IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

DEBRA L. WINTERS **APPELLANT**

brief

VS. **CAUSE NO. 2007-CA-00476**

CALHOUN COUNTY SCHOOL DISTRICT and
CALHOUN COUNTY BOARD OF EDUCATION **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Chancellor:	The Honorable Edwin H. Roberts, Jr.
Appellant:	Debra L. Winters Grenada, Mississippi
Appellees:	Calhoun County School District Pittsboro, Mississippi
	Calhoun County Board of Education Pittsboro, Mississippi
Attorneys for Appellant:	David Burks Langford, Langford & Associates, PLLC Starkville, Mississippi
	Billie Jo White Langford & Associates, PLLC Starkville, Mississippi
	Matthew Daniel Wilson Langford & Associates, PLLC Starkville, Mississippi

Attorneys for Appellees:	James A. Keith Adams and Reese LLP Jackson, Mississippi
	R. Jarrad Garner Adams and Reese LLP Jackson, Mississippi
	Paul Moore, Jr. Moore & Moore Attorneys Calhoun City, Mississippi
Other Interested Parties:	Beth Hardin Superintendent of Education for Calhoun County
	Dale Hays Principal of Calhoun City High School
	Grover Eddington Member of the Calhoun County Board of Education
	Susan Hardin Member of the Calhoun County Board of Education
	Billy McCord Member of the Calhoun County Board of Education
	Danny Harrelson Member of the Calhoun County Board of Education
	Bozzie Edwards Member of the Calhoun County Board of Education
	Barry Black Former Member of the Calhoun County Board of Education

Phil Yarbrough
Former Member of the
Calhoun County Board of Education

MATTHEW D. WILSON (MS BAR 102344)
LANGFORD & ASSOCIATES, PLLC
Attorneys of Record for Debra Winters

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STATEMENT OF THE CASE

I. Procedural History

This case was commenced by the filing of a Notice of Appeal (hereinafter "Notice") and Petition for Appeal from the Calhoun County Board of Education, Request for Temporary Restraining Order, Preliminary Injunction, Damages and Other Relief (hereinafter "Petition") by Debra L. Winters in the Chancery Court of Calhoun County. The Petition alleges that Mrs. Winters, a teacher at Calhoun City High School, had been demoted in violation of the Education Employment Procedures Law of 2001 (*Miss. Code Ann.* §§ 37-9-101, *et. seq.*)[1] (hereinafter the "EEPL") when the Superintendent of Education transferred her from the High School to the Calhoun County Alternative School (hereinafter the "Alternative School"). The Petition also alleges violations of federal law.

Prior to filing her Notice and Petition, Mrs. Winters complied with the "Staff Complaints and Grievance Policy" (hereinafter the "Grievance Policy") that was established by the Calhoun County Board of Education (hereinafter the "School Board"). Pursuant thereto, Mrs. Winters had a Level I Grievance Hearing before Principal Dale Hays. After Principal Hays denied her petition, Mrs. Winters had a Level II Grievance Hearing before Superintendent Beth Hardin. When Superintendent Hardin denied her petition, Mrs. Winters had a Level III Grievance Hearing before the School Board. When the School Board chose to take no action, Mrs. Winters filed her Notice and Petition with the Chancery Court of Calhoun County.

The Appellees (hereinafter the "School District & School Board") removed this matter to the United States District Court for the Northern District of Mississippi. After the federal court assumed jurisdiction, Mrs. Winters moved the court to compel transcription of the record of the

[1] The EEPL used to be referred to as the School Employment Procedures Law, or "SEPL".

Level III Grievance Hearing. The court never ruled on this motion because the matter was remanded, by way of Agreed Order, to the Chancery Court of Calhoun County.

Following remand, the School District & School Board moved the Chancery Court to dismiss the appeal pursuant to *Miss. R. Civ. P. 12 (b) (6)*. Briefs were submitted to the lower court. An oral hearing was conducted on February 28, 2007. The Chancery Court sustained the School District & School Board's Motion to Dismiss on March 1, 2007.

Feeling aggrieved by the decision of the Chancery Court in this case, Debra L. Winters has perfected her appeal and now presents this case to be reviewed by this Honorable Court.

II. Statement of the Facts

Mrs. Winters was a biology teacher for the Calhoun County School District (hereinafter "School District") from August 1997 to July 2006. (R.E. at 9; C.P. at 8.) As of the 2005-2006 school year, Mrs. Winters was certified by the Mississippi Department of Education to teach biology, but she was not certified to teach chemistry or special education. (R.E. at 9; C.P. at 8.) In addition, Mrs. Winters had limited experience teaching students with behavioral problems. (R.E. at 9; C.P. at 8.) In fact, Principal Hays had placed Mrs. Winters on a plan of improvement, which cited that her major problem was controlling the classroom. (R.E. at 38; T. at 26.)

On January 23, 2006, Mrs. Winters received a School District letter of intent for employment during the 2006-2007 school year (hereinafter "the Letter of Intent"). (R.E. at 10; C.P. at 9.) Mrs. Winters initialed and checked Section I, § 1 of the Letter of Intent, indicating her intention to remain in her position as a science teacher at Calhoun City High School and Junior High School during the 2006-2007 school year. (R.E. at 10; C.P. at 9.) Outside of Mrs. Winters' presence, Mr. Hays initialed Section II, § 1 of the Letter of Intent, signed the document,

and added the phrase "Recommending Alternative School Transfer Chemistry Certification." (R.E. at 10; C.P. at 9.)

In late February 2006, Mrs. Winters received a copy of the Letter of Intent signed by Mr. Hays. (R.E. at 10; C.P. at 9.) Mrs. Winters attempted to contact Mr. Hays about the additional language concerning the recommended transfer; however, Mr. Hays was unavailable. (R.E. at 10; C.P. at 9.) In the meantime, Mrs. Winters contacted Superintendent Beth Hardin, who informed her that a transfer to the Alternative School was not imminent since there were no openings for teachers at the Alternative School. (R.E. at 10; C.P. at 9.)

On April 19, 2006, Mr. Hays called Mrs. Winters into his office to meet with Alternative School Principal Hilda Hemphill. (R.E. at 10; C.P. at 9.) Mr. Hays stated that the purpose of the meeting was for Mrs. Hemphill and Mrs. Winters to "get on the same page" so that Mrs. Winters' transfer to the Alternative School would be smooth. (R.E. at 10; C.P. at 9.) Mrs. Winters promptly informed Mr. Hays that she had no reason to discuss her transfer to the Alternative School because she had never agreed to work there. (R.E. at 10-11; C.P. at 9-10.) The next day, April 20, 2006, Mr. Hays instructed Mrs. Winters that the decision to transfer her to the Alternative School had been finalized pursuant to the authority of Mrs. Hardin, and that Mrs. Winters was going to teach at the Alternative School the next year. (R.E. at 11; C.P. at 10.)

At no time prior to April 15, 2006, did Mrs. Winters receive written notice from Mrs. Hardin, as required by the EEPL, expressly stating that Mrs. Winters would be transferred to the Alternative School for the 2006-2007 school year. (R.E. at 11; C.P. at 10.)

On May 1, 2006, Mrs. Winters requested a Level I Grievance Hearing with Mr. Hays pursuant to the Grievance Policy. (R.E. at 11; C.P. at 10.) On May 9, 2006, the Level I hearing was conducted. (R.E. at 11; C.P. at 10.) Immediately after the hearing, without offering any

reason for his decision, Mr. Hays denied Mrs. Winters' request for a renewal of her contract to teach science at Calhoun City High School and Junior High School. (R.E. at 11; C.P. at 10.)

On May 22, 2006, Mrs. Winters requested a Level II Grievance Hearing with Mrs. Hardin. (R.E. at 12; C.P. at 11.) On June 12, 2006, the Level II hearing was conducted before Mrs. Hardin. (R.E. at 12; C.P. at 11.) On June 14, 2006, without offering any reason for her decision, Mrs. Hardin denied Mrs. Winters' request for a renewal of her contract to teach science at Calhoun City High School and Junior High School. (R.E. at 12; C.P. at 11.)

On June 26, 2006, Mrs. Winters requested a Level III Grievance Hearing with the School Board. (R.E. at 12; C.P. at 11.) Letters discussing the appropriate time periods under the EEPL were exchanged. (R.E. 43-44; T at 31-32.) More than one month later, on July 31, 2006, the Level III hearing was conducted before the School Board. (R.E. at 12; C.P. at 11.) At the Level III hearing, neither the School District, nor the superintendent, nor the principal presented evidence to support their contention that Mrs. Winters should be transferred to the Alternative School. No one offered (1) any evidence that such decision to transfer was based on any articulated facts, factors or objective criteria; or (2) any reason to contradict the evidence offered by Mrs. Winters that such decision was unlawful. (R.E. at 12; C.P. at 11.)

Upon information and belief, after Mrs. Winters, by and through counsel, had presented her case at the Level III hearing, the School Board went into Executive Session with Mrs. Hardin and Mr. Hays being present during the deliberations, but without Mrs. Winters or her counsel being afforded the opportunity to cross-examine and/or to observe the Board's discussion and examination of those present. (R.E. at 12; C.P. at 11.) Following the conclusion of the Executive Session, the School Board issued no ruling and subsequently took no action on the evidence presented. (R.E. at 12; C.P. at 11.)

The School Board failed to vote on Mrs. Winters request for renewal of her contract for the 2006-2007 school year as a science teacher for Calhoun City High School and Junior High School, failed to offer findings of fact and conclusions of law as a basis for their decision, and failed to offer any basis or explanation whatsoever, absent the letter from the superintendent stating that the Board "took no action." (R.E. at 13; C.P. at 12.) Moreover, the School Board failed to provide a reporter to transcribe the record of the Level III Grievance Hearing. (R.E. at 13; C.P. at 12.)

On August 29, 2006, Mrs. Winters filed her Petition with the Chancery Court of Calhoun County. (R.E. at 1; C.P. at 2.) Therein, Mrs. Winters alleges that she had been demoted in violation of the EEPL (*Miss. Code Ann.* §§ 37-9-101, *et. seq.*). (R.E. at 13; C.P. at 12.) The Petition also alleges violations of federal law. (R.E. at 13; C.P. at 12.)

On September 6, 2006, the School District & School Board removed this matter to the United States District Court for the Northern District of Mississippi. (C.P. at 16-21.) After the federal court assumed jurisdiction, Mrs. Winters moved the court to compel transcription of the record of the Level III Grievance Hearing. (R.E. at 14-16; C.P. at 222-24.) The court never ruled on this motion because the matter was remanded, by way of Agreed Order, to the Chancery Court of Calhoun County. (R.E. at 16-17; C.P. at 63-64.)

Following remand, the School District & School Board on December 21, 2006 moved the Chancery Court to dismiss the appeal pursuant to *Miss. R. Civ. P. 12 (b) (6)*, asserting that Mrs. Winters had chosen to follow the Grievance Policy set forth by the School Board, and not the procedures set forth by the EEPL. (C.P. at 70-75.) The School District & School Board also asserted that Mrs. Winters' transfer to the Alternative School was not a demotion. (C.P. at 70-75.) The School District & School Board also incorporate as exhibits to their Motion to Dismiss Petitioner's Notice of Appeal and Petition for Appeal (hereinafter the "Motion to Dismiss"): (1)

Mrs. Winters' 2005-2006 employment contract; (2) an unsigned contract purporting to be the one that the District had offered her; and (3) a copy of the Petition. (R.E. at 19-22; C.P. at 70-78.)

In response, Mrs. Winters argued in her Reply Brief to School District & School Board's Motion to Dismiss (hereinafter the "Reply Brief"), which was filed on February 8, 2007, that the transfer was a demotion because the District was asking her to teach multiple subjects, including some of which she was not certified to teach, to students with behavior problems so severe that they had to be segregated from the rest of the school population. (C.P. at 94-95.) Furthermore, Mrs. Winters contended that she had a duty to comply with School Board policy, and that it would have been a "useless act" for her to request another hearing before the School Board, especially since the School Board had already heard live testimony from all the key witnesses and had been provided with all available relevant evidence during the Level III Grievance Hearing. (C.P. at 95-98.)

The School District & School Board filed their Rebuttal in Support of Motion to Dismiss Petitioner's Notice of Appeal and Petition for Appeal (hereinafter "Rebuttal") on February 15, 2007. (R.E. at 29; C.P. at 104-10.) Therein, the School District & School Board assert that Mrs. Winters did not lack "substantial experience" to teach children at the Alternative School. (R.E. at 29; C.P. at 104-10.)

On February 28, 2007, a hearing was held on the School District & School Board's Motion to Dismiss, at which time counsel for both sides presented oral arguments. (C.P. at 89-90.) On March 1, 2007, the Chancery Court granted the School District & School Board's Motion to Dismiss. (R.E. at 4-5; C.P. at 205-06.)

Feeling aggrieved by the decision of the Chancery Court in this case, Debra L. Winters has perfected her appeal and now asks this Honorable Court to review the decisions rendered in this case. (R.E. at 4-5; C.P. at 205-06.)

SUMMARY OF THE ARGUMENT

The esteemed Chancellor erred when he ruled that Mrs. Winters' reassignment to the Alternative School was not a non-renewal.

Under Mississippi law, a teaching contract is considered "non-renewed" if, among other reasons, the teacher is demoted. A demotion includes any reassignment 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. Thus, if it was reasonably possible for Mrs. Winters to prove that she had been asked to teach outside of her certification and/or her recent level of experience, then the esteemed Chancellor erred by sustaining the Motion to Dismiss, particularly with regard to the issue of her demotion.

When considering the School District & School Board's Motion to Dismiss, this Honorable court must assume that the allegations in the Petition are true. In her Petition, Mrs. Winters alleges that: (1) she had limited experience teaching students with learning disabilities or behavioral problems; and that (2) she was reassigned to the Alternative School.

The Legislature has determined that only students having *severe* behavioral problems shall be transferred to the Alternative School. Taking Mrs. Winters at her word, as an appeals court is obliged to do when reviewing a motion to dismiss, this Honorable Court should find that Mrs. Winters had limited experience teaching students with behavioral problems. Thus, Mrs. Winters lacked substantial experience within a reasonably current period to teach at the Alternative School—a school comprised of students having severe behavioral problems. As such, Mrs. Winters' contract was not renewed, triggering the application of the EEPL.

The esteemed Chancellor also erred when he found that Mrs. Winters had waived her right to an appeal under the EEPL.

Under Mississippi law, a school board may prescribe and enforce rules and regulations not inconsistent with law or with the regulations of the State Board of Education for their own government and for the government of the schools. Mrs. Winters operates under the assumption that the Grievance Policy is consistent with the EEPL.

The School Board & School District contend that Mrs. Winters waived her right to appeal under the EEPL. According to counsel opposite, Mrs. Winters had a choice: Either she could have followed the Grievance Policy, or she could have followed the EEPL, but she could not have done both.

Under the EEPL, the School Board is required to conduct a hearing on the non-renewal of a teacher's contract. Likewise, under the Grievance Policy, the School Board is required to conduct a hearing on a complaint by an individual based upon an alleged violation of a person's rights under state law, federal law or Board policy. Since an unlawful non-renewal would violate a person's rights under the EEPL, then, *ipso facto*, a Level III hearing on an alleged demotion of a school employee would be tantamount to an EEPL hearing (and vice versa).

In the case *sub judice*, Mrs. Winters gave proper notice to the School Board of her desire to have a Level III hearing. The hearing covered all the subjects that would have been addressed in an EEPL hearing and was done in compliance with the EEPL. Therefore, the Level III hearing was, as a matter of law, an EEPL hearing.

For this Honorable Court to conclude otherwise would imply that a board of education may enact rules or regulations that are inconsistent with state law. The only way that the School Board's Grievance Policy could relate to an issue of non-renewal would be if the procedures set forth therein were understood to complement—and not compete with—the EEPL.

Mrs. Winters contends that the Grievance Policy complements the EEPL by creating preliminary levels of evaluation prior to the Level III/EEPL hearing. Nevertheless, if we

assume, *arguendo*, that the Level III hearing and the EEPL hearing are separate animals, then the only consistent way to reconcile the two would be to require an aggrieved person to appeal the School Board's Level III finding to the School Board, yet again, but this time under the auspices of the EEPL. Of course, this would be absurd. If Mrs. Winters had demanded another hearing before the School Board, she could have hardly expected a different outcome, especially since the School Board had already heard testimony from the key witnesses, and since all evidence offered would have been identical.

In effect, the School District & School Board contend that Mrs. Winters did not afford them proper notice of her request for an EEPL hearing since she did not expressly invoke the language of the statute in her request for a Level III hearing. Even though the School Board received actual notice of her grievance and actually conducted a live hearing on the merits thereof, the School Board now claims that it did not have proper written notice pursuant to the EEPL. This argument fails as a matter of law.

Upon weighing the relevant factors, the esteemed Chancellor should have concluded that Mrs. Winters did, in fact, have her EEPL hearing. Since Mrs. Winters did have her EEPL hearing, the esteemed Chancellor erred by holding that she had waived her rights to an appeal under the EEPL.

Mrs. Winters argues in the alternative that the Motion to Dismiss should have been evaluated as a motion for summary judgment since the Motion to Dismiss and its corresponding Rebuttal offer material outside of the pleadings.

A genuine issue of material fact is in dispute with regard to the issue of demotion, thus making summary judgment inappropriate. As such, this Honorable Court should reverse the esteemed Chancellor's finding that there was no demotion, and subsequently no non-renewal of Mrs. Winters' 2005-2006 contract.

Further, Mrs. Winters contends that, as a matter of law, the esteemed Chancellor could not have granted summary judgment to the School District & School Board on the issue of her alleged waiver.

Since a genuine issue of material fact exists with respect to the issue of Mrs. Winters' demotion, and since the School District & School Board's contention that Mrs. Winters waived her rights under the EEPL fails as a matter of law, this Honorable Court should reverse the lower court's order sustaining the Motion to Dismiss.

Accordingly, Mrs. Winters respectfully petitions this Honorable Court to set aside the esteemed Chancellor's order granting the Motion to Dismiss.

ARGUMENT

I. Standard of Review

The standard of review for this Honorable Court depends upon whether the School District & School Board's Motion to Dismiss should have been treated by the lower court as a motion to dismiss for failure to state a claim (*Miss. R. Civ. P. 12 (b) (6)*) or as a motion for summary judgment (*Miss. R. Civ. P.* 56).

A. Standard of Review Under Miss. R. Civ. P. 12 (b) (6)

If the esteemed Chancellor was correct in evaluating the Motion to Dismiss pursuant to *Miss. R. Civ. P. 12 (b) (6)*, then the trial court's order granting the Motion to Dismiss should be reviewed *de novo*. See Penn Nat'l Gaming, Inc. v. Ratliff, 954 So.2d 427, 430 (Miss. 2007). "When considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim." Id. at 430-31; but see Taylor v. Southern Farm Bureau Cas. Co., 954 So.2d 1045, 1047 (Miss. App. 2007) (citing State Indus., Inc. v. Hodges, 919 So.2d 943, 945 (Miss. 2006)) (holding that *de novo* review of a grant or denial of a motion to dismiss is proper, but that a motion to dismiss will not be reversed unless the trial court has abused its discretion).

In considering the Motion to Dismiss, the Chancellor had limited discretion. See Penn Nat'l Gaming, Inc., 954 So.2d at 430-32. The lower court was required to assume that the facts alleged in the Petition are true. Id. If there is a reasonable possibility that the facts alleged could prove Mrs. Winters' claim, the Chancellor would have been obligated to deny the Motion to Dismiss. See id. Accordingly, this Honorable Court should review the case *de novo* to determine whether the esteemed Chancellor abused his discretion by granting the Motion to

Dismiss in contravention of the aforesaid standard of review. See id.; see also Taylor, 954 So.2d at 1047.

B. Standard of Review Under Miss. R. Civ. P. 56

Rule 12 (b) of the *Miss. R. Civ. P.* states:

> If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Assuming the lower court should have treated the Motion to Dismiss as a motion for summary judgment under *Miss. R. Civ. P. 56*, because it contained matters outside of the Petition, the esteemed Chancellor should have given the non-moving party, *i.e.,* Mrs. Winters, the "benefit of the doubt as to the existence of a material fact." Monsanto Co. v. Hall, 912 So. 2d 134, 136 (Miss. 2005). Giving Mrs. Winters the benefit of the doubt should have resulted in the lower court's denial of the Motion to Dismiss had any genuine issue of material fact existed. See id. It follows that this Honorable Court should rely on the same standard of determination when conducting its *de novo* review of the Chancellor's findings. See id.

II. The Chancellor Abused His Discretion When He Found That Mrs.Winters Had Not Been Demoted And, Therefore, That A Non-Renewal Of Her Contract Had Not Occurred Pursuant To The Education Employment Procedures Law Of 2001 (*Miss. Code Ann.* §§ 37-9-101, Et. Seq.) ("EEPL"), Even Though The Allegations Set Forth In Mrs.Winters' Petition Would Prove Otherwise, And The Chancellor Was Obliged To Take Those Allegations As True.

If the Chancellor was correct in utilizing *Miss. R. Civ. P.* 12 (b) (6) to evaluate the Motion to Dismiss, Mrs. Winters respectfully submits that she is capable of proving a set of facts in support of her claim that her contract was not renewed and, therefore, that the EEPL applies to her situation. See Penn Nat'l Gaming, Inc., 954 So.2d at 430. Accordingly, the lower court erred

when it found that Mrs. Winters had not been demoted and, therefore, that a non-renewal of her employment contract had not occurred. See id. (R.E. at 4; C.P. at 205.)

Under Mississippi law, a teaching contract is considered "non-renewed" if, among other reasons, the teacher is demoted. See Bd. of Edu. for the Holmes Co. Schs. v. Fisher, 874 So.2d 1019, 1022 (Miss. App. 2004). "A demotion includes any reassignment ... 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." Id. (quoting Montgomery v. Starkville Mun. Sep. Sch. Dist., 665 F. Supp. 487, 492 (N. D. Miss.1987)). Thus, if it was reasonably possible for Mrs. Winters to prove that she had been asked to teach outside of her certification and/or her level of experience, then the lower court erred by sustaining the Motion to Dismiss on the issue of her demotion. See Penn Nat'l Gaming, Inc., 954 So.2d at 430.

When considering the School District & School Board's Motion to Dismiss, this Honorable Court must assume that the allegations in Mrs. Winters' Petition are true. See id. In her Petition, Mrs. Winters alleges that: (1) she had limited experience teaching students with behavioral problems; and that (2) she was reassigned to the Alternative School. (R.E. at 9-11; C.P. at 8-10.)

Section 37-13-92 of the Mississippi Code Annotated (1972) requires all school districts to establish alternative schools, such as the one presently at issue. Subsection (1) thereof reads as follows:

> Beginning with the school year 2004-2005, the school boards of all school districts shall establish, maintain and operate, in connection with the regular programs of the school district, an *alternative school program or behavior modification program* as defined by the State Board of Education for, but not limited to, the following categories of compulsory-school-age students:
>
> (a) *Any compulsory-school-age child who has been suspended for more than ten (10) days or expelled from school*, except for any student expelled for possession of a weapon or other felonious conduct;

> (b) *Any compulsory-school-age child referred to such alternative school based upon a documented need for placement* in the alternative school program by the parent, legal guardian or custodian of such child *due to disciplinary problems*;
>
> (c) *Any compulsory-school-age child referred to such alternative school program by the dispositive order of a chancellor or youth court judge*, with the consent of the superintendent of the child's school district; and
>
> (d) *Any compulsory-school-age child whose presence in the classroom*, in the determination of the school superintendent or principal, *is a disruption to the educational environment of the school* or a detriment to the best interest and welfare of the students and teacher of such class as a whole.

(Emphasis not in original.)

The Legislature has determined that only students having *severe* behavioral problems shall be transferred to the Alternative School. See id. Taking, Mrs. Winters at her word, as any court is obliged to do when reviewing motions to dismiss under *Miss. R. Civ. P. 12 (b) (6)*, see Penn Nat'l Gaming, Inc., 954 So.2d at 430, this Honorable Court should note that Mrs. Winters had limited experience teaching students with behavioral problems. (R.E. at 9-11; C.P. at 8-10.) In fact, Principal Hays had placed Mrs. Winters on a plan of improvement, which cited that her major problem was classroom control. (R.E. at 38; T. at 26.) Thus, it could hardly be said that Mrs. Winters had "substantial experience within a reasonably current period," Fisher, 874 So.2d at 1022, to teach at the Alternative School—a school comprised of students having behavioral problems so severe that, in some instances, the students have been ordered there by a chancellor or a youth court judge, especially considering her documented weakness in behavioral control. See § 37-13-92. (R.E. at 38; T. at 26.)

Given the disparity between the requirements of the job and her experience, Mrs. Winters was, in fact, demoted. See Fisher, 874 So.2d at 1022. As such, Mrs. Winters' contract was not renewed, triggering the application of the EEPL. See id.

With due respect being afforded to the Chancellor, Mrs. Winters contends that he abused his discretion by holding that she was not demoted. (R.E. at 4; C.P. at 205.) Since the School

District failed to transcribe a record of Mrs. Winters' hearing before the School Board, see § 37-9-111, and since counsel opposite has stated that a transcription thereof is not a part of this record (R.E. at 13, 31-36; C.P. at 12, 216-17, 234-38), the only facts upon which the Chancellor could have based his conclusions would have been those facts set forth in the Petition. (R.E. at 9-11; C.P. at 8-10.) Since the facts set forth in the Petition—which are assumed to be true—support Mrs. Winters' *prima facie* case for demotion, see Fisher, 874 So.2d at 1022, the Chancellor lacked "substantial evidence" to conclude to the contrary. See § 37-9-113.

Upon weighing the relevant factors, the Chancellor "'committed a clear error of judgment in the conclusion [he] reached.'" Cooper v. State Farm Fire & Cas. Co., 568 So.2d 687, 692 (Miss. 1990) (quoting Brown v. Arlen Mgmt. Corp., 663 F.2d 575, 580 (C.A.Tex.1981) (internal citations omitted)). Accordingly, the lower court abused its discretion by holding that Mrs. Winters had not been demoted and, as a result, Mrs. Winters was not afforded the protections provided under the EEPL. (R.E. at 4-5; C.P. at 205-06.)

Based on the foregoing, Mrs. Winters respectfully petitions this Honorable Court to set aside the Chancellor's order granting the Motion to Dismiss. (R.E. at 4-5; C.P. at 205-06.) In the alternative, if this Honorable Court sustains the Chancellor's order on any of the separate legal issues, Mrs. Winters requests this Honorable Court then set aside the Chancellor's finding on the issue that there was no demotion as a matter of law.

This Honorable Court should be advised that Mrs. Winters intends to file a related action against the School District in the United States District Court pursuant to federal civil rights laws that are no longer at issue in this matter. (R.E. at 16-17; C.P. at 63-64.) If left undisturbed, the lower court's findings, which were not based upon "substantial evidence," see § 37-9-113, would have an adverse effect upon any subsequent federal litigation. See Allen v. McCurry, 449 U.S. 90, 93 (1980) ("Under collateral estoppel, once a court has decided an issue of fact or law

necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.")

It would be unfair for Mrs. Winters' federal law claims to be inhibited by the Chancellor's findings when, in fact, said findings could not have been supported under the standard of review for motions to dismiss. See Penn Nat'l Gaming, Inc., 954 So.2d at 430. (R.E. at 4-5; C.P. at 205-06.) Mrs. Winters should be afforded a merit-based determination of her federal law claims, with due consideration being afforded to all relevant evidence. With due respect to the Chancellor, it would be a miscarriage of justice if Mrs. Winters' federal law claims were barred, on the outset, by the lower court's order, especially since the School District & School Board failed to transcribe a record for the Chancellor to review. Cf. § 37-9-111. (R.E. at 13; C.P. at 12.)

Therefore, Mrs. Winters respectfully petitions this Honorable Court to set aside the Chancellor's determination that she was not demoted. (R.E. at 4; C.P. at 205.)

III. The Chancellor Abused His Discretion When He Found That Mrs. Winters Had Waived Her Right To An Appeal Pursuant To The Education Employment Procedures Law Of 2001 (*Miss. Code Ann.* §§ 37-9-101, Et. Seq.) ("EEPL"), Even Though (A) The School District's Grievance Policy Was Consistent With, And Ran Appurtenant To, The EEPL; (B) Mrs. Winters Was Afforded The Same Due Process Hearing Before The School Board Under The Grievance Policy That She Otherwise Would Have Been Afforded Had She Expressly Invoked The Provisions Of The EEPL In Her Notice; And (C) It Would Have Been A Useless Act For Mrs. Winters To Request An EEPL Hearing Before The School Board After The School Board Had Already Denied Her Petition During The Level III Hearing.

A school board may "prescribe and enforce rules and regulations not inconsistent with [the] law or with the regulations of the State Board of Education for their own government and for the government of the schools," *Miss. Code Ann.* § 37-7-301 (l). (Emphasis not in the original.) Mrs. Winters accurately operates from the assumption that the Grievance Policy is consistent with the EEPL. Otherwise, the School Board's implementation of the Grievance

Policy would have been in violation of state law. See id. Counsel opposite will likely deny that the School Board has violated any laws—even though he asserts that the EEPL and the Grievance Policy are "far different" from each other (C.P. at 73).[2] Nevertheless, Mrs. Winters continues to assert confidently that the EEPL and the Grievance Policy can only be interpreted consistently with each other in light of their overlapping coverage. Compare id. with §§ 37-9-101, *et. seq.*

The School Board implemented the Grievance Policy in order to "secure at the first possible administrative level, an equitable solution to any grievance." (Emphasis not in the original.) (R.E. at 24; C.P. at 101.) A "grievance," as defined by the Grievance Policy, is "a complaint by an individual based upon an alleged violation of a person's rights *under state or federal law* or Board policy." (Emphasis not in the original.) (R.E. at 24; C.P. at 101.)

Compliance with the Grievance Policy is *mandatory*. (R.E. at 24; C.P. at 101.) The Grievance Policy states in pertinent part: "Grievances *shall be processed* in accordance with the following procedures: ... *All* grievances ... *must* be presented orally to the principal." (R.E. at 24; C.P. at 101.) (Emphasis not in the original.) (R.E. at 24; C.P. at 101.) To comply with the Grievance Policy, the aggrieved person must request a hearing before the Principal ("Level I"). (R.E. at 24-26; C.P. at 101-03.) If the Level I hearing does not resolve the grievance, the complainant may request a hearing before the Superintendent ("Level II"). (R.E. at 24-26; C.P. at 101-03.) If the Level II hearing does not resolve the grievance, the complainant may request a hearing before the School Board ("Level III"). (R.E. at 24-26; C.P. at 101-03.)

As Mrs. Winters alleges in her Petition—which must be taken as true—she properly followed the Grievance Policy all the way through the Level III hearing. (R.E. at 11-12; C.P. at

[2] If the School District, however, were now to assert that the Grievance Policy was in violation of the law, then the Grievance Hearings would not have been a proper "due process mechanism" as counsel opposite claimed at oral argument before the Chancellor. (R.E. at 37; T. at 4.)

10-11.) After the School Board failed to resolve her employment-based grievance, one having its basis in enforcing her rights under the EEPL, Mrs. Winters filed her Petition pursuant to the EEPL to appeal the School Board's decision. (R.E. at 7-13; C.P. at 6-15.)

The School District & School Board contend, however, that Mrs. Winters had no right to appeal under the EEPL. (R.E. at 37; T at 4.) Opposing counsel argued in the hearing on the Motion to Dismiss:

> Mrs. Winters voluntarily chose another due process procedural mechanism in this case and that would be she followed the district's internal grievance policies and procedures, which are set forth in board policies and referred to in the employee handbook. She followed these procedures to conclusion rather than the procedures set forth in the non-renewal statutes...

(R.E. at 37; T at 4.) (Emphasis added.) By virtue of counsel opposite's statement to the Chancellor, one may surmise that the School Board & School District contend that the EEPL and the Grievance Policy are mutually exclusive of one another. (R.E. at 37; T at 4.) Pursuant to the arguments presented to the court by counsel opposite, Mrs. Winters had to make a choice: Either follow the Grievance Policy, or follow the EEPL. (R.E. at 37; T at 4.) The School District & School Board contend that she could not have done both. (R.E. at 37; T at 4.)

Under the EEPL, the School Board is required to conduct a hearing on the non-renewal of a teacher's contract. § 37-9-111. Likewise, under the Grievance Policy, the School Board is required to conduct a hearing on "a complaint by an individual based upon an alleged violation of a person's rights *under state or federal law* or Board policy." (R.E. at 24; C.P. at 101.) Since an unlawful non-renewal would violate a person's rights under the EEPL, see §§ 37-9-101, *et. seq.*, then, *ipso facto*, a Level III hearing on an alleged demotion of a teacher would be tantamount to an EEPL hearing (and vice versa). See § 37-9-111.

In the case *sub judice*, Mrs. Winters gave more than one month's written notice to the School Board of her desire to have a Level III hearing. (R.E. at 11-12; C.P. at 10-11.) See id.

Correspondence between the parties discussed the time periods under the EEPL. (R.E. at 43-44; T. 31-32.) The live hearing covered all the subjects that would otherwise have been addressed had Mrs. Winters' request for a hearing expressly mentioned the EEPL by name. (R.E. at 11-12, 43-44; C.P. at 10-11; T. at 31-32.) See id. Therefore, the Level III hearing was, as a matter of fact and law, a hearing under the EEPL by both express agreement and implicit operation. (R.E. at 24, 43-44; C.P. at 101; T. at 31-32.) See id.

For this Honorable Court to conclude otherwise would imply that a board of education may enact rules or regulations that are inconsistent with state law. Cf. § 37-7-301 (l). In the same way that federal laws on a particular subject preempt state laws regarding the same realm of law, see Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984), so it follows that state laws, *i.e.*, the EEPL, preempt school board policies, *i.e.*, the Grievance Policy, whenever such laws and policies attempt to govern the same area. Compare id. with § 37-7-301 (l). (R.E. at 24; C.P. at 101.) Along these lines, requiring a Level III hearing pertaining to a non-renewal would crowd the field of law governed by the State, by and through the EEPL. Thus, the only consistent way by which the Grievance Policy could relate to an issue of non-renewal would be if Grievance Policy was interpreted to complement—and not compete with—the EEPL. Compare § 37-9-111 with § 37-7-301 (l). Mrs. Winters contends that the Grievance Policy complements the EEPL by creating preliminary levels of evaluation prior to the Level III/EEPL hearing, increasing, rather than decreasing, the procedural due process afforded to the aggrieved individual.

Nevertheless, if we assume, *arguendo*, that the Level III hearing and the EEPL hearing are totally separate animals, as counsel opposite contends (R.E. at 37; C.P. at 73; T at 4), then the only consistent way to reconcile the two would be to require an aggrieved person to appeal the School Board's Level III finding to, of all entities, the School Board, albeit this time under the

auspices of the EEPL. Naturally, this would be absurd. "In Mississippi, there is a well recognized rule that a person or entity is never required by law to proceed with a vain and useless act." Ronald Adams Contractor, Inc. v. Miss. Transp. Com'n, 777 So.2d 649, 654 (Miss. 2000). Further, if Mrs. Winters had demanded another hearing before the School Board, she could have hardly expected a different outcome, especially since the School Board had already heard live testimony from the key witnesses. (R.E. at 12; C.P. at 11.) Instead, she would have incurred additional damages, attorney's fees, and lost time by performing such an idle gesture. See id.

In effect, the School District & School Board contend that Mrs. Winters did not afford them proper notice of her request for an EEPL hearing since she did not expressly invoke the language of the statute in her request for a Level III hearing. (C.P. at 72.) Even though the School Board had actual notice of her grievance and actually conducted a hearing on the merits thereof (R.E. at 12; C.P. at 11), the School Board now claims that they did not have proper written notice pursuant to the EEPL. (C.P. at 72.) This argument fails as a matter of law. See Shell Petroleum Corp. v. Yandell, 172 Miss. 55, 158 So. 787, 790 (1935) (holding that it would be a useless act to require a person to give notice of a condition to one who already has actual notice thereof.)

"Upon weighing the relevant factors," Cooper, 568 So.2d at 692, the esteemed Chancellor should have concluded that Mrs. Winters did, in fact, have her EEPL hearing. (R.E. at 4-5; C.P. at 205-06.) This conclusion is the only logical way to reconcile the competing policy and law. As such, the lower court "committed a clear error of judgment in the conclusion [he] reached." Id. (with internal quotations omitted). Since Mrs. Winters did have her EEPL hearing, the lower court abused its discretion by holding that she had waived her rights thereto. (R.E. at 4-5; C.P. at 205-06.) Accordingly, Mrs. Winters respectfully petitions this Honorable Court to

set aside the esteemed Chancellor's order granting the Motion to Dismiss. (R.E. at 4-5; C.P. at 205-06.)

IV. The Chancellor Abused His Discretion By Failing to Treat The *Miss. R. Civ. P. 12 (b) (6)* Motion To Dismiss As A *Miss. R. Civ. P. 56* Motion For Summary Judgment Since (A) The Motion To Dismiss References Matters Outside Of The Petition; (B) The School District & School Board's Rebuttal References Facts Not In The Petition; (C) The Chancellor Had The Obligation To Give Mrs. Winters The Benefit Of The Doubt As To The Existence Of A Material Fact; And (D) The Pleadings Demonstrate Genuine Issues Of Material Fact.

Mrs. Winters argues in the alternative that the Motion to Dismiss should have been evaluated under *Miss. R. of Civ. P.* 56. See *Miss. R. of Civ. P.* 12 (b).

In reviewing the Motion to Dismiss, the esteemed Chancellor should have examined whether the motion presented matters outside of the pleadings. See *Miss. R. of Civ. P.* 12 (b) (6). If, in fact, the Motion to Dismiss does present matters outside of the pleadings, the lower court had two options: (1) to exclude such material, or (2) to accept the material outside of the pleadings and to treat the Motion to Dismiss as a summary judgment motion under *Miss. R. Civ. P. 56.* See id. Mrs. Winters respectfully contends that the Chancellor exercised neither of these options.

The Motion to Dismiss incorporates three exhibits: (1) Mrs. Winters 2005-2006 contract with the School District, (2) an unsigned contract purporting to be the one Mrs. Winters had been offered for the 2006-2007 school year, and (3) a copy of the Petition. (R.E. at 18-22; C.P. at 70-78.)

Admittedly, the Petition does make reference to the 2005-2006 contract. (R.E. at 11; C.P. at 10.) However, the Petition does not make reference to the unsigned contract that is attached to the Motion to Dismiss. Although the Petition does state that "no new contract was signed by Mrs. Winters finalizing the transfer to the Alternative School," (R.E. at 11; C.P. at 10), no

inference may then result in a conclusion that Mrs. Winters was referencing the particular unsigned contract that is attached to the Motion to Dismiss. (R.E. at 21; C.P. at 77.) Therefore, by attaching this unsigned contract to the Motion to Dismiss, the School District & School Board inadvertently transformed their motion into one for summary judgment. See id.

This Honorable Court should further note that in the School District & School Board's Rebuttal, they state: "Petitioner argues that she does not have 'substantial experience' teaching students with disciplinary problems. This argument is patently disingenuous." (R.E. at 29; C.P. at 106.) Mrs. Winters contends that this is an allegation of fact is not found anywhere else in the record. As such, this allegation transforms the Motion to Dismiss into a summary judgment motion. See id.

Although Mrs. Winters claims in her Petition that she had limited experience teaching students with behavioral problems, (R.E. at 9; C.P. at 8), the School District & School Board assert the opposite in their Rebuttal. (R.E. at 29; C.P. at 106.) It follows that in regard to the issue of demotion, a genuine issue of material fact is in dispute, see Fisher, 874 So.2d at 1022; see also Monsanto Co, 912 So. 2d at 136, thus making summary judgment inappropriate. See id. Since there was at least one material fact in dispute, this Honorable Court should reverse the lower court's finding that there was no demotion and, by extension, that Mrs. Winters' 2005-2006 contract had been renewed. (R.E. at 4-5; C.P. at 205-06.)

For the reasons set forth in Section III, *supra*, which are incorporated herein by reference, Mrs. Winters contends that, as a matter of law, the lower court could not have granted summary judgment to the School District & School Board. As such, upon *de novo* review of the record, see id., this Honorable Court should reverse the esteemed Chancellor's finding that Mrs. Winters had waived her rights under the EEPL. (R.E. at 4-5; C.P. at 205-06.)

Since a genuine issue of material fact exists with respect to the issue of Mrs. Winters' demotion (R.E. at 9, 29; C.P. at 8, 106), and since the School District & School Board's contention that Mrs. Winters' waived her rights under the EEPL fails as a matter of law (see § III, supra), this Honorable Court should reverse the Chancellor's order sustaining the Motion to Dismiss. See id.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Debra L. Winters, the Appellant, respectfully requests that this Honorable Court, after a *de novo* review of both parties' briefs, the record in this case, and the oral argument of the parties, find that the esteemed Chancellor abused his discretion in determining that Mrs. Winters had not been demoted and that she had waived her rights to an appeal under the Education Employment Procedures Law of 2001 (§§ 37-9-101, *et. seq.*). Accordingly, Mrs. Winters respectfully requests that this Honorable Court enter an order reversing the Chancellor's order granting the Motion to Dismiss that was filed on behalf of the Calhoun County School District and the Calhoun County Board of Education.

In the alternative, Mrs. Winters respectfully requests that this Honorable Court find that the esteemed Chancellor erred by not treating the Motion to Dismiss as being one for summary judgment. Accordingly, Mrs. Winters respectfully requests that this Honorable Court reverse the esteemed Chancellor's order on the grounds that material issues are in dispute and/or that the Appellees were not entitled to judgment as a matter of law.

In any event, Mrs. Winters respectfully requests that this Honorable Court enter an order reversing that portion of the Chancellor's order that finds Mrs. Winters had not been demoted.

Respectfully submitted, this the 2nd day of July, 2007.

DEBRA L. WINTERS

BY: _____
DAVID BURKS LANGFORD
(MSB #[redacted]

BY: _____
BILLIE JO WHITE
(MSB #[redacted]

BY: 

MATTHEW DANIEL WILSON
(MSB # [redacted])

Prepared by:

LANGFORD & ASSOCIATES, PLLC
Attorneys at Law
212 East Main Street
Starkville, MS 39759
Telephone: (662) 324-6306
Facsimile: (662) 320-4275

CERTIFICATE OF SERVICE

I, Matthew D. Wilson, counsel for Debra L. Winters, do hereby certify that I have on this date filed a bound original and three (3) bound copies of this Brief of Appellant with the Clerk of the Supreme Court. I further certify that I have filed with the Clerk an electronic copy of the Brief of Appellant on CD-ROM.

I further certify that I have filed with the Clerk a four (4) copies of the Appellant's Record Excepts, containing selected portions of the Clerk's Papers, including the Chancery Clerk's docket and the Order under review; said Appellant's Record Excerpts is properly paginated and has a Table of Contents.

I further certify that I have on this date sent a copy of the Brief of Appellant and the Record Except to the following persons via first-class mail, postage prepaid:

The Honorable Edwin Hayes Roberts, Jr.
Chancellor
P. O. Box 49
Oxford, Mississippi 38655

James A. Keith, Esquire
ADAMS AND REESE, LLP
Post Office Box 24297
Jackson, MS 39225-4297

R. Jarrad Garner, Esquire
ADAMS AND REESE, LLP
Post Office Box 24297
Jackson, MS 39225-4297

Respectfully submitted, this the 2nd day of July, 2007.

BY: _____
MATTHEW D. WILSON (MS BAR [redacted])