

United States Department of Education  
Office of Administrative Law Judges

IN THE MATTER OF )  
)  
) Appeal of Denial of Waiver Request/  
) Reduction in Funds  
South Carolina )  
)

The South Carolina Department of Education (SCDE) requests that the Office of Administrative Law Judges (OALJ) review the determination by Assistant Secretary Alexa Posny, Office of Special Education and Rehabilitative Services, that the State of South Carolina should not be granted a waiver of the requirement to meet the maintenance of fiscal effort (MOE) for the 2009–10 school year, pursuant to 20 USC § 1412(a)(18) and 34 CFR § 300.163, and the determination by the United States Department of Education (ED) to permanently reduce South Carolina’s allocation under the Individuals with Disabilities Education Act (IDEA) by \$36,202,909 annually.

**ISSUES ON APPEAL**

1. The ED failed to provide the SCDE with notice and opportunity for a hearing regarding the loss of \$36,202,909 in IDEA funding.
2. Assistant Secretary Posny erred in failing to grant the SCDE a complete waiver of the MOE requirement for the 2009–10 fiscal year.
3. The ED erred in not considering South Carolina’s level of services provided to students with disabilities.
4. The ED erred in its interpretation of 34 CFR § 300.163(d) by finding that South Carolina’s IDEA allocation would be forever reduced by \$36,202,909.

## FACTS

Like many states, South Carolina experienced unprecedented fiscal decline between the years 2007–08 and 2009–10. Considering three sources of revenue, General Fund, Lottery, and the Education Improvement Act (EIA), the state collected \$1,229,125,946 *less* in revenue in 2009–10 than in 2007–08. The significance of the 2007–08 fiscal year is that it is the last fiscal year in which South Carolina met its MOE requirement under the IDEA; therefore, IDEA MOE 2007–08 is the base year to which comparison for MOE is made. South Carolina submitted a waiver request to the ED for the fiscal years 2008–09, 2009–10, and 2010–11.<sup>1</sup> (R 1-2)

South Carolina sought a waiver of the MOE requirement for those fiscal years based on the provisions of 20 USC § 1412(a)(18) and 34 CFR § 300.163(c)(1) (2006) that “granting a waiver would be equitable due to exceptional or uncontrollable circumstance such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State.” The IDEA provides at 20 USC § 1412(a)(18)(c) as follows:

(18) Maintenance of State financial support

(C) Waivers for exceptional or uncontrollable circumstances

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that--

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a *precipitous and unforeseen decline in the financial resources of the State*; (Emphasis added).

South Carolina experienced a precipitous and unforeseen decline in revenue in 2008–09, which coincided with the unprecedented drop in housing values, high rates of foreclosures, and

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<sup>1</sup>The SCDE requested a waiver of MOE for state fiscal year 2009–10 on February 26, 2010. (R 1) On May 9, 2011, an additional request was made to waive the MOE requirement for state fiscal years 2008–09 and 2010–11. (R 2)

the stock market crash. The first fiscal year that South Carolina did not meet MOE was in the 2008–09 year, just as the country was starting its fiscal decline. The decline continued and compounded in 2009–10, and the state of South Carolina applied for and received American Recovery and Reinvestment Act funds for Title I and the IDEA, as well as State Fiscal Stabilization Funds.

By letter dated June 17, 2011, the ED granted a waiver for 2008–09 and denied the waiver request for 2010–11. (R 35-43). It also granted a partial waiver for the 2009–10 year—denying the amount of \$36,202,909. This appeal only involves the partial approval of the waiver for the 2009–10 fiscal year.

After receiving notification of the denial for the 2010–11 year on June 17, 2011, state Superintendent Mitchell M. Zais, PhD, worked with the South Carolina General Assembly to seek permission to transfer \$75,343,070 in funding to school districts earmarked for special education. Since the end of the state’s fiscal year was quickly approaching, the parties involved worked to ensure that surplus funds which were discovered late in the fiscal year could be used for this purpose. (R 44-45). South Carolina was able to transfer these funds and notified the ED that the transfer occurred. (R 46). The ED sent a letter acknowledging that South Carolina met the MOE requirements for 2010–11. (R 50)

### South Carolina’s Budgetary Process

The South Carolina General Assembly meets annually. Its session begins the second Tuesday in January and concludes the first Thursday in June. South Carolina operates a July 1 through June 30 fiscal year, and the state’s budget for the following fiscal year is typically debated and adopted by May or June. As stipulated in the South Carolina Constitution, the state

must have a balanced budget. (S.C. Const. of 1895, art. X, § 7 (2009) provides “(a) The General Assembly shall provide by law for a budget process to insure that annual expenditures of state government may not exceed annual state revenue.”). To ensure a balanced budget safeguards are built into the budgetary process.

South Carolina relies on the Board of Economic Advisors (BEA) in determining the amount of revenue that the state may appropriate. This BEA is established by statute and its duties include forecasting state revenues for the next fiscal year. S.C. Code Ann. § 11-9-880 (2011). The General Assembly uses the BEA’s forecasted revenues when developing the state’s budget. Consistent with statutory and Constitutional requirements, the General Assembly cannot exceed the BEA’s estimate when appropriating revenues.

#### 2009–10 Budget Year

The 2009–10 final budget figures improved upon that which was projected by the BEA. (R 13 & 22). This improvement was considered by the ED in rejecting South Carolina’s request in the amount of \$36,202,909. An overview of the 2009–10 budget year is important to demonstrate the state of South Carolina’s economy and the uncertainty that the SCDE was faced with during that time. The Appropriations Act budgeted revenues for 2009–10 were originally \$5,552,002,165; however, actual General Fund revenues were \$5,241,895,775—over \$310,000,000 less than what was budgeted. (R 13). Because of anticipated shortfalls and revisions of the revenue projections by the BEA, the state Budget and Control Board issued two mid-year budget cuts (4.04 percent in September 2009 and 5 percent in December 2009) and applied \$127,847,888 from the state’s Capital Reserve Fund against the projected state shortfall. (R 13). The budget cuts and use of the Capital Reserve Fund created a \$566,527,922 “savings”

to the state. (R 13). The state then had to expend \$185,420,932 to cover expenses required by statute or proviso, some of which was to liquidate a \$98,216,617 operating deficit from the previous fiscal year. After these payments were made, there was a net budget (not revenue) surplus of \$71,000,600. (R 13). Note, however, that this budget surplus was not due to an increase in revenue, but was a result of across the board budget cuts and use of the Capital Reserve Fund to avoid violating the state Constitution.

### **ARGUMENT**

**1. The ED failed to provide the SCDE with notice and opportunity for a hearing regarding the loss of \$36,202,909 in IDEA funding.**

The SCDE received notification that its waiver request was partially denied on June 17, 2011, and on July 1, 2011, the SCDE received a letter from Melody Musgrove, EdD, Director, Office of Special Education Programs, approving the state's application for the federal fiscal year 2011. (R 35-43 & 47-49). In the July 1, 2011, letter, Dr. Musgrove informed South Carolina that:

The State failed to meet the requirements in Section 612(a)(18)(A) to maintain State financial support for special education and related services for FFY 2010 by \$36,202,909. The Department is required by Section 612(a)(18)(B) to reduce, in any fiscal year, the Grants to States awards of States that failed to meet this requirement by the amount the State Failed to maintain effort." (R 47-48).

Neither letter provided the SCDE with notification of rights to appeal the determination. From its review of the IDEA and the General Education Provisions Act (GEPA), the SCDE expected notification from the ED of its right to appeal this determination. On July 13, 2011, within thirty days from the June 17, 2011, letter, the SCDE's General Counsel, Shelly Bezanson Kelly, sent an e-mail to Joan Bardee, Esquire, of the ED Office of General Counsel, inquiring about appeal rights. (R 51-53). Ms. Bardee responded on July 20, 2011, that nothing bars the SCDE from asking for a reconsideration but that since the ED is not "withholding" money from the SCDE,

the ED does not have to provide the SCDE with notice and an opportunity for a hearing because “the action to reduce the amount of the State’s allocation is not a withholding.” (R 51-53). Ms. Kelly followed with a direct question as to what appeal rights applied, to which Ms. Bardee wrote “the IDEA does not include a provision for appealing decisions under Section 612(a)(18)(C).)” (R 51-53). While the ED, through its attorney, maintains that the SCDE does not have a hearing right because the determination with regard to the waiver was not what they consider a “withholding, the comments to the regulations imply that the intent was to provide hearing rights to states. The comments to the IDEA regulation address the hearing rights: “When the Secretary proposes to deny a State’s eligibility to receive a grant under Part B of the Act, withhold funds, or take other enforcement action, it is important to all parties that the process through which those issues will be decided is clearly described, so that time, money, and effort are not spent resolving procedural questions instead of the underlying issues. For these reasons, we believe it is important to retain §§ 300.179 through 300.183 in the regulations.” Federal Register, Vol. 71, No. 156, August 14, 2006, p. 46622. (Emphasis added). It is hard to imagine how reducing a state’s allocation by \$36,202,909 could not be considered a withholding or an enforcement action.

While the SCDE was informed by Ms. Bardee that no appeal right exist; the SCDE asserts that in the absence of a right to appeal under the IDEA, which the SCDE believes exists, GEPA is controlling and hereby files this appeal under both the provisions of 34 CFR § 300.179 or in the alternative 20 USC § 1234d. The SCDE believes that the ED is in noncompliance with the notice provisions of 20 USC § 1234d because its letter dated July 1, 2011, stating that \$36,202,909 would be withheld from future payments, did not provide the notice provisions required by 20 USC § 1234. (R 47-49). The SCDE, nevertheless, wishes to reserve its appeal

rights and hereby files this petition, absent the receipt of the notice required by law. However, by filing this appeal, the SCDE does not waive its notice rights that are afforded to it under federal law.

Assuming *arguendo* that the IDEA does not provide appeal rights to a state when funds are being reduced, the SCDE believes the Office of Administrative Law Judges (OALJ) decision in *The Matter of State of California*, Docket No. 09-05-R (R 54-65), is controlling in establishing a right to appeal the denial of South Carolina's request for a waiver of the MOE requirements and subsequent reduction in funding in the amount of \$36,202,909. In that decision, the OALJ reviewed a decision by the Secretary to withhold funds under the Elementary and Secondary Education Act (ESEA). In that case the Assistant Secretary argued that the OALJ had no authority to review the withholding action in that case "as its jurisdiction does not include a withholding action under Section 1111(g)(2)." The OALJ held that while jurisdiction was not specifically conferred in that particular statute, the general law 20 USC § 1234d applied. In that ruling, the OALJ stated "Although it is difficult to conceive that Congress would permit the Secretary to act without notice and a hearing under Section 6311(g)(2), it is even more so in matters involving tens of millions of dollars." Here, the Secretary is attempting to withhold over \$36 million from South Carolina without giving South Carolina notice of an opportunity to be heard.

As such, we submit that the OALJ has jurisdiction to hearing this Petition for Review and we submit such, even though South Carolina has not received notice of its rights.

**2. Assistant Secretary Posny erred in failing to grant the SCDE a complete waiver of the MOE for the 2009–10 Fiscal Year.**

The SCDE appreciates the speed at which the ED addressed its 2010–11 waiver request. The SCDE made the request on May 9, 2011, and on June 17, 2011, received a definitive answer.

Even though the answer came only two weeks prior to the end of the fiscal year, it gave the SCDE time to approach the General Assembly and request special permission to use funds that were not specifically appropriated for MOE to be transferred to meet this obligation. That permission was granted and funds were allocated to the school districts in time to meet the 2010–11 MOE requirements. The timing of the ED’s response gave the SCDE time to address the situation.

Juxtaposed, the SCDE submitted the 2009–10 waiver request on February 26, 2010. Had the ED acted upon that request in the same manner as it did the 2010–11 request, the SCDE would have had time to notify the General Assembly of the need for additional funds. While there is no way to ascertain whether funding would have been found because the financial environment was not as promising in April 2010 as it was in May 2011 (when the 2010-2011 request was made), an expedited response would have given South Carolina the opportunity to address the shortfall. The failure of the ED to have procedures in place to adequately address the MOE waiver request detrimentally impacted South Carolina’s ability to rectify the funding situation.

During the process, the ED and the SCDE staff met, spoke via conference call, and corresponded via e-mail at least twenty-five (25) times. At no point during these meetings was there any indication that the ED would not grant the waiver.

A review of the decisions with regard to other waiver requests demonstrates that in no other case did the ED delay in making the final determination as it did in South Carolina’s. In reviewing denials, the ED issued a letter after one to three months of consideration—except to South Carolina where the determination took sixteen months. (R 66-67). Because of the promptness in addressing those denials, those states had time to plan. Compare that to the



sixteen months that the ED took to reject South Carolina's request. There was no mechanism to correct the MOE deficiency because of this delay.

### **Merits of the Waiver Request**

The Secretary has the discretion to grant South Carolina's request for a waiver for the 2009–10 fiscal year. Regulation 34 CFR § 300.163(c)(1) grants the Secretary authority to grant a waiver of the requirement to maintain fiscal effort if the Secretary determines that “granting a waiver would be equitable due to the exceptional or uncontrollable circumstance such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State.” The regulation provides, however, that in subsequent years the fiscal support must meet the level of the year that the state last met fiscal effort. South Carolina last met MOE in the 2007-2008 Fiscal Year<sup>2</sup>. When reviewing South Carolina's request, Dr. Posny used the 2008-2009 FY for comparison instead of the base funding year of 2007–2008 fiscal year. We believe that Dr. Posny erred by using that year for comparison. Regulation 34 CFR § 300.163 requires that the state use the last year in which the state met MOE as the base for establishing the level of effort required. Since that year is used as the comparison year for establishing the MOE, it should also be the year that is used for fiscal comparisons when determining whether the waiver is “equitable” under 34 CFR § 300.163. South Carolina provided clear evidence that when compared to the 2007–2008 fiscal year, expenditures for students with disabilities were not disproportionately reduced as compared to state expenditures in general. The chart that was attached to Dr. Posny's letter clearly shows that the percentage change in funding levels for IDEA MOE from 2007–2008 to 2009–10 was -16.31%, as compared to -20.20% in total appropriations and -16.31% in revenue overall. (R 43). However, when compared to the previous year, the numbers reflect a greater impact on IDEA MOE. This comparison to the

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<sup>2</sup> The ED granted a waiver of MOE for the 2008–09 year.

previous year was an abuse of discretion by the Secretary and does not accurately reflect the true state of funding for South Carolina. By the Secretary's ruling, South Carolina is being punished for attempting to hold IDEA MOE as harmless as possible in the 2008–09 Fiscal Year. In that year, IDEA MOE only saw a -4.87% decrease while appropriations in general saw a -13.69% decrease.

The ED erred in considering the perceived “surplus” in the state's budget at the close of the 2009–10 fiscal year. South Carolina's decision is unique when compared to other denials in that the ED's decision came after the end of the fiscal year, yet the ED used the “surplus” against South Carolina. As explained in the May 24, 2011, letter, the surplus was not known by the state until the close of the books in August 2010—after the close of the fiscal year. All revenue forecasts that year were bleak. The state started the year with an Appropriations Act budgeted revenues of \$5,552,002,165, but the actual revenues were over \$300 million less at \$5,241,895,775. (R 13). The state's Budget and Control Board initiated two statewide budget cuts and applied Capital Reserve Funds against the projected revenue shortfall, in essence closing the gap by \$566,527,922. By the close of the fiscal year, the state did have a net budgetary surplus of \$71,000,600. Dr. Posny considered this “surplus” when rejecting \$36,202,909 of South Carolina's request. This budget surplus was partially created by borrowing against the Capital Reserve fund and budget cuts. It was not a surplus in revenue. Revenue was down—by \$300 million. It is a budgetary surplus—not a revenue surplus.

When rejecting South Carolina's request by \$36,202,909, the ED overemphasized what it saw as revenue increases in the EIA and Lottery accounts. South Carolina recognized an increase in both Lottery and EIA from that which was *appropriated* for 2009–10. EIA funding is derived from a one penny sales tax. By 2009–10 the annual EIA revenues decreased by over

\$800 million *per year*, in just two years. The final 2009–10 EIA revenue figures were approximately \$10,000,000 less than the previous year. The ED erred in considering and emphasizing the remaining EIA balances in rejecting South Carolina's. As late as April 14, 2010, the BEA estimated that the EIA revenues would be \$521,090,107. (R 22).<sup>3</sup> Based on the BEA estimate, the SCDE could not have asked for EIA funds to apply towards IDEA MOE. The Lottery account also closed with an increase in revenue during the 2009–10. When comparing the Lottery funds depicted on the South Carolina—Financial Data chart, 2009–10 seems to be the outlier.<sup>4</sup> (R 43). These revenues greatly dropped in 2010–11. These increased Lottery funds were not anticipated and were not appropriated as such.

Neither the IDEA or its regulations mention surpluses with regard to granting waivers of MOE. Based on the ED's logic in emphasizing budget or unanticipated revenue surpluses, a state would have to run a deficit to be able to qualify for a waiver. South Carolina is prohibited from appropriating a budget based on a projected deficit. The South Carolina General Assembly, as explained earlier, must appropriate funds based on revenue projections that it receives from the BEA. To penalize South Carolina after the fact for having an unanticipated budget surplus, which at the time of the final ruling by the ED could not be used towards MOE since it was outside of the fiscal year, is an abuse of discretion. Additionally, the ED is basically stating that 100 percent of all budget surpluses must be allocated towards IDEA MOE. This logic ignores the other spending needs of the state.

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<sup>3</sup> The 2009-10 EIA appropriation was \$531,507,880. (R 43).

<sup>4</sup> In 2007–2008 Lottery revenues were \$269,841,217; 2008–09 they were \$262,989,055; and in 2010-2011 were estimated at \$256,000,000. (R 43). By this comparison the 2009–10 figures were unusual.

### **3. The ED erred in not considering South Carolina's level of services provided to students with disabilities**

Despite the shortfall in the state's appropriated funding for special education and related services for federal fiscal year (FFY) 2009<sup>5</sup> the ED determined that, under the IDEA § 616(d)(2)(A)(i), South Carolina met the requirements of Part B of the IDEA. As indicated in the ED's June 20, 2011, letter to Dr. Zais, this determination was based on the totality of the state's data and information, including the state's FFY 2009 Annual Performance Report (APR) and revised State Performance Plan (SPP), other state-reported data, and other publicly available information.

Specific factors affecting the determination made by the Office of Special Education Programs (OSEP) that South Carolina meets requirements under IDEA section 616(d) include that: (1) South Carolina provided valid and reliable FFY 2009 data reflecting the measurement for each indicator; (2) South Carolina reported high levels of compliance or correction for Indicators 9, 10, 11, 12, 16, 17, and 20; and (3) South Carolina reported under Indicator 15 both a high level of compliance in timely correcting FFY 2008 findings of noncompliance and that it verified the correction of FFY 2008 findings of noncompliance consistent with the guidance in OSEP Memorandum 09-02, dated October 17, 2008. We commend South Carolina for its performance in these areas.

(R 68-90).

More specifically, the state met the established 0 percent target for Indicator 9, with no school district identified with disproportionate representation of racial and ethnic groups in special education and related services that was the result of inappropriate identification, and continued to meet the 100 percent compliance requirements for the timelines for the investigation of complaints for Indicators 16 and conducting due process hearings for Indicator 17. The state also maintained its FFY 2008 compliance level at 100 percent for the reporting of accurate and reliable data for Indicator 20.

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<sup>5</sup> Note this reference is to the federal fiscal year which includes the state 2009-10 fiscal year.

For Indicators 10, 11, and 12, the state evidenced substantial compliance. The percent of school districts with disproportionate representation of racial and ethnic groups in specific disability categories that was the result of inappropriate identification was 4.5 percent (four out of eighty-six school districts). The percent of children who were evaluated within 60 days of receiving parental consent for initial evaluation increased from the FFY 2008 rate of 96 percent to 99.16 percent. Additionally, the percent of children referred by Part C prior to age 3, who were found eligible for Part B and had an individualized education program (IEP) developed and implemented by their third birthdays, was 96.7 percent, which was an increased level of compliance from the 93 percent reported for FFY 2008.

In addition to these gains, the state improved its performance relative to its general supervision system under Indicator 15 with a compliance rating that rose from 77 to 92 percent. The state exceeded its targets relative to the increase in the percent of children with IEPs served inside the regular class 80 percent or more of the day and the decrease in the percent of children with IEPs served in separate schools, residential facilities, or homebound/hospital placements. With technical assistance and guidance from the SCDE, the state, through efforts by its LEAs, also met a number of other targets for FFY 2009.

The ED should consider its determination under the IDEA § 616(d)(2)(A)(i), that South Carolina met the requirements of Part B of the IDEA for the 2009–10 SFY, in determining whether to grant a waiver.

**4. The ED erred in its interpretation of IDEA Regulation 34 CFR § 300.163(b) by finding that South Carolina’s IDEA allocation would be forever reduced by \$36,202,909.**

IDEA Regulation 34 CFR § 300.163(b) states, “*Reduction of funds for failure to maintain support.* The Secretary reduces the allocation of funds under Section 611 of the Act for any fiscal

year following the fiscal year in which the state fails to comply with the requirement of paragraph (a) of this section by the same amount by which the state fails to meet the requirement.”<sup>6</sup> The SCDE maintains that this provision requires that the allocation be reduced once, not annually, in perpetuity. The plain reading of the statute states that the reduction be taken for “any fiscal year,” not all fiscal years. If Congress intended for this impact to be lasting, it would have clearly stated the reduction would be permanent. In fact, the ED appears to have different interpretations of the impact of this language. In her letter to the SCDE notifying the SCDE of the reduction, Dr. Musgrove states:

The State failed to meet the requirements in § 612(a)(18)(A) to maintain State financial support for special education and related services for FFY 2010 by \$36,202,909. The Department is required by Section 612(a)(18)(B) to reduce, in any fiscal year, the Grants to States awards of States that failed to meet this requirement by the amount the State failed to maintain effort. *We will be working with your State to determine when the State’s allocation will be reduced in order to provide the State with an opportunity to plan for the reduction* and to mitigate the risk that students with disabilities will be adversely affected.

(R 48, Emphasis added).

South Carolina was informed that the reduction will occur in all future fiscal years. This interpretation is contrary to the statement made in Musgrove’s letter and to the plain reading of the statute. Dr. Musgrove’s offer to work to determine when the allocation will be reduced is an admission by the ED that this reduction is not continuous. The inference is that perhaps the ED could spread the reduction over more than one fiscal year. If not, the inquiry becomes what is the benefit of the offer? The state does not receive these funds in a lump sum manner but is allocated those funds to be drawn down when spent. If the statute and regulation required lasting

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<sup>6</sup> The statutory language is “The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.” 20 USC § 612(a)(18)(B).

reductions, the ED would simply have informed the SCDE that the allocation would be reduced. No other interpretation is plausible regarding the ED's offer to mitigate.

### CONCLUSION

The SCDE respectfully requests that the OALJ grant a review of this petition under the provisions of 34 CFR 300.179, or in the alternative GEPA, 20 USC § 1234d, and reverse Assistant Secretary Posny's decision to grant South Carolina only a partial waiver for the 2009–10 state fiscal year and the determination that South Carolina's annual allocation will be reduced by \$36,202,909. The SCDE also seeks a declaration that a reduction, if ordered, be taken in one fiscal year only.

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August 1, 2011  
Columbia, South Carolina

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Brief and Record on Appeal was served upon the following via FedEx Priority Overnight Service:

Office of Hearings and Appeals (2 copies)  
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The Honorable Arne Duncan (1 copy)  
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This is the 1<sup>st</sup> day of August, 2011.



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