

May 26, 2009

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29211

Re: South Carolina Association of School Administrators v. The Honorable
Mark Sanford, in his official capacity as the Governor of the State of South
Carolina, and The Honorable Jim Rex, in his official capacity as the State Superintendent
of Education of South Carolina

Dear Mr. Shearouse:

Enclosed herewith for filing, please find an original and seven (7) copies of State Superintendent of Education Jim Rex's Return to the Petition for Original Jurisdiction, Answer, Affidavits of Service, and Proof of Service in the above-captioned matter. Please return one (1) date-stamped copy of the documents to my courier.

If you have any questions regarding this matter, please contact me, or Karla Hawkins, at 803-734-8783.

Sincerely,

Shelly Bezanson Kelly
General Counsel

Enclosures

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

South Carolina Association of School Administrators Petitioner,

v.

The Honorable Mark Sanford, in his official capacity
as the Governor of the State of South Carolina, and
The Honorable Jim Rex, in his official capacity as the
State Superintendent of Education of South Carolina Respondents.

RETURN TO PETITION FOR ORIGINAL JURISDICTION

Co-Respondent Jim Rex, State Superintendent of Education (hereinafter “Superintendent Rex”), consents to the request that the South Carolina Supreme Court authorize the bringing of the referenced suit within its original jurisdiction pursuant to Rule 229 of the South Carolina Appellate Court Rules, S.C. Code Ann. § 14-3-310 and S.C. Const. Art. V, § 5.

Introduction

Since the passage of the American Recovery and Reinvestment Act (hereinafter “ARRA”), Pub. L. No. 111-5, 123 Stat. 115 (2009), on February 17, 2009, Superintendent Rex has been an active and vocal supporter of the application of the State Fiscal Stabilization Fund (hereinafter “SFSF” or “Funds”). Immediately after the enactment of ARRA, Superintendent Rex created a committee to begin assembling the necessary information required for the application of the Funds. Superintendent Rex submitted the final draft application to Co-Respondent Governor Mark Sanford (hereinafter “Governor”) on May 23, 2009. That application provides the necessary information that substantiates that the State of South Carolina qualifies

for SFSF. Since the passage of the ARRA, Superintendent Rex has done everything within his power to provide the necessary information to the Governor to facilitate the SFSF application process.

These Funds are essential for South Carolina public schools. Without these Funds, additional jobs will be lost among teachers and other school and district staff, compounding what is already the highest unemployment rate ever recorded in South Carolina. Beyond the immediate, short-term impact on the State's struggling economy, long-term damage to the State's efforts to reform and improve the education system will occur: class sizes will increase; course offerings will be reduced; innovative programs to close the achievement gap affecting poor, rural, and minority students will be suspended or discontinued; the future educational and economic prospects for public school students will be diminished, all because of the inaction of and the willful disregard for the law of Governor Mark Sanford.

In short, the Governor's refusal to act has both an immediate and a far-reaching impact on the public education system, the economic well-being of educators and staff, and the educational attainment of students.

Issues

This case is properly in the South Carolina Supreme Court because the issues at hand are exclusively state law and constitutional issues. This is not a federal case, but a question of where the separation of power lies in the State of South Carolina. Our General Assembly, through two separate legislative actions, mandated that these Funds flow to South Carolina. Superintendent Rex respectfully requests that the Supreme Court hold that either or both of the General Assembly's actions are sufficient to provide this much needed funding to the citizens of South Carolina.

1. Right of the General Assembly to Legislate and Appropriate Funds

The issue presented in this instant action is whether the General Assembly has the authority to require the Governor to apply for funds through legislative action. The South Carolina Constitution sets forth the responsibilities of each branch of government. While the legislative branch is charged with the responsibility of creating laws, the Constitution provides, “The Governor shall take care that the laws be faithfully executed.” S.C. Const. Art. IV, § 15.

Part 3 of the 2009–10 Appropriation Act provides:

SECTION 1. Pursuant to Title XVI of the American Recovery and Reinvestment Act of 2009 (ARRA), the Governor has certified that (1) the State will request and use funds provided by the ARRA, and (2) the funds will be used to create jobs and promote economic growth. As a result of the Governor's action, the General Assembly recognizes \$694,060,272 of federal funds pursuant to the State Fiscal Stabilization Fund established by Title XIV of the ARRA and that these funds are authorized for appropriation pursuant to the provisions of this Part. In order to fund the appropriations provided by this Part, the Governor and the State Superintendent of Education shall take all action necessary and required by the ARRA and the U.S. Secretary of Education in order to secure the receipt of the funds recognized and authorized for appropriation pursuant to this section. The action required by this Part includes but is not limited to: (1) within five days of the effective date of this Part, the Governor shall submit an application to the United State's Secretary of Education to obtain phase one State Fiscal Stabilization Funds, and (2) within thirty days of phase two State Fiscal Stabilization Funds becoming available or thirty days following the effective date of this act, whichever is later, the Governor shall submit an application to the United State's Secretary of Education to obtain phase two State Fiscal Stabilization Funds. The State Superintendent of Education shall take all action necessary and provide any information needed to assist the Governor in fulfilling his obligation to apply for State Fiscal Stabilization funds pursuant to this Section.

This law clearly requires that the Governor apply for the Funds within five days of the effective date of the law. Superintendent Rex carried out his responsibilities under this section in that he submitted the completed application to the Governor on May 23, 2009, and is available, as is his staff, to assist in any additional manner to answer questions or provide additional information, as they have done since the passage of the ARRA.

A careful reading of the ARRA indicates that the Governor does not have discretion to reject ARRA funding where the General Assembly has directed otherwise and the submission of the SFSF application does not rest solely with him. To qualify for these Funds, the State must meet certain maintenance of effort requirements, which under South Carolina state law, only our General Assembly can advance. First, the state must “in each of fiscal years 2009, 2010, and 2011, maintain State support for elementary and secondary education at least at the level of such support in fiscal year 2006.” ARRA § 14005(d)(1)(A). If the state does not meet maintenance of effort, the state may qualify for a waiver if elementary, secondary, and postsecondary education receive the same or greater portion of funding as they did the previous year. ARRA § 14012.

Under South Carolina law, only the General Assembly can appropriate the Funds to ensure that the State meets either the maintenance of effort or the waiver criteria. The Governor does not have a role in the appropriations process, except for his authority to veto, which he exercised with regard to the 2009–10 Appropriation Act. The General Assembly overrode the Governor’s veto on May 20, 2009. Therefore, the Governor has no discretion in addressing this requirement of the law.

Additionally, 81.8% of the Funds are completely non-discretionary. ARRA § 14002(a)(1) states “the Governor shall use 81.8% of the State’s allocation under section 14001(d) for the support of elementary, secondary, and postsecondary education and, as applicable, early childhood education programs and services.” ARRA § 14002 states that the Funds shall flow through the State’s primary elementary and secondary funding formulae. The Governor has no discretion on how these Funds flow. The Governor requested on two occasions

to use these Funds to pay down debt and the Office of Management and Budget rejected that usage stating that the law did not allow for that discretionary use.

The plain reading of the application language in the ARRA also indicates that the Governor's application is on behalf of the State and not a discretionary act that only the Governor holds. ARRA § 14005(a) addresses the application for the SFSF and provides that a "Governor of a *State desiring* to receive an allocation under section 14001 shall submit an application. . ." (Emphasis added) The General Assembly clearly indicated its desire to receive the allocation on behalf of the State through the passage of Part 3 of the 2009–2010 Appropriation Act. This section of the ARRA does not create a discretionary act of the governor; instead it established who must make the application on *behalf* of the State.

2. Clyburn Amendment

Explanation regarding the origin of § 1607(b) of the ARRA has been sufficiently briefed in petitioners Casey Edwards and Justin Williams' petition for original jurisdiction, thus Superintendent Rex will not repeat it here.

The Congressional Research Service's (hereinafter "CRS") March 17, 2009, memorandum to the Honorable Lindsey Graham that has been widely used as declaring the Clyburn Amendment unconstitutional must be read in context with South Carolina law. A careful reading of that memorandum requires one to delve into State law. The CRS opined that the language of ARRA § 1607 would not "otherwise reallocate power within the state." In other words, if our State did *not* provide the General Assembly the authority to legislate and to appropriate funds, perhaps a concurrent resolution, alone, would not be enough to draw the Funds. However, in South Carolina the Governor has no authority to either legislate or appropriate funds. His duty is to carry out the laws of the State. S.C. Const. Art. IV, § 15 and

State v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002). House Majority Whip Clyburn, in introducing this amendment, recognized that the Governor would not accept these Funds. The law was amended to provide an alternative to the “technical” requirement that the Governor apply. To interpret otherwise would give the South Carolina Governor an absolute veto over the will of the United States Congress, the President of the United States, the people of South Carolina, and the General Assembly—a right he does not have under the South Carolina Constitution or State law.

Superintendent Rex asks that the Supreme Court accept original jurisdiction of this case to declare that the South Carolina General Assembly has authority, pursuant to ARRA § 1607(b) and the South Carolina Constitution to accept the Funds by its concurrent resolution, Senate Bill 577, and to appropriate the use of the Funds as it did with the passage of the 2009–2010 Appropriation Act.

Respectfully submitted:

By: _____

Shelly Bezanson Kelly
Karla McLawhorn Hawkins
Barbara A. Drayton
Wendy Bergfeldt Cartledge

South Carolina Department of Education
1429 Senate Street, Suite 1015
Columbia, SC 29201
(803) 734-8783

Attorneys for Co-Respondent Jim Rex
State Superintendent of Education

May _____, 2009
Columbia, South Carolina