


COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2021-SC-000518
(Consolidated with Nos. 2021-SC-519, -520, -522)

COMMONWEALTH OF KENTUCKY
ex. rel ATTORNEY GENERAL DANIEL CAMERON APPELLANT

v. APPEAL FROM COURT OF APPEALS NO. 2021-CA-1320;
FRANKLIN CIRCUIT COURT NO. 21-CI-461

HOLLY M. JOHNSON, in her official capacity as
Secretary of the Kentucky Finance and Administration
Cabinet, *et al.* APPELLEES

**AMICUS CURIAE BRIEF ON BEHALF OF THE BOARD OF EDUCATION
OF FAYETTE COUNTY PUBLIC SCHOOLS**


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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail, first class postage prepaid, on the 15th day of June, 2022: Rebecca Combs Lyon, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Phillip Shepherd, Judge, Franklin County Courthouse, 222 St. Claire St., Frankfort, KY 40601; Matthew F. Kuhn, Brett Nolan, Alexander Y. Magera, Office of the Attorney General, 700 Capital Avenue, Ste. 118, Frankfort, KY 40601; Brian C. Thomas and Wm. Robert Long, Jr., Finance & Administration Cabinet, 702 Capital Avenue, Room 392, Frankfort, KY 40601; Bethany Atkins Rice and Jennifer A. Stosberg, Office of Legal Services for Revenue, Finance & Administration Cabinet, P.O. Box 423, Frankfort, KY 40602; Michael A. Owsley, Regina Jackson, and Lindsay Porter, English, Lucas, Priest & Owsley, LLP, 1101 College Street, P.O. Box 770, Bowling Green, KY 42102; Timothy Crawford, Crawford Law, Office, 317 North Main Street, P.O. Box 1206, Corbin, KY 40701; Matthew D. Doane, Doane & Elliot, P.S.C., 120 East Adams, Street, Ste. 2, LaGrange, KY 40031; Joshua A. House and Benjamin A. Field, Institute for Justice, 901 N. Glebe Rd., Ste. 900, Arlington, VA 22203; Michael Bindas, Institute for Justice, 600 University Street, Ste. 1730, Seattle, WA 98101; Byron E. Leet, Virginia Hamilton Snell, Mitzi D. Wyrick, and Sean G. Williamson, Wyatt, Tarrant & Combs, LLP, 400 West Market Street, Ste. 2000, Louisville, KY 40202; Jeffrey S. Walther and John K. Wood, Walther, Gay & Mack, PLC, 163 East Main Street, Ste. 200, Lexington, KY 40507; Kristen L. Hollar and Alice O'Brien, National Education Association, 1201 16th Street NW, Washington, DC 20036. The undersigned does also certify that the record on appeal has not been withdrawn from the Clerk's Office.



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INTRODUCTION

Amicus Curiae is the Board of Education for Fayette County Public Schools (“FCPS”), which is the public school district that serves Fayette County, Kentucky. The district is the second largest in the Commonwealth and serves over 40,000 students. Fayette County Public Schools, Fast Facts, fcps.net, <https://www.fcps.net/Page/4946>. A significant portion of FCPS students are economically disadvantaged, with 49.5% of qualifying for free or reduced meals. *Id.* Appellants contend HB 563 will benefit these particular FCPS students by “rout[ing] private donations to the Kentucky students who need them the most.” Commonwealth’s Brief at 3. While it is true that HB 563’s “Education Opportunity Accounts” (“EOAs”) may theoretically create opportunities for FCPS’s economically disadvantaged students to receive financial assistance with private school tuition and certain educational expenses, from a practical perspective EOAs for private school tuition will be inaccessible for FCPS’s most vulnerable students.

Two key impediments make reliance on an EOA unrealistic for FCPS’s economically disadvantaged students. First, thousands of these students use services that private schools are not required to offer such as special education, English Language Learner Services, and many more. Second, the economic reality of HB’s 563 private school funding mechanism is that private school attendance requires disposable income beyond what can be provided through an EOA.

To be sure, HB 563 funnels money that should be dedicated to a public purpose to private uses. If this Court upholds HB 563’s method of funding private education HB 563 and future legislation like it, will irreparably impede the very rights public education exists to ensure.

I. The Right to Public Education in Kentucky

The purpose of public education in Kentucky is to ensure all of Kentucky's children are provided with an equal opportunity to succeed, both in academics and the real world. The framers of the Kentucky Constitution recognized the importance of public education and enshrined the fundamental right to that education in Section 183 of the Kentucky Constitution, which requires the General Assembly to "provide for an efficient system of common schools throughout the State." Ky. Const. § 183. The purpose of Section 183 is to ensure all of Kentucky's children are guaranteed an effective public education. To be sure, the delegates at Kentucky's constitutional convention made clear that public education should embrace *all* children and should be equally accessible to rich and poor alike. *Official Report of the Proceedings and Debates in the Convention*, Vol. III, 4462–63, 4531 (1890). As delegate Moore articulated:

Common schools make patriots, and men who are willing to stand upon a common level. The boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, but all stand upon one level.

Id. at 4531.

This Court recognized the fundamental right to public education in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 206 (Ky. 1989). Later, this Court reinforced *Rose*, holding the right to public education includes the right to "equal opportunity to achieve academic success." *D.F. v. Codell*, 127 S.W.3d 571, 576 (Ky. 2003). Thus, Section 183's guarantee is that *all* of Kentucky's children should have equal access to—and an equal opportunity to succeed in—public education.

To ensure public money will be dedicated to the Kentucky Constitution's guarantee of a public education, Section 184 of the Kentucky Constitution "provides that public money can be expended for education other than in common schools" but only if "a majority of the legal voters approve the expenditure by public referendum." *Fannin v. Williams*, 655 S.W.2d 480, 484 (Ky. 1983). In other words, "the Constitution establishes a public school system and limits spending money for education to spending it in public schools." *Id.* Thus, absent public referendum, tax law schemes like HB 563 are constitutionally required to ensure the money raised is spent on public, rather than private, education.

II. Fayette County Public Schools

This case is of substantial interest to FCPS because it serves a county with a population of greater than 90,000 residents, which makes it one of the few districts targeted by the unconstitutional private-school tuition provisions of HB 563, which reach only eight of Kentucky's 120 counties. A cornerstone of FCPS's programs is to provide a rich, culturally diverse educational environment. FCPS's student body is 45.9 percent White, 23.4 percent Black, 19.1 percent Hispanic, and 4.9 percent Asian. FCPS has over 6,000 students classified as English learners, who together speak over 90 native languages. Fast Facts, *supra*, <https://www.fcps.net/Page/4946>.

FCPS supports its students through a variety of services that private schools receiving funding through HB 563 are not required to offer, such as special education, mental health services, free and reduced-cost meals, interpreter services, and English Language Learner services, among many others. Many of FCPS's students regularly use these services. For example, as of February 2022, approximately 49.5% of FCPS students

qualify for free or reduced meals. *Id.* During the 2021–2022 school year, 6,175 students received English Language Learner services and 4,925 received special education services from FCPS.

The diversity and support for the community’s most vulnerable is at the heart of FCPS’s core values, which include the belief that it takes an entire community to ensure the success of our public schools. Fayette County Public Schools, *Core Values, Vision & Mission*, fcps.net, (Feb. 13, 2017) <https://www.fcps.net/mission>. Yet HB 563 threatens to pull resources away from FCPS and divert them into private, unregulated pockets, stripping them away from public education, potentially diluting the diversity that benefits FCPS students, and leaving behind students who may need those resources the most.

III. HB 563 creates a negative impact on public education and the targeted school districts.

Regardless of intent, the private school tuition provisions of HB 563 create an unconstitutional end-run around the requirement to provide for public education, which will have a lasting, detrimental impact on some of the largest school districts in the Commonwealth. Funding enrollment in private schools stands to pull funding away from crucial services that low-income students desperately need, such as occupational, behavioral, physical, speech-language, and audiology therapies.

To be clear, not all of HB 563 is harmful. HB 563 attempts to establish a mechanism to provide Kentucky children with funding for a variety of educational expenses, including educational services and therapies, computer hardware, tutoring, tuition for dual credit courses, summer education programs, and fees for nationally standardized testing and examination, among others. Providing this type of funding is a

laudable goal, but from a practical standpoint, HB 563 falls short of its goals and exacerbates inequities.

In particular, HB 563's selective mechanism for funding private school tuition is both unconstitutional and harmful to the districts it targets as well as the least advantaged students in those districts who could most benefit from HB 563's other provisions. Altogether, HB 563 stands to create two systems of education: one for those who already have resources to spare and a second for those who do not. This result is untenable and the practical impact of HB 563 runs counter to the fundamental right to public education guaranteed by the Kentucky Constitution.

A. HB 563 does not benefit the most disadvantaged students like Appellants contend.

HB 563's private school funding mechanism is problematic because it will not help the students who need it the most. Appellant Parents and the Commonwealth contend HB 563's private-school tuition funding scheme for eight counties will benefit the lowest income students because (1) only families with income below the income threshold (approximately \$85,000 per year for a family of four) are eligible to use the EOA funds, (2) the student must have a demonstrated financial need for private school tuition, and (3) AGOs are supposed to prioritize the lowest income families. These arguments are misplaced for two reasons. First, even if HB 563 fully funds the cost of tuition and fees for private school attendance, disposable income would still be required to cover the true cost of private school attendance, including transportation and the cost of obtaining services FCPS offers students for free. Because the entire cost of obtaining services and the true cost of private school attendance are not covered, HB 563 will have

a disparate impact on the disadvantaged, such as students with the lowest incomes and those who rely on services FCPS provides like special education, health care clinics, or mental health services. Second, a substantial portion of the students who would purportedly benefit from the private school funding mechanism who need to use services that private schools are not required to offer, such as English Language Learner services or special education services.

Because EOAs do not cover the true cost of private school attendance, only families with some measure of disposable income will be able to use the private school funding option.¹ On the other hand, families with the lowest incomes—those who truly live paycheck to paycheck—likely will not be able to. This is because HB 563’s language indicates an eligible student may only use EOA funds for *either* private school tuition *or* other eligible educational expenses. Specifically, the Act provides two limitations on funds in the EOA:

- (a) For eligible students that intend to use the funds in the EOA to pay tuition at a nonpublic school or tuition as described in subsection (2) of Section 2 of this Act, the EOA funds shall not exceed the lesser of:
 1. Their parents' demonstrated financial need as determined by an independent financial analysis performed by an organization that is:
 - a. Experienced in evaluating a student's need for financial aid; and
 - b. Included on the department's list of approved organizations as required by subsection (2)(a) of Section 12 of this Act; or
 2. The actual amount of tuition and required fees charged by the school to students who do not receive assistance under this program;

¹ A family of four need only have income under 175% of the federal reduced-price meal threshold (roughly \$85,000) to get into the program. However, once a family qualifies, they can continue to use AGO funding for private school up to 225% of the reduced-price meal threshold (approximately \$120,000 for a family of four).

(b) For **all other eligible students**, the EOA funds shall not exceed the lesser of:

1. The expected cost of educational services to be provided during the succeeding school year; or
2. The Commonwealth's guaranteed SEEK base amount for the immediately preceding school year reduced by the percentage equal to one-fourth ($\frac{1}{4}$) of the percentage by which the applicant's household income exceeds the applicable federal reduced lunch household income threshold[.]

KRS 141.504 (emphasis added); 2021 Ky. Laws Ch. 167 (HB 563) § 7 (emphasis added).

In other words, once a student chooses to use EOA funding for tuition, that EOA funding is capped at the cost of tuition and fees to attend the private school. Even if the EOA funding covers all of tuition and fees, it will not cover other costs of private school attendance such as required technology and equipment, textbooks, or online learning programs.

This disparate impact is compounded by the fact that a substantial portion of students who would purportedly benefit from HB 563's private school tuition funding use services private schools are not required to offer, such as special education services, English Language Learner services, access to mental health professionals, or access to health clinics, all of which public districts like FCPS already provide to their students. As a result, to take advantage of the private school funding option, those families would be required to obtain those services elsewhere, at their own cost. The need for these services (at the family's expense) means the neediest students will have no greater access private education than they did before HB 563, while those with disposable income will be the ones who benefit. As one scholar has observed:

Far from being the potential great leveler—the long awaited equity silver bullet their most enthusiastic and least thoughtful proponents contend—educational vouchers and tax credits, particularly if unregulated and pegged below the real cost of private school tuition, fees, and transportation costs, could dramatically increase educational segregation along lines of race and class, significantly reduce the educational efficiency of public sector schools, and perhaps reduce rather than increase overall achievement levels.

Jerry Paquette, *Public Funding for "Private" Education: The Equity Challenge of Enhanced Choice*, 111 American J. Educ., 568, 576 (Aug. 2005).

To illustrate, take a hypothetical FCPS student whose family income is below the federal threshold for reduced-price meals and who receives ELL services, uses a FCPS health clinic, and works with a FCPS mental health professional. Nothing in HB 563 requires private schools being paid tuition through EOA funds to offer similar services. So, if that student were to transfer to a private school, the student would no longer be able to use those services through FCPS. Because HB 563's funding mechanism forces a choice between using EOA funds for private school tuition and using it for other qualifying expenses, the student would also no longer be able to use EOA funds to cover the costs that would be qualifying expenses. As a result, the family would be forced to procure those services at the family's own expense. For families at this income level, the cost of obtaining these types of services out-of-pocket would likely be prohibitive in most cases. Thus, only families with the disposable income needed to cover those expenses on their own would be able to select the private school option.

Nor does HB 563's directive to prioritize the lowest income families cure the problem. An AGO is only required to prioritize the lowest income families among *that* AGO's applicants. Thus, if an AGO only offers EOA funding for private school tuition,

and the families utilizing that option are those who already have disposable income, then the AGO will only need to prioritize among families who already have disposable income.

B. HB 563 diverts resources away from public education and the students it serves.

The use of AGO funding for private school tuition diverts resources away from students who need it the most. Under HB 563, the annual “tax credits” (and therefore, outgoing funding) are limited to \$25 million per year (less up to 10% for the AGO’s operating expenses). KRS 141.512(1); KRS 141.522(2). In other words, funding under HB 563 is a zero-sum game. Diverting funding to private schools (particularly for just *some* counties) necessarily diverts funding from public school students who could use it to access critical resources that would otherwise be inaccessible.

This effect is compounded by the fact students who use EOA funds for private school tuition can receive far more funding through an EOA than students who need EOA funding for critical services beyond the obligations of private schools. As discussed above, students using EOA funds for private school tuition can receive funding up to the amount of private school tuition and fees. Tuition at prominent private schools in Fayette County range from \$7,825 to \$26,625.² On the other hand, the amount of AGO funding provided for uses other than private school tuition under HB 563 is limited to the lesser of SEEK base amount for the immediately preceding school year or the expected cost of educational services to be provided during the succeeding school year. So, for the 2022-2023 school year the *maximum* AGO funding for a child’s educational costs and services

² These ranges are based on tuition figures provided online by a number of Lexington private schools, including Christ the King; Lexington Catholic; Lexington Christian Academy; Sayre School; Mary Queen of the Holy Rosary School; and Trinity Christian Academy.

would be limited to \$4,100, while those using it for private school tuition can receive well over double that amount. Kentucky Department of Education, SEEK Calculations, 2021-2022 Final (Mar. 2, 2022) <https://education.ky.gov/districts/SEEK/Documents/FY2021-22%20SEEK%20Final%20Calculations.pdf>:

For these reasons, HB 563's private school tuition funding mechanism does not actually make private school accessible for the least advantaged students. Instead, it diverts funding away from the least advantaged students who could use it to access critical educational resources and services that would help give them achieve academic success.

C. HB 563 creates a system of unregulated financial aid that deprives students who choose to use an EOA for private school of other critical services that disadvantaged students often need.

A targeted, eight-county funding mechanism is not the only way HB 563 disadvantages students who need assistance the most. The AGOs' unfettered discretion to limit what services they will cover and HB 563's lack of requirements for private schools receiving money from AGOs are unchecked by the constitutional obligation to provide equal opportunity to achieve academic success as public schools, virtually guaranteeing the children who need help the most will be left behind by HB 563.

First, AGOs' unfettered power to provide funding for only some of the "qualifying expenses" in HB 563 is inherently harmful. HB 563 provides a comprehensive list of qualifying expenses that EOA funds can be used to cover:

1. Tuition or fees to attend a prekindergarten to grade twelve (12) public school;
2. Tuition or fees for online learning programs;

3. Tutoring services provided by an individual or a tutoring facility;
4. Services contracted for and provided by a public school, including but not limited to individual classes and extracurricular activities and programs;
5. Textbooks, curriculum, or other instructional materials, including but not limited to any supplemental materials or associated online instruction required by either a curriculum or an education service provider;
6. Computer hardware or other technological devices that are primarily used to help meet an EOA student's educational needs;
7. Educational software and applications;
8. School uniforms;
9. Fees for nationally standardized assessments, advanced placement examinations, examinations related to college or university admission, and tuition or fees for preparatory courses for these;
10. Tuition or fees for summer education programs and specialized after-school education programs, excluding after-school childcare;
11. Tuition, fees, instructional materials, and examination fees at a career or technical school;
12. Educational services and therapies, including but not limited to occupational, behavioral, physical, speech-language, and audiology therapies provided by a licensed professional;
13. Tuition and fees at an institution of higher education for dual credit courses; and
14. Fees for transportation paid to a fee-for-service transportation provider for the student to travel to and from an education service provider.

KRS 141.504; 2021 Ky. Laws Ch. 167 (HB 563) § 7. Many of these expenses are for items or services that benefit students across the state and FCPS is thrilled at the prospect of its students having broader access to them. However, despite the General Assembly having determined these items are worthwhile, nothing in HB 563 actually *requires*

AGOs to allow EOA funds to be used for them. In fact, it does just the opposite. HB 563 provides these services are qualifying expenses “*if* covered by the AGO” and permits AGOs to “define *and limit* the services that the EOA funds *may* cover.” 2021 Ky. Laws Ch. 167 (HB 563) § 7(2)(a), (9). As it stands, AGOs are free to pick and choose which of these “qualifying expenses” they will actually fund.

Nor can parents go to a different AGO to cover expenses that another AGO will not. This is true because HB 563 requires a parent to sign an agreement with the AGO “[n]ot to establish any other EOA for the eligible student with any other AGO.” Instead, choosing an AGO is a one-shot deal.

Second, nothing in HB 563 requires private schools who receive tuition and fee payments through EOAs to provide an equal opportunity for academic success to students who wish to transfer using AGO funding. HB 563 provides “An education service provider shall not be required to alter its creed, practices, admissions policy, or curriculum in order to accept payments from an EOA.” KRS 141.518; 2021 Ky. Laws Ch. 167 (HB 563) § 14. Thus, despite receiving funds financed by public tax credits, private institutions paid through HB 563’s tuition provisions remain free to turn away students for a multitude of reasons such as special needs, religion, or political views. This may be the private schools’ right without acceptance of public funding, but to maintain that right without qualification even after acceptance of HB 563 funds is incongruous with the widely accepted and expected parameters of public education.

IV. HB 563 is the gateway to a path toward an irreversible decay in public education.

HB 563 is just the first step in deconstructing public education for students who desperately need it, rather than trying to help it succeed. Other legislation coming down the pipeline goes even further. Next on the horizon is HB 9 (2022), which will require FCPS to *transfer its funds* to charter schools even if they are not being attended by any FCPS student. In other words, it will require school districts to redirect public money to places that may not even serve students within the district.

V. HB 563 violates multiple sections of the Kentucky Constitution.

The problems with HB 563 discussed above are not its only shortcomings. In addition to HB 563's problems under *Rose* and the inequity it will lead to, the Franklin Circuit Court correctly held that HB 563 is unconstitutional under Sections 59 and 184 of the Kentucky Constitution.

The Commonwealth recognizes this Court's precedent in *Fannin* holds that the private school funding mechanism in HB 563 violates the Kentucky Constitution. Commonwealth's Brief at 36–39. In *Fannin*, this Court invalidated a statute that supplied textbooks to children in private schools. *Fannin* explicitly held “money spent on education is to be spent exclusively in the public school system, except where the question of taxation for an educational purpose has been submitted to the voters and the majority of the votes cast at the election on the question shall be in favor of such taxation.” *Fannin*, 655 S.W.2d at 482. In response, the Commonwealth simply argues this Court should disregard *Fannin* as “poorly reasoned” to uphold HB 563.

The Commonwealth argues in the alternative that *Fannin* is distinguishable because HB 563 involves tax credits instead of direct funding and donations to “private” non-profits instead of funding directly to private schools. These arguments place form over substance. The reality of HB 563 is that it creates a funding stream to private schools based on a dollar-for-dollar credit from the Commonwealth.

The Commonwealth also argues that because HB 563 assigns state tax revenue to the AGOs through use of a “tax credit” that simply allows private individuals to funnel money that would otherwise have been paid (dollar-for-dollar) to the Commonwealth as tax, the legislation does not run afoul of Section 184. This is because—the argument goes—the AGO funding is merely a “donation” by a private party to a private organization. This argument also places form over substance and encourages future end-runs around the Constitution’s requirements for the expenditure of public money.

The Circuit Court also correctly relied on this Court’s decision in *Sherrard v. Jefferson County Board of Education*, 171 S.W.2d 963 (Ky. 1942) in determining HB 563 is unconstitutional. While the Commonwealth argues this Court should limit its reading of *Sherrard* to money appropriated directly from the common-schools fund, the plain language of the opinion contains no such limitation. As the Commonwealth recognizes, the challenger to the law argued the law at issue “divert[s] the public school funds raised by taxation *or otherwise* for the purpose of common and public schools . . . to channels not intended by and contrary to the Constitution of Kentucky.” *See id.* Even if the AGO tax credits were not a use of the Commonwealth’s taxing power (which it plainly is), it certainly “otherwise” raises funds for non-public schools. And it does so without putting the issue before the voters as required by the Kentucky Constitution.

CONCLUSION

For these reasons, FCPS supports the position of Appellees that the Franklin Circuit Court's decision should be affirmed.

Respectfully submitted,



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