

SUPREME COURT OF KENTUCKY
CASE NO. 2024-SC-0022



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BRIEF OF APPELLEES KENTUCKY BOARD OF EDUCATION,¹ SUPREME COURT
KENTUCKY BOARD OF EDUCATION CHAIR SHARON
v. **PORTER ROBINSON, AND COMMISSIONER OF EDUCATION**
ROBBIE FLETCHER¹

COUNCIL FOR BETTER EDUCATION, INC., et al.

APPELLEES

ON APPEAL FROM

Kentucky Court Of Appeals
Case No. 2024-CA-0051

Franklin Circuit Court
Case No. 23-CI-00020, Division One (1)
Judge Phillip J. Shepherd

CERTIFICATE OF SERVICE

The undersigned certifies that on October 2, 2024, this Brief of Appellees was electronically filed using the e-filing system which will transmit notice of filing to counsel of record, and was served via email upon the following: Matthew F. Kuhn, John H. Heyburn, Sara N. Christensen, Office of Attorney General; Paul E. Salamanca; Byron Leet, Mitzi Wyrick, Sean Williamson, Wyatt Tarrant & Combs, LLP. I further certify that this Brief was served via U.S. Mail, postage prepaid, upon the following: Kentucky Court of Appeals Clerk, 669 Chamberlin Ave, Suite B, Frankfort, KY 40602, and Judge Phillip J. Shepherd, Franklin County Judicial Center, 222 St. Claire Street, Frankfort, KY 40601.

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¹ Pursuant to RAP 8(E), Commissioner Fletcher was automatically substituted for Interim Commissioner of Education, Robin Fields Kinney, when he assumed the role on July 1, 2024.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees, Kentucky Board of Education (“KBE”), KBE Chair Sharon Porter Robinson (“Robinson”), and Commissioner of Education Robbie Fletcher (“Fletcher”) submit that oral argument is warranted in this case concerning the constitutionality of statutes and the impact on Kentucky’s system of common schools.

INTRODUCTION

“The [KBE] shall have the management and control of the common schools and all programs operated in these schools[.]” KRS 156.070(1). The KBE manages the common schools through promulgation of administrative regulations which provide for a uniform system of elementary and secondary schools throughout the Commonwealth. KRS 156.070(4) and 156.160. Yet, House Bill 9 from the 2022 ordinary session of the Kentucky General Assembly establishes that charter schools “shall be exempt from all statutes and administrative regulations applicable to the state board, a local school district, or a school[.]” KRS 160.1592(1). That is, charter schools, unlike common schools, are not subject to the management and control of the KBE. The Attorney General argues that common schools are whatever the General Assembly says they are. However, such a reading is inconsistent with this Court’s precedent in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989). Furthermore, the Attorney General’s reading essentially renders §184 of the Kentucky Constitution meaningless. If the General Assembly can create and fund any type of school it chooses, and merely call it a common school as the Attorney General contends, submission to the voters under §184 would never be necessary. As detailed more fully herein, charter schools simply do not meet the definition of common schools in Kentucky. As such, the Circuit Court should be affirmed.

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COUNTERSTATEMENT OF THE CASE

The Attorney General paints a rosy picture of charter schools, suggesting they are the solution to all educational woes. And while it is true that some charter schools perform well on state standardized tests, others perform quite poorly. The Center for Research on Education Outcomes (CREDO) studied charter school performance for over a decade with mixed reviews. *Charter Studies*, Center for Research on Education Outcomes, <https://credo.stanford.edu/research-reports/charter-studies/>. What's more, some high performing charter schools have been found to employ student removal practices to either suspend or encourage the withdrawal of the most challenging students. Examples include a "Got to Go" list drafted by charter school administrators and teachers listing specific students the charter school wished to root out. Kate Taylor, *At a Success Academy Charter School, Singling Out Pupils Who Have 'Got to Go,'* New York Times, Oct. 29, 2015. "Some on the list required special education settings that [the charter school] could not offer[.]" *Id.* Employees of high performing charter schools confirmed practices of "suspending students or calling parents into frequent meetings as ways to force parents to fall in line or prompt them to withdraw their children." *Id.* Removal from charter schools can be for something as trivial as not wearing the approved color of socks. ROBERT PONDISCIO, *HOW THE OTHER HALF LEARNS*, 265, Penguin Random House LLC 2019. "The extraordinary demands the [charter] schools place not just on students but also on their parents to be active participants in educating their children reaches a level that can be uncomfortable; for some it borders on harassment." *Id.* at 15.

Nevertheless, the parties agree that the question before the Court is *not* whether charter schools are good or bad for Kentucky. Instead, the question is whether House Bill

9 passes constitutional muster. Appellees KBE, Robinson, and Fletcher agree with the procedural history as described by the Attorney General's Statement of The Case. KBE, Robinson, and Fletcher, disagree, however, with the notion that charter schools, as provided in House Bill 9, are "common schools." Therefore, the Court must answer two questions: (1) what is a common school; and (2) do the charter schools provided in House Bill 9 fall within that definition? If the answer to the latter question is "no," the Circuit Court should be affirmed.

ARGUMENT

This Court announced in *Rose v. Council for Better Education* that "the sole responsibility for providing the system of common schools" belongs to the General Assembly. 790 S.W.2d 186, 211 (Ky. 1989). "It is a duty—it is a constitutional mandate placed by the people on the 138 members of that body who represent those selfsame people." *Id.* The system of common schools must be "adequately funded to achieve its goals" and provide "*every child* [] in this Commonwealth...with an equal opportunity to have an adequate education." *Id.* Beyond establishing the system of common schools, the General Assembly must "monitor it on a continuing basis so that it will always be maintained in a constitutional manner" and "carefully supervise it, so that there is no waste, no duplication, no mismanagement, at any level." *Id.* But, what is a common school? Our courts' grappling with this question over the past 100 years makes one thing clear: House Bill 9 charter schools are *not* common schools.

I. What is and is not a common school is for this Court to decide.

"The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." Ky. Const. § 183. The Attorney General

suggests that this means whatever the General Assembly says is a common school, must therefore be a common school. Appellant argues that a common school is simply an “elementary school or secondary school of the state supported in whole or in part by public taxation.” Brief of the Commonwealth at 9, quoting *Commonwealth ex. Rel. Cameron v. Johnson*, 658 S.W.3d 25, 36 (Ky. 2022). “Common sense [however,] must not be a stranger in the house of the law.” *Webb v. Sharp*, 223 S.W.3d 113, 118 (Ky. 2007), quoting *Cantrell v. Kentucky Unemployment Ins. Comm’n*, 450 S.W.2d 235, 236-37 (Ky. 1970). Sect. 184 of the Kentucky Constitution provides that “no sum shall be raised or collected for education other than in the common schools until the question of taxation is submitted to the legal voters[.]”

Following the Attorney General’s logic, the General Assembly need only call an elementary or secondary school “public” (even if operated by a private entity) and provide to it some amount of funding for it to be a common school. Likewise, the Attorney General argues that the school need not follow any of the statutes or regulations (i.e. the common rules) applicable to other public elementary and secondary schools to be a common school. See KRS 160.1592. This logic, of course, renders §184 of the Constitution meaningless. The constitutional provision designed to limit the authority of the General Assembly - reserving the power for the people to determine whether new classes of schools should receive public funding - is easily manipulated by the General Assembly to never require a vote of the people. Under the Attorney General’s logic, the General Assembly could simply pass a law providing funding to private schools, call them common schools, and avoid submitting the question to Kentucky’s voters pursuant to §184. Such an argument must fail. With House Bill 9, “the legislature has attempted to make into a common school

something which, by the very meaning of the term, cannot possibly be a common school.” *Hodgkin v. Board for Louisville & Jefferson County*, 242 S.W.2d 1008, 1009-10 (Ky. 1951). It is for this Court to determine what is a system of common schools and whether the charter schools called for in House Bill 9 fall within that system.

II. Charter schools are not available to all Kentucky children.

In *Rose v. Council for Better Education*, this Court held that “[t]he essential, and minimal, characteristics of an ‘efficient’ system of common schools, may be summarized as follows: [...] Common schools shall be available to all Kentucky children.” *Id.* at 212-13. But charter schools need not be available to all Kentucky children. “If capacity is insufficient to enroll all students who wish to attend any specific grade level or program at a public charter school, the school shall select students through a randomized and transparent lottery.” KRS 160.1591. In fact, charter schools are not required to operate throughout the state. “An application to establish a public charter school may be submitted to a public charter school authorizer[,] including the targeted student population and the community the school hopes to serve[.]” KRS 160.1593. That is, charter schools only operate where they wish and at the capacity they determine. The General Assembly did not strategically design charter schools to be available to and serve all Kentucky children.

Contrast our existing public school districts which must operate to provide elementary and secondary education to children in every square inch of the Commonwealth. "Each county in this state constitutes a county school district, except that, in counties in which there are independent school districts, the county school district consists of the remainder of the county outside the boundaries of the independent school districts." KRS 160.010. "[E]ach school district shall provide an approved preschool

program through grade twelve (12) school service” for every child residing in the district under the age of 21. KRS 158.100.

The Attorney General suggests that the Circuit Court’s focus on charter school admission lotteries was trivial. But, charter school admission lotteries make clear that charter schools are not available to all Kentucky children. When all the seats are full, charter schools, unlike our traditional public school districts, are under no obligation to build additional classrooms and hire more teachers to serve students. The Attorney General attempts to liken this to magnet schools or particularly sought after schools within a common school district. Such a comparison, however, ignores two key facts: (1) even if there isn’t room at a student’s preferred school within the district, a common school must be made available to the child by her resident school district; and (2) all schools within the district, preferred or not, must comply with statutes and regulations applicable to all common schools in Kentucky.² Kentucky’s traditional public school districts have an obligation to erect schools and hire teachers to serve every student residing in the district. When 200 new students move into Warren County, the Warren County school district cannot put the students into a lottery to determine who gets one of the remaining 10 seats. Instead, the Warren County school district must provide facilities (whether it is in existing

² Appellant argues that Kentucky School for the Blind (KSB) and Kentucky School for the Deaf (KSD) do not accept all students. KSB and KSD are not common schools and do not share in the common school fund, also known as the Support Educational Excellence in Kentucky (“SEEK”) fund. Both KSB and KSD were in existence and funded by the General Assembly at the adoption of the present constitution, allowing their continued funding. See *Agricultural & Mech. Coll. v. Hager*, 87 S.W. 1125, 1127 (Ky. 1905). Furthermore, Appellant argues that Gatton Academy at Western Kentucky University and Craft Academy at Morehead State University are not open to all Kentucky children. However, Gatton and Craft are postsecondary programs, not elementary or secondary schools. See *Bradley v. Jefferson County Public Schools*, 88 F.4th 1190 (6th Cir. 2023) and *Holland v. Kenton County Public Schools*, 88 F.4th 1183 (6th Cir. 2023).

schools or in a new school) and hire qualified teachers to serve all 200 students, all while complying with the statutes and regulations applicable to common schools throughout the state.

Our constitutional delegates made clear that equality of opportunity for every child in Kentucky was part and parcel of the common school system. “The boys of the humble mountain home stand equally high with those from the mansion of the city. There are no distinctions in the common schools, but all stand upon one level.” *Rose v. Council for Better Education*, 790 S.W.2d 186, 206 (Ky. 1989), quoting *III Debates Constitutional Convention* 1890 at 4531. If charter schools will in fact “[i]mprove student learning outcomes by creating additional high-performing schools with high standards for student performance” as the General Assembly indicates, those opportunities are not open to all Kentucky children. KRS 160.1591. Children of the most rural areas of Kentucky have no guarantee that charter schools will operate within reasonable proximity to their homes, or that they will be guaranteed a seat if a charter school opens within their communities. “Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.” *Rose v. Council for Better Education* at 212. Here, charter schools simply do not pass the test.

III. Charter schools are not substantially uniform throughout the state.

Appellant admits that the common schools must be “substantially uniform.” Brief of the Commonwealth at 28. To be sure, this Court held that “[c]ommon schools shall be substantially uniform throughout the state.” *Rose v. Council for Better Education* at 212. Appellant goes so far as to argue that “charter schools operate just like other public

schools.” *Brief of the Commonwealth* at 11. A cursory review, however, proves this is not the case.

“The chief state school officer shall prepare for electronic publication biennially, the complete school laws of the state, including abstracts of decisions of the Court of Justice, and opinions and interpretations of the Attorney General and the chief state school officer.” KRS 156.240. This publication consists of over 1,800 pages of statutes, with annotations, applicable to our common schools. 2023 Kentucky School Laws, Annotated, https://www.education.ky.gov/districts/legal/Documents/KY%20School%2023E%20PDF_508.pdf. What’s more, the KBE promulgated over 150 administrative regulations at titles 701-707 “for the efficient management, control, and operation of the [common schools] under its jurisdiction.” KRS 156.070(4). “[T]he Kentucky Board of Education shall promulgate administrative regulations establishing the standards which school districts shall meet in student programs, services and operational performance.” KRS 156.160(1). These statutes and regulations serve as the common set of rules that all common schools must follow to ensure uniformity throughout the state.

Charter schools, however, are exempt from these statutes and regulations, save for requirements for “health, safety, civil rights, and disability rights” unless otherwise noted in House Bill 9.³ The legislation itself acknowledges that charter schools, in fact, do not operate “just like other public schools.” The purpose of charter schools is to allow different models of “teaching, governing, scheduling, or other aspects of schooling” and to “[a]llow

³ The Attorney General provides only eight bullet points on pg. 39 of the Commonwealth's brief listing provisions applicable to common schools with which charter schools must comply.

schools freedom and flexibility[.]” KRS 160.1591. Simply put, the entire point of charter schools is for them to operate differently than our common schools.

Charter schools “[o]perate under the oversight of its authorizer in accordance with its charter contract and application,” not the statutes and regulations applicable to common schools throughout the state. KRS 160.1592. The charter contract is a “fixed term, renewable contract between a charter school and an authorizer that identifies the roles, powers, responsibilities, and performance expectations for each party[.]” KRS 160.1590. No two charter schools will be the same – in fact they will vary wildly - as they each are governed by individual contracts with the authorizer, not a common set of statutes and regulations applicable to common schools throughout the state. House Bill 9 recognizes on its face that even performance expectations will be different from one charter school to the next. Charter schools fail the substantial uniformity test set forth in *Rose v. Council for Better Education*.

IV. Charter schools are not monitored by the General Assembly to assure they are operated without waste, duplication, mismanagement or political influence.

“Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.” *Rose v. Council for Better Education* at 213. One way the General Assembly monitors common schools is through its Office of Education Accountability (OEA). OEA shall “[m]onitor the elementary and secondary public education system, including actions taken and reports issued by the [KBE], the commissioner of education, the Department of Education, and local school districts.” KRS 7.410. OEA shall “[i]nvestigate allegations of wrongdoing of any person or agency, including but not limited to waste, duplication,

mismanagement, political influence, and illegal activity at the state, regional, or school district level[.]” *Id.* But charter schools are seemingly immune from OEA’s oversight. Charter schools “shall be exempt from all statutes and administrative regulations applicable to the state board, a local school district, or a school[.]” KRS 160.1592(1). Even the General Assembly, with “sole responsibility” for the “establishment, maintenance[,] funding” and monitoring of common schools, has exempted charter schools from its monitoring functions. *Rose v. Council for Better Education* at 212-13.

Other monitoring activities applicable to our common schools come in the form of statutory compliance and submission of information to the Kentucky Department of Education. One example is surety bonds for those individuals entrusted with access to common school funds:

The treasurer shall execute an official bond for the faithful performance of the duties of his office, to be approved by the local board and the commissioner of education. The bond shall be guaranteed by a surety company authorized to do business in this state, and shall be in an amount determined by the board of education in accordance with the administrative regulations promulgated by the Kentucky Board of Education. The premium on the bond shall be paid by the board of education. A copy of the bond shall be filed with the board of education and with the commissioner of education.

KRS 160.560. Kentucky Board of Education regulations impose this same obligation on “the finance officer, and others holding similar positions who are responsible for district funds or who receive and expend funds on behalf of the school district.” 702 KAR 3:080. House Bill 9 makes no mention of a similar surety bond for charter school officials with access to those common school funds that must be transferred from local school districts to the charter school. See KRS 160.1596. And of course, charter schools are “exempt from

all statutes and administrative regulations applicable to the state board, a local school district, or a school[.]” KRS 160.1592.

Another example is required collateral of banks where common school funds are deposited:

The depository selected shall, before entering upon its duties, provide collateral in accordance with KRS 41.240, to be approved by the local board of education in accordance with Kentucky Board of Education administrative regulations, and to be approved by the commissioner of education.

KRS 160.570. Yet again, House Bill 9 makes no mention of similar requirements for banks where charter schools will deposit common school funds they receive from school districts.

Charter schools are monitored by their authorizers, not the General Assembly. “A public charter school shall [...] operate under the oversight of its authorizer in accordance with its charter contract and application.” KRS 160.1592(3). And, the authorizer need not be a common school official who has taken any oath or have any obligation to the common school system. KRS 160.1590(15). Once again, charter schools created by House Bill 9 fail the common school test set forth in *Rose v. Council for Better Education*.

CONCLUSION

There can be no mistake that the framers of our present constitution went to great pains to create and protect a common school system which is meant to provide equality for all Kentucky children. “Do not let us make a mistake in dealing with the most vital question that can come before us.” *Rose v. Council for Better Education*, 790 S.W.2d 186, 205 (Ky. 1989), quoting *III Debates Constitutional Convention 1890*, 4459. Constitutional Delegate Beckner reported to the General Assembly that the common school system created by Sect. 183 “is a system of practical equality in which the children of the rich and poor meet upon

a perfect level and the only superiority is that of the mind.” *Id.* Beckner explained that the common schools “should be universal and should embrace all children” and that they should “be supervised by the State.” *Id.* The charter schools provided in House Bill 9, however, do not live up to the expectations of Beckner and fellow constitutional delegates. What’s more, they do not live up to the clear mandates for common schools established by this Court in *Rose v. Council for Better Education*. Charter schools, as provided in House Bill 9, simply are not common schools. As such, the Circuit Court should be affirmed.

A

Respectfully submitted,



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WORD-COUNT CERTIFICATE

This brief complies with the limit of 17,500 words pursuant to RAP 31(G)(3)(a) because, excluding the parts of the document exempted by RAP 15(E), this document contains 3,115 words.



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