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

CHARLES ARAUJO, ET AL. PLAINTIFFS

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

GOVERNOR PHIL BRYANT, ET AL. DEFENDANTS

PLAINTIFFS' RESPONSE IN OPPOSITION TO
THE STATE'S MOTION FOR SUMMARY JUDGMENT

This is a simple case about two straightforward constitutional provisions.

Section 206 of the Mississippi Constitution allows only "that a school district's taxes be used to maintain 'its schools.'"[1] The Mississippi Supreme Court has explained: "The Legislature has no authority to mandate how the funds are distributed, as Section 206 clearly states that the purpose of the tax[illegible]

the relevant constitutional provisions. A ccordingly, the State's motion for summary judgment[5] must be denied.

I. Section 206 Allows Ad Valorem Tax Revenue to Be Used Only By the Levying School District. Any Other Use of Ad Valorem Revenue is Unconstitutional.

In 2012, the Mississippi Supreme Court issued the decision that controls the case at hand. In Pascagoula School District v. Tucker,[6] the Mississippi Supreme Court held

are distributed, as Section 206 clearly states, that the purpose of the tax is to maintain the levying school district's schools."[8]

As the Tucker Court explained, accepting the defendants' argument would have allowed the Legislature to dictate how school districts spent their ad valorem revenue, and "Section 206 would be rendered a complete nullity."[9] The Supreme Court rejected that outcome and applied "[t]he plain language of Section 206."[10] Under that plain language, ad valorem revenue must be used only by the school district that levied the tax. The Legislature has no power to order levying school districts how to spend their ad valorem revenue. Here, the levying school district is JPS, and charter schools are not "the levying school district's schools." Requiring JPS to redirect its ad valorem revenue to charter schools violates Section 206.

B. Section 206 Only Allows a Levying School District's Taxes to Be Used to Maintain Its Schools.

The State claims that Section 206 allows a school district to send ad valorem revenue to any school – even a school outside its control – so long as that school falls

In Tucker, a statute required the Pascagoula School District to share its ad valorem revenue with the rest of Jackson County's school districts.[12] A group of plaintiffs challenged the law's constitutionality. In the Tucker decision's opening paragraph, the Supreme Court agreed that "the contested statute violates the constitutional mandate that a school district's taxes be used to maintain 'its schools.'"[13]

The Tucker Court explained that Section 206 defines the limits of a levying school district's taxing power. Section 206 "is the enabling authority for a school district's ad valorem taxation power in this state."[14] Without Section 206, a school district's power to levy ad valorem taxes would not exist; with Section 206 come the limits it imposes on that power. And the Tucker Court defined those limits unambiguously:

> The plain language of Section 206 grants [the Pascagoula School District] the authority to levy an ad valorem tax and mandates that the revenue collected be used to maintain only its schools. Conversely, no such authority is given for the PSD to levy an ad valorem tax to maintain schools outside its district.[15]

More to the point, the Tucker Court explained that Section 206 vests control over ad valorem revenue solely with the levying school district: "The Legislature has no authority to mandate how the funds are distributed, as Section 206 clearly states that the purpose of the tax is to maintain the levying school district's schools."[16]

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

[12] Tucker, 91 So. 3d at 600-01.
[13] Id. at 600.
[14] Id. at 604 (emphasis in original).
[15] Id.
[16] Id. at 605.

rigid, and they are singular: "the purpose of the tax is to maintain the levying school district's schools."[17] Any other use of a school district's ad valorem revenue – including sharing that revenue with charter schools – is contrary to the clear rule set forth by the Mississippi Supreme Court in Tucker.

In this case, three facts are indisputable: (1) the tax-levying school district is the Jackson Public School District; (2) charter schools are separate, stand-alone school districts; and (3) charter schools are not "the levying school district's schools." The CSA plainly violates Section 206.

The State ignores Tucker's reasoning and its central holding. Instead, the State urges the Court to interpret the word "its" broadly. Specifically, the State argues that "its schools" should mean all schools located within the levying school district. The State does not dispute that Article 8, Section 206 of the Mississippi Constitution permits a school district to levy taxes to maintain "its schools." Further, the State concedes that charter schools are not part of the Jackson Public School District.[18] Instead, the State argues that "the City of Jackson's local taxes will be used to support 'its' schools – the local public schools . . . serving the City of Jackson's children."[19] This bizarre interpretation is clearly erroneous.

Section 206 provides, in pertinent part (with emphasis added): "Any county or separate school district may levy an additional tax, as prescribed by general law, to maintain its schools." By its plain language, Section 206 allows a school district – not a city or municipality – the authority to levy ad valorem taxes, or property taxes, for the

[17] Id. (emphasis added).
[18] Governor Bryant and the Mississippi Department of Education's Combined Memorandum Brief in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment [Docket No. 47] (hereinafter "State Brief") at 21.
[19] State Brief at 2.

maintenance and operation of its own schools. Accordingly, pursuant to Section 206, the Jackson Public School District may levy an additional tax, as prescribed by general law, to maintain its schools.

In Mississippi, a charter school is not part of the school district where it is geographically located.[20] Instead, each charter school operates as its own local

issue is the interpretation of Section 206, which clearly authorizes a school district to levy taxes to maintain its schools.

The Mississippi Supreme Court's interpreta

practicable, establish schools of higher grade."[28] A decade later, though, Mississippi still lacked public schools of higher grade (high schools).[29] Therefore, in 1878, the Legislature enacted what it believed to be a solution – but not by creating public high schools for all schoolchildren. Instead, the Legislature attempted to short-circuit the lack of public high schools by paying for children to attend private high schools at the State's expense.[30]

2. The Constitutional Convention of 1890: The Framers Reject a Rollback of the Otken Decision.

Despite the Court's ruling in Otken, the practice of subsidizing private high-school education with public money remained popular throughout the 1880s.[35] The goal of working around Otken also remained popular among the state's policymakers.[36] And by the time the Constitutional Convention of 1890 rolled around, policymakers finally had an opportunity to supplant Otken once and for all.

The earliest draft of the Constitution of 1890 would have done just that. The Convention's education committee originally proposed including within the new Constitution a requirement for a "uniform system of free public schools" and a ban on funding "any sectarian school."[37] But unlike the Constitution of 1868, the education committee's original proposal lacked any provision forbidding appropriations to private schools.[38]

Such a proposal would have overturned Otken and left the door wide open to unfettered public funding of purely private schools.

Not all members of the education committee embraced this wholesale change. A minority of committee members referred approvingly to an annual report by the State Superintendent, in which he praised the practice of paying private high schools to educate public schoolchildren.[39] This demonstrates that, although the minority was

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[35] Morris, 144 So. at 378 (explaining that, even after Otken, "privately owned and controlled schools, some of them of a sectarian character, continued to affiliate with the state's common schools, and to be supported, in part, from the common school fund").
[36] Id. (recalling the 1890 Legislature's amendment to the school law).
[37] Id. (quoting Convention education committee's proposal) ("No religious or other sect or sects, shall ever control any part of the school, or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school.").
[38] Id. ("The proposed new section, it will be observed, did not contain the words, 'or to any school that, at the time of receiving such appropriation, is not conducted as a free school.'").
[39] Id.

uncomfortable with the idea of allowing unlimited public funding of private schools, it remained open to compromise.

In the end, that compromise won the day: instead of limiting public funds to schools that actually fell within the system of free schools, the Constitution of 1890 prohibited the funding of "any school that at the time of receiving such appropriation is not conducted as a free school."[40] In other words, private schools could receive public funding, but only when they conducted themselves as free schools – that is, subject to the dual supervision of the State Superintendent and the local district superintendent.

And indeed, historical evidence demonstrates that, during the era in which the Constitution of 1890 was adopted, private schools that functioned as part-time free schools were subject to state and local control during each year's "free term." In other words, although they were not technically part of the system of free schools, they operated part-time as free schools – and, therefore, were eligible for public funding during those times.

For example, in the state superintendent's report to the Legislature for 1888-89 (one of the reports relied upon by the Constitutional Convention's education committee), the superintendent of Monroe County reported the existence of a single high school in his district: "High Schools – One in county – E. E. Cowley, principal. This is run as free school during free term and subject to all the laws governing other free schools in the county."[41] In the same record, the superintendent of Newton County similarly reported that his control over the schools of higher grade existed only when they operated as free schools: "There are four high schools in the county that are

[40] Miss. Const. Art. VIII § 208 (emphasis added).
[41] Biennial Report of the State Superintendent of Public Education to the Legislature of Mississippi for the Years 1888 and 1889, at 210, available at http://babel.hathitrust.org/cgi/pt?id=njp.32101050882024;view=1up;seq=7 (last visited Feb. 27, 2017).

chartered and run ten months during the year. I have never had any official report from any of them other than during their public school term." [42]

The practice continued after the new Constitution's adoption. In the state superintendent's 1894 report, the principal of Brandon Female College indicated that the curriculum taught to publicly funded students was controlled by state authorities: "The school is free for seven months for pupils studying public school branches. The attendance is good during the entire session, which lasts about nine months."[43] Similarly, the superintendent of Oktibbeha County reported that, at the two high schools in his county, "[t]he public term is supplemented at both places by a pay term of five months. Besides the public school curriculum, instruction is given in book-keeping, higher mathematics, etc."[44]

3. Morris v. State Teachers' College: This Court Reaffirms that Otken's Definition of "Free Schools" Endured Past the Enactment of the Constitution of 1890.

History clearly demonstrates that Section 208's framers understood that the question of whether a school is a "free school" involves much more than whether the school charges tuition.[45] But if any doubt lingered after the passage of the Constitution of 1890, the Supreme Court put that confusion to bed in 1932.

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[42] Id. at 217.

[43] Biennial Report of the State Superintendent of Public Education to the Legislature of Mississippi for Scholastic Years 1891-92 and 1892-93 at 406, available at http://babel.hathitrust.org/cgi/pt?id=njp.32101050882032;view=1up;seq=7 (last visited Feb. 27, 2017). Elsewhere in the report, it is clear that what late-1800s educators called a "branch" is what modern students would refer to as a "subject." For example, the 1894 report lists the number of pupils studying the public school branches, and it lists those branches: Spelling, Reading, Geography, Arithmetic, etc. Id. at page VII. Candidly, the superintendent

[44] Id.

In State Teachers' College v. Morris, a father's two children attended a demonstration and practice school at the State Teachers' College in Hattiesburg.[46] The school charged the father $72 in tuition for the 1930-31 school year.[47] Aggrieved, the father filed suit and argued that his children 's school received public funding; therefore, in his view, the school was a "free sc

4. Charter Schools are Not “Free Schools” Because They are Not Overseen by the State Superinten dent or By a Local District Superintendent.

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these amendments simply distributed state-level supervision to both the state superintendent and the State Board of Education.

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

Of course, the CSA allows none of these authorities to oversee charter schools. The CSA forbids the local district superintendent from overseeing charter schools.[58] It

That court had long held that the public "common schools" are, among other things, "subject to and under the control of the qualified voters of the school district." [62] In contrast, Washington's Charter Schools Act provided for schools that were "exempt from all school district policies" and nearly "all . . . state statutes and rules applicable to school districts." [63] The Washington Supreme Court could only conclude that charter schools were not within its constitution's system of public schools and, therefore, could not receive public funding. [64]

The parallels between the Washington law and Mississippi's CSA are obvious. As in Washington, Mississippi's charter schools are exempt from the rules and regulations of the school districts where they are located. [65] As in Washington, Mississippi's charter schools are not under the supervisory authority governing public schools. [66]

The same reasoning that guided the Washington Supreme Court's decision applies to this case: charter schools are constitutionally ineligible for state school funds because they are not subject to the same oversight as the constitutionally required system of public schools.

[62] Id. at 1137 (quoting Sch. Dist. No. 20 v. Bryan, 51 Wash. 498, 504, 99 P. 28 (1909)).
[63] Id. at 1136.
[64] Id. at 1141.
[65] Miss. Code Ann. § 37-28-45(5).
[66] Miss. Code Ann. § 37-28-45(3).

III. Jackson Schoolchildren Have Lost Millions of Dollars Because of the CSA.