

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Karen W., Edward M., Richard S., Susan E., Rob L.,
Peter B., Ann J., Corrie D. and Robyn P.,

Petitioners,

Marshall C. Sanford, Individually and in his Official Capacity as the Governor of South Carolina and Member of the South Carolina Budget and Control Board; Converse A. Chellis, III and Richard Eckstrom, Individually and in their Official Capacities as Members of the South Carolina Budget and Control Board; Daniel Cooper and Hugh Leatherman, in their Official Capacities as Members of the South Carolina Budget and Control Board, Emma Forkner, Individually and in Her Official Capacity as the Director Of the South Carolina Department of Health and Human Services, Kelly Hansen Floyd, Individually and in her Official Capacity as the Chairman of the South Carolina Department of Disabilities and Special Needs, W. Robert Harrell, Individually and In his Official Capacity as former Chairman and Current Commissioner of the South Carolina Department of Disabilities and Special Needs; Otis Speight, Richard Huntress, Susan Lait, Deborah McPherson and Nancy Banov, In their Official Capacities as Commissioners of the South Carolina Department of Disabilities and Special Needs; and Thomas Waring; Individually and in his Official Capacity as Budget Analyst for the South Carolina Department of Disabilities and Special Needs, and David Goodell, Individually and in his Official Capacity as Associate State Director of the South Carolina Department of Disabilities and Special Needs,

Defendants.

**RETURN OF DEFENDANT BUDGET AND CONTROL BOARD TO PETITIONERS'
MOTION FOR PRELIMINARY INJUNCTION**

STATEMENT

The Budget and Control Board, Office of State Budget (the Board), files this Return to Petitioners' Motion for Preliminary Emergency Injunction. Based on the pleadings, it is unclear whether the Motion seeks to enjoin the Board, and more fundamentally, whether the Board is a proper defendant in this action. There is an absence of any substantive allegation that Board actions deprived petitioners of any rights or proximately caused petitioners injury. Moreover, petitioners in no way indicate how their interests will be served by enjoining the Board. At a minimum, the extraordinary relief of issuing an emergency injunction should not be granted based on the disjointed pleadings before the Court. In their pleading, petitioners show neither the right nor need of an emergency injunction. Particularly when the requested relief would undermine a regularly enacted Appropriation Act of the General Assembly approved by the Governor over six months ago, and followed consistently by state government since its enactment.

Petitioners have requested, on unnecessarily short notice, i.e., by motion filed less than 48 hours prior to the alleged need for relief, that the Court enjoin the Defendants from "reduc[ing] or terminat[ing] Petitioners' DDSN services on January 1, 2010." Petitioners also seek mandatory preliminary injunctive relief from the Court, such relief to include an order to "restore services in effect on July 1, 2008, and an order to use funds contained in the Health Care Annualization and Maintenance of Effort Fund to pay for those services. The Board is most concerned with this latter request.

The Court has requested that the Defendants respond to Petitioner's Petition for Injunction by 1:00 p.m. on December 31, 2009. In view of the extremely short time which has been given in which to respond, the Board is constrained to present some arguments in summary

fashion. This Return by necessity is limited to the narrow issues pertaining to preliminary injunctive relief, and not to the other issues that Petitioners seek to have this Court determine. The core position of the Board is simple: Petitioners simply have not shown any likelihood of immediate harm to themselves, or for that matter to anyone else, that would require immediate preliminary injunctive relief, nor have they shown any reasonable likelihood that any action by State authorities would contravene any provision of state or federal law.

The General Assembly enacted, and the Governor approved, 2009 Act 23, Part IB, Section 90.13 (“the proviso”) effective May 19, 2009. The portion of the proviso relating to this action is:

There is created with the State Treasurer’s Office the Health Care Annualization and Maintenance of Effort Fund which shall be separate and distinct from the General Fund and shall be used exclusively for health care purposes. All agencies, unless specifically exempt by another provision contained in this act, shall transfer unobligated state match funds resulting from the receipt of the increased Federal Medical Assistance Percentage to the State Treasurer to be deposited into the Health Care Annualization and Maintenance of Effort Fund.

It is undisputed that the General Assembly, and only the General Assembly, has the duty and authority to appropriate public funds for the expenditure by state agencies. Condon v Hodges, 349 S.C. 232, 562 S. E.2d 623, 630 (2002). Further, only the General Assembly has the right to specify the conditions under which the appropriated monies shall be spent. *Id.* In addition, the American Recovery and Reinvestment Act of 2009 (“ARRA”) does not invalidate the appropriation authority of the General Assembly. Williams v Sanford, 383 S.C. 82, 678 S.E. 2d 412. (2009). We note as well that the proviso only appropriates the “state match funds”, and not any FMAP or federal stimulus funds. Although ARRA did not invalidate the General Assembly’s appropriation authority, we believe that the appropriation proviso is fully consistent with the provisions of ARRA.

The individual petitioners may disagree with the policy and fiscal decisions made by the General Assembly and the Executive Branch. They may disagree with the decisions that an Executive Branch department made to balance the respective department budget and believe that these decisions have serious consequences for the state. However, their disagreement does not undermine the plenary authority of the General Assembly to appropriate funds and specify the conditions upon which the moneys shall be spent.

Of course, prior to considering the issuance of a preliminary injunction enjoining an appropriation decision of the General Assembly, or otherwise diverting funds appropriated by the General Assembly to some purpose other than that specified in the appropriation, the Court should require a sufficient security from the petitioners and a very particularized showing supported by competent evidence of the precise irreparable harm the individual petitioners will suffer. In light of the petitioner's failure to establish the substantial likelihood of prevailing on the merits; the absence of any harm, irreparable or otherwise, to petitioners from the denial of injunctive relief; and the apparent substantial injury to be suffered by the Government if this motion is granted, the injunctive relief should be denied.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that Petitioners' motion for preliminary injunction should be dismissed. In so arguing, this party does not concede that this Court should assume original jurisdiction over this case, but instead reserves the right to respond with respect to that issue under the time periods prescribed by law.

Respectfully submitted,

STATE BUDGET AND CONTROL BOARD

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