SUPREME COURT OF KENTUCKY

NO. 2011-SC-000658

JEFFERSON COUNTY BOARD OF EDUCATION
-and-
DR. SHELDON BERMAN, SUPERINTENDENT
JEFFERSON COUNTY PUBLIC SCHOOLS — MOVANTS

VS.

CHRIS FELL, as Father and — RESPONDENTS
Next Friend of L.F.
and
JENNIFER R. HOOVER, as Mother and
Next Friend of B.J.H.
and
ABIGAIL FOWLER, as Mother and
Next Friend of A.F.
and
ERIN LAWRENCE, as Mother and
Next Friend of S.E.L. and E.J.L.
and
ANGEL THOMPSON, as Mother and
Next Friend of W.C.T.
and
TERILYNN B. RALSTON, as Mother and
Next Friend of T.W.R.
and
DIANA J. ANJUM as Mother and
Next Friend of K.N.
and
URSELLA RILES, as Mother and
Next Friend of N.W.
and
BELINDA ABERNETHY, as Mother and
Next Friend of B.A.

COURT OFAPPEALS
NO. 2010-CA-001830

APPEAL FROM THE JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
NO. 10 CI 004174

CERTIFICATION

It is hereby certified that a copy of the foregoing was mailed this _____ day of November, 2011, to the Hon. Byron Leet, Attorney for Movants, Wyatt, Tarrant & Combs, LLP, 500 W. Jefferson Street, Ste. 2800, Louisville, KY 40202-2898.; Hon. J. Bruce Miller, Hon. Norma Miller, J. Bruce Miller Law Group, 605 West Main Street, Louisville, Kentucky 40202; and Hon. Sheila P. Hiestand, Hughes & Coleman, 200 S. Seventh St., Ste. 110, Louisville, Kentucky 40202, Attorneys for Respondents, and further certifies that the statement of facts as recited in this response are true and correct.

_____
TEDDY B. GORDON
Attorney for Respondents, Chris Fell as Father and next Friend of L.F.; Jennifer R. Hoover, as mother and Next Friend of B.J.H.; and Abigail Fowler, as Mother and Next Friend of A.F.; and Erin Lawrence as Mother and Next Friend of S.E.L. and E. J. L.

INTRODUCTION

This case comes before this honorable court on movant's motion for Discretionary review from the Opinion of the Court of Appeals. At all levels of these proceedings, JCPS has tried to justify their use of their student assignment plan: overwhelming pages in their motion to dismiss before the trial court, and their brief before Appellant Court, and seven of their fifteen pages allotted in their motion for Discretionary Review, herein. Once again, their presentation before the Court of Appeals was replete with justification of their plan. Upon stern questioning at the oral argument as to the effects of the plan, JCPS had to admit that within the parameters of the plan, minority status was mostly African American. In their defense of the plan and by their own admission, the goal of the plan was diversity. There was no defense that the plan would rectify the largest percentage failing schools statewide of any school district. In further attempting to defend the plan as failing to comply with the opinion of the Supreme Court of the United States in Meredith v JCPS, the appellate panel or at least two of the three reacted that JCPS was intentionally attempting to defy the Opinion of the U.S. Supreme Court and the plan was no more than the same thing they had before and was a proxy for race. Counsel, herein, during his presentation was specially asked that question and answered in the affirmative. Justice Caperton questioned very strongly, how JCPS could comply with KRS 161.290 (1) as to promoting the education, general health and welfare of the students when they were on a bus for that long to be sent to failing schools. Justice Thompson remarked how could it help children learn when they were on a bus going to school equal to traveling to Indianapolis and back.

As through out these proceedings and the proceedings before the Supreme Court of the United States, they have tried to sustain their actions whether unconstitutional as found by the Supreme Court or in violation of KRS 159.070 be pleading with the Courts to give deference to the elected status of the Jefferson County Board. How can that deference be given when two justices have found that this same Board continues to defy the law harming the children they are elected to protect? In response to questioning during my oral presentation and contrary to the omission in Movant's motion found on page 6 of their motion, Counsel, herein, explained that I had filed one challenge to the bussing post Meredith, but after an initial hearing for immediate injunctive relief to stay the plan on a day that the City was besieged with rainwater, JCPS acceded to the Plaintiffs request in their complaint and granted their kids admission in the school nearest their home. The allegations raised in Plaintiffs' complaint had been granted and were now moot. The action was dismissed.

Contrary to the argument of the Movants, this is not a case of first impression. Statutory construction has been decided by the appellate Court and this Honorable court many times before; and this legal issue will be more fully discussed in Respondents' Statement of Law set out below.

Further, contrary to the argument of the Movants, the Movants have never raised the issue that this case must first go before the Kentucky Department of Education.

Further contrary to the argument of the Movants that this opinion would affect the other 119 counties in the Commonwealth of Kentucky; or the other 174 public school districts in the Commonwealth of Kentucky, no other entity intervened. As powerful as the Jefferson County Board of Education, is if this litigation usurped the powers of the

Kentucky Department of Education or challenged the enrollment practices of the other 170 public school districts they have had over a year either at the appellate level or currently before this Honorable Court. Before the Supreme Court of the United States, there were literally hundreds of Amicus briefs filed. There were no such motions to intervene and file an amicus brief made and obviously so such motion was or would have been denied. There was no agreement by the Movant to bypass the Appellate Court and go directly to the Supreme Court of Kentucky. They chose the forum.

STATEMENT OF FACTS

The facts of this case are relegated to simplicity:

1. All of the current plaintiffs were forced to attend school **NOT** the nearest to their home.
2. Three of the students were forced to attend kindergartens **NOT** the nearest to their home.
3. None of the Plaintiffs were allowed to enroll their kids in the school nearest their home.
4. Neighborhood schools are simply not depositories for paper work.

STATEMENT OF LAW

I. WAS IS THE PROPER STATUTORY CONSTRUCTION OF KRS 159.070?

The issue before this Honorable Court is a matter of statutory construction. Respondents strongly believe the Appellate court got it right. Movants fail to cite one case that specifically defines the courts' duty in determining statutory construction. They do try to distinguish the case of precedent utilized by the Appellate Court in supporting their reasoning. See: Swift v Breckinridge County Board of Education 875 S.W.2 810 (Ky.App. 1994).

I am partial to Overnite Transportation v Gaddis 793 S.W.2d 129 (Ky. App. 1990) since I argued that case before the court of appeals, but Judge Maze referred to at least five other cases. The Court of Appeals used one other case Cosby v Commonwealth 147 S.W.3d 56 (Ky. 2004). They all stand for the same proposition: what is the plain meaning of the language used? What is the legislative intent?

See *Asher v. Stacy*, 185 S.W. 2d 958 (Ky. App. 1945); *Commonwealth v. Stevens,* 92 S.W. 3d 69 (Ky. 2002); *Commonwealth v. Montague,* 23 S.W. 3d 69 (Ky. 2000); *Cab. for Human Resources, Interim Office of Health Planning and Certification v. Jewish Hospital Health Care Services*, 932 S.W. 2d 388 (Ky. App. 1996), p.390. "…The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect…". Opinion of Judge Maze, page 7 appendix 1 to Movants motion. Although Movants have proffered other legal issue, the legal issue cited above is the issue before this honorable court. This Honorable Court must decide that review is warranted on this issue alone to reverse the Appellate Opinion.

There are two choices and two choices only as to the legislative intent and/or the statutory construction or interpretation of KRS 159.070. The first choice, which Respondents submits defies common sense, is that the Respondents' kids must allow these students to enroll (shall be permitted) in the school nearest their home, but they can attend anywhere JCPS wants to send them. In the facts of this case be bussed to Indianapolis and back to attend school. The second choice and the logical choice is kids are allowed to enroll in the school nearest their home. Contrary to the arguments of the movants the courts of the Commonwealth of Kentucky have long held that reasonable, good faith or substantial compliance is sufficient to comply with statutory law.

Contrary to the argument of the movants, when two school districts merge the intent of the legislature was not to bus kids to Indianapolis and back within two merged systems. For example: Caldwell County school district merges with the Hopkins County school district. Pursuant to the movants argument, the children who attend an elementary school in the Northeast corner of Hopkins County could be sent to an elementary school in the southwest corner of Caldwell County, almost to Indianapolis and back. The legislative intent was to allow the students in either school district after merger to –shall be permitted—in the school nearest their home. There is no other proper statutory construction to comport with the legislative intent.

Respondents reiterate that there would be no need for language in the statute permitting these students to enroll in the school nearest their home if they were going to be assigned to another school. Why not delete that language altogether? If the intent of the legislature was to allow school boards in the Commonwealth of Kentucky to assign their students to any school within their school district regardless of what school was closest to their home; then why have KRS 159.070 at all?

This statute does not apply to one hundred and nineteen counties in the Commonwealth of Kentucky. It applies to all one hundred and twenty counties including Jefferson County. Jefferson County can no longer seek the protection of a Federal Desegregation Order that forced bussing over thirty-five years ago. By their own admission, it was dissolved in the Hampton case in June of 2000. Jefferson County Public Schools is already a merged dissect. The movants "midnight" argument that this entire matter must first be submitted to the Kentucky Department of Education for "settlement" is a total contradiction. JCPS has always maintained that they are one

school district with one student assignment plan that applies to all of their students. As stated they have an appeal process in effect that decides hardship transfers. Now they are arguing that each of their clusters are separate attendance districts and because the Respondents desire to enroll in the school nearest their home which would be in a separate attendance district they must first appeal to the Kentucky Department of Education?

As stated before the well settled rule in the commonwealth of Kentucky is that reasonable, good faith and/or substantial compliance is sufficient to comport with statutory law. The Appellate opinion allows just that. JCPS can draw their attendance districts any way they want. It is obvious that if one school is 1.5 miles away from a child's home, and the next school is 2.0 miles away, that will not be a violation of the Court's Order. The Order specifically allows their magnet and other special programs. As admitted by the movants, the kids apply to the school for these special programs that are not the nearest school to their home. These are voluntary and are still encourages. The appellate opinion does not seek closures of any schools or any magnet or special programs in any schools. The Order merely enforces statutory law. It prevents cross county bussing that substitutes and deprives a child of one race to enroll in the school nearest their home so that a child of another race can enroll and attend that school. The Appellate Order interprets and enforces legislative intent to be carried out by an administrative agency, same being a public school district.

For all of the above reasons, these respondents respectfully submit that Movants' motion for Discretionary Review should be overruled.

Respectfully submitted,

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