

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. _____
DIVISION _____

COUNCIL FOR BETTER EDUCATION, INC.

FRANKFORT INDEPENDENT SCHOOL BOARD

WARREN COUNTY SCHOOL BOARD

MICHELLE GRIMES JONES, on behalf of herself and her minor
children

KATHERINE WALKER-PAYNE, on behalf of herself and her
minor children

CHRIS RASHEED, on behalf of himself and his minor child,

PLAINTIFFS

v.

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

SERVE: Office of the Attorney General
The Capitol
700 Capitol Avenue
Frankfort, Kentucky 40601

THOMAS B. MILLER, in his official capacity as
Commissioner of the Kentucky Department of Revenue,

DEFENDANTS

SERVE: Office of the Attorney General
The Capitol
700 Capitol Avenue
Frankfort, Kentucky 40601

SERVE: Attorney General of the Commonwealth of Kentucky
Office of the Attorney General
The Capitol
700 Capitol Avenue
Frankfort, Kentucky 40601

**VERIFIED COMPLAINT FOR A DECLARATION
OF RIGHTS AND FOR INJUNCTIVE RELIEF**

Plaintiffs Council for Better Education, Inc., Frankfort Independent School Board, Warren County School Board, Michelle Grimes Jones, Katherine Walker-Payne and Chris Rasheed, by and through counsel, bring this action for declaratory and injunctive relief against the Defendants, Holly M. Johnson, Secretary of the Finance and Administration Cabinet, in her official capacity, and Thomas B. Miller, Commissioner of the Department of Revenue of the Commonwealth of Kentucky, in his official capacity.

INTRODUCTION

1. Our 1891 Constitution enshrined Kentucky’s fundamental commitment to public education. Ever since, the Supreme Court has emphatically and repeatedly held that the Constitution’s education and public funds provisions forbid the Commonwealth from funding private schools. Rather, the fundamental duty of the General Assembly is to maintain an “adequate, uniform and unitary” public school system under the control of the state. *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 192 (Ky. 1989). “Since the constitution acknowledges the importance of education to this Commonwealth and since the establishment and maintenance of a system of common schools is a mandated duty of the General Assembly, it is part and parcel of this overall goal that the system have the twin attributes of uniformity and equality.” *Id.* at 207.

2. Yet this year the General Assembly enacted HB 563, which redirects state revenues to fund, among other things, private school tuition and expenses using a tax expenditure scheme called Education Opportunity Accounts (“EOAs”). Because the EOAs will be used primarily, and perhaps exclusively, to fund private school tuition, this Complaint refers to the program as the Voucher Program.

3. To avoid the plain constitutional prohibition against the public funding of unaccountable private schools through direct expenditures, the General Assembly concocted a complicated tax credit scheme to move state revenue through a private grant program. But both the aim and the result are the same: Under the Voucher Program, state expenditures will impermissibly fund private schools.

4. The Voucher Program violates the Constitution in at least four distinct ways.

(a) First, *Rose* holds that the constitutional provisions governing “[e]ducation,” Ky. Const. §§ 183-88, and specifically the “efficient” common school system requirement in Section 183, mandate a state-administered, “substantially uniform” school system across the entire state. HB 563 ignores this mandate in establishing and funding a separate, non-uniform system of schools that is not under state control. And HB 563 imposes no educational quality standards on the private schools it funds. Sections 183, 184, and 186 are clear: The Commonwealth may not, as a general rule, raise or collect funds for private school education—it only has the authority to fund the public, common schools.

(b) Second, Section 184 of the Kentucky Constitution expressly dictates that “[n]o sum shall be raised or collected for education other than in common schools” unless a change is submitted to and approved by a majority of voters at an election. HB 563 fails to qualify for this limited exception because it was never submitted to or approved by a voter referendum.

(c) Third, even if HB 563 had obtained Section 184’s required voter approval, the Voucher Program fails to serve a public purpose under Sections 3, 171 and 186 of the Kentucky Constitution. The Supreme Court has recognized that parents may choose to send their children to private schools for any number of reasons, “whether to provide a better secular education, to further their religious education, to avoid busing for desegregation, or whatever.” *Fannin v.*

Williams, 655 S.W.2d 480, 484 (Ky. 1983). Those reasons, however, are inherently private and personal. The funding of private schools does not advance a public purpose. HB 563 does not even require private schools that receive EOA funds to accept all eligible students; in fact, it affirmatively *prohibits* any regulation of their admissions practices. The Program on its face fails to serve a public purpose.

(d) Finally, the Voucher Program unconstitutionally delegates legislative authority over the essential governmental function of providing education to private entities without imposing any of the safeguards the Supreme Court has said are required under Sections 2 and 29 of the Constitution. The Supreme Court has repeatedly held that when the General Assembly delegates its power to even a *public* entity, it must do so with sufficient standards or safeguards against the arbitrary or abusive exercise of that power. Yet HB 563 delegates broad discretion over state-supported educational services to *private* entities while providing no meaningful limits on that discretion nor standards to regulate how these private entities are to perform the task of educating Kentucky’s students.

5. Plaintiffs respectfully request that this Court enter an order declaring HB 563’s diversion of public revenues to private schools unconstitutional, and enjoining Secretary Johnson, the Finance and Administration Cabinet, Commissioner Miller, and the Department of Revenue from enforcing or implementing the Voucher Program.

NATURE OF ACTION

6. This Verified Complaint for a Declaration of Rights and for Injunctive Relief is governed by the Kentucky Declaratory Judgment Act, KRS 418.040., CR 57, and CR 65.

7. KRS 418.040 provides this Court with authority to “make a binding declaration of rights, whether or not consequential relief is or could be asked” when a controversy exists. An

actual and justiciable controversy regarding violations of the Kentucky Constitution exists in this action.

8. CR 57 permits this Court to issue a declaratory judgment.

9. CR 65 permits this Court to issue a temporary injunction and, in a final judgment, a permanent injunction, which may restrict or mandatorily direct the doing of an act.

10. Plaintiffs request an expedited review pursuant to KRS 418.050 and CR 57. HB 563 is scheduled to take effect on June 28, 2021. The Department of Revenue will then begin approving tax credits that will fund the Program, causing the Plaintiffs immediate harm as funds are siphoned from the public fisc to fund selective and unaccountable private schools rather than public schools open to all. Absent immediate relief, funds will begin to flow to private schools in violation of the Constitution. This justiciable controversy presents an immediate concern that the Court should promptly resolve.

11. Plaintiffs ask this Court to declare that HB 563's funding of private schools is null, void, unconstitutional, and of no effect.

12. This is also an action to enjoin Defendants Johnson and Miller, the Finance and Administration Cabinet, the Department of Revenue, and all their agents, attorneys and any other persons in active concert or participation with them, from implementing and enforcing HB 563's diversion of public revenues to private schools.

THE PARTIES

13. Plaintiff Council for Better Education, Inc. is a nonprofit corporation that represents 168 of Kentucky's 173 public school districts. The Council's goal is "to ensure full implementation of Kentucky's constitutional commitment to its students and common schools." HB 563 violates this commitment.

14. Plaintiff Frankfort Independent School Board (“Frankfort Schools”) operates four public schools in Franklin County, Kentucky, and has one of the highest concentrations of top ranked public schools in Kentucky, educating over 800 students in 2021. The Frankfort Schools, like all public schools, will be harmed by the diversion of public revenues under HB 563 that will cause students to leave public school.

15. Plaintiff Warren County School Board (“Warren Schools”) operates 35 public schools in Warren County, Kentucky, and has one of the highest concentrations of top ranked public schools in Kentucky, educating more than 15,000 students in 2021. Warren County's population exceeds 90,000. The Warren Schools, like all public schools, will be harmed by the diversion of funds under HB 563 that will cause students to leave public school.

16. Plaintiff Michelle Grimes Jones is a Frankfort resident who is raising two children who attend Franklin County Public Schools. She was formerly an elected member of the local board of education, serving as Chair for a period of time. As a parent, public school advocate, taxpayer, and voter, she objects to HB 563 because she believes that public funds should be used to support the public schools that her children attend, rather than private schools open to a select few. She also believes that the Voucher Program established in HB 563 is dangerous and is an unlawful abdication of legislative duties. She further believes that HB 563 will not benefit low-income families but will instead harm them by discriminating against them and removing resources from their public schools. As a voter, she has publicly opposed HB 563 and wants her right to vote on its approval to be vindicated.

17. Plaintiff Katherine Walker-Payne is a Jefferson County resident, who, along with her wife, is raising two rising first graders who attend public schools. As a taxpayer and parent, she objects to HB 563, because, as an LGBTQ family, she believes that public funds should be

used to support the public schools that her children attend, rather than private schools that may discriminate against her family. She also believes that the Voucher program will not benefit low-income families, but will instead harm low-income families by having resources removed from their public schools. She further believes that families who already send their children to private schools will benefit from the Voucher Program. As a voter, she has publicly opposed HB 563, writing her political representatives, and wants her right to vote on its approval to be vindicated. She has no *per se* objection to private education—indeed, she works in higher education at a private university—but objects to the public funding of private primary and secondary schools.

18. Plaintiff Chris Rasheed is a resident of Jefferson County. He is African-American and a Muslim. He has been teaching English Language Arts in public schools for 19 years and has a middle school daughter who attends Jefferson County public schools. As a taxpayer and parent, he opposes the Voucher Program established by HB 563 because he believes such voucher programs bleed public schools of money, benefit families who already send their children to private schools without state assistance, and allow for religious discrimination. As a voter, he wants his right to vote on the Voucher Program to be vindicated.

19. As voters, citizens, and taxpayers, Plaintiffs Jones, Walker-Payne, and Rasheed have been and will continue to be injured by the unconstitutional expenditure of public revenues to private schools under the Voucher Program. The Kentucky Constitution demands that public money go to public schools that are open to all students, and not to unaccountable private schools that are open to a select few. This is so whether the public money is a direct expenditure or a tax expenditure. The manner in which HB 563 was passed usurped their right to vote on private school funding programs under Section 184 of the Kentucky Constitution. Plaintiffs Jones, Walker-Payne, and Rasheed further object to the provision of private education with public funds in their districts

by unaccountable private AGOs, which have absolute authority over how that education is provided. Children who attend public schools have been and will continue to be injured by the Voucher Program’s funding of private schools and by its diversion of resources from the public schools.

20. Defendant Holly M. Johnson is the duly appointed Secretary of the Finance and Administration Cabinet, a Program Cabinet of the Executive Branch of state government, and is vested with such powers as are afforded her by the Kentucky Revised Statutes. This includes KRS Chapter 48, which requires the Finance Secretary to administer the budget and finances of the Commonwealth. The Kentucky Department of Revenue, which is tasked with implementing the Voucher Program’s funding mechanism, conducts its work under the authority of the Finance and Administration Cabinet. Secretary Johnson is named in her official capacity.

21. Thomas B. Miller is the Commissioner of the Department of Revenue (“DOR”). He is named in his official capacity. DOR is the administrative agency of Kentucky government that is responsible for administering the collection of state taxes, and, under HB 563, for implementing the Voucher Program’s funding mechanism. In particular, DOR is charged with verifying the eligibility of AGOs, processing and preapproving applications for the tax credit expenditures used to fund the Program, and collecting and publishing information about the Program.

JURISDICTION AND VENUE

22. An actual, justiciable controversy exists, and this Court has subject matter jurisdiction over this action pursuant to KRS 418.040, KRS 23A.010, CR 57 and CR 65.

23. Venue is appropriate in this Court pursuant to 2021 Ky. Acts Ch. 2 (HB 3), KRS 452.***, because this action challenges the constitutionality of a Kentucky statute, Frankfort

Schools operates in Franklin County, and Michele Grimes Jones and her children are residents of Franklin County.

24. Pursuant to KRS 418.040, *et seq.*, this Court may properly exercise *in personam* jurisdiction over the Defendants.

FACTUAL BACKGROUND

The Private School Voucher Program

25. On March 29, both houses of the General Assembly approved HB 563, “AN ACT relating to education,” overriding the veto of the Governor. A true and correct copy of the enrolled act is attached as Exhibit A.

26. Most of HB 563’s twenty-one sections are devoted to establishing the EOA Program,¹ which subtracts money from a taxpayer’s tax bill to the Commonwealth money that the taxpayer contributes to private AGOs. The AGOs then distribute the tax credit funds to select Kentucky residents, who can use the voucher funds for, among other things, private school tuition.

27. Funds can be used by eligible residents for a range of expenses including: tutoring; online learning programs; education-related technology, including hardware, software or applications; textbooks; costs associated with summer school, after school programs, or career or technical education; transportation; and education services and therapies.

28. Students who reside in counties with populations of 90,000 can also use EOA funds to pay for private school tuition.

29. “Eligible students” include students from households making nearly \$85,000 per

¹ The first four sections of HB 563 require public school districts in the Commonwealth to adopt a policy for admitting nonresident pupils, and are the only sections of the bill unrelated to the EOA Program. This action asserts no challenge or claim regarding these nonresident admission provisions.

year for a family of four. Once in the Program, students remain eligible until their household income reaches over \$121,000 per year, nearly 2.5 times Kentucky's median income. The Program is funded by \$25 million in tax credit expenditures taken from taxes raised by Kentucky but diverted to AGOs that in turn fund the Voucher Program. Individuals, corporations, or limited liability entities may receive up to a 97 percent tax credit for contributions of cash or marketable securities, up to a total of \$1 million per year, to AGOs approved by DOR.

30. Taxpayers are reimbursed for the payments to an AGO by applying to DOR for preapproval of the tax credit expenditure before they make a donation to an AGO, or by allowing the AGO to apply on their behalf.

31. Because taxpayers' "donations" to AGOs are almost entirely reimbursed through the tax credit, HB 563 functionally serves to re-direct funds from state coffers to private schools.

32. When a taxpayer makes a "gift" of marketable securities, the Commonwealth's reimbursement is even more substantial. There, the taxpayer receives reimbursement for the value of the security *and* avoids capital gains tax on any capital gains that the underlying security may have accrued. As such, the Commonwealth reimburses nearly the full value of the donated security and forgoes the revenue it would collect on the capital gains.

33. HB 563 vests AGOs with the power and discretion to administer every substantive aspect of education services funded through the EOA Program, including processing applications for accounts from selected families, allocating funds to individual student accounts or education service providers, and approving the education service providers who will receive funds under the Program.

34. In exchange for administering the Program, AGOs can retain up to ten percent of the re-directed tax expenditures, ostensibly for their own administrative expenses.

35. To receive funds, parents of eligible students first apply to a participating AGO, which verifies student eligibility and availability of funding. Once approved, parents sign an agreement with the AGO stating that they will use funds only for eligible expenses (as determined by the AGO), that they will abide by program requirements, and that they will not use tax-diverted funds to pay for services they are already receiving through a public school district. Once approved, the student is eligible to renew their funds each year unless their household income exceeds 250 percent of the Program's income limits; the parent withdraws from the Program; the account is closed because of misuse of funds; or the student completes high school, receives an equivalence certificate, or reaches 21 years of age.

36. The value of each education opportunity account varies depending on household income, as well as on how funds are used. However, for selected students who opt to use the account for private school tuition vouchers, the amount is based on the lesser of: (1) the parents' demonstrated financial need or (2) the actual amount of tuition charged by the private school to non-voucher students.

37. HB 563 contains no provision submitting the Voucher Program to the legal voters of the Commonwealth, but is scheduled to go into effect on June 28, 2021, without any referendum approval.

**The Voucher Program Will Fund
Exclusive, Unaccountable Private Schools**

38. Unlike Kentucky public schools, which educate all entering students, private schools funded through the Voucher Program can refuse to accept students based on their backgrounds, abilities, and prior educational records.

39. Section 15 of HB 563 explicitly licenses discrimination by providing that the law does not "limit the independence" of private schools or other education service providers or require

them to alter their “creed, practices, admissions policy or curriculum” in order to accept payments through the Program.

40. The General Assembly intends Sections 5 through 21 of HB 563 solely or primarily to direct public funds to private schools. Section 15(3) makes clear that any education provider that accepts payments under HB 563 “is not an agent of the state.” By definition, public schools are agents of the state and thus could not accept payments under Section 15. It also purports to protect “the independence and autonomy of education service providers.” Yet public schools are not independent from state government.

41. HB 563 does not prohibit participating private schools from discriminating on the basis of race.

42. Private schools funded by HB 563 can, and are expected to, bar entry to students based on a student’s religion, sexual orientation, past academic performance, standardized test scores, disciplinary history, or disability status.

43. Upon information and belief, many, if not most, private schools are not open to all students, and reserve the right to deny admission to students and their families on a variety of grounds including but not limited to religion, sexual orientation, past academic performance, standardized test scores, disciplinary history, or disability status.

44. Public schools must provide an efficient education that meets the standards set forth in *Rose*, as well as extensive requirements under state education statutes and administrative regulations. Under HB 563, participating private schools need not meet any educational quality standards.

45. The Commonwealth offers a voluntary certification program for private schools, because certified private schools “are more likely to be recognized as a valid educational institution

by colleges, universities, and future employers.”² Certified private schools must be accredited by a third-party entity.³ *Id.* Accrediting agencies’ standards vary, but they typically require accredited private schools to maintain financial records, have a budget and adequate resources to support their operations, establish a governance structure that complies with applicable laws, make some provision for student health and safety, and adopt a curriculum that purports to cover basic academic subjects such as reading, mathematics, science and history.⁴

46. HB 563 requires none of this. Instead, HB 563-funded private schools need not be accredited, nor meet any educational standards at all, nor comply with any standards concerning their operations, fiscal management, or curriculum. They are not required to have regular fire or health inspections. HB 563 vouchers divert public moneys to fund private schools that do not meet any standards when it comes to the education they provide or the environment in which it is provided.

47. Private schools that receive vouchers are not held to state accountability standards, and they are not required to report test scores and other measures of success for participating students. This means that neither parents, policy makers, nor the public will have any means of assessing whether the Voucher Program provides students with any tangible educational benefits.

² Kentucky Department of Education, *Non-Public or Private School Information* (Jan. 2017), <https://education.ky.gov/federal/fed/Documents/Kentucky%20Nonpublic%20Information%20Packet.pdf>

³ Kentucky Non-Public Schools Commission, Inc., <https://www.kynpsc.org/> (listing approved accreditation bodies) (last visited June 2, 2021).

⁴ See, e.g., American Association of Christian Schools, *2020 Accreditation Manual* (2020), <https://www.aacs.org/wp-content/uploads/2020/02/2020-Accd-Manual-4.-Standards-for-Accd.pdf>; National Council for Private School Accreditation, *Manual for the Recognition of Accrediting Associations for Early Childhood, Elementary, and Secondary Private Schools* (2010), https://ncpsa.org/wp-content/uploads/2019/08/186_ncpsaaccrreditationmanualjan20107132015.pdf (last visited June 2, 2021).

48. HB 563 offers no incentive for AGOs to impose meaningful quality standards on private schools receiving tax-diverted funds. Instead, the AGO receives ten percent on the funds it distributes, encouraging maximum distribution of funds and discouraging limitations on those tax-diverted funds based on the private schools' education quality, openness, financial oversight, nondiscrimination rules, or anything else.

The Voucher Program Will Drain Resources from the Common Schools

49. On its face, HB 563 guarantees that the Commonwealth will lose more in funds through the Voucher Program than it saves due to any reductions in public school enrollment.

50. The fiscal note to HB 563 House Committee Substitute 1, which added the Voucher Program provisions to the bill, estimates that the Voucher Program will result in a negative fiscal impact of \$25 million per year to the General Fund, or \$125 million over five years.⁵

51. The Commonwealth itself considers tax credits to be “tax expenditures” that adversely impact the public fisc. “Tax expenditures [including tax credits] are made by authorizing preferential tax treatment that allows the targeted recipient to retain money that would otherwise be paid in taxes to the Commonwealth.” Kentucky Office of State Budget Director, Tax Expenditure Analysis: Fiscal Years 2020-2022, page 1 (2019) (last visited June 7, 2021) (attached hereto as Exhibit B).

<https://osbd.ky.gov/Publications/Documents/Special%20Reports/Tax%20Expenditure%20Analysis%20Fiscal%20Years%202020-2022.pdf>.

52. Kentucky's executive branch budget bill, which carries the force of law, requires the Office of State Budget Director to provide the legislature with “detailed estimates for the

⁵ Commonwealth State Fiscal Note Statement, 2021 BR Number 1716, HB Bill No. 563/HCS 1 (Mar. 8, 2021), *available at* <https://apps.legislature.ky.gov/recorddocuments/note/21RS/hb563/HCS1FN.pdf>

General Fund and Road Fund for the current and next two fiscal years of the revenue loss resulting from tax expenditures.” *See* 2021 Ky. Acts 169, Pt. III, 16. (HB 192). The budget bill further states that a tax expenditure “means an exemption, exclusion, or deduction from the base of a tax, a credit against the tax, a deferral of a tax, or a preferential tax rate.” *Id.*

53. The Commonwealth considers tax credits expenditures of public funds because they represent tax revenue legally owed to the state treasury and collectible by state revenue officials, which is subsequently “reduced because of a specific statute enacted by the Kentucky General Assembly.” Ex. B at 1.

54. The tax credit expenditures created by HB 563 are the functional equivalent of direct outlays of public funds by the Commonwealth.

55. The General Assembly has tied base per-pupil funding for public schools to attendance levels under its Support Education Excellence in Kentucky (“SEEK”) formula. When a student leaves public school to attend a private school using a voucher, the public school will lose funds under the SEEK formula. Yet the public schools have fixed costs that cannot be cut. Having one fewer student to educate does not mean that a particular school or district can make a dollar-for-dollar cut to its budget. There is no difference, for example, between the electricity needed to heat, cool, or light an existing school building for 450, as opposed to 500, students.

56. Unable to reduce fixed costs, public schools will be forced to reduce other expenses, such as teaching staff, academic resources, or after-school programs. Each student the General Assembly urges to leave the public school system will leave behind a system with fewer resources to educate the remaining students.

57. An AGO’s ten percent administrative expenses will not go towards educating children. Public schools cannot reduce expenditures in direct proportion to the students lost to the

Voucher Program. But even if they could, the Commonwealth will be stripped of at least \$2.5 million each year of funding for students who remain in public schools.

58. Prior public school attendance is not required for a student to receive tax-diverted funds through the Voucher Program. This means that the Voucher Program will pay for private school tuition and expenses for at least some students whose families pay for private school already.

59. While HB 563 caps the amount of EOA funds granted for allowable uses other than private school tuition by using the SEEK formula, where accounts are used for private school vouchers the award is determined based on family need. As a result, participating private schools that charge tuition in excess of the state per-pupil funding rate may receive an amount that is equal to or greater than what the student's public school would have received to educate that student.

60. The Program's convoluted tax credit funding structure "does more to point up the constitutional problems" with the Voucher Program than to avoid them, *Fannin*, 655 S.W.2d at 482. Economists and public school budgets treat tax expenditures like the Voucher Program the same as direct expenditures. In fact, by siphoning ten percent of funds to AGOs—funds that will no longer be available to fund the education of students in either public or private schools—HB 563's scheme creates more fiscal harm to public school students than a direct expenditure would, without creating any offsetting public benefit either for individual eligible students or the Commonwealth as a whole.

Private Account Granting Organizations Charged with Administering the Program Are Not Subject to Any Meaningful Limits on Their Discretion

61. HB 563 vests the AGOs with absolute discretion to decide how the Voucher Program will operate.

62. HB 563 purports to give participating families control over EOAs, but in practice

AGOs have ultimate control over how funds will be distributed, and AGOs are encouraged to pay private schools directly.

63. AGOs are vested with the authority to set rules about which service providers are eligible to receive funds through the Program, and what criteria will determine whether approval of service providers is granted or revoked.

64. AGOs may establish rules for screening service providers, accept service providers only from a particular chain of private schools, serve only providers affiliated with a single religious denomination or even serve only providers that discriminate against particular students or families. They may also opt to accept all service providers without applying any screening process.

65. AGOs may establish rules providing they will fund all of the allowable expenses listed in Section 7 of the Act, a narrower subset of those expenses, or a single expense such as private school tuition.

66. HB 563 does not set any standards of quality for private schools or other education service providers. Instead, the General Assembly has delegated to AGOs the authority to set rules establishing extensive performance standards for education service providers or to establish no such standards at all.

67. With respect to each of these delegated powers, HB 563 does not provide any standards to guide AGOs in performing their delegated tasks.

68. If AGOs do adopt some standards, policies or requirements, none of the adopted standards, policies, or requirements are subject to review by DOR or any other government entity.

69. AGOs are required to provide DOR with a list of approved education service providers when they apply for certification renewal with the Department. But they are not required

to publish the rules or standards that govern their administration of the Voucher Program, or otherwise make those rules or standards public.

70. In their applications to DOR, AGOs must provide their incorporation documents and proof of 501(c)(3) status; along with “descriptions” of how they will evaluate student eligibility, process applications, fund and manage EOAs, approve education service providers, and process refunds from education service providers back to students’ EOAs. But HB 563 does not provide the Department with authority to deny certification to AGOs whose policies or procedures it deems insufficient, or any standards for making that determination.

71. AGOs’ decisions to select and fund particular private schools face no meaningful review by governmental actors. DOR’s role is largely limited to awarding tax credits and certifying AGOs; it has no meaningful say over how the Voucher Program operates, and DOR cannot prohibit funding of a particular private school—even if the school poses a risk to students.

72. Neither AGOs nor their leaders are required to possess any special expertise or qualifications in the field of education or education administration. In fact, HB 563 does not require AGOs to have any education-related experience at all.

73. AGOs are required to submit annual reports containing information on their financial operations including the number of accounts they funded in the past year, the amount of funds they received and distributed, and a list of their approved service providers. AGOs must also certify that they fund at least two education service providers. But DOR is only permitted—not required—to audit the organizations. Likewise, the Department is only permitted—not required—to revoke their certification if they fail to meet these requirements.

74. The Kentucky Board of Education, local boards of education, and the General Assembly are subject to constitutional, statutory and regulatory limits on how they provide for

education. By comparison, AGOs are granted the wide and unregulated discretion described above.

CLAIMS

Count I Declaratory Judgment Violations of Section 183 and 186 of the Kentucky Constitution

75. The allegations in Paragraphs 1-74 are realleged and incorporated by reference.

76. Section 183 requires the General Assembly to “provide an efficient system of common schools throughout the state.”

77. Section 186 requires that “[a]ll funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose”

78. The Supreme Court has said that Section 183 requires education in the Commonwealth to be “adequate, uniform and unitary,” and that “the state must control and administer the system.” *Rose*, 790 S.W.2d at 192, 211. The Constitution imposes on the General Assembly a non-delegable duty to maintain an adequately funded, substantially uniform system of public schools throughout the entire state.

79. HB 563 uses state revenues to subsidize a separate system of private schools not under control of the state, a system that is not available to all students in the Commonwealth.

80. HB 563 does not provide that private schools participating in the Voucher Program provide an adequate education, or otherwise impose any quality standards on participating private schools. Nor does it require that AGOs impose such standards. By carrying out the Voucher Program, the Defendants have violated Sections 183 and 186.

Count II Declaratory Judgment Violation of Section 184 of the Kentucky Constitution

81. The allegations in Paragraphs 1-74 are realleged and incorporated by reference.

82. Section 184 of the Kentucky Constitution commands that “[n]o sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters” Ky. Const. § 184.

83. The Supreme Court has said that any “fair reading” of Section 184 “compels the conclusion that money spent on education is to be spent exclusively in the public school system,” unless the referendum requirement is met. *Fannin*, 655 S.W.2d at 482

84. The Court has further concluded that Section 184’s restrictions apply both to revenue already raised for public schools and to potential future revenue. *Miller v. Covington Dev. Auth.*, 539 S.W.2d 1 (Ky. 1976).

85. HB 563 does not contain any requirement that its private school funding provisions be submitted to the legal voters of the Commonwealth before the Voucher Program becomes law. As such, by implementing the Voucher Program, the Defendants are violating Section 184.

Count III
Declaratory Judgment
Violation of Sections 3, 171, and 186 of the Kentucky Constitution

86. The allegations in Paragraphs 1-74 are realleged and incorporated by reference.

87. Section 3 of the Constitution prohibits the payment of funds “to any man or set of men except in consideration of public services.”

88. Section 171 of the Constitution provides that taxes must be “levied and collected for public purposes only.”

89. Section 186 of the Constitution provides that “[a]ll funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school fund among the school districts and its use

for public school purposes.”

90. The question of whether money is being used for a public purpose “depends on whether the use is a public one and is calculated to aid all the people in the state” *Fannin*, 655 S.W.2d at 482 (Ky. 1983). And private education cannot qualify as a public purpose where private schools “are open to selected people in the state, as contrasted with public schools which are open to all people in the state.” *Id.*

91. HB 563-funded private schools need not be open to all students in the state. Instead, HB 563 explicitly provides that participating private schools are not required to alter their admissions policies in order to participate. Admissions discrimination among private schools in Kentucky is so pervasive that discrimination is inevitable.

92. By funding private schools that are open only to selected people in the Commonwealth, the Voucher Program’s private school funding provisions violate Sections 3, 171 and 186 of the Constitution.

93. By implementing the Voucher Program, the Defendants have violated these provisions.

Count IV
Declaratory Judgment
Violation of Sections 2 and 29 of the Kentucky Constitution

94. The allegations in Paragraphs 1-74 are realleged and incorporated by reference.

95. Section 2 of the Kentucky Constitution states that “[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” And Section 29 provides that “[t]he legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the ‘General Assembly of the Commonwealth of Kentucky.’”

96. Under these provisions, the legislature can delegate its authority only if the law contains “sufficient standards controlling the exercise of [delegated] discretion.” *Holsclaw v. Stephens*, 507 S.W.2d 462, 471 (Ky. 1973).

97. Through the Voucher Program, the General Assembly has given private AGOs unfettered discretion over how education services are provided and how funds are distributed, without providing any standards controlling the exercise of that authority.

98. By implementing the Voucher Program, the Defendants have violated or will violate these provisions.

Count V Injunctive Relief

99. The allegations in Paragraphs 1-74 are realleged and incorporated by reference.

100. Plaintiffs are entitled to relief in the form of injunctive relief, both temporary and permanent, restraining and enjoining the Defendants and their agents, attorneys, and any other person in active concert or participation with them, from enforcing or implementing HB 563’s the Voucher Program, set forth in Sections 5 through 21 of the Bill.

101. CR 65.01 authorizes an injunction to “restrict or mandatorily direct the doing of an act.” Plaintiffs ask this court to permanently enjoin all the defendants from implementing or enforcing HB 563 in a manner that violates the aforementioned constitutional provisions, consistent with Plaintiffs’ prayer for relief below.

102. CR 65.04 provides:

A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.

103. As set forth above, HB 563's Voucher Program funds private schools violate numerous provisions of the Kentucky Constitution.

104. The Plaintiffs have suffered and will continue to suffer immediate and irreparable injury, loss, or damage pending a final judgment in this action. The challenged legislation is scheduled to take effect on June 28 without going through the referendum required by Section 184. Once that occurs, DOR will begin processing preapprovals for tax credit expenditures and AGOs will begin receiving and distributing re-directed tax dollars to private schools. Recovering the unconstitutionally diverted funds after they are distributed will be impractical, if not impossible. Unless the Court issues an injunction, unconstitutional and illegal acts of the Defendants will render any final judgment in this action ineffectual. Therefore, the Plaintiffs have no adequate remedy at law other than the issuance of the requested injunction.

105. HB 563 clearly violates numerous provisions of the Kentucky Constitution. There is a high likelihood the Plaintiffs will prevail in a full trial on the merits of their claims in this action.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs, by their counsel, demand as follows:

- I. For an expedited review of this action pursuant to KRS 418.050 and CR 57.
- II. That this Court issue a declaration and order that Sections 5 through 21 of HB 563, which allows voucher accounts to be used to fund private school tuition and fees, violates Section 2, 3, 29, 171, 183, 184 and 186 of the Kentucky Constitution.
- III. That the Court issue a temporary injunction, and a permanent injunction, restraining and enjoining the Defendants, their agents, attorneys, representatives, and any other persons in active concert with them, from implementing or enforcing HB 563 in a manner that violates the

aforementioned constitutional provisions.

IV. For any and all further relief to which Plaintiffs may appear to be entitled, including reasonable costs and attorneys' fees.

Dated this the 7th day of June, 2021.

Respectfully submitted,

/s/ Virginia Hamilton Snell

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