelled – the threat against the school - was sent to C.G. That version of events conflicted with the incident report, which stated the school threat was sent to K.M. Ms. Carter changed the reference to K.M. to "us," to create the appearance that the message was sent to all students. [Hearing Audio 14:55-15:48; R. p. 233, line 18 - 20]. Student H.G. had written that he and C.G. were "messing with" T.D., but Ms. Carter read the statement as "messaging with" T.D. [Hearing Audio 2, 13:52-14:55; R. p. 232, line 25 –p. 233, line 18]. That alteration dramatically changes the nature of the interaction with alleged victims, and casts doubt on the question of whether the messages were considered threats at all. These alterations have been repeated by the Hearing Officer and Respondent's counsel so often, that they are now

included in the Circuit Court's Order as "substantial evidence." Order p. 7; R. p. 14. The Administrators and Hearing Officer could have easily used anonymous identifiers (student A, B, C) or initials, but instead chose to conceal material facts.

C. The Family was prejudiced by the unfair procedures.

The Family's substantive rights were prejudiced because they did not know what Student was accused of doing and had no opportunity to prepare a defense. There was no allegation or evidence of when the messages were sent or who the message was sent to? There was no evidence of when or how student allegedly committed the act until 40 minutes into the hearing. The Hearing Officer acknowledged this stating: "I don't know how you sent the message but a message was sent." [Hearing Audio 2, 32:23-32:45; R. p. 249, lines 19-25].

Near the end of the hearing, the Hearing Officer read a document which stated T.D. sent the message from the Emergency Room on the night of Saturday, December 1, 2018. Had the Family been apprised of the basic factual allegations, they could have brought records showing that T.D. sold his phone on November 23, 2018. [R. p. 443]. Moreover, the family could document that T.D. departed from the Emergency Room at 9:30 p.m. [R. p. 445-447]. Had they been provided with the other images in the district's possession, they could have shown that the messages were time-stamped around 2:00 a.m. [R. 455, 457 and 459]. Finally, Student C.G. claimed to have received the message on a completely different day – Friday, November 30, 2018. [R. p. 366].

The Student was significantly prejudiced by the concealment of relevant information in other documents withheld by the administrator and Hearing Officer. Specifically, administrators and Chishom possessed and withheld documents and information showing:

a. Student C.G. told police that the messages did not originate from T.D.'s known SnapChat account. [R. p. 366].

b. Contrary to the statement read at the hearing [R. p. 414], Student K.M. had told law enforcement that he didn't receive messages directly from T.D., but rather from other students. [R. p. 362-63].
c. Student H.G. told the school that the messages were part of an extensive back and forth between C.G. and T.D. [R. p. 415]. However, C.G. had told law enforcement that he did not respond and knew nothing about the subject matter of the messages. [R. p. 366].
d. The facts of the alleged confession introduced by the Hearing Officer were contradicted by other statements and documents in the law enforcement records which were withheld from the Family by the administrator and Hearing Officer.[13]

Student was denied an opportunity to make a record with these critical facts. Student was totally prevented from preparing a defense and showing that the state's case against him was untrue. *See,* Brown, *supra.*

Finally, the Circuit Court erred in applying federal case law to justify concealment of witness information. The Circuit Court cites Reese v. Richland County School District Two, 3:13-03040-MGL, 2015 WL 9239785 to find that the use of anonymous witness statements is consistent with the principles of due process. The Reese decision is simply an application of a federal standard to a federal question.[14] The Reese court expressly declined to rule on the Plaintiff's state law claims and its holding is inconsistent with South Carolina law. The General Assembly has forbidden schools from pursuing formal disciplinary action based solely on anonymous reports of threats, harassment or bullying. S.C. Code Ann. § 59-63-

[13] The alleged confession was part of an unsigned, undated "Investigation Follow-Up." It stated that T.D. confessed to sending messages from his mother's phone while at the emergency room on the night of December 1, 2018. R. p. 362-3. Contrary to this account, law enforcement records in Respondent's possession showed that the messages were reported as being received by third parties by 12:00 p.m. on December 1, 2018. Investigators submitted sworn petitions stating that the messages were sent from Student's home at 12:00 p.m. R. p. 355. Student C.G. wrote to police that he received the messages at a sleepover on Friday, November 30, not Saturday night. R. p. 366. Three of the messages are time-stamped 1:48 a.m., 1:51 a.m. and 1:53 a.m., [R. p. 426, 428 and 430], whereas T.D. was discharged from the hospital at 9:30 p.m. on December 1, 2018. [R. p. 445-447]. In short, the timeline of the alleged confession conflicted with every other piece of evidence in the possession of law enforcement and the school district employees.

[14] The Plaintiff in Reese filed an action for damages alleging that the school district violated his right to due process under the Fourteenth Amendment to the United States Constitution by failing to provide student witness information. See, Reese v. Richland County School District Two, C/A No. 2013-CP-40-06295, Summons and Complaint filed October 16, 2013, in the Richland County Circuit Court (available on public index). Because of the federal claim, the case was removed the Federal District Court and federal law was applied to its resolution. Moreover, the facts in Reese show that the district recognizes the right to confront and question adverse witnesses, including law enforcement witnesses. Two hours into Reese's hearing, Lottie Chishom continued the remainder of the expulsion hearing to secure a Sheriff's deputy to be questioned by the plaintiff. The Sheriff's deputy appeared and was questioned, but refused to disclose witness information outside the criminal discovery process.

140(B)(5) ("[F]ormal disciplinary action must not be taken solely on the basis of an anonymous report"); *see also*, Richland County School District Two Policy JICFAA-R (same). Withholding evidence and using anonymous accusations is not consistent with due process in South Carolina.

D. The Hearing Officer demonstrated partiality and acted as both the Prosecutor and Finder of Fact in Violation of Article I, Section 22 of the South Carolina Constitution, which prejudiced Student during the fact-finding stage of this proceeding.

The Circuit Court, like the Board before it, did not directly address the specific conduct of the Hearing Officer on the December 12, 2019 hearing. The Order states: "[t]o the extent proceedings before the Hearing Officer on December 12, 2018, were unfair or impartial, such alleged violation or deficiency would have been cured on appeal at the Board level . . .." This was an error of law. Trial before a biased judge is a structural error requiring "automatic reversal." Neder v. U.S., 527 U.S. 1, 119 S.Ct. 1827, *citing* Tumey v. Ohio, 273 U.S. 510 (1927). This is not a case of imputed bias or suggested bias, but rather a case of actual, overt bias, which rendered the evidentiary proceedings fundamentally unfair.

The Hearing Officer acted in both the prosecutorial and adjudicatory roles during the hearing on December 12, 2019. She conducted a fifteen minutes cross-examination of Student which consisted of loaded questions, denigrating comments, shouting at the Student and overt statements showing a predetermined commitment to proving Student's guilt. She preempted and argued against Student's witnesses, conducted her own search of Student's juvenile records received *ex parte* and introduced her own evidence against Student, without letting him review it.

"[A] fair trial in a fair tribunal is a basic requirement of due process [and] [t]his applies to administrative agencies which adjudicate as well as other courts." Garris v. Gov.

Bd. of S.C. Reinsurance, 333 S.C. 432, 511 S.E.2d 48 (S.C. 1998). The purpose of Article I, Section 22 of the South Carolina Constitution is to guarantee citizens an impartial finder of fact in administrative hearings. Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997). Article I, Section 22 states:

> "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

A person acts as both prosecutor and adjudicator when they participate in the investigation of a matter as well as preside over the decision. Ross, 492 S.E.2d at 71, 328 S.C. at 72. Partiality exists where an adjudicator either has *ex parte* information as a result of prior investigation or has developed "a will to win." Id. *citing* Grolier, Inc., v. Federal Trade Commission, 615 F.2d 1215 (9th Cir. 1980). Evidence of actual bias that violates due process consists of statements on the merits by those who must make factual determinations on contested fact issues where fact finding is critical. Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 287 S.C. 545, 552, 340 S.E.2d 144, 148, (1985). The overt bias or partiality of a hearing officer can also be established where an administrative hearing officer dominates a hearing in such a way that it deprives an individual a meaningful opportunity to be heard. A hearing officer's "decisional objectivity" may be "suspect" based on the hearing officer's extensive participation in the hearing and the adversarial nature of questioning. Kosik v. Industrial Commission of Arizona 611 P.2d 122, 125 Ariz. 535 (Ariz. App. 1980).[15]

During the hearing on December 12, 2019, Ms. Chishom repeatedly made statements on the merits indicating she had already concluded that T.D. was guilty, before he even had an

[15] In Kosik, the hearing officer asked "more than half" the questions of one party, based his findings on information that was not present in the record and characterized innocuous statements as admissions.

opportunity to defend himself. The Hearing Officer aggressively cross-examined student for over fifteen minutes, while asking virtually no questions of the administrators. Many of the loaded questions presupposed of T.D.'s guilt:

> **Chishom:** Tell me what a juul is.
> **[T.D.]**: An e-cig.
> **Chishom**: Where is yours now.
> **[T.D.]**: I don't have one, I quit doing that.
> **Chishom**: But you did have one at one time?
> **[T.D.]**: Yea like 3, it was a while ago.
> **Chishom**: So you said something about they had it and if they don't bring it to school what's going to happen.
> **[T.D.]** I didn't say that.
> Chishom: What did you say?
> **[T.D.]**: I didn't say nothing to them.
> **Chishom**: It says here my pistol is coming to school with me.
> **[T.D.]**: I don't own a hand gun and plus I would never say nothing like that.

[Hearing Office Audio 2, 20:00-20:30; R. p. 238, line 9 – p. 239, line 13]. T.D. attempted to ask questions about the critical evidence, but Chishom declined to answer his questions, and misstated or twisted his grandmother's testimony against him:

> "**[T.D.]:** Do you have screenshots of the messages?
> **Chishom**: No, I have, I went, I want my, I got one[16] that says I want my shit on Monday. The same stuff that she said.
> **[T.D.]:** Does it have my name on it?
> **Chishom**: You know you all so savvy now whether it did or not, I'm asking you now whether or not you were involved in that conversation. And like you grandmamma said, she believed truly that you were.[17]

[Hearing Office Audio 2, 29:26 to 30:30; R. p. 247, line 25- p. 248, line 13]. The message in question did not, in fact, show any name. [R. p. 397, 419]. Rather than acknowledge factual information favorable to T.D., Chishom mocked a thirteen year old for attempting to defend himself and reasserted her concrete belief in his guilt.[18]

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[16] The hearing office subsequently submitted thirteen images to the Board. [R. pp. 419-430].

[17] T.D.'s grandmother, A.D., had actually just testified that she did not believe the allegations because T.D. had sold his phone a week earlier. Ms. Chishom's responses in this passage were not transcribed in full by the Hearing Office. Numerous references to "reading" the evidence were omitted from both transcriptions.

[18] Although Chishom told the family she only had one message, several messages were subsequently submitted to the Board *ex parte* by the Administration. *See* [R. pp. 419-430]. Neither of the messages that reference shooting up the school have T.D.'s name or any identifiable account information.

Chishom repeatedly declared that T.D. was guilty. She frequently interrupted witnesses and reasserted her belief in T.D.'s guilt when testimony favored T.D.:

> **Chishom**: . . . How you did it is a whole different story.
> **T.D.**: I couldn't have because I don't have a phone.
> Chishom: I can't hear you.
> **T.D.**: I couldn't have because I don't have a phone.
> **A.D.**: He didn't have a phone.
> Chishom: I don't know when you got rid of your phone or whether you had a phone or what but-
> **J.D.**: He sold his phone before all this happened so that's what I'm concerned about Ms. Chishom.
> **A.D.**: He sold his phone on Friday … what was . . . ok, Thanksgiving and then that Friday, he –
> Brother: That was the day after Thanksgiving.
> **A.D.**: Yeah he sold his phone because you told him where he could go up there and sell his phone and that's what he did.
> Brother: Yeah.
> **A.D.**: I mean we done told them that [T.D.] couldn't have a phone. I don't even have a phone now.
> **J.D.** What puzzles me is how could my grandson do something when he didn't even have a phone to do it? The only phone in my house is right here on my side. This here phone don't do that stuff.
> **A.D.**: They searched the house. I gave them consent to search the whole house and they did. Didn't They?
> **J.D.**: But I'm just, I think my grandson, he, he …
> **Chishom**: [T.D.], I don't know how you sent the message but a message was sent.

[Hearing Audio 2, A.R. Exhibit 35 32:23-32:45; R. p. 248, line 14-p. 249, line 25]. After the second reading of student H.G.'s school statement, Ms. Chishom, simply reiterated that she had already concluded T.D. was guilty:

> "**Chishom**: You want to respond?
> **T.D**: I don't got nothing to say about it?
> **Chishom:** That's a conversation between you and those students. [Raising voice] That's a conversation between you all.
> **T.D.**: Not something I sent.
> **Chishom**: [Shouting] I can't hear! [19]
> **T.D.**: Not something I sent.
> **Chishom**: Your name is involved, [raising voice] that's a conversation you and those students and they are afraid.[20]

[19] Chishom's repetition of this declaration in an elevated tone and her shouted interruption were not transcribed in the original or revised transcripts.

[Hearing Audio 2, 27:05-27:30; R. p. 243, line 21-p. 244, line 5].

When T.D. and his brother attempted to tell the Hearing Officer how screennames can be manipulated on SnapChat, Chishom totally foreclosed consideration of the testimony and declared, again, that T.D. was the responsible party:

> "**[T.D.]** And you can edit names on snapchat. Like you can't change your username but you can change your name that pops up.
> **[Brother]**: And I actually went on snapchat myself and there is a bunch of T---- Ds and [T.D.]s on snapchat.
> **Chishom**: These kids attend school together. This is not several [T]'s or anything and they are referring to or . . . it sounds like . . . they are people who knows him. And they are saying that [T.D.] even talked back to them and [T.D.] and it's not like this information is foreign to T.D. It was more like T.D. knew that these kids have had something belonging to him and he wanted to get it back. Now why I'm getting I know nothing about this.

[Hearing Audio 2, 34:30-36:00; R. p. 251, line 22-R. p. 252, line 18.] Chishom openly denigrated T.D.'s character and discounted his testimony, even when corroborated by administrators. Mazyck had testified that T.D. had apologized of his own accord for a separate social media incident. Chishom even rejected the administrator's favorable testimony stating,

> **Chishom**: Why you apologize?
> **T.D.**: Because it was done on my account. If something's done on my account then I'm going to apologize.
> **Chishom:** Now [T.D.] that ain't like you to apologize to nobody if you haven't done anything. That is not your makeup.
> **T.D.**: No. I'm just saying ... it would look bad on me if I just didn't apologize to the teacher.
> **Chishom**: No because I heard your Mama say that she made you.[21]

All of the family members testified that Student had sold his phone the day after Thanksgiving and that Student did not have a phone at the time these messages were sent.

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[20] No witness said they were "afraid." The only testimony on the point came from H.G.'s school statement, which stated he "didn't believe" the messages and started "messing with" T.D. [See, R. p. 415].

[21] None of this exchange was included in the initial transcript prepared by the Hearing Office [Compare R. pp. 196-201, with R. p. 209].

Chishom introduced her own evidence against the student that was not part of the administration's presentation. [Hearing Audio 2, 38:00-41:42; R. p. 254, line 21 – R. p. 257, line 23]. Chishom read selections from an anonymous law enforcement report, while omitting information in the same document that directly contradicted the student statements previously read by the administrators. [Id.; Compare R. p. 417-418 and R. p. 414 and 416]. Finally, after a fifteen minute interrogation, Chishom disclosed that Student was charged with a criminal offense.

> **Chishom**: . . . So, therefore [T.D.] was charged with unlawful communication.
> **[Brother]:** I thought, I thought there was no charges.[22]
> **Chishom**: Oh you talk to the cops on that. We don't . . . I'm just reading what I see here. But your parents . . . the parents can deal with that.

[Hearing Audio 2; 39:00-41:42; R. p. 254, line 21 – p. 257, line 23]. This was the first notice to the Family from any person that Student had been charged with a criminal offense.

After grandparents appealed, Chishom created a Summary of the Evidence, which referenced information that was not disclosed during the hearing, including inventing sources for anonymous testimony. [R. p. 31-32 (Attributing information in the Investigative Follow-Up Report to Investigator Stephany Boyd)]. Student and his brother also explained how display names can be changed on SnapChat and how accounts can be created [Hearing Audio 2, 34:30-36:00; R. p. 251, line 17-p. 252 line 20], but Chishom excluded that from her summary as well. [R. p. 31-32]. The Hearing Office prepared a transcript which omitted the first fifteen minutes of the hearing audio, deleted most of the Family's testimony in defense of T.D. as well as Chishom's inappropriate comments and prosecutorial conduct. [*Compare* R. p. 196-201 *and* R. p. 202-211]. The transcript inserted information from the police incident report that was not stated or shared during the hearing. [*Compare* Hearing Audio 2; 12:20-

[22] As noted above, Mazyck had told the family there were no charges. This exchange was not included in the Hearing Office Transcript. R. pp. 196-201. Respondent's ultimately transcribed the Brother's statement as "I thought I saw there was no charges." R. p 210.

13:22; R. p. 231, line 17-p. 232, line 15; and Hearing Audio 2; 24:19 to 25:22; R. p. 241, line 18-p. 242, line 12, *with* R. p. 196 and 200; and R. p. 202 and 205]. Although the summary and transcript did insert identifiers for student witnesses and corrected some omissions from the witness statements, the changes to C.G.'s statement and H.G.'s statement were transcribed as modified by the administrators. [*Compare* Hearing Audio 2, 13:22-15:48; R. p. 232, line 25-R. p. 234, line 8 *with* R. p. 32, R. p. 196-197, 202-203.]

Throughout the hearing Chishom demonstrated a will to win and a "predetermined purpose to reach a predetermined end." Kizer, 287 S.C. 553, 340 S.E.2d 149. Chishom directed the administration's presentation. [Hearing Audio 2, 20:00-20:30; R. p. 238, line 9 – p. 239, line 13]. She engaged in sidebar discussions with administrators about changes to the evidence, and demonstrated familiarity with evidence that was not introduced by the administrators. [R. p. 194; Hearing Audio 2; 34:30 – 35:06]. Chishom aggressively cross-examined Student for fifteen minutes, using loaded questions that presupposed his guilt. [Hearing Audio 2, 20:00-20:30; R. p. 238, line 9 – p. 239, line 13]. She repeated the accusations as conclusions. [Hearing Audio 2, 27:05-27:30; R. p. 243, line 21-p. 244, line 5; Hearing Audio 2, 32:23-32:45; R. p. 249, lines 19-25]. She openly denigrated Student's character. [Hearing Audio 2, 36:47-37:19; R. p. 253, line 5-13]. She foreclosed consideration of testimony in Student's defense [Hearing Audio 2, 34:30-36:00; R. p. 251, line 22-R. p. 252, line 18] and curtailed and rejected testimony that was favorable to Student [Hearing Audio 2, 36:47-37:19; R. p. 254, line 4-line 20]. Chishom refused to answer Student's questions that would have produced evidence favorable to his defense. [Hearing Audio 2, 29:26-30:30; R. p. 247, line 25- p. 248, line 13].

After admitting that the evidence did not explain how T.D. might have sent the messages, Chishom searched Student's confidential juvenile records to obtain additional evidence against him. She introduced her own evidence in an effort to bolster the administration's case against Student. She received this information without notice to Student and used it to conduct a targeted, specific cross-examination, before publishing parts of the document in the record. [Hearing Audio 2, 39:41-42:00; R. p. 254, line 24 - p.257, line 23; pp. 209-211].

South Carolina does not have a case on point with facts that are similar to Ms. Chishom's conduct. However, the Supreme Court recently issued a decision in a Worker's Compensation appeal which discussed judicial impropriety. Ledford v. Department of Public Safety, 428 S.C. 387, 835 S.E.2d 509 (2019). The Supreme Court reversed and vacated a decision, because the Commissioner made numerous coercive, prejudicial and derogatory statements about the litigant prior to issuing a final ruling, including attacks on his credibility and his character. It is notable that the Supreme Court found the Commissioner's efforts to conceal her misconduct through a false affidavit to be especially egregious, and stated that her attempted cover-up "compounded the error."

Based on the foregoing, it is beyond dispute that the proceedings before the Hearing Officer were infected with bias, prejudice and an illegal combination of prosecutorial and adjudicatory functions, which denied Student a fair hearing.

III. The Board Hearing did not cure the due process violations below, because the hearing did not expand rights or address the due process failures of the earlier hearing. Student was not permitted to introduce evidence or examine witnesses to meet the allegations against him.

The Board hearing did not cure the structural errors of the prior hearing. The Board recognized that due process deprivations had occurred, bud did not provide any adequate remedial procedures to cure those deficiencies. Cleveland C. Smith wrote that:

> Following a review of the record and consideration of the record, your written appeal, and oral arguments presented by you and your attorney, and after thoughtful deliberation over the key issues raised, the Board found that there was sufficient and substantial evidence in the record to support the expulsion recommendation. In addition, *the Board found that to the extent the student was deprived of the opportunity to review any evidence prior to the hearing, it was subsequently provided, and he was given an opportunity to respond to it on appeal.*
>
> [R. p. 27] (emphasis added).

The Circuit Court's decision echoes the same ruling, in almost identical terms. [R. p. 18-19; Order, p. 11-12 (Stating that providing evidence after the evidentiary hearing, but before the appeal afforded Student due process)]. In short, the Circuit Court has approved a procedure where the accused is only afforded his statutory right to ask questions[23] without having access to the evidence, but once an adverse decision is made and the evidence is finally produced, the accused has no right to ask questions or introduce evidence in response. This is an error of law.

Due process requires an opportunity to be heard at a meaningful time and in a meaningful way. *See,* Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The evidence was not provided at a meaningful time or in a meaningful way that would allow Student to make a presentation in the record. [24] Due process requires the right to introduce evidence and the right to cross-examine adverse witnesses. In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003); See also, S.C. Code Ann. § 59-63-240 (proving parents all regular legal rights at

[23] S.C. Code Ann. § 59-63-240.

[24] It was completely redacted, so that no names could be attributed to any statements until Appellants received Rule 5 discovery from the Solicitor's Office in the Family Court case.

expulsion hearing, including the right to ask questions of all witnesses). A subsequent hearing where the burden of proof has been shifted and the prejudiced party is denied an opportunity to present evidence does not make up for prior deprivations of due process. Armstrong, 380 U.S. at 551 (subsequent hearing where burden of proof was shifted does not cure failure of notice). Riggan v. Midland Independent School District, 86 F.Supp.2d 647 (W.D. Tex. 2007) (Subsequent hearing where the accused is not entitled to present additional evidence does not cure prior procedural defects of prior hearing, where there was a failure to disclose evidence or facts before the hearing.) *See, also,* Ledford, *supra,* (Although the Commissioner's decision was reviewed and modified by an unbiased Appellate Board, and that Board's decision was affirmed by the Court of Appeals, the Supreme Court ordered the lower court's decisions to be reversed and vacated based on the impartiality of the original Commissioner).

A subsequent independent review before an unbiased tribunal, which afforded Student full statutory rights to ask questions and present evidence would have potentially cured Student's due process concerns, but an appeal using a deferential standard cannot. McIntyre v. Sec. Comm'r of South Carolina, 425 S.C. 439, 443-444, 823 S.E.2d 193, 195 (Ct. App. 2018). In McIntyre, the court specifically noted that a substantial evidence review does not cure prior procedural due process violations that deny a litigant a fair hearing at the lower level. That principle should apply with greater force to a case like this, where the due process deprivations bear directly on the litigant's ability to meet the evidence in the record and where the Hearing Officer took pains to create a false record for review on appeal.

The Hearing Office errors were structural errors that made the evidentiary hearing fundamentally unfair. A structural error is a "defect affecting the framework within which the

trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310 (1991). Structural errors are not subject to harmless error review, because they affect the entire conduct of the trial from beginning to end. LaSalle Bank National Ass'n v. Davidson, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009). Trial before a biased judge is a structural error requiring "automatic reversal." Neder v. U.S., 527 U.S. 1, 119 S.Ct. 1827, *citing* Tumey v. Ohio, 273 U.S. 510 (1927).

The Circuit Court erroneously relied on Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997), for the proposition that a subsequent hearing can cure a prior procedural due process violation. The court failed to note that the Board in Ross conducted an "independent review" of a record created during a seven day trial-like hearing, where the accused was afforded discovery, detailed written notice and the opportunity to cross-examine adverse witnesses. Our Courts have consistently cited Ross for the proposition that a subsequent *de novo* or independent review can cure a technical due process defect.[25] *See*, e.g. James Academy v. Dorchester School Dist., 376 S.C. 293, 657 S.E.2d 469 (2008) (Relying on Ross, in concluding subsequent *evidentiary hearing* cured alleged due process deprivation); *see* In re Vora, 354 S.C. 590, 596-597, 582 S.E.2d 413 (Citing Ross for proposition that "complete and independent" review by appellate review committee applying a stricter standard of proof cured due process violation).

The subsequent non-evidentiary hearing before the Board, with no right to question witnesses or introduce evidence, did not expand student's procedural rights previously denied or cure the prior due process deprivations. Despite Student's repeated requests to reopen the

[25] The due process complaint in Ross, was more of a technical violation of article I, Section 22 of the South Carolina Constitution, because an administrator who served as a witness in a grievance proceeding also served on the review committee that decided the case. It was not like this case, where the single Hearing Officer acted as the primary prosecutor, openly denigrated the child's character, deliberately withheld information from a thirteen year old child, produced a false transcript and relied on *ex parte* information in reaching her decision.

record to introduce the evidence, the Board prohibited Student from introducing the evidence and presenting information about the records that were withheld by the administration and the Hearing Officer.

The information withheld from the Appellants and refused by the Board was material to T.D.'s defense. Furthermore, T.D. had evidence to support his own contentions, including his receipt confirming that he had sold his phone on November 23, 2018 and emergency room records showing he was not at the hospital when certain messages were sent. Without having any notice of the specific allegations against him or access to the evidence, Appellants had no idea whether that information would have been relevant when he arrived at the hearing on December 12, 2018.

The Board expressly refused to consider Student's evidence from the law enforcement records and applied a deferential review, without regard for Student's due process arguments. Thus, the refusal to allow the introduction of the additional evidence prejudiced Student and contrary to the Circuit Court's conclusion, T.D. was not given an adequate opportunity to respond.

IV. The Circuit Court erred in affirming the Board's refusal to Grant a Remand Based on the Board's Unwritten Policy of Prohibiting Confrontation of Student Witnesses, which violates Student's rights under the South Carolina Constitution, S.C. Code Ann. § 59-63-240 and the District's Own Policies.

The Board refused to order a remand for another evidentiary hearing, because Student requested the rights articulated in S.C. Code Ann. § 59-63-240 and Board policies JKE and AR-JKE-R, namely the right to ask questions of all witnesses, including student witnesses and law enforcement witnesses. The board did not provide any rationale for this decision. [R. pp. 27-28]. On Appeal, the Circuit Court rejected the plain language of our expulsion statute and

adopted the reasoning of a Sixth Circuit Federal case to disregard rights expressly guaranteed by the General Assembly. The Court's interpretation of the statute is contrary to the plain language of the statute, South Carolina law, the current law of the Sixth Circuit Court of Appeals and the law in other states which provide students with a statutory right to cross-examine adverse witnesses.

Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). This case turns on the dubious credibility of the hearsay statements of absent witnesses, and the opposing testimony of the accusers and the accused. Where a school discipline case turns on the credibility of the accuser and the accused, due process requires that the finder of fact have an opportunity to evaluate the credibility of the witnesses. *See,* Doe v. Baum, 882 F.3d 579 (6 th Cir. 2018) and Doe v. Miami Univserity, 882 F.3d 579 (6th Cir. 2018).

A. The Plain language of the Statute establishes a right "to ask questions of all witnesses" not just those selected or presented by the prosecuting district.

The Family asked that any remand ordered by the Board comply with S.C. Code Ann. § 59-63-240, which states that parents and students have "the right to ask questions of all witnesses." Superintendent Davis made conclusive statements that the District would never make student witnesses available at disciplinary hearings. [Board Audio: 24:27-25:00; R. p. 289, line 19 - p. 291, line 15]. In the first paragraph of its decision letter, the board states that the Family "rejected" a remand to a different hearing officer based on a disagreement over student witnesses. [R. p. 27]. Thereafter the board refused to order any remand whatsoever.

The provisions of the South Carolina Constitution are mandatory, not merely directory. S.C. Const. Art. I, Sec. 23. Article I, Section 22 of the South Carolina Constitution

provides that "no person shall be ... deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly." T.D. has a constitutionally protected property interest in his education, Goss v. Lopez, 419 U.S. 565 (1975), and the General Assembly has prescribed a mode of procedure for conducting expulsion hearings at South Carolina Code Section 59-63-240.

South Carolina Code Section 59-63-240 clearly and unambiguously provides parents and students facing expulsion the right to question all witnesses at expulsion hearings:

> ". . . If procedures for expulsion are initiated, the parents or legal guardian of the pupil shall be notified in writing of the time and the place of a hearing either before the board or a person or committee designated by the board. At the hearing the parents or legal guardian shall have the right to legal counsel and to all other regular legal rights including the right to question all witnesses."

S.C. Code Ann. § 59-63-240. Respondent's Policy JKE includes identical language. [R. p. 489].

The language of the statute is plain and this court should not alter the clear meaning of the words used. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, ___ (2000) (internal citations omitted).

The obvious intent of the General Assembly, as indicated by the plain language used, was to grant parents the right to ask questions of *all* witnesses in an expulsion proceeding. The use of the phrase "all witnesses" indicates the legislature did not intend to exclude any

witnesses from this requirement.[26] To interpret this statute to mean "only those witnesses voluntarily produced by the district" or "only adult witnesses" is to impose another meaning on the law, which the legislature did not intend.[27] Neither school districts nor the court have the power to amend or repeal state statutes, even if they disagree with their wisdom. Smith v. Wallace, 295 S.C. 448, 452, 369 S.E.2d 657, 659 (Ct. App. 1988).

B. In states with a statutory right to cross-examine witnesses in expulsion hearings, State Courts consistently protect students' statutory right to question adverse student witnesses.

The Court relied on Newsome v. Batavia Local School District, 842 F.2d 920 (1998) to justify disregarding the plain language of S.C. Code Ann. Section 59-63-240, in favor of a federal rule arising in a state where no similar statute exists. Newsome arose from an expulsion in Ohio, a state that provides no statutory right to cross-examination in school discipline cases.[28] South Carolina and other states expressly guarantee students the right to ask questions of their accusers in school expulsion proceedings.[29] [30] State courts have

[26] "All" means, "the whole amount, quantity or extent of;" "every member or individual component of;" "the whole number or sum of;" "every." *See,* https://www.merriam-webster.com/dictionary/all?src=search-dict-box

[27] It is submitted that Respondent is aware of the plain meaning of this statutory language and the clear understanding that it conveys to the reader. Even children know what a "witness" is. In its expulsion notice to the Family, Respondent obscures this right by advising parents that they only have a right to "ask questions of persons presenting information at the hearing." R. p. 34; Hearing Office Letter dated Dec. 5, 2018.

[28] In recent years the Sixth Circuit Court of Appeals has distanced itself from Newsome and its rationale by repeatedly recognizing that some form of cross-examination is essential in serious school discipline cases which turn on the credibility of the accuser and the accused. *See,* Doe v. Baum, 882 F.3d 579 (6 th Cir. 2018) and Doe v. Miami Univserity, 882 F.3d 579 (6th Cir. 2018).

[29] California: Cal. Educ. § 48918(b): Requiring notice of the student's right "to confront and question all witnesses who testify at the hearing . . .." Colorado: *See,* Nichols ex rel. Nichols v. DeStefano, 70 P.3d 505 (Colo. App. 2002) (School district denied student due process by refusing to invite teacher witnesses and by using anonymous student statements); Delaware – Del. Code Ann. 14 § 10.3.11.3 (The student shall have the right "to cross-examine witnesses."); District of Columbia – D.C. Mun. Regs. 5 5-B2506.5 "The student, parent or guardian, or representative shall have the right to question any witness or challenge any documentary evidence."; Georgia – Ga. Code Ann. § 20-2-754(b)(3) "All parties are afforded an opportunity to present and respond to evidence and cross-examine witnesses on all issues unresolved."; Hawai'i – Haw. Code R. § 8-19-9(d)(3): In appellate hearings, "Parent and principal or principal's designee have the right to present evidence, cross-examine witnesses, and submit rebuttal testimony." Kansas – Kan. Stat. Ann. § 72-6116(a)(4) (Granting "the right of the pupil and the pupil's counsel to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena."); Minnesota – Minn. Stat. § 121A47 (right to confront and cross-examine witnesses and compulsory process); North Carolina – N.C. Gen. Stat. §

consistently upheld students' statutory right to cross-examine witnesses and rejected the dated rationales advanced in Newsome. It is submitted this court should apply the analysis of sister courts with a similar statute rather than a federal court applying the minimal requirements of the federal constitutional.

In states where the right to cross-examine is guaranteed by statute, state courts have consistently found that a school district's failure to disclose witnesses and or make them available to be a violation of state constitutional and statutory provisions. *See,* Stone v. Prosser Consol. School Dist. No. 116, 971 P.2d 125, 94 Wn.App. 73 (Wash. App., 1999) (district violated student's due process rights by introducing hearsay statements without right to confront witnesses); In Re Expulsion of EJW from ISD NO. 500, 632 N.W.2d 775 (Minn. App., 2001) (district violated student's due process rights by failing to identify witnesses before the hearing and failing to produce witnesses against student, where student had a statutory right to cross-examine district's witnesses); Rone v. Winston-Salem/Forsythe Cnty Bd. of Educ., 701 S.E.2d 284, 207 N.C. App. 618 (N.C. App., 2010) (Board violated student's due process rights by denying student the opportunity to cross-examine administration's witnesses). Additionally, even courts in states without a statutory right to cross-examination have nevertheless protected student's right to confront their accusers in school expulsion cases. *See,* Nichols ex rel. Nichols v. Destefano, 70 P.3d 505 (Colo. App. 2002); Colquitt v. Rich. Tp. High School Dist. 599 N.E.2d 1109, 298 Ill. App.3d 856 (1998) (Holding that denial of confrontation violated student's rights and expressly rejecting Newsome's argument

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115C-390.8(4) -- Guaranteeing "the right of the student, parent or student's representative to question witnesses".

[30] Some states limit the right to questioning adult witnesses. *See, e.g.* Idaho Code Ann. § 33-205: granting " . . . [T]he rights of the pupil to be represented by counsel, to produce witnesses and submit evidence on his own behalf, and to cross-examine any adult witnesses who may appear against him." South Carolina has placed no such limitation in its statute.

that administrator's assessment of credibility outside the hearing context provided adequate safeguards.)

Stone v. Prosser Consolidated School District No. 116, 94 Wn.App. 73, 971 P.2d 125 (1999), is particularly instructive. In Stone, a student was accused of threatening another student and assaulting him. Washington statutes provide that students have a right to confront and cross-examine witnesses. At his hearing, the administrator relayed the substance of the student witness's accusations, but the district did not produce the student witness. On appeal, the school district relied on Newsome to argue that failing to produce the student witness did not violate the student's due process rights. The Washington Court Appeals reversed, rejecting the Newsome rationale as follows:

> In response to this argument we should note first that federal law, unlike Washington law, does not provide students the right to confront and question adverse witnesses at the expulsion hearing. Second, it is risky to base an expulsion on hearsay statements bolstered by a school official's testimony that the proponent is reliable. As stated in *Colquitt* [supra], a case with remarkably similar facts, reliance on the official's opinion of the absent witnesses' credibility "is a particularly egregious departure from the adversarial standard." 298 Ill.App.3d at 865, 232 Ill.Dec. 924, 699 N.E.2d 1109. On balance, the risk that [the student's] interests were deprived by the refusal to offer him the opportunity to confront and question the adverse witnesses is compelling. He should have been provided the opportunity to cross-examine unless the burden on the school administration was prohibitive.

Stone, 921 P.2d at 127.

C. Absence of subpoena power does not relieve the district of its statutory obligations or obligations to comply with fundamental fairness.

State courts have held that the absence of specific statutory subpoena power does not excuse a district's failure to make witnesses available. School administrators bear the burden of proof and the burden of production in expulsion cases. They must produce the witnesses on whom their case depends. Speaking on this exact issue, an Illinois Court of Appeals stated the following:

> Finally, the Board contends that, because it has no powers of subpoena, "there is no way that school administrators could compel witnesses to testify at student disciplinary hearings." The mere fact, however, that the School Code does not confer subpoena powers to the Board cannot excuse noncompliance with principles of due process.

Colquitt v. Rich. Tp. High School Dist. 599 N.E.2d 1109, 298 Ill. App.3d 856 (1998).

This is similar to the view that the South Carolina Supreme Court has taken in administrative proceedings. In administrative proceedings, fundamental fairness mandates that the accused have the opportunity to confront the principal witnesses against him, even without a statutory provision requiring it. City of Spartanburg v. Parris, 251 S.C. 187, ___, 161 S.E.2d 228, 229 (1968). As the Supreme Court noted in Parris, if the state does not want to bring the witness or compel the witness to testify, it is free not to use the evidence.

This Court should reverse the Circuit court and interpret S.C. Code Ann. § 59-63-240 in accordance with the plain language of the statute and in accordance with similar statutes across the country.

V. The Circuit Court erred by not dismissing the case for clear violations of S.C. Code Ann. § 63-19-2020(E) and § 63-19-810(C), which specifically limit the disclosure and use of juvenile records by school principals.

A. The Respondent's policies do not meet the requirements of state law protecting juveniles from the misuse of their confidential law enforcement information and Student's expulsion was in direct violation of state law limiting the use of such information to supervision, monitoring and serving the educational needs of the child.

The Circuit Court erred in finding that juvenile law enforcement confidentiality statutes permit school principals to conduct recorded cross-examinations of student's using confidential juvenile records. Law enforcement records relating to a juvenile are confidential and "may not be disclosed directly or indirectly to anyone, other than those entitled under this chapter to receive the information." S.C. Code Ann. § 63-19-2030(A). Under certain

circumstances, the law permits limited juvenile law enforcement information to be shared with a school principal. When a child is taken into custody by law enforcement, the law enforcement officer "shall notify the principal of the school in which the child is enrolled, if any, of the nature of the offense." S.C. Code Ann. § 63-19-810(c). Additionally, "incident reports, including information identifying a child, must be provided by law enforcement to the principal of the school in which the child is enrolled when the child has been charged with" certain enumerated offenses. S.C. Code Ann. §63-19-2030(E).

When this information is provided to a principal, it must be kept confidential and can only be accessed and used for limited purposes. Information shared after a child is taken into custody "may be used by the principal for monitoring and supervisory purposes but otherwise must be kept confidential by the principal ...." S.C. Code Ann. § 63-19-810(C). Additionally, school districts "must" develop policies that limit any access to incident reports and charging information except "to meet and adequately address the educational needs of the child." S.C. Code Ann. 63-19-2020(E).

The plain language of the statute shows that these provisions are mandatory. Under the rules of statutory interpretation, use of the words such as "shall" or "must" indicates the intent to enact a mandatory requirement. Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 734 (2002). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges, 341 S.C. 79, 85, 533 S.E.2d 578, ___ (2000).

Respondent's Policy JKA and JKA-R [R. pp. 506-512] do not comply with the requirements of S.C. Code Ann. § 63-19-2030(E), even after amendment on April 30, 2019. The Respondent's policies do not include the mandatory language to protect and safeguard

juvenile information, even though such policies have been required by statute for nearly twenty years. *See,* Act No. 388, 2000 S.C. Acts 3222.[31] At the time this action was filed, the District's policy on student records, Policy JRA, references a statute (S.C. Code Ann. § 20-7-3300) that has not existed since the mid-nineties, before the general assembly required mandatory policies limiting access or use of juvenile records. [R. p. 506]. Respondent subsequently amended their policy on April 30, 2019, however, they did not include any of the provisions expressly required by S.C. Code Ann. § 63-19-2030(E) and S.C. Code § 63-19-2020(E).

The district's policy simply does not include this mandatory language.

B. The Court's interpretation of the statutes leads to an absurd result because it renders the juvenile confidentiality statutes meaningless and of no effect.

The Circuit Court's reasoning that general references to FERPA and other outdated state laws, accomplishes the same goal as the juvenile confidentiality statutes renders the juvenile confidentiality statutes meaningless and makes their enactment a futile act. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless. *See* Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 670 S.E.2d 371 (2008) (in construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the General Assembly); Gordon v. Phillips Utils., Inc., 362 S.C. 403, 608 S.E.2d 425 (2005) (it is presumed that the General Assembly intended to accomplish something by its choice of words and would not do

[31]"Each school district is responsible for developing a policy for schools within the district to follow to ensure that the confidential nature of a child offense history and other information received is maintained. This policy must provide for, but is not limited to: (a) the retention of the child offense history and other information relating to the child offense history in the child's school disciplinary file of in some confidential location; (b) the destruction of the child offense history upon the child's completion of secondary school or upon reaching twenty-one years of age; and *(c) limiting access to the child's school disciplinary file to school personnel. This access must only occur when necessary and appropriate to meet and adequately address the educational needs of the child.*" S.C. Code Ann. §63-19-2020(E)(2) (emphasis added). This language has been a part of the Juvenile Justice Code since July of 2000. Act. No. 388, 2000 S.C. Acts 3222.

a futile thing); Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) ("[T]his Court must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something").

Not only do Respondent's policies fail to include language that accomplishes statute's goal – limiting access and use of confidential information to serving the educational to a child – the court's interpretation and application of the statutes in this renders them a nullity. In this case, the principal did not limit her use of records to supervising and monitoring the student in accordance with S.C. Code Ann. 63-19-810(c) or to serve the educational needs of the child in accordance with S.C. Code Ann. 63-19-2030(E). Mazyck disseminated the records to other district personnel for the purpose of denying student any of his educational needs. [R. p. 353-354].[32] Mazyck circulated these records in violation of the statute's plain terms. These entire proceedings were predicated on the misuse of information that Mazyck had an obligation to keep confidential.

The Circuit Court's ruling that using confidential juvenile information to cross-examine and expel children from school is inconsistent with the statute's plain language and intent. Supervision, monitoring and serving the educational needs of the child are activities that can only be undertaken if a child is in school. Principals cannot perform any of those actions when a student is expelled, because expulsion results in total exclusion from the school environment and school property.

The reasons behind the laws and policies limiting the use of juvenile arrest records are clear. Incident reports and law enforcement records are not convictions or adjudications, nor are they sworn statements or testimony. They are merely reports – allegations that have never

[32] The law does permit using records for supervision and monitoring. Appellants do no contest the Respondent's right to use administrative transfer or alternative educational settings to remove students who pose real and immediate safety concerns.

been proven or vetted in a court of law or even reviewed by a prosecutor. By contrast, the law treats convictions and adjudications differently. Accordingly, the legislature put express limitations on the access and use of this information once in the school's hands.

Appellants' interpretation is consistent with other school statutes, which treat adjudication and convictions differently than mere allegations. Under S.C. Code Ann. § 59-63-370, information relating to a student's *adjudication* or *conviction* for certain serious offenses is shared with administrator s and disseminated to school personnel annually. Additionally, in considering a student's past conduct for first time enrollments, school districts are permitted to consider a student's prior *adjudications* for various offenses. *See*, S.C. Code Ann. § 59-63-217. Notably, they are not permitted to exclude students based on pending charges, incident reports, dismissed charges or innuendo.

Accordingly, the decision of the Circuit Court and Board should be reversed and vacated because proceedings were conducted in violation of statutory law.

Conclusion

Based on the foregoing, the Family requests that the court reverse and vacate the decision of the Circuit Court and Respondent and declare the Respondent's practices, policies and actions to be in violation of T.D.'s statutory rights under S.C. Code §§ 59-63-240, 63-19-810(c), 63-19-2020(E) and 63-19-2030(E).

Respectfully Submitted,

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August 14, 2020