UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Valencia Robinson; A.T., by and through his parent, C.M.; and Jenni Smith, Plaintiffs, v. DON THOMPSON, Executive Director of the Mississippi Department of Human Services, in his official capacity; CHERYL E. SPARKMAN, Director of the Division of Economic Assistance, in her official capacity, Defendants.	Civil Action No. 3:09CV537 WHB-LRA Oral Argument Requested

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

After routinely engaging in egregious violations of the Establishment Clause at their annual abstinence-only-until-marriage summits, Defendants now seek to dispose of this case by claiming they will not hold a summit in 2010. But this litigation-inspired position directly contradicts Defendants' own words immediately following the summit. Defendants' motion must be denied on the sole basis that there is a factual dispute that could not possibly be resolved at this stage of the litigation. Moreover, even if Defendants did decide to suddenly end their five year practice of sponsoring a state summit, Defendants have never said that they will not sponsor other abstinence-only

events, and Defendants have never said that they will prohibit religious proselytizing at these future events. Even if Defendants made such a claim, it is well settled that voluntary cessation of allegedly unconstitutional conduct does not deprive courts of jurisdiction to hear the case. Furthermore, Defendants' argument that Plaintiffs lack standing to seek prospective relief is largely a different iteration of their disputed assertion that they will not hold a summit in 2010, and thus this argument lacks merit as well. Defendants only other basis for seeking dismissal of Plaintiffs' case is their argument that Plaintiffs have not suffered injury-in-fact. But this argument is contrary to Fifth Circuit precedent and numerous Courts of Appeals decisions. Lastly, Defendants' claim that one aspect of Plaintiffs' requested relief is barred by the Eleventh Amendment is unavailing given that federal dollars can be returned to the federal government without implicating the state treasury. Accordingly, Plaintiffs respectfully request that this Court deny Defendants' motion.

FACTUAL BACKGROUND

Defendants sponsor various abstinence-only-until-marriage events and programs, including, for the last five years, the annual abstinence-only-until-marriage summit held at the Jackson Coliseum. Pls.' Compl. ¶ 7, 12; Defs.' Answer ¶ 12. Defendants' staff identifies, and Defendants ultimately select, the speakers for the annual summits. Defs.' Answer ¶¶ 15, 17. Defendants then promote, sponsor, and host the event. *See, e.g.*, Defs.' Answer Exs. 1, 2, 3, 6. Defendants claim they pay for the summits with federal funds from the Community Based Abstinence Education (CBAE) program and Title V of the Social Security Act. Defs.' Answer ¶ 19. The Title V abstinence-only-until-marriage program is a joint state-federal program, and the state is required to match 75% of the

Title V funds. *See* U.S. Dep't of Health & Human Servs., *Fact Sheet: Section 510 State Abstinence Education Program*, http://www.acf.hhs.gov/programs/fysb/content/abstinence/factsheet.htm (last visited Nov. 9, 2009). Defendants were awarded $599,800 in CBAE funds in fiscal year 2007, and that grant is currently renewable for up to five years. *See* U.S. Dep't of Health & Human Servs., *FY 2007 Family and Youth Servs. Bureau, Grant Awards, Abstinence Educ. Div.*, http://www.acf.hhs.gov/programs/fysb/content/docs/07_grantawards.htm (last visited Nov. 9, 2009).

For at least the last two years, the summit has included significant religious proselytizing, including sectarian invocations; a sermon on the Ten Commandments by a sitting judge; and performances by a mime ministry accompanied by Christian gospel songs. *See, e.g.*, Pls.' Compl. ¶¶ 29-33, 42-59. On April 3, 2009, after the May 2008 summit and in advance of the May 2009 summit, Plaintiffs' counsel sent a letter to Defendants reminding them that religious proselytizing in the context of a government-sponsored and government-funded event is unconstitutional, and asked that Defendants ensure that the constitutional problems at the May 2008 summit would not be repeated at the May 2009 summit. Defs.' Answer Ex. 4. Defendants did not respond to Plaintiffs' letter before the May 2009 summit. Defs.' Answer ¶ 34. Despite Plaintiffs' letter to Defendants, the May 2009 summit again contained significant religious themes, messages, and proselytizing. *See, e.g.*, Pls.' Compl. ¶¶ 42-59.

Plaintiffs then filed the instant action challenging Defendants' practice of violating the Establishment Clause in the context of their abstinence-only programs. Plaintiffs also allege that Defendants will sponsor a May 2010 abstinence-only summit. Pls.' Compl. ¶ 13. The basis for this claim is twofold. First, Defendants have held the

event for the last five consecutive years. Pls.' Compl. ¶ 12; Defs.' Answer ¶ 12. Second, Defendants' newsletter, "The Beacon," attached as Exhibit A, indicates that Defendants will sponsor a May 2010 summit. Indeed, in the May 2009 edition of "The Beacon," Defendant Don Thompson, Executive Director of the Mississippi Department of Health and Human Services, wrote an article about the summit held that month, stating:

> I want to thank all of the MDHS staff, our volunteers and sponsors who gave so much time and effort in making this such a successful event. I hope everyone enjoyed themselves as much as I did and *I look forward to next year*.

Id. (emphasis added).

Moreover, Defendants have expressed no concern over their myriad Establishment Clause violations, nor have they made any pronouncements that they will prohibit religious proselytizing in their abstinence-only programs. To the contrary, after Plaintiffs filed suit, a local television news station interviewed the Lt. Governor of Mississippi who said: "I was so disappointed that the ACLU has decided that we don't need to tell young women in the state of Mississippi about our faith; we don't need to explain to them that abstinence, we believe, is related to our faithful Christianity beliefs." *See* WAPT News: ACLU Sues State (WAPT television broadcast Sept. 14, 2009), http://www.youtube.com/watch?v=7vpl66_vJ0g (last visited Nov. 9, 2009).

STANDARD OF REVIEW

When reviewing motions to dismiss, courts must "take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff."[1] *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). Moreover, a

[1] Defendants' motion to dismiss was filed after they filed their answer, and therefore cannot be considered a motion to dismiss; however, their motion may be considered a motion for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c). *See* Fed. R. Civ. P. 12(b) (stating that a motion asserting the

complaint should not be dismissed "unless the court determines that the plaintiff cannot prove a plausible set of facts that support the claim and would justify relief." *Id*.; *see also Castro v. U.S*., 560 F.3d 381, 386 (5th Cir. 2009). Furthermore, disputed factual issues cannot be considered under either a motion for judgment on the pleadings or under a motion to dismiss. Indeed, "[j]udgment on the pleadings is appropriate only if material facts are not in dispute and questions of law are all that remain." *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 891 (5th Cir. 1998); *see also* Wright & Miller, 5C Fed. Prac. & Proc. Civ. 3d § 1368 ("[W]hen material issues of fact are raised by the answer and the defendant seeks judgment on the pleadings on the basis of this matter, his motion cannot be granted."). Similarly, under 12(b)(1) if the Court looks beyond the complaint, the Court can consider only *undisputed* facts or resolved factual disputes. *See Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996).

ARGUMENT

I. Defendants' Motion Must Be Denied Because Their Claim That They Will Not Hold a 2010 Summit Is Disputed and Because They Have Never Alleged That They Will Cease Unconstitutional Conduct in Other Abstinence-Only Events.

Defendants' motion boils down to their claim that they have no current plans to hold a 2010 summit. After the 2009 summit, Defendants learned that Plaintiffs were going to file suit. This prompted Defendant Thompson to send Plaintiffs a letter saying, quite vaguely, that "the probability of subsequent statewide events of that magnitude [as the summit] is unlikely due to changes in the way the federal funds for that activity will be allocated in the future." Defs.' Answer Ex. 5. After litigation was filed, Defendant

---

defense of lack of subject matter jurisdiction must be made *before* the responsive pleading). This difference is slight, however, given that the standard for considering a motion for "judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6)." *Doe v. MySpace, Inc*., 528 F.3d 413, 418 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 600 (2008).

Sparkman stated in an affidavit, "There will be no teen summit in 2010 nor in the foreseeable future." Defs. Br. Ex. A. These statements contradict Defendants' prior statements before litigation was threatened or filed. *See supra* at 4 (Defendant Thompson stated immediately after the summit that he "look[s] forward to next year.").

A factual dispute therefore exists as to whether Defendants will sponsor an abstinence-only summit in 2010. Indeed, as discussed above, Plaintiffs' complaint alleges that Defendants will sponsor a 2010 summit. *See supra* at 3-4. Because this factual dispute is material, Defendants' motion, whether it is considered a motion for judgment on the pleadings or a motion to dismiss, must be denied.[2] *See, e.g., Voest-Alpine Trading USA Corp.*, 142 F.3d at 891 (judgment on the pleadings is appropriate only if there are no material facts in dispute); *Barrera-Montenegro*, 74 F.3d at 659 (at motion to dismiss stage only undisputed facts or resolved factual disputes can be considered).

Moreover, even if Defendants do not hold a "summit" per se, Defendants have never alleged that they will cease all abstinence-only events. Indeed, the gravamen of Plaintiffs' complaint is not whether Defendants will hold an identical abstinence-only event in 2010, but that Defendants sponsor and fund religious activities in the context of their abstinence-only activities. Notably, Defendants have *not* said that they will no longer allow sectarian prayer, religious proselytizing, or overt Christian messages to be communicated in their abstinence-only programs. Defendant Thompson has said only that it is "unlikely" that the State will sponsor another statewide abstinence event of the same magnitude as the summit. Defendants never said that they will not sponsor an

[2] Alternatively, if this Court exercises its jurisdiction to resolve the factual disputes presented at this stage, it must allow the parties to first conduct discovery. *See, e.g., McAllister v. Fed. Deposit Insurance Corp.*, 87 F.3d 762, 766 (5th Cir. 1996).

abstinence-only rally, jamboree, or convention. In other words, Defendants cannot insulate review of their Establishment Clause violations simply by claiming that they will not sponsor the exact same event. *See, e.g., Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (holding that a slight change in affirmative action ordinance during the pendency of litigation does not change the gravamen of plaintiffs' complaint). For these reasons alone, Defendants' motion should be denied.

II. Defendants' Litigation-Inspired Claims Do Not Deprive This Court of Jurisdiction To Hear Plaintiffs' Case.

Defendants' primary argument is that they decided to end their five year practice of sponsoring state summits after this litigation was filed, and, even if they held a state summit, there is "no certainty" that they would allow religious proselytizing at the event. Although couched in terms of standing and ripeness, Defendants' argument is actually that their disputed allegations have mooted Plaintiffs' claims. However, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004) (internal quotation marks and citations omitted). Moreover, "the standard for determining whether a case has been mooted by the defendant's conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to reoccur." *Id.* (internal quotation marks and citations omitted). The party asserting mootness bears the heavy burden of persuading the court that the challenged conduct "cannot reasonably be expected to start up again." *Id.; see also Cooper v. McBeath*, 11

F.3d 547, 551 (5th Cir. 1994) (holding that a case is moot only if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) ("'[t]he crucial test . . . where defendant has voluntarily ceased his allegedly illegal conduct [] is whether it can be said with assurance that there is no reasonable expectation that the wrong will be repeated'") (quoting *Melzer v. Bd. of Pub. Instruction*, 548 F.2d 559, 566 n.10 (5th Cir. 1977)); *Hall v. Bd. of Sch. Comm'rs of Conecuh County*, 656 F.2d 999, 1001 (5th Cir. Unit B Sept. 1981) (to defeat jurisdiction, defendants "must offer more than their mere profession that the conduct has ceased and will not be revived").

For example, in *Duncanville Independent School District*, the Court held that the district court properly granted a preliminary injunction against a school district for allegedly allowing faculty-led and classroom prayers. By the time of the preliminary injunction hearing, these prayers had stopped, but the district court nevertheless entered a permanent injunction, which the Fifth Circuit upheld, because the defendant's voluntary cessation of the alleged constitutional violation could not moot the claim. 994 F.2d at 166. Similarly, in *Hall*, the plaintiffs challenged the school district's practice of allowing morning devotional readings over the school's public address system. 656 F.2d at 1000. Though the school stopped the practice after learning a lawsuit was going to be filed, the court nevertheless proceeded to the merits of the case because the court held that the defendants were free to return to their old ways. *Id*. at 1001; *see also Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 833-34 (11th Cir. 1989) (holding that plaintiffs' challenge to pre-football game prayer was not moot even though the school district ceased the practice before the complaint was filed); *Steele v. Van Buren Public Sch. Dist*.,

845 F.2d 1492, 1494-95 (8th Cir. 1988) (holding plaintiffs' challenge to prayers at school band practice was not moot even though the defendants testified that they permanently discontinued the practice).

The same is true here. At the outset, Defendants have not met their burden of showing that the May 2010 summit – or some other abstinence-only event – will not occur. Right after the event, Defendants said that they would hold another summit next year. It was not until after Defendants learned that Plaintiffs would file the instant action that they claimed that they would not hold another summit in 2010. These litigation-inspired positions – including such vague statements that a future statewide abstinence-only event is "unlikely" – cannot be the basis for granting Defendants' motion.[3]

Furthermore, even if Defendants claimed that they would prohibit religious proselytizing at future events – which they have not – Defendants could not meet their burden of showing that Establishment Clause violations would not reoccur at a future summit or some other abstinence-only event. First, Defendants have engaged in a pattern and practice of violating the Establishment Clause in the context of their abstinence-only events. *See, e.g., Gates*, 376 F.3d at 337 (holding defendants' claim that they remedied the prison conditions did not moot plaintiffs' claim because the prison conditions existed for years prior); *Hall*, 656 F.2d at 1000 (noting that defendants permitted morning devotionals over the school's public address system for years prior to the threat of litigation). Second, Defendants seem unconcerned by their blatant violation of the Establishment Clause: They did not respond to Plaintiffs' counsel's letter after the May

[3] The concern that the government will resort to its old ways after the termination of litigation is heightened where, as here, the voluntary cessation is purely a litigation position. For example, the Seventh Circuit in *Ragsdale v. Turnock*, refused to hold most of the plaintiffs' claims moot because the government's representations of non-enforcement were asserted only in the context of the litigation and were not based on "pre-existing documentation." 841 F.2d 1358, 1366 (7th Cir. 1988).

2008 summit pointing out the constitutional violations; Defendants subsequently repeated the obvious constitutional violations; Defendants do not claim that they prohibit religious proselytizing in their abstinence-only programs; and the Lt. Governor believes that the State can tell young women that abstinence is related to the State's faithful Christian beliefs. *See, e.g., Hall*, 656 F.2d at 1000 (defendants failed to demonstrate that the challenged behavior would not reoccur because they continued the constitutional violation in the face of clear precedent to the contrary). Third, no formal binding policy has been adopted by Defendants ensuring that the Establishment Clause violations will absolutely not be repeated; rather, these Defendants, or their successors, at any time could allow religious proselytizing. *See, e.g., Jager*, 862 F.2d at 824 (holding issue of pre-football game prayers not moot in part because the challenged action was voluntarily stopped by the principal, but there was no formal policy adopted by the school district); *Hall*, 656 F.2d at 1001 ("plaintiffs were entitled to injunctive relief that would be binding upon the institutions, regardless of changes in personnel"). Accordingly, Defendants have not met their "heavy burden" of demonstrating that their wrongful behavior "cannot reasonably be expected to start up again." *Gates*, 376 F.3d at 337.

III. Plaintiffs Have Standing to Seek Prospective Relief.

Defendants' argument that Plaintiffs do not have standing to seek prospective relief is nothing more than their same argument dressed up in new clothes: Defendants claim that Plaintiffs cannot demonstrate imminent injury because Defendants have "decided" not to sponsor a 2010 summit, and, even if they did, there can be "no certainty" that there will be religious proselytizing at the summit. But Plaintiffs have demonstrated imminent injury, and thus standing to seek prospective relief, for the same

reasons that their claim is not moot: (1) Defendants' claim that they will not hold a 2010 summit is contradicted by their prior statements; (2) Defendants have a history of violating the Establishment Clause in their abstinence-only events; (3) Plaintiffs' concerns about the constitutional violations at the May 2008 summit fell on deaf ears, and Defendants again engaged in blatant violations of the Establishment Clause; (4) Defendants have never said that they will prohibit religious proselytizing in their abstinence-only events; and (5) the Lt. Governor believes that indoctrinating young people with Christian beliefs poses no constitutional problem.[4] *See supra* at 7-10.

Moreover, as a prudential matter, Defendants' argument would mean that no one could ever challenge religious proselytizing at Defendants' abstinence-only events. Defendants claim that Plaintiffs cannot pursue their complaint now, ahead of the next in the series of these events. But they also say that they cannot bring their case after any such event. It seems Defendants would only be satisfied if, as soon as Plaintiffs heard Defendants deliver religious messages, they ran to the courthouse and moved for a temporary restraining order while the religious proselytizing was still ongoing. Obviously, that is not possible. Plaintiffs' claim is ripe, and filing now will give the

[4] In support of their argument, Defendants rely on two cases, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), but neither controls the standing issue here. *See* Defs.' Br. 11-13. As the Fourth Circuit has held where, as here, an Establishment Clause plaintiff points to past constitutional violations and his or her intent to participate in the government activity at issue, the plaintiff has standing to seek prospective relief, which distinguishes the standing inquiry from that in *Lyons*. *Suhre*, 131 F.3d at 109-91. Moreover, the discussion in *Santa Fe* relied upon by Defendants is not about standing, but rather about whether the plaintiffs could mount a facial challenge to the school's policy that permitted, but did not require, prayer at school football games. Plaintiffs here are not mounting a facial challenge, and in any event, as the *Santa Fe* Court specifically noted, "[w]e need not wait for the inevitable to confirm and magnify the constitutional injury." 530 U.S. at 316.

parties time to conduct discovery and conduct necessary motion practice before the next event.[5]

IV. Plaintiffs Need Not Allege That They Will Avoid Defendants' Abstinence-Only Events To Demonstrate Injury In Fact.

Aside from Defendants' various iterations of the same argument – that Plaintiffs' case should be disposed of because of their disputed assertion that they will not hold a 2010 summit – Defendants make only one other argument in an attempt to dismiss Plaintiffs' case. Defendants argue that Plaintiffs have suffered no injury in fact, and thus lack standing, because their attendance at the summits is voluntary and because they merely "disagree" with Defendants' conduct. The crux of Defendants' argument is that if Plaintiffs dislike the religious proselytizing at Defendants' abstinence-only events, they should skip the government sponsored program. Not only is Defendants' argument contrary to Fifth Circuit precedent, and numerous Courts of Appeals decisions, their argument makes a mockery of the First Amendment. Indeed, the heart of the First Amendment ensures that government cannot exclude individuals from participating in, or make them feel unwelcome at, any government-related activity because of their religious beliefs.

For example, in *Doe v. Beaumont Independent School District* students challenged a voluntary "Clergy in the Schools" program, which provided counseling on

[5] Defendants also argue that Plaintiffs lack standing because their request for injunctive relief is too broad. Defs.' Br. 18-19. Plaintiffs disagree that it is too broad, but, in any event, the only way Defendants' argument could relate to the standing inquiry is if it were impossible to craft any injunctive relief to prevent future Establishment Clause violations. Obviously, after consideration of the merits, it is wholly within the competence of the Court to shape the contours of the requisite relief. Moreover, Defendants argue that Plaintiffs request an "obey the law" injunction. Defs.' Br. 19. This is truly ironic; clearly, Defendants need to be bound by a court order to comply with the Constitution because they have failed miserably to do so voluntarily. Regardless, Defendants' assertion is wrong – Plaintiffs have specified the scope of the injunction and they do not seek a vague "obey the law" injunction.

various secular social issues. 240 F.3d 462 (5th Cir. 2001) (en banc). The court held that the plaintiffs had standing to challenge the voluntary program because "the students cannot participate in the school's offered program without taking part in an unconstitutional practice." *Id*. at 467. Similarly, it is well settled that a plaintiff need not alter his or her conduct by foregoing a state sponsored event in order to have standing. *See Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002) ("An Establishment Clause plaintiff need not allege that he or she avoids, or will avoid, the area containing the challenged display."); *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997) ("rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable" and the "Supreme Court has never required that Establishment Clause plaintiffs take affirmative steps to avoid contact with challenged displays or religious exercises").[6] Plaintiffs here have standing because they attended the summits, plan to attend future abstinence-only events, but do not want to be subjected to unconstitutional government-sponsored and government-funded religious proselytizing at the events. Pls.' Compl. ¶¶ 8-10.

Even *Books v. City of Elkhart*, cited by Defendants, supports Plaintiffs' position. 235 F.3d 292 (7th Cir. 2000). In *Books*, the court held that "both the Supreme Court and this court have found standing for constitutional challenges to religious conduct when the

[6] Defendants rely on two other cases to support their argument. The first, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., is inapposite. 454 U.S. 464 (1982) (cited in Defs.' Br. 15-18). In that case, the plaintiffs, who resided in Maryland and Virginia, alleged taxpayer standing to challenge the transfer of federal property, located in Pennsylvania, to a religious entity. *See id.* (noting that the out-of-state plaintiffs had no direct contact with the property in question and simply learned about the land transfer through a press release). The Court held that the plaintiffs' injury was too attenuated. The same cannot be said here – Plaintiffs attended the event and were subjected first-hand to the constitutional violation. *See, e.g., Doe v. Beaumont Indep. Sch. Dist*., 240 F.3d 462, 466 (5th Cir. 2001) (distinguishing *Valley Forge* because plaintiffs had direct contact with the Establishment Clause violation); *Suhre*, 131 F.3d at 1086 (same). The second case, *Alabama Freethought Association v. Moore*, 893 F. Supp. 1522 (N.D. Ala. 1995), cited in Defendants' Brief 18, is contrary to Fifth Circuit precedent and the weight of various other circuits as discussed *supra*.

plaintiffs did not assume a special burden or alter their behavior." *Id*. at 299 (collecting cases). The issue in that case was whether the plaintiffs were injured by a Ten Commandments monument in front of the Municipal Building. The Seventh Circuit held:

> Although it is true that the plaintiffs here could have altered their path into the Municipal Building to avoid the monument . . . they were not obligated to do so to suffer injury in fact.

Id. at 300-01 (internal citations omitted).

Moreover, in addition to suffering injury from attending the summit and being subjected to government-sponsored and government-funded religious proselytizing, Plaintiffs are also injured because their state tax dollars fund the summits. State taxpayers have standing to challenge Establishment Clause violations if they (1) show that they pay taxes to the state, and (2) that tax revenues are spent on the disputed practice. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995); *see also Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 507-09 (6th Cir. 2001) (state taxpayers have standing to challenge loss of revenue to the state); *Minnesota Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1356-59 (8th Cir. 1989) (based on Supreme Court precedent there must only be a "measurable expenditure of tax money" for plaintiffs to have state taxpayer standing). Plaintiffs Robinson and Smith allege that they are state taxpayers and that, upon information and belief, state taxpayer dollars were spent on the summits. Pls.' Compl. ¶¶ 8, 10, 20.

Plaintiffs dispute Defendants' claim that no state dollars were spent on the summit, Defs.' Br. 10 n.5, for two reasons. First, Defendants admit that they used funds received from the federal government under Title V of the Social Security Act. The Title

V abstinence-only-until-marriage program is a joint state-federal program, and the state is required to match 75% of the Title V funds. *See supra* at 3. Second, even if state funds weren't used to pay the performers at the summit, state funds were almost certainly used to pay for the salaries of Defendants and their staff who planned the event, printing costs for the programs, or other expenses. At minimum, Plaintiffs are entitled to conduct discovery to obtain a full accounting of the summit expenses.

IV. Requiring Defendants to Return Misspent Money to the Federal Government Is Not Barred by the Eleventh Amendment.

Defendants take aim at one aspect of the relief Plaintiffs seek – Defendants claim that Plaintiffs are barred by the Eleventh Amendment from seeking an order requiring Defendants to return the federal dollars they spent on unconstitutional activities to the federal government.[7] As discussed above, Plaintiffs have ample bases for pursuing this case and obtaining prospective relief. The only question presented by Defendants' Eleventh Amendment argument is whether Defendants can be ordered to return federal dollars. Such an order, however, would not necessarily invade the state treasury and thus would not implicate the Eleventh Amendment. For example, Defendants continue to receive federal abstinence-only dollars, and they could return to the federal government an amount equal to what they misspent on the summits. *See Schiff v. Williams*, 519 F.2d 257, 262 (5th Cir. 1975) (holding that the Eleventh Amendment did not bar plaintiffs' back pay award because the money would come from a fund comprised of private monies, and therefore there would be "no true impact on the state treasury"); *see also*

[7] Defendants also claim in a footnote that Plaintiffs also lack standing to pursue this remedy, but the sole case they cite for their argument is inapposite. Defs.' Br. 9 n.4. (citing *Arrington v. Helms*, 438 F.3d 1336, 1342 (11th Cir. 2006)). In *Arrington*, the court held that there was no private right of action under 42 U.S.C. § 1983 to enforce Spending Clause legislation. Obviously, Plaintiffs have the ability to enforce the First Amendment under 42 U.S.C. § 1983.

Brown v. Porcher, 660 F.2d 1001, 1007 (4th Cir. 1981) (holding that retroactive award against state employment commission was not barred by the Eleventh Amendment because the award would not come from state funds); *American Re-Insurance Co. v. Janklow*, 676 F.2d 1177, 1184-85 (8th Cir. 1982) (holding that if retroactive damage award would not come from state treasury, there would be no Eleventh Amendment bar). Indeed, one of the purposes of Eleventh Amendment immunity is to ensure that a State does not have to pay damages to a plaintiff from "the general revenues of a State." *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). An order directing Defendants to return unspent federal dollars to the federal government would not affect the general revenues of the State. At minimum, Plaintiffs are entitled to discovery on this matter.[8]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss.

Dated: November 10, 2009

Respectfully Submitted,

s/Brigitte Amiri
Brigitte Amiri*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: 212-549-2633
Fax: 212-549-2652
bamiri@aclu.org

Kristy L. Bennett, MSB #99525

[8] Furthermore, if this Court determines that this aspect of Plaintiffs' requested relief is barred by the Eleventh Amendment, Plaintiffs seek leave to file an amended complaint to name Defendants in their individual capacities given that they directly and personally violated the Establishment Clause. *See, e.g., Sheuer v. Rhodes*, 416 U.S. 232, 238 (1974) (notwithstanding the Eleventh Amendment, when a state official is liable in his or her individual capacity, damages may be awarded), *overruled in part on other grounds, Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

American Civil Liberties Union of Mississippi
P.O. Box 2242
Jackson, MS 39225
Phone: 601-354-3408
Fax: 601-355-6465
kbennett@aclu-ms.org

Daniel Mach*
American Civil Liberties Union Foundation
915 15th Street, 6th Floor
Washington, DC 20005
Phone: (202) 675-2330
Fax: (202) 546-0738
dmach@dcaclu.org

*Motion for *pro hac vice* granted

CERTIFICATE OF SERVICE

I, Brigitte Amiri, counsel for Plaintiffs, do hereby certify that on November 10, 2009, I have electronically filed the foregoing Plaintiffs' Opposition to Defendants' Motion to Dismiss with the Clerk of the Court using the ECF system which sent notification of such filing to:

Shawn Shurden
Special Assistant Attorney General
Office of the Attorney General
Civil Litigation Division
Post Office Box 220
Jackson, Mississippi 39205
T: 601-359-3680
F: 601-359-2003
sshur@ago.state.ms.us

/s Brigitte Amiri
BRIGITTE AMIRI

EXHIBIT A

Mississippi Department of Human Services

The BEACON

MAY 2009

Abstinence Works - Let's Talk About It!

Last Saturday, May 16th, the Division of Economic Assistance sponsored an Abstinence Summit at the Coliseum here in Jackson. This was my first ever experience with a conference of this nature, so I wanted to share some of my thoughts and observations on the event.

First, I couldn't believe the number of participants who joined us from almost every area of our state. There were well over 5,000 young people and sponsors in attendance which was quite impressive. The event brought together young and old alike. One of our attendees was Mrs. Elizabeth Kegler, a 94-year-old lady, who came with a group of young folks all the way from Tallahatchie County.

I also want to point out how well organized the program was. And from what I observed, everyone thoroughly enjoyed the event and its festivities.

I just hope that at the end of the day the message that was presented made a positive impact on our young people.

I want to thank all of the MDHS staff, our volunteers and sponsors who gave so much time and effort in making this such a successful event.

I hope everyone enjoyed themselves as much as I did and I look forward to next year.

Don Thompson
Executive Director

In this issue:

Mississippians are "Living Today for a Better Tomorrow"

Dr. B. T. Simms, Jr. of Pontotoc was recognized and presented the Distinquished Service Award. From left: grandaughters Annaliese Simms, Mr. Simms, Whitney and Courtney Weatherholt and daughter Susan Simms Weatherholt.

The Mississippi Department of Human Services (MDHS), Division of Aging and Adult Services (DAAS) held a press conference at the State Capitol on May 1 to celebrate May as Older Americans Month.

At the press conference, MDHS, DAAS honored Dr. B. T. Simms, Jr. of Pontotoc, as the 2009 Older Americans Month, Distinguished Service Award recipient. Dr. Simms has offered many hours of exceptional volunteer services to his community and his kindness and compassion are evident through his works and countless contributions.

This year's theme, "Living Today for a Better Tomorrow," encourages Mississippians to prepare for a larger aging population and to think differently about healthy aging.

For 45 years, America has paused to honor its seniors during May. The ongoing contributions of Mississippi's older citizens were highlighted with a

Continued on page 2.

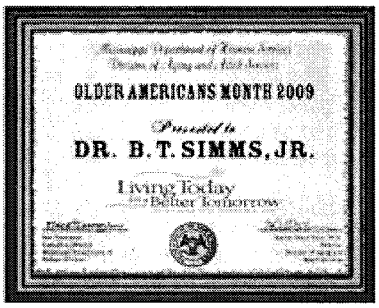
Continued from page 1.

state proclamation issued by Governor Haley Barbour. Activities and events are also planned in communities statewide.

One of the biggest obstacles facing the United States is how the aging population is cared for as they age. By 2011, 78 million baby boomers will begin to turn 65. This change in the nation's demographics will have an overwhelming effect on economic and social scenes. Currently, in Mississippi there are over 457,000 citizens age 60 or older.

The national aging services network is led by the U.S. Administration on Aging and comprised of state, tribal and area agencies on aging, as well as more than 29,000 community service providers, caregivers and volunteers.

MDHS, DAAS is one of the many organizations working to help older Mississippians remain in their communities. For additional information on Older Americans Month activities, contact MDHS, DAAS at 601-359-4929 or 1-800-345-6347.



MDHS - The BEACON

Julia Bryan, Editor
Office of Communications
Mississippi Department of Human Services

The BEACON is published monthly.

For additional copies or to submit materials for publication:
Phone: 601-359-4517
Fax: 601-359-9687
Email: julia.bryan@mdhs.ms.gov
Mailing Address:
MDHS - Office of Communications
P.O. Box 352
Jackson, MS 39205-0352

Dr. B. T. Simms, Jr. of Pontotoc was presented the 2009 Distinguished Service Award by Three Rivers AAA Director Cleveland Joseph. Simms is an active volunteer in Pontotoc County, serving in many capacities from donating fresh fruit to hosting a monthly fish fry for anyone who's hungry. He is a retired Doctor of Veterinary Medicine who lives at home with his wife of 60 years, Millie. Dr. Simms motto is, "If everyone helped someone, the world and our community would be a much better place and everyone would benefit." At the conference, Dr. Simms was also awarded a beautiful Gail Pittman ® handmade platter by Valley Food Services Executive Vice President John Covert.

Attendees of the Older Americans Month press conference listened to Dr. Simms as he humbly told how he helped others in his community.

Dathan Thigpen and Holy Nation Step Up to Help OTS Students

A local gospel group is using the sound of music to change the lives of at-risk youth. Dathan Thigpen and Holy Nation recorded a live music cd at the Jackson Convention Center in May.

Other internationally known gospel artists like Tye Tribbett, Kim Burrell and Deluge Band also performed.

Thigpen says he and his brothers have always had music in their lives and it has been a source of motivation. They now want to help at-risk youth by providing musical instruments to them. They recently had a music drive where used and gently-used instruments were donated.

"We had people coming out bringing violins, flutes, guitars, a drum set, keyboards, all of this stuff so we can start this six-week program. We've partnered with Youth Solutions to start the program to help the kids at Oakley Training School and that's how we're giving back," said Thigpen.

The staff and students at OTS are thrilled with the music project. Expect to hear more about it as this mission develops.

Story reprint from WLBT News.
Photo from HolyNation.com

Stop the Hurt Conference held in Tupelo

Resource specialists Mary Toney (Union County) and Kimberly Sandlin (Lee County) were on hand at the Stop the Hurt Conference in Tupelo with information and tips. This year's theme was "Agencies Responding to Kids." The conference goal was to raise community awareness of child maltreatment and violence in the home.

West Bolivar County DFCS Hosts Child Abuse Awareness Program

The West Bolivar County Division of Family & Children's Services (DFCS) presented the 8th Annual Child Abuse Awareness Program on April 24 at the Bolivar County Courthouse. About 200 students and guests were on hand to hear guest speaker Corey Holmes, a former Canadian Professional Football Player for the Saskatchewan Roughriders. Holmes earned four Championship Rings during his career. Information was distributed to attendees on signs of child abuse and where to report neglect or abuse.

Laura Mason Retires with 29 Years of Service to the State

Laura Mason, DEA Case Manager, Hinds County Office, was honored with a retirement celebration May 6 and her "going away party" was certainly a celebration. Many family and friends joined in to, not only honor Laura, but offer prayers, gifts, songs and many fond words of encouragement to her. She is a great fan of the JSU Tigers and Provine Rams and the room was decorated accordingly. After remarks and songs were presented, everyone enjoyed a feast fit for a queen! Laura will be missed by her friends at MDHS but she will continue to support her Tigers and Rams. She also plans to devote time to her family and church missions. Congratulations Laura on your years of service.

Program Integrity Investigators Bust Crooks

Mississippi Department of Human Services (MDHS), Office of Fraud Investigations has been busy this spring netting the following SNAP clients for fraud:

- In Panola County, the Sheriff's Department and fraud investigators arrested Keisha Perry of Batesville and Angela Sanford of Courtland for fraud in the Supplemental Nutrition Assistance Program (SNAP). On April 14, 2009, Sanford was found guilty by Judge Willie Earl Jones in the Panola County Justice Court and was ordered to pay $1,927 in fines and restitution with 30 days in jail suspended pending payment. On April 21, 2009, Perry entered a guilty plea and Judge James W. Appleton ordered her to pay $750 in restitution with 30 days in jail suspended pending payment. Perry was also permanently disqualified from receiving SNAP benefits.

- The Clay County Sheriff's Department and fraud investigators arrested and charged Tonya D. Gibbs of West Point with felony SNAP fraud. On April 14, 2009, Gibbs entered a guilty plea at the Clay County Justice Court where Judge James T. Kitchens, Jr. ordered Gibbs to pay $10,478 in restitution and fines with three years supervised probation through the Mississippi Department of Corrections. Judge Kitchens is withholding acceptance of her guilty plea until Gibbs complies with payment of court ordered fines and serves probation. Gibbs is disqualified for a 12 month period from receiving SNAP benefits.

- The Desoto County Sheriff's Department and investigators arrested and charged Jackie L. Lyons of Olive Branch with SNAP fraud. On April 24, 2009, Lyons was found guilty in the Desoto County Justice Court by Judge Ken Adams who ordered Lyons to pay $3,064 in restitution and fines. Lyons was also disqualified from receiving SNAP benefits for 24 months.

The MDHS Office of Fraud Investigations is charged with detection, investigation and verification of alleged fraud in federal public assistance programs administered by MDHS. During State Fiscal Year 2008, the office handled 2,816 suspected program violations and recovered $1,213,002. Ken Palmer, director for the Office of Fraud Investigations warned that more arrests statewide are forthcoming.

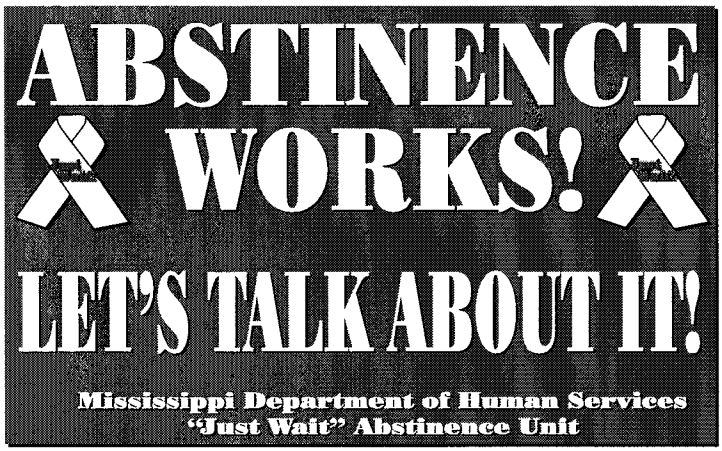
Administrative Assistants Day Celebrated in a Big Way *The Energy behind MDHS Programs*

Warren County DEA treated their clerks like "Queens for the Day" with lunch, gifts, balloons and tiaras. From left: Shirley Peaches, Janette Johnson and Del Harris.

Ruby McBride (center) secretary for Region II-E, DFCS was honored for Administrative Professional's Day. She was treated to lunch and given a gift. Thank you Ruby for your hard work and dedication to DFCS!

Jefferson County Clerks Patricia Felton at left and Tiffany Young, were treated to lunch by Director Delores Rankin (center) at the Sand Bar. Congratulations on a job well done!

May is Teen Pregnancy Prevention Month



To promote abstinence among teens, the Mississippi Department of Human Services (MDHS), "Just Wait" Abstinence Unit hosted the 8th Annual Abstinence Rally, Wednesday, May 6 at the State Capitol. Guest speakers included Miss Mississippi 2008 Christine Kozlowski, Mr. Tougaloo College Rashad Junior and Belhaven College freshman Amber Hill. Over 100 students from area schools were in attendance.

"The rally is one of several events that the Mississippi Department of Human Services will host during the month of May to emphasize the importance of abstinence for teens. Simply put, an abstinent teen is one that makes better decisions and has greater successes in life," said MDHS Executive Director Don Thompson.

"Mississippi has one of the highest percentages of births to teens in the nation, so one of our main objectives is to raise public awareness and stress that sexual purity through abstinence is the best and safest choice for our teenagers," said MDHS, Division of Economic Assistance Director Cheryl Sparkman.

On May 16, the Abstinence Unit hosted the "Abstinence Works! Let's Talk About It!" Teen Summit at the Mississippi Coliseum in Jackson with over 5,000 participants in attendance. The summit included national motivational speaker David Mahan of Frontline Youth Communication and performances by local artists and cheerleading squads.

With teen birth rates increasing at alarming rates nationwide, campaigns to reduce these trends are proving successful. Although it was widely reported nationally that Mississippi had the highest teen birth rate in 2006, current trends show that rate to be decreasing. Provisional data released by the Mississippi State Department of Health (MSDH) indicates a significant drop in births from 7,954 in 2007 to 6,824 in 2008.

The decrease in teen birth rates emphasizes the importance of continuing abstinence education programs in Mississippi. Studies have shown that a number of factors influence a teen's sexual behavior including a desire for intimacy, lack of family values, peer pressure, poor refusal skills, the media and few established goals for their own future.

From 2004 through 2008, the "Just Wait" Abstinence Unit has worked tirelessly to present the abstinence message to over 91,000 adults and youth across the state. Despite impressive gains made, there is still much work to be done to further reduce the number of teens becoming pregnant in our state.

Too many teens think that "it won't happen to me" and continue to have unsafe sex resulting in unplanned pregnancies and increased rates of sexually transmitted diseases (STDs). Events hosted during May addressed this common misconception and helped teens realize that they can make good choices "in the heat of the moment."

The message to "just wait" will continue to be promoted throughout the year through Families First Resource Centers, partnerships with the Mississippi Department of Education and other state and local agencies. These programs also produce other related benefits such as reduction in the number of teens dropping out of school, facing incarceration, depression and emotional trauma.

Teen pregnancies and childbearing have significant economic and social costs. A reduction in these birth rates will benefit the state's overall economy and improve educational, health and social prospects for future Mississippians.

An analysis from the National Campaign to Prevent Teen and Unplanned Pregnancy shows that teen births in Mississippi cost taxpayers (federal, state and local) at least $135 million in 2004 representing:

- $26 million for public health care (Medicaid and SCHIP);
- $8 million for child welfare;
- $18 million for incarceration; and
- $50 million in lost tax revenue due to decreased earnings and spending.

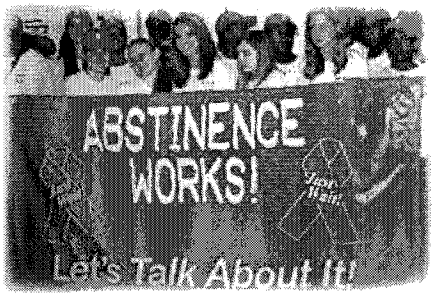
Pregnancy prevention campaigns offer positive solutions which represent sound fiscal policy. If the state is able to sustain current trends in the reduction of teens having children, we will not only improve the well-being of children, families and communities, but will also reduce the burden on taxpayers and give Mississippi's teens and future generations a chance to move from poverty to prosperity, personal responsibility and self-sufficiency.

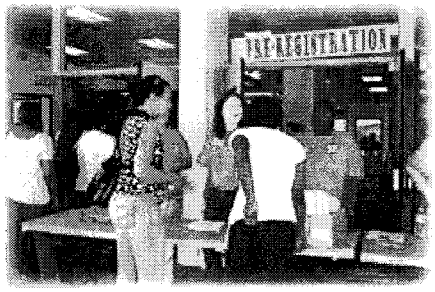
For more information on area events call the MDHS Abstinence Unit at 1-800-590-0818.

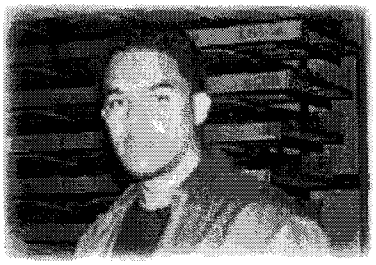
*As of 5/1/09, 2008 data is provisional.

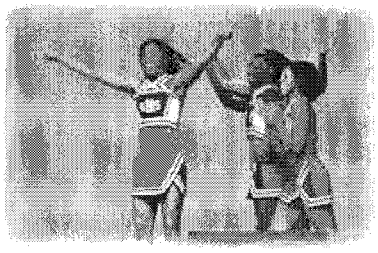
Data available at the Mississippi State Department of Health *website.*

Scenes from Abstinence Events









Benton County DFCS Celebrates April in a BIG Way

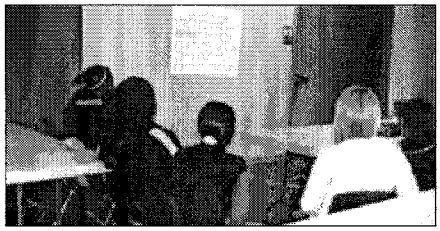
Benton County Division of Family and Children's Services (DFCS) staff kicked off Child Abuse Awareness Month by decorating their offices with blue ribbons and posters to raise awareness about child abuse and neglect. Benton County United Community Action and the Mississippi Extension Service also allowed DFCS to hang ribbons and posters on their office doors.

Family Protection Service (FPS) staff Felicia Penilton and Tracey Barnett held In-Service Training for child abuse awareness and foster care at both the Ashland and Hickory Flat Head Starts where ribbons and posters were given to each center for display. These two centers have about 175 children enrolled. DFCS also distributed child abuse awareness stickers and pamphlets about the blue ribbon campaign to each child and gave child abuse awareness pins to Head Start staff members.

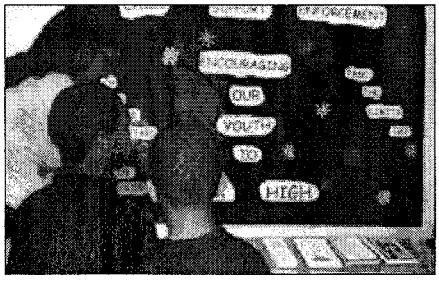
DFCS staff and local community volunteers also incorporated Easter activities with child abuse awareness by making April 9 a day of fun for foster children at the Benton County Fire Department. FPS Tracey Barnett spoke about child abuse awareness, Morgan Barnes, a local youth, volunteered her time to help bring smiles to the foster children's

faces and Child Support Supervisor Kervin Richard filled their stomachs by grilling hamburgers. Webster's Supermarket and Farese Law Office donated food, plastic eggs and candy. Mr. and Mrs. Bancroft, Mr. and Mrs. Weakley, Ms. Willie Ruth Daugherty and the Benton Sheriff's Department generously donated to the event to help make it complete.

On April 22, DFCS staff invited Community Educator, Mary Spencer, from Shelter and Assistance in Family Emergencies (S.A.F.E.) to speak to the teens in foster care. Mary Spencer spoke on issues concerning date rape, teenage domestic violence and internet safety. One of the foster care teens in attendance said, "When I took Mrs. Mary's class, I learned about online predators and what I should do if I ever got involved with a predator. I learned that I should tell an adult who can handle the situation or contact the local police. I also learned about domestic violence. I am 16 and I have an 18-year-old boyfriend and I know now about signs where he might be abusive or controlling."



May 8, Benton County staff attended the Benton County Health Fair. Barnett (shown below) and Felicia Penilton took several foster children to the fair to help educate them about health issues. This event further raised awareness and gave divisions a chance to distribute materials on MDHS programs.



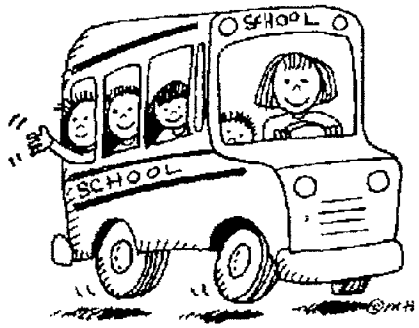
SSBG Funds Touch Leflore County through Abstinence Education

Communities in Schools of Greenwood Leflore, Inc., conducted abstinence education classes in March at Leflore County High School, Leflore County Elementary School and Shaw Middle and High Schools with presentations by Lillie Stanley and Jauretta Silas.

Session topics included: Why I am Choosing to Abstain; Abstinence: Hanging on to your Hormones; Let's Spring into Good Health and Stepping into Abstinence. Presentations were made at the various schools throughout the month with additional information distributed at the Leflore County School District Health Fair, Greenwood Leflore Hospital, Delta State School of Nursing and Leflore County School District's Nutrition Program.

On March 28, students at Shaw Middle and High School enjoyed guest speaker Bernadette Stanis, the actress who played Thelma on the television program "Good Times."

The Division of Social Services Block Grant funds programs throughout Mississippi that are positively changing lives.



Judy Stewart Retires with 40 Years of Service

Region I Program Specialist Judy Stewart (center) retired from MDHS on February 28, 2009. DEA Director Cheryl Sparkman (right) and Region I Director Kathy White presented Judy with a certificate for her 40 years of dedicated service to the agency. Judy says now that she is retired she plans to spend more time with her family and friends. Congratulations and thank you for your years of service to the people of Pontotoc County.

Senior Games held on Gulf Coast

The Southern Mississippi Area Agency on Aging (SMAAA) held the 2009 Mississippi Gulf Coast Senior Games April 22-25 in Gulfport. The events were open to anyone 50 years of age and older in Hancock, Harrison and Jackson Counties. Seniors enjoyed a variety of activities including swimming, tennis, track and field, visual arts, karaoke, dance competition and golf. The games allowed seniors to meet new friends and enjoy the Mississippi Gulf Coast. The Division of Aging and Adult Services would like to recognize the SMAAA Volunteers in Service to America (VISTA) members and community partners who made this fun event possible.

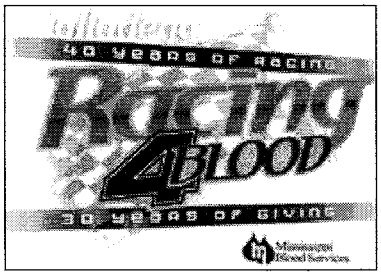
VISTA members Irma Marin and Glenda Carter.

VISTAs Help with a Day at the Farm Picnic

DAAS would like to highlight the SMAAA VISTA members who partnered with the Harrison County Board of Supervisors and the Harrison County Human Resource Agency (HRA) to recognize Older Americans Month. On May 12, the HRA provided a "Day At The Farm" picnic for over 320 seniors at the Lyman Senior Center in Gulfport. VISTA members used this time as an opportunity to emphasize AmeriCorps Week, shine a spotlight on the work accomplished by its members and motivate more Americans to serve in their communities.

VISTA members Marin, Donna Young and Carter.

MDHS is Racing 4 Blood



MDHS employees are a generous bunch of folks. For the latest blood drive, there were 26 employees who rolled up their sleeves to try and donate blood at the Mississippi Blood Services Spring Drive. Of the 26 staff members, 19 successfully donated. Thanks so much for caring for the needs of others!

REMEMBER to send in your ARTICLES and PICTURES for the BEACON.

The Office for Children and Youth is all about Mississippi's Kids

N O A H W Q S Q T N Y R S D L	CERTIFICATE
L Z D O E C B C G P Y C T S Z	CHILDCARE
I A H J L M E T G O E T N O X	CHILDREN
S X I C B J K N U R T R A S X	CREDENTIAL
I E Q T O Q I T T G I A R Q N	EDUCATION
M N C R N D H I J I Q I G X E	FUNDING
I Z P R N E F E L D C N E R R	GRANTS
E C R U U I D X M F W I R Z D	PLAYGROUND
Q M F D C O N E J B G N A D L	PROJECT
U I K A U U S V R L M G C X I	PROVIDERS
A Q T B A H P E B C C J D K H	QUALITY
L E K O D N U O R G Y A L P C	RESOURCES
I L I E D U C A T I O N I W O	SWIMMY
T P R O V I D E R S Z O H Z B	TRAINING
Y V S W I M M Y X D G H C L L	YOUTH

Training Schedule for Staff Development Workshops

DATE	CLASS	LOCATION
May 28	Nonviolent Crisis Intervention	Harrison County
May 29	Nonviolent Crisis Intervention	Harrison County
June 2	Orientation to MDHS	Oakley
June 5	Orientation to MDHS	Winston County
June 10	Nonviolent Crisis Intervention	Forrest County
June 11	Nonviolent Crisis Intervention	Forrest County
June 16	Orientation to MDHS	Jasper County
June 22	Noviolent Crisis Intervention	Lee County
June 23	Nonviolent Crisis Intervention	Lee County
June 26	Orientation to MDHS	Tate County
June 29	Nonviolent Crisis Intervention	Lee County
June 30	Nonviolent Crisis Intervention	Lee County
June 30	Orientation to MDHS	Lee County

To register or request additional information, email Joe.Broger@mdhs.ms.gov or call 601-359-4394 or 601-359-4449.

01
State of Mississippi
Department of Human Services
750 North State Street
Jackson, MS 39202