STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS
BRIGETTE HERBST, on behalf of herself and her minor children, PH and BH, Plaintiff, v. BERKELEY COUNTY SCHOOL DISTRICT, and EDWARD INGRAM, in his official capacity as Superintendent of the Berkeley County School District, Defendants.	Civil Action No. _____ **MOTION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**

Pursuant to South Carolina Rule of Civil Procedure 65, Plaintiff Brigette Herbst moves the Court to issue a Temporary Restraining Order and Temporary Injunction ordering Defendants, Berkley County School District and Superintendent Edward Ingram, to provide Plaintiff's children, PH and BH, five-day per week in-person instruction, as required by S.C. Senate Bill 704, Section 1. Under the plain text of that provision, "every school district in the State must offer five-day, in-person classroom instruction to students no later than April 26, 2021." It is now after April 26, 2021, and Plaintiff's children are indisputably "students" in the Berkeley County School District. *See* Declaration of Brigette Herbst ¶¶ 1-4. Yet Defendants refuse to offer them in-person learning, evidently reasoning that because some *other* students have been offered five-day, in-person learning, they need not offer the same to Plaintiff's children. *See id.* ¶¶ 7-8. Not only does Defendants' refusal violate the plain text of the statute, it violates multiple constitutional provisions. Plaintiff's children

are, quite literally, being "denied the equal protection of the laws." S.C. Const. art. I, § 3. And the apparent basis of Defendants' action—that Plaintiff's family moved from out-of-state several months ago—establishes a separate violation of Plaintiff's right to travel, a fundamental privilege and immunity protected by the state constitution.

Because Plaintiff and her children are likely to succeed on the merits, will be irreparably harmed without immediate relief, and have no adequate remedy at law, a temporary restraining order is warranted. *See Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 587 (2010) ("the three requirements (irreparable harm, success on merits, and inadequate remedy at law) are well established and clearly delineate the burden of proof and of persuasion"); *Foc Lawshe, Ltd. P'ship v. Int'l Paper Co.*, 352 S.C. 408, 416 (Ct. App. 2002) ("Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law" (citing *Roach v. Combined Util. Comm'n*, 290 S.C. 437, 442 (Ct. App. 1986))).

I. Plaintiff is likely to succeed on the merits.

A. Violation of S.704. "[S]tatutory interpretation begins (and often ends) with the text of the statute in question." *Smith v. Tiffany*, 419 S.C. 548, 555 (2017). As the South Carolina Supreme Court has explained, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Hodges v. Rainey*, 341 S.C. 79, 85 (2000) (internal quotation marks omitted). Therefore, "it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.*

Here, the text of the statute is clear: starting April 26, 2021, "every school district in the State must offer five-day, in-person classroom instruction to students."

S.704, § 1. Defendants' refusal to comply with this law is equally clear: they will not offer Plaintiff's children—who are indisputably "students"—five-day, in-person classroom instruction. This refusal is contrary to the plain text and original understanding of the law. Nothing in the statutory text suggests that the word "students" should be limited to a subset of students. The term does not include a qualifier like "some" or "at least one." "[G]eneral words are general words, and they must be given general effect." A. Scalia & B. Garner, Reading Law 101 (2012). Thus, the Court must give the statute its ordinary meaning, and because Plaintiff's children are "students" who are *not* being "offer[ed] five-day, in-person classroom instruction," Defendants have violated the law. "Absent an ambiguity, there is nothing for a court to construe, that is, [the Court] should not look beyond the statutory text to discern its meaning." *Smith*, 419 S.C. at 556; *see also CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 76 (2011) (explaining that "we cannot ignore the plain language . . . that contains no restrictions").

Even if the Court looked beyond the plain meaning of the statutory provision, there is no evidence that the General Assembly intended for only some favored students to have the opportunity for five-day in-person learning. For instance, Section 1 of S.704 was titled the "Five-day, in-person classroom instruction mandate." Likewise the title of the Joint Resolution, in relevant part, is "A Joint Resolution to Provide for a Return to Five-Day, In-Person Classroom Instruction for the 2020-2021 and 2021-2022 School Years." Both these titles reflect that the law is a "mandate" to "provide for a return to five-day, in-person classroom instruction." *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)); *cf.* S.C. Const. art. III, § 17 (stating that the "subject" of a "resolution having the force of law" "shall be expressed in the title").

Likewise, the General Assembly, the Governor, agency heads, and the public understood the statute's text to encompass all students. For example, when signing the bill into law, Governor McMaster explained that "since July the 15th, I have been calling on the General Assembly to send me a bill to require school districts to give parents the option of five-day in-person instruction for their children. Today they have passed it."[1]

Similarly, the State Superintendent of Education explained that under S.704,

> Every family must be given the option of sending their child to school five days a week face to face and the science shows that this can be done safely in every community. I am thankful for the educators who have been making this option a reality for many throughout this school year and look forward to the Governor signing this bill into law, ensuring every school will be fully open for in-person learning now and into the future.[2]

In the same news release, the South Carolina Department of Education explained that "districts may offer virtual instruction to those families that have chosen it for the 2020-21 school year. The face to face instruction requirement in S.704 does not preclude a district from continuing to offer a virtual option."[3] Under S.704, virtual instruction is at the option of the parent; in-person education is the default assumption and the responsibility of the district. *Cf. CFRE*, 395 S.C. at 77 ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." (internal quotation marks omitted)).

Palmetto State Teachers Association interpreted the statute in the same manner: the union's official statement supporting the bill argued that "[t]his

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[1] Henry McMaster, *S.704 Bill Signing*, Facebook, April 22, 2021. Available at https://www.facebook.com/HenryMcMaster/videos/2944217945856670/

[2] South Carolina Department of Education, "Update on School Operations, Full Face to Face Instruction, and S.704." Available at https://ed.sc.gov/newsroom/news-releases/update-on-school-operations-full-face-to-face-instruction-and-s-704/ (April 21, 2021).

[3] *Id.*

legislation will benefit students" since "it ensures every family will have the option for a five-day, face-to-face instructional model for the remainder of this school year and for the entirety of next school year."[4]

Finally, "[n]othing in the statutory context [suggests] a narrowing construction—indeed . . . the statute is most consistent and coherent when" "students" "is read to mean what it literally says." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227-28 (2008). Defendants apparently interpret the State's mandate that all school districts provide students in-person instruction to mean that as long as one student somewhere within the school district has the option to attend class in-person for five days per week, the statute is satisfied. This far-fetched interpretation is flatly inconsistent with the statutory language, which refers to "students" broadly. And Defendants' interpretation would render the statutory mandate all but meaningless, in derogation of the settled interpretive assumption that "the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 322 (2018) (cleaned up); *see also Hodges*, 341 S.C. at 87 (explaining that courts must reject interpretations that "will lead to a result so plainly absurd that it can not possibly have been intended by the legislature"); Scalia & Garner, *supra*, at 63 ("The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered.").

Defendants' conduct is therefore a violation of S.704, Section 1.

B. Violation of Education Clause. Defendants have also denied PH and BH's rights under Art. XI, § 3, of the South Carolina Constitution, which "requires the General Assembly to provide the opportunity for each child to receive a minimally

[4] Patrick Phillips and Adam Mintzer, "SC lawmakers send 5-day in-person learning bill to governor," WIS (April 21, 2021). Available at https://www.wistv.com/2021/04/21/sc-lawmakers-send-day-in-person-learning-bill-governor/

adequate education." *Abbeville Cty. Sch. Dist. v. State*, 335 S.C. 58, 68 (1999). As the South Carolina Supreme Court has explained, "the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government." *Id.* at 69. Here, by enacting S.704, the General Assembly has demonstrated that it considers five-day, in-person learning part of a "minimally adequate" education. Thus, by denying Plaintiff's children such learning, Defendants have failed to provide a "minimally adequate" education as required by state law.

C. Denial of equal protection and privileges and immunities. Finally, the South Carolina Constitution protects "[t]he privileges and immunities of citizens of this State and of the United States under this Constitution" as well as the right of all "person[s]" to "equal protection of the laws." S.C. Const. art. I, § 3. Defendants have violated both aspects of this constitutional guarantee.

First, "[t]he constitutional guarantee of equal protection of the laws requires that all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C.*, 288 S.C. 174, 181 (1986) (internal quotation marks omitted). But Plaintiff's children—even though they are in all respects "students" within the terms of the law—are *not* being "treated alike." The law makes no classifications whatsoever, and therefore Defendants cannot argue that Plaintiff's children are somehow not similarly situated to other students for purposes of this statute. *Cf. Bodman v. State*, 403 S.C. 60, 69 (2013) ("We give great deference to the General Assembly's decision to create a classification."). Instead, Defendants are simply refusing to enforce the law equally to protect all students covered by the law. By "denying [Plaintiff's children] a benefit granted to others similarly situated," Defendants have violated the equal protection clause. *Weaver v. S.C. Coastal Council*, 309 S.C. 368, 375 (1992); *see also Thompson v. S.C. Comm'n on Alcohol & Drug Abuse*,

267 S.C. 463, 472 (1976) ("The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated. Protection is not protection unless it accomplishes this."); *id.* at 471 ("The acts of the legislature must apply equally to all persons within an appropriate class.").

Second, the privileges and immunities of citizens of the United States protected by S.C. Const. art. I, § 3 include the right to travel between states, and "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State" where they move. *Saenz v. Roe*, 526 U.S. 489, 500 (1999). Apparently, Defendants are denying Plaintiff equal access to in-person education because her family moved here from another state part-way through the school year. This denial "penalize[s] the exercise of [her] right" to travel. *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Thus, Defendants' action violates the state constitution. *See Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 623 (1985) ("The State may not favor established residents over new residents"); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) ("The only apparent justification for the retrospective aspect of the program, favoring established residents over new residents, is constitutionally unacceptable." (cleaned up)).

Therefore, Plaintiff is likely to succeed on the merits of her claims.

II. Plaintiff and her children will be irreparably harmed if the motion is not granted.

Though virtual learning was an understandable and perhaps necessary accommodation during the height of the coronavirus pandemic, it is now widely understood that such learning does not serve the needs of students, particularly younger students who require more hands-on instruction. Here in South Carolina, approximately 70% of students will not meet grade-level standards for math and

reading this spring, a significant increase over prior years.[5] This story of students struggling is confirmed by the experience around the country. In Fairfax County, Virginia, the percentage of students failing two or more classes jumped 83%.[6] At one high school in Oregon,

> hundreds of students initially had not just Fs, but grade scores of 0.0%, indicating they simply were not participating in school at all. In New Mexico, more than 40 percent of middle and high school students were failing at least one class as of late October. In Houston, 42% of students received at least one F in the first grading period of the year. Nearly 40% of grades for high school students in St. Paul, Minnesota, were Fs, double the amount in a typical year.[7]

As confirmed by many cases, lost educational opportunities constitute irreparable injury, for no amount of monetary damages can fully remedy the injury. *See, e.g.*, *Paul Y. by & Through Kathy Y. v. Singletary*, 979 F. Supp. 1422, 1427 (S.D. Fla. 1997) ("irreparable injury will be and has been suffered" where the plaintiff "has been deprived of, and continues to be deprived of, the education he and his parents allegedly desire for him"); *Skelly v. Brookfield Lagrange Park Sch. Dist*. 95, 968 F. Supp. 385, 395-96 (N.D. Ill. 1997) (finding irreparable harm where denial of necessary transportation services would force student into restrictive homebound placement); *see also N.D. ex rel. parents acting as guardians ad litem v. Haw. Dep't of Educ.*, 600

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[5] The South Carolina Education Oversight Committee's Review of Remote Learning's Impact on South Carolina's Students (January 2021). Available at https://eoc.sc.gov/sites/default/files/Documents/remote%20learning%202021/Review%20of%20Remote%20Learning%E2%80%99s%20Impact%20on%20South%20Carolina%E2%80%99s%20Students%2C%20Part%201.reduced.pdf.

[6] Fairfax County Public Schools, "Study of Teaching and Learning During the COVID 19 Pandemic," (November 2020). Available at https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BVJV847F7247/$file/Q1%20Marks%20Rpt%20-%20v6%20lzh.pdf

[7] Carolyn Thompson, "Schools confront 'off the rails' numbers of failing grades," Associated Press (December 6, 2020). Available at https://apnews.com/article/distance-learning-coronavirus-pandemic-oregon-7fde612c3dbfd2e21fab9673ca49ad89.

F.3d 1104, 1112-13 (9th Cir. 2010) (behavioral regression caused by deprivation of educational services constitutes irreparable harm); *D.D. v. N.Y.C. Bd. of Educ.*, Civil Action No. CV-03-2489 (DGT), 2004 U.S. Dist. LEXIS 5189, at *74 (E.D.N.Y. Mar. 30, 2004) (failure to provide appropriate special education to class members in a timely manner is irreparable harm); *Borough of Palmyra Bd. of Educ. v. F.C.*, 2 F. Supp. 2d 637, 645 (D.N.J. 1998) (holding that loss of appropriate education for child with Attention Deficit Disorder would constitute irreparable harm); *J.B. v. Killingly Bd. of Educ.*, 990 F. Supp. 57, 72 (D. Conn. 1997) (holding that continued denial of a free appropriate public education satisfied irreparable harm element)

Therefore, Plaintiff and her children will suffer irreparable harm absent a temporary restraining order. *See generally* Herbst Decl. ¶¶ 9-10.

III. Plaintiff has no adequate remedy at law.

For similar reasons, Plaintiff has no adequate remedy at law because the irreparable harm caused by the denial of in-person education is not something than can be fully remedied by damages at the end of this case. *Cf. D.D. v N.Y.*¸ 2004 U.S. Dist. LEXIS 5189, at *75 ("any developmental delays suffered as a result of further placement delays cannot be fully remedied by monetary damages").

The harm to Plaintiff and her children is not simply her lost wages, or their potential lost wages from a failure to excel academically, but rather the intrinsic benefits of education itself. Education "is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). It is also "a principal instrument in awakening the child to cultural values, in preparing him for

later professional training, and in helping him to adjust normally to his environment." *Id.* For this reason, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* Because these intrinsic benefits are not measurable, they cannot be remedied by a simple award of damages.

CONCLUSION

For the foregoing reasons, Plaintiff ask that this court grant a Temporary Restraining Order and Temporary Injunction requiring that Defendants provide Plaintiff's children in-person instruction during the pendency of this action.

Dated: May 3, 2021

Respectfully Submitted,

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