Pursuant to Court Order

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-000658

JEFFERSON COUNTY BOARD OF EDUCATION, et al. APPELLANTS

APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-001830

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
CIVIL ACTION NO. 10-CI-004174
Division Ten, Hon. Irv Maze

CHRIS FELL, as father and next friend of L.F., et al. APPELLEES

BRIEF OF *AMICI CURIAE*, CENTRAL KENTUCKY EDUCATIONAL COOPERATIVE, GREEN RIVER REGIONAL EDUCATIONAL COOPERATIVE, KENTUCKY EDUCATIONAL DEVELOPMENT CORPORATION, KENTUCKY VALLEY EDUCATIONAL COOPERATIVE, OHIO VALLEY EDUCATIONAL COOPERATIVE, SOUTHEAST/SOUTH CENTRAL EDUCATIONAL COOPERATIVE AND WEST KENTUCKY EDUCATIONAL COOPERATIVE IN SUPPORT OF APPELANTS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and ten (10) copies of this Brief of Amici Curiae in Support of Appellants have been served by United States registered mail this 17th day of January 2012 on Ms. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, New Capitol Building, 700 Capital Avenue, Room 209, Frankfort, Kentucky, 40601, and a true and correct copy has been served by United States mail this 17th day of January 2012 on: Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; the Honorable Irv Maze, Judge, Division Ten, Jefferson Circuit Court, 700 W. Jefferson Street, Louisville, KY 40202; Counsel for Appellants: Byron E. Leet, Lisa C. DeJaco, Anne R. Maclean, Wyatt, Tarrant & Combs, LLP, 500 W. Jefferson Street, Louisville, KY 40202; and Counsel for Appellees: Teddy B. Gordon, 807 W. Market Street, Louisville, KY 40202; J. Bruce Miller, Norma C. Miller, J. Bruce Miller Law Group, Waterfront Plaza, 20th Floor, 325 W. Main Street, Louisville, KY 49292; and Sheila P. Hiestand, Hughes & Coleman, Republic Plaza, 200 S. 7th St., Suite 110, Louisville, KY 40202.

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PURPOSE OF THE BRIEF AND PARTICULAR ISSUES ADDRESSED

The purpose of this brief is to assist this Court in considering the central question presented by this appeal: whether KRS 159.070 vests every public school student with a right to attend the school nearest his or her home regardless of the attendance boundaries or other assignment plan developed by local boards of education for their school districts.

Answering this question in the affirmative, in agreement with the majority opinion of the Court of Appeals (the "Majority Opinion"), would ignore the fact that the General Assembly removed from the statute the very language which would have supported such an interpretation, undermine the broad discretion long afforded to local boards of education with regard to the assignment of students to schools within the district they serve, and render it impossible for districts to comply with the statute.

Amici Curiae are seven of the eight regional educational cooperatives in Kentucky, whose members collectively include approximately 158 of the 174 school districts in Kentucky, as follows:

Central Kentucky Educational Cooperative: *Anderson County*, Bardstown Independent, *Bourbon County*, *Boyle County*, *Danville Independent*, Frankfort Independent, Harrison County, *Jessamine County*, *Marion County*, Mercer County, *Montgomery County*, *Nelson County*, Nicholas County, Paris Independent, *Scott County*, *Washington County*, *Woodford County*, Kentucky School for the Deaf.
Green River Regional Educational Cooperative: Adair County, Allen County, *Barren County*, *Bowling Green Independent*, *Breckinridge County*, *Butler County*, Campbellsville Independent, Caverna Independent, Clinton County, Cloverport Independent, Cumberland County, *Daviess County*, *Edmonson County*, *Elizabethtown Independent*, *Glasgow Independent*, *Grayson County*, Green County, *Hancock County*, *Hardin County*, *Hart County*, *LaRue County*, *Logan County*, *Meade County*, *Metcalfe County*, Monroe County, Muhlenburg County, *Ohio County*, *Owensboro Independent*, *Russell County*, Russellville Independent, Simpson County, Taylor County, *Todd County*, *Union County*, *Warren County*, West Point, Western Kentucky University.
Kentucky Educational Development Corporation: *Ashland Independent*, Augusta Independent, Barbourville Independent, *Bath County*, *Bell County*, Berea Independent, *Boyd County*, *Bullitt County*, Burgin Independent, Cambellsville Independent, *Carter*

County, *Casey County*, *Clark County*, *Clay County*, Corbin Independent, Dayton Independent, East Bernstadt Independent, *Elliott County*, *Estill County*, Fairview Independent, *Fayette County*, *Fleming County*, *Floyd County*, *Garrard County*, *Greenup County*, Harlan Independent, *Harrison County*, *Jackson County*, Jenkins Independent, *Johnson County*, *Knott County*, *Knox County*, *Laurel County*, *Lawrence County*, *Leslie County*, *Letcher County*, *Lewis County*, *Lincoln County*, *Logan County*, *Madison County*, *Magoffin County*, *Marion County*, *Martin County*, Mason County, *McCreary County*, *Menifee County*, Mercer County, Middlesboro Independent, *Morgan County*, *Nelson County*, Paintsville Independent, *Perry County*, *Pike County*, Pineville Independent, *Powell County*, *Pulaski County*, Raceland Independent, Robertson County, *Rockcastle County*, *Rowan County*, *Russell County*, Russell Independent, Russellville Independent, Science Hill Independent, Somerset Independent, Wayne County, *Whitley County*, Williamsburg Independent, *Wolfe County*, Ashland Community Technical College, Eastern Kentucky University, Morehead State University, University of Kentucky.
Kentucky Valley Educational Cooperative: Breathitt County, *Floyd County*, Hazard Independent, Jackson Independent, Jenkins Independent, *Knott County*, Lee County, *Leslie County*, *Letcher County*, *Magoffin County*, Owsley County, Perry County, *Pike County*, Pikeville Independent, *Wolfe County*.
Ohio Valley Educational Cooperative: Anchorage Independent, *Bullitt County*, Carroll County, Eminence Independent, *Franklin County*, Gallatin County, *Grant County*, *Henry County*, *Oldham County*, Owen County, *Shelby County*, *Spencer County*, *Trimble County*.
Southeast/SouthCentral Educational Cooperative: Berea Independent, Burgin Independent, *Casey County*, Corbin Independent, East Bernstadt Independent, Estill County, Garrard County, Harlan Independent, Jackson County, Lincoln County, *Madison County*, McCreary County, Middlesboro Independent, Monticello Independent, Pineville Independent, *Powell County*, *Pulaski County*, *Rockcastle County*, Science Hill Independent, Somerset Independent, Wayne County, *Whitley County*, Eastern Kentucky University.
West Kentucky Educational Cooperative: Ballard County, Caldwell County, *Calloway County*, Carlisle County, *Christian County*, Crittenden County, Dawson Springs Independent, Fulton County, Fulton Independent, *Graves County*, *Henderson County*, Hickman County, *Hopkins County*, *Livingston County*, Lyon County, *Marshall County*, Mayfield Independent, *McCracken County*, *McLean County*, Muhlenberg County, Murray Independent, *Owensboro Independent*, *Paducah Independent*, Trigg County, *Union County*, *Webster County*, Murray State University, Owensboro Diocese.

According to the Kentucky Department of Education (http://www.education.ky.gov/KDE/About+Schools+and+Districts/), Kentucky's 174 school districts include 1,233

schools. In other words, the majority of districts have multiple schools serving the same grades, particularly at the elementary school level. For example, the districts italicized in the chart above have two or more elementary schools serving overlapping grade levels. The schools are obviously not going to be evenly spaced throughout the physical area served by the district (some districts encompass rural as well as urban and/or suburban areas). It would therefore not be practical, or sensible, to draw attendance boundaries such that each student is assigned to the school which is "nearest" their home, as individual schools would either surpass or fall far short of their capacities. *See, e.g.* attendance boundary and/or facility maps available on-line for Daviess County,[1] Elizabethtown Independent,[2] Owensboro Independent,[3] Grant County,[4] Oldham County,[5] Calloway County,[6] Fayette County,[7] and Christian County.[8] *Amici* believe the Majority Opinion will create havoc with regard to planning for the transportation and education of students, developing facilities plans, and addressing claims of parents who would like their child to attend a school other than one to which they have been assigned.

ARGUMENT

The question presented to the trial court, and to the Court of Appeals, was one of statutory interpretation regarding KRS 159.070. Because the question arose in the context of litigation against the Jefferson County Public Schools ("JCPS"), there was substantial discussion regarding JCPS's current assignment plan. While this is helpful context with regard to the litigation, the reasons for, and details of, JCPS's plan are not

[1] http://www.daviesskyschools.org/content_page2.aspx?cid=812
[2] http://www.etown.k12.ky.us/pdf/prospectivestudents/etown24x092603.pdf
[3] http://www.owensboro.kyschools.us/map.jpg
[4] http://www.grant.kyschools.us/Downloads/Elementary%20Lines.jpg
[5] http://www.oldham.kyschools.us/files/Oldham_County_Elementary_Districts_2008-2009(1).jpg
[6] http://beta.calloway.kyschools.us/District/fashby/Doument%20LIbrary/Elementary%20Zone%20Map.pdf
[7] http://www.fcps.net/media/425268/elem%20areas.pdf
[8] http://www.christian.kyschools.us/files/618792/INNERCITY_E_ALLDISTRICTS_31408.pdf

relevant to consideration of whether the language of KRS 159.070 entitles students to attend the public school nearest their home.

Again, the majority of school districts in Kentucky have more than one school serving the same grade levels. Thus, most local boards of education must assign students enrolled in the district to a particular school in the district. In most cases, the local board of education adopts attendance boundaries for each school serving the same grade levels. The designation of attendance boundaries necessarily takes into consideration the resources available at each facility, including the physical space, as there are a finite number of seats and services available within each school building.

Attendance boundaries change over time as populations shift, new facilities are constructed, and old facilities are expanded or closed. Thus, while many schools are physically located within their attendance boundaries, they are not centered therein. Additionally, school buildings are not located at evenly spaced intervals within the physical area served by the district. It would be virtually impossible for the attendance boundaries of, for example, each elementary school within a district to be drawn so that each school served those students for whom that school was the nearest school.[9] If the Majority Opinion is affirmed, many local boards of education in Kentucky will face claims that they are in violation of KRS 159.070 and be in a position where they cannot appropriately and efficiently use existing facilities, plan for new facilities, implement special programs and services, or provide transportation or allocate resources.

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[9] Viewing the location (available at http://www.etown.k12.ky.us/pdf/etown24x092603.pdf) of the two elementary schools in the Elizabethtown Independent School District is illustrative of the problem. One elementary school is located north of the center of the area served by the district. The other elementary school is located near the northwest border of the area served by the district. The majority of residences in the district would be nearest the elementary school that is more centrally located, even though these schools have similar capacities. *See* Summary of Eliz. Indep. Facilities Plan, available at http://www.education.ky.gov/KDE/Administrative+Resources/Facilities/Facility+Plans/Facility+Plans+for+District+Names+Beginning+with+E.htm.

I. The Majority Opinion Ignores Well-Settled Rules Of Statutory Interpretation

The emphasized portion of KRS 159.070, set forth below, is the language that the Court is asked to interpret:

> Each school district shall constitute a separate attendance district unless two (2) or more contiguous school districts, with the approval of the Kentucky Board of Education, unite to form one (1) attendance district. Controversies arising in attendance districts relating to attendance matters shall be submitted to the Kentucky Board of Education for settlement. In case an agreement suitable to all parties cannot be reached, the Kentucky Board of Education may dissolve a united district. In case of dissolution, each school district involved may unite with other contiguous school districts in forming a united attendance district or may act as a separate attendance district. ***Within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll their children in the public school nearest their home.*** (Emphasis added).

At issue is whether the emphasized provision conferring a right to enroll at the nearest school also confers a right to attend that school notwithstanding a 1990 amendment deleting the very words "for attendance" from this provision.

Courts are not permitted to interpret statutes at variance with their stated language. Their duty is to ascertain and give effect to the intent of the General Assembly. *See Hoy v. Kentucky Indus. Revitalization Auth.*, 907 S.W. 2d 766, 768 (Ky. 1995); *Beckham v. Bd. of Educ. of Jefferson County*, 873 S.W. 2d 575, 577 (Ky. 1994)). Additionally,

> [w]hen a statute is amended, the presumption is that the legislature intended to change the law. Our Supreme Court has held that "[i]n determining legislative intent certain presumptions are indulged. One of these is that...where a clause in an old enactment is omitted from the new one, it is to be inferred that the Legislature intended that the omitted clause should no longer be the law." Likewise: "[w]here a statute is amended or re-enacted in different language, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the Legislature. On the contrary, it will be presumed that the language was intentionally changed for the purpose of effecting a change in the law itself." (Emphasis added).

City of Somerset v. Bell, 156 S.W. 3d 321 (Ky. App. 2005) (internal citations omitted). Thus, a review of the history and amendment of KRS 159.070 is appropriate.

A. The History And Amendment Of KRS 159.070 Demonstrate That The Statute Does Not Confer A Right of Attendance

KRS 159.070 generally relates to the right of contiguous school districts to unite to form one attendance district. The bulk of the statute existed prior to 1942. The initial version of the provision at issue was added to the statute in 1976. As explained in the Majority Opinion, the provision was added in response to a desegregation decree ordered against JCPS and the public resistance to that decree, specifically busing children from their neighborhoods as a remedy for *de jure* segregation. As enacted in 1976, the subject provision provided that: "[w]ithin the appropriate school district attendance area, parents or legal guardians shall be permitted to ***enroll for attendance*** their children in the public school nearest their home." (emphasis added). The provision was quickly declared unconstitutional as applied to JCPS. *Newburg Area Council, Inc. v. Board of Education of Jefferson County, Kentucky*, 583 F.2d 827, 829 (6th Cir. 1978). In other words, the statute could not be applied so as to accomplish its apparent intended purpose.

The *Newburg* opinion expressly declined to address the constitutionality of the subject provision as applied to other school districts. *Id.* However, in an opinion issued in 1980, the Kentucky Attorney General's office indicated that the subject provision was viable in districts other than JCPS, but was at odds with *Skinner v. Board of Education of McCracken County*, 487 S.W. 2d 903 (Ky. 1972). *See* Ky. OAG 80-394, 1980 WL 103141 (Ky. A.G.). In *Skinner*, the court affirmed summary judgment for a school district in the face of a complaint that a plan to change attendance boundary lines would

adversely impact children who would be required to attend schools other than those nearest their homes. The Court explained:

> School boards have wide discretion in the management of the school systems under their jurisdiction. This includes the location and number of school buildings, the transportation of pupils within the school system, and, in general, the management of the affairs of promoting education for the best interest of all citizens and pupils within the school district. ... It is not an abuse of administrative discretion for a board of education to implement by a general overall plan the transportation of pupils within its system in such a manner to use effectively and efficiently the physical facilities in the school district.

Skinner, 487 S.W. 2d at 905 (citing numerous prior decisions which relied on Section 2 of the Kentucky Constitution (prohibiting arbitrary state action) and KRS 160.290 (broad discretion given local boards of education to manage and control their district's schools)).

Subsequently, in *Rose v. Council for Education*, 790 S.W. 2d 186 (1989), this Court explained that Section 183 of the Kentucky Constitution requires that the General Assembly establish an efficient system of common schools with certain essential and minimal characteristic, including the obligation to ensure that the common schools be "operated with no waste, no duplication, no mismanagement, and with no political influence." *Id.* at 212- 213. This Court declared that the then-existing statutory scheme providing for a system of common schools was constitutionally deficient, and directed the General Assembly to recreate and design a new system that would comply with the standards it set out. *Id.* at 212.

> Like the crumbling schoolhouse which must be redesigned and revitalized for more efficient use, with some component parts found to be adequate, some found to be less than adequate, statutes relating to education may be reenacted as components of a constitutional system if they combine with other component statutes to form an efficient and thereby constitutional system.

Id. at 215. In accordance with *Rose*, the General Assembly enacted the Kentucky Educational Reform Act ("KERA") in 1990. KERA made sweeping changes to the statutory scheme applicable to schools in Kentucky. A number of statutes were amended and reenacted, including KRS 159.070 and other provisions of Chapter 159. In addition to *Rose,* KRS 159.070 was amended against the backdrop of having been declared unconstitutional as to JCPS (despite it having been enacted so as to impact JCPS) and having been described as contrary to long-standing precedent affording considerable discretion to local boards of education in creating attendance boundaries and assigning students to schools within the district. *See Tilley v. Tilley*, 947 S.W. 2d 63 (Ky. App. 1997) (legislature is presumed to be aware of existing law when it enacts a statute).

The General Assembly amended and reenacted the final sentence of KRS 159.070 as follows:

FORMER VERSION OF RELEVANT PORTION OF KRS 159.070	**AMENDED, PRESENT VERSION OF RELEVANT PORTION OF KRS 159.070**
Within the appropriate school district attendance area, parents or legal guardians shall be ***permitted to enroll for attendance*** their children in the public school nearest their home.	Within the appropriate school district attendance area, parents or legal guardians shall be ***permitted to enroll*** their children in the public school nearest their home.

1990 Kentucky Laws H.B. 940 (Ch. 476) (Section 218). The Majority Opinion, contrary to the aforementioned rules of statutory construction, ignores the deletion of the words "for attendance" – and instead reads them back into the statute. As the dissenting opinion cogently points out, however, the Court is required to:

> construe the language of KRS 159.070 as amended, which now leaves the term *enroll* stripped of the modifying prepositional phrase *for attendance*, without that modifying phrase, *enroll* now undoubtedly connotes the mere act of registering at a neighborhood school without the mandate,

assurance, or even the implication that attendance at that **same school** should be guaranteed.

Moreover, "enroll" and "attend" are not synonymous, and, contrary to the view expressed in the Majority Opinion, it is not absurd to read the statute so as to provide a right to enroll in the nearest school without a corresponding right to attend that school.

B. "Enroll" And "Attend" Are Not Synonyms.

As set forth in the brief filed with this Court by the Appellants ("Appellants' Brief"), it is readily apparent that the term "enroll" is not synonymous with attendance so as to support the conclusion reached by the Majority Opinion – that the General Assembly was simply intending to eliminate a redundancy when it deleted the words "for attendance" from the statute. Dictionaries define "enroll" so as to connote registering or entering (on a roll, list or record). *See* Black's Law Dictionary (9th ed., 2009); American Heritage Dictionary of the English Language (5th ed.). One can clearly enroll – register – at one location for purposes of being entitled to physically be in attendance somewhere else.[10] Moreover, within KERA, the General Assembly continued to use the words "attend" and "enroll" side-by-side in other statutory provisions in KRS Chapter 159 which were amended, evidencing an understanding that the terms are not redundant. *See* KRS 159.030(1)(b) (granting exemption from compulsory attendance requirements when student is enrolled and in regular attendance in a private, parochial, or church regular day school). Finally, as set forth at length in Appellants' Brief, courts in Kentucky and in other jurisdictions have construed the word "enroll" in other contexts as distinct from

[10] An internet search reveals that there are school districts in other states which require students to enroll in the central office to be able to attend their designated school in the district. Such districts include Madison Public Schools, Madison, CT (http://www.madison.k12.ct.us/page.cfm?p=365); Palo Alto Unified School District, Palo Alto, CA (http://www.pausd.org/parents/registration/index.shtml); and Scottsdale Unified School District, Phoenix, AZ(http://susd.schoolfusion.us/modules/cms/pages.phtml?pageid=164650&sessionid=)

"attend." *See e.g. Fuller v. Nat'l Union Fire Ins. Co.*, No. 2008 WL 2224885 (E.D. Ky. May 27, 2008); *Nerness v. Christian Fidelity Life Ins. Co.*, 733 S. 2d 146 (La. App. 1999).

C. The Construction Urged By Appellants Is Not Untenable

The construction urged by Appellants, and adopted by the trial court, gives meaning to the statutory language and does not, as asserted by the Majority Opinion, render it untenable. *See Cosby v. Commonwealth*, 147 S.W. 3d 56, 58-59 (Ky. 2004) (words of a statute must be accorded their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion). It is not wholly unreasonable for the legislature to have preserved for parents a right to register their child in the district at the nearest school while eliminate the mandate that their child be permitted to attend that school. Without such a provision, parents could be required to register their children at the central office, potentially at great inconvenience. For example, in the Pike County School District, an inquiry on Mapquest.com reveals that it is a more than 40 minute drive from Blackberry Elementary School or Feds Creek Elementary School to the district's central office. For those living "nearest" these schools, the central office could be more than an hour away.

II. The Majority Opinion Renders It Impossible To Comply With KRS 159.070.

It is clear that the Majority Opinion questions the wisdom and benefit of the assignment plan adopted by JCPS. However, the wisdom of JCPS's plan is not at issue – the issue is whether the current version of KRS 159.070 gives students an absolute right to attend the school nearest their homes. The majority fails to adequately consider the effect of its interpretation on nearly every other district in Kentucky, and virtually ignores

well-settled precedent affording boards of education discretion to manage the schools in their district, including the ability to set attendance boundaries and designate the school that a child in the district will attend. The Majority Opinion will result in endless litigation for school districts, as the mandate is impossible to achieve. Indeed, as set forth in the examples provided below, the Majority Opinion's interpretation may well render the statute unconstitutional, in violation of Section 183 of the Kentucky Constitution, as it fails to ensure that the common schools be operated without waste or duplication as required by *Rose v. Council for Education*, 790 S.W. 2d 186, 212-213 (1989).[11]

A. *The Majority Opinion Results In The Inability To Maximize Use Of Facilities And Plan For Education And Transportation Of Students.*

As noted above, the vast majority of school districts in Kentucky have more than one school which serves the same grade levels in their district and most draw attendance boundaries such that the school serving the area within the boundary is located somewhere within that boundary. Because development of boundaries must take into account such things as the capacity of the school, feasible transportation routes, population concentration and anticipated growth, as well as the need and desire for special programs and/or services, schools are obviously not going to be centered within each attendance area. Districts cannot be expected to accurately predict population growth and purchase property to ensure that students attend the "nearest" school.

In areas where population is dense, there may be more than one elementary school within a short distance of the other. Where population is sparse, a larger physical area

[11] Perhaps recognizing that its own interpretation of the statute would render it wholly unreasonable and unworkable, the Majority Opinion attempts to read a reasonable compliance standard and exceptions into what it considers the statutory mandate. As set forth in Appellants' brief, no such standard actually appears in the statute, and the statute does not provide any exceptions. *See Tilley v. Tilley*, 947 S.W. 2d 63, 66 (Ky. App. 1997) (where no exceptions are carved out by the legislature, it is presumed that none were intended). The statute is mandatory.

may be served by a single school. In order to prevent overcrowding in schools located in more densely populated areas, and to effectively use the space available in a school located in a more sparsely populated area, boundaries must be drawn such that a student will attend a school other than the one which may be physically closest to their home. For example, in Oldham County, Liberty Elementary and Locust Grove Elementary schools serve relatively large physical areas, whereas Centerfield, Camden and Kenwood Station Elementary schools serve relatively small physical areas. (*See* http://www.oldham.k12.ky.us/files/Oldham_County_Elementary_Districts_2008-2009 (1).jpg). The same is true in other districts.[12]

Applicable Kentucky regulations regarding facilities planning dictate that districts utilize the space available in existing facilities before constructing new facilities or additions to old ones. Districts must comply with the "Kentucky School Facilities Planning Manual," June 2008 (the "Manual") (available at http://www.education.ky. gov/nr/rdonlyres/f0a3eb4c-ef29-4290-be11e38acc3fabbc/0/school_facilities_manual_ 2008.pdf). 702 KAR 4:180. The Manual requires that districts look six years ahead to project enrollment in the district in order to justify building a new school, and then plan for the location of that school. Thus, a facility with a capacity of 500 students must be utilized prior to constructing a new facility to relieve overcrowding an existing facility – even if the school is not the nearest school for the overflow students. Moreover, if a district is incorrect with regard to predicting an area of population growth it could be left with a school that is only the "nearest" school for a small percentage of its capacity.

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[12] *See, e.g.,* maps available for Boone County schools (http://arcims.boonecountygis.com/bcsdbase/); Christian County schools (http://www.christian.kyschools.us/files/618792/INNERCITY_E_ ALLDISTRICTS _31408.pdf); and Hopkins County schools (http://www.hopkins.kyschools.us /files/628292/map _elementarycounty.pdf).

Should the new building operate at less than capacity while old buildings exceed theirs in violation of statutory mandates regarding class size? The Majority Opinion's interpretation of the statute would apparently require such a result.

B. *The Majority Opinion May Require Unnecessary Duplication Of Special Education Programs And Services.*

The Majority Opinion would apparently require duplicative special services and educational programs in multiple schools within the district even if only needed for a handful of students. School districts in Kentucky provide special educational programs and related services to specific students in accordance with the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973. Federal courts have consistently held that districts are not required to provide such programs and services at the school the student would attend if they were not disabled – schools can and do centralize such programs and services. As set forth in *LeBron v. North Penn School District*, 769 F. Supp. 2d 788 (E.D. Pa. 2011):

> Geographic proximity is a factor that districts must consider [in determining the school that a disabled child will attend], but they have "significant authority to select the school site, as long as it is educationally appropriate." *White [v. Ascension Parrish School Bd.*, 342 F. 3d 373, 382 (5th Cir. 2003)]; *see A.W. v. Fairfax County Sch. Bd.*, 372 F. 3 674 (4th Cir. 2004); *McLaughlin [v. Holt Public Schools Board of Education*], 320 F. 3d [663] at 672 (6th Cir. 2003); see *also T.Y. v. N.Y. City Dept. of Educ.*, 584 F. 3d 412,420 (2nd Cir. 2009) (finding that an IEP need not specify the school location); Letter from Patricia J. Guard, Acting Dir., Office of Spec Ed. Programs, to Tom Trigg, Chapman Mgmt. Grp., (Nov. 30,2007), available at http://www2.ed.gov/policy/speced/guid/idea/letters/revpolicy/tplre.html (advising that "[i]f a child's IEP requires services that are not available at the school closest to the child's home, the child may be placed in another school that can offer the services that are included in the IEP and necessary for the child to receive a free appropriate education").

Id. at 801. See also *McLaughlin v. Holt Public Schools Board of Education*, 320 F. 3d 663 (6th Cir. 2003) (child could be required to attend other than neighborhood school

where student required classroom of type provided only at certain elementary schools within the district). Such flexibility is necessary because, under federal regulations, a student's disability may, in addition to requiring certain types of educational programming and classrooms, entitle them to a myriad of related services under 34 CFR §300.34(a) (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, counseling services, orientation and mobility services, school health services and school nurse services). Assuming appropriate personnel could even be found to staff all schools, the costs associated with providing necessary educational programming and all related services in all schools within a district would be exorbitant. Moreover, creating a special classroom to serve one disabled student at a particular "nearest" school would take needed space and resources from other students when that student could be provided a free and appropriate public education in another school within the district.

C. *The Majority Opinion May Require The Cessation Of Magnet And Alternative Programs.*

JCPS is not the only district that offers magnet and/or alternative programs housed at their own schools or within a school. Fayette County, Oldham County and Christian County, for example, offer such programs.[13] Students who do not meet the criteria for such programs could argue that they are entitled to attend the school housing such programs because it is the school "nearest" to their home. Districts would either have to offer non-alternative or non-magnet education at schools designed to solely provide such education, or "convert" magnet or alternative seats provided within a school

[13] *See* http://www.fcps.net/schools/; http://www.oldham.k12.ky.us/index.php?option=com_content&view=section&layout=blog&id=15&Itemid=1812; and http://www.christian.k12.ky.us/academics.cfm? subpage =618142.

for use as regular classrooms. This could result in the inability to continue to offer popular and needed programs which enable districts to appropriately serve different students within their borders.

CONCLUSION

For the foregoing reasons, *Amici Curiae* ask this Court to honor long-established principles of statutory construction (and avoid requiring local boards of education to achieve the impossible) by construing KRS 159.070 as conferring a right to enroll, as in register, students in the nearest school without a corresponding right to attend that school. These *Amici* respectfully request that the Court reverse the majority opinion of the Court of Appeals and reinstate the judgment entered by the Jefferson Circuit Court as urged by Judge Combs in her minority opinion for the Kentucky Court of Appeals.

Respectfully submitted,

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