APPENDIX

Exhibit Number	Description
1	Opinion and Order, entered October 8, 2021, Vol. 16, R. 2382–411
2	Order, entered November 2, 2021, Vol. 17, R. 2471–75
3	Order, entered June 25, 2021, Vol. 3, R. 446–48
4	Order, entered September 27, 2021, Vol. 16, R. 2364–67
5	2021 Ky. Acts ch. 167 (House Bill 563), Vol. 1, R. 27–44

TAB 1

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 21-CI-00461

COUNCIL FOR BETTER EDUCATION, INC., *et al.* **PLAINTIFFS**

v.

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

and

THE COMMONWEALTH OF KENTUCKY *ex rel.* Attorney General Daniel Cameron, *et al.* and AKIA McNEARY and NANCY DEATON **INTERVENING DEFENDANTS**

OPINION AND ORDER

This action is before the Court on *Cross-Motions for Summary Judgment* under CR 56. The Plaintiffs are the Council for Better Education, Inc. (a non-profit entity composed of various school districts and school officials who promote public education), the Warren County and Frankfort Independent Boards of Education, and several parents of public school students.[1] Plaintiffs seek declaratory and injunctive relief on their claims that House Bill 563, as enacted by the 2021 General Assembly, violates §§3, 59, 171, 183, 184 and 186 of the Kentucky Constitution. Secretary Holly Johnson of the Finance and Administration Cabinet, and Commissioner Thomas Miller of the Department of Revenue, who are charged with administering House Bill 563, are the nominal defendants. The Attorney General has intervened to defend the constitutionality of the challenged legislation, and the Court has granted the motion of various parents and guardians of school children who seek to obtain financial assistance from the Bill, to intervene as Defendants.

[1] Plaintiffs will be collectively referred to as "CBE" or "the Council".

CBE has filed a *Motion for Summary Judgment*, and the Attorney General and Intervening Defendants have filed cross-motions. The Court conducted oral arguments on September 16, 2021, and the case is now submitted to the Court for decision.

After careful consideration of the record, the Court **GRANTS** *Summary Judgment* under CR 56 on the Plaintiffs' claims that House Bill 563 violates §59 and §184 of the Kentucky Constitution. The Court finds that there are potential disputed issues of material fact on the Plaintiffs' claims under §3, §171, §183 and §186 of the Kentucky Constitution, and therefore **DENIES** the *Motions for Summary Judgment* on those claims. Likewise, the Court **DENIES** the *Motions for Summary Judgment* of the Attorney General and the Intervening Defendants on the defenses they have asserted. The reasons for the Court's rulings are set forth more fully below.

FACTUAL AND LEGAL BACKGROUND

House Bill 563 was enacted by the 2021 General Assembly to provide greater options for school children in Kentucky to obtain educational services, including financial assistance to pay tuition to private schools (for those children who reside in designated geographic areas with a population over 90,000). The stated goal of the legislation is "to give more flexibility and choices in education to Kentucky residents and to address disparities in educational opportunities to students."[2] The legislation provides financial assistance in the form of Education Opportunity Accounts (EOAs), funded by tax credits, to families with children in both the public schools (the "common schools" required by the Kentucky Constitution) and private schools. It provides for financial assistance to pay for supplemental educational programs such as test preparation, tutoring, computer hardware and software, and other educational services to supplement the educational opportunities available to all children in the common schools, and to children enrolled

[2] 2021 Ky. Acts ch. 167, Section 5.

in private schools. The legislation, in some circumstances, provides for financial assistance for public school students to pay out-of-district tuition to attend another public school district as a non-resident student. The portions of the legislation that allow public school students to transfer, without penalty, from their district of residence to another public school district where they do not reside, have not been challenged and are not at issue here.[3]

The private school tuition assistance that is a key component of the legislation has strict geographic limitations on its availability. It provides that "students that are residents of counties with a population of ninety thousand (90,000) or more, as determined by the 2010 decennial report of the United States Census Bureau, shall be permitted to use funds received through the EOA program for tuition and fees to attend nonpublic schools..."[4] The stated justification for this geographic limitation on private school tuition assistance is that "students in these counties have access to substantial existing nonpublic school infrastructure and there is capacity in these counties to either grow existing tuition assistance programs or form new nonprofits from existing networks that can provide tuition assistance to students over the course of the pilot program."[5] The legislation then references Section 17 of the Act, which calls for future evaluations of the program to assess its effectiveness and scope.[6] Of course, *all* legislation is subject to revision with each annual session of the General Assembly, and so the promise of future re-evaluation under Section 17 cannot cure any constitutional defects in the legislation as enacted.

At the Court's request, the parties reviewed the publicly available data concerning private schools that are currently operating in Kentucky, and they filed a ***Stipulation*** on September 28, 2021 that includes an ***Exhibit*** listing these schools. For example, in Franklin County (population

[3] 2021 Ky. Acts ch. 167, Sections 1-4.
[4] 2021 Ky. Acts ch. 167, Section 7(2)(b).
[5] *Id.*
[6] *Id.*

49,285), there are three schools (Frankfort Christian Academy, Good Shepherd School, and Capital Day School) that are available to families who seek a private education option. All three Franklin County private schools are excluded from the private school tuition assistance provisions of this Act.[7]

The stated reason for the population-based classification is to ensure eligible counties have "substantial nonpublic school infrastructure" and that those existing private schools have capacity "to grow existing tuition assistance programs".[8] Hardin County, with a population of 105,000 has only three (3) existing non-public schools, while neighboring Nelson County, with a population of 43,437, has five (5) existing non-public schools. Yet tuition assistance is provided in the bill for students in Hardin County, but not for students in Nelson County.

The legislation establishes a relatively elaborate system of privatizing the allocation of the tax credits to privately operated "account granting organizations" (or "AGOs") that are approved by the Department of Revenue (DOR). These AGOs accept funding from taxpayers, who, in turn will receive a virtual dollar-for-dollar credit on their income tax liability to the Commonwealth of Kentucky.[9] Thus, the taxpayers (both individuals and business entities) who make a $10,000 payment to an approved AGO will receive almost $10,000 credit on their income tax liability. In essence, the Commonwealth simply forgives the income tax liability it is owed by the taxpayer, in exchange for the taxpayer's funding of a private AGO. The tax debt to the Commonwealth is extinguished to the extent of the credit. The tax revenue of the Commonwealth is diminished by the amount of the payments to the AGO. The amount of income taxes collected for the general

[7] Stipulation, 9/28/21, Exhibit A.
[8] 2021 Ky. Acts ch. 167, Section 7(2)(b).
[9] The tax credit is limited to "ninety-five (95%) of the total contributions made to an AGO, except as provided in subsection (4) of this section." The tax credit is also capped at one million dollars. 2021 Ky. Acts ch. 167, Section 16(3). However, subsection (4) provides that the tax credit can be made over four (4) years and carried forward, in which case the allowable credit is increased to ninety-seven (97%) percent for each tax year. *Id.*

obligations of government will be diminished by $125 million over the five tax years covered in the legislation.[10] The AGOs, in turn, will distribute the money received from the tax credits to students and families in the form of Educational Opportunity Accounts (EOAs). The families of these students can spend the tax credit money on approved educational expenditures for the purposes set forth in the bill.

The Department of Revenue may audit AGOs for compliance with the tax provisions of the Act, apparently state expense.[11] But under Section 15(4) of the legislation, "[a]n education service provider shall not be required to alter its creed, practices, admissions policy, or curriculum in order to accept payments from an EOA." Accordingly, the funds can be paid to schools that exclude children with learning disabilities, and educational providers can discriminate on any basis they choose, and still receive EOA funds. It appears education providers are exempt from all of the safeguards and accountability measures that the legislature has enacted that apply to public schools.

The legislation is designed to assist low and moderate-income families in obtaining private educational services, but the generous income limits of the Act provide for subsidies to families in the high-income category. The income limits for participation are found in the statute's definition of "eligible student."[12] That definition ties eligibility to income levels calculated based on requirements for participation in the free and reduced school lunch program funded by the U.S. Department of Agriculture. Eligibility is capped at "175% of the amount of household income necessary to establish eligibility for reduced-price meals based on size of household" under the

[10] To the extent that the Taxpayer makes a payment to the AGO in the "form of marketable securities", the Taxpayer could receive the additional tax benefit of avoidance of capital gains taxes, which foreseeably could allow the Taxpayer to receive not just a dollar-for-dollar credit on his income tax, but to receive *more than* a dollar of tax benefits for each dollar paid to the AGO. *See* 2021 Ky. Acts ch. 167, Section 9(4)(b).
[11] 2021 Ky. Acts, ch. 167, Section 13.
[12] 2021 Ky. Acts ch. 167, Section 6(6).

U.S.D.A. guidelines for the school nutrition program.[13] Applying this standard, a family of four, with income of $85,793.00 in annual income, will qualify for these subsidies for private educational services, including the payment of private school tuition for students who live in the geographic areas designated for such aid.[14] Once a student is initially accepted into the EOA program, the legislation then allows for continued eligibility for benefits for families with income of up to $122,562.00 (250% of the amount of household income necessary to establish eligibility for reduced-price meals under U.S.D.A. guidelines).[15]

By contrast, the median household income in Kentucky in 2019 was $50,589.00.[16] Thus, under the provisions of this legislation, non-EOA families with the median household annual income of under $50,589.00 will be paying income taxes on all of their income and paying all the educational expenses of their children, while families with incomes up to $122,562.00 will receive private tuition subsidies, paid for by tax credits to the funders of the AGOs (who are allowed to opt out of income taxes to the extent of their payments to the AGOs).

The "donor" taxpayers who take advantage of this tax credit are taxpayers who, by definition, are unwilling to make charitable donations to support the laudable goals of this legislation. Rather, these taxpayers are engaging in a tax transaction: they are paying the funds (which they already owe in tax liability to the state) to private AGOs, in exchange for a tax credit

[13] HB 563, Section 6(6)(a). For more information on the guidelines used in the legislation to determine aid eligibility also *See*: Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. 7,732 (Feb. 1, 2021); Child Nutrition Programs: Income Eligibility Guidelines, 86 Fed. Reg. 12, 594 (Mar. 4, 2021); https://www.govinfo/content/pkg/FR-2021-03-04/pdf/2021-004452.pdf (The eligibility levels referenced in the statute, based on U.S.D.A eligibility for reduced lunch program is $49,025 (130% of federal poverty guidelines from *Federal Register*); the eligibility for private school tuition is keyed to that figure: 175% of $49,025 = $85,792; 250% of $49,025 = $122,562).

[14] The counties with populations exceeding 90,000 include: Jefferson, Fayette, Kenton, Boone, Warren, Hardin, Daviess, and Campbell. *See Exhibit A to Stipulation* of 09/28/2021.

[15] 2021 Ky. Acts ch. 167, Section 8(3). *See also* Section 14(3)(b); AN ACT relating to education, H.B. 563, 21 Reg. Sess. (Ky. 2021); Kentucky QuickFacts, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/KY/PST045219 (last visited Oct. 7, 2021).

[16] QuickFacts Kentucky, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/KY/INC110219.

that eliminates their income tax liability to the extent of the payment. This tax transaction cannot accurately be characterized as a "donation."

Under current (and prior) law, all taxpayers can make donations to non-profit charitable educational programs, and to any other charity, and to deduct all such donations from their gross income. In contrast, the taxpayers who will participate in this *tax credit* program are, by definition, taxpayers who are unwilling to make such donations for the standard deduction available to all taxpayers. The taxpayers who will fund this program will pay the money they already owe to the Commonwealth in income taxes to private AGOs, in *lieu* of paying their tax liability. In establishing this program, the legislature has essentially taken an account receivable to the Commonwealth of Kentucky, assigned it to these private AGOs, and forgiven the taxpayer's liability to the state.

While the Attorney General and Intervenors repeatedly refer to this re-assignment of tax liability from the government to a private AGO as a "donation" of "private funds", this description of the funding mechanism mischaracterizes the true nature of the transaction. The funding for this program is 100% raised from the state's levying of the income tax. This funding is completely dependent on the coercive power of the state to collect that tax. The legislation simply allows this favored group of taxpayers to re-direct the income taxes they owe the state to private AGOs, and thereby eliminate their income tax liability. There is nothing "private" or "charitable" about the funding of the AGOs, and this funding mechanism is not a "donation" in any meaningful sense of that word that connotes a voluntary contribution of personal or business income. These taxpayers are not donating their own money to AGOs; they are taking the money they owe to the state in income taxes, and re-directing it to the AGOs, as authorized by this legislation. This distinction is

critical in applying the provisions of the Kentucky Constitution that govern taxation, and funding of "an efficient system of common schools." Ky. Constitution, §§171, 183, 184 and 186.

The Attorney General and Intervenors rely heavily on the U.S. Supreme Court decision of *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 131 S. Ct. 1436, 179 L. Ed. 2d 523 (2011), which dismissed an establishment clause challenge to the Arizona tuition tax credit program on the basis of standing. The Supreme Court never reached the merits of the establishment clause challenge to the Arizona statute, and dismissed the case on the grounds that the taxpayers who brought the suit lacked the standing to sue. The Supreme Court found that it was purely speculative that the tuition subsidies would adversely impact any individual taxpayer. The Plaintiffs could not show a nexus between the challenged statute and any alleged non-speculative injury they would suffer, and thus they failed to meet the required minimum basis for taxpayer standing under the doctrine of *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). None of the issues that form the basis for the establishment clause challenge to the Arizona statute are present in this case. Here, the Plaintiffs seek enforcement of the unique provisions of the Kentucky Constitution that govern taxation and education, which govern the legislature's power to shape tax and education policy in the Commonwealth. The standing of Plaintiffs like these to bring such claims was definitively decided in *Rose v. Council for Better Education*, 790 S.W.2d 186, 202 (Ky. 1989).[17] Additionally, the language from the *Winn* case concerning whether the Arizona tax credit is a private donation, or a public tax expenditure under Arizona law, has no applicability to this case. The Supreme Court's characterization of the Arizona statute is based on Arizona law and is limited to its relevance to determining standing to sue under Article III of the

[17] "If the system is not efficient, the local school board's duty is to make every effort to remedy that situation. Included in that responsibility is the filing of this lawsuit. The local school board and the Council have a judicially recognizable interest in a system of efficient common schools, and we so recognize and declare."

U.S. Constitution in an establishment clause challenge. *Winn* did not address the merits of the statute in any way that is relevant to the Kentucky Constitutional provisions before this Court.

DISCUSSION

I. THE ACT'S GEOGRAPHIC LIMITATION ON PRIVATE SCHOOL TUITION ASSISTANCE VIOLATES SECTIONS 59 OF THE KENTUCKY CONSTITUTION, AND THOSE PROVISIONS ARE NOT SEVERABLE FROM THE ACT'S REMAINING PROVISIONS.

A. The Act's Geographic Limitations Constitute Special Legislation in Violation of Section 59 Because They Benefit Only Particular Locales.

The Kentucky Supreme Court has recently refined the proper analysis of §59 claims to specify that "for analysis under Sections 59 and 60, the appropriate test is whether the statute applies to a particular individual, object or locale." *Calloway County Sheriff's Department v. Woodall,* 607 S.W.3d 557, 573 (Ky. 2020). Previously, §59 was applied more broadly by the Kentucky Supreme Court to prohibit any classifications that the courts found to be arbitrary or discriminatory. The Court in *Calloway County Sheriff's Department* held that §59 review should be more narrowly focused on whether the legislation is discriminatory in the more limited sense of singling out a particular individual, object, or geographic location, for either disadvantageous or favorable treatment. Here, the singling out of a few counties with populations of over 90,000 for the lucrative benefit of tuition assistance for private schools, to the exclusion of all other counties (even those with robust private school options for students), falls squarely within the prohibition of §59.

There is no doubt that the private school tuition assistance provisions of the legislation apply only to a very limited *locale*, defined by the Act as counties with a population of over 90,000. This limits private school tuition assistance to only eight (8) counties, notwithstanding the fact that many other counties have accredited private schools that will be arbitrarily excluded from the program for no rational reason.

The Attorney General and Intervenors have attempted to characterize the population based restrictions of Section 7(2)(b) as a reasonable classification designed to enhance the efficient implementation of the Act by limiting the tuition assistance program to geographic areas where there are existing private school options. This rationale does not withstand even the most minimal scrutiny. There is simply no rational basis to exclude counties like Franklin County, Nelson County, and many others with a strong existing base of private schools from the tuition assistance program. If the legislature had wanted to limit tuition assistance to counties with existing accredited private schools, it would have been simple to do so. Instead, the legislature chose an arbitrary and discriminatory geographical classification (tied to population, not existing private school options) that excludes most counties, and families, from the most lucrative benefit of the legislation. As the Kentucky Supreme Court has explained, §59 was adopted to "prevent special privileges, favoritism and discrimination and to assure equality under the law." *Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446, 452 (Ky. 1994). The classification contained in this Act violates those principles.

The classification drawn by the legislation in this Act is virtually identical to the geographic classification struck down by the Kentucky Supreme Court in *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2008). There the legislature created a pharmacy tuition assistance program and limited its application to students attending "an accredited school of pharmacy at a private four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county in the Commonwealth." *Id.* at 684. The Kentucky Supreme Court struck down the legislation because of its discrimination against students who attended pharmacy schools outside the favored geographic area. As the Court explained, "the General Assembly failed to treat equally all members of the pharmacy student class. Only those

pharmacy students enrolled or accepted for enrollment at the planned UC Pharmacy School could take advantage of this lucrative scholarship program. *This is precisely the type of special privilege and favoritism that Section 59 condemns." Id.* at 685 (emphasis supplied). Here, the classification was drawn based on an arbitrary population limit that has the effect of greatly limiting the geographic availability of the "lucrative scholarship program"; in *Pennybacker* the classification was based on location of a main campus "in an Appalachian Regional Commission county". But the geographic limit is the same, as is the limitation to a particular object (conferring a tuition benefit on a limited class of students, to the exclusion of similarly situated students).

In the *Calloway County Sheriff's Department* case, the Supreme Court specifically re-affirmed that *Pennybacker* was correctly decided.[18] Here, the result must be the same. Section 7(2)(b) of this Act arbitrarily limits the tuition assistance provision of the Act to a geographic area encompassing only eight (8) counties, arbitrarily excluding students and families in 112 other counties from this "lucrative benefit" with no rational basis.

To illustrate the arbitrary geographic discrimination codified in this statute, families with children enrolled in private school in Hardin County are eligible, but families with children enrolled in private schools next door in Nelson County are excluded. Families with children enrolled in private schools in Fayette County are included, but families with children enrolled in the Frankfort Christian Academy, Good Shepherd School, or Capital Day School in nearby Franklin County are excluded. In fact, under the legislation as passed, the absurd situation could arise that a family that resides in Frankfort would be denied tuition assistance to send their child to Lexington Sayre School solely because they "are residents of [a county] with a population of [fewer than 90,000 people]." A family that lives in Woodford County would likewise be denied

[18] *Calloway County Sheriff's Department, supra* 607 S.W.3d at 573, f.n. 19.

EOA private school tuition assistance if they enrolled their children in private schools in neighboring Fayette County because they are not residents of Fayette County.[19]

This form of geographical and object-based discrimination is prohibited by §59 of the Kentucky Constitution. As the Supreme Court stated in *Pennybacker*, "[t]hus, however well intentioned the [tuition assistance] legislation may have been, as written, [the statute] is unconstitutional and cannot be implemented." *Id.* at 685.

B. The Act's Geographic Limitations Create Discriminatory Treatment in Educational Opportunities That Violate Rose v. Council for Better Education.

Moreover, this Court is mindful that it must decide the §59 challenge in this case in the context of the underlying constitutional requirement to provide adequate and equal educational opportunities for all children under §183, as required in *Rose v. Council for Better Education,* 790 S.W.2d 185 (Ky. 1989). One of the primary constitutional violations found by the Supreme Court in *Rose*, was the geographic disparities in educational opportunities. In this case, even *if* the funding of a private school tuition with tax credits could pass constitutional muster, the blatant geographic discrimination that limits such educational opportunity to children in the eight most populous counties of Kentucky cannot withstand even the most minimal constitutional scrutiny. As the Supreme Court found in *Rose*, "Kentucky's children, simply because of their place of residence, are offered a virtual hodgepodge of educational opportunities." *Id.* at 198. This form of geographic discrimination is prohibited under §59, and the discriminatory impact of this legislation is exacerbated because it arises in the context of government action to fund educational services. *Rose* established that the legislature cannot discriminate in the funding of public schools under §183; even if the legislature can fund private schools (a proposition that is vigorously contested in

[19] 2021 Ky. Acts ch. 167, Section 7(2)(b).

this case), it certainly cannot provide for funding that discriminates against private school students and families based on their place of residence consistent with §59 of the Kentucky Constitution. The Court, in applying §59 in the context of legislation to create educational opportunities for all Kentucky children, must ensure that its interpretation of the special legislation prohibitions of §59 are applied consistently with the requirements of adequacy and equity which govern state aid to education. By striking down the statute under §59, the Court avoids the potential constitutional conflict under §183, at least on the issue of the geographic limitation on private school tuition assistance.

C. The Act's Geographic Discrimination Cannot be Severed from the Remainder of the Act's Provisions, Which Cannot Stand Alone Without the Unconstitutional Limitations.

The Attorney General and Intervenors have argued that the Court should employ the severability statute, KRS 446.090, to strike down the unconstitutional geographical limitation of Section 7(b)(2) and re-write the statute to make the tuition assistance provisions of the statute available statewide. The Court must reject this invitation. KRS 446.090 provides that:

> if any part of the statute be held unconstitutional the remaining parts shall remain in force...*unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.*
>
> (Emphasis supplied).

The Court cannot take the radical step of re-writing the statute in the manner suggested by the Attorney General and the Intervenors. The legislative record is abundantly clear that the tuition assistance for this favored group of students and families in large urban areas, is integral to the overall scheme of the statute. Of the approved educational expenditures that are identified in

Section 7 of the Act, this private school tuition for students in the eight most populous counties in Kentucky set forth in Section 7(2)(b) is by far the most expensive item. It is clearly central to the overall scheme of the Act. The Attorney General and Intervenors suggest that the Court extend this lucrative benefit by judicial fiat to the rest of the state, rather than using the severability doctrine to simply eliminate this lucrative benefit. This illustrates that the private tuition feature of the legislation is central to the bill, and the Court cannot re-write the legislation to cure this constitutional defect. As the former Court of Appeals held in rejecting the severability doctrine in similar circumstances, "[t]o remove only Section 4 would be like taking out the motor of an automobile which leaves the machine of no use. We are quite sure that these other provisions would not have been enacted without Section 4; hence they too must fail." *Engle v. Bonnie,* 204 S.W.2d 963, 965 (Ky. 1947). Here, the Court is also quite sure that the other provisions of this legislation would not have been enacted without the tuition assistance for private schools in the eight most populous counties, nor would it have been enacted if the private school tuition assistance provisions had been extended statewide. Here, as in *McGuffey v. Hall,* 557 S.W.2d 401 (Ky. 1977), "the portions of §10 we have held invalid are so essential to that section as a whole that the remainder of the section could not stand without them. Hence §10 is invalid in its entirety." *Id.* at 416. The same principle applies to this case.

This Act was approved on final passage in the House of Representatives by the razor thin vote of 48-47.[20] With this one vote margin for passage, this Court cannot presume that the bill would have passed without the unconstitutional section limiting private school tuition assistance to the eight (8) designated urban counties, nor can it presume the bill would have passed if that lucrative benefit was extended beyond the eight (8) counties.

[20] Legislative Record, 3/16/21, *See https://apps.legislature.ky.gove/record/21rs/hb563.html.*

In view of the one vote plurality vote (48-47) on the final passage in the House of Representatives on House Bill 563, and the close vote in the Senate (21-15), the most logical conclusion is that *any* material change in the bill would have jeopardized its passage. Accordingly, the severability provisions of KRS 446.090 cannot be applied to save the legislation. The Court finds that this legislation would not have passed without the unconstitutional provisions. In these circumstances, "it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part"[21], and thus the Court cannot sever the remaining parts of the bill from the unconstitutional parts.

II. THE ACT VIOLATES §184 OF THE KENTUCKY CONSTITUTION WHICH PROVIDES "NO SUM SHALL BE *RAISED OR COLLECTED* FOR EDUCATION OTHER THAN IN COMMON SCHOOLS UNTIL THE QUESTION OF TAXATION IS SUBMITTED TO THE LEGAL VOTERS."

§184 of the Kentucky Constitution provides that "no sum shall be ***raised or collected*** for education other than in common schools until the question of taxation is submitted to the legal voters."[22] Here, applying the plain language of the Kentucky Constitution, the income tax credit at issue raises a sum of money for private education outside the system of common schools. That it does so through a tax credit rather than a direct appropriation is not relevant, applying the plain language of §184. The "question of taxation"—in this case, the income tax credit—must be "submitted to the legal voters" before it can take effect.

Further, §184 also prohibits the legislature from allocating "any sum produced *by taxation or otherwise* for purposes of common school education" to any purpose other than "the common schools, and to no other purpose." Here, it is apparent that the money produced by the tax credits is designed, in part, for "common school education" in the form of payment of out-of-district

[21] KRS 446.090.
[22] Emphasis supplied.

tuition for nonresident public school students, and many other private educational services for public school students, as set forth in Section 7 of the Act. Under the plain language of §184, such sums "shall be appropriated to the common schools, and to no other purpose." Accordingly, the allocation of the funding created by these tax credits to private school students is in violation of §184. Here, it is apparent that the money funding this program is produced by taxation through the creation of a tax credit. But even if the funding is somehow characterized as not being directly the result of the tax law, the prohibition of §184 extends to all funding of education "by taxation *or otherwise*". Accordingly, any such legislation is subject to a referendum of the voters before it can become effective.

The case law in Kentucky has been undeviating in holding that public funds cannot be expended in support of private education. *See e.g. Pollitt v. Lewis*, 269 Ky. 680, 108 S.W.2d 671 (1937); *Sherrard v. Jefferson County Board of Education*, 171 S.W.2d 963 (Ky. 1942); *Fannin v. Williams*, 655 S.W.2d 4880 (Ky. 1983). The question presented here is whether the use of the taxation innovation employed in this case—the use of a tax credit—can circumvent the plain requirements of §184 that require for a voter referendum before the state can "raise or collect" any sum for education other than in the common schools.

While this legislation does not *collect* taxes for private education, it most certainly "raises" the sums of money that fund the AGOs, through application of the income tax law. Moreover, the applicable provision of §184 requiring a voter referendum is not limited to collection of taxes. It states "**No sum** shall be **raised** ***or*** **collected** for education other than in the common schools until the question of taxation has been submitted to the legal voters..." The Court can see no principled basis to hold that this term does not encompass the tax credit which raises the sums that fund the program.

Can the constitutional requirement for a referendum of the voters be evaded through the mechanism of funding this program from a tax credit rather than by a direct appropriation of tax dollars? The Kentucky Supreme Court has long insisted that compliance with our fundamental law cannot be evaded by elevating form over substance. The law in Kentucky is well established that "[c]onstitutional provisions, whether operating by way of grant of limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant of limitation. In appraising the validity of the statute we must look through the form of the statue to the substance of what it does. The courts may not countenance an evasion or even an unintentional avoidance of our fundamental law." *Commonwealth v. O'Harrah*, 252 S.W.2d 385, 389 (Ky. 1953). The Constitutional Debates discussed the fear that the General Assembly would find ways to circumvent the restrictions on the common school fund by taxation provisions:

> The Chairman, in section two, says that "the interest in dividends of the common school fund, together with any sums which may be produced by taxation for purposes of education, shall be appropriated to the common schools, and to no other purpose"; and then, as if still afraid that the General Assembly may not be sufficiently restricted, these words are added: "No sum shall be raised or collected for education except in the common schools, until the question of taxation is submitted to the legal voters, and a majority of the votes cast in favor of taxation." When carefully examined, it will be seen that this clause conflicts with the one immediately preceding it. If any sum raised by taxation is to be appropriated to common schools, and to no other purpose, how is it consistent to say in the next breath that a sum may be raised by taxation for education, and yet not be used in aid of the common schools?
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> 2 Debates Constitutional Convention 1890 4471 (1890) (remarks of Mr. Beckner).

This tax credit requires legislation to amend the income tax statute and is thus subject to the requirements of §184. There is no question that every dollar raised to fund the AGOs is raised

by the tax credits which must be authorized and approved by the Department of Revenue, and which will diminish the tax revenue received to defray the necessary expenses of government. The use of the disjunctive, "raised **or** collected", demonstrates that it applies to the tax credit. Even though that money, owed to the state, is not *collected,* by the Department of Revenue, it is *raised* by the tax laws by virtue of the tax credits extended to taxpayers in exchange for their funding of the AGOs. Accordingly, this tax credit must be approved by the legal voters before it can take effect under the plain language of §184. *See Sherrard v. Jefferson County Board of Education, supra.*

III. THE LEGISLATION RAISES IMPORTANT QUESTIONS CONCERNING UNIFORMITY AND EQUALITY OF TAXATION UNDER §3 AND §171 THAT CANNOT BE RESOLVED ON SUMMARY JUDGMENT.

The Kentucky Constitution's extensive provisions governing taxation are based on the underlying principles of *uniformity* and *equality* in taxation. These principles are set forth clearly in §171, which provides, in part:

> The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. *Taxes shall be levied and collected for public purposes only and shall be uniform* upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and ***all taxes shall be levied and collected by general laws.***
>
> (Emphasis supplied).

These principles of public purpose, uniformity and equality were explained during the constitutional debates by Mr. P.P. Johnston, the chair of the Convention's Committee of Revenue and Taxation:

> A certain amount of money must be raised to meet the expenses of the State. If the burden is borne equally by all, it rests lightly on all ...
> The only way to distribute the burdens of government justly is to let the weight of taxation rest equally on all. If all pay a just proportion, the burden

> will be light ....
>
> I am for broadening the basis of taxation and taking less out of your Pockets [to defray the expense of government].

2 Debates Constitutional Convention 1890 2382 (1890) (remarks of Mr. Johnston).

Under the funding scheme for the AGOs and EOAs set forth in this bill, the income tax is *levied* by the state, but the tax liability is *collected* by a private AGO (through Department of Revenue approved "donations" that qualify for tax credits) for distribution to families of children receiving education in private schools and from private educational service providers. The legislation essentially gives certain favored taxpayers the ability to opt out of the income tax, in exchange for paying the amount of their tax liability to the private entities designated by the legislature. While the purpose of this tax break is laudable, the means employed by the legislature raise profound questions under the taxation provisions of the Kentucky Constitution.

§171 of the Kentucky Constitution also requires that all taxes "shall be levied and collected by general laws." It is difficult to see how a tax credit that allows a select group of favored taxpayers to completely opt out of their income tax obligations, can be considered to be "a general law."

Likewise, §171 provides that "[t]axes shall be levied and collected for public purposes only." It is difficult to see how the levying of the income tax, to the extent it is diverted through a tax credit to private education expenses, can be considered to be "for public purposes only." The concern for the public purpose clause is heightened by the Kentucky Supreme Court's decision in *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983), where the Supreme Court invalidated a statute providing for the distribution of books to private schools through the Department of Libraries. There, the Kentucky Supreme Court invalidated the law, and noted "[t]he statute in question seeks

to evade constitutional limitations by a series of devices, which do more to point up the constitutional problems than to avoid them." *Id.* at 482.

The factual record on these questions is not yet developed. There are no affidavits or depositions that shed light on the practical questions of how this legislation will be implemented and whether it runs afoul of these constitutional limitations. There is no expert testimony that explains the impact, if any, of this legislation on the overall funding of the common schools, the SEEK funding formula, or the oversight and regulation of the tax credits (if any) to ensure compliance with constitutional restrictions. In the absence of a more extensive record, the Court believes that summary judgment cannot be granted on the issues arising under §171, or §3, which prohibits payment of public money "to any man or set of men, except in consideration of public services." While the Attorney General and the Intervenors respond to these arguments by asserting that the funds at issue are private donations, not public money, that characterization of the tax credits is a disputed issue of fact and law, which cannot be decided in the absence of additional factual proof and legal arguments.

Regardless of whether the funding is labeled "public" or "private", there can be no dispute that these *sums* are being *raised* through the taxing power of the Commonwealth, and thus are subject to the referendum requirements of §184. But whether they also run afoul of §§3 and 171 cannot be properly determined on the record presently before the Court.

As the Kentucky Supreme Court held in *Fannin v. Williams. supra,* "[o]ne can argue, quite reasonably, that this statute (and any statute) furthering education is of public benefit, whether selective or not. Unfortunately, this approach begs the question, because the Constitution establishes a public school system and limits spending money for education to spending it in public schools." 655 S.W.2d at 484. In this case, we have the question of whether a tax credit is the

functional equivalent of an appropriation of tax dollars. In *Fannin,* the Court held that this question must be answered by looking to the substance of the legislation, not the form. *Id.* Is this tax credit the functional equivalent of an appropriation of tax dollars? The Court must also address the question of whether the tax credit set forth in House Bill 563 meets the constitutional requirements of being "levied and collected by general laws."

While the Defendants and Intervenors argue that the funding of the AGOs is limited to private funds that are exempt from these requirements, the Court believes that determination is a disputed area that requires further proof. Here, the question is whether this legislation, in substance, operates as an evasion of the constitutional limitations of §§3 and 171 of the Kentucky Constitution, which prohibit the expenditure of public funds on private schools. The Court believes those issues are disputed, and thus require a more fully developed record.

IV. THE LEGISLATION RAISES IMPORTANT QUESTIONS CONCERNING THE REQUIREMENT OF §183 OF THE KENTUCKY CONSTITUTION AND §186, AS APPLIED IN *ROSE V. COUNCIL FOR BETTER EDUCATION,* FOR "ADEQUATE AND EQUITABLE" FUNDING OF THE COMMON SCHOOLS, WHICH CANNOT BE RESOLVED ON SUMMARY JUDGMENT.

This legislation presents important questions under §183 of the Kentucky Constitution, most significantly, whether it is consistent with the mandatory duty of the Kentucky General Assembly to provide for "an efficient system of common schools" that is adequately and equitably funded, as required in *Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989). There, the Kentucky Supreme Court found systemic violations of §183 based on its finding that "Kentucky's primary and secondary education is inadequate and is lacking in uniformity." *Id.* at 198. The fundamental ruling at the heart of *Rose* is:

> Each child, *every child,* in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of

> the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education.

Id. at 211 (emphasis in the original).

The question presented here is whether the funding of a parallel system of private educational services, that will serve the needs of a few select children, in both public and private schools, to the exclusion of the vast majority of both public and private school children in the Commonwealth, is consistent with the obligation to provide for "an efficient system of common schools" and whether it meets the obligation adopted in *Rose* to provide that opportunity for an adequate education for *every child.* Likewise, §186 of the Kentucky Constitution provides that "[a]ll funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose." Here, there is a dispute over whether the tax credits that fund the AGOs should be considered as part of the school fund within the meaning of §186, and are thereby limited to the sole purpose of maintenance of the public schools.

The Constitutional Debates were clear that the intent of §186 was to ensure that funds the legislature designated for education would be held inviolate for the common schools. Likewise, §184 provides that "[t]he interest and dividends of said fund together with any sum which may be produced *by taxation or otherwise* for the purposes of common school education *shall be held inviolate for the purposes of common school education.*" (emphasis supplied). The Constitutional Debates shed great light on the purpose of these provisions:

> "I am not afraid to trust the Legislature, but if we are going to guarantee funds to educational purposes, let us guarantee all of them. The old Constitution says "or otherwise," which includes the tax on billiard-tables, playing cards, etc., all of which is secured by the Constitution. If we are going to make the school fund sacred by Constitutional provision, let us make it all sacred. Why leave out the words "or otherwise," and say only by taxation, when there is so considerable a fund from other sources that goes to common school purposes? If we are going to guarantee its integrity, so that the

> General Assembly shall never disturb it, or appropriate it to any other purpose, let us do it. We have now in the section, as it stands, that guarantee. I do not want the common school fund taken for the purposes of normal schools. I do not want any of it taken for any college or any other thing, except the common schools. Will not the people of the State have the advantage of every dollar of it? It is a sacred fund, and held so by our fathers in the Constitution of 1849, and we are here guaranteeing its inviolability, that it shall not be diverted for any other purposes, and I say let us provide that all of it shall be held so.

2 Debates Constitutional Convention 1890, 4575 (1890) (remarks of Mr. Beckner)

The legislation is clear that both public and private school students are eligible for assistance through EOAs that are administered by AGOs. 2021 Ky. Acts ch. 167, Section 7. Public school students can use EOA funding to pay nonresident tuition to attend a public school outside their district, or to pay for other private educational services identified in the Act (e.g., tutoring, test preparation, computers, and other approved services). This raises the specter of a two tiered system of public school financing, with one small group of students obtaining the benefits of funding through EOAs, and the rest of the children remaining completely dependent on the funding allocated to the common schools from the legislature and the local school boards. Such a two tiered funding system raises serious questions about compliance with §183, as interpreted and applied in *Rose.*

A system of subsidizing private educational opportunities for a small group of students has the potential to exacerbate inequality in educational funding, and to undermine the required uniformity in educational opportunity that was mandated in *Rose.* While the proof may show that this system would merely supplement a fully adequate state system, as contemplated by *Rose*[23], the proof could also show that the additional financial assistance provided by AGOs to a few select

[23] *Id.* at 211-12.

children is simply a stop gap measure to address a systemic inadequacy in the funding and operation of the common schools.

Rose provided that *supplemental* efforts to enhance education are allowed (even encouraged), so long as *all children* are provided the basic right to an adequate education, as defined in *Rose.*[24] Whether the state has met this critical threshold is a question that is not resolved on the record before this Court. If the state fails to reach this threshold, then efforts to enhance the educational opportunities for a small portion of children, in public and private schools, raise questions of adequacy and equity under *Rose.*

Certainly the provisions of the legislation that extend EOA funding through AGOs to a select group of public school students could potentially conflict with the mandate of *Rose* that "common schools shall be substantially uniform throughout the state"; that "common schools shall provide equal educational opportunities to all Kentucky children regardless of place of residence or economic circumstances"; and that "all children in Kentucky have a constitutional right to an adequate education" which includes a broad range of educational goals specifically identified in the *Rose* opinion.[25]

The Attorney General and Intervenors have argued that the allocation of tax credits to fund this program has not diminished the funding appropriated to the common schools, and thus it raises no issue with regard to the legislature's constitutional duty to fund "an efficient system of common schools." The Attorney General and Intervenors maintain that this program is wholly outside the parameters of the public school system in terms of funding and administration, and so it does not

[24] *Id.* ("Section 183 requires the General Assembly to establish a system of common schools that provides an equal opportunity for children to have an adequate education. In no way does this constitutional requirement act as a limitation on the General Assembly's power to create local school entities and to grant to those entities the authority to supplement the state system").
[25] *Id.* at 212-13.

implicate the requirements of §183. At this point, no evidence has been taken on this issue, and the Court is obligated to construe the facts alleged in the Complaint in the light most favorable to the Plaintiffs on this issue. Accordingly, this issue cannot be resolved on summary judgment.

The record contains no discovery, no depositions, and no expert testimony to establish whether this legislation is consistent with the constitutional requirements for "an efficient system of common schools." Although the parties have made reference to SEEK[26] funding for the public school system, there is no record to establish whether this legislation will have an adverse impact on SEEK funding for public schools, either now or in the future. This Court does not dispute that many students and their families, both in public and private schools, could greatly benefit from the financial assistance provided for in this legislation. Yet, the very fact that so many children need additional educational assistance, beyond what is presently funded and appropriated for the public schools, is an indication that we, as a state, may well be falling short of the constitutional mandate of "an efficient system of common schools" as defined in the *Rose* case.

To the extent that is the problem being addressed by this legislation, the Constitution requires a solution that does not exacerbate the inequality and increase the disparity in educational opportunities available to all children. On this issue, neither the Plaintiff, the Defendants or Intervenors have submitted convincing proof that establishes that there are no disputed issues of material fact. Accordingly, it would be inappropriate to enter summary judgment on the Plaintiff's claims, or the Attorney General's and the Intervenors' defenses, on the issues arising under §183 of the Kentucky Constitution.

[26] SEEK is an acronym for Supporting Educational Excellence in Kentucky, the funding formula appropriated by the legislature for public schools, and administered by the Kentucky Department of Education. *See https://education.ky.gov.*

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As the Kentucky Supreme Court held in *Fannin v. Williams, supra,* "[o]ne can argue, quite reasonably, that this statute (and any statute) furthering education is of public benefit, whether selective or not. Unfortunately, this approach begs the question, because the Constitution establishes a public school system and limits spending money for education to spending it in public schools." 655 S.W.2d at 484. In this case, we have the question of whether a tax credit is the functional equivalent of an appropriation of tax dollars. In *Fannin,* the Court held that this question must be answered by looking to the substance of the legislation, not the form. *Id.* Is this tax credit the functional equivalent of an appropriation of tax dollars?

The financial impact, if any, of this legislation on the legislature's funding of the common schools under the SEEK formula is unclear based on this record. The amount of tax credits allocated by the legislature to fund this program, $25 million per year for five years (for a total of $125 million), is modest compared to the multi-billion dollar funding of the common schools over the same time period. Yet, if it is constitutional to allocate $25 million in tax credits per year, it is hard to see how it would be unconstitutional to allocate $250 million. At what point does the legislative funding of a private educational services program (including private school tuition) adversely impact the available funds for the common schools and undermine the constitutional obligation of the legislature to adequately fund the common schools under §183 and *Rose*? Those questions are not addressed in this record, but the Court needs additional information before ruling on whether this legislation violates §§183 and 186 of the Kentucky Constitution.

CONCLUSION

For the reasons stated above, **IT IS ORDERED AND ADJUDGED:**

1. The Plaintiffs' *Motion for Summary Judgment,* to declare that House Bill 563, as codified in 2021 Ky. Acts ch. 167, is in violation of §59 of the Kentucky Constitution,

is **GRANTED,** and the Court so finds and declares pursuant to KRS 418.040 and CR 57.

2. The Court further finds and declares pursuant to KRS 418.040 and CR 57, that House Bill 563 violates §184 of the Kentucky Constitution by taking "sum[s] which are produced by taxation or otherwise for purpose of common school education" and allocating them to private Account Granting Organizations for purposes outside the common schools. The Court further finds and declares that, pursuant to §184 of the Kentucky Constitution, the $25 million in funds annually generated by the tax credit cannot "be collected for education other than in common schools until the question of taxation has been submitted to the legal voters." Accordingly, the tax credit created by this legislation must be approved by "the legal voters" before it can take effect.
3. The Plaintiffs' motion for injunctive relief under CR 65 is **GRANTED** and the Defendants Secretary Holly Johnson and Commissioner Thomas Miller, and their agents, employees, the Department of Revenue, and all persons acting in concert with them, are hereby **PERMANENTLY ENJOINED** from enforcing the provisions of House Bill 563 as codified at 2021 Ky. Acts, ch. 167. Accordingly, the Defendants shall not approve the creation or operation of any Account Granting Organizations, the establishment of any Educational Opportunity Accounts, or the granting of any tax credits to fund such organizations and accounts under this legislation.
4. In all other respects, the *Motions for Summary Judgment* filed by the Plaintiffs, the Attorney General, and the Intervenors are **DENIED** without prejudice, in that the Court finds that there are disputed issues of material fact and the Court finds that additional factual discovery, legal argument, and potentially a trial on the merits, will be necessary

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to resolve the remaining claims for relief and defenses asserted by the parties. *See Steelvest, Inc v. Scansteel Service Center*, 908 S.W.2d 104 (Ky. 1995).

5. The Court finds that the portions of this ruling set forth in paragraphs 1-3 above, granting *Summary Judgment* on the claims under §§59 and 184 of the Kentucky Constitution, and granting injunctive relief based on those findings, are **FINAL AND APPEALABLE** and there is no just cause for delay in the entry of this Order.
6. On all other claims, the Court finds that further discovery, legal argument, and fact finding is necessary to adjudicate those claims and so the Court's finality endorsement applies only to the claims and relief under §§59 and 184, and the Court reserves jurisdiction for further proceedings on all other claims.

SO ORDERED, this 8th day of October, 2021.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

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TAB 2

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 21-CI-00461

COUNCIL FOR BETTER EDUCATION, INC., *et al.* **PLAINTIFFS**

v. **ORDER**

HOLLY M. JOHNSON, *et al.* **DEFENDANTS**

This matter is before the Court on the *Motion to Alter or Amend* filed by the Attorney General, and the *Motions to Intervene* and *to Alter or Amend* filed by various school districts seeking clarification of the Court's *Summary Judgment* issued on October 8, 2021. Both the movants for intervention and the Attorney General raise the issue of whether the Court's ruling has the effect of striking down Sections 1-4 of House Bill 563, notwithstanding the Court's explicit statement that Sections 1-4 of the legislation are not at issue in this case. Accordingly, the Court's rulings do not involve Sections 1-4 of the Bill in any way, shape or form. The Court will re-iterate this ruling, for reasons more fully explained below, and **DENY** the *Motion to Intervene* as **MOOT.**

The Attorney General has also requested that the Court make final its rulings denying summary judgment on various other constitutional claims, involving Sections 3, 171, 183, and 186 of the Kentucky Constitution. Because the Court has determined that the record before the Court on those issues is inadequate for a final ruling, it will *decline* to extend its finality determination to the other claims that are presented. However, recognizing that the Court's ruling granting Summary Judgment to the Plaintiffs' on their claims under Sections 59 and 184 of the Kentucky Constitution will be appealed, the Court will hold all other claims in **ABEYANCE** pending a final ruling of appeal. In the event the Court's ruling is affirmed, the case will be over. In the event the Court's ruling is reversed, additional proceedings will be required to adjudicate the remaining

constitutional claims, which the Court has determined require additional factual development and legal arguments.

DISCUSSION

The movants seeking intervention have filed papers indicating that the Kentucky Department of Education has interpreted the Court's ruling to mean that Sections 1-4 of the Act are also unconstitutional, notwithstanding the Court's specific statement that "[t]he portions of the legislation that allow public school students to transfer, without penalty, from their district of residence to another public school district where they do not reside, **have not been challenged and are not at issue here.**" (Opinion and Order, October 8, 2021, p. 3; fn 3 cites to Sections 1-4 of the legislation) (emphasis supplied). The Court recognizes that it later used language in the Conclusion of the *Opinion and Order*, setting forth its ruling, that referenced "House Bill 563" without again specifying that its ruling was limited to Sections 5-17 of the Act. To the extent the Court's language created confusion, it is easily corrected. The ruling of the Court does not involve Sections 1-4 of the Act in any way, shape or form. The Court's discussion of severability, set forth at pages 13-15 of the *Opinion and Order* entered on October 8, 2021, is limited to whether the unconstitutional provisions of Section 7(b)(2) of the Act, limiting private tuition assistance to students who reside in counties with a population of over 90,000, can be severed from the remaining portions of Sections 5-17 of the Act. Because the private school tuition assistance is "integral to the overall scheme" of funding that is provided in Sections 5-17 of the Act, the Court held that Section 7(b)(2) is not severable from the other portions of the Act that were being challenged in this lawsuit. This ruling has no bearing on Sections 1-4 of the Act, which are not at issue in this case. Sections 1-4 of the Act were not litigated in these proceedings. The question of whether the provisions of Sections 1-4 of the Act are constitutional, including the question of

whether those provisions are severable under KRS 446.090, was not raised in this lawsuit, and was not ruled on by this Court. Accordingly, the Court's ruling has no bearing on the validity of Sections 1-4 of the Act.

Likewise, the Attorney General has asked for a finality determination on the remaining issues, raising the concern that the Plaintiffs may assert their arguments on those issues as a separate basis to affirm the judgment. The Court denied summary judgment to both parties on all remaining issues because it determined that there were factual and legal issues that are still in dispute, and the record is incomplete to grant a summary judgment on those issues. Having made that determination, the Court cannot convert its interlocutory order into a final order on those issues.

Under longstanding Kentucky law, the trial court has broad discretion on the issue of whether to provide for certification of the finality of judgment on one claim for relief in a multi-claim action. *Christie v. First American Bank*, 908 S.W.2d 679 (Ky. App. 1995). And the law is equally clear that where an order is essentially interlocutory, it cannot be transformed into a final and appealable judgment merely by including the recitals prescribed in CR 54.02. *Hale v. Deaton*, 528 S.W.2d 719 (Ky. 1975). With regard to the remaining issues presented in this case, beyond the issues of Sections 59 and 184 of the Kentucky Constitution, the Opinion and Order of this Court entered October 8, 2021 is *not* final. The Court's ruling is final as to whether Sections 5-17 of the Act constitute special legislation in violation of Section 59 of the Kentucky Constitution, and whether Sections 5-17 of the Act violate Section 184 of the Kentucky Constitution by taking "sum[s] which are produced by taxation or otherwise for the purpose of common school education" and allocating them to private Account Granting Organizations for purposes outside the common

schools, without the approval of a referendum of "legal voters". No party carried its burden to show entitlement to summary judgment on the remaining issues in the case.

CONCLUSION

For the reasons stated above, IT IS ORDERED AND ADJUDGED as follows:

1. The Court's ruling striking down the provisions of House Bill 563 that are at issue in this case, 2021 Ky. Acts, ch. 167, Sections 5-17, does not apply in any manner to Sections 1-4 of House Bill 563, which are not at issue in this case in any way;
2. The *Motion to Intervene* is **DENIED** as **MOOT;**
3. The Court incorporates its prior ruling entered on October 8, 2021 by reference, and re-affirms its holding that Sections 5-17 of House Bill 563 violate Sections 59 and 184 of the Kentucky Constitution;
4. As to the remaining claims presented in this action, the Court re-affirms its denial of summary judgment, and hereby **ORDERS** that all remaining claims shall be held in **ABEYANCE** pending the finality of the appeal of the Court's ruling declaring Sections 5-17 of the Bill unconstitutional under Sections 59 and 184 of the Kentucky Constitution. Accordingly, no further proceedings in this action shall be conducted until a final adjudication on appeal has been rendered on the appeal of this Court's October 8, 2021 Opinion and Order granting Summary Judgment.
5. This is a final order.

So **ORDERED** this, the 1st day of November, 2021.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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TAB 3

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION No. 21-CI-00461

COUNCIL FOR BETTER EDUCATION, et al. **PLAINTIFFS**

V.

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

ORDER

This matter is before the Court upon Defendants *Motions to Intervene*. On Thursday, June 24, 2021, the parties convened to discuss the pending matters before the Court. First, the Defendants, Akia McNeary and Nancy Deaton, sought leave to intervene in order to defend the Education Opportunity Account Program ("EOAP"). Akia McNeary and Nancy Deaton, as parents and guardians of students who may be eligible for financial assistance under the Act, shall be allowed to permissively intervene under Kentucky Civil Rule 24.02, because of they have asserted an interest in the implementation of the EOAP, and their defenses have questions of law in common with the claims asserted in the Complaint. Their intervention is timely, and will not "unduly delay or prejudice the adjudication of the rights of the original parties." CR 24.02. Second, the Attorney General's Office seeks to intervene, as well, to defend the EOAP. Pursuant to KRS 418.075, where a proceeding involves the validity of a statute, the Attorney General is entitled to be heard. Accordingly, the *Motions to Intervene* filed by the Intervening Individual Defendants and the Attorney General are **GRANTED.** The Answer tendered by the Intervening Individual Defendants on June 9, 2021 as Exhibit C to the *Motion to Intervene* shall

be deemed **FILED** as of the entry of this Order. The Attorney General shall file a responsive pleading by July 2, 2021.

Further, this Court will conduct a hearing on July 7, 2021, via Zoom, to address the Plaintiffs' *Motion for Temporary Injunction*. All Responses to the *Motion for Temporary Injunction* shall be filed by close of business on Friday, July 2, 2021. The Plaintiffs may file a Reply by close of business on Tuesday, July 6, 2021.

Finally, the parties are directed to meet and confer to submit an Agreed Scheduling Order to the Court, which establishes a briefing schedule for the expedited filing and briefing of any initial dispositive motions. Counsel are directed to be prepared to discuss a scheduling order at the hearing on July 7, 2021 in the event they have not entered into an agreement regarding the filing and briefing of such dispositive motions.

SO ORDERED, this 24th day of June, 2021.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

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TAB 4

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 21-CI-00461

COUNCIL FOR BETTER EDUCATION, INC., *et al.* **PLAINTIFFS**

v.

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

and

THE COMMONWEALTH OF KENTUCKY *ex rel.* Attorney General Daniel Cameron, *et al.* **INTERVENING DEFENDANTS**

ORDER

This matter is before the Court on Plaintiffs' *Motion to File Amended Complaint.* CR 15.01 provides that leave to amend "shall be freely given when justice so requires." Similarly, CR 15.02 provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

The Court notes that the issues under Section 59 of the Kentucky Constitution were briefed in the motions for summary judgment. The Commonwealth and the Intervenors at oral argument asserted that the issues under Section 59 had been waived because they were not specifically set forth in the Complaint.

The Court heard the *Motion to Amend* at its regular motion hour docket on Monday, September 27, 2021 at 9:00 a.m. For the foregoing reasons, Plaintiffs' *Motion to File Amended Complaint* is **GRANTED**. The tendered Amended Complaint shall be **FILED** as of the entry of this Order. Additionally, the Court relieves Defendants and Intervenors of any obligation to file an answer to the Amended Complaint and directs that all allegations of the new count are deemed **DENIED**. The Court will decide pending motions based on the record before the Court without further briefing, and the Court will give due consideration to the arguments on futility and the applicability of §59 of the Kentucky Constitution that were set forth by the Defendants and Intervenors in their opposition to the motion to amend.

SO ORDERED, this 27th day of September, 2021.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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TAB 5

CHAPTER 167

(HB 563)

AN ACT relating to education.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 157.350 is amended to read as follows:

Each district which meets the following requirements shall be eligible to share in the distribution of funds from the fund to support education excellence in Kentucky:

(1) Employs and compensates all teachers for not less than one hundred eighty-five (185) days. The Kentucky Board of Education, upon recommendation of the commissioner of education, shall prescribe procedures by which this requirement may be reduced during any year for any district which employs teachers for less than one hundred and eighty-five (185) days, in which case the eligibility of a district for participation in the public school fund shall be in proportion to the length of time teachers actually are employed;

(2) Operates all schools for a minimum school term as provided in KRS 158.070 and administrative regulations of the Kentucky Board of Education. If the school term is less than one hundred eighty-five (185) days, including not less than one hundred seventy (170) student attendance days as defined in KRS 158.070 or one thousand sixty-two (1,062) hours of instructional time, for any reason not approved by the Kentucky Board of Education on recommendation of the commissioner, the eligibility of a district for participation in the public school fund shall be in proportion to the length of term the schools actually operate;

(3) Compensates all teachers on the basis of a single salary schedule and in conformity with the provisions of KRS 157.310 to 157.440;

(4) Includes no nonresident pupils in its average daily attendance, except:

(a) 1. ***Until July 1, 2022,*** pupils listed under a written agreement, which may be for multiple years, with the district of the pupils' legal residence.

2. If an agreement cannot be reached, either board may appeal to the commissioner for settlement of the dispute.

3. The commissioner shall have thirty (30) days to resolve the dispute. Either board may appeal the commissioner's decision to the Kentucky Board of Education.

4. The commissioner and the Kentucky Board of Education shall consider the factors affecting the districts, including but not limited to academic performance and the impact on programs, school facilities, transportation, and staffing of the districts.

5. The Kentucky Board of Education shall have sixty (60) days to approve or amend the decision of the commissioner;~~[and]~~

(b) ***Beginning July 1, 2022, those nonresident pupils admitted pursuant to district nonresident pupil policies adopted under Section 2 of this Act; and***

(c) A nonresident pupil who attends a district in which a parent of the pupil is employed. All tuition fees required of a nonresident pupil may be waived for a pupil who meets the requirements of this paragraph.

This subsection does not apply to those pupils enrolled in an approved class conducted in a hospital and pupils who have been expelled for behavioral reasons who shall be counted in average daily attendance under KRS 157.320;

(5) Any secondary school which maintains a basketball team for boys for other than intramural purposes, shall maintain the same program for girls;

(6) Any school district which fails to comply with subsection (5) of this section shall be prohibited from participating in varsity competition in any sport for one (1) year. Determination of failure to comply shall be made by the Department of Education after a hearing requested by any person within the school district. The hearing shall be conducted in accordance with KRS Chapter 13B. A district under this subsection shall, at the hearing, have an opportunity to show inability to comply.

➔Section 2. KRS 158.120 is amended to read as follows:

(1) ***By July 1, 2022, a board of education shall adopt a nonresident pupil policy to govern the terms under which the district shall allow enrollment of nonresident pupils. Upon allowing nonresident pupil enrollment, the policy shall allow nonresident children to be eligible to enroll in any public school located within the district. The policy shall not discriminate between nonresident pupils, but may recognize enrollment capacity, as determined by the local school district. The nonresident pupil policy and any subsequent changes adopted by a board of education shall be filed with the Kentucky Department of Education no later than thirty (30) days following their adoption.***

(2) Any board of education may charge a reasonable tuition fee per month for each child attending its schools whose parent, guardian, or other legal custodian is not a bona fide resident of the district. Any controversy as to the fee shall be submitted to the Kentucky Board of Education for final settlement. The fee shall be paid by the board of education of the school district in which the pupil resides, except in cases where the board makes provision for the child's education within his district. If a board of education is required to pay a pupil's tuition fee, the pupil shall be admitted to a school only upon proper certificate of the board of education of the district in which he resides.

(3)~~[(2)]~~ When it appears to the board of education of any school district that it is convenient for a pupil of any grade residing in that district to attend an approved public school in another district, the board of education may enter into a tuition contract with the public school authorities of the other school district for that purpose, but before a contract is entered into with public school authorities in another state the school shall have been approved by the state school authorities of that state through the grades in which the pupil belongs. When a district undertakes, under operation of a tuition contract or of law, to provide in its school for pupils residing in another district, the district of their residence shall share the total cost of the school, including transportation when furnished at public expense, in proportion to the number of pupils or in accordance with contract agreement between the two (2) boards.

➔Section 3. KRS 156.070 is amended to read as follows:

(1) The Kentucky Board of Education shall have the management and control of the common schools and all programs operated in these schools, including interscholastic athletics, the Kentucky School for the Deaf, the Kentucky School for the Blind, and community education programs and services

(2) The Kentucky Board of Education may designate an organization or agency to manage interscholastic athletics in the common schools, provided that the rules, regulations, and bylaws of any organization or agency so designated shall be approved by the board, and provided further that any administrative hearing conducted by the designated managing organization or agency shall be conducted in accordance with KRS Chapter 13B.

(a) The state board or its designated agency shall assure through promulgation of administrative regulations that if a secondary school sponsors or intends to sponsor an athletic activity or sport that is similar to a sport for which National Collegiate Athletic Association members offer an athletic scholarship, the school shall sponsor the athletic activity or sport for which a scholarship is offered. The administrative regulations shall specify which athletic activities are similar to sports for which National Collegiate Athletic Association members offer scholarships.

(b) Beginning with the 2003-2004 school year, the state board shall require any agency or organization designated by the state board to manage interscholastic athletics to adopt bylaws that establish as members of the agency's or organization's board of control one (1) representative of nonpublic member schools who is elected by the nonpublic school members of the agency or organization from regions one (1) through eight (8) and one (1) representative of nonpublic member schools who is elected by the nonpublic member schools of the agency or organization from regions nine (9) through sixteen (16). The nonpublic school representatives on the board of control shall not be from classification A1 or D1 schools. Following initial election of these nonpublic school representatives to the agency's or organization's board of control, terms of the nonpublic school representatives shall be staggered so that only one (1) nonpublic school member is elected in each even-numbered year.

(c) The state board or any agency designated by the state board to manage interscholastic athletics shall not promulgate rules, administrative regulations, or bylaws that prohibit pupils in grades seven (7) to eight (8) from participating in any high school sports except for high school varsity soccer and football, or from participating on more than one (1) school-sponsored team at the same time in the same sport. The Kentucky Board of Education, or an agency designated by the board to manage interscholastic athletics,

may promulgate administrative regulations restricting, limiting, or prohibiting participation in high school varsity soccer and football for students who have not successfully completed the eighth grade.

(d) 1. The state board or any agency designated by the state board to manage interscholastic athletics shall allow a member school's team or students to play against students of a non-member at-home private school, or a team of students from non-member at-home private schools, if the non-member at-home private schools and students comply with this subsection.

2. A non-member at-home private school's team and students shall comply with the rules for student athletes, including rules concerning:

a. Age;

b. School semesters;

c. Scholarships;

d. Physical exams;

e. Foreign student eligibility; and

f. Amateurs.

3. A coach of a non-member at-home private school's team shall comply with the rules concerning certification of member school coaches as required by the state board or any agency designated by the state board to manage interscholastic athletics.

4. This subsection shall not allow a non-member at-home private school's team to participate in a sanctioned:

a. Conference;

b. Conference tournament;

c. District tournament;

d. Regional tournament; or

e. State tournament or event.

5. This subsection does not allow eligibility for a recognition, award, or championship sponsored by the state board or any agency designated by the state board to manage interscholastic athletics.

6. A non-member at-home private school's team or students may participate in interscholastic athletics permitted, offered, or sponsored by the state board or any agency designated by the state board to manage interscholastic athletics.

(e) Every local board of education shall require an annual medical examination performed and signed by a physician, physician assistant, advanced practice registered nurse, or chiropractor, if performed within the professional's scope of practice, for each student seeking eligibility to participate in any school athletic activity or sport. The Kentucky Board of Education or any organization or agency designated by the state board to manage interscholastic athletics shall not promulgate administrative regulations or adopt any policies or bylaws that are contrary to the provisions of this paragraph.

(f) Any student who turns nineteen (19) years of age prior to August 1 shall not be eligible for high school athletics in Kentucky. Any student who turns nineteen (19) years of age on or after August 1 shall remain eligible for that school year only. An exception to the provisions of this paragraph shall be made, and the student shall be eligible for high school athletics in Kentucky if the student:

1. Qualified for exceptional children services and had an individual education program developed by an admissions and release committee (ARC) while the student was enrolled in the primary school program;

2. Was retained in the primary school program because of an ARC committee recommendation; and

3. Has not completed four (4) consecutive years or eight (8) consecutive semesters of eligibility following initial promotion from grade eight (8) to grade nine (9).

(g) 1. The state board or any agency designated by the state board to manage interscholastic athletics shall promulgate administrative regulations that permit a school district to employ or assign nonteaching or noncertified personnel or personnel without postsecondary education credit hours to serve in a coaching position. The administrative regulations shall give preference to the hiring or assignment of certified personnel in coaching positions.

2. A person employed in a coaching position shall be a high school graduate and at least twenty-one (21) years of age and shall submit to a criminal background check in accordance with KRS 160.380.

3. The administrative regulations shall specify post-hire requirements for persons employed in coaching positions.

4. The regulations shall permit a predetermined number of hours of professional development training approved by the state board or its designated agency to be used in lieu of postsecondary education credit hour requirements

5. A local school board may specify post-hire requirements for personnel employed in coaching positions in addition to those specified in subparagraph 3. of this paragraph.

(h) Any student who transfers enrollment from a district of residence to a nonresident district under subsection (4)(b) of Section 1 of this Act shall be ineligible to participate in interscholastic athletics for one (1) calendar year from the date of the transfer.

(3) (a) The Kentucky Board of Education is hereby authorized to lease from the State Property and Buildings Commission, or others, whether public or private, any lands, buildings, structures, installations, and facilities suitable for use in establishing and furthering television and related facilities as an aid or supplement to classroom instruction, throughout the Commonwealth, and for incidental use in any other proper public functions. The lease may be for any initial term commencing with the date of the lease and ending with the next ensuing June 30, which is the close of the then-current fiscal biennium of the Commonwealth, with exclusive options in favor of the board to renew the same for successive ensuing bienniums, July 1 in each even year to June 30 in the next ensuing even year; and the rentals may be fixed at the sums in each biennium, if renewed, sufficient to enable the State Property and Buildings Commission to pay therefrom the maturing principal of and interest on, and provide reserves for, any revenue bonds which the State Property and Buildings Commission may determine to be necessary and sufficient, in agreement with the board, to provide the cost of acquiring the television and related facilities, with appurtenances, and costs as may be incident to the issuance of the bonds.

(b) Each option of the Kentucky Board of Education to renew the lease for a succeeding biennial term may be exercised at any time after the adjournment of the session of the General Assembly at which appropriations shall have been made for the operation of the state government for such succeeding biennial term, by notifying the State Property and Buildings Commission in writing, signed by the chief state school officer, and delivered to the secretary of the Finance and Administration Cabinet as a member of the commission. The option shall be deemed automatically exercised, and the lease automatically renewed for the succeeding biennium, effective on the first day thereof, unless a written notice of the board's election not to renew shall have been delivered in the office of the secretary of the Finance and Administration Cabinet before the close of business on the last working day in April immediately preceding the beginning of the succeeding biennium.

(c) The Kentucky Board of Education shall not itself operate leased television facilities, or undertake the preparation of the educational presentations or films to be transmitted thereby, but may enter into one (1) or more contracts to provide therefor, with any public agency and instrumentality of the Commonwealth having, or able to provide, a staff with proper technical qualifications, upon which agency and instrumentality the board, through the chief state school officer and the Department of Education, is represented in such manner as to coordinate matters of curriculum with the curricula prescribed for the public schools of the Commonwealth. Any contract for the operation of the leased television or related facilities may permit limited and special uses of the television or related facilities for other programs in the public interest, subject to the reasonable terms and conditions as the board and the operating agency and instrumentality may agree upon; but any contract shall affirmatively forbid the use of the television or related facilities, at any time or in any manner, in the dissemination of political propaganda or in furtherance of the interest of any political party or candidate for public office, or for commercial advertising. No lease between the board and the State Property and Buildings Commission shall bind the board to pay rentals for more than one (1) fiscal biennium at a time, subject to the

aforesaid renewal options. The board may receive and may apply to rental payments under any lease and to the cost of providing for the operation of the television or related facilities not only appropriations which may be made to it from state funds, from time to time, but also contributions, gifts, matching funds, devises, and bequests from any source, whether federal or state, and whether public or private, so long as the same are not conditioned upon any improper use of the television or related facilities in a manner inconsistent with the provisions of this subsection.

(4) The state board may, on the recommendation and with the advice of the chief state school officer, prescribe, print, publish, and distribute at public expense such administrative regulations, courses of study, curriculums, bulletins, programs, outlines, reports, and placards as each deems necessary for the efficient management, control, and operation of the schools and programs under its jurisdiction. All administrative regulations published or distributed by the board shall be enclosed in a booklet or binder on which the words "informational copy" shall be clearly stamped or printed.

(5) Upon the recommendation of the chief state school officer or his designee, the state board shall establish policy or act on all matters relating to programs, services, publications, capital construction and facility renovation, equipment, litigation, contracts, budgets, and all other matters which are the administrative responsibility of the Department of Education.

➔Section 4. By November 1, 2021, the Kentucky Department of Education shall submit a report to the Legislative Research Commission and the Interim Joint Committee on Education with options on how to ensure the equitable transfer of education funds so that funds follow a nonresident student to a school district of enrollment from a school district of residence. The report shall include recommendations on how the amount should be calculated and what mechanism should be used to conduct the transfer.

➔SECTION 5. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

There is hereby established the Education Opportunity Account Program, also known as the EOA program. The purpose of the EOA program is to give more flexibility and choices in education to Kentucky residents and to address disparities in educational options available to students.

➔SECTION 6. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

As used in Sections 5 to 19 of this Act:

(1) "Account-granting organization" or "AGO" means a nonprofit organization that complies with the requirements of Sections 5 to 19 of this Act and:

(a) Receives contributions, allocates funds, and administers EOAs; or

(b) Is an intermediary organization;

(2) "Contribution" means a donation in the form of cash or marketable securities that is eligible for the tax credit permitted by Section 16 of this Act;

(3) "Curriculum" means a complete course of study for a particular content area or grade level;

(4) "Education opportunity account" or "EOA" means the account to which funds are allocated by an AGO to the parent of an EOA student in order to pay for expenses to educate the EOA student pursuant to the requirements of Sections 5 to 19 of this Act;

(5) "Education service provider" means a person or organization that receives payments from an EOA to provide educational materials and services to EOA students;

(6) "Eligible student" means a resident of Kentucky who:

(a) Is a member of a household with an annual household income at the time of initially applying for an EOA from an AGO under this section of not more than one hundred seventy-five percent (175%) of the amount of household income necessary to establish eligibility for reduced-price meals based on size of household as determined annually by the United States Department of Agriculture applicable to the Commonwealth, pursuant to 42 U.S.C. secs. 1751 to 1789;

(b) Has previously received an EOA from an AGO under this section; or

(c) Is a member of the household of an eligible student that currently has an EOA from an AGO under this section;

(7) "Eligible taxpayer" means an individual or business, including but not limited to a corporation, S corporation, partnership, limited liability company, or sole proprietorship subject to tax imposed under KRS 141.020, 141.040, or 141.0401;

(8) "EOA student" means an eligible student who is participating in the EOA program;

(9) "Income" has the same meaning as in the United States Department of Agriculture, Food and Nutrition Service, Child Nutrition Programs, Income Eligibility Guidelines, Federal Register Vol. 83, No. 89, published May 8, 2018, and as updated annually as authorized by 42 U.S.C. sec. 1758(b)(1)(A);

(10) "Intermediary organization" means a nonprofit organization that complies with the requirements of Sections 5 to 19 of this Act and receives contributions to fund AGOs; and

(11) "Parent" means a biological or adoptive parent, legal guardian, custodian, or other person with legal authority to act on behalf of an EOA student.

➔SECTION 7. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) Each AGO shall create a uniform process for determining the amount allocated to each eligible student's EOA with the following limitations:

(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;

(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 (1/4) of the percentage by which the applicant's household income exceeds the applicable federal reduced lunch household income threshold; and

(c) For students in the foster care system, the AGO shall assume that the student's parents have no income or ability to pay for educational services for the purposes of prioritizing the students and determining the amount of assistance provided under this program.

(2) (a) The funds in an EOA shall not be used for athletics or any associated fees and shall only be used to pay for the tuition and fee expenses permitted by paragraph (b) of this subsection and the following qualifying expenses if covered by the AGO and incurred for the purpose of educating an EOA student:

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.*

(b) In addition to the variety of education-related expenses for public and nonpublic schools in the Commonwealth as provided by paragraph (a) of this subsection, EOA students that are residents of counties with a population of ninety thousand (90,000) or more, as determined by the 2010 decennial report of the United States Census Bureau, shall be permitted to use funds received through the EOA program for tuition and fees to attend nonpublic schools, because students in these counties have access to substantial existing nonpublic school infrastructure and there is capacity in these counties to either grow existing tuition assistance programs or form new nonprofits from existing networks that can provide tuition assistance to students over the course of the pilot program. Pursuant to Section 17 of this Act, the General Assembly shall assess whether the purposes of the EOA program are being fulfilled.

(3) EOA funds shall not be refunded, rebated, or shared with a parent or EOA student in any manner. Any refund or rebate for materials or services purchased with EOA funds shall be credited directly to the student's EOA.

(4) Parents may make payments for the costs of educational materials and services not covered by the funds in their student's EOA, but personal deposits into an EOA shall not be permitted.

(5) Funds allocated to an EOA shall not constitute taxable income to the parent or the EOA student.

(6) (a) An EOA shall remain in force, unless the EOA is closed because of a substantial misuse of funds, and any unused funds shall roll over from quarter to quarter and from year to year until:

1. *The parent withdraws the EOA student from the EOA program;*

2. *The EOA student receives a high school diploma or equivalency certificate; or*

3. *The end of the school year in which the student reaches twenty-one (21) years of age;*

whichever occurs first.

(b) When an EOA is closed, any unused funds shall revert to the AGO that granted the EOA and be allocated by that AGO to fund other EOAs. If the AGO that granted the EOA is no longer operating, the funds shall be transferred to another AGO operating in good standing with the Commonwealth.

(7) An AGO shall first prioritize funding EOAs for students, their siblings, and foster children living in the same household who received an EOA in the previous academic year and then to first-time applicants in accordance with subsection (8) of this section.

(8) For first-time applicants, an AGO shall prioritize awarding EOAs to the applicants as follows:

(a) A majority of funds available for first-time applicants shall be reserved for students whose household income does not exceed that necessary to establish eligibility for reduced-price meals based on size of household as determined annually by the United States Department of Agriculture applicable to the Commonwealth, pursuant to 42 U.S.C. secs. 1751 to 1789. Within in this group of applicants, the funds shall be further prioritized to fund EOAs in the order of the applicants with the most demonstrated financial need; and

(b) The remaining unfunded first-time applicants shall be selected for funding based on a random lottery until all remaining funds are allocated to EOAs.

(9) An AGO may define and limit the services that the EOA funds may cover.

(10) An AGO shall not accept a contribution from an eligible taxpayer if the eligible taxpayer designates that the contribution shall be used to award an EOA to a particular student.

(11) Dependents of the AGO's board of directors, its staff, and its donors are ineligible to receive an EOA.

➔SECTION 8. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) To establish an EOA for an eligible student, the parent shall submit an application to an AGO.

(2) The AGO shall approve an application for an EOA if:

(a) An AGO verifies that the student on whose behalf the parent is applying is an eligible student;

(b) Funds are available for the EOA; and

(c) The parent signs an agreement with the AGO:

1. To use the funds in the EOA only for the covered qualifying expenses;

2. Not to establish any other EOA for the eligible student with any other AGO;

3. To comply with the rules and requirements of the EOA program; and

4. Not to use EOA funds to cover the cost of educational materials or services if they are currently receiving the same types of materials or services through the school district in which the student is enrolled.

(3) The AGO shall annually renew a student's EOA if funds are available unless the student's family income has increased above two hundred fifty percent (250%) of the amount of household income necessary to establish eligibility for reduced-price meals based on size of household as determined annually by the United States Department of Agriculture applicable to the Commonwealth, pursuant to 42 U.S.C. secs. 1751 to 1789.

(4) In the event that an eligible student becomes ineligible for reasons other than fraud or misuse of funds, the AGO may cease funding for the student's EOA provided that:

(a) The AGO immediately suspends payment of additional funds into the student's EOA. For EOAs that have been open for at least one (1) full school year, the EOA shall remain open and active for the parent to make qualifying expenditures to educate the student from funds remaining in the EOA. When no funds remain in the student's EOA, the AGO may close the EOA;

(b) If a parent reapplies to the AGO and signs a new written agreement, payments into the student's existing EOA may resume if the EOA is still open and active. A new EOA may be established if the student's EOA was closed; and

(c) An AGO shall adopt policies to provide the least disruptive process possible for EOA students desiring to leave the EOA program.

➔SECTION 9. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) Prior to making a contribution to an AGO, the taxpayer or an AGO acting on behalf of the taxpayer shall apply to the department for preapproval of the tax credit permitted by Section 16 of this Act in a manner prescribed by the department. Each application shall be submitted separately and shall provide the total amount of proposed contributions and the year or years in which the contributions will be made, whether the proposed contributions will be in the form of cash or marketable securities, and the name of the AGO to which the contributions will be made.

(2) Subject to the annual tax credit cap established by Section 16 of this Act, the department shall preliminarily approve the amount of tax credit within ten (10) business days of receipt of the application and shall notify the taxpayer and the AGO. The notification shall include the amount of the tax credit preliminarily approved, the name of the AGO to which contributions may be made, and any other information the department deems necessary.

(3) If a taxpayer applies or the AGO applies on behalf of the taxpayer for preapproval when no amount of tax credit remains for allocation, but a portion of the total amount of tax credit available is pending

verification, the department shall notify the taxpayer and the AGO that the application is being held in abeyance and will be funded on a first-come, first-served basis or will be denied if all preapproved contributions are timely made.

(4) (a) The taxpayer shall make the preapproved contribution to the AGO no later than the earlier of:

1. Fifteen (15) business days following the date of the department's preapproval notice, excluding weekends and holidays; or

2. June 30 of the fiscal year of the preapproval.

(b) If the preapproved contribution is in the form of marketable securities, the AGO shall monetize the securities within five (5) business days of receipt, excluding weekends and holidays, and notify the department within ten (10) business days of the monetization of the securities. If the monetized value of the marketable securities is less than the amount of the proposed contribution reflected on the application, the taxpayer shall supplement the contribution with additional cash to equal the amount of contribution reflected on the application. The taxpayer shall not receive preapproval for a tax credit in excess of the amount of proposed contribution reflected on the application form.

(5) (a) The AGO shall certify to the department the name of the taxpayer, amount of the contribution made, and the date on which the contribution was made within ten (10) days of when the contribution has been made.

(b) Upon receipt of certification that the contribution has been made or the expiration of the ten (10) day period without certification, whichever occurs first, the department shall modify the amount of credit pending certification, the amount of credit allocated to taxpayers, and the remaining credit available for allocation, as applicable.

➔SECTION 10. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) An organization that seeks to become an AGO shall apply for initial certification or renewal of certification from the department.

(2) An application for initial certification as an AGO shall include:

(a) A copy of the AGO's incorporation documents;

(b) A copy of the AGO's Internal Revenue Service determination letter as a Section 501(c)(3) not-for-profit organization;

(c) A description of the methodology the AGO will use to evaluate whether a student is eligible to establish an EOA;

(d) A description of the application process the AGO will use for parents and eligible students;

(e) A description of the methodology the AGO will use to establish, fund, and manage EOAs;

(f) A description of the process the AGO will use to approve education service providers;

(g) A description of how the AGO will inform parents of approved education service providers; and

(h) A description of the AGO's procedures for crediting refunds from an education service provider back to a student's EOA.

(3) An application for renewal of certification as an AGO shall include:

(a) The AGO's completed Internal Revenue Service Form 990, submitted no later than November 30 of the year before the academic year that the AGO intends to fund EOAs;

(b) A copy of any audit that may be required by the department; and

(c) 1. An annual report that includes:

a. The number of applications the AGO received during the previous academic year, by county and by grade level;

b. The name and address of all students that received EOA funds from the AGO during the previous academic year;

c. When the AGO is an intermediary organization, the name and address of all AGOs that received funds from the intermediary organization during the last fiscal year;

d. The total number of EOAs the AGO maintains;

e. The amount of funds the AGO:

i. Received to fund EOAs during the last fiscal year;

ii. Distributed into EOAs during the last fiscal year;

iii. Has remaining after the distribution into EOAs and any obligations to fund EOAs in the future;

iv. Spent on administrative expenses and an accounting thereof during the last fiscal year; and

v. Spent on fees to private financial management firms or other organizations to maintain records and process transactions of the EOAs;

f. When the AGO is an intermediary organization, the amount of funds the intermediary organization:

i. Received to distribute to AGOs during the last fiscal year;

ii. Distributed to each AGO during the last fiscal year;

iii. Has remaining after the distribution into AGOs and any obligations to distribute to AGOs in the future;

iv. Spent on administrative expenses and an accounting thereof during the last fiscal year; and

v. Spent on fees to private financial management firms or other organizations to maintain records and process transactions;

g. A list of the AGO's approved education service providers; and

h. A description of how the AGO has complied with the operational requirements and responsibilities of Sections 5 to 19 of this Act.

2. The annual report shall also:

a. Comply with uniform financial accounting standards;

b. Be attested to by an independent certified public accountant in accordance with procedures promulgated by the department; and

c. Be free of material misstatements or exceptions.

(4) The department shall only certify an AGO or renew an AGO's certification if the organization meets the requirements established by Sections 5 to 19 of this Act. The department shall issue initial certifications within sixty (60) days of receiving the application and renew certifications within thirty (30) days of receiving the application.

(5) Upon application for renewal, an AGO shall demonstrate that:

(a) It is an intermediary organization that collects contributions exclusively for the use by AGOs; or

(b) It includes two (2) or more education service providers in its EOA program and has awarded at least fifty (50) EOAs aggregating a minimum of two hundred thousand dollars ($200,000) in the previous year and is expected to award at least fifty (50) EOAs aggregating a minimum of two hundred thousand dollars ($200,000) in the succeeding year.

➔SECTION 11. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) An AGO shall ensure that at least ninety percent (90%) of the total annual contributions received are allocated to EOAs no later than the last day of the AGO's immediately succeeding calendar year or fiscal year, as applicable, unless the current year's total annual contributions received by the AGO exceed an amount equal to the average of the total annual contributions received in the immediately preceding three

(3) years by more than fifteen percent (15%), in which case the excess amount may be carried forward and expended for EOAs in three (3) equal installments over the immediately succeeding three (3) years.

(2) An AGO shall maintain separate accounts for EOA funds and operating funds.

(3) Any interest that accrues from contributions that are eligible for the tax credit permitted by Section 16 of this Act shall be allocated by the AGO to fund EOAs.

(4) An AGO shall create a standard application process for parents to establish their student's eligibility for an EOA. An AGO shall ensure that the application is readily available to interested families and may be submitted through various sources, including the Internet.

(5) An AGO shall provide parents with a written explanation of the allowable uses of EOA funds, the responsibilities of parents, and the duties of the AGO and the role of any private financial management firms or other organizations that the AGO may contract with to process EOA transactions or maintain records for other aspects of the EOA program.

(6) (a) An AGO may transfer funds to another AGO if additional funds are required to meet EOA demands at the receiving AGO or if the transferring AGO determines it cannot continue to operate due to any reason.

(b) If funds are transferred for the purpose of meeting EOA demands, no more than a combined aggregate of ten percent (10%) of the AGOs' total annual contributions received may be retained by the AGOs for administrative expenses.

(c) All transferred funds shall be allocated by the receiving AGO to its account for EOAs.

(d) All transferred amounts received by an AGO shall be separately disclosed in the receiving AGO's annual report for certification renewal pursuant to Section 10 of this Act.

(e) An AGO that receives a transfer of funds from an AGO that has determined it will not continue to operate shall agree to fund the EOAs established by the transferring AGO to the extent funds are available. The receiving AGO shall also prioritize the funding of transferred EOAs before funding new EOA applicants.

(7) An AGO may accept donations that are not eligible for the tax credit permitted by Section 16 of this Act, gifts, and grants to cover administrative costs, to inform the public about the EOA program, to fund additional EOAs or to offer assistance outside of the EOA program. Donations that are not eligible for the tax credit permitted by Section 16 of this Act shall not be subject to Sections 5 to 19 of this Act.

➔SECTION 12. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) To administer the tax credit and the total annual tax credit cap established in Section 16 of this Act, the department shall:

(a) Create the tax credit application form, the forms to be used by the department to notify the taxpayer and the AGO of preapproval or denial of the credit, and the educational materials to be distributed by the AGO;

(b) Create a Web site listing the amount of the total credit pending verification, the amount of the total credit allocated to date, and the remaining credit available to taxpayers making contributions to AGOs;

(c) Notify the taxpayer and the AGO of the amount of credit allocated to the taxpayer upon certification that the contribution has been made by the issuance of a tax credit allocation letter, which the taxpayer shall submit with the taxpayer's return when claiming the credit; and

(d) Collect necessary data to provide the report required by subsection (3) of this section.

(2) On or before January 1 of each year, the department shall publish on its Web site:

(a) A list of organizations that have been approved by the department to perform independent financial analyses of parents' demonstrated financial needs; and

(b) A list of AGOs.

1. If an AGO fails to meet the requirements of this section, the department shall not include the organization on the list of AGOs the following calendar year.

2. *Only contributions to AGOs on the list maintained by the department for each calendar year shall be recognized for tax credits awarded under Section 16 of this Act.*

(3) *The department shall produce and publish on its Web site an annual report that aggregates the data obtained from the annual reports submitted by AGOs for the renewal of their certification pursuant to Section 10 of this Act. The department's report shall not include any identifying information of EOA students or AGOs that would violate the confidentiality requirements in subsection (1) of Section 21 of this Act.*

➔SECTION 13. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) *The department may conduct an audit of an AGO or contract for the auditing of an AGO.*

(2) (a) *In the event that the department determines that there has been a violation of Sections 5 to 19 of this Act by an AGO, the department shall send written notice to the AGO.*

(b) *The AGO that receives written notice of a violation will have sixty (60) days from receipt of notice to correct the violation identified by the department.*

(c) *If the AGO fails or refuses to comply after sixty (60) days, the department may revoke the AGO's certification to participate in the EOA program.*

(3) *An AGO whose certificate has been revoked under this section:*

(a) *May appeal the revocation of its certification to the Kentucky Claims Commission pursuant to KRS 49.220;*

(b) *Shall continue administering EOAs that were donated prior to the date of notice stated on the revocation;*

(c) *Shall not accept any further contributions for the purpose of funding EOAs on or after the date of notice stated on the revocation; and*

(d) *Shall refund any contributions that were received for the purpose of funding EOAs on or after the date of notice stated on the revocation.*

➔SECTION 14. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) (a) *Each AGO shall implement a commercially viable, cost-effective, and parent-friendly system for payment of services from EOAs to education service providers.*

(b) *The AGO shall not adopt a system that relies exclusively on requiring parents to be reimbursed for out-of-pocket expenses, but shall provide maximum flexibility to parents by facilitating direct payments to education service providers or requests for preapproval of and reimbursements for qualifying expenses.*

(c) *An AGO may contract with private financial management firms or other organizations to develop the payment system.*

(2) *An AGO may contract with private financial management firms or other organizations to maintain records and process transactions of the EOAs.*

(3) *If funding is available, an AGO shall continue making payments into an EOA until:*

(a) *The parent does not renew the EOA;*

(b) *The AGO determines that the EOA student's family income has increased above two hundred fifty percent (250%) of the amount of household income necessary to establish eligibility for reduced-price meals based on size of household as determined annually by the United States Department of Agriculture applicable to the Commonwealth, pursuant to 42 U.S.C. secs. 1751 to 1789;*

(c) *The AGO determines that there was substantial misuse of the funds in the EOA; or*

(d) *The EOA student receives a high school diploma or equivalency certificate.*

(4) *Each AGO shall establish a process for approving education service providers.*

(5) *An AGO may approve education service providers on their own initiative, at the request of parents, or upon request from prospective education service providers.*

➔SECTION 15. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) Nothing in Sections 5 to 19 of this Act shall be deemed to limit the independence or autonomy of an education service provider or to make the actions of an education service provider the actions of the state government.

(2) Nothing in Sections 5 to 19 of this Act shall be construed to expand the regulatory authority of the state, its officers, or any county school district to impose any additional regulation of education service providers beyond those necessary to enforce the requirements of the EOA Program.

(3) An education service provider that accepts payment from an EOA pursuant to Sections 5 to 19 of this Act is not an agent of the state or federal government.

(4) 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.

➔SECTION 16. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

(1) (a) Effective for taxable years beginning on or after January 1, 2021, but before January 1, 2026, a nonrefundable, nontransferable tax credit shall be permitted against the tax imposed by KRS 141.020 or 141.040 and 141.0401, with the ordering of credit as provided in Section 20 of this Act, as applicable, for contributions made during a taxable year to one (1) or more AGOs in accordance with the EOA program. To qualify for this credit, a taxpayer filing as an individual shall elect to claim a federal and Kentucky contribution deduction associated with the contributions made to an AGO that does not exceed an amount equal to the total contribution for the taxable year less the amount of credit allowed by this section for the taxable year.

(b) If the taxpayer is a pass-through entity, the taxpayer shall apply the credit against the limited liability entity tax imposed by KRS 141.0401, and shall also pass the credit through to its members, partners, or shareholders in the same proportion as the distributive share of income or loss is passed through.

(2) The aggregate value of the total annual tax credit cap awarded shall not exceed twenty-five million dollars ($25,000,000).

(3) The credit amount awarded per taxpayer per taxable year shall be no more than the lesser of:

(a) Ninety-five percent (95%) of the total contributions made to an AGO, except as provided in subsection (4) of this section; or

(b) One million dollars ($1,000,000).

(4) (a) The taxpayer may elect to pledge a contribution for multiple taxable years, not to exceed a total of four (4) taxable years.

(b) If the multi-year pledge is made by the taxpayer and the amount of the contributions for each of the multiple taxable years is equal to or more than the amount of contributions made to the AGO in the taxable year within which the pledge is made, the amount of allowable credit shall be increased by two (2) percentage points to ninety-seven percent (97%) in the taxable year within which the pledge is made and for each pledged year.

(c) If the taxpayer does not remit the pledged amount of contributions during any taxable year for which a multi-year pledge is made, the taxpayer shall repay the portion of the credit resulting from the increase allowed by this subsection.

(5) Any tax credit awarded under this section that is not used by the taxpayer in the current taxable year may be carried forward for up to five (5) succeeding taxable years until the tax credit has been utilized.

(6) Tax credits under this section shall be awarded on a first-come, first-served basis each fiscal year within the limitations set forth in this section. The date and time stamp from each application for preapproval shall establish the order in which the application was received. For contributions pledged for multiple tax years, the contribution shall be considered the first in line for the years subsequent to the initial year of the pledge.

➔SECTION 17. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

The department shall provide the following information to the Interim Joint Committee on Appropriations and Revenue no later than November 1, 2022, and no later than November 1 of each year thereafter as long as the tax credit permitted by Section 16 of this Act is taken:

(1) All information contained in each annual report filed by an AGO as required by Section 10 of this Act and the administrative regulations promulgated thereunder, with each eligible student's identifying information removed and replaced with an assigned unique identification number;

(2) The number and total amount of EOAs awarded by AGOs to EOA students reported by household income range intervals of five thousand dollars ($5,000);

(3) The number and total amount of EOAs awarded by AGOs to EOA students:

(a) Who are currently in the Commonwealth's foster care program;

(b) Who have previously received an EOA under this section; and

(c) Who are members of a household in which a student has previously received an EOA under this section; and

(4) Any other information that may be necessary to assist the members of the General Assembly in determining that the purposes of this tax credit are being fulfilled.

➔SECTION 18. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

If any part of Sections 5 to 19 of this Act is challenged in state court as violating either the state or federal constitutions, parents of students who would meet the criteria for being eligible students as defined by Section 6 of this Act shall be permitted to intervene as of right in such lawsuit for the purposes of defending the EOA program's constitutionality.

➔SECTION 19. A NEW SECTION OF KRS CHAPTER 141 IS CREATED TO READ AS FOLLOWS:

Sections 5 to 19 of this Act may be cited as the "Education Opportunity Account Act" or "EOA Act."

➔SECTION 20. KRS 141.0205 is amended to read as follows:

If a taxpayer is entitled to more than one (1) of the tax credits allowed against the tax imposed by KRS 141.020, 141.040, and 141.0401, the priority of application and use of the credits shall be determined as follows:

(1) The nonrefundable business incentive credits against the tax imposed by KRS 141.020 shall be taken in the following order:

(a) The limited liability entity tax credit permitted by KRS 141.0401;

(b) The economic development credits computed under KRS 141.347, 141.381, 141.384, 141.3841, 141.400, 141.401, 141.403, 141.407, 141.415, 154.12-207, and 154.12-2088;

(c) The qualified farming operation credit permitted by KRS 141.412;

(d) The certified rehabilitation credit permitted by KRS 171.397(1)(a);

(e) The health insurance credit permitted by KRS 141.062,

(f) The tax paid to other states credit permitted by KRS 141.070;

(g) The credit for hiring the unemployed permitted by KRS 141.065;

(h) The recycling or composting equipment credit permitted by KRS 141.390;

(i) The tax credit for cash contributions in investment funds permitted by KRS 154.20-263 in effect prior to July 15, 2002, and the credit permitted by KRS 154.20-258;

(j) The research facilities credit permitted by KRS 141.395;

(k) The employer High School Equivalency Diploma program incentive credit permitted under KRS 151B.402;

(l) The voluntary environmental remediation credit permitted by KRS 141.418;

(m) The biodiesel and renewable diesel credit permitted by KRS 141.423;

(n) The clean coal incentive credit permitted by KRS 141.428;

(o) The ethanol credit permitted by KRS 141.4242;

(p) The cellulosic ethanol credit permitted by KRS 141.4244;

(q) The energy efficiency credits permitted by KRS 141.436;

(r) The railroad maintenance and improvement credit permitted by KRS 141.385;

(s) The Endow Kentucky credit permitted by KRS 141.438;

(t) The New Markets Development Program credit permitted by KRS 141.434;

(u) The distilled spirits credit permitted by KRS 141.389;

(v) The angel investor credit permitted by KRS 141.396;

(w) The film industry credit permitted by KRS 141.383 for applications approved on or after April 27, 2018;

(x) The inventory credit permitted by KRS 141.408; and

(y) The renewable chemical production credit permitted by KRS 141.4231.

(2) After the application of the nonrefundable credits in subsection (1) of this section, the nonrefundable personal tax credits against the tax imposed by KRS 141.020 shall be taken in the following order:

(a) The individual credits permitted by KRS 141.020(3);

(b) The credit permitted by KRS 141.066;

(c) The tuition credit permitted by KRS 141.069;

(d) The household and dependent care credit permitted by KRS 141.067;~~[and]~~

(e) The income gap credit permitted by KRS 141.066*; and*

(f) The Education Opportunity Account Program tax credit permitted by Section 16 of this Act.

(3) After the application of the nonrefundable credits provided for in subsection (2) of this section, the refundable credits against the tax imposed by KRS 141.020 shall be taken in the following order:

(a) The individual withholding tax credit permitted by KRS 141.350;

(b) The individual estimated tax payment credit permitted by KRS 141.305;

(c) The certified rehabilitation credit permitted by KRS 171.3961 and 171.397(1)(b); and

(d) The film industry tax credit permitted by KRS 141.383 for applications approved prior to April 27, 2018.

(4) The nonrefundable credit permitted by KRS 141.0401 shall be applied against the tax imposed by KRS 141.040.

(5) The following nonrefundable credits shall be applied against the sum of the tax imposed by KRS 141.040 after subtracting the credit provided for in subsection (4) of this section, and the tax imposed by KRS 141.0401 in the following order:

(a) The economic development credits computed under KRS 141.347, 141.381, 141.384, 141.3841, 141.400, 141.401, 141.403, 141.407, 141.415, 154.12-207, and 154.12-2088;

(b) The qualified farming operation credit permitted by KRS 141.412;

(c) The certified rehabilitation credit permitted by KRS 171.397(1)(a);

(d) The health insurance credit permitted by KRS 141.062;

(e) The unemployment credit permitted by KRS 141.065;

(f) The recycling or composting equipment credit permitted by KRS 141.390;

(g) The coal conversion credit permitted by KRS 141.041;

(h) The enterprise zone credit permitted by KRS 154.45-090, for taxable periods ending prior to January 1, 2008;

(i) The tax credit for cash contributions to investment funds permitted by KRS 154.20-263 in effect prior to July 15, 2002, and the credit permitted by KRS 154.20-258;

(j) The research facilities credit permitted by KRS 141.395;

(k) The employer High School Equivalency Diploma program incentive credit permitted by KRS 151B.402;

(l) The voluntary environmental remediation credit permitted by KRS 141.418;

(m) The biodiesel and renewable diesel credit permitted by KRS 141.423;

(n) The clean coal incentive credit permitted by KRS 141.428;

(o) The ethanol credit permitted by KRS 141.4242;

(p) The cellulosic ethanol credit permitted by KRS 141.4244;

(q) The energy efficiency credits permitted by KRS 141.436;

(r) The ENERGY STAR home or ENERGY STAR manufactured home credit permitted by KRS 141.437;

(s) The railroad maintenance and improvement credit permitted by KRS 141.385;

(t) The railroad expansion credit permitted by KRS 141.386;

(u) The Endow Kentucky credit permitted by KRS 141.438;

(v) The New Markets Development Program credit permitted by KRS 141.434;

(w) The distilled spirits credit permitted by KRS 141.389;

(x) The film industry credit permitted by KRS 141.383 for applications approved on or after April 27, 2018;

(y) The inventory credit permitted by KRS 141.408;~~[and]~~

(z) The renewable chemical production tax credit permitted by KRS 141.4231*; and*

(aa) The Education Opportunity Account Program tax credit permitted by Section 16 of this Act.

(6) After the application of the nonrefundable credits in subsection (5) of this section, the refundable credits shall be taken in the following order:

(a) The corporation estimated tax payment credit permitted by KRS 141.044;

(b) The certified rehabilitation credit permitted by KRS 171.3961 and 171.397(1)(b); and

(c) The film industry tax credit permitted by KRS 141.383 for applications approved prior to April 27, 2018.

➔Section 21. KRS 131.190 is amended to read as follows:

(1) No present or former commissioner or employee of the department, present or former member of a county board of assessment appeals, present or former property valuation administrator or employee, present or former secretary or employee of the Finance and Administration Cabinet, former secretary or employee of the Revenue Cabinet, or any other person, shall intentionally and without authorization inspect or divulge any information acquired by him of the affairs of any person, or information regarding the tax schedules, returns, or reports required to be filed with the department or other proper officer, or any information produced by a hearing or investigation, insofar as the information may have to do with the affairs of the person's business.

(2) The prohibition established by subsection (1) of this section shall not extend to:

(a) Information required in prosecutions for making false reports or returns of property for taxation, or any other infraction of the tax laws;

(b) Any matter properly entered upon any assessment record, or in any way made a matter of public record;

(c) Furnishing any taxpayer or his properly authorized agent with information respecting his own return;

(d) Testimony provided by the commissioner or any employee of the department in any court, or the introduction as evidence of returns or reports filed with the department, in an action for violation of state or federal tax laws or in any action challenging state or federal tax laws;

(e) Providing an owner of unmined coal, oil or gas reserves, and other mineral or energy resources assessed under KRS 132.820, or owners of surface land under which the unmined minerals lie, factual information about the owner's property derived from third-party returns filed for that owner's property, under the provisions of KRS 132.820, that is used to determine the owner's assessment. This

information shall be provided to the owner on a confidential basis, and the owner shall be subject to the penalties provided in KRS 131.990(2). The third-party filer shall be given prior notice of any disclosure of information to the owner that was provided by the third-party filer;

(f) Providing to a third-party purchaser pursuant to an order entered in a foreclosure action filed in a court of competent jurisdiction, factual information related to the owner or lessee of coal, oil, gas reserves, or any other mineral resources assessed under KRS 132.820. The department may promulgate an administrative regulation establishing a fee schedule for the provision of the information described in this paragraph. Any fee imposed shall not exceed the greater of the actual cost of providing the information or ten dollars ($10);

(g) Providing information to a licensing agency, the Transportation Cabinet, or the Kentucky Supreme Court under KRS 131.1817;

(h) Statistics of gasoline and special fuels gallonage reported to the department under KRS 138.210 to 138.448;

(i) Providing any utility gross receipts license tax return information that is necessary to administer the provisions of KRS 160.613 to 160.617 to applicable school districts on a confidential basis;

(j) Providing documents, data, or other information to a third party pursuant to an order issued by a court of competent jurisdiction; or

(k) Providing information to the Legislative Research Commission under:

1. KRS 139.519 for purposes of the sales and use tax refund on building materials used for disaster recovery;
2. KRS 141.436 for purposes of the energy efficiency products credits;
3. KRS 141.437 for purposes of the ENERGY STAR home and the ENERGY STAR manufactured home credits;
4. KRS 148.544 for purposes of the film industry incentives;
5. KRS 154.26-095 for purposes of the Kentucky industrial revitalization tax credits and the job assessment fees;
6. KRS 141.068 for purposes of the Kentucky investment fund;
7. KRS 141.396 for purposes of the angel investor tax credit;
8. KRS 141.389 for purposes of the distilled spirits credit;
9. KRS 141.408 for purposes of the inventory credit;
10. KRS 141.390 for purposes of the recycling and composting credit;
11. KRS 141.3841 for purposes of the selling farmer tax credit;~~[and]~~
12. KRS 141.4231 for purposes of the renewable chemical production tax credit; ***and***
13. ***Section 17 of this Act for purposes of the Education Opportunity Account Program tax credit.***

(3) The commissioner shall make available any information for official use only and on a confidential basis to the proper officer, agency, board or commission of this state, any Kentucky county, any Kentucky city, any other state, or the federal government, under reciprocal agreements whereby the department shall receive similar or useful information in return.

(4) Access to and inspection of information received from the Internal Revenue Service is for department use only, and is restricted to tax administration purposes. Information received from the Internal Revenue Service shall not be made available to any other agency of state government, or any county, city, or other state, and shall not be inspected intentionally and without authorization by any present secretary or employee of the Finance and Administration Cabinet, commissioner or employee of the department, or any other person.

(5) Statistics of crude oil as reported to the ***department***~~[Department of Revenue]~~ under the crude oil excise tax requirements of KRS Chapter 137 and statistics of natural gas production as reported to the ***department***~~[Department of Revenue]~~ under the natural resources severance tax requirements of KRS Chapter

143A may be made public by the department by release to the Energy and Environment Cabinet, Department for Natural Resources.

(6) Notwithstanding any provision of law to the contrary, beginning with mine-map submissions for the 1989 tax year, the department may make public or divulge only those portions of mine maps submitted by taxpayers to the department pursuant to KRS Chapter 132 for ad valorem tax purposes that depict the boundaries of mined-out parcel areas. These electronic maps shall not be relied upon to determine actual boundaries of mined-out parcel areas. Property boundaries contained in mine maps required under KRS Chapters 350 and 352 shall not be construed to constitute land surveying or boundary surveys as defined by KRS 322.010 and any administrative regulations promulgated thereto.

Veto overridden March 30, 2021.