COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 23-CI-00020

COUNCIL FOR BETTER EDUCATION, INC., *et al*. PLAINTIFFS v. OPINION and ORDER

JASON GLASS in his official capacity as COMMISSIONER OF THE KENTUCKY DEPARTMENT OF EDUCATION, *et al*. DEFENDANTS

This action is before the Court on Cross-Motions for Summary Judgment under CR 56. The Plaintiffs seek a declaration of rights under KRS 418.040 that House Bill 9 (HB 9) enacted by the 2022 General Assembly (2022 Ky. Acts, ch. 213) is unconstitutional. HB 9, for the first time in Kentucky history, provides for public funding and allocation of tax dollars to private entities known as charter schools. The legislation exempts charter schools "from all statutes and administrative regulations applicable to the state board, a local school district, or a school"[1] notwithstanding the appropriation of tax dollars to such schools.

The Plaintiffs, led by the Council for Better Education (CBE)[2], argue that this funding of private educational entities with tax dollars violates Sections 183, 184 and 186 of the Kentucky Constitution. The Defendants are the Commissioner of Education, the Kentucky Board of Education and its chair, in their official capacities. Attorney General Cameron, on behalf of the Commonwealth, has intervened to defend the constitutionality of the statute, as has Gus LaFontaine, an applicant for approval of a Charter School in Madison County who is seeking

[1] 2022 Ky. Acts, ch. 213, Section 3(1). This section does provide that the exemption for charter schools from state

regulation does not extend to health, safety and civil rights requirements applicable to public schools.

[2] CBE is a coalition of public school districts. Other named plaintiffs include the Jefferson County Board of Education and the Dayton Independent Board of Education.

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authorization from the Madison County Board of Education for operation of his school, and tax dollars to fund it under the provisions of H.B. 9.

The Kentucky Constitution requires the legislature to establish "an efficient system of common schools" (Section 183), and further provides that "any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools." (Section 184). Likewise, Plaintiffs argue that H.B. 9 violates Section 186, which provides that:

> All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.
>
> **Ky. Const., Section 186**

For reasons more fully stated below, the Court **GRANTS** the Plaintiffs' motion for summary judgment, and **DENIES** the cross-motions of the Intervening Defendants. The Court finds that the challenged legislation is not consistent with the constitutional requirement for "an efficient system of common schools" under Section 183 of the Constitution, as interpreted by *Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989), and that the use of tax dollars to support charter schools violates Sections 184 and 186 of the Kentucky Constitution.

Introduction

The charter school legislation at issue in this case sets forth a comprehensive plan to establish taxpayer funded private schools that are exempted from traditional public oversight and regulation. The legislation seeks to give parents and students an alternative to the public education offered in the common schools, and to fund these private alternative schools with tax dollars.

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While there is vigorous debate as to whether the policy goals of the legislature are positive or negative, the policy goals of the legislation are not at issue in this case. Here, the only issue is whether the legislation runs afoul of the very specific mandates of the Kentucky Constitution governing public education and the expenditure of tax dollars.

The central question in this constitutional analysis is whether the privately owned and operated "charter schools", which are established by this legislation, should be considered "common schools" or "public schools" within the meaning of Sections 183, 184 and 186 of the Kentucky Constitution? A review of the case law, and the plain language of the Kentucky Constitution itself, yields the inescapable conclusion that "charter schools" are not "public schools" or "common schools" within the meaning of our state's 1891 Constitution.

ANALYSIS

At the most basic level, the analysis of whether "charter schools" can be considered within the meaning of "common schools" as required by the Section 183 of the Ky. Constitution, must begin with a simple question: is the term "common schools" malleable enough to include

two separate and unequal systems of education? *One,* the common schools that are governed by the state board of education and elected local school boards in which all schools are subject to the laws and regulations duly enacted by law; and *another,* charter schools, that are governed by private entities that are exempt from those laws and regulations even though funded with tax dollars. The obvious distinction between these two forms of schools is totally inconsistent with the use of the term "common" as a modifier of "schools." The whole purpose of "charter schools" is to establish

an *alternative* system of education that is *exempt* from the requirements of "common schools."

The Intervening Defendants attempt argue that the term "common schools" essentially

means whatever the legislature says it does. (Attorney General's reply brief, 5/19/23 at pp. 2-3).

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Turning *Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989) on its head, the Intervenors essentially argue that the legislature has unlimited power to define an efficient system of common schools in any way it chooses[3]. The core ruling of *Rose,* striking down the entire system of education laws governing the common schools enacted by the General Assembly for over 100 years, powerfully refutes the proposition that the discretion of the General Assembly in this area is unlimited. The Intervenors' argument on this point mirrors the argument of the legislature that the Supreme Court rejected in *Rose*, that the General Assembly "has sole and exclusive authority to determine whether the system of common schools is constitutionally 'efficient' and that a Court may not substitute its judgment for that of the General Assembly." *Id.*

at 208-09. The Supreme Court emphatically rejected this argument, holding: "To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable." *Id.* at 209.

Accordingly, any analysis of the constitutionality of HB 9 must begin with the question of whether "charter schools", as defined in the legislation, can be considered "common schools." The statutes define "common school" as follows:

> "Common school" means an elementary or secondary school of the state supported in whole or in part by public taxation. No school shall be deemed a "common school" or receive support from public taxation unless the school is taught by a certified teacher for a minimum school term as defined by KRS 158.070 and every child residing in the district who satisfies the age requirements of this section has had the privilege of attending it.
>
> KRS 158.030(1).

[3] The Attorney General argues that the General Assembly "[i]n its wisdom … could also, if it so chose, abolish every local school district, every local school board, and the Kentucky Department of Education, and instead contract with private persons to operate and manage the common school system on its behalf. So long as the common school system remains constitutionally efficient under Section 183, the General Assembly may, consistent with *Rose,* structure that system in anyway it sees fit …" Commonwealth's Reply, filed 5/19/23, pp. 2-3).

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This definition has essentially remained substantively unchanged since before the adoption of the present constitution, and has been codified since prior to its inclusion in the Kentucky Revised Statutes (1942 Ky. Acts ch. 208, sec. 1), going back to the original codification in Ky. Stat. 4363-2. It is the definition that appears to have been substantially in

effect at the time of the adoption of the 1891 Kentucky Constitution. Its primary elements are 1) support from public taxation; 2) employment of state certified teachers; 3) state prescribed minimum school terms; and 4) eligibility of "every child residing in the district" to attend.

While there may be debate about whether charter schools under HB 9 meet the other requirements, HB 9 is explicit that charter schools are **not** required to meet the last requirement of this definition. Under HB 9, charter schools--unlike common schools--are specifically permitted to impose *enrollment caps* limiting their enrollment to a number of children who will ensure ease of instruction through small class sizes. Charter schools may turn away qualified children residing in the district. As set forth in the legislation, taxpayer supported charter schools are authorized to limit their enrollment, and to "conduct an admissions lottery if capacity is insufficient to enroll all students who wish to attend the school". 2022 Ky. Acts, ch. 213, Section 3(3)(q). In contrast, public schools in the common school system are required to enroll *all* children. While the lottery system established in the statute is supposed to be "randomized, transparent and impartial," it still allows charter schools to turn away children who the common schools are obligated to educate. It also appears to allow charter schools to adopt admissions policies that--explicitly or implicitly--favor families that are affluent, well educated, well connected, and academically (or athletically) gifted and talented, since admissions policy--other than basic civil rights requirement--are beyond the scope of regulation. *See* KRS 160.1594(1)(i)(2). The statute allows the charter school to define for itself "the targeted student population and community it hopes to serve." KRS 160.1593(3)(a).

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In contrast, public schools in the Commonwealth are not allowed to reject eligible students to limit enrollment. A primary characteristic of the common schools is that they must "take all comers", and educate each child regardless of poverty, language barriers, disability, health or addiction problems at home, or any other obstacle to learning. Yet charter schools in Kentucky would be allowed to limit enrollment, resulting in rejection of children who through no fault of their own lack the resources, parental involvement, language skills, or other means to succeed in school or the charter school admissions process. While theoretically, the "admissions lottery" could ameliorate this disparity, the "admissions lottery" is not triggered unless "capacity is insufficient to enroll all students who wish to attend." KRS 160.1592(3)(q).

Charter schools are allowed to limit their enrollment, even though the funding mechanism for charter schools requires the public funding to be re-allocated from the public schools to the charter school for every child that attends the charter school "proportional to the public charter school's enrollment or average daily attendance …" KRS 160.1596(6). Likewise, "a public charter school shall receive a proportionate per pupil share of any state moneys not otherwise identified in this section that is received by the local district of location." KRS 160.1596(7). Still, charter schools are allowed to maintain selective admissions, and to conduct a lottery for admissions if they have more applicants than spaces, thus ensuring small class size for the limited number of students admitted. If the "money follows the child", as this legislation requires, then what is the rationale for allowing charter schools to limit their enrollment or to design selective admissions criteria?

The public has no ability to regulate such policies because "authorizing" public entities (primarily school boards, or mayors) are prohibited from imposing any "undue constraint", or

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"unilaterally imposed condition" that would infringe on the autonomy of the charter school. *See* KRS 160.1595(2)(b), 160.1596)(1)(c)(11), KRS 160.1592(1).

While the allocation of state and local tax dollars to charter schools is mandatory, there appear to be no guardrails that ensure these tax dollars are used for a public purpose. For example, these tax funds can be re-allocated to an "education service provider"[4] which can be a private for profit company. While charter school purchases in excess of $10,000 are subject to the Model Procurement Code (KRS Chapter 45A)[5], there appear to be no restrictions as to the ultimate ownership or control of assets purchased with tax dollars. The Attorney General argues that charter schools are subject to the Open Records Act, but it is far from clear that this requirement would apply to private "education service providers" who are under contract to provide management and operation of these taxpayer funded schools.[6] Thus, a charter school building, real estate, furniture, fixtures and equipment, could be pledged as collateral or sold for profit, with no deed restriction, trust clause or statutory requirement that would ensure that the tax dollars expended for the purchase would be recouped by the public, or used for an educational purpose in the event of sale or default. *See* KRS 160.1592(3)(p). There is no restriction that would prohibit the takeover of charter schools by private equity investors who could increase their profits by draining the charter school of tax-dollar-funded resources needed to educate children.

A review of the case law interpreting Sections 183, 184 and 186 of the Kentucky Constitution strongly reinforces the conclusion that "charter schools" as defined by HB 9 are outside the scope of the system of common schools required by the Kentucky Constitution. In the

long history of cases decided under the education provisions of the 1891 Ky. Constitution, there

[4] KRS 160.590(7).

[5] KRS 160.1592(3)(l).

[6] *See Utility Management Group v. Pike County Fiscal Court,* 531 S.W.3d 3 (Ky. 2017).

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are simply no cases that can reasonably be interpreted to support the taxpayer funded alternative system of education to supplement the long established system of "common schools" ordained by the Constitution. Moreover, the Kentucky Supreme Court has jealously guarded against the use of public funds to promote private education, as mandated by these constitutional provisions.

The definition of "common schools" adopted by Kentucky's highest court is based on the statute and the long tradition followed since the adoption of the 1850 Constitution: "there is no long any room for controversy or dispute as to the meaning of [common schools}, … 'a common school was a school taught in a district laid out by authority of the school laws, under the control of trustees elected under those laws, by a teacher qualified according to law to teach." *Sherrard v. Jefferson County Board of Education,* 171 S.W.2d 963, 966 (Ky. 1942) (invalidating law providing for use of public funds to provide transportation costs to private schools). The companion idea that common schools must be free and open to all children, and serve all children, has been part of the law for over a hundred years, as discussed above. *See Agricultural and Mechanical College v. Hager,* 87 S.W. 1126, 1127 (Ky. 1905).

Similarly, *Pollitt v. Lewis,* 108 S.W.2d 671, 673 (Ky. 1937) invalidated the attempt by the

Boyd County Board of Education to fund a junior college with tax dollars. The *Pollitt* court extensively reviewed the debates of the 1891 Constitutional Convention, and came to the conclusion that the definition of "common schools" incorporated into the 1891 Ky. Constitution dated back to the decision in *Bush v. Henderson,* 11 Bush 74 (Ky. 1874), which was still controlling at the time of the adoption of the 1891 Ky. Constitution. That original definition required common schools to be part of "a district laid out by authority of the school laws, under the control of trustees elected under those laws, by a teacher qualified according to law to teach."

11 Bush at 82-83. In contrast, charter schools under HB 9 are *exempt* from the authority of school

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laws, and *exempt* from the control of the elected school district board. Under this legislation, charter schools are governed by an autonomous board and are exempt from all state or school district regulation related to "finance, personnel, scheduling, curriculum and instruction." KRS 160.1590(14)(b).

Indeed, Kentucky's highest court, at the time of the adoption of the present Constitution, struck down a statute that provided for appropriation from the state school fund for "payment of tuition" for students in a private academy that was exempt from control of the trustees of the common school. There, the Court noted that the local school district trustees "have no voice in the selection of the teachers." *Underwood v. Wood,* 93 Ky. 177, 19 S.W. 405, 406 (Ky. 1892). Indeed, the Taylor Academy discussed in *Underwood* has a very striking resemblance to the charter schools contemplated by HB 9.

By vesting power over "finance, personnel, scheduling, curriculum and instruction" with the private operators of charter schools, the legislature has drawn a sharp distinction with the established system of common schools. Ironically, the original Kentucky Educational Reform Act (KERA)[7], adopted broad autonomy for each local school in the common school system under Section 183 of the Ky. Constitution: it vested the power over "personnel, scheduling curriculum and instruction" in site-based decision making councils elected from parents, teachers and administrators for each school. It effectively used the philosophy of charter schools to empower each public school to adopt its own policies: "decentralization of authority and the development of school-based decision making are two primary objectives of KERA." *Board of Education of Boone County v. Bushee,* 889 S.W.2d 809, 814 (Ky. 1994). When local school districts attempted to assert approval power over the school councils, the Kentucky Supreme Court in *Bushee* upheld

[7] The school reform legislation adopted by the General Assembly in response to the *Rose* decision.

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the autonomy of school councils under KERA. The legislature, however, later restricted the powers of school councils and gave local school districts greater power over personnel, instruction and curriculum at the school level. This charter school legislation is effectively an attempt to bypass the system of common schools, and establish a separate class of publicly funded but privately controlled schools that have unique autonomy in management and operation of schools, an autonomy that the legislature itself granted but then stripped away from the

common schools. This "separate and unequal" system of charter schools is inconsistent with the constitutional requirements for a common school system. The common schools must be open to every child, and operated, managed and fully accountable to the taxpaying public.

Whether the charter schools envisioned by HB 9 are good or bad, they are outside the scope and definition of the "common schools" defined by our Ky. Constitution. The legislature in HB 9 has authorized the creation of a system of non-public schools that: 1) will be governed by an unelected board of private citizens; 2) may contract with private for-profit "education service providers" to operate and manage these schools; 3) are exempt from "all statutes and administrative regulations applicable to the state board, a local school district, or a school"; and 4) will be funded by state and local tax dollars without any effective legal or public accountability. There is no way to stretch the definition of "common schools" so broadly that it would include such privately owned and operated schools that are exempt from the statutes and administrative regulations governing public school education.

From the time of the earliest cases applying Section 184 of the Ky. Constitution, it has been uniformly held that "the intention [of Sec. 184] was to prohibit the collection of any taxes to any extent for educational purposes other than common schools, **without the consent of a majority of voters**." *Brown v. Board of Education of City of Newport,* 108 Ky. 783, 57 S.W.612, 613 (Ky. 1900). (Emphasis added). The charter school legislation before this Court collects and expends tax dollars for schools that are not "common schools" within the meaning of the Ky. Constitution.

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Accordingly, this legislation cannot be upheld, "until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation." Ky. Const. Sec. 184.

As recently as last year, the Kentucky Supreme Court reiterated the vitality of the prohibition against using public tax dollars for educational purposes that are "outside the system of common schools." *Commonwealth ex rel. Cameron v. Johnson,* 658 S.W.3d 25, 36 (Ky. 2022). There is no way to uphold the expenditure of tax dollars for charter schools under the provisions of HB 9 without doing violence to this recent ruling of the Kentucky Supreme Court. HB 9 erects an elaborate structure of mandated public authorization for schools with private ownership and control, and little meaningful public oversight. The charter schools are owned and operated by private entities. But here, as in *Commonwealth ex rel Cameron v. Johnson,* the task of the Court is to "look through the form of the statute to the substance of what it does." *Id.* at 37. And the substance of what this statute does is to establish taxpayer funded private schools that are exempt from the laws and regulations of the system of common schools established by our Ky. Constitution and laws.

The violation of Section 186 of the Ky. Constitution is even more clear. That provision requires that "All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by

general law prescribe the manner of the distribution of the public school fund *among the school districts* and its use for *public school purposes.*" (Emphasis supplied). To take tax dollars to

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support these privately owned and operated charter schools is flatly inconsistent with the mandate of Section 186 of the Ky. Constitution.

As the Court held in *Johnson,* "Forty years ago, in *Fannin v. Williams,* 655 S.W.2d 480 (Ky. 1983), this Court applied Section 184 to strike down a statute supplying textbooks to children in Kentucky's nonpublic schools. The statute tried to avoid constitutional infirmity by having the state department of libraries rather than the department of education purchase the books …." 658 S.W.3d at 36. The *Johnson* Court went on to adopt the ruling of the decision striking down the legislation in *Fannin*, and quoting *Fannin* in terms that apply equally here: "The 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.* Here, as in *Johnson* and *Fannin,* "The Commonwealth is obliged to furnish every child in this state an education in the public schools, but it is constitutionally proscribed from providing aid to furnish a private education." *Fannin,* 655 S.W.2d at 484. This legislation seeks to provide tax dollars "to furnish a private education." The legislature cannot do *indirectly* what the Constitution prohibits them from doing *directly:* "Constitutional provisions, whether operating by way of grant or 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 or limitation." *Commonwealth v. O'Harrah,* 262 S.W.2d 385, 389 (Ky. 1953).

Here, Section 184 of the Kentucky Constitution gives the legislature a clear path to advance the public policy they seek to enact in HB 9: a voter referendum. Section 184 provides that "No

sum shall be raised or collected for education other than in the common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall

be in favor of such taxation."

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CONCLUSION

For the reasons stated above, **IT IS ORDERED AND ADJUDGED** that the motion of the Plaintiffs for Summary Judgment **GRANTED** and the cross-motions of the Intervening Defendants are **DENIED.** Accordingly, **IT IS ORDERED AND ADJUDGED** as follows:

1) the provisions of House Bill 9 are declared to be **UNCONSTITUTIONAL** under Sections 183, 184 and 186 of the Kentucky Constitution**;**

2) The Commonwealth of Kentucky, the Kentucky Department of Education, the Kentucky Board of Education and all officers, employees, agents, and persons acting in concert with them, including Intervening Defendant Lafontaine, his agents and employees, are **PERMANENTLY ENJOINED** under CR 65 from implementing the provisions of House Bill 9, and from distribution or expenditure of any tax dollars to charter schools under that statute.

So **ORDERED** this, the 11th day of December, 2023.

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

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