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CASE NO. 2024-SC-0024



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GUS LAFONTAINE, *et al.*

APPELLANT
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**BRIEF OF APPELLEES KENTUCKY BOARD OF EDUCATION, CLERK
KENTUCKY BOARD OF EDUCATION CHAIR SHARON SUPREME COURT
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-0064

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

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CERTIFICATE OF SERVICE

Pursuant to CR 5 and eFiling Rules, the undersigned certifies that on October 1, 2024, this notice was electronically filed and served on Katie Bing, Clerk, Kentucky Supreme Court through the CourtNet 2.0 system; and one (1) copy was served via regular U.S. mail and electronic mail on: Byron E. Leet, Mitzi D. Wyrick, Sean G. Williamson, Wyatt, Tarrant & Combs, LLP, 400 West Market Street, Suite 2000, Louisville, Kentucky 40202; Matthew F. Kuhn, John H. Heyburn, Sarah N. Christensen, Office of the Attorney General, 700 Capitol Avenue, Suite 118; Frankfort, KY 40601; Paul E. Salamanca, 279 Cassidy Avenue, Lexington, Kentucky 40502; Clerk, the 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.

/s/ Donald J. Haas

Donald J. Haas

Todd G. Allen

Kentucky Department of Education

300 Sower Blvd., 5th Floor

Frankfort, Kentucky 40601

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.

Filed

502-892-6364 ext. 4815

donald.haas@education.ky.gov

***Counsel for Appellees, Kentucky Board of
Education, Commissioner of Education,
and the Chair of the Kentucky Board of
Education***

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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. LaFontaine incorrectly applies this Court’s decision in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989) to conclude that House Bill 9 charter schools are common schools. A close look, however, reveals that 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

LaFontaine 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, 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.

To be clear, Appellees do not question LaFontaine's motives or desire to provide educational services to students. In fact, LaFontaine serves students today through his

private school in Madison County.² But, as LaFontaine admits, charter schools “do not always succeed.” Brief of Appellant at 6. Nevertheless, 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 LaFontaine’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

² See <https://www.lafontaineprep.org/>

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. LaFontaine suggests that the General Assembly has the discretion to determine what is and is not a common school. Appellant argues that "the Legislature must necessarily have the discretion of choosing its own agencies, and conferring upon them the powers deemed by it necessary to accomplish the ends aimed at." Brief of Appellant at 12, quoting *Prowse v. Board of Education for Christian County*, 790 S.W.2d at 209. In short, LaFontaine suggests that if the General Assembly aims to provide elementary and secondary education, we should defer to their means of doing so and deem such legislative action within the system of common schools. "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). Following LaFontaine's logic, the General Assembly need only call an elementary or secondary school "public" (even if operated by a private entity) for it to be a common school. Likewise, LaFontaine 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.

That logic, of course, renders §184 of the Constitution meaningless. Providing 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[,]" section 184 is designed to limit

the authority of the General Assembly and reserve the power for the people to determine whether new classes of schools should receive public funding. Ky. Const. § 184. By LaFontaine's reasoning, though, the General Assembly could simply pass a law providing funding to private schools, call them common schools, and avoid ever 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.

These 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. LaFontaine 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 is no 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.³ 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

³ 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 *Politt v. Lewis*, 269 Ky. 680 (1937).

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 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. LaFontaine admits as much, noting that of the states operating charter schools, most charter schools are concentrated in large cities. Brief of Appellant at 1. “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 Appellant at 14. 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. LaFontaine argues that because charter schools must teach state academic standards and take state tests, they are uniform. Brief of Appellant at 14-15. A cursory review, however, proves charter schools are not uniform throughout the state.

“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 9.⁴ The legislation itself acknowledges that charter schools, in fact, do not operate 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 schools freedom and flexibility[.]” KRS 160.1591. Even LaFontaine admits that charter schools “operate 100% by boldness and experimentation.” Brief of Appellant at 6. Simply put, the entire point of charter schools is for them to operate differently than our common schools.

A charter school “[o]perate[s] 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 each is governed by individual contracts with the authorizer rather than 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. KRS 160.1591(2). Charter schools fail the substantial uniformity test set forth in *Rose v. Council for Better Education*.

⁴ In addition to state testing and teaching state academic standards, LaFontaine lists four provisions applicable to common schools that are also applicable to charter schools: (1) open-meetings and open-records requirements; (2) oaths of office for charter board members; (3) removal of charter board members pursuant to KRS 62.010; and (4) participation in state retirement. Brief of Appellant at 5 and 18.

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 that provided 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.

Respectfully submitted,

/s/ Donald J. Haas

Donald J. Haas

Todd G. Allen

Kentucky Department of Education

300 Sower Blvd., 5th Floor

Frankfort, Kentucky 40601

502-892-6364 ext. 4815

donald.haas@education.ky.gov

***Counsel for Appellees Kentucky Board of
Education, Commissioner of Education, and***

the Chair of the Kentucky Board of
Education

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 3,365 words.

/s/ Donald J. Haas

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Filed

502-892-6364 ext. 4815

donald.haas@education.ky.gov

***Counsel for Appellees, Kentucky Board of
Education, Commissioner of Education,
and the Chair of the Kentucky Board of
Education***

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