IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

CHARLES ARAUJO, *ET AL.* **PLAINTIFFS**

V. **CAUSE NO. 25CH1:16-cv-001008**

GOVERNOR PHIL BRYANT, *ET AL.* **DEFENDANTS**

PLAINTIFFS' RESPONSE IN OPPOSITION TO
MISS. JUSTICE INSTITUTE'S MOTION FOR SUMMARY JUDGMENT

> *"[F]reedom of choice is the only way to save quality public education. Freedom of choice – what could be more American? Or more democratic?"*
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> *Rep. Charles H. Griffin, in opposition to the U.S. Supreme Court's order in Alexander v. Holmes County Board of Education that public schools desegregate "at once" (Oct. 29, 1969)*

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The Mississippi Justice Institute ("the Institute") argues that charter schools are a mechanism of "school choice," and that "school choice" is good for Mississippi. But the CSA is not Mississippi's first experiment with dual school systems. Contrary to the Institute's assertions, the "school choice" movement was not invented in Mississippi in 2013. It came to our state more than 50 years ago as a way to avoid desegregation. At that time, it was called "freedom of choice." Under Mississippi's "freedom of choice" plans, school districts purported to integrate their schools by allowing students to attend any school in the district. In reality, though, Mississippi continued to maintain its system of dual public schools.[1]

[1] Charles C. Bolton, *The Hardest Deal of All: The Battle Over School Integration in Mississippi, 1870-1980* (University Press 2005) at 119-120.

long as that school is attended by students living within the geographic boundaries of the tax-levying school district.[3] However, the Institute offers no legal authority to support its position, and indeed *Tucker* provides no basis for such an interpretation. At no point did the *Tucker* Court discuss geographic boundaries of school districts. Instead, *Tucker* focused on school districts in their capacities as taxing entities. *Tucker* made clear that *ad valorem* revenue can only maintain the schools under the levying school district's control.

Therefore, the Institute's argument fails for two reasons. First, the Institute's reading of *Tucker* defies the decision's central holding. Second, even if *Tucker* could be interpreted to mean that *ad valorem* revenue simply cannot leave the school district, the

County's school districts.[5] A group of plaintiffs challenged the law's constitutionality. In the *Tucker* decision's opening paragraph, the Supreme Court agreed that "the contested statute violates the constitutional mandate that a school district's taxes be used to maintain 'its schools.'"[6]

The *Tucker* Court explained that Section 206 defines the limits of a levying school district's taxing power. Section 206 "is *the* enabling authority for a school district's ad valorem taxation power in this state."[7] Without Section 206, a school district's power to levy *ad valorem* taxes would not exist; with Section 206 come the limits it imposes on that power. And the *Tucker* Court defined those limits unambiguously:

> The plain language of Section 206 grants [the Pascagoula School District] the authority to levy an ad valorem tax and mandates that the revenue collected be used to maintain only its schools. Conversely, no such authority is given for the PSD to levy an ad valorem tax to maintain schools outside its district.[8]

More to the point, the *Tucker* Court explained that Section 206 vests control over *ad valorem* revenue solely with the levying school district: "The Legislature has no authority to mandate how the funds are distributed, as Section 206 clearly states that the purpose of the tax is to maintain the levying school district's schools."[9]

At no point in *Tucker* did the Court describe school districts as geographic areas. The word "geographic" does not even appear in the opinion. Instead, the Court described school districts as tax-levying authorities, and it placed firm limits on that taxing power. Contrary to the Institute's suggestions, those limits are not flexible. They are rigid, and they are singular: "*the purpose of the tax is to maintain the levying school*

[5] *Tucker*, 91 So. 3d at 600-01.
[6] *Id.* at 600.
[7] *Id.* at 604.
[8] *Id.*
[9] *Id.* at 605.

Legislature to dictate how school districts spent their *ad valorem* revenue, and "Section 206 would be rendered a complete nullity."[13]

The Supreme Court rejected that outcome and applied "[t]he plain language of Section 206."[14] Under that plain language, *ad valorem* revenue must be used only by the school district that levied the tax. The Legislature has no power to order levying school districts how to spend their *ad valorem* revenue. Here, the levying school district is JPS, and charter schools are not "the levying school district's schools." Requiring JPS to redirect its *ad valorem* revenue to charter schools violates Section 206.

The Institute ignores *Tucker*'s reasoning and its central holding. Instead, the

agency, which is another name for a local school district.[17] Therefore, under Section 206, JPS' ad valorem tax revenue may not be distributed to charter schools.

II. Section 208 of the Mississippi Constitution Forbids Sending State School Funds to Schools Outside the Dual Supervision of the State Superintendent and a Local District Superintendent.

Article VIII of the Mississippi Constitution requires the establishment of a system of free public schools and provides guidelines for those schools' funding and governance. Chief among those guidelines is Section 208, which forbids providing state school funds to any school outside the system contemplated by the Constitution.[18]

Through the years, some provisions of Article VIII have been revised from time to time. But for nearly 140 years, the fundamental requirements for schools within that system have been clear: they must be "under the general supervision of the State superintendent and the local supervision of the [district] superintendent, are free from all sectarian religious control, and ever open to all children within the ages of five and twenty-one years."[19]

Charter schools lack this mandatory supervision. They are not overseen by the state superintendent, by the State Board of Education, by the Mississippi Department of Education,[20] or by any local district superintendent.[21] Nevertheless, the CSA's "state

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charter school may not be considered a school within that district under the purview of the school district's school board.").

[17] Miss. Code § 37-28-39; *see also* Miss. Code § 37-135-31 (defining "local education agency" as a public authority legally constituted by the state as an administrative agency to provide control of and direction for Kindergarten through 12th grade public educational institutions).

[18] Miss. Const. art. VIII, § 208 ("No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.").

[19] *Otken v. Lamkin*, 56 Miss. 758, 764 (1879).

[20] Miss. Code Ann. § 37-28-45(5) ("A charter school is not subject to any rule, regulation, policy or procedure adopted by the State Board of Education or the State Department of Education unless otherwise required by the authorizer or in the charter contract.").

[21] Miss. Code Ann. § 37-28-45(3) ("Although a charter school is geographically located within the boundaries of a particular school district and enrolls students who reside within the school district, the

funding stream" requires the Mississippi Department of Education to send state money to charter schools from the Mississippi Adequate Education Program. Sending state school funds to schools that are not under the general supervision of the State superintendent and the local superintendent violates Section 208.

Despite this longstanding restriction on spending state school funds, the Institute argues that changes to two other constitutional provisions have amended Section 208 by implication. The Institute is wrong for two reasons. First, the 1984 amendments to Section 202 and 203 strengthened the dual-supervision requirement of Section 208. Second, Section 204 is irrelevant to the dual-supervision requirement of Section 208.

A. The 1984 Amendments to Section 202 and Section 203 Only Strengthened the Dual-Supervision Requirement in Section 208.

The Institute correctly points out that Section 202 of the Mississippi Constitution changed in 1984. But the Institute's telling of the story is incomplete.

When the Constitution of 1890 was enacted, Section 202 broadly charged the state superintendent of education with "the general supervision of the common schools, and of the educational interests of the State." In contrast, Section 203 envisioned the Board of Education as a weaker entity: only three members (one of whom was the state superintendent), and charged with "the management and investment of the school funds, according to law, and for the performance of such other duties as may be

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charter school may not be considered a school within that district under the purview of the school district's school board. The rules, regulations, policies and procedures established by the school board for the noncharter public schools that are in the school district in which the charter school is geographically located do not apply to the charter school unless otherwise required under the charter contract or any contract entered into between the charter school governing board and the local school board.").

prescribed."[22] The Board could transact no business without the state superintendent's presence.[23]

Beginning in 1984, the responsibilities became more evenly divided. Section 202 and Section 203 both were amended, with Section 202 dropping the "general supervision" clause and requiring the state superintendent to "administer the [Department of Education] in accordance with the policies established by the State Board of Education."

In turn, the 1984 changes added far more detailed responsibilities for the State Board of Education: Section 203 still required the Board to "manage and invest school funds according to law," but it also became responsible for "formulat[ing] policies according to law for implementation by the State Department of Education, and perform[ing] such other duties as prescribed by law."[24]

The Mississippi Supreme Court has not considered the effects of these changes on the dual-supervision requirement. But clearly, the Court did not do away with the state-level supervision requirement at the heart of its decision in *Otken v. Lamkin*[25] and *State Teachers' College v. Morris*.[26] At most, these amendments simply distributed state-level supervision to both the state superintendent and the State Board of Education.

In other words, if the 1984 amendments brought any change at all to the rule of *Otken* and *Morris*, it added an additional layer of supervision necessary to be a "free school:" supervision by a local district superintendent, the state superintendent, *and* the State Board of Education.

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[22] Miss. Const. art. VIII, § 203 (1890).
[23] *Id.* ("The superintendent and one other of said board shall constitute a quorum.").
[24] Miss. Const. art. VIII, § 203.
[25] *Otken v. Lamkin*, 56 Miss. 758 (1879).
[26] *State Teachers' College v. Morris*, 144 So. 374, 376 (Miss. 1932).

Of course, the CSA allows none of these authorities to oversee charter schools. The CSA forbids the local district superintendent from overseeing charter schools.[27] It also exempts charter schools from the oversight of the Department of Education and the State Board of Education.[28]

Any one of these failings would render the CSA's funding statute unconstitutional under Section 208. Together, they leave absolutely no doubt that charter schools are outside the dual supervision required by the Mississippi Supreme Court for nearly 140 years.

B. Section 204 is Irrelevant to the Dual-Supervision Requirement of Section 208.

The Institute also argues that Section 204 of the Mississippi Constitution invalidates the dual-supervision requirement emphasized by the Supreme Court in *Otken* and *Morris*.[29]

Section 204 of the Mississippi Constitution provides for "a superintendent of public education in each county."[30] However, Section 204 also empowers the Legislature to "abolish said office." The Institute seizes on this component and argues that, because Section 204 allows the Legislature to abolish the office of county superintendent, the dual-supervision requirement in *Otken* and *Morris* must be invalid.

The Institute is wrong for an obvious reason: Section 204 has never been amended. It is an original provision of the Constitution of 1890. It existed in its current

[27] Miss. Code Ann. § 37-28-45(3).
[28] Miss. Code Ann. § 37-28-45(5).
[29] Institute Brief at 25 ("[T]he modern day Mississippi Constitution states that the Legislature 'may otherwise provide for the discharge of the duties of county superintendent or abolish said office.'").
[30] Miss. Const. art. VIII, § 204 ("There shall be a superintendent of public education in each county, who shall be appointed by the board of education by and with the advice and consent of the senate, whose term of office shall be four years, and whose qualifications, compensation, and duties, shall be prescribed by law: Provided, That the legislature shall have power to make the office of county school superintendent of the several counties elective, or may otherwise provide for the discharge of the duties of county superintendent, or abolish said office.").

form when the Supreme Court decided *Morris*. If the enactment of Section 204 had changed the dual-supervision requirement, then the *Morris*

Math and Science, the Mississippi School for the Arts, Agricultural High Schools, Alternative School Programs, Conservatorships, the Recovery School District, and transfer students.

The Institute is wrong. Mississippi's longstanding commitment to local and state oversight over public schools has never limited the Legislature's establishment of specialty schools, and it will not do so now.

A. The School for Math and Science and the School of the Arts are "State Owned and Supported Schools." *Morris* Explains that Funding These Schools is Constitutional.

Neither the Mississippi School for Math and Science nor the Mississippi School of the Arts is part of any local school district; therefore, neither is overseen by a district superintendent. Nevertheless, they may receive state funds without offending Section 208.[32]

The Supreme Court has explained that, despite Section 208, the Legislature may establish "state owned and supported schools" that (1.) are individually contemplated by either the Constitution or statute, (2.) are overseen exclusively at the state level of government, and (3.) receive no *ad valorem* tax revenue. Such schools intentionally exist outside the system of "free schools" contemplated by Section 208 and, therefore, are not subject to Section 208's limitations.

This recognition appears most clearly in *State Teachers' College v. Morris*.[33] In that case, a father enrolled his two daughters in a teacher demonstration and practice school operated by the State Teachers' College. The practice school was established and overseen by the college's administration pursuant to a statute that allowed the state's

[32] To be clear, Section 206 would prohibit either from receiving *ad valorem* tax revenue. And indeed, *ad valorem* tax revenue is not allocated to the Mississippi School for Math and Science or to the Mississippi School for the Arts.
[33] *State Teachers' College v. Morris*

colleges and universities to open such schools.[34] When the City of Hattiesburg declined to pay the girls' tuition, the school billed the father. He then filed suit under the theory that any school receiving state money must be conducted as a "free school."[35]

On appeal, the Mississippi Supreme Court rejected that theory. The Court explained that Section 201 of the Constitution required establishment of a system of public schools, but it did not preclude the intentional establishment of schools outside that system.[36] For example, the Court pointed to the Legislature's creation of colleges and universities, which charged tuition and were not "free schools."[37] On that basis, the Court concluded that the Constitution's drafters "did not have state owned and supported schools, including the State's University and colleges, in mind, and that it was no part of its purpose to interfere with the Legislature's power over them."[38]

Notably, the *Morris* Court did not hold that colleges and universities were the only schools outside the scope of Section 208. Instead, the Court explained that the group of schools outside the coverage of Section 208 "*includ[ed]* the State's University and colleges."[39] Clearly, the *Morris* Court envisioned that some K-12 schools – such as

[34] *See id*. at 375 ("A part of [State Teachers' College's] activities include the operation of a teachers' demonstration and practice school established by it under the provisions of section 7241-7246, Code 1930."); Miss. Code of 1930 §7241 ("The right and authorit0 isn at e7peraue 1 Teerecgngulaeat e7per TD-.e.0]TJ5(ls.)]s

the practice and demonstration school – might also fall outside the scope of Section 208.

The practice school in *Morris* had several characteristics that intentionally removed it from the system of free schools covered by Section 208. First, the school was contemplated individually by statute.[40] Second, the school was overseen by officials at the state level of government – specifically, the State Teachers' College administration.[41] Third, the school was not entitled to *ad valorem* tax revenue.[42]

Similarly, the Mississippi School for Math and Science and the Mississippi School for the Arts are (1) individually contemplated by statute;[43] (2) overseen exclusively by the State Board of Education;[44] and (3) receive no *ad valorem* tax revenue.[45] Like the practice school at issue in *Morris*, the Mississippi School for Math and Science and the Mississippi School for the Arts were intentionally created to be outside the existing system of free public schools and are governed and funded accordingly. Thus, these schools do not contradict Section 208.

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[40] Miss. Code of 1930 §7241 (authority to establish practice schools granted only to individual institutions of higher learning).

[41] *Id.* ("The right and authority is hereby recognized and conferred upon the respective administrative authorities of the major state institutions of learning in Mississippi to operate, maintain and conduct

Charter schools satisfy none of the three characteristics of the "state owned and supported schools" in *Morris*. They are not individually contemplated by statute; they are overseen by private organizations instead of state government officials; and they receive *ad valorem* revenue. Unlike the Mississippi School of Math and Science and the Mississippi School of the Arts, charter schools are *not* overseen by the State Board of Education.[46] Further, charter schools are funded, in part, by the diversion of *ad valorem* tax receipts from the school district within which they are geographically located.[47] Charter schools do not fit *Morris*' "state owned and supported schools" exception to Section 208.

As with the practice school in *Morris*, state-owned and supported schools such as the Mississippi School for Math and Science are eligible for state funding. Applying Section 208 to the CSA will have no effect on the School for the Arts or the School for Math and Science.

B. The Statutes that Fund Agriculture Schools and Alternative Schools are Not Facially Unconstitutional. Unlike the CSA, These Statutes Do Not Require the Expenditure of *Ad Valorem* Revenue.

Unlike the CSA and the statute at issue in *Tucker*, the statutes calling for local funds to follow students attending agriculture schools and alternative schools do not require diversion of *ad valorem* taxes. [48] For out-of-county students attending

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[46] Miss. Code § 37-28-45(5) ("A charter school is not subject to any rule, regulation, policy or procedure adopted by the State Board of Education or the State Department of Education unless otherwise required by the authorizer or in the charter contract.").
[47] Miss. Code § 37-28-55(2).
[48] *See* MISS. CODE. ANN. § 37-27-61 (emphasis added) ("The county superintendent of education of a county which does not alone or in conjunction with another county maintain an agricultural high school or an agricultural high school-junior college, may provide, with the approval of the county board of education and the board of supervisors, for the attendance of pupils residing in the county of which he is superintendent of education, at an agricultural high school or an agricultural high school-junior college

agricultural high schools, county school funds are used to pay for the child's education. For out-of-district students attending alternative schools, funds made available to the district for alternative schools or local district maintenance funds may be used to pay for the child's education. Because local school districts are not required to use *ad valorem* funds to pay for out-of-district students attending an alternative school located in the district, this statute is not facially unconstitutional.

C. In a Conservatorship, the State Does Not Eliminate a District's Local Oversight. It Simply Replaces the Officials Performing that Oversight.

The Institute also argues that reaffirming the dual-supervision requirement would make school conservatorships impossible. That is incorrect.

A conservatorship is, by definition, a temporary remedy to address a "state of emergency in a school district."[49] When the State "takes over" a failing school district and places it under conservatorship, the conservator becomes "responsible for the administration, management and operation of the school district."[50]

Charter schools, in contrast, are not under the oversight of the local superintendent or the state board at any time, even in a state of emergency. Unlike a local school board or a conservator, the Charter Authorizer Board does not attend all meetings of Midtown Charter's board and administrative staff; supervise the day-to-day activities of Midtown Charter's staff; or appoint a parent advisory committee. The Authorizer Board does not approve Midtown Charter's checks, ratify its employment contracts, or approve its financial obligations. Moreover, unlike a conservatorship, the Authorizer Board is not a temporary remedy during a state of emergency.

In sum, a conservatorship does not eliminate local oversight over a district during a state of emergency; it merely replaces the officials responsible for performing that oversight. Since local oversight remains in place, a conservatorship does not change the fact that the district's schools are correctly characterized as "free schools" pursuant to

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CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that, simultaneously with its filing, a copy of the foregoing Response was served on all counsel of record via the Court's MEC electronic filing system.

SO CERTIFIED this Twenty-Seventh day of February 2017.

/s/ *Will Bardwell*
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