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EDUCATION LAW ABSTRACT: A SURVEY OF PROMINENT ISSUES IN MISSISSIPPI'S PUBLIC SCHOOLS

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The Mississippi Constitution requires the Mississippi Legislature to "provide for the establishment, maintenance and support of free public schools."[1] Pursuant to this mandate, all Mississippi children are guaranteed the right to an education.

In order to protect this most vital right, state law not only provides the mechanisms by which public school districts are created, organized and maintained, but also addresses individual rights and responsibilities of public school students and employees. Additionally, the United States Constitution and federal statutory law provide guarantees of personal rights which must be protected and requirements of educational accountability which must be met in the administration of the public school system. It is within the framework of these ever-evolving laws that public education functions in Mississippi.

Mississippi's public school teachers, administrators, boards, and attorneys share a continuing concern with a variety of legal issues which affect the day-to-day operation of the schools as well as the ability to provide a safe, productive learning environment. This article will provide an overview of the basic operational provisions and synopses of some of the most significant issues facing Mississippi school districts today, as outlined below:[2]

I. GENERAL PROVISIONS
   - A. *Compulsory Attendance*
   - B. *Student Assignment and Transfer*
   - C. *Alternative Schools*
   - D. *Immunity*

II. STUDENTS' RIGHTS AND RESPONSIBILITIES
   - A. *Due Process*
   - B. *On-Campus Searches*
   - C. *Corporal Punishment*

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1. MISS. CONST. art. VIII, § 201 (1890).

2. This article will not address a number of issues which are equally as important to the proper functioning of the state's public schools, including, but not limited to, the state laws concerning open meetings, taxation, bonds and obligations, funding, budgets, purchasing, contracting, construction, sixteenth section lands, special education, early education programs, transportation, textbooks, the federal laws concerning desegregation, the Voting Rights Act, Title IX, the Americans with Disabilities Act, § 1983 and § 1981 actions, equal employment opportunity matters and special education.

I. GENERAL PROVISIONS

Mississippi public school districts are political subdivisions of the state.[3] Each district is governed by a local school board consisting of five trustees, each of whom must be both residents and qualified electors of the district.[4] Depending on the type of district, board members selected for five-year terms are either appointed by the governing body of the municipality or county, elected by the voters of the county or selected as otherwise provided by law.[5] Upon selection to a board position and each year thereafter, each board member is required to complete a course of training and continuing education.[6]

The school board operates its district pursuant to broad statutory powers and duties, all necessary to perform the functions essential to the educational programs mandated by the state.[7] The school board can take official action only by the action of a majority of its members; thus, the individual board members hold no authority over the schools.[8]

Each district is managed by a superintendent, who is either appointed by the school board or elected as provided by law.[9] While the superintendent is bound to implement the decisions of the school board, he is granted broad statutory powers and duties with which to administer the daily operation of the district's schools.[10]

A. Compulsory Attendance

The Mississippi Compulsory School Attendance Law[11] requires every child who is six years old on or before September 1 or who has not reached age seventeen on or before September 1 to be enrolled in a public or legitimate private

3. MISS. CODE ANN. § 37-6-5 (1990).
4. MISS. CODE ANN. § 37-6-7 (1990).
5. MISS. CODE ANN. §§ 37-7-203 to -229 (1990).
6. MISS. CODE ANN. § 37-7-306 (Supp. 1993).
7. MISS. CODE ANN. § 37-7-301 (1990).
8. MISS. CODE ANN. § 37-6-9 (1990).
9. MISS. CODE ANN. § 37-9-13 (1990).
10. MISS. CODE ANN. § 37-9-14 (Supp. 1993).
11. MISS. CODE ANN. §§ 37-13-91 to -92 (Supp. 1993).

school.[12] The only three exceptions to the attendance requirement exist when a child is (1) physically, mentally or emotionally incapable of attending school; (2) enrolled in and pursuing a special, remedial or disability-related course of education; or (3) being educated in a legitimate home instruction program.[13]

When a compulsory-school-age child has not been enrolled within fifteen days of the first day of the school year or has accumulated five unlawful absences, the superintendent is responsible for notifying the school attendance officer at the local youth or family court.[14] An "unlawful" absence occurs when a valid excuse is not presented for temporary nonattendance.[15] The law provides nine valid excuses for student absences: authorized school activities, illness or injury, isolation ordered by a health official, death or serious illness of an immediate family member, medical or dental appointments, court orders or actions, religious observances, participation in valid educational opportunities, and other conditions which justify non-attendance.[16]

The school attendance officer is responsible for working with the schools and the youth or family court in locating and identifying all compulsory-school-age children who are not attending schools.[17] The school attendance officer is also charged with investigative and counseling duties.[18] If he is unable to secure enrollment or attendance, the school attendance officer must file a petition with the youth court and a hearing in the matter must be expedited.[19]

B. Student Assignment and Transfer

A student must enroll and attend school in the district of his residence unless he is lawfully transferred elsewhere.[20] For purposes of establishing residency, a district may not recognize a legal guardianship formed for the purpose of school attendance.[21]

The law provides three exceptions to this general residency requirement. First, the child of a certificated non-resident employee may attend school in the district of his parent's employment.[22] The employer school board must consent to such a transfer.[23] A district may expand this exception to permit the transfer of children of non-certificated non-resident employees as well.[24] However, the employer district cannot charge tuition to students it accepts under these circumstances[25] and must

12. MISS. CODE ANN. § 37-13-91(2)(f), (3) (Supp. 1993).
13. *Id.* § 37-13-91(3) (Supp. 1993).
14. *Id.*
15. *Id.* § 37-13-91(4).
16. *Id.* § 37-13-91(4)(a)-(i).
17. *Id.* § 37-13-91(7) (Supp. 1993).
18. *Id.*
19. *Id.* Such action must be taken pursuant to MISS. CODE ANN. § 43-21-451 (1993).
20. MISS. CODE ANN. § 37-15-29 (Supp. 1993).
21. MISS. CODE ANN. § 37-15-31(1)(d) (Supp. 1993).
22. MISS. CODE ANN. § 37-15-29(2) (Supp. 1993).
23. MISS. CODE ANN. § 37-15-31(2)(a) (Supp. 1993).
24. *Id.* § 37-15-31(2)(b).
25. *Id.* § 37-15-31(2)(e).

notify the transferee district of its acceptance of such transfers.[26] In both cases, the parents have the responsibility for transporting the student absent an agreement otherwise.[27]

Second, a student who must travel more than thirty miles by bus from home to the school in his district of residence may transfer to an adjacent district if his residence is located on a shorter bus route to a school in the adjacent district.[28] Both the sending and receiving boards must consent to such transfer.[29] If the sending and receiving districts fail to agree on which will provide transportation, the parent will be responsible for transporting the student to the receiving school.[30]

Finally, a third exception was added to the transfer rule in 1992.[31] A receiving district must continue to accept students who were lawfully transferred prior to July 1, 1992, if the students choose to remain in the district.[32] A district is also required to consent to the transfer of siblings of such lawfully transferred students.[33]

In circumstances where none of the three exceptions apply, a student may still obtain a legal transfer from the district of his residence to another by the mutual consent of the boards of both the sending and receiving districts.[34] The boards must act on a student's transfer petition not later than the next regular meeting following receipt of the request, and a failure to so act constitutes a rejection of the transfer request.[35] The boards may enter into an agreement regarding the funding of transferred students and a receiving district may require transferred students to pay tuition.[36]

Once a student is enrolled, the district has the authority to assign the student to the appropriate school and classroom.[37] Districts are specifically prohibited from assigning a student to classrooms or schools where his presence due to age, development or personal habits would adversely affect the academic development of other students.[38]

C. Alternative Schools

Beginning with the 1993-94 school year, school boards are required to create and operate alternative school programs for certain classes of compulsory-school-age children.[39] As part of the compulsory school law, these special alternative pro-

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26. *Id.* § 37-15-31(2)(c).
27. *Id.* § 37-15-31(2)(d).
28. MISS. CODE ANN. § 37-15-29(3) (Supp. 1993).
29. MISS. CODE ANN. § 37-15-31(3) (Supp. 1993).
30. *Id.*
31. MISS. CODE ANN. § 37-15-29(4) (Supp. 1993).
32. *Id.*
33. *Id.*
34. MISS. CODE ANN. § 37-15-31(1) (Supp. 1993).
35. *Id.* § 37-15-31(1)(c).
36. MISS. CODE ANN. § 37-19-27 (Supp. 1993).
37. MISS. CODE ANN. § 37-11-1 (1990).
38. *Id.*
39. MISS. CODE ANN. § 37-13-92(2) (Supp. 1993).

grams are intended to keep three specific categories of students in the classroom: (1) students referred by a chancellor or youth court judge, including nonviolent juvenile offenders confined in a youth court facility; (2) students who have dropped out, been suspended or expelled, or committed disciplinary infractions which will result in expulsion; and (3) students referred by a parent, legal guardian, or custodian due to discipline problems.[40]

Adjacent districts are permitted to join together in a cooperative effort to provide alternative programs.[41] The programs must be accredited through the State Department of Education.[42]

D. Immunity[43]

In the 1982 decision of *Pruett v. City of Rosedale*,[44] the Mississippi Supreme Court abolished judicially-created sovereign immunity in tort suits for injuries caused by the state and its political subdivisions; however, it did so prospectively only, deferring the details of abolition to the Legislature.[45] In 1984, the Mississippi Legislature responded to *Pruett* by enacting the Sovereign Immunity Act of 1984.[46] Each year thereafter, the Legislature extended the effective date of the Act by one year, thus providing the State and its political subdivisions with continuous protection from suit under the doctrine of sovereign immunity.[47] In 1992, the Legislature substantively revised the Act but continued its prospective effect by limiting it to claims arising on or after October 1, 1993.[48]

The 1992 revision of the Act continued to provide that claims arising prior to its effective date were "governed by the case law governing sovereign immunity as it existed immediately prior to the decision in *Pruett* . . . and by the statutory law [relevant to those claims]."[49] On August 31, 1992, the Mississippi Supreme Court issued *Presley v. Mississippi Highway Commission*,[50] which held this particular language to be unconstitutional.[51] However, the court determined that *Presley* should be applied only from the date of its decision.[52] In so finding, the court effectively abolished sovereign immunity for the period between the issuance of the *Presley* decision and the effective date of the Act. The *Presley* decision left school districts

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40. *Id.*

41. *Id.* § 37-13-92(4).

42. *Id.* § 37-13-92(3).

43. This discussion addresses only sovereign and qualified immunity in tort actions under state law. Determinations of sovereign immunity under the Eleventh Amendment of the United States Constitution and qualified immunity in federal cases are based on standards separate and apart from those discussed here.

44. 421 So. 2d 1046 (Miss. 1982).

45. *Id.* at 1052.

46. MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1993) (The Act is now referred to as the "Tort Claims Act.").

47. *See* Richardson v. Rankin County Sch. Dist., 540 So. 2d 5, 8 (Miss. 1989).

48. MISS. CODE ANN. § 11-46-6 (Supp. 1993).

49. *Id.*

50. 608 So. 2d 1288 (Miss. 1992).

51. *Id.* at 1296. The *Presley* court found that MISS. CODE ANN. § 11-46-6 was unconstitutional on the grounds that it violated the separation of powers clause of Article I Section 1 and Article VI Section 144 and the enactment by reference clause of Article IV Section 61 of the Mississippi Constitution. *Id.* at 1295-97.

52. *Id.* at 1301.

and other state and local government agencies struggling to define the ramifications of the court's sudden removal of immunity and to protect themselves from liability.

Less than three weeks following *Presley*, a special session of the Legislature was called to deal with the issue of sovereign immunity. The Legislature repealed the offensive statute[53] and amended the Act so that absolute sovereign immunity was reinstated until the Act's effective date.[54] Thus, for the period following *Presley* and the subsequent legislative actions, school districts remained in essentially the same position: pre-*Pruett* case law was to be applied to claims arising prior to October 1, 1993, and the Act was to apply to claims arising thereafter.

However, in *Churchill v. Pearl River Basin Development District*,[55] the Mississippi Supreme Court continued its attack on sovereign immunity, leaving districts again uncertain as to its vulnerability to suit. *Churchill* leveled three more blows to immunity. First, the court expressly overruled a long line of prior decisions by finding statutory authorization to purchase insurance to be an implicit waiver of immunity to the limits of the insurance coverage.[56] Second, the court held that sovereign immunity had no application to claims based on the existence of an implied contract.[57] Finally, the court announced that the portion of the *Presley* decision which made its application prospective only was not binding.[58] Thus, *Churchill* left school districts vulnerable to lawsuits in all instances covered by insurance and in cases where an implied contract argument can be made. Furthermore, *Churchill* left questions concerning the applicability of *Presley*.

In direct response to *Churchill*, the Legislature amended the law to expressly include implied contracts.[59] Therefore, at the time of this writing, public school districts may continue to claim sovereign immunity, and its employees may continue to claim qualified immunity for all actions arising prior to October 1, 1993, the effective date of the Act.[60]

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53. MISS. CODE ANN. § 11-46-6 (Supp. 1993).

54. MISS. CODE ANN. § 11-46-3(1) (Supp. 1993).

55. 619 So. 2d 900 (Miss. 1993).

56. *Id.* at 905.

57. *Id.* at 903. The *Churchill* case involved a claim for personal injuries suffered when the plaintiff dove into shallow water at a state-owned/county-operated water park. *Id.* at 901-02. Because the county charged an admission fee, the court held that it had entered into an implied contract with the plaintiff, a part of which was a promise that the premises were safe for the enjoyment of water sports. *Id.* at 903. The court relied on two Alabama Supreme Court cases, one of which dealt with a claim against a school district arising from the collapse of a bleacher at a football game. *Id.* at 902.

58. *Id.* at 904. In *Presley*, only four justices joined that portion of the decision which held the abolition of immunity to be effective prospectively only. Presley v. Mississippi Highway Comm'n, 608 So. 2d 1288, 1301 (Miss. 1992). The *Churchill* court found that because a majority of the court had not joined in that portion of the opinion, then it has no precedential effect. *Churchill*, 619 So. 2d at 904.

59. MISS. CODE ANN. § 11-46-3(1) (Supp. 1993).

60. MISS. CODE ANN. § 11-46-1 (Supp. 1993).

1. Pre-*Pruett* Law

Historically, school districts have enjoyed continuous protection from civil suits under the doctrine of sovereign immunity.[61] This absolute immunity from tort actions could be pierced only if liability is authorized by statute, either expressly or by implication.[62] Because none of the specific powers and duties granted to school districts provided that districts could sue or be sued,[63] no express general authority to sue a district existed.

Until October 1, 1993, specific authority for tort suits against a school district existed for very particularized situations only and with express limits of liability.[64] First, a district's purchase of liability insurance on any vehicle operated by it resulted in an express waiver of immunity to the extent of the insurance.[65] Second, the purchase of workers' compensation liability insurance also subjected a district to a limited waiver of immunity.[66] Third, a district's purchase of general liability insurance resulted in a limited waiver of immunity for acts covered under such a policy.[67] Fourth, a district could be sued for personal injury or property damage incurred as a result of a bus accident.[68] Finally, a district could sue or be sued based on a breach of contract theory.[69]

No other express waivers of immunity existed prior to or were enacted after *Pruett*. The courts continued to follow pre-*Pruett* case law which found no implied waiver of immunity in the purchase of liability insurance.[70] In all other situations, school districts were consistently found to be absolutely immune from suits arising from both negligent and intentional torts.[71]

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61. *See* Richardson v. Rankin County Sch. Dist., 540 So. 2d 5, 8 (Miss. 1989).

62. French v. Pearl River Valley Water Supply Dist., 394 So. 2d 1385, 1387 (Miss. 1981); State Highway Comm'n v. Gulley, 145 So. 351, 354 (Miss. 1933); Ayres v. Board of Trustees, 98 So. 847, 850 (Miss. 1924).

63. *See* MISS. CODE ANN. § 37-7-301 (Supp. 1993). The statute which previously empowered districts included authority to do "'all things necessary to the successful operation of the school'"; however, the Mississippi Supreme Court found that even that broad grant of authority did not imply that a district could be sued. *Ayres*, 98 So. at 850. When compared with its more suggestive and broad predecessor, the specific language of the current statute presents a strong argument against a district being vulnerable to suit.

64. *See infra* notes 65-69 and accompanying text.

65. MISS. CODE ANN. § 37-7-304 (Supp. 1993).

66. MISS. CODE ANN. § 37-7-303(2) (Supp. 1993).

67. MISS. CODE ANN. § 37-7-319 (Supp. 1993).

68. MISS. CODE ANN. §§ 37-41-39, -41 (Supp. 1993). Claims resulting from bus accidents were paid from the Accident Contingent Fund and were limited to actual costs up to $1,000.00 for personal and property claims and, if a lawsuit is filed, to damages up to $10,000.00 per person and $50,000.00 per accident for personal injury. MISS. CODE ANN. § 37-41-41 (Supp. 1993). These limitations of liability have been found to be nonviolative of substantive due process, because they bear a rational relationship to the legitimate purpose of protecting state funds. Turrentine v. Brookhaven Sch. Dist., 794 F. Supp. 620 (S.D. Miss. 1993).

69. *See* Grenada Mun. Separate Sch. Dist. v. Jesco, Inc., 449 So. 2d 226 (Miss. 1984). *See also* Mississippi State Dep't of Welfare v. Howie, 449 So. 2d 772 (Miss. 1984); Cig Contractors, Inc. v. Mississippi State Bldg. Comm'n, 399 So. 2d 1352 (Miss. 1981).

70. Strait v. Pat Harrison Waterways Dist., 523 So. 2d 36 (Miss. 1988); Joseph v. Tennessee Partners, Inc., 501 So. 2d 371 (Miss. 1987) (following French v. Pearl River Valley Water Supply Dist., 394 So. 2d 1385 (Miss. 1981)).

71. *See, e.g.*, Boyd v. Gulfport Mun. Separate Sch. Dist., 821 F.2d 308 (5th Cir. 1987); McFadden v. State, 542 So. 2d 871 (Miss. 1989).

Pre-*Pruett* law also extended qualified immunity to public officials and employees in order to promote efficient and timely decision making without the officials having to fear personal liability for error.[72] Mississippi courts long recognized that the absolute protection of sovereign immunity was inapplicable "where a suit [was] against [a] governmental official individually and the state [was] not a party, nor would the relief demanded require the state to take any affirmative action."[73] Qualified immunity provided public school employees protection from civil liability for acts resulting from discretionary, but not ministerial, functions.[74]

In addition to qualified immunity, state statute continues to specifically provide school personnel, including bus drivers, with absolute immunity from criminal or civil liability as a result of maintaining student discipline except where excessive force or cruel and unusual punishment is used.[75] School employees are also given immunity from civil or criminal action for actions taken in compliance with their duty to report suspected child abuse.[76]

2. The Mississippi Tort Claims Act

The Mississippi Tort Claims Act continues to grant broad sovereign immunity for acts and omissions of governmental entities, whether governmental, proprietary, discretionary or ministerial.[77] This Act, however, waives the statutory immunity up to maximum limits of liability set on a sliding scale intended to limit the impact of this new general waiver of immunity.[78]

Under the Act, all governmental entities retain their immunity in several areas which are expressly excepted from the Act's waiver of immunity.[79] Entities and their employees who are acting in the course and scope of their employment continue to be immune from claims under several circumstances: taking or failing to take legislative, judicial or administrative action; exercising of discretion in providing or failing to provide resources or services; planning or designing construc-

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72. State v. Lewis, 498 So. 2d 321 (Miss. 1986).

73. Davis v. Little, 362 So. 2d 642 (Miss. 1978).

74. Poyner v. Gilmore, 158 So. 922, 923 (Miss. 1935). A discretionary function is one that requires personal judgment and discretion in its performance while a ministerial function is one that is imposed by law and requires no personal judgment in its performance. *Id.* at 923.

75. MISS. CODE ANN. § 37-11-57 (Supp. 1993).

76. MISS. CODE ANN. § 43-21-353 (1993). The Child Welfare Reporting Law requires any person, including school principals and teachers, who has reasonable cause to suspect that a child is neglected or abused, to make a oral report immediately and a written report as soon thereafter as possible to the Mississippi Department of Health and Human Services. *Id.* § 43-21-353(1)d. Where the knowledge of suspicion of such neglect or abuse is obtained in the performance of school-related services, the person with such information must notify the superintendent or his designated delegate, who is then responsible for making the report to the welfare department. *Id.* § 43-21-353(3). Reports made under this law are confidential except when the investigating court finds the testimony of the reporting person to be material to adjudication. *Id.*

77. MISS. CODE ANN. § 11-46-3 (Supp. 1993).

78. *Id.* The maximum limits of liability escalate every four years. For claims arising on or after October 1, 1993, and before October 1, 1997, districts may be liable for up to $50,000.00; on or after October 1, 1997, and before October 1, 2001, up to $250,000.00; on or after October 1, 2001, up to $500,000.00. MISS. CODE ANN. § 11-46-15 (Supp. 1993).

79. *Id.*

tion or improvements to public property; failing to warn of a dangerous condition obvious to one exercising due care; and adopting or failing to adopt regulations.[80]

All political subdivisions are required to purchase liability insurance or to set up self-insurance reserves sufficient to cover the maximum limits of liability set out by the Act.[81] Political subdivisions are authorized to pool their liabilities through insurance or self-insurance reserves.[82] School districts are permitted, but not required, to purchase insurance in excess of the statutory liability limits.[83] If excess insurance is purchased, immunity is waived to the extent of the policy amount.[84] Districts must obtain approval of their chosen form of insurance from the state's Tort Claims Board.[85]

The Act specifically states that a public school district employee who has acted in the course and scope of his authority can be sued in his official capacity only and cannot be held personally liable for damages resulting from such acts.[86] The school district must provide a defense for an employee who is sued,[87] and the district's duty to defend continues even after termination of the employment.[88] The only exceptions to this grant of employee immunity are in cases of intentional torts, such as defamation, fraud and criminal offenses, where the district remains shielded from liability.[89] Thus, under the Act, the rules of qualified immunity are no longer applicable.

A one-year statute of limitations is applicable to any tort action brought against a school district.[90] The Act also includes an exhaustion requirement, mandating that notice of a claim be given to the district at least ninety days prior to filing a lawsuit.[91] Such notice tolls the one-year period for ninety-five days.[92]

II. STUDENTS' RIGHTS AND RESPONSIBILITIES

The United States Constitution guarantees certain personal rights to all citizens.[93] Because of the special considerations inherent in the school setting, however, the United States Supreme Court has recognized the need for special limitations of these rights as applied to students.[94] School authorities have the duty

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80. MISS. CODE ANN. § 11-46-9 (Supp. 1993).

81. MISS. CODE ANN. § 11-46-17(3) (Supp. 1993). To cover the monetary awards against governmental entities other than political subdivisions, the Act establishes a "Tort Claims Fund" which is intended to serve as a self-insurance pool for those entities which choose to participate. MISS. CODE ANN. § 11-46-17 (Supp. 1993).

82. *Id.* § 11-46-17(5).

83. *Id.* § 11-46-17(4).

84. *Id.*

85. MISS. CODE ANN. § 11-46-19(l) (Supp. 1993).

86. MISS. CODE ANN. § 11-46-7(2) (Supp. 1993).

87. *Id.* § 11-46-7(4).

88. *Id.* § 11-46-7(6).

89. *Id.* § 11-46-7(2).

90. MISS. CODE ANN. § 11-46-11(3) (Supp. 1993).

91. *Id.* § 11-46-11(1), (2).

92. *Id.* § 11-46-11(3).

93. U.S. CONST. amends. I-VIII.

94. United States v. T.L.O., 469 U.S. 325, 340 (1985).

to maintain a safe and non-disruptive educational environment; therefore, it follows that they have the power to maintain order within their schools by demanding student compliance with rules created for that purpose.

Some of the most recurring legal problems concerning students' rights are those related to providing due process in disciplinary matters, conducting on-campus searches, utilizing corporal punishment, imposing academic or other disciplinary penalties, protecting First Amendment rights of religion and speech, and releasing student information. In these areas the courts have attempted to balance the constitutional rights of the students against the need of the schools to maintain discipline and order.

A. Due Process

The United States Supreme Court has explicitly held that the Fourteenth Amendment forbids the state to deprive a student of his right to an education without due process of law:

> The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safe guards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause.[95]

Due process mandates that students be provided with both substantive and procedural safeguards.[96] A student can challenge disciplinary penalties where either or both of these constitutional protections are not afforded him in a manner appropriate under the circumstances.[97]

1. Substantive Due Process

The provision of substantive due process in a student discipline case is traditionally guided by a "reasonableness" standard.[98] For a penalty to be reasonable, two elements must be present. First, the penalty must be rationally related to a valid educational objective, such as providing a safe learning environment.[99] Second, the severity of the penalty must be reasonable in relation to the student's conduct.[100] Basically, the determinative consideration of substantive due process is whether the punishment fits the violation.[101]

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95. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

96. *Id.*

97. Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455, 459 (Miss. 1986).

98. Mitchell v. Board of Trustees, 625 F.2d 660, 665 (5th Cir. 1980); Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 241 (Miss. 1985).

99. *Mitchell*, 625 F.2d at 665; *Byrd*, 477 So. 2d at 241.

100. *See* Fisher v. Burkburnett Indep. Sch. Dist., 419 F. Supp. 1200 (N.D. Tex. 1976).

101. *Id.* at 1205.

Generally, Mississippi public school district superintendents and principals have substantial power to discipline students,[102] including the power to suspend students from school "for good cause or for any reason for which the student may be suspended, dismissed, or expelled by the school board."[103] Each district has the responsibility to adopt and implement its own plan which uses discipline as necessary to meet the district's educational objectives.[104] The courts will not interfere with the district's exercise of discretion in disciplinary matters "so long as constitutional parameters are not transgressed."[105]

2. Procedural Due Process

Under state and federal law, a student has a right to be afforded certain procedures when subjected to possible loss of his right to an education.[106] Mississippi statutes conform to the constitutional guarantees by requiring districts to go through a process of notice and hearing in many areas, including student discipline.[107]

The Supreme Court has held that in disciplinary actions, such as suspending a student for misconduct, the minimum procedural due process requirements apply.[108] First, the student must receive prior notice of the type of conduct that will give rise to disciplinary action.[109] Mississippi law requires school districts to adopt, implement and distribute copies of its discipline plan and student code of conduct to all students, parents and school personnel.[110] The code of conduct must include "[s]pecific grounds for disciplinary action" and "[p]rocedures to be followed for acts requiring discipline . . . ."[111] These statutory requirements should

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102. MISS. CODE ANN. § 37-7-301 (Supp. 1993). *See Byrd*, 477 So. 2d at 239.

103. MISS. CODE ANN. § 37-9-71 (1990).

104. MISS. CODE ANN. §§ 37-9-69 to -70 (1990).

105. *Byrd*, 477 So. 2d at 241 (citing Shows v. Freeman, 230 So. 2d 63, 64 (Miss. 1969); McLeod v. State *ex rel.* Colmer, 122 So. 737, 738 (Miss. 1929)).

106. Fisher v. Burkburnett Indep. Sch. Dist., 419 F. Supp. 1200, 1204 (N.D. Tex. 1976).

107. MISS. CODE ANN. § 37-9-71 (1990).

108. Goss v. Lopez, 419 U.S. 565 (1975). The standards discussed in this section apply only to regular students. Mississippi's special education students must be afforded procedures in compliance with the Individuals with Disabilities Education Act and in accordance with the standards set forth in Mattie T. v. Holladay, 522 F. Supp. 72 (N.D. Miss. 1981).

109. *Goss*, 419 U.S. at 576-79.

110. MISS. CODE ANN. §§ 37-11-53, -55 (Supp. 1993).

111. MISS. CODE ANN. § 37-11-55 (Supp. 1993). The student code of conduct must also include "[a]n explanation of the responsibilities and rights of students with regard to attendance, respect for persons and property, knowledge and observation of the rules of conduct, the right to learn, free speech and student publications, assembly, privacy and participation in school programs and activities." MISS. CODE ANN. § 37-11-55(c). The discipline plans must also notify parents that they are financially responsible for their "minor child's destructive acts against school property . . ." and that they may be requested to appear at school for a conference regarding such acts subject to a misdemeanor criminal charge for refusal or willful failure to appear or pay damages. MISS. CODE ANN. § 37-11-53(2) (Supp. 1993). Districts may recover damages, not to exceed $20,000.00, from parents of students, ages six through seventeen, "who maliciously and willfully [] damage or destroy []" school property. *Id.* § 37-11-53(4). Parents are required to sign a statement verifying that they have received notice of the discipline policy. *Id.* § 37-11-53(1). Districts must have their discipline plans audited by the state department of education annually to insure compliance with state and federal law. *Id.*

assist in ensuring that this initial element of due process is met in every circumstance.

Second, the student who is to be disciplined must be given the opportunity to be heard prior to penalties being imposed.[112] In *Goss v. Lopez,*[113] the United States Supreme Court determined that minimum procedural safeguards are necessary for short term suspensions of ten days or less.[114] This minimum process is achieved by the prior notice plus an informal hearing which need not consist of anything more than the "give and take" between the student and administrator prior to the penalty being assessed.[115] Without giving specific rules, the *Goss* Court stated that a higher level of procedural due process may be necessary in cases of suspensions of more than ten days or of expulsions.[116] Based on that proclamation, districts generally consider removal from school for more than ten days to be "long term," requiring prior notice of the rules, an informal hearing with the administrator and the opportunity for a more formal hearing.[117]

As determined by local policy and practice, the superintendent or principal has the responsibility of informing the parents of a student who is so disciplined that they have the right to a due process hearing on the action.[118] The notice and hearing procedures afforded the student must be in compliance with federal guarantees of due process.[119] In Mississippi, districts have creatively utilized various hearing formats to afford more process in these long term removal cases.[120] A district's procedures must depend on the parties, the subject matter and the particular circumstances.[121] A district's procedure will generally be constitutionally sufficient unless the student suffers "substantial prejudice" as a result.[122]

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112. *See infra* note 108.

113. 419 U.S. 565 (1975).

114. *Id.* at 576.

115. Keough v. Tate County Bd. of Educ., 748 F.2d 1077, 1080 (5th Cir. 1984) (citing Goss v. Lopez, 419 U.S. 565, 584 (1975)); Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749, 751 (S.D. Miss. 1987), *aff'd,* 853 F.2d 924 (5th Cir. 1988) (citing *Goss,* 419 U.S. at 581-82).

116. *Goss,* 419 U.S. 584.

117. *See* Jones v. Pascagoula Mun. Separate Sch. Dist., 524 So. 2d 968, 973 (Miss. 1988) (finding that the amount of process due depends on the situation at hand). Although confrontation of witnesses is not a student's right, hearsay testimony is admissible in a student discipline matter and, written statements, therefore, should be available to the student. *Id.* The student should also be provided with a list of witnesses along with an explanation of the charges against him. *Id.* (citing *Keough,* 748 F.2d at 1083).

118. MISS. CODE ANN. § 37-9-71 (1990).

119. *Id.*

120. Some districts have successfully implemented plans which use discipline committees consisting of school personnel which serve as a hearing board in all long term discipline cases. In all cases the student must be afforded the right to appear before the school board for review. MISS. CODE ANN. § 37-9-71 (1990).

121. *Keough,* 748 F.2d at 1081 (citing Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701 (5th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975); Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970)).

122. Jones v. Pascagoula Mun. Separate Sch. Dist., 524 So. 2d 968, 972 (Miss. 1988) (citing *Keough,* 748 F.2d at 1083).

3. Academic Penalties

School districts have both the legal authority and responsibility to utilize whatever disciplinary measures are deemed appropriate.[123] In addition to removal from the classroom or some other penalty, academic penalties are frequently utilized for or are imposed as a result of discipline.[124] When a student's grades are affected by discipline, special legal problems can arise.

When academic sanctions are used only in response to academic performance, the courts will not interfere in the educator's evaluation.[125] However, when academic penalties are imposed as a disciplinary measure or as a result of disciplinary removal from the school, the courts will scrutinize such use.[126] Challenges can be leveled against academic penalties on the same substantive and procedural due process grounds as can be made with suspensions or expulsions.[127] Students can also challenge academic penalties by claiming that such imposition is an ultra vires act of the board, i.e., beyond the board's statutory authority.[128]

Mississippi school districts retain the discretion to set policies regarding how student grades will be affected by discipline-related absences.[129] To avoid a violation of substantive due process, a district should determine that there is a clear demonstration that reducing the student's grade due to such absences is reasonably related to a valid educational objective.[130] Whether the actual academic penalty is a reduced grade on make-up work or not being allowed to make-up missed work,[131] the penalty should reflect only the impact on the student's academic performance for the days actually missed due to truancy, suspension, expulsion or other absence.[132] A penalty may be upheld if the impact upon the student's overall grade is not substantial.[133]

Prior to imposing an academic penalty in conjunction with discipline, the school district should consider whether notice and hearing is afforded. While procedural due process is not required in the case of academic decisions alone,[134]

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123. *See* MISS. CODE ANN. §§ 37-9-69, -70 (1990).

124. *See* Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455 (Miss. 1986).

125. *See* Board of Curators v. Horowitz, 435 U.S. 78 (1978).

126. *See Wilkinson*, 500 So. 2d at 458 (student facing loss of credit by implication of suspension has property interest protected by due process). *See also* Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223 (E.D. Tex. 1980).

127. *Id.*

128. *See* Bruce Beezer, *Using Academic Grades to Discipline Students: A Legal Caution*, 21 EDUC. L. RPTR. 765 (1985).

129. *See* MISS. CODE ANN. §§ 37-9-69, -70 (1990).

130. *See* Katzman v. Cumberland, 479 A.2d 671 (Pa. Commw. Ct. 1984); Campbell v. Board of Educ., 475 A.2d 289 (Conn. 1984); Knight v. Board of Educ., 348 N.E.2d 299 (Ill. App. 3d 1976).

131. No Mississippi court has considered whether school districts must allow suspended or expelled students to make-up missed work. One Pennsylvania court has held that students must be given the opportunity to make-up work. *Katzman*, 479 A.2d at 674. However, other courts have held that the opportunity to make-up missed work with the exception of final exams is not required. *See* Donaldson v. Board of Educ., 424 N.E.2d 737 (Ill. App. 3d 1981).

132. *See Katzman*, 479 A.2d at 674-75; Fisher v. Burkburnett Indep. Sch. Dist., 419 F. Supp. 1200, 1205 (N.D. Tex. 1976).

133. Lee v. Macon County Bd. of Educ., 490 F.2d 458 (5th Cir. 1974).

134. Board of Curators v. Horowitz, 435 U.S. 78 (1978).

when the academic penalty is coupled with a suspension or expulsion, somewhat greater procedural safeguards may be triggered.[135] Thus, if a student is faced with losing grades as a result of disciplinary-related absences, the district would be wise to afford the same procedural protections for the academic penalty as for the suspension or expulsion.

Because Mississippi school boards are given broad authority in discipline matters, an ultra vires challenge to academic penalties would not appear to be well-founded. Where the districts are given such discretion to impose disciplinary measures in response to misbehavior, the courts have found utilization of academic penalties to be within that discretionary authority.[136]

B. On-Campus Searches

In 1984, the United States Supreme Court held that the Fourth Amendment prohibition against unreasonable searches and seizures applies in public schools.[137] The decision, however, confirmed a lessened standard for searches conducted by school personnel than the probable cause standard applicable to searches by law enforcement personnel.[138] In *New Jersey v. T.L.O.*, the Court stated that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[139]

To determine whether "reasonableness" existed, the Court set out a two-part test: (1) "'whether . . . the action was justified at its inception,'"[140] and (2) "whether the search as actually conducted was reasonably 'related in scope to the circumstances which justified the interference in the first place.'"[141] Once these elements are established, the school administrator does not need a search warrant in order to conduct a school-related search.[142]

To determine whether a search is justified at its inception, school officials can generally rely on the particular circumstances arousing their suspicion about the student to be searched.[143] Where there is "individualized suspicion" that a student has violated either the law or school rules, justification is easily established.[144] Thus, dragnet searches of large numbers of students, without evidence or suspicion of violations of each student searched, generally cannot be justified.

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135. Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 237-39 (E.D. Tex. 1980).

136. *See* Fisher v. Burkburnett Indep. Sch. Dist., 419 F. Supp. 1200 (N.D. Tex. 1976); Slocum v. Holton Bd. of Educ., 429 N.W.2d 607 (Mich. App. 1988); Campbell v. Board of Educ., 475 A.2d 289 (Conn. 1984); Knight v. Board of Educ., 348 N.E.2d 299 (Ill. App. Ct. 1976). On the other hand, courts have found ultra vires violations in states with more limited authorizing statutes. *See* Hamer v. Board of Educ., 383 N.E.2d 331 (Ind. 1978); Dorsey v. Bale, 521 S.W.2d 76 (Ky. 1975).

137. New Jersey v. T.L.O., 469 U.S. 325 (1985).

138. *Id.* at 340.

139. *Id.* at 341.

140. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

141. *Id.* (quoting *Terry*, 392 U.S. at 20).

142. *Id.* at 342.

143. *Id.* at 341-42.

144. *Id.* at 342.

The Mississippi Supreme Court has recognized the application of the *T.L.O.* "reasonableness" standard to locker searches.[145] In *S.C. v. State*, the court considered the search of a student's locker which was conducted after an informant reported that the student had offered to sell two handguns and admitted to having the guns on campus.[146] The court found that the informant gave the school officials reasonable grounds to search the locker.[147] Based on a Mississippi constitutional provision affording privacy[148] and on the *T.L.O.* Court's description of "high school 'reality,'"[149] the court held that a student possesses a legitimate interest to be "secure in [his] . . . possessions" and, thus, in his school locker.[150] The court followed the usual rule by holding that a student's privacy interest in his locker could be overridden by the reasonable need to enforce school rules against bringing contraband on campus.[151] The court went further to state that it would make an exception to the search warrant requirement because the involvement of weapons created an exigent circumstance.[152] This decision seems to imply that the Mississippi Supreme Court will consider school searches on a case by case basis, determining reasonableness from the school rules and the exigency of the circumstances.

School districts also retain authority to inspect students' automobiles which are used as transportation to school, whether they are located on or off school property.[153] The Fifth Circuit Court of Appeals has held that trained dogs may not be used to search students themselves absent individualized suspicion but that students' lockers and cars are fair game for sniffing dogs even where individualized suspicion has not yet been established.[154]

Absent exigent circumstances, strip searches are generally disapproved as being excessively intrusive.[155] Although neither the Fifth Circuit nor the Supreme Court has issued opinions specifically involving the constitutionality of student strip searches, the Supreme Court has refused to hear cases where appellate courts declare such searches, conducted under unexceptional circumstances, to be un-

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145. 583 So. 2d 188 (Miss. 1991).

146. *Id.* at 189. Two assistant principals obtained the student's locker number but found it locked. *Id.* The student voluntarily opened the lock and the principals found the guns inside a bag hanging in the locker. *Id.*

147. *Id.* at 191. The court stated that "[a]bsent information that a particular student informant may be untrustworthy, school officials may ordinarily accept at face value the information they supply." *Id.* at 192.

148. *Id.* (citing MISS. CONST. art. III, § 23 (1890)).

149. *S.C.*, 583 So. 2d at 191. The court relied on a discussion in *T.L.O.* which stated that a student should not have to waive all rights to privacy in certain personal items that he must bring in addition to school supplies. *Id.* (citing *T.L.O.*, 469 U.S. at 339).

150. *Id.* at 191-92.

151. *S.C.*, 583 So. 2d at 192.

152. *Id.*

153. *See* Coronado v. State, 806 S.W.2d 302 (Tex. App. 1991). *Compare S.C.*, 583 So. 2d at 192, where the court stated that a student's expectation of privacy in a school locker "is considerably less than he would have in the privacy of his home or even, perhaps, his automobile." *Id.*

154. Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); *see also* Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313 (5th Cir. 1989), *cert. denied*, 469 U.S. 935 (1990).

155. *See, e.g.*, Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

constitutional.[156] Thus, it appears that a district may safely limit strip searches to cases involving the possession of drugs, weapons or other such items which would pose an imminent and serious danger to the student or others.[157]

C. Corporal Punishment

In the landmark case of *Ingraham v. Wright*,[158] the Supreme Court held that the use of corporal punishment in the classroom does not violate the Eighth Amendment's prohibition of cruel and unusual punishment.[159] Further, the Court held that due process does not require notice and hearing prior to disciplining a student with corporal punishment.[160]

In accordance with *Ingraham*, the Fifth Circuit has consistently found that the use of reasonable corporal punishment does not violate the Constitution.[161] "Reasonable" corporal punishment has been identified as that which is not "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."[162] Where the punishment has been shown to be reasonable, the Fifth Circuit has continually refused to recognize federal claims which seek recovery for injuries resulting from disciplinary paddlings, "irrespective of the severity of the injuries or the sensitivity of the student[s]."[163] In every case, the court's refusal to recognize a cause of action is premised on two factors. First, the educator who administered the punishment was able to show a reasonable relationship between the student's offense and the discipline received.[164] Second, state law was found to have provided adequate civil and/or criminal remedies which the student might have sought against the educator individually.[165]

Mississippi law does not prohibit corporal punishment. However, pursuant to general authority to prescribe and enforce rules, a Mississippi school board may prohibit, limit or otherwise condition the use of corporal punishment within its district.[166] Where no local prohibition or limitation exists, Mississippi educators may legally use reasonable corporal punishment for purposes of discipline.

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156. *See* Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

157. The Sixth Circuit recently found a strip search to be justified from the inception where school officials first received a confidential student tip, obtained statements from the father concerning his daughter's drug use, and retrieved drugs in an initial search. Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991). *But see* Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (strip search not reasonable where conducted to find three dollars stolen, in view of lack of seriousness, exigency, or prevalence of problem and in consideration of age and children's history).

158. 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651 (1977).

159. *Id.* at 917.

160. *Id.*

161. *See, e.g.*, Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990), *cert. denied*, 498 U.S. 908 (1990); Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989); Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243 (5th Cir. 1984).

162. *Fee*, 900 F.2d at 808.

163. *Id. See also Cunningham*, 858 F.2d at 273; *Woodard*, 732 F.2d at 1244.

164. *Fee*, 900 F.2d at 809-10.

165. *Id.* at 810.

166. *See* MISS. CODE ANN. § 37-7-301 (Supp. 1993).

Mississippi law does provide students with criminal remedies for negligent and intentional infliction of bodily injury incurred as a result of disciplinary paddlings.[167] However, a state law expressly grants immunity from civil liability to teachers, instructional staff members, principals or their designees and bus drivers for actions taken to discipline students.[168] This protection is specifically limited to disciplinary actions which conform with state law and local policy which do not involve excessive force or cruel and unusual punishment.[169] As in other areas where qualified immunity applies, if the educator acts outside the scope and authority of his employment, he is highly subject to the loss of such immunity.[170] Therefore, the utilization of corporal punishment should be in complete compliance with the standard of reasonableness with any local board policy regarding discipline procedures and, of course, with both the professional and personal judgment of the educator.

D. Freedom of Religion

The First Amendment, as it relates to religion, contains both the establishment and free exercise clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[171] Both apply to public school districts.

1. The Establishment Clause

Mississippi law advances this constitutional prohibition by forbidding the teaching of any doctrinal, sectarian or denominational matters in its public schools.[172] The seminal decision of *Lemon v. Kurtzman*[173] held that the establishment clause may not be violated.[174] An exception is allowed, however, if a district implements a religion-related course or uses religion-related symbols so long as the district's purpose is secular in nature, a "principal or primary effect [of the activity] neither advances nor inhibits religion,"[175] and the activity does not foster excessive entanglements with religion.[176] If these requisites are met, the course does not violate the establishment clause.[177] The permissiveness of a district's actions under the establishment clause must be determined by the purpose, nature and result of the act.[178]

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167. *See* MISS. CODE ANN. § 97-3-7 (Supp. 1993) (simple and aggravated assault).
168. MISS. CODE ANN. § 37-11-57 (Supp. 1993).
169. *Id.*
170. *Id.*
171. U.S. CONST. amend. I.
172. MISS. CODE ANN. § 37-13-3 (1990).
173. 403 U.S. 602 (1971).
174. *Id.*
175. *Id.* at 612.
176. *Id.* at 613.
177. *Id.*
178. *Id.* at 612-13.

Mississippi law allows teachers to permit voluntary prayer by students;[179] however, organized devotional prayers in public schools have been held to violate the establishment clause even where participation is voluntary.[180] State-directed and authorized periods of silence for meditation and voluntary prayer have been found to be violative as well.[181]

In *Jager v. Douglas County School District*,[182] the Eleventh Circuit first held that invocations given before football games were violative of the establishment clause.[183] However, in *Jones v. Clear Creek Independent School District*,[184] the Fifth Circuit upheld a district's right to allow graduation invocations.[185] The Fifth Circuit was required to revisit the graduation prayer issue after the United States Supreme Court vacated and remanded the *Clear Creek* case following its decision in *Lee v. Weisman*.[186]

In *Lee*, the Court held that a Rhode Island district's practice of permitting middle and high school principals to invite a clergy member to present prayers at official graduation ceremonies violated the establishment clause, finding the activity to be impermissibly "pervasive" involvement "with religious activity."[187] The *Lee* prayers consisted of non-denominational invocations and benedictions, no longer than one minute in length, delivered by a local rabbi.[188] The principal had decided that the prayers should be given, chose the religious participant, and directed and controlled the prayer's content by giving the rabbi written and oral guidelines for preparing nonsectarian prayers.[189] The school officials also exercised a high degree of control over the timing, movements, dress and decorum of the students.[190] Taking these factors together, the Court found them to constitute "pervasive" involvement with religion and unlawfully imposed "social pressure [tending] to enforce orthodoxy"[191] on the students objecting to the prayers, even though the students were not required to attend the ceremony in order to receive their diplomas.[192]

Notwithstanding the *Lee* decision, the Fifth Circuit did not alter its decision in *Clear Creek*. In *Clear Creek*, high school seniors were permitted, but not required, to "choose student volunteers to deliver nonsectarian, nonproselytizing invoca-

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179. MISS. CODE ANN. § 37-13-4 (1990). Teachers are prohibited from prescribing the form or content of any prayer. *Id.*

180. Engle v. Vitale, 370 U.S. 421 (1962).

181. Wallace v. Jaffree, 472 U.S. 38 (1985).

182. 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

183. *Id.*

184. 930 F.2d 416 (5th Cir. 1991), *vacated*, 112 S. Ct. 3020 (1992).

185. *Id.*

186. 112 S. Ct. 2649 (1992).

187. *Id.* at 2655.

188. *Id.* at 2652.

189. *Id.* at 2660 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)).

190. *Id.*

191. *Id.* at 2651.

192. *Id.*

tions at their graduation ceremonies."[193] The students presented the district with their proposed invocation for approval by a majority vote of the senior class.[194] Finding that the school was legitimately concerned with solemnizing its graduation ceremonies, the court stated that the prayer procedure simply permitted each senior class to decide how to best achieve that end.[195]

The *Clear Creek* court analyzed the district's prayer policy and procedure under each element of the traditional *Lemon* test.[196] Until specific further direction from the Supreme Court is given, such analysis will be necessary under each district's given set of facts to ensure that district practice does not violate the establishment clause.

2. Free Exercise Clause

Generally while at school, students have the right to express their religious beliefs in a nondisruptive manner. Students enjoy the right to identify their religious beliefs through signs and symbols as long as they do not materially and substantially interfere with the school's operation or collide with the rights of others.[197] Several other types of "religious" activities in the schools have been found by the courts to be permissible. Students have the right to talk about their beliefs on campus;[198] to distribute religious literature on campus;[199] to pray on campus;[200] to carry or study the Bible or other religious writings on campus;[201] to do research papers, speeches and creative projects with religious themes;[202] to be exempt from activities due to conflicts with religious beliefs;[203] and to celebrate and study religious holidays on campus.[204] Students also have the right, in certain instances, to participate in religious clubs on campus.[205]

In *Board of Education of the Westside Community Schools v. Mergens*,[206] the Supreme Court found that a Nebraska high school violated the 1984 Equal Access Act when it refused to let students in a Christian prayer group meet after school.[207] The Court held that a "limited open forum" exists whenever a public secondary school gives the opportunity for one or more non-curriculum related student

193. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 964 (5th Cir. 1992).

194. *Id.* at 969.

195. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992). The court concluded: "By attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards. The Constitution requires nothing different." *Id.* at 972.

196. *Id.* at 965 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

197. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

198. *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

199. *See* Hazlewood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

200. Engle v. Vitale, 370 U.S. 421 (1962).

201. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Stone v. Graham, 449 U.S. 39 (1980).

202. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

203. *See* West Virginia Bd. of Educ. v. Barnett, 319 U.S. 624 (1943).

204. *See* Lynch v. Donnelly, 465 U.S. 668 (1984).

205. *See infra* notes 206-07.

206. 496 U.S. 226 (1990).

207. *Id.* at 253.

groups to meet on school grounds during noninstructional time, before or after classes.[208] The Court stated that a club may be "curriculum related" under four conditions: (1) "the subject matter . . . is actually . . . or will soon be taught, in a regularly offered course;" (2) "the subject matter . . . concerns the body of courses as a whole;" (3) "participation . . . is required for a particular course;" or (4) "participation . . . results in academic credit."[209] Where one "non-curriculum related" club is allowed, the school may not deny equal access to another group, such as the Bible group which was the subject of the *Mergens* case.[210] Furthermore, the Court held that the school must officially recognize such organizations by allowing them "to be part of the student activities program, [including] access to the school newspaper, bulletin boards, public address system,"[211] and any other school-sponsored publication or event.[212]

With regard to sponsorship of religious groups, the Court noted that school officials are expressly prohibited from participating at meetings of student religious groups.[213] Non-school persons are prohibited from directing, controlling or regularly attending the activities of such clubs.[214] The assignment of school personnel to such meetings is permitted but for custodial purposes only.[215] No school person so assigned may act to monitor the content of speech at the meetings.[216] As with most other federal statutory law, failure to comply with the provisions of the Equal Access Act will subject the school to possible forfeiture of federal funds.[217]

E. Freedom of Speech

In the landmark case of *Tinker v. Des Moines Independent School District*,[218] the Supreme Court established the right of students to freedom of expression in the absence of constitutionally valid reasons to regulate their speech.[219] The Court established a strict standard of review in student free speech cases, requiring that the district show a material and substantial disruption justifying restriction of the students' speech.[220] However, subsequent Court decisions have worked together to limit this rigorous standard.[221]

The Court has recognized that the primary aim of the First Amendment is "the full protection of speech upon issues of public concern."[222] In *Bethel School Dis-*

208. *Id.* at 235 (citing 20 U.S.C. § 4072(3) (1988)).
209. *Id.* at 239-40.
210. *Id.*
211. *Id.* at 247.
212. *Id.*
213. *Id.* at 251-53.
214. *Id.* at 253.
215. *Id.* (citing 20 U.S.C. § 4072(2) (1988)).
216. *Id.*
217. 20 U.S.C. §§ 4071-4074 (1988).
218. 393 U.S. 503 (1969).
219. *Id.* at 511.
220. *Id.* at 513.
221. *See supra* notes 222-227 and accompanying text.
222. Connick v. Myers, 461 U.S. 138 (1983).

trict No. 403 v. Fraser,[223] the Court emphasized the difference between expressions of public and of private concern, finding that the school district had the responsibility and the right to prohibit the use of vulgar and offensive language and "that the determination of what manner of speech is inappropriate in school properly rests with the school board."[224] The *Bethel* Court found that where the student's expression conveys only a generalized message or is deemed to be inappropriate for school purposes, the district need only have a reasonable basis for restricting the offending expression.[225]

School district policies that limit student expression must strike a balance between the students' rights under the First Amendment and the district's responsibility to maintain a nondisruptive learning environment. Reading *Tinker* together with *Bethel* and the other subsequent free speech cases, it is apparent that districts can regulate student speech by implementing codes of conduct and dress with restrictions rationally related to preventing disruptions and maintaining discipline. In all instances districts can forbid dress, conduct or language which is vulgar, indecent, obscene or insulting, as well as prohibit such that carries a message promoting or encouraging behavior contrary to valid educational purposes.[226] When student conduct is deemed to be expressive of some matter of public concern, however, the district must not regulate such conduct unless it would cause a material or substantial disruption.[227]

F. Release of Student Records

The Family Education and Privacy Act of 1974 regulates the availability and release of educational records.[228] The Privacy Act conditions the receipt of federal funds upon compliance with its provisions, which generally prohibit the release of most student information without parental consent.[229]

The term "education records" refers to records, files, documents or other materials which contain information directly related to a student and are maintained by school districts.[230] However, records not protected under the Privacy Act do not include those items in the possession of teachers and other educational personnel relating to instruction,[231] records maintained solely for law enforcement purposes,

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223. 478 U.S. 675 (1986). *Fraser* concerned the disciplining of a student for giving a sexually explicit speech at a school assembly. *Id.*

224. *Id.* at 683.

225. *Id.* at 685.

226. *Id.* at 683. Messages pertaining to smoking, drinking, drug use, or physical or sexual violence can be prohibited under *Bethel*. *Id.* at 684.

227. *Id.* at 688.

228. 20 U.S.C. § 1232g (1988 & Supp. 1992).

229. A violation of the Privacy Act has been held to be "good cause" for the termination of a public school employee's employment. Harrison County Sch. Bd. v. Morreale, 538 So. 2d 1196 (Miss. 1989).

230. 20 U.S.C. § 1232g(a)(4)(A)-(B) (1988 & Supp. 1992).

231. The Privacy Act exempts records in the possession of "instructional, supervisory, administrative, or other educational personnel." *Id.* Those types of materials are not available to any other person except a substitute teacher. *Id.*

employee records and medical records made in the provision of treatment of the student.[232]

Districts may release certain "directory information" if it has first given parental and public notice of the categories of information that will be released.[233] "Directory information" includes a student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized sports and activities, dates of attendance, height of members of athletic teams, degrees and awards received and the last school attended.[234]

Districts must not deny or prevent parents the right to inspect and review the education records of their children.[235] This right applies evenly to custodial and noncustodial parents, regardless of the wishes of either.[236] Districts must notify parents and students of their rights under the Privacy Act.[237] When a student reaches age eighteen, however, the permission or consent necessary under the Privacy Act is required of the student and not the parents.[238]

Districts must implement appropriate procedures which allow granting access to records no later than forty-five days after a request is made.[239] Where parents request to access records which contain information on more than one student, districts may allow them to view only those portions of the document relating to their student or may inform them of the information contained in the document as it relates to their student.[240]

Districts must provide parents with an opportunity for a hearing if they wish to contest the content of their student's records.[241] Such a hearing must allow an opportunity to correct or delete any inaccurate, misleading, or otherwise inappropriate data and to insert into the record a written explanation of the parents' challenge.[242]

To release student records to persons other than parents, districts must obtain a parent's consent, except when access is requested by one of the following parties: (1) other district officials, including teachers who the district determines have legitimate educational interests; (2) authorized representatives of the government; (3) parties in connection with financial aid; (4) "[s]tate and local officials or authorities [who must report such information] pursuant to state statute adopted prior to November 19, 1974;"[243] (5) "accrediting organizations in order to carry

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232. *Id.*

233. 20 U.S.C. § 1232g(a)(4)(B) (1988 & Supp. 1992).

234. 20 U.S.C. § 1232g(a)(5)(A) (1988).

235. MISS. CODE ANN. § 95-5-24 (Supp. 1992).

236. *See* Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21, 32-33 (2d Cir. 1986). Mississippi law specifically provides for the availability to noncustodial parents of all records pertaining to a minor child, including school records. MISS. CODE ANN. § 93-5-24 (Supp. 1993).

237. 20 U.S.C. § 1232g(e) (1988).

238. 20 U.S.C. § 1232g(d) (Supp. 1992).

239. 20 U.S.C. § 1232g(a)(1)(A) (1988).

240. *Id.*

241. 20 U.S.C. § 1232g(a)(2) (Supp. 1992).

242. *Id.*

243. No such Mississippi statute exists.

our their accrediting functions;" (6) parents of dependent study students; (7) appropriate persons in the case of an emergency and subject to federal regulations, "if the knowledge . . . is necessary to protect the health or safety of the student or other persons;" (8) "officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;" and (9) "organizations conducting studies for educational agencies or institutions for the purpose[s]" of testing, student aid programs or instructional improvement, under certain conditions.[244]

The Privacy Act further provides that if a lawfully executed subpoena demands release of student information, no parental permission is necessary, but the district must notify the parent prior to compliance.[245] Additionally, federal or state education authorities may obtain, without parental consent or notification, information necessary for audit and evaluation of federally-funded programs or enforcement of legal requirements specific to such programs, conditioned upon the removal of personally identifiable information and upon the destruction of the records after utilization.[246]

Districts must maintain a record of all requests for access to be kept with each student file.[247] Such record must include the legitimate interest of the requesting party and may be available only to the parents, school officials and record custodians.[248] Districts may release personal information only if the receiving party agrees to deny access to such information to any other person without the consent of the parents.[249]

III. EMPLOYMENT MATTERS

Mississippi law charges public school principals with the duty to recommend to the superintendent all instructional and noninstructional personnel to be employed within their schools.[250] If the recommendations meet with the superintendent's approval, the superintendent must then recommend employment to the school board.[251] The school board is required to elect the recommended personnel unless "good reason to the contrary exists."[252]

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244. 20 U.S.C. § 1232g(b)(1)(A)-(I) (1988 & Supp. 1992).

245. 20 U.S.C. § 1232g(b)(2)(B) (1988 & Supp. 1992).

246. 20 U.S.C. § 1232g(b)(3), (5) (1988).

247. 20 U.S.C. § 1232g(b)(4)(A) (1988).

248. *Id.*

249. 20 U.S.C. § 1232g(b)(4)(B) (1988).

250. MISS. CODE ANN. § 37-9-17 (1990). Principals are required to recommend to the superintendent new certificated or noninstructional employees on or before April 1 of each year. *Id.* School boards are authorized to designate up to two personnel supervisors or another principal to make employment recommendations for a principal or to accept the recommendations for transmittal to the school board. *Id.*

251. *Id.* § 37-9-17 (1990). The superintendent has the ultimate responsibility to see that all necessary certificated and noninstructional personnel are retained. MISS. CODE ANN. §§ 37-9-3, -14(a)(t) (1990 & Supp. 1993).

252. MISS. CODE ANN. § 37-9-17 (1990).

Mississippi law imposes a limited nepotism prohibition in district hiring practices.[253] A school board is prohibited from hiring a superintendent, principal or other certificated employee who is related within the third degree by blood or marriage to a majority of the school board members.[254] A board is also prohibited from hiring any person whose employment would pose a conflict of interest.[255]

A. Assignment of Personnel

The district superintendent has the authority to make assignments of all certificated employees within the district.[256] This power is controlled by two statutory limitations: (1) the employee may be assigned or reassigned only to a position for which he holds a valid certificate; and (2) the assignment or reassignment may be reviewed by the Board on the employee's request.[257] Recognizing that the true purpose of public school districts is to educate children and not to provide employment opportunities for adults, the Mississippi Supreme Court has acknowledged the statutory intent to allow broad discretion in assignment of personnel.[258] Thus, in accordance with statutory and contractual language, superintendents maintain a fair amount of discretion in determining the appropriateness of employee reassignment. Employees do have the right, however, to request that the school board review objectionable reassignments.[259] Numerous lawful reasons for reassignment exist, including maintenance of faculty discipline and adjustment due to enrollment shifts. However, a decision to reassign an employee must not be based on any unlawful reason, such as discrimination, harassment or retaliation for the exercise of a constitutional right.[260]

The Fifth Circuit has analyzed the standards by which a public school reassignment is to be judged. In *Fyfe v. Curlee*,[261] a secretary employed by a public school district enrolled her daughter in an all-white private academy contrary to the wishes of the superintendent.[262] The superintendent requested that the secretary

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253. MISS. CODE ANN. § 37-9-21 (1990).

254. *Id.*

255. MISS. CONST. art. IV, § 109; MISS. CODE ANN. § 25-4-101 to 25-4-119 (1991 & Supp. 1993). Basically, the law prohibits a public officer or member of the state legislature from having direct or indirect interest in a contract which is authorized by any law passed or order made by any board of which he was a member. *Id.* § 25-4-105. Statute limits this prohibition for a one year period following the end of a public employee's tenure. *Id. See* Smith v. Dorsey (Smith II), 599 So. 2d 529 (Miss. 1992); Smith v. Dorsey (Smith I), 530 So. 2d 5 (Miss. 1988); *see also* Waller v. Moore, *ex rel.* Quitman County Sch. Dist., 604 So. 2d 265 (Miss. 1992).

256. MISS. CODE ANN. § 37-9-14(2)(s) (Supp. 1993).

257. *Id.* The State Board of Education prescribes the form of the contract. MISS. CODE ANN. § 37-9-23 (1990). The state-issued form contract includes a standard reassignment clause stating that the employee agrees to reassignment during the year to any area in which he holds a valid certificate.

258. Holliday v. West Point Mun. Separate Sch. Dist., 401 So. 2d 1296, 1301 (Miss. 1981).

259. MISS. CODE ANN. § 37-9-12(2)(s) (1990).

260. *See* Claiborne County Bd. of Educ. v. Martin, 500 So. 2d 981, 985 (Miss. 1986) (though possessing broad authority, school boards must act within constitutional limits).

261. 902 F.2d 401 (5th Cir. 1990), *cert. denied*, 498 U.S. 940 (1990). The plaintiff brought her action pursuant to 42 U.S.C. § 1983, alleging a violation of her First and Fourteenth Amendment privacy rights. *Id.*

262. Although not discussed in *Fyfe*, Mississippi law specifically prohibits school districts from denying employment or reemployment to any person for the sole reason that a child of that person does not attend school in the employing district. MISS. CODE ANN. § 37-9-59 (1990).

resign; but, when she refused, he created a menial job for her at the school's resource center and instituted conditions of employment which prevented her from going into the schools or having breaks with fellow employees.[263] The court stated that a person does not lose the right to send his child to a private school by accepting employment with a public school system and that an employment decision based on the exercise of such right is constitutionally impermissible unless the school could demonstrate that the conduct materially and substantially interfered with the effectiveness of the school system.[264] The mere belief that such interference may occur, without any supporting objective evidence, was found to be insufficient to demonstrate material interference which would justify quelling the employee's exercise of her constitutional right.[265] Applying those standards, the court found that the superintendent had violated the secretary's constitutional rights and ordered reinstatement to her former position.[266]

In addition to ensuring that a reassignment does not violate the employee's rights under the law, a superintendent must also determine that a reassignment does not constitute an improper demotion.[267] The central value of employment to be protected is responsibility; salary and title are not necessarily determinative as to whether a demotion has occurred.[268] In the landmark desegregation case, *Singleton v. Jackson Municipal Separate School District*,[269] the Fifth Circuit set forth these strict requirements by which a demotion was to be judged:

> Demotion . . . includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period.[270]

Although the strict requirements of *Singleton* are not applicable in the absence of desegregation-related reductions in staff members, *Singleton*-based decisions provide guidance when trying to determine whether a reassignment is actually a demotion.[271]

In *Jones v. Birdsong*,[272] finding that the counselor did not suffer a decrease in wages and was certified to teach the class to which she was assigned, the court

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263. *Fyfe*, 902 F.2d at 405.

264. *Id.* at 404.

265. *Id.* at 405.

266. *Id.* The court directed that on remand consideration be given to the secretary's claims for mental anguish, constructive discharge and attorney's fees. *Id.*

267. *Id.*

268. Lee v. Russell County Bd. of Educ., 563 F.2d 1159, 1161 (5th Cir. 1977).

269. 419 F.2d 1211 (5th Cir.), *vacated in part*, 396 U.S. 226 (1969).

270. *Singleton*, 419 F.2d at 1218.

271. *See supra* notes 269-70 and accompanying text.

272. 530 F. Supp. 221 (N.D. Miss. 1980), *aff'd*, 679 F.2d 24 (5th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983).

held that the reassignment of a counselor to teaching duties was not a demotion.[273] The court found that the counselor and teacher positions required similar levels of skill and were of equal importance and prestige.[274] Importantly, the court also stated that the source of funds used for compensation of the position – whether federal, state or local – was not a valid concern in determining demotion where full payment of salary was received by the employee.[275] The *Jones* court affirmed the general principle that "[s]chool administrators are entitled to exercise responsible professional judgment in the assignment of personnel to conduct the changing course work offered in their schools, without interference from the . . . courts."[276]

In order to determine whether two positions actually are on different employment levels, the courts have clearly looked beyond the subjective opinions of the employees. In *Lee v. Russell County Board of Education*,[277] the court refused to allow the desirability of one position over another to control the determination, holding that a transfer from a high school counseling assignment to an elementary counseling assignment held equal responsibility and thus was not a demotion.[278] Likewise, demotions have not been found where a principal was transferred from high school to elementary school[279] or where a teacher was transferred from one type course to another.[280] Although not specifically addressing the issue of demotion, the Mississippi Supreme Court also considered the reduction in salary and responsibilities in finding that the reassignment of a principal to a teaching position effectively amounted to a nonrenewal of the principal's contract and an offer of a new contract.[281]

Whether a district may properly reassign a certificated employee to non-instructional duties has not been addressed by Mississippi courts. Other jurisdictions provide conflicting views on this issue. Where a teacher can be given a non-teaching assignment that bears a reasonable relationship to the teacher's competence and training and that is consistent with the dignity of the profession, a temporary reassignment for disciplinary or other reasons may be upheld.[282] Where the employee does not lose any salary, a temporary reassignment to non-

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273. *Id.* at 231.

274. *Id.*

275. *Id.*

276. *Id.*

277. 563 F.2d 1159 (5th Cir. 1977).

278. *Id.* at 1162.

279. Bassett v. Atlanta Indep. Sch. Dist., 485 F.2d 1268 (5th Cir. 1973). Note, however, that the Fifth Circuit more recently recognized that "the head of a high school can properly be said to have more responsibility than the head of an elementary school." *Lee*, 563 F.2d at 1162.

280. McLaurin v. Columbia Mun. Separate Sch. Dist., 530 F.2d 661 (5th Cir. 1976).

281. Desoto County Sch. Bd. v. Garrett, 508 So. 2d 1091 (Miss. 1987). Although the court did not label the district's action a "demotion," it did recognize that a reduction in responsibilities and salary would invoke the employee's rights under the School Employment Procedures Law (SEPA). *Id.* at 1094.

282. Alderstein v. Board of Educ., 474 N.E.2d 209 (N.Y. 1984).

teaching duties may also be permitted.[283] On the other hand, a total deprivation of teaching responsibilities may be found to constitute a constructive discharge.[284]

The standard Mississippi contract provision regarding assignment obligates the employee to perform duties "required by law" as well as those prescribed under "policies, rules and regulations of the board."[285] It could be argued that this contract language refers only to those duties which can be attributable or related to the contracted position. However, logical justification for reassignment to certain non-instructional duties may arise. Administrative office assignments which are geared toward development, implementation and maintenance of instructional programs would certainly bear a "reasonable relationship" to a teacher's training. Such duties could arguably be considered professional and nonmenial. Additionally, placement in merely supervisory or nonacademic positions would serve the best interest of the teacher where dismissal or suspension are the other alternatives. The superintendent should carefully examine the character of any contemplated noninstructional duties and avoid such reassignment if at all possible. However, temporary placement in a productive and professional position which would not present a deprivation of responsibility or prestige or a loss in salary could be acceptable under certain circumstances.

B. Certificated Employees

Teachers, principals, superintendents and other instructional personnel must hold a proper certificate through the state department of education in order to teach or serve in a public school.[286] The contract[287] of a certificated employee can be rendered null and void in the event the employee is released from the contract by order of the board or if the employee abandons or breaches his contract.[288] Otherwise, a district can end the employment of a certificated employee only by termination or nonrenewal of the contract.

1. Mid-Year Removal of the Certificated Employee

The superintendent may remove any certificated employee by mid-year termination or suspension for incompetence, neglect of duty, immoral conduct, intem-

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283. Dooley v. Fort Worth Indep. Sch. Dist., 866 F.2d 1418 (5th Cir. 1989), *cert. denied,* 490 U.S. 1107 (1989).

284. *See* Haag v. Board of Educ., 655 F. Supp. 1267 (N.D. Ill. 1987); Hansen v. Board of Educ., 502 N.E.2d 467 (Ill. App. Ct. 1986).

285. MISS. CODE ANN. § 37-7-301 (Supp. 1993).

286. The certification process is governed by rules and regulations adopted and implemented by the State Department of Education. MISS. CODE ANN. § 37-9-23 (1990).

287. All certificated employees must enter into a contract with the employing district for no less than 185 days. MISS. CODE ANN. § 37-9-24 (1990). The salaries of all certificated employees are required to be in compliance with the state's minimum education program. MISS. CODE ANN. § 37-9-33 (1990).

288. MISS. CODE ANN. §§ 37-9-55, -57 (1990).

perance, brutal treatment of a student or other good cause.[289] Before being removed, the employee must be notified of charges against him and advised of his right to a public hearing on those charges.[290] The employee must request a hearing within five calendar days from the date of the notice of termination or suspension or his right to such a hearing is deemed waived and his termination or suspension effective as of the date of the notice.[291] If the employee properly requests a hearing, the statutory procedures provided for nonrenewals under the School Employment Procedures Law[292] (commonly referred to as SEPA) are invoked.[293] A termination or suspension hearing must be held not sooner than five days nor later than thirty days from the date the hearing was requested.[294]

When a notice of termination or suspension has been issued, circumstances may permit the superintendent to release the employee from his duties immediately.[295] An employee may be released if his continued presence on campus poses a potential threat or danger to the students or if, in the superintendent's discretion, his continued presence may interfere with or cause a disruption of normal school operations.[296] If the employee has been arrested, indicted or otherwise charged with a felony, his continued presence on campus is statutorily deemed to constitute a disruption of school operations, and his immediate removal is automatically permitted.[297] In any case, if the employee is released from his duties pending a hearing, the district must continue to compensate him up to and including the date that the initial hearing is set by the board.[298]

At a termination or suspension hearing, the burden rests upon the superintendent to prove by a preponderance of the evidence that adequate grounds for the adverse employment action exists.[299] The hearing is conducted in accordance with the procedures under SEPA[300] discussed *infra*.[301] If the employee is not satisfied with the school board's decision after hearing, he may appeal to the Mississippi

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289. MISS. CODE ANN. § 37-9-59 (1990). Insubordination has long been recognized as "other good cause" within the meaning of this statute. Merchant v. Board of Trustees, 492 So. 2d 959 (Miss. 1986). Mississippi law defines "insubordination" as a constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority. Sims v. Board of Trustees, 414 So. 2d 431 (Miss. 1982).

290. MISS. CODE ANN. § 37-9-59 (1990).

291. *Id.*

292. MISS. CODE ANN. § 37-9-101 (1990).

293. *Id.* The procedures to be implemented are set forth in MISS. CODE ANN. § 37-9-111 (1990).

294. MISS. CODE ANN. § 37-9-111 (1990). Although not expressly provided in MISS. CODE ANN. § 37-9-59, SEPA allows the parties to agree to a continuance beyond the stated time period. MISS. CODE ANN. § 37-9-111(1) (1990).

295. MISS. CODE ANN. § 37-9-59 (1990).

296. *Id.*

297. *Id.*

298. *Id.*

299. Merchant v. Pearl Mun. Separate Sch. Dist., 492 So. 2d 959, 961 (Miss. 1986) (citing Mississippi Employment Sec. Comm'n v. Philadelphia Mun. Separate Sch. Dist., 437 So. 2d 388, 393 n.4 (Miss. 1983); Sims v. Board of Trustees, 414 So. 2d 431, 434 (Miss. 1982)).

300. MISS. CODE ANN. §§ 37-9-100 to -113 (1990).

301. *See infra* notes 303-42 and accompanying text.

Chancery Court in accordance with the procedures under SEPA, also discussed *infra*.[302]

2. Nonrenewal of the Certificated Employee

While Mississippi's public school teachers are not granted tenure under the law, certificated employees are provided with certain rights protecting their property interest in continued employment.[303] SEPA mandates the implementation of certain procedural safeguards when a certificated employee is not going to be offered a renewal contract in the district for the following school year.[304] All certificated employees are protected under SEPA, including teachers, principals, superintendents and other certified professionals, such as athletic directors and coaches.[305]

The district superintendent is required to submit recommendations for contract renewals and nonrenewals to the school board for action no later than February 15 for principals and assistant principals[306] and no later than April 1 for teachers and other employees.[307] Upon receipt, the school board must vote to accept or not accept the superintendent's recommendations.[308] The board must then give notice to each employee for whom a renewal contract has not been recommended.[309] Such notice must be given on or before February 1 for superintendents, March 1 for principals, and April 8 for teachers and other professional educators.[310]

With the notice that nonrenewal has been recommended, the employee should also receive notice of his right to request a hearing in the matter of his nonrenewal.[311] If the employee does not request a hearing, the nonrenewal becomes final.[312] If the employee makes a written request for a hearing, he becomes entitled to several enumerated rights.[313] First, at least five days before the hearing, he must be provided with the reasons for nonrenewal, including a summary of the facts supporting each reason.[314] Second, he must be given the opportunity to present matters relevant to the reasons given for the nonrenewal, including any matters

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302. *See infra* notes 303-42 and accompanying text.

303. MISS. CODE ANN. §§ 37-9-100 to -113 (1990).

304. *Id.*

305. MISS. CODE ANN. § 37-9-103 (1990). *See* Merchant v. Board of Trustees, 492 So. 2d 959 (Miss. 1986) (athletic director and coach); Tutwiler v. Jones, 394 So. 2d 1346 (Miss. 1981) (superintendent); Jackson v. Board of Educ., 349 So. 2d 550 (Miss. 1977) (drug education specialist); Dampier v. Lawrence County Sch. Dist., 344 So. 2d 130 (Miss. 1977) (librarian).

306. MISS. CODE ANN. § 37-9-15 (Supp. 1993).

307. MISS. CODE ANN. § 37-9-17 (1990).

308. Leake County Sch. Dist. v. Duren, 591 So. 2d 813 (Miss. 1991).

309. MISS. CODE ANN. § 37-9-105 (1990). Failure to give timely notice pursuant to this statute will result in the automatic renewal of the employee's current contract. Merchant v. Board of Trustees, 492 So. 2d 959 (Miss. 1986); Noxubee County Sch. Bd. v. Cannon, 485 So. 2d 302 (Miss. 1986); Robinson v. Board of Trustees, 477 So. 2d 1352 (Miss. 1985). Furthermore, this initial notice need not include the reasons for the nonrenewal recommendation; indeed, the superintendent should not have presented and the board should not have yet considered any reasons therefor. *See, e.g., Merchant*, 492 So. 2d at 959; *Noxubee*, 485 So. 2d at 302.

310. *Id.*

311. MISS. CODE ANN. § 37-9-105 (1990 & Supp. 1992).

312. *Id.*

313. *Id.*

314. MISS. CODE ANN. § 37-9-109(a) (1990).

which he alleges to be the actual reasons for nonrenewal.[315] He is further entitled to a fair and impartial hearing before the board or a hearing officer and to be represented by an attorney at his own expense.[316]

The hearing must be held not sooner than five days nor later than thirty days from the date of the request unless otherwise agreed upon by the district and employee.[317] The school board may conduct the hearing, or it may retain a hearing officer to do so.[318] The hearing officer may be one of the board members, a district employee other than the one who made the initial nonrenewal decision, or some other qualified and impartial person.[319] A board member or hearing officer may be disqualified from hearing a case where he is shown to have bias resulting from personal animosity or personal or financial stake in the decision.[320] The school board may utilize its own attorney to prosecute the case, to advise the board or to conduct the hearing unless it can be shown that the participation of the board attorney destroys the impartiality of the proceeding.[321]

The hearing procedure should afford the employee with the right to present witnesses and other evidence and to cross-examine witnesses against him.[322] However, the hearing is an informal procedure that does not invoke the formality of trial and does not require adherence to the rules of evidence or procedure.[323] Because the hearing record may provide the basis for the employee's legal appeal in the event of an adverse decision, the hearing must be properly transcribed and the witnesses should be required to testify under oath.[324]

At the nonrenewal hearing, the burden of proof is on the employee to prove affirmatively and conclusively that the reasons for nonrenewal had no basis in fact or that the nonrenewal was contrary to law.[325] If the employee claims a violation of a constitutional right, such as free speech or freedom of religion, he can gain a rebuttable presumption that the nonrenewal was for impermissible reasons by showing that he engaged in constitutionally protected activity and that the reason given for nonrenewal was false or a sham.[326] However, the administration may overcome the presumption by showing that it would have rationally made the

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315. MISS. CODE ANN. § 37-9-109(b) (1990).

316. MISS. CODE ANN. § 37-9-109(c), (d) (1990).

317. MISS. CODE ANN. § 37-9-111(1) (1990).

318. MISS. CODE ANN. § 37-9-111(2) (1990).

319. *Id.*

320. Spradlin v. Board of Trustees, 515 So. 2d 893, 898 (Miss. 1987) (citing Dampier v. Lawrence County Sch. Dist., 344 So. 2d 130, 132 (Miss. 1977)).

321. Hoffman v. Board of Trustees, 567 So. 2d 838 (Miss. 1990).

322. MISS. CODE ANN. § 37-9-111(2) (1990).

323. MISS. CODE ANN. § 37-9-111(5) (1990). *See* Noxubee County Bd. of Educ. v. Givens, 481 So. 2d 816, 820 (Miss. 1985).

324. MISS. CODE ANN. § 37-9-111(3) (1990). In the case of appeal, the cost of the transcript is assessed as court costs. *Id.*

325. Claiborne County Bd. of Educ. v. Martin, 500 So. 2d 981, 985 (Miss. 1986); Tanner v. Hazlehurst Mun. Separate Sch. Dist., 427 So. 2d 977 (Miss. 1983); Cox v. Thomas, 403 So. 2d 135 (Miss. 1981); Calhoun County Bd. of Educ. v. Hamblin, 360 So. 2d 1236 (Miss. 1978).

326. *Martin*, 500 So. 2d at 985.

same nonrenewal decision in the absence of the protected conduct.[327] If the employee fails to carry his burden of proof, the administration is ordinarily not required to justify its decision.[328]

The school board must make the final decision in a nonrenewal matter.[329] The board's decision must be based solely on the evidence received at the hearing.[330] Hearsay evidence may be properly admitted into evidence at a nonrenewal hearing, but the board cannot make a determination of facts based solely on hearsay evidence.[331] If the board has used a hearing officer to conduct the hearing, the employee has the right to appear before the board prior to it making a final decision.[332] If the board finds that the nonrenewal was not a proper employment decision, it can order the execution of a new one-year contract.[333] In any event, the board must give the employee notice of its final decision within thirty days of the close of the hearing if it was conducted by a hearing officer or within ten days if it was conducted by the board.[334] The employee may appeal an adverse school board decision to the chancery court.[335] An appeal must be filed within twenty days following the final decision of the school board.[336] On appeal, the hearing record is reviewed by chancery court.[337] The court may find the board decision to be unlawful if the record reveals that the decision was "[n]ot supported by any substantial evidence, . . . [a]rbitrary or capricious, or [i]n violation of statutory or constitutional [law]."[338] The court will consider procedural violations, but harmless error in complying with SEPA cannot be the basis for reversal of an otherwise proper

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327. *Id.* (citing Hattiesburg Mun. Separate Sch. Dist. v. Gates, 461 So. 2d 730, 737 (Miss. 1984); *Tanner*, 427 So. 2d at 979).

328. *Tanner*, 427 So. 2d at 979 (because teacher failed to show any impermissible reason for board's nonrenewal decision, board was not required to justify its decision); Jones v. Birdsong, 679 F.2d 24 (5th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983) (school board may refuse to rehire teacher for whatever reason, so long as it is not a constitutionally impermissible one); *Hamblin*, 360 So. 2d at 1239 (statute does not create a substantive right to reemployment which would require that school board demonstrate good cause for nonreemployment).

329. MISS. CODE ANN. § 37-9-111(4) (1990). Where a hearing officer conducts the hearing, the board must base its decision solely on the record developed at the hearing. *Id.* Thus, while the statute does not forbid a hearing officer from providing the school board with findings of fact, conclusions of law or a recommendation, the board is not permitted to rely on such hearing officer reports in making its decision. *Id.*

330. *Id.*

331. *Id.* § 37-9-111(5). *See Tanner*, 427 So. 2d at 979; Stone County Sch. Bd. v. McMaster, 573 So. 2d 753 (Miss. 1990). Section 37-9-111(5) refers to "the determination of facts by the board or hearing officer." MISS. CODE ANN. § 37-9-111(5) (1990). Thus, it appears that a hearing officer may properly issue findings of fact to the school board, which it can then determine to be supported or not supported by the record.

332. MISS. CODE ANN. § 37-9-111(4) (1990). Prior to the board voting on the nonrenewal matter, either the employee or his attorney may present a statement to the board; however, if the record has been closed, no further witnesses or evidence should be permitted. *Id.*

333. *Id.* § 37-9-111(6).

334. *Id.* § 37-9-111(4).

335. MISS. CODE ANN. § 37-9-113(2) (1990). The proper jurisdiction on appeal is the chancery court in the judicial district where the school district is located. *Id.* An appeal is perfected when the employee files a petition with the court and executes a bond payable to the school board sufficient to satisfy all costs of appeal. *Id.* Because the cost of the hearing transcript is deemed to be court costs, the employee's bond should include the price of the transcript. *See* Hattiesburg Mun. Separate Sch. Dist. v. Gates, 461 So. 2d 730, 738 (Miss. 1984).

336. MISS. CODE ANN. § 37-9-113(2) (1990).

337. *Id.*

338. *Id.* § 37-9-113(3).

board decision.[339] Recognizing that the inherent discretion granted to school administrators in discharging their duties should be accorded great weight and deference, the courts will disturb board action only where the board has exceeded legally permissible limits or has grossly abused its discretion.[340] Upon a finding of error, the chancery court can reverse the decision of the school board and order the issuance of a renewal contract and back pay.[341] Either party may appeal an adverse chancery court decision to the Mississippi Supreme Court.[342]

C. Non-Certificated Employees

All employees who are not certificated by the state are classified as "non-instructional" employees.[343] Under Mississippi law, these noncontractual employees are at-will employees who can be terminated at any time, with or without cause, except where such action would be in violation of the employee's statutory or constitutional rights.[344]

Recognizing the at-will status of non-certificated employees, public school districts should not structure employment agreements which could be construed as contractual obligations. Any document issued by the school district for the purpose of verifying employment status should specifically identify the employment relationship as being at-will.

IV. CONCLUSION

The public's special interest in the operation of its schools often causes heightened scrutiny of school board attorneys. Therefore, an attorney must accept both legal and civic responsibility in representing his public school client. To meet these demands, the attorney must keep continually updated on the laws and regu-

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339. *Id.* § 37-9-113(4).

340. Claiborne County Bd. of Educ. v. Martin, 500 So. 2d 981, 987 (Miss. 1986); Everett v. Board of Trustees, 492 So. 2d 277, 283 (Miss. 1986); Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 242 (Miss. 1985); Hattiesburg Mun. Separate Sch. Dist. v. Gates, 461 So. 2d 730, 738 (Miss. 1984).

341. *Martin*, 500 So. 2d at 987.

342. MISS. CODE ANN. § 37-9-113(5) (1990). The usual appeal procedures are applicable.

343. MISS. CODE ANN. § 37-9-1 (1990).

344. Harrison County Sch. Bd. v. Morreale, 538 So. 2d 1196, 1200 (Miss. 1989). A non-instructional employee may not be disciplined or discharged in violation of any constitutional right. For example, in McGlothin v. Jackson Mun. Separate Sch. Dist., No. J90-0402(L), 1992 WL 516081 (S.D. Miss. Nov. 30, 1992), *aff'd*, No. 93-7039 (5th Cir. Aug. 6, 1993), a teacher's aide sued the school district which had terminated her employment due to her insubordinate refusal to remove her headcovering in the classroom. The aide claimed that wearing berets and scarves on her head was an expression of her religious beliefs and alleged that her termination violated her right to freedom of religion under the first amendment and amounted to religious discrimination under Title VII. Based on detailed findings of fact, the court concluded the aide did establish that her conduct was the result of a sincerely held religious belief, but she had not notified the district of such belief prior to her termination. *Compare* Mississippi Employment Sec. Comm'n v. McGlothin, 556 So. 2d 324 (Miss. 1990), where the Mississippi Supreme Court, reviewing only the record developed at the unemployment benefits hearing, found that the aide's conduct did not constitute "misconduct" under the Mississippi Employment Security Law as it was protected by the First Amendment. *Id.* at 325. As a nominal party in that case, the school district did not have the opportunity to fully develop the evidence as it did in the federal action. These two decisions, arising from the same employment but with diametrically opposed conclusions, prove that school districts must fully develop, document and consider all facts upon which an employment decision is to be based, especially where there is an implication of a constitutional right is a possibility.

lations as well as the particularized needs and desires of his districts' students and faculty. Hopefully, this article has provided school board attorneys with a starting place for continued study of the wide-ranging area of education law.