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M. Katherine Bing, Clerk
Supreme Court of Kentucky

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2023-SC-0498

RUSSELL COLEMAN, Attorney General

APPELLANT

v.

BRIEF OF APPELLEE
ROBBIE FLETCHER, COMMISSIONER OF EDUCATION

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*

APPELLEES

ON APPEAL FROM

Kentucky Court Of Appeals
Case No. 2022-CA-0964

Jefferson Circuit Court
Case No. 22-CI-2816, Division Four (4)
Judge Charles L. Cunningham, Jr

*** **

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Appellee’s Brief was electronically filed through the CountNet 2.0 system and delivered to Katie Bing, Clerk, Kentucky Supreme Court; all parties of record; and one (1) copy thereof was served via regular mail to Judge Charles L. Cunningham, Jr. Jefferson County Judicial Center, 700 West Jefferson Street, Division Four, Louisville, Kentucky 40202 this 5th day of July 2024. This will further certify that the Record on Appeal was not withdrawn by the undersigned.

Respectfully submitted,

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INTRODUCTION

This case presents the issue of whether SB 1 (2022 RS) is unconstitutional as applied to the Jefferson County Board of Education (JCBE).

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STATEMENT CONCERNING ORAL ARGUMENT

It is the position of the Appellee that oral arguments would not assist the Court concerning the issue presented by the Appellant. The Appellee believes this is an issue that can be taken under submission based on the briefs.

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COUNTERSTATEMENT OF THE CASE

I. Statutory Framework

As explained in the Appellee’s brief before the Court of Appeals, Robbie Fletcher, Commissioner of Education (“Commissioner”) was made a party in the underlying matter pursuant to KRS 156.210(3). Concerning the Commissioner’s duties as they relate to SB 1, KRS 156.210(3) provides that:

When [the chief state school officer] or his assistants find any mismanagement, misconduct, violation of law, or wrongful or improper use of any district or state school fund, or neglect in the performance of duty on the part of any official, he **shall** report the same, and any other violation of the school laws discovered by him, to the Kentucky Board of Education, which **shall**, through the chief state school officer or one (1) of his assistants, call in the county attorney or the Commonwealth’s attorney in the county or district where the violation occurs, and the attorney so called in shall assist in the indictment, prosecution, and conviction of the accused. If prosecution is not warrantable, the Kentucky Board of Education may rectify and regulate all such matters.

(Emphasis added.)

KRS 156.148(3) provides, in part, that the Commissioner “shall carry out all duties assigned to him by law[.]” Accordingly, the Commissioner’s involvement in the defense of the trial court matter was in the spirit of acknowledging the presumption of constitutionality of SB 1 and recognizing the simultaneous need for judicial interpretation in some instances to ensure full compliance with the legal duties of the Commissioner set forth in KRS Chapter 156.

II. Legislative History

While the following was set forth in briefing at the trial court and Court of Appeals, a summary is provided again here for ease of reference. The amendments to Section 3 of SB 1 were first introduced via House Committee Substitute (HCS) 1, which was heard and adopted

by the House Education Committee on March 22, 2022.¹ Sen. Schickel and Rep. Massey appeared before the Committee to explain the legislation and HCS 1. They were joined by Eric Kennedy from the Kentucky School Boards Association (KSBA). A high-level overview of the HCS 1 was provided by Rep. Massey. Thereafter, Rep. Bojanowski of District 32 in Jefferson County asked why there was a provision which removed local control from the Jefferson County Board of Education to meet more frequently than provided in HCS 1. Rep. Massey responded in part:

In regards to the particular nuances regarding that language, I cannot speak to that. What I can tell you, Representative, is that this was brought to me by folks from Jefferson County that said ‘the process we have in place is working effectively and therefore we would like to see that continue and not alter that through this new language that’s part of Senate Bill 1.’

Eric Kennedy from KSBA responded to a similar inquiry:

We - KSBA was not - that is not a part of the bill that we really have had a lot of involvement with, to be honest. [...] So I can’t speak in detail to the background on that piece of the committee sub that you see. However, I will say very generally KSBA for many years has advocated that we need to protect local decision making with the locally elected school board for the things that are in their statutory role as part of our common school system governance[.]

SB 1, with HCS 1, passed out of the committee with a vote of 13-7.

SB1 then proceeded to the House on the same day.² As it relates to Section 3, on the house floor, Rep. Massey explained essentially that:

There are three large components that are rolled into one committee substitute that we discussed actually in committee today. The first one is a request with regards to Jefferson County which had done some things differently - had gotten some approval

¹ *KET Legislative Archives – House Education Committee*, March 22, 2022, <https://www.ket.org/legislature/archives/?nola=WGAOS+023253&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcnRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzAyMzI1My5tcDQvcGxheWxpc3QubTN1OA%3D%3D>, discussion beginning at approximately 1:13.

² *KET Legislative Archives – House Chambers Part II*, March 22, 2022, <https://www.ket.org/legislature/archives/?nola=WGAOS+023259&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcnRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzIyMzI1OS5tcDQvcGxheWxpc3QubTN1OA%3D%3D&part=2>, discussion beginning at approximately 50:18.

to do some things differently. They had the largest board in the state of Kentucky. There was at times a power struggle that existed between the board and the superintendent and how the day-to-day operations would be able to run. So, this language was brought to us and asked to be added into this as a house committee sub to allow them to continue to do what we believe is good work in Jefferson County in trying to deal with that particular issue.

There was no debate on HCS 1 and it was adopted. Thereafter, Rep. Nemes addressed House Floor Amendment (HFA) 7 to SB 1. Rep. Nemes explained the amendment:

The second thing that it does of two things is that in one of the provisions that was put on the committee sub today it said that the school board can only meet one out of every eight weeks. This is an amendment that would make it one of out every – it could meet every four weeks. That’s on page 32 line 4. And it also would take a unanimous vote to overturn any policy that the superintendent has made. That seems a little bit too far and so what this does is on page 33 line 9 it takes two-thirds to overturn a policy that the superintendent has come up with.

There was no debate on HFA 7 and it was adopted.

On March 24, 2022, SB 1 was taken up by the Senate.³ Sen. Schickel explained the bill, including HCS 1 and HFA 7:

House floor amendment number 7 is language for the jurisdiction of Louisville which basically keeps what they’re doing in place. And the house committee sub, that also is language for Louisville, plus it changes sick days a little bit, Mr. President, in that apparently teachers that got COVID were not allowed to use sick days, but teachers who were quarantined did. And this allows them to use up to fifteen days, those teachers who were not allowed to do that.

Final passage of SB 1 with HCS 1 and HFA 7 passed with a vote of 21-15 in the Senate.

When taken together, the nexus between Jefferson County’s status as a consolidated local government and Section 3 remains uncertain.

³ *KET Legislative Archives – Senate Chambers Part II*, March 24, 2022, <https://www.ket.org/legislature/archives/?nola=WGAOS+023271&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcnRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzIyMzI3MS5tcDQvcGxheWxpc3QubTNlOA%3D%3D&part=2>, discussion beginning at approximately 30:30.

ARUGUMENT

I. The Commissioner's Authority Under KRS 156.210

On appeal, the Attorney General addresses the Commissioner's involvement in the underlying matter on the basis of KRS 156.210 and whether the superintendent of the Jefferson County Public School District should have been named in the suit. The Commissioner admits no action relating to JCBE and SB 1 has been taken pursuant to his authority under KRS 156.210. The Commissioner had no opportunity to take such action, as JCBE quickly moved for and was granted declaratory judgment prior to the effective date of SB 1. In light of that judgment, the Commissioner does not take a position on how he would have responded to a violation of SB 1 or what action may have been taken against the JCBE, but he agrees that his authority would have been limited to a referral to an outside enforcement agency or the Kentucky Board of Education consistent with the statute. However, the Commissioner would add that he is the Board's executive officer and would be the state agent carrying out any enforcement action taken by the Board. KRS 156.010(1)(g); KRS 156.029(8); KRS 156.148(3).

Despite the Attorney General's description of the Commissioner of Education – the Chief State School Officer for the Commonwealth – as “cagey”, the Commissioner has maintained a consistent position throughout this litigation: he would carry out all duties prescribed by law under the mandatory presumption that SB 1 is constitutional. *Rose v. the Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). Notwithstanding that, the Commissioner also acknowledged that JCBE's challenge appeared to raise legitimate questions regarding the bill's constitutionality and the Commissioner's associated duties. The Attorney General was initially served pursuant to KRS 418.075, allowing him to be heard regarding the constitutionality of a state statute. However, the Attorney General seeks instead

to avoid a determination altogether. That result would leave the parties to speculate as to how courts may rule in the future while obligating the Commissioner to report JCBE to prosecutors and the Kentucky Board of Education for violations of a statute that has now been held unconstitutional by two lower courts.

II. Whether SB 1 is Unconstitutional

The issue of whether SB 1 is unconstitutional special legislation is an issue to be decided by the Court which has been addressed by the Attorney General and the JCBE. In his capacity as the Commissioner of Education, the Appellee requests clarity on the issue so his duties to the Department of Education and Kentucky Board of Education can be fulfilled.

As a practical matter, when a county becomes a consolidated local government, pursuant to SB 1 such an action now causes changes in the authority and operations of the local school board which is a separate state governmental entity with responsibility to implement state school laws consistent with the Kentucky constitution. The operations of the county as a government entity (whether a consolidated local government or otherwise) are wholly unrelated to the operations of the publicly elected local board of education. *Louisville/Jefferson Cnty. Metro Gov't v. O'Shea's-Baxter, LLC*, 438 S.W.3d 379 (Ky. 2014). The Attorney General argues that *O'Shea's-Baxter* is not applicable here because it relied on decisions that predate the current version of §156 of the Kentucky Constitution, but it is not clear why that distinction matters.

This Court also recently held in *Calloway County Sherriff's Department v. Woodall*, 607 S.W.3d 557 (Ky. 2020), that a statute implicated Ky Const. §59 when it “appl[ied] to a particular individual, object, or locale”. The Court added in a footnote that a prior decision striking down a statute as special legislation in *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010) applied an incorrect standard but reached the correct result because “the statute applied to a particular object”. The statute at issue there created a scholarship

program for 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. Just as SB 1 currently applies only to Jefferson County, the statute in *Pennybacker* applied to only one school. The Attorney General reasons that the *Pennybacker* statute described a “closed class” that “[could] only ever apply to a single school”, but it is again unclear how the language in *Pennybacker* is distinct from the classification in SB 1 of “*a* county school district in *a* county with *a* consolidated local government adopted under KRS Chapter 67C”.

In light of the existing case law, the Commissioner seeks clarity on whether there is a constitutionally sufficient link between SB 1 and consolidated local governments.

CONCLUSION

In sum, the Appellee defers to the Attorney General’s Office to defend the constitutionality of SB 1. Robbie Fletcher, Commissioner of Education, by counsel, respectfully requests that this Honorable Court clarify the constitutionality of SB 1.

Respectfully submitted,

/s/ Donald J. Haas

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