IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

JACKSON FEDERATION
OF TEACHERS AND PSRPS PLAINTIFF

v. CAUSE NO. 25CI1:21-cv-00152

JACKSON PUBLIC SCHOOL DISTRICT DEFENDANT

DECLARATORY JUDGMENT AND PERMANENT INJUNCTION[1]

The Jackson Federation of Teachers PSRP ("JFT") is a labor union representing "member teachers, para-professionals, and school-related personnel in the Jackson Public School District." The focus of this litigation is JFT's claim that the Jackson Public School District ("JPS") is in violation of Article 3, Sections 11[2] and 13[3] the Mississippi Constitution by restricting "the speech of its employees through a web of formal and informal policies, guidance documents, trainings and instructions."

Also before the court are JPS's claim that JFT lacks standing to bring this suit, and its request that the court take judicial notice of certain policy changes its Board of Trustees enacted on April 5, 2022, following the trial of this case.

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[1]The court finds the unusual length of this order necessary to fully comply with Miss. R.Civ. P. 65 (d)(2), which requires that "[e]Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained; . . ."

[2]"The right of the people to . . . petition the government on any subject shall never be impaired." Miss. Const., Art. 3, §11.

[3]"The freedom of speech and of the press shall be held sacred." Miss. Const. Art. 3 §13.

Following an initial hearing before Judge Green and two evidentiary hearings before the undersigned judge on JFT's motion for preliminary injunction, the parties agreed that the court should consider the record fully developed at those hearings, and that the court should proceed to decide the question of whether the court should dismiss the case or issue a declaratory judgment and permanent injunction. For the reasons stated below, JPS's motion to dismiss is denied; its motion for the court to take judicial notice is granted; and JFT's petition for a declaratory judgment and an injunction are granted in part and denied in part.

The Policies at Issue

JPS's definition of "confidential information" is set out in its "GACC – Confidential Information" policy.

GACC – CONFIDENTIAL INFORMATION

> **All information** that pertains to the district, its employees, its students, its operations, and/or related matters constitutes proprietary information that belongs to JPS and is **strictly confidential**.
> * * *
> No employee shall disclose, divulge or otherwise compromise any confidential information **except as authorized by the superintendent and/or board of trustees**. In addition, this policy strictly prohibits the unauthorized possession, disclosure, removal, distribution or other use of confidential school or district **information**, records, property, or funds."
> * * *
> Any violation of **confidentiality** seriously injures the Jackson Public School District's reputation and can have adverse consequences on the men, women, and students who rely upon the protections afforded by this policy. Therefore, **any policy violation would result in termination**.

(Emphasis added). Once defined, the term "confidential information" permeates JPS's policies and training.

GBA – STAFF ETHICS

The introduction to JFT's Staff Ethics policy states in part that its "employees have a responsibility to the school system, to their fellow employees, parents and community and to the students that they serve to adhere to certain standards of behavior, performance and conduct. . . ." It then goes on to provide that

> generally speaking, the Jackson Public School District expects each of its employees to act in a professional and responsible manner at all times. In addition, examples of some of the more obvious unacceptable behaviors that may subject an employee to disciplinary action, including **termination or revocation of certification** are set forth below.

[Emphasis added] The examples include:

> Directing **any criticism** of other staff members or of any department of the school system toward the improvement of the school system. Such constructive criticism is to be made **directly to the particular school administrator** who has the administrative responsibility for improving the situation and then to the superintendent, if necessary. The complaint policy, GAE, is cross-referenced.
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> * * *
> "Prohibited Conduct" includes:
>
> Although not exhaustive, any of the following types of conduct by an employee is grounds for **discipline, up to and including immediate termination**:
>
> 7) * * * The district recognizes the obligation of all employees of the school district to be conscious of their professional responsibility not to divulge information presented by a student, parent, a colleague, or an agency **when that revelation is not in the best interest of the district**. The district recognizes that within a human services organization as complex as a school district, it is necessary to share information on a "need to know" basis. However, the sharing of information should only serve to assist, rectify, or resolve a situation and should never be downgraded to **idle gossip or negative commentary to the media, or others within the community**.
>
> 36) Unauthorized disclosure or use of **confidential school information** . . . .

[Emphasis added].

GBAA – SOCIAL NETWORKING WEBSITES

JPS's Social Networking policy provides that "[a]ll employees, faculty and staff of this school district who participate in social networking websites

> **shall not post** any data, documents, photos or inappropriate information on any website or application **that might result in a disruption of classroom activity**. **This determination will be made by the Superintendent**. . . . Violation of any of these policies may result in **disciplinary action, up to and including termination**.

[Emphasis added].

JPS's policy statement on "Using Social Media to Communicate Your Message" states that the policy applies to employees "using social media, **personally or professionally**," and that

> [o]nline postings and conversations are not private. Do not share **confidential information** whether it is internal school discussions or specific information about students or other staff. What you post will be seen by others and will be online for a long time. It can be forwarded or shared in just a few clicks. Do not write about colleagues or students **without their expressed permission**.

ANALYSIS

Judicial Notice

On April 25, 2022, JPS's counsel filed a motion asking the court to take judicial notice of certain policy changes that JPS's Board of Trustees enacted on April 5, 2022, following the trial. The court finds that, pursuant to Miss. R. Evid. 201 (c), the motion should be, and is, hereby granted.

JPS's Motion To Dismiss

Federal court action.

JPS argues in its brief that JFT unsuccessfully pursued a federal court claim that JPS's media relations policy violates the First Amendment, and that this state-court litigation

amounts to nothing more than JFT's attempt to have a "second bite at the apple." For several reasons, this court rejects the implication that, because the federal district judge dismissed the federal claim, this court should follow suit. As cited by JFT in footnote 1 of its memorandum, our Supreme Court has held

> that while federal courts adhere to a stringent definition of standing, limited by Art. 3, § 2 of the United States Constitution to a review of actual cases and controversies, the Mississippi Constitution contains no such restrictive language." ***State v. Quitman County***, 807 So. 2d 401 (Miss. 2001); *e.g*. ***Araujo v. Bryant***, 283 So.3d 73, 77 (Miss. 2019) (*quoting* ***Davis v. City of Jackson***, 240 So.3d 381, 384 (Miss. 2018). . . .

The focus of the case before this court differs substantially from the case pursued in federal court. The issue there was a particular teacher's alleged violation of JPS's media policy which led to termination of that teacher's employment, whereas here, JFT alleges that the policies at issue are facially unconstitutional under the Mississippi Constitution.

Standing

The requirements to establish standing in federal court are more stringent than those in our state courts. In ***Lujan v. Defenders of Wildlife***,[4] the Supreme Court articulated its three-part test to determine standing to sue:

- The plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent;
- There must be a causal connection between the injury and the conduct brought before the court; and
- It must be likely, rather than speculative, that a favorable decision by the court will redress the injury.

[4]***Lujan v. Defenders of Wildlife***, 504 U.S. 555 (1992).

By contrast, our Supreme Court has held that "Mississippi's standing requirements are broad."[5]

JFT's standing on its own behalf

In ***Fordice v. Bryan***, the Court explained that Mississippi parties have standing to "sue or intervene when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise authorized by law."[6] However, last year in ***Butler v. Watson***, our Supreme Court pointed out that it had "recently abandoned the "colorable interest" standard for establishing standing," but that **"the traditional articulation of 'adverse impact' to describe when a party can assert standing to bring a suit" survives**.[7] The ***Butler*** Court went on to state:

We have described our general law on standing as follows:

> Our general standing requirement is important to our review of standing issues because it appropriately focuses judicial review on a plaintiff's legal interest and a defendant's legal duty. However, it must be recognized that different standing requirements are accorded to different areas of the law, and an individual's legal interest or entitlement to assert a claim against a defendant must be grounded in some legal right recognized by law, whether by statute or by common law. Quite simply, the issue adjudicated in a standing case is whether the particular plaintiff had a right to judicial enforcement of a legal duty of the defendant or, as stated in ***American Book Co. v. Vandiver***, 181 Miss. 518, 178 So. 598

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[5] ***Desoto Times Today v. Memphis Pub. Co***., 991 So. 2d 609, 612 (Miss. 2008) (*citing* ***Dunn v. Miss. State Dep't of Health***, 708 So.2d 67, 70 (Miss. 1998)).

[6] ***Fordice v. Bryan***, 651 So. 2d 998, 1003. (*quoting* ***State ex rel. Moore v. Molpus***, 578 So.2d 624, 632 (Miss. 1991)); *see also* ***Mississippi Gaming Comm'n v. Board of Educ***., 691 So.2d 452, 460-61 (Miss. 1997); ***Harrison County v. City of Gulfport***, 557 So.2d 780, 782 (Miss.1990); Dye v. State ex rel. Hale, 507 So.2d 332, 338 (Miss. 1987).

[7] ***Butler v. Watson***, NO. 2020-IA-01199-SCT (Miss. 2021) (internal citations omitted) (emphasis added).

> (1938), whether a party plaintiff in an action for legal relief can show in himself a present, existent actionable title or interest, and demonstrate that this right was complete at the time of the institution of the action. ***Id***. at 599. "Such is the general rule." ***Id***.[8]

Applying these precedents to JFT's claim of standing on its own behalf in the instant case, the court must determine whether it has articulated an "adverse impact," that is to say, that it has an actionable legal interest, and that JPS has a legal duty.

In its Complaint, JFT alleges that JPS's unconstitutional "policies, trainings, instructions, and other actions . . . have harmed JFT by discouraging membership, limiting access to information, forbidding members from acting in furtherance of JFT's core purposes, and in other ways." The court takes judicial notice[9] that, according to JFT's website, it "was established to give teachers and paraprofessionals a voice within their working environments," and they claim to be

> a union of professionals that champions fairness; democracy; economic opportunity; and high-quality public education, healthcare and public services for [JPS] students, their families and [their] communities. [They] are committed to advancing these principles through community engagement, organizing, collective bargaining and political activism, and especially through the work our members do.[10]

And among JFT's stated purposes are:

- To achieve a spirit of cooperation among the school board, the administration the professionals, the paraprofessionals, the parents, and the public that provides each group an opportunity to contribute their full potential to the improvement of the public education system for our children.
- To become the largest professional organization for teachers and non-certified personnel.

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[8]***Butler*** *at 8, citing* ***City of Picayune v. S. Reg'l Corp***., 916 So. 2d 510, 526 (¶ 40) (Miss. 2005) (emphasis added).

[9]Miss. R. Evid. 201(c)(1).

[10]http://www.jftpsrp.com/about.html

- To educate our members in the rights and responsibilities of a majority professional organization.
- To continue improving the working conditions for all school employees.
- To improve the quality of education for all children.
- To continue to promote special screening and treatment programs for students who show symptoms of behavioral problems.

The court finds that JPS's unconstitutional policies have the potential to be frustrated – and in fact, frustrate – these enumerated purposes; and that they both prevent and chill free speech. The court finds that, as an advocacy organization that exists specifically for JPS employees, JFT's existence is dependent on its ability to attract potential members from among JPS's teachers and other employees.

Stated another way, the court finds that JFT is adversely impacted by any JPS policy that tends to prohibit or restrict its employees from providing information to JFT and others that would assist JFT in fulfilling its mission and purposes. Such harm and potential harm to JFT is sufficient to establish its standng to pursue this litigation on its own behalf.[11]

JFT's Associational standing.

In addition to claiming standing in its own right, JFT also claims it meets the test for associational standing. Thirty-five years ago in ***Belhaven Imp. Ass'n, Inc. v. City of Jackson***, the Mississippi Supreme Court addressed associational standing, citing with approval the test set out in ***Hunt v. Washington***:

> The federal view has been stated as follows:
> Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks are germane to the organization's

[11] *See also* ***Miss. Pub. Corp. v. Coleman***, 515 So. 2d 1163, 1175 (Miss. 1987) (discussion of media standing).

> purpose; and (c) neither the claim asserted nor the relief requested, requires the participation of individual members in the lawsuit.
>
> For standing, the person(s) aggrieved, or members of the association, whether one or more, should allege an adverse effect different from that of the general public. Also, they should show the fact of a representative capacity, particularly of those adversely affected.[12]

Factor 1: The association's members would otherwise have standing to sue in their own right.

The first ***Hunt*** factor unquestionably is met. The court finds as a fact that while none of JFT's witnesses at trial were among its then-current employees, JFT nonetheless established through credible testimony that many of its members were current JPS employees and, as such, could individually pursue the claims asserted here. Thus, the first ***Hunt*** factor is met.

Factor 2: The interests the association seeks are germane to the organization's purpose.

As stated above,[13] JFT's purposes include achieving "a spirit of cooperation among the school board, the administration the professionals, the paraprofessionals, the parents, and the public that provides each group an opportunity to contribute their full potential to the improvement of the public education system for our children." JFT's purposes also include "educat[ing its] members in the rights and responsibilities of a majority professional organization," and "continuing to improv[e] the working conditions for all school employees,"

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[12] ***Belhaven Imp. Ass'n, Inc. v. City of Jackson***, 507 So.2d 41, 47 (Miss. 1987) (citing ***Hunt v. Washington Apple Advertising Comm'n***, 432 U.S. 333, 343, 97 S.Ct. 2434 2441, 53 L.Ed.2d 383, 394 (1977). *See also* ***Mississippi Manufactured Housing Ass'n v. Board of Alderman of City of Canton***, 870 So.2d 1189, 1192 (Miss. 2004).

[13] *See* f.n. 8, and accompanying text above.

as well as "continuing to promote special screening and treatment programs for students who show symptoms of behavioral problems."

The court finds all of JFT's purposes to be germane to the "interests [it] seeks" in this litigation, which is to promote the free speech rights of JPS teachers and other school employees, thus enhancing the free flow of information necessary for JFT to better accomplish those purposes.

In its memorandum, JFT states that the policies at issue also do harm to its right of association by chilling free speech which frustrates communication among it, its members, and JPS. The court agrees.

Finally, the court finds that policies which would tend to frustrate JFT's normal organizing, advocacy, and recruitment – even in part – are pertinent to its purposes.[14]

Factor 3: Neither the claim asserted nor the relief requested, requires the participation of individual members in the lawsuit.

Concerning the third ***Hunt*** factor, JPS argues that there is insufficient information about the individual members to establish standing. However, as the Mississippi Supreme Court recently explained, "when an association seeks only prospective relief and raises only issues of law, it need not prove the individual circumstances of its members to obtain relief, and the third element of associational standing is met."[15]

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[14] *Cf*. ***Janus v. AFSCME***, 138 S. Ct. 2448, 2473 (2018).

[15] ***City of Jackson v. Allen***, 242 So.3d 8, 29 (Miss. 2018) (*citing* ***Mississippi Manufactured Housing Ass'n***, 870 So.2d at 1194).

Here, JFT claims that JPS's policies on their face violate the Constitution. Therefore, the court looks only at the language of the policies themselves, thus satisfying the third requirement for associational standing in Mississippi.

As stated above, "different standing requirements are accorded to different areas of the law."[16] And what is more, Mississippi law is "more permissive in granting standing to parties who seek review of governmental actions,"[17] and the test is "quite liberal." ***Id***.

The Fifth Circuit has observed that "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."[18] Courts also have held that restrictions on speech, such as the subject policies, cause irreparable harm in light of the "chilling effect" they have on the exercise of speech rights. For instance, the Ninth Circuit has stated that

> [a]n ordinance need not be enforced against a speaker to pose a threat to his free speech rights. [Plaintiff] continues to restrain his own speech under the threat that Chapter 8.56 will be enforced against him. This chill on his free speech rights . . . constitutes irreparable harm." (citations omitted).[19]

The evidence at trial demonstrated that the threat of loss of employment and licensure in the subject policies has in fact chilled protected speech. The court also finds credible the testimony of Mr. Gunter, Ms. Anderson and Dr. Stout concerning the chilling effect that JPS's

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[16]***Butler v. Watson***, (*quoting* ***City of Picayune v. S. Reg'l Corp***., 916 So. 2d 510, 526 (Miss. 2005)).

[17]***City of Jackson v. Greene***, 869 So. 2d 1020, 1023 (Miss. 2004).

[18]***Opulent Life Church v. City of Holly Springs***, 697 F. 3d 279, 295 (5th Cir. 2021) (quoting 11A *Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure* § 2948.1 (2d ed. 1995))). *See also* ***Elrod v. Burns***, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[19]***Cuivello v. City of Vallejo***, 944 F.3d 816, 833 (9th Cir. 2019).

policies, trainings, and disciplinary actions has had on their ability to communicate legitimate concerns of JPS employees and JFT members.

JPS argues that JFT produced no evidence that any current JPS employee was a member of JFT, and no current member to testify. However, JPS's own witness, Dr. Nalls, testified that it was expected and routine for a new JPS employee to sign up with JFT, and that JFT had made numerous school visits and new employee orientation visits specifically to sign up current employees.

The court also notes that JPS's policies, on their face, would justify the termination of a JPS teacher's employment who chose to testify in this case. JFT's members have a legitimate interest in anonymous free association, including not revealing their identity in this litigation.[20] The evidence presented – both circumstantial and direct – persuades the court that JPS employs current members of JFT, and that those employees are not required to be identified in order for JFT to proceed on their behalf.

For all the reasons stated above, the court finds it has standing both in its own right and on behalf of its members. Accordingly, JPS's motion to dismiss is denied.

Mootness

At JPS's request, the court has taken judicial notice of recent changes to JPS's policies. These changes, JPS argues, render moot the issues before the court. For several reasons, the court disagrees. First, as pointed out in a treatise on Mississippi civil procedure:

[20] *See, e.g.*, ***Hastings v. North East Ind. School Dist***., 615 F. 2d 628 (5th Cir. 1980) (holding that union cannot be forced to disclose the identity of members, even in a suit brought by the union); ***NAACP v. Alabama ex rel. Patterson***, 357 U.S. 449 (1958) (Hostile state cannot compel civil rights organization to disclose its membership).

> Mississippi's mootness doctrine is more relaxed than that enforced in the federal courts. . . . [O]ne reason for this is that Mississippi does not have a Cases or Controversies clause, as does the Federal Constitution."

Jeffrey Jackson, 1 *Mississippi Civil Procedure*, § 1:26 (West 2009) (*discussing* ***Activities Ass'n, Inc. v. Coleman***, 631 So.2d 768 (Miss. 1994) and related cases).

Also, in a case applying more restrictive federal law to the mootness doctrine, the Fifth Circuit has held that a defendant "cannot moot a case simply by ending its unlawful conduct once sued."[21] Furthermore, JFT filed its complaint more than a year ago, challenging JPS's policies and alleging them to be unconstitutional. Rather than examining and changing the policies in the early stages of this litigation, JPS waited to change its confidentiality policy – which the court notes is not its only challenged policy – until after the trial while the court was deliberating its decision.

JPS has provided no affidavit or other "absolutely clear" proof necessary to satisfy the "heavy burden of persua[ding]" the Court that JPS will not repeat its unconstitutional actions.[22] Indeed, JPS continues to maintain that its policies do not violate the constitution, highlighting the court's concern that, once this litigation is terminated, it will reinstate its challenged policies.

Nor does the court have confidence that, should the case be dismissed as moot, JPS will cease instructing and training employees that, under its surviving "GBA – Staff Ethics policy," they are prohibited from

- "[d]irecting any criticism of other staff members or of any department of the school system toward the improvement of the school system," except to "the

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[21] ***Yarls v. Bunton***, 905 F.3d 905, 910 (5th Cir. 2018).

[22] *See* ***Trinity Lutheran Church of Columbia, Inc. v. Comer***, 137 S. Ct. 2012, 2019 n.1 (2017).

particular school administrator who has the administrative responsibility for improving the situation and then to the superintendent, if necessary;" or

- divulging information that "is not in the best interest of the district;" or
- sharing information on a "need to know" basis; or
- refraining from "idle gossip or negative commentary to the media, or others within the community."

Furthermore, JPS's change to its definition of "confidential information" does not dilute the unconstitutionality of its GBAA – SOCIAL NETWORKING WEBSITES policy which prohibits "[a]ll employees, faculty and staff of this school district who participate in social networking websites" from posting "any data, documents, photos or inappropriate information on any website or application that might result in a disruption of classroom activity," reserving unto the "Superintendent" the sole, unfettered authority to monitor proposed postings and prohibit them, should they be deemed to be "a disruption of classroom activity." The court finds this requirement that prospective postings be monitored by the Superintendent before they are posted to be an unlawful prior restraint on protected free speech.

While it is true that the mootness doctrine might apply in cases involving corrective conduct by non-governmental parties where the issues are not of public interest, our Supreme Court has held that,

> when the "public interest" is at stake, this Court will review an otherwise moot issue if "the question concerns a matter of such nature that it would be distinctly detrimental to the public interest that there should be a failure by the dismissal to declare and enforce a rule for future conduct." ***Alford v. Miss. Div. of Medicaid*** , 30 So. 3d 1212, 1214 (Miss. 2010) (internal quotation mark omitted) (quoting ***Sartin v. Barlow ex rel. Smith***, 196 Miss. 159, 16 So. 2d 372, 376-77 (1944)); *see also* ***Lafayette Cnty. Bd. of Supervisors v. Third Cir. Drug Ct.*** , 80 So. 3d 785, 788 (Miss. 2012).[23]

[23] ***Hyundai Motor Am. v. Hutton***, 328 So.3d 592, 608 (Miss. 2021)

School Board policies that control the operation of public schools and the conduct of schoolteachers and other educational professionals unquestionably are matters of "public interest." Indeed, this court can think of no higher "public interest" than the education and protection of our children, as well as the development of ideas trusted to our public schools where children spend half their waking hours each school day. Moreover, the "public interest" is amplified when school policies tend to frustrate the flow of information – and particularly information critical of the school – to parents, taxpayers, legislators, the press, and other members of the general public.

Injunctive relief.

The Mississippi Constitution states that "[t]he freedom of speech shall be held sacred."[24] The framers' use of the word "sacred" has led our Supreme Court to declare that the Mississippi Constitution "appears to be more protective of the individual's right to freedom of speech than [is] the First Amendment since [the Mississippi Constitution] makes it worthy of religious veneration."[25] That said, the court doubts JPS's policies would survive, even under the First Amendment's more relaxed analysis.

For instance, the Fifth Circuit analyzed the following policies of a Texas sheriff's department:

> Gossiping about affairs of the department, or the members of it, making unauthorized public statements, or the unauthorized revealing of confidential information of any kind, is prohibited. . . .

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[24]Miss. Const. Art. 3, § 11.

[25]***ABC Interstate Theatres, Inc. v. State***, 325 So. 2d 123, 127 (Miss. 1976); *see also* ***Beavers v. City of Jackson***, 439 F.Supp.3d 824, 829 (Miss. 2020); ***Gulf Pub. Co. Inc. v. Lee***, 434 So.2d 687, 696 (Miss. 1983).

> No employee of this department will address any statement or remark to any member of the news media that is or could be of a controversial nature. All requests will be referred to the Sheriff even during my absence. . . .
>
> No member of this department will discuss any matters pertaining to policy or procedure of this department with any elected official or department head.[26]

In holding the policies unconstitutional, the Fifth Circuit stated that they "[swept] unnecessarily broadly and thereby invade[d] the area of protected freedom;"[27] and that they "explicitly [forbade] acts that departmental employees have a clear constitutional right to do."[28] And as is true in the case before me, the court noted that the department's actions in telling employees about the policies and in enforcing them also served to chill free speech.[29]

Similarly, the Tenth Circuit found a violation of the free speech rights of school employees where the school principal "told [employees] at a mandatory faculty meeting, in a very serious and angry tone, they were not to speak to anyone about school matters and she would prefer for them not to meet together socially at all."[30] The court finds the policies under review here to be far more restrictive and hostile to the free speech rights of school employees than those at issue in these federal cases applying a more relaxed standard of free speech protection.

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[26] ***Barrett v. Thomas***, 649 F.2d 1193 (5th Cir. 1981).

[27] ***Id***. at 1198 (*quoting* ***NAACP v. Alabama***, 377 U.S. 288 (1964))

[28] ***Id***. at 1199.

[29] ***Id***.

[30] ***Brammer-Hoelter v. Twin Peaks Charter Academy***, 602 F.3d 1175, 1181-1184 (10th Cir. 2010).

I now turn to the court's findings of fact and conclusions of law as to the specific policies challenged by JFT, beginning with Policy GACC, which provides JPS's sweeping definition of confidential information.

GACC – Confidential Information

Policy GACC drags within its purview "**[a]ll information** that pertains to the district, its employees, its students, its operations, and/or related matters . . . ." [emphasis added]. Apparently not satisfied with labeling "all" information as merely confidential, Policy GACC designates it as "strictly confidential," heightening the threat to JPS employees of termination – and in the case of schoolteachers, with loss of their teaching licenses – for "disclose[ing], divulg[ing] or otherwise compromis[ing] any confidential information" without prior approval.

The court does not doubt that JPS designed GACC's definition of confidential information to protect against disclosure of information rightfully considered confidential; but the policy's language – on its face – goes much too far, requiring schoolteachers and other school employees to seek permission before disclosing "all information that pertains to the district, its employees, its students, its operations, and/or related matters . . . ." This sweeping language trespasses far into territory of protected speech. Accordingly, the court finds this policy to be vague, over-broad, and unconstitutional. The court further finds the policy's requirement that JPS's employees first obtain permission from the "superintendent and/or board of trustees" to be an unconstitutional prior restraint on the employees' constitutional right to exercise protected speech.

GBA – Staff Ethics

JPS's Policy GBA – Staff Ethics states that "the sharing of information . . . should never be downgraded to idle gossip or negative commentary to the media, or others within the

community." The court finds this policy to be unconstitutional, not only by prohibiting protected speech, but also by discriminating based on viewpoint. For instance, this policy would prevent teachers and other JPS staff from expressing negative (as opposed to positive) commentary and views to parents, the news media, legislators, and other interested persons. This places off-limits all views of such public-interest information as unsafe or unsanitary school facilities,[31] inappropriate content being taught in the classrooms,[32] and misuse of public property by staff, teachers and/or administrators.[33] The court also finds the policy to be unconstitutionally vague in stating that it is "the obligation of all employees of the school district" not to "divulge information" when "that revelation is not in the **best interest** of the district."

GBAA – Social Networking Websites

JPS's social networking policy prohibits JPS "employees, faculty and staff . . . who participate in social networking websites" from posting

> any data, documents, photos or **inappropriate information** on any website or application that **might result** in a disruption of classroom activity. This determination will be made by the Superintendent. [Emphasis added].

The policy lacks any guidelines or definition of what information would be deemed "inappropriate," or what "might result in a disruption of classroom activity." Accordingly, the

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[31]The court finds that JPS has presented no compelling – or even reasonable – basis for withholding information about unsafe or unsanitary school facilities from the taxpayers who fund, and the legislators who appropriate, the funds to pay for those facilities.

[32]The court can think of no information more important to parents than what their children are being taught, both academically and socially, in the public schools. The court finds that filtering such information through school officials is patently unconstitutional.

[33]In some cases, these administrators to whom reports must be made under the policy would be the very people responsible for the conduct or conditions that are subject to the complaint.

court finds this policy to be an unconstitutionally vague restraint on free speech; and the requirement that any speech that might come under the purview of the policy's vague terms be approved at the unfettered discretion of the superintendent presents an unconstitutional prior restraint on protected speech.

The court finds from the evidence presented at trial that the policies discussed above are used by JPS to engage in a widespread practice of explicitly forbidding constitutionally protected speech in its annual training and instruction of employees. The court further finds that JPS routinely chills its employees' protected speech in training exercises and instructions, and that administrators have singled out particular viewpoints and speakers for special disapproval, such as "The Cipher Voice" and WAPT News, as indicated by the evidence.

This broad, overreaching policy allowed JPS to forbid employees from talking about the conditions of the buses and other events at work; to forbid JPS employees from taking and publicizing photos of empty, unclean or poorly conditioned buses; to claim that Mr. Gunter violated school policy by giving a media interview about tuberculosis in the schools; and to criticize Dr. Stout for giving a press conference about safety in schools.

While JFT is not pursuing "as applied" claims in this lawsuit, the above instances persuade the court that JPS interprets and enforces its policies in a way that harms JFT by chilling the speech of its members which, in turn, deprives JFT of information necessary to protect its members' interests and fulfill its purposes as a representative labor union for JPS employees. As discussed above, this provides an additional basis for JFT's standing to bring the claims.

JPS's GBA – Staff Ethics policy which forbids "negative commentary to the media, or others within the community" is nothing more than explicit censorship of viewpoints that are

disfavored by the government. As such, the court finds the policy violates perhaps one of American jurisprudence's most fundamental free speech principles, as articulated by the United States Supreme Court:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of [free speech rights] is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[34]

Viewpoint discrimination is particularly anathema to free speech principles, even where speech is unprotected, such as "fighting words."[35]

In ***Schacht v. United States***, the United States Supreme Court held unconstitutional a statute that permitted actors in motion pictures and theaters to wear military uniforms only "if the portrayal does not tend to discredit the armed forces."[36] The Court noted it would have allowed the statute to stand, had it provided a total prohibition, but a prohibition aimed only at a viewpoint did not pass constitutional muster.[37]

In ***Morgan v. Swanson***, the en banc Fifth Circuit found that prohibiting elementary school students from distributing religious but not other literature at school was unconstitutional viewpoint discrimination.[38] And consistent with the United States Supreme

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[34]***Rosenberger v. Rector and Visitors of Univ. of Va***., 515 U.S. 819, 828-89 (1995).

[35]***RAV v. St. Paul***, 505 U.S. 377, 381-86 (1992).

[36]***Schacht v. United States***, 398 U. S. 58 (1970)

[37]***Id.***

[38]***Morgan v. Swanson***, 659 F.3d 359, 401-404 (5th Cir. 2011).

Court's holding in ***Procunier v. Martinez***, the kind of viewpoint discrimination represented by JPS's policy would be unconstitutional, even in the tightly-controlled environment of a prison.[39]

Vagueness and Overbreadth

Additionally, and as stated above, the challenged policies are unconstitutionally vague and overbroad.[40]

The policies are vague.

Under analogous federal law,"courts are particularly troubled about vague laws restricting speech of out concern that they will chill constitutionally protected speech."[41] The United States Supreme Court held in ***NAACP v. Button*** that vague rules threatening punishment "deter [free speech] almost as potently as the actual application of sanctions."[42]

In ***Button***, the Supreme Court stated that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." ***Id***. The Mississippi Supreme Court has repeatedly explained that a law is unconstitutionally vague if people of "common intelligence must necessarily guess at its meaning and differ as to its application." *E.g*. ***Nichols v. City of Gulfport***, 589 So.2d 1280, 1282 (*quoting* ***Connally v. General Const. Co***., 269 U.S. 385, 391 (1926)). And in ***Mayor & Board of Aldermen v. Welch***, our Supreme Court stated that

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[39]*See e.g.* ***Procunier v. Martinez***, 416 U. S. 396, 416 (1974) (striking down rule that allowed censorship of outgoing prison mail that "unduly complain" or "magnify grievances").

[40]*See e.g.* ***Edwards v. State***, 294 So.3d 671 (Ct. App. Miss. 2020) (on overbreadth); ***Lewis v. State***, 765 So.2d 493, 500 (Miss. 2000) (on vagueness).

[41]Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 11.2.2 (2d ed.) (2002).

[42]***NAACP v. Button***, 371 U.S. 415, 433 (1963).

> [a]governmental enactment is impermissibly vague where it fails to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.[43]

The policies are overbroad.

JPS's policies – on their face – not only are vague, but also are overbroad, reaching far beyond the reasonable bounds of its constitutional limits. In addressing the overbreath doctrine, the Mississippi Court of Appeals has held that policies are "facially invalid if [they prohibit] a substantial amount of protected speech."[44]

And in ***Seals v. McBee***, the Fifth Circuit held that the overbreadth doctrine is regularly used to invalidate rules which encompass both protected and unprotected speech, where they "[encompass] a substantial number of unconstitutional applications judged in relation to the statute's plainly legitimate sweep."[45]

In ***Seals***, a statute proscribing "threats" to a police officer was held unconstitutionally broad. The court stated that while "true threats" of bodily harm were unprotected, the plain statutory terms also encompassed protected "threats" such as the threat to engage in litigation or boycotts, rendering the statute unconstitutionally overbroad.

In this case, as in ***Seals***, each of the policies at issue "encompasses a substantial number of unconstitutional applications judged in relation to the [policies'] plainly legitimate sweep."

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[43]***Mayor & Bd. of Aldermen v. Welch***, 888 So.2d 416, 421 (Miss. 2004) (citing ***Hill v. Colorado***, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (*citing* ***City of Chicago v. Morales***, 527 U.S. 41, 56-57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (ordinance prohibiting anyone from remaining "in any one place with no apparent purpose" held unconstitutionally vague)).

[44]***Edwards***, 294 So.3d at 675 (internal quotation omitted).

[45]***Seals v. McBee***, 898 F. 3d 587, 593 (5th Cir. 2018) (quotations and citations omitted); ***US v. Stevens***, 559 U.S. 460 (2010).

Thus, although JPS can regulate speech which, if unregulated, would compromise its legitimate confidential interests such as the attorney client privilege, or the Family Educational Rights and Privacy Act of 1974 (FERPA), it cannot do so by imposing policies that sweep up "a substantial number of unconstitutional applications" as the court finds to be the case here.

Prior Restraint

Every governmental prior restraint on speech is presumptively unconstitutional.[46] Mississippi caselaw defines a "prior restraint" as occurring "when government suppresses speech based on its content before the speech is uttered."[47]

JPS argues that this Court should engage in a balancing of interests of the kind courts undertake in "as-applied" retaliation cases such as ***Pickering*** and ***Garcetti***. The caselaw is clear, however, that these cases have no bearing on facial challenges.[48]

In ***U.S. v. NTEU***, a union brought a facial challenge seeking to enjoin a rule that prohibited its government employee members from accepting honoraria. The rule did not ban speech; it only forbade compensation. Still, the Court struck down the rule, making it clear that the government's burden in justifying this kind of blanket rule impacting government employee speech was far higher than in an ordinary retaliation case.[49]

> Unlike ***Pickering*** and its progeny, this case does not involve a post hoc analysis of one employee's speech and its impact on that employee's public

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[46]***Miss. Comm'n on Judicial Performance v. Wilkerson***, 876 So.2d 1006, 1014 (Miss. 2004) (*citing* ***Southeastern Promotions, Ltd. v. Conrad***, 420 U.S. 546, 558 (1975)); ***Jeffries v. State***, 724 So.2d 897 (Miss. 1998) (*citing* ***Nebraska Press Ass'n v. Stuart***, 427 U.S. 539 (1976)).

[47]***In re R.J.M.B.***, 133 So.3d 335, 343 (Miss. 2013).

[48]***Janus v. AFSCME***, 138 S. Ct. 2448, 2473 (2018); ***US v. NTEU***, 513 U.S. 454 (1995).

[49]***US v. NTEU***, 513 U.S. 454 (1995).

> responsibilities. Rather, the Government seeks to apply ***Pickering*** to Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers. . . . The widespread impact of the honoraria ban, however, gives rise to far more serious concerns than could any single supervisory decision. In addition, unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens. For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action.[50]

The instant case involves a far more exacting balancing than under ***Pickering***, and "the government's burden is greater." ***Id***.

In ***Schwartzwelder v. McNeilly***, for example, the court held that ***NTEU*** was the correct framework for analyzing a police department's rule requiring pre-clearance with the Chief of Police before giving opinion testimony in court on behalf of a criminal defendant.[51] The court stated:

> The present case differs from the typical ***Pickering***/***Connick*** case in that Order 53-7 restricts employee speech before it occurs, rather than penalizing employee speech after the fact.[52]

Thus, the court applied ***NTEU*** instead of ***Pickering*** and upheld a preliminary injunction against the policies, finding them likely to be unconstitutional on their face, and in so doing, rejecting an argument that the policies could be justified to "prevent the disclosure of confidential information" because the policies "are ill-suited to serve this end. The Order and Memo do not simply permit the Bureau to prohibit an employee from giving testimony that would reveal confidential information but rather sweep much more broadly."[53]

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[50] ***US v. NTEU***, at 466-68 (citations, quotations, and footnotes omitted).

[51] ***Schwartzwelder v. McNeilly***, 297 F.3d 228 (3rd Cir. 2002).

[52] ***Id***. at 235.

[53] ***Id***. at 239.

In 2018, the United States Supreme Court solidified the principle in ***Janus v. AFSCME***, rearticulating the ***NTEU*** test and holding ***Pickering*** inapplicable to "general rules" limiting employee speech:

> While we have sometimes looked to ***Pickering*** in considering general rules that affect broad categories of employees, we have acknowledged that the standard ***Pickering*** analysis requires modification in that situation. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." Therefore, when such a law is at issue, **the government must shoulder a correspondingly "heav[ier]" burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights**.[54]

Thus, "[t]he end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional ***Pickering*** analysis."[55]

"Exacting scrutiny" is a high burden, and courts routinely strike down rules which limit government employee speech. For example, in the recent case of ***Liverman v. City of Petersburg***, a police department had a social media policy which forbade

> the dissemination of any information on social media 'that would tend to discredit or reflect unfavorably upon the [Department]' [including] '[n]egative comments on the internal operations of the Bureau' . . . or on the 'specific conduct of supervisors or peers.'[56]

The court noted that this was "a virtual blanket prohibition on all speech critical of the government employer" and further noted "the astonishing breadth of the social networking policy's language."[57] The policy was held unconstitutional.

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[54] ***Janus v. AFSCME*** at 2472 (citations omitted) (emphasis added).

[55] ***Id.***

[56] ***Liverman v. City of Petersburg***, 844 F. 3d 400, 408 (4th Cir. 2016).

[57] ***Id***.

Likewise, in ***Moonin v. Tice***, the K9 Chief sent an email stating that "all communication" by "line employees" with outside persons about the work was to

> be expressly forwarded for approval to [the] chain-of-command. Communication will be accomplished by the appropriate manager/commander if deemed appropriate. Any violation of this edict will be considered insubordination and will be dealt with appropriately.[58]

The ***Moonin*** court held that the rule was unconstitutional because

> [t]he troopers' freedom to offer their informed opinions about the direction of the K9 program on their own time, as concerned citizens, is a prerogative that the First Amendment protects but that Tice's edict forbids.[59]

The parallel of the facts in ***Moonin*** to those in the case before this court is both striking and instructive.

The same concerns apply to public schools. In ***Brammer-Hoelter v. Twin Peaks Charter Academy***, the principal of the school "directed teachers not [to] discuss school matters with anyone." This instruction was held unconstitutional.[60]

And in ***Luethje v. Peavine School District of Adair County***, the School Board policy instructed cafeteria workers "[i]f you have any problems, consult [the principal]. Don't take any school problems other places, or discuss it [sic] with others." This policy also was held unconstitutional.[61]

The court also notes that this case involves union speech, which under federal constitutional analysis, enjoys heightened constitutional protection because, "[w]hen a large

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[58] ***Moonin v. Tice***, 868 F. 3d 853, 859 (9th Cir. 2017).

[59] ***Id***. at 864.

[60] ***Brammer-Hoelter v. Twin Peaks Charter Academy***, 602 F.3d 1175, 1181-1184 (10th Cir. 2010).

[61] ***Luethje v. Peavine School District of Adair County***, 872 F.2d 352 (10th Cir. 1989).

number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk [sic]."[62]

Finally, in addition to the policies' direct threat of loss of employment, the Court must consider the additional free speech implications of these policies for teachers in light of the risk, not only of losing their employment, but also their license to teach under the Mississippi Department of Education's state ethics rules. Standard 9 provides that it is unethical for a teacher to violate "local school board policies related to confidentiality" and "confidentiality agreements required by . . . local policy." Violations of these rules can result in temporary or permanent loss of a license to teach.[63]

Thus, in addition to losing their jobs, teachers can lose their licenses to teach if they are found to have violated the policies at issue in this case. For this reason, the policies cannot be analyzed solely as government employment rules, but must also be analyzed according to the jurisprudence applying heightened scrutiny to professional licensure rules that restrict free speech.[64]

Applying the applicable standard, the policies at issue here are not narrowly tailored to serve a compelling government interest, and as such are unconstitutional as a restriction on the protected speech of licensed professionals.

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[62] ***Janus***, 123 S. Ct. at 2473.

[63] *See* Miss. Code Ann. § 37-3-2 (4) & (11).

[64] *See, e.g.*, ***Miss. Com'n on Judicial Perf. v. Wilkerson***, 876 So. 2d 1006 (Miss. 2004) (canon censoring Judge on pain of removal is a prior restraint subject to heightened scrutiny); *see also* ***Edenfield v. Fane***, 507 U.S. 761, 775 (1993) (striking down a no-solicitation ethics rule concerning accountants).

JFT has not proven retaliation.

The final issue to be addressed is JFT's claim that it suffered retaliation. The court finds some evidence on this claim, but not enough to justify a finding that actionable retaliation has occurred.

The public interest is served by an injunction.

Free speech is an important public interest. As one court explained, "free speech rights are included among those recognized as important rights affecting the public interest."[65] Moreover, in addition to its general interest in free speech, the public also has a specific interest in public education.[66] As such, the public interest in free speech around public education issues is substantial.

The court repeats for emphasis the United States Supreme Court's finding that policies which were similar to JPS's "impose[] a significant burden on the public's right to read and hear what the employees would otherwise have written and said."[67] This harm to the public interest is especially profound in the realm of public education.

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how [schools should be operated]. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[68]

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[65] ***Family Planning Specialists Medical Group, Inc. v. Powers***, 39 Cal. App. 4th 1561, 1568 (Cal. Ct. App. 1995). *See also* ***Walsh v. Ward***, 991 F.2d 1344, 1346 (7th Cir. 1993); ***New Era Publs. Int'l, ApS v. Henry Holt & Co***., 873 F.2d 576, 582 (2d Cir. 1989); ***Thomas v. Varnado***, No. 20-2425, 2020 U.S. Dist. LEXIS 187818 at *14 (E.D. La. Oct. 9, 2020); ***State v. Jackson***, 224 Ore. 337 (Ore. 1960).

[66] *E.g.* ***Moore v. Tangipahoa Parish Sch. Bd***., 507 Fed.Appx. 389, 412 (5th Cir. 2013); ***Crosson v. Carrollton City Sch. Dist***., 478 F.Supp.3d 1255, 1266 (N.D. Ga. May 28, 2020).

[67] ***NTEU***, 466 U.S. at 470.

[68] ***Pickering v. Board of Education***, 391 U.S. 563, 572 (1968).

The court finds not only that JPS's policies violate the Mississippi Constitution, but also that they gravely threaten the public interest in public education. By silencing its teachers, staff, employees, and their organizational advocate, JPS deprives its students, their parents, and other interested parties such as legislators and taxpayers, of important information necessary to fully understand and take part in their public education system, and meaningfully call for its improvement where and when needed.

DECLARATORY JUDGMENT

For the reasons stated above, the court hereby issues a declaratory judgment, finding that:

> JPS's GACC – Confidentiality policy in its entirety, and the portions of GBA – Staff Ethics and GBAA – Social Networking Websites policies enjoined below, violate Article 3, Section 11 and Article 3, Section 13 of the Mississippi Constitution, in that the court finds them to unconstitutionally restrict the protected speech of JPS's employees, and to be a prior restraint on free speech; and by restricting JPS's employees' speech, the enjoined policies unconstitutionally restrict JPS employees' right to petition their government.

PERMANENT INJUNCTION

For these reasons stated herein, JPS is hereby PERMANENTLY ENJOINED from enforcing the following portions of the following policies:

> JPS is hereby PERMANENTLY ENJOINED from enforcing GACC – CONFIDENTIAL INFORMATION in its entirety, and is further enjoined from using the policy's definition of confidential information to enforce any other JPS policy.
>
> JPS is hereby PERMANENTLY ENJOINED from enforcing the following prohibited conduct under its GBA – STAFF ETHICS policy:
>
> > Directing any criticism of other staff members or of any department of the school system toward the improvement of the school system [to anyone other than] the particular school administrator who has the administrative responsibility for improving the situation and then to the superintendent, if necessary.

> Sharing of information . . . downgraded to idle gossip or negative commentary to the media, or others within the community.
>
> Unauthorized disclosure or use of confidential school information . . . .

JPS is hereby PERMANENTLY ENJOINED from enforcing the following portions of GBAA – SOCIAL NETWORKING WEBSITES:

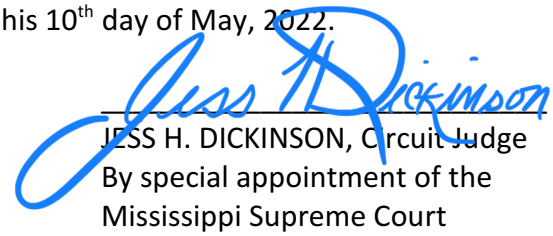
> All employees, faculty and staff of this school district who participate in social networking websites shall not post any data, documents, photos or inappropriate information on any website or application that might result in a disruption of classroom activity. This determination will be made by the Superintendent. . . . Violation of any of these policies may result in disciplinary action, up to and including termination.
> Do not share confidential information whether it is internal school discussions or specific information about students or other staff. . . . Do not write about colleagues or students without their expressed permission.

JPS is further PERMANENTLY ENJOINED from disciplining, terminating, or otherwise penalizing any of its employees for future violations the aforementioned policies.

JPS is further PERMANENTLY ENJOINED from instructing, training, or otherwise informing employees that they are not permitted to contact the media, the public, parents, law enforcement, or anyone else about information concerning, or issues arising in, the schools, provided that nothing in this order shall prohibit JPS from enacting policies and/or taking such actions as are necessary to comply with all local, state, and/or federal laws including, but are not limited to, the Federal Educational Rights and Privacy Act of 1974, and as are necessary for JPS to maintain its attorney-client privilege.

JPS is ORDERED to provide written notice of this order to all JPS employees within 14 days of its entry, and to pay all costs of this litigation.

SO ORDERED this 10th day of May, 2022.



JESS H. DICKINSON, Circuit Judge
By special appointment of the
Mississippi Supreme Court