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

JEFFERSON COUNTY BOARD OF EDUCATION, et al. — APPELLANTS

COURT OF APPEALS 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

REPLY BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Appellants' Reply Brief was transmitted by Federal Express pursuant to CR 76.40(2) to Susan Stokely Clary, Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Frankfort, KY 40601 for filing with the Court; and that copies were served by U.S. Mail upon 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; 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 40202; and Sheila P. Hiestand, HUGHES & COLEMAN, 9300 Shelbyville Road, Suite 110, Louisville, KY 40222, on this 17th day of February, 2012.

One of Counsel for Appellants

May it please the Court: Plaintiffs' response brief [the "Response"] is a political speech for neighborhood schools masquerading as a legal brief. Plaintiffs believe that different policy choices with respect to school assignment would improve the Jefferson County Public Schools ("JCPS"), while the Board elected by Jefferson County voters believes that the student assignment policies and the managed choice system in use in the JCPS serve important educational and societal objectives. But the proper context for airing this difference of opinion is in campaigns to elect school board members, not in litigation. It is clear that KRS 159.070 is simply the vehicle Plaintiffs hope to use to impose their policy preferences on the Board and Superintendent. Plaintiffs' Response devotes little space to statutory construction - the issue before the Court - and instead harps on JCPS's allegedly poor performance. Even if "neighborhood schools" were the silver bullet Plaintiffs believe them to be, it would not be this Court's prerogative to fire that bullet. This Court is not elected to make decisions about educational policy. The Court's task - in fact, everyone's task in the case at hand - is to construe KRS 159.070 in light of the 1990 amendment.

The 1990 change to KRS 159.070 must be given effect. Plaintiffs' one citation to authority as to the principles of statutory construction is *Waters v. City of Pioneer Village*, 299 S.W.3d 278 (Ky. App. 2009), which affirms that words must be afforded their plain, commonly accepted meaning, and the construction should carry out the will of the legislature. Applying these rules does not yield Plaintiffs' desired result. The plain meaning of "enroll" connotes only registration, not attendance. And the will of the legislature should be determined as of the 1990 amendment, according to which KRS 159.070 now addresses only where parents may "enroll" their child, not where they may "enroll for attendance."[1]

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[1] Apparently the parties and the lower courts have perpetrated a mistaken quote of KRS 159.070 as originally enacted. The former statute was misquoted as having provided that parents or guardians should be permitted to "enroll their children for attendance" in the public school nearest their home. However, in 1976, the last sentence actually provided,

(continued...)

Plaintiffs assert that the "'original purpose' of the statute is manifestly clear. It was passed in an effort to give statutory authority to the concept of 'neighborhood schools.'" [Response at 22.] The intended purpose of adding the last sentence to KRS 159.070 in 1976 might more accurately be described as preventing desegregation,[2] but the point is moot because KRS 159.070 has been amended to remove the very language Plaintiffs now seek to read back into the statute.

Plaintiffs gloss over the 1990 amendment to KRS 159.070, claiming that the lack of legislative history from 1990 should cut in their favor. [Response at 11.] Because the Board and Superintendent cannot show what the legislature intended when amending the statute, Plaintiffs say, the original purpose of KRS 159.070 must hold sway. Plaintiffs are setting a well-established principle of statutory construction on its head. What we know about the change made in 1990 is the General Assembly removed the words "for attendance" from KRS 159.070. And when a statute is amended, the legislature is assumed to have had a purpose in mind. *See Blackburn v. Maxwell Co.*, 305 S.W.2d 112 (Ky. 1957). When a clause in an old enactment is omitted from a new one, then obviously the courts should infer that the legislature intended that the omitted clause should no longer be the law. *See Brown v. Sammons*, 743 S.W.2d 23, 24 (Ky. 1988).

Plaintiffs say that the 1990 amendment only eliminated a redundancy and urge this

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(...continued)

"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." (Emphasis added.)

[2] The *amici curiae* brief filed by the Louisville Urban League, Kentucky Commission on Human Rights, and the NAACP-Louisville Branch highlights the federal constitutional problem that would arise from giving force to the original intent behind KRS 159.070. Fortunately, properly applying the rules of statutory construction giving force to amendments also serves to interpret KRS 159.070 to avoid an unconstitutional construction.

Court to apply KRS 159.070 as if it were unchanged from its 1976 incarnation. Plaintiffs argue that there would be legislative history if the General Assembly had intended to make a "bold" change in the law. This purely speculative argument fails on multiple counts. First, in the absence of legislative history to indicate the amendment was merely cosmetic, this Court must assume the change was intended to alter the law. *See Inland Steel Co. v. Hall*, 245 S.W.2d 437, 438 (Ky. 1952). Second, the 1990 revision to KRS 159.070 was not so "bold" as Plaintiffs would paint it: locally elected boards of education retained the discretion to pursue a neighborhood schools policy, if they choose. Third, Plaintiffs' argument presumes that prior to 1990, it was generally agreed that KRS 159.070 gave every child in Kentucky a statutory right to attend his or her nearest school. But federal court orders had prevented KRS 159.070 from taking effect as to student assignment in Jefferson and Fayette Counties, and in 1980 the Office of the Attorney General could express no opinion to Campbell County about the effect of KRS 159.070 on projected changes to boundaries for attendance areas. Nothing indicates that KRS 159.070 was recognized to have the impact Plaintiffs suggest.

Plaintiffs' argument that the 1990 amendment merely cleared up a redundancy fails in the face of other school law statutes such as KRS 159.020 and 159.030, which continue to use "enroll" and "attend" side by side. This redundancy that Plaintiffs suggest the General Assembly thought it so important to address in KRS 159.070 was not at all important to address in KRS 159.020 or 159.030. In the Response, Plaintiffs put forth the puzzling contention that the two words actually are synonyms in these statutes because they are linked by "and" as opposed to "or." [Response at 24.] Clearly, use of the word "and" establishes two requirements - for student transfers in KRS 159.020 and for exemptions from public school attendance in KRS 159.030 - both of which must be met; if the statutes used the word "or," meeting either of the two requirements would suffice. But either conjunction indicates two separate and distinct requirements, demonstrating that "enroll" and "attend"

are not interchangeably used in KRS Chapter 159.[3]

The Board and Superintendent's interpretation of KRS 159.070 is reasonable and practical. Construing enrollment simply to connote registration without attendance does not "lead to an absurd or wholly unreasonable conclusion." *Cosby v. Com.*, 147 S.W.3d 56, 58-59 (Ky. 2004). Plaintiffs insist that even by this interpretation the Plan "is a deliberate and willful violation of KRS 159.070" [Response at 8], because there is no proof in the record that the school nearest home is "identified as a depository for general enrollment forms." [Response at 7.] Actually, Appellants' Original Brief cited App'x C.1 at ¶ 8 [R. 46] to show that parents may drop off enrollment forms at the nearest JCPS school; but more importantly, there are no allegations in the Complaint that any Plaintiff parent was denied the opportunity to do so. The Complaint and the Response merely conflate enrollment and attendance.

Plaintiffs claim that JCPS is the only school district in Kentucky not in accord with KRS 159.070 as they read it [Response at 8, 37-38], but the *amicus* briefs indicate otherwise.[4] "School districts outside Jefferson County neither interpret nor apply KRS 159.070 to create a geographic test when drawing school attendance zones." [KSBA Brief at 8-9.] Indeed, "[i]t would not be practical, or sensible, to draw attendance boundaries so that each student is assigned to the school which is 'nearest' their home...." [Co-op Brief at 3.] *Amici* emphasize the destructive effect that Plaintiffs' interpretation of KRS 159.070 would have on school districts statewide as to "programs or facilities for students who qualify for special education

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[3] The *amicus curiae* brief filed by the Kentucky School Board Association and the Fayette County Board of Education ("KSBA Brief") also flags KRS 159.140(1)(e), requiring the director of pupil personnel to "keep all enrolled students in reasonably regular attendance." KSBA Brief at 2.

[4] The *amicus curiae* brief filed by 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 is referred to here as the "Co-op Brief."

services or specialized health services, alternative schools and programs, and magnet schools and programs." [KSBA Brief at 9; *see also* Co-op Brief at 13.] And following Plaintiffs' interpretation would make it impossible for school districts to follow state regulations about projecting enrollment and adding new facilities. [Co-op Brief at 12.] On the other hand, a statute making registration more convenient is useful particularly in rural areas, where the county seat may be up to an hour's drive away. [*Id.* at 10.]

This case examines the meaning of the word "enroll" as used in KRS 159.070, not JCPS performance or Section 183 of the Kentucky Constitution. Even the Court of Appeals majority acknowledged that the only legal issue in this case is the construction of KRS 159.070, but the bulk of the Response has nothing to do with statutory construction. Instead, Plaintiffs engage in personal attacks on JCPS administrative staff[5] and criticize the amount of money being spent on "busing" - a number found nowhere in the record below, and which Plaintiffs seem to calculate as including all JCPS transportation costs. Under any student assignment plan, many students will ride buses, even if they attend the school nearest to home. Given that over 40 percent of JCPS elementary school parents request a school other than their resides school as their first choice, and mindful of the highly popular county-wide JCPS magnet schools, it is not surprising that a school district with nearly 100,000 students spends a lot of money on student transportation. Certainly, that fact alone does not give rise to a Kentucky constitutional issue under Section 183.

Section 183 of the Kentucky Constitution did not appear in the Complaints in this case,

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[5] News stories about JCPS administrative salaries are clearly irrelevant to the subject matter of this lawsuit. More troubling is Plaintiffs' demonization of Patricia Todd. Now retired from JCPS, Ms. Todd spent nearly forty years dedicated to the education of Jefferson County's children; for the last fourteen years of her career, she held the job of Director of Student Assignment where she was charged with the complex task of carrying out the directives of the Board and the Superintendent. Despite Plaintiffs' dislike for the Plan she implemented, Ms. Todd is entitled to civility and respect.

though it was the focal point of *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). Plaintiffs seriously misunderstand the *Rose* decision, wherein the Council for Better Education - a collective body representing many of the school districts in Kentucky - challenged the existing statutory system of school funding (which relied heavily on local property taxes) as insufficient to educate all Kentucky's children efficiently, hence violating the Kentucky Constitution. Plaintiffs portray *Rose* as one in which the "arrogant attitudes" of a school board were brought to heel [Response at 28], but school boards were in essence the plaintiffs in the *Rose* case - and they were victorious.

Plaintiffs' brief is full of accusations that JCPS is operated inefficiently, ranging from attacks on student test scores [*id.* at 11, 36, 41], to the cost of transportation [*id.* at 1, 11, 14, 29, 35, 42], to "bloated" salaries [*id.* at 28 fn. 13], to the length of students' bus rides and the darkness while they wait for a bus [*id.* at 38, 42] - all without record citation. Even assuming the merit of all these accusations, none of these issues weigh on the statutory construction of KRS 159.070.[6] Rebutting Plaintiffs' frequent canard that the Board and Superintendent are riding roughshod over their constituents [Response at 20, 27, 29], it should be noted that community stakeholders including other Jefferson County parents filed an *amicus curiae* brief to support the Plan.[7]

Counsel for the Board and Superintendent appreciate Plaintiffs' effusive praise for our

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[6] Plaintiffs say, "IF 'the result' was an across-the-board outstanding nationally recognized (or even regionally-recognized) educational achievement as a paragon of educational virtue, then possibly this Court could rationalize JCPS' willing dishonor of the statute." [Response at 41.] So apparently, Plaintiffs' view of their statutory interpretation argument is that "enroll" means "attend" in KRS 159.070 right now, but "enroll" would not mean "attend" if test scores were higher.

[7] See *amicus curiae* brief of Cheryl Armstrong, as mother and next friend of C.O.; Jocelyn Moore, as mother and next friend of S.K. and J.K.; Patricia Kannapel and John Grossman, as mother and father and next friends of L.G.; Seana Golder and Roger Bradshaw, as mother and father and next friends of B.B. and V.B.; Jefferson County Teachers Association; and League of Women Voters of Louisville and Jefferson County, Inc.

late law partner Governor Bert T. Combs and for the work done by him and others when representing the Council for Better Education in *Rose*. But Court of Appeals Judge Sara Combs said it well: "Although the *Rose* case and Section 183 of the Kentucky Constitution (upon which *Rose* was premised) were discussed at some length during oral argument, *Rose* has absolutely no bearing on the case before us as to public policy issues. To reiterate, this is solely a case of statutory construction. *Rose* was merely the vehicle for causing the statutory amendments to be rewritten by the General Assembly." [Court of Appeals Opinion at 25, Combs, J., dissenting.]

The Board's compliance with *Meredith* and the U. S. Constitution is not at issue either. Plaintiffs repeatedly insist that the Board and Superintendent are flouting the U. S. Supreme Court. [Response at 2, 7, 20, 25, 27, 29, 37, 39.] In this regard Plaintiffs exhibit three grievous errors. First, Plaintiffs are wrong on the facts. JCPS is no longer using the same plan that was at issue in *Meredith*. [*Cf.* Response at 20, 37.] The Plan was adopted in 2008, after the Board carefully reviewed the 2007 *Meredith* decision, consulted with experts, and conducted numerous public meetings.

Second, Plaintiffs are wrong on the law. Plaintiffs rely on the words of Chief Justice Roberts [*e.g.* Response at 26], but Chief Justice Roberts did not write for a majority of the Supreme Court with respect to the elements Plaintiffs are trumpeting. Justice Kennedy provided the swing vote in the 4-1-4 *Meredith* decision and explicitly rejected Chief Justice Roberts's axiom that "the way to stop racial discrimination is to stop discriminating on the basis of race" as overly simplistic. *See* 551 U.S. 701, 788 (2007) (Kennedy, J., concurring). Justice Kennedy called the Chief Justice "profoundly mistaken" to suggest that the government is powerless to address a racially isolated status quo. *See id.* Instead, Justice Kennedy stated: "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial

composition," and state and local governmental officials administering the public schools may take race-conscious general measures to avoid the problem of racial isolation so long as they are not "treating each student in different fashion solely on the basis of a systematic individual typing by race." *Id.* at 788-89.

Third, Plaintiffs are wrong about the position taken by the Board and Superintendent. Plaintiffs argue that allowing JCPS schools to re-segregate due to housing patterns would raise no constitutional implications [Response at 19, 28, 40], but the Board does not claim that the U. S. Constitution obligates it to use a student assignment system like the Plan. Rather, under long-established Kentucky jurisprudence - not overridden by KRS 159.070 - the Board has the discretion to make decisions about student assignment that it believes to be in the best interests of the entire community. In *Meredith*, five U. S. Supreme Court justices agreed that there is a compelling government interest in avoiding racial isolation in the public schools, and local government officials may take narrowly-tailored measures to redress it.

The Board is confident that the student assignment plan now in place complies fully with *Meredith*. More importantly, this Court is not the venue in which to litigate that question. The Complaints did not allege that the Plan violates the U. S. Constitution; if they had, this case would be making its way through the federal court system.

Plaintiffs want this Court to put the judiciary directly in charge of the public schools. In response to the grave separation of powers violation proposed by the Court of Appeals majority, Plaintiffs have doubled down. Where the Court of Appeals opinion seemed to contemplate that the Board and Superintendent would devise a new assignment plan and submit it to the circuit court for review, Plaintiffs take it to the next level, expecting that the circuit court judge will personally "draft a new plan." [Response at 43.] And they want the judiciary to step in when student performance is faltering. For instance, Plaintiffs urge the Court that various data points regarding three JCPS high schools are "**ALL FACTS JUSTIFYING**

JUDICIAL INTERVENTION." [Response at 41 fn.17 (emphasis original).]

It is a long jump from Kentucky courts' inherent power to enforce their orders [Response at 30] to writing a student assignment plan - let alone assuming the responsibility for keeping student performance up to snuff. Judge Gordon tackled the student assignment process with the *Haycraft* litigation in the 1970s, but that was a different court system and therefore a different constitution: the separation of powers is more "forcefully enunciated" in Kentucky's Constitution than in the U. S. Constitution. *See, e.g., Fletcher v. Com.*, 163 S.W.3d 852, 861 (Ky. 2005). In *Rose*, the Kentucky Supreme Court did not write new school laws after it struck down the old school statutes as unconstitutional. The General Assembly drafted a new set of education statutes for the Commonwealth; the Court refused to keep jurisdiction during that effort. Yet Plaintiffs believe that Section 183 of the Kentucky Constitution gives courts the power to take direct control of a school district, writing and implementing new and more efficient policies when the quality of student performance has been challenged. Plaintiffs are deeply in error.

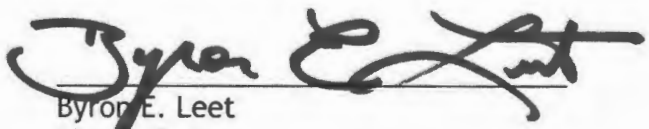
Conclusion

Even though the schools nearest their homes may not have been Plaintiffs' first choices, Plaintiffs prefer those schools to the ones to which their children were assigned under the Plan. Because the Plan did not generate results Plaintiffs liked they brought this lawsuit, using KRS 159.070 as a pretext for policy change as to student assignment. Such a policy change comes at the ballot box, not at the courthouse. Year after year Jefferson County voters have elected school board members who favor a student assignment policy that seeks to avoid the crippling effects of isolating the district's most disadvantaged children into a few schools. This Court should respect the wishes of the voting majority over the litigious few and preserve the discretion of a locally elected board of education to make policy decisions about student assignment.

If this Court accepts Plaintiffs' invitation to read the words "for attendance" back into KRS 159.070, school districts across the Commonwealth will be hostage to every litigious parent who thinks that the "nearest" school is a better option than the one to which the local school board assigned his or her child. School districts will be stripped of all discretion in student assignment and will no longer be able to take into account the need to ease over-crowding, or to facilitate transportation, or to cluster special services, or to remedy the geographic isolation of poor children and racial minorities.

KRS 159.070 requires no such result when the word "enroll" is construed according to its surrounding statutes in Chapter 159, the dictionary, and authority in Kentucky and other jurisdictions. The Board and Superintendent respectfully ask this Court to reinstate the Circuit Court decision dismissing the Complaints.

Respectfully submitted,



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