

## Higher Education Prevails in Proration Case Appeal.

In an anxiously awaited decision, the Alabama Supreme Court has agreed with the position of the state's public universities that proration of the Education Trust Fund (ETF) must be imposed equally on "K-12" (elementary and secondary education) and higher education. *Alabama Association of School Boards v. Siegelman*, No. CV-01-345 (Ala. S.Ct. June 29, 2001). The Court's unanimous decision overturned an April ruling by the Montgomery County Circuit Court that had insulated K-12 teacher salaries from proration. Since proration was imposed to deal with an anticipated \$266 million dollar shortfall in ETF tax revenues, the lower court's decision meant that fewer dollars would be taken from K-12 and correspondingly more dollars would be required from higher education. The effect was to nearly double the annualized proration rate for higher education, raising it from 6.2% to 11.11%, while reducing the rate for K-12 from 6.2% to 3.4%. Since that rate was to be imposed on the entire appropriation amount but at a point in time half way through the fiscal year, when only about half of higher education's appropriations would be available for the reduction, the impact on higher education was even more severe than 11.11%.

The lower court had granted a motion by the plaintiffs, the Alabama Association of School Boards, several local school boards, and the Alabama Coalition for Equity, for an injunction barring state officials from imposing proration on K-12 salaries. The plaintiffs had argued that two identical statutory provisions enacted in 1995 (§16-6B-9 and §16-13-144, *Alabama Code*) exempted K-12 salaries from any exemption order, leaving proration applicable only to non-salary appropriations to K-12. Their argument was buttressed by an advisory opinion from the Alabama Attorney General indicating that these statutes protected teacher salaries from being cut due to proration. He further stated that the Governor's plan to exclude such salaries from proration was a permissible way to carry out the intent of these statutes.

In appealing the trial court's order, the universities contended that the statutes in question were not directed at state officials in their determination of how to impose proration but instead at local school boards in their use of funds distributed to them by the state. That interpretation was consistent, the universities argued, with a provision in the Budget and Financial Control Act (§41-4-90) that requires the Governor, when acting to prevent a deficit in any state fund, to "restrict allotments . . . by prorating without discrimination against any department, board, bureau, commission, agency, office or institution of the state the available revenues . . ." (emphasis added). Joining the universities in these arguments was the Joint Fiscal Committee of the Alabama Legislature.

The Supreme Court sided with the appealing parties in their interpretation of these statutory provisions: "Considering the 1995 directive in the context of the acts in which it appeared compels the conclusion that it speaks, not to the Governor, but to local school boards." The trial court, in reaching a contrary interpretation, was in error, and its injunction was therefore vacated by the high court. This outcome was, of course, welcomed by higher education, not only for the fiscal relief it should provide for the current year but for the protection it affords in future years against discriminatory proration orders.

The Supreme Court's ruling sidestepped a second major issue in this suit. Prior to issuing its April injunction, the lower court had issued an injunction in February that was similar in effect but that was based on a different legal theory. The court recognized a right to an "equitable and adequate education" for every Alabama child guaranteed by the Alabama Constitution and then declared that cutting back K-12 funds, through implementation of the proration order, would violate that right. In so holding, the court relied on an earlier, controversial decision in *Alabama Coalition for Equity v. Hunt*, Nos. CV-90-883-R and CV-91-0117 (Ala. Cir.Ct. Montgomery Cty. March 31, 1993), popularly known as the "Equity Funding Case." Judge Gene Reese in that case identified this new right as derived from language in Section 256 of the Alabama Constitution requiring the state to establish and maintain a "liberal system of public schools" throughout the state for the benefit of Alabama's children. The court held that the state had failed to comply with this duty and ordered the state to remedy the violation. Clearly, a remedy, which has not been developed to date, will involve the commitment of substantial, additional funding by the state for its K-12 school systems to achieve equity among school systems and to bring them all to the requisite level of quality. Judge Reese's order was not appealed.

The universities in appealing the *AASB* ruling challenged not only the trial court's April order but also the February order and its underlying constitutional basis. There was considerable speculation as to how the high court would respond to this opportunity to review the central holding in the Equity Funding Case. In its June opinion, the court observed that, since no party was asserting the constitutional theory any longer (the original plaintiffs having strategically abandoned it in favor of the statutory theory), the issue was not properly before the court for decision. While it accordingly decided not to address this part of the appeal, the court did invite the parties to present written argument to the court on the question of whether the Equity Funding Case, as it is currently postured procedurally, is still subject to the court's jurisdiction.

The UAS supports "fair share" funding for K-12 from the ETF, but Judge Reese's ruling is regarded as so broad that the price tag for the remedial plan could reach hundreds of millions of dollars. Funding requirements for a plan could potentially result in a dramatic redistribution of available revenues within the ETF away from higher education and toward K-12. The universities desire to have the Supreme Court review Judge Reese's ruling and therefore plan to file a brief by the end of this month supporting that position.

Further developments in this matter will be discussed in future issues of *LegalWatch* as they unfold.