

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Hon. DeAndrea Gist Benjamin, Circuit Court Judge

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C.A. No.: 2017-CP-40-06976  
Appellate Case No. 2019-001231

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Jefferson Davis, Jr. ....Appellant,

v.

South Carolina Educational Credit for Exceptional Needs Children Fund, .....Respondent.

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INITIAL REPLY BRIEF OF APPELLANT

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Jefferson Davis, Jr.  
403 McCarter Avenue  
Greenville, SC 29615  
843-901-8036 (cell)  
*jeff@apogeetax.com*

*Appellant*

**RECEIVED**

**Jul 13 2020**

**SC Court of Appeals**

## ARGUMENT

**DOMAINSNEWMEDIA.COM GONE AWRY.** This matter is frankly quite simple – in fact, it is elementary in its most basic respects– however it is far reaching in its potential result as a fallout of the *DomainsNewMedia.com, LLC, v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 814 S.E.2D 513 (2018) case.

The *DomainsNewMedia.com* ruling reached the proper result. We all agree that “NO”, the operations of a local and independently run Chamber of Commerce should not be subject to the provisions of the S.C. Freedom of Information Act (hereinafter “**FOIA**”). However, the technical caselaw fallout of the *DomainsNewMedia.com* opinion is the unintended outcome we have today in this matter.

Today have an outcome whereby Respondent (hereinafter the “**ECENC Fund**”) ... a legislatively created, single purpose, public non-profit, that is administered pursuant to statute by the South Carolina Department of Revenue (hereinafter the “SCDOR”), by SCDOR employees, at S.C. taxpayer expense, and governed pursuant to statute by a five person legislatively appointed board ... pursuant to the *DomainsNewMedia.com* ruling, is found to not be a “public body” for purposes of FOIA. Why? Simply because the legislature also asked the SCDOR for the most basic of a “report” about the organization ... not even a report from the ECENC Fund itself. It is an unintended result which no one can justify within the broader intent of FOIA.

Legislatively and based on the original legislative intent, for purposes of good and transparent government, for the purpose of public trust in our government, really for any purpose whatsoever, the outcome in this matter as it relates to the government administered body entitled the ECENC Fund, is an overbroad outcome of the *DomainsNewMedia.com* ruling. If allowed to stand as is, FOIA as we have always known it, is meaningless.

We have a long and well documented history as it relates to the legislative intent of FOIA. The S.C. Code Ann. § 30-4-15, “Findings and purpose”, perhaps says it best:

“The General Assembly finds that it is *vital in a democratic society* that *public business be performed in an open and public manner* so that *citizens shall be advised of the performance of public officials* and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, *provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials* at a minimum cost or delay to the persons seeking access to public documents or meetings.” (Emphasis added.)

Was it the intent of the S.C. Supreme Court to completely gut the bedrock of FOIA by its ruling in *DomainsNewMedia.com*? Gut something that our General Assembly said is “vital in a democratic society”? Is the General Assembly’s legislative intent completely overwritten because of the ruling in *DomainsNewMedia.com*? **Absolutely not and why the trial court must be reversed in this case.**

The *DomainsNewMedia.com* ruling was intended to reach a proper result, the result that an independent Chamber of Commerce was not subject to FOIA. Our Supreme Court reached this proper result by finding that an *independent* Chamber of Commerce was required to submit a “report” ... so the independent organization was therefore exempt from FOIA.

To now say that because a “report” SCDOR is required to make on an annual basis exempts a government administered entity completely from FOIA, is overbroad and frankly absurd in its result. FOIA has far reaching policy goals of government “oversight”. The required SCDOR report falls far short of meeting the “oversight” policy goals of FOIA. To apply *DomainsNewMedia.com* in this case, to a government administered entity, is exactly what Justice Few predicted when he wrote a scathing dissent in *DomainsNewMedia.com*.

**PUBLIC FUNDS OR NOT – IT IS IRRELEVANT.** Respondent also wants to rely upon its belief that the scholarship funds distributed are not public funds. That finding is not necessary as it is irrelevant. It is a fact that the ECENC Fund is a “public body” because it meets the clear FOIA definition of “supported in whole or in part by public funds” given its substantial government ties, the least of which is that Respondent is by statute administered by **SCDOR**, by SCDOR employees, at S.C. taxpayer expense. This can not be denied by Respondent as it is a statutory requirement.

**WHERE IS THE PROMISED TRANSPARENCY?** The irony of this entire matter is the then current SCDOR Director who formed the ECENC Fund (while on government time and the government dime), as well as the legislatively appointed Board Chairman, both publicly promised “transparency” in a July 29, 2016 Op. Ed. in the Charleston Post & Courier. Exhibit A. The leaders of the ECENC Fund itself stated the legislative intent for transparency:

“In its revised form, the ECENC, through Exceptional SC, will provide that support in an effective, ***transparent*** and fair manner, leaving independent schools free to focus their efforts on specialized instruction and services. To do so, best serves our most vulnerable children and their families.” (Emphasis added.)

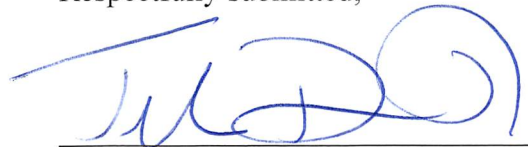
Our government leaders, including Respondent ECENC Fund’s government leadership, promised transparency for this organization. Now Appellants’ most basis of FOIA requests are being denied simply because the program has completely collapsed from mismanagement and the disclosure of the requested information would be embarrassing to these government officials and government appointees. That “oversight” is the purpose of FOIA and can not be overwritten or erased by the *DomainsNewMedia.com* ruling.

**ALTERNATIVELY, REMAND FOR LEGISLATIVE INTENT.** Should the Court of Appeals not elect to REVERSE the trial court outright, at a minimum the dismissal of this case at the Summary Judgement level was premature given the inability to demonstrate the actual legislative intent, including but not limited to the reporting requirements and whether such was intended to exempt organizations such as Respondent ECENC Fund from FOIA.

**CONCLUSION**

For the foregoing reasons, as well as those in Appellants other filings, Respondent ECENC Fund is a “public body” and subject to the Freedom of Information Act. As such the trial court should be REVERSED. Alternatively, the matter should be remanded with further instructions to determine the actual legislative intent of Respondent governing statute.

Respectfully submitted,



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*Appellant*

Date: July 13, 2020

[https://www.postandcourier.com/opinion/new-rules-aid-education-for-special-needs/article\\_2e8f1b15-ecb3-544c-9dd1-4e0dc44c8fc7.html](https://www.postandcourier.com/opinion/new-rules-aid-education-for-special-needs/article_2e8f1b15-ecb3-544c-9dd1-4e0dc44c8fc7.html)

## New rules aid education for special needs

JUL 29, 2016



Some students at Trident Academy in Mount Pleasant have received help through the S.C. Educational Credit for Exceptional Needs Children. Photographed Friday June 27, 2014. Grace Beahm/Staff

**BY RICK REAMES III and**

**THOMAS E. PERSONS, SR.**

Educating students with special needs is costly and complex, and one size rarely fits all. South Carolina's Educational Credit for Exceptional Needs Children (ECENC) was enacted to help students with special needs attend approved, credentialed private schools. Starting in 2013, families sought grants awarded by Scholarship Funding Organizations (SFOs) to offset school costs. For the most challenged students at the most specialized schools, these costs can be staggering.

The initial ECENC authorized state tax credits for donations made to several SFOs provided they met specific charitable criteria. Although every SFO was free to serve any eligible student at any eligible school, some participation began to evolve according to sectarian lines. This inadvertently led to an uneven distribution of the ECENC benefits, and in some cases, worked to subsidize schools rather than supporting individual special needs students choosing freely among them. Still the proper actions and achievements of some SFOs are to be applauded. These SFOs emphasize the program's value and serve as a model for how best to serve the special needs children of South Carolina moving forward.

In June, state lawmakers proposed specific, substantive reforms, seeking to return to the spirit and intent of the ECENC — equal access for eligible students at all eligible schools. First, they raised the maximum per-student grant to \$11,000. Second, they increased the sum of tax credits reserved for grant donations from \$8 million to \$10 million. Third, legislators guaranteed last year's ECENC students were provided first priority for this year's grants, offering predictability to families and continuity of educational support for students. Fourth, state lawmakers authorized the creation of a single, statewide SFO — Exceptional SC — to serve all eligible students at all approved schools and to ensure a more transparent and direct route to earn tax credits.

Formally organized by the South Carolina Department of Revenue (SCDOR) this summer, Exceptional SC is governed by a board of directors representing the state's private school associations including the Diocese of Charleston, South Carolina Independent Schools Association and the Palmetto Association of Independent Schools.

Thanks to the hard work and dedication of these board members, more than \$3.75 million in donations has already been received, along with more than 700 applications. Board members are active in encouraging more donations and have established a streamlined online application process affording all families equal access to fast and fair consideration of their applications, refocusing the ECENC on the end user.

The board will announce a first round of approved applicants on or before September 15, 2016. Incumbent applicants must complete this year's application and submit all required documentation by September 1, 2016, for priority consideration within this first round. Additional approvals will be made as more donations are received.

Individuals and corporations who pay South Carolina taxes can donate directly to Exceptional SC. Those contributions are eligible for state income tax credits on a dollar per dollar basis, for up to 60 percent of the donor's total state liability. Statewide, \$10 million in credits are available on a first come, first served basis. Information about how to donate as well as how to apply is available on Exceptional SC's website at [exceptionalsc.org](http://exceptionalsc.org).

These legislative refinements and the creation of Exceptional SC were necessary and important to preserve the program's integrity and help to ensure accountability and sustainability. The ECENC can serve families of some of the most challenged and educationally expensive students in South Carolina. That fuels innovation and specialization in education. In its revised form, the ECENC, through Exceptional SC, will provide that support in an effective, transparent and fair manner, leaving independent schools free to focus their efforts on specialized instruction and services. To do so, best serves our most vulnerable children and their families.

To learn more about Exceptional SC including how to apply and donate, please visit [exceptionalsc.org](http://exceptionalsc.org).

Rick Reames III is director of the S.C. Department of Revenue.

Thomas E. Persons Sr., is president & CEO of S.C. Technology Alliance and serves as chairman of South Carolina's Educational Credit for Exceptional Needs Children Fund / Exceptional SC.

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PROOF OF SERVICE

I, the undersigned Appellant does hereby certify that I have caused to be mailed and/or otherwise transmitted a copy of the below listed document(s) to the party shown below, postage prepaid, on the **13<sup>th</sup> day of July, 2020**, as follows:

PLEADINGS:                   **INITIAL REPLY BRIEF OF APPELLANT**

PARTY SERVED:           Geoffrey Kelly Chambers, Esq.  
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July 13, 2020

VIA EMAIL ONLY ([ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org))

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**RECEIVED**

**Jul 13 2020**

**SC Court of Appeals**

**RE: Jefferson Davis Jr, Appellant vs. SC Educational Credit, Respondent**  
**Appellate Case No.: 2019-001231**  
**C.A. NO. 2017-CP-40-06976**

Dear Ms. Kitchings:

Please find enclosed the following for the above referenced matter. Only one copy is enclosed (or in this case attached) pursuant to recent directions from the Court.

- 1. Initial Reply Brief of Appellant**
- 2. Proof of Service**

I have also served this filing on Respondent only via email (cc'd hereon) for safety reasons. Pursuant to recent Orders from the Supreme Court of South Carolina, it appears service by email is preferred due to the current Coronavirus Emergency. If anything has changed, or if this does not comply with the rules, please let me know.

Thank you for your assistance. If you have any questions, please feel free to email me at [jeff@apogeetax.com](mailto:jeff@apogeetax.com) or give me a call at 843-901-8036 (cell).

Sincerely,



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cc: Geoffrey Kelly Chambers, Esquire