Charting Kentucky's Path: How the Commonwealth Can Innovate Its Public Schools with Charter Legislation

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INTRODUCTION

"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." These words come from the majority opinion in San Antonio Independent School District v. Rodriguez, a 1973 United States Supreme Court case involving the constitutionality of Texas's school-funding system. In Rodriguez, the Court declined to subject Texas's financing system to strict scrutiny, holding that education was not a fundamental right found within the U.S. Constitution and leaving it to the states to determine the quality and funding of their educational systems.

Every state constitution contains an education clause of some kind, however, each is remarkably different. Twenty-one state constitutions have "establishment provisions," which merely mandate a free public school system and nothing more. Eighteen state constitutions, including

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3 See id. at 4.
4 See id. at 6.
5 See id.
7 See id.
8 See ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. VI, § 1; LA. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); NEB. CONST. art. VII, § 1; N.H. CONST. pt. 2, art. 83; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. XI, § 3; TENN. CONST. art. XI, § 12; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68. See also Thro, supra note 6, at 16.
Kentucky's constitution, have "quality provisions," which mandate that an educational system of a specific quality be provided. Six state constitutions have "strong mandate provisions" that not only establish a level of quality but also provide a firm requirement for doing so. Finally, five state constitutions have "high duty provisions" which seemingly place education above other public functions such as highways or welfare.

Kentucky's constitution calls for an "efficient system of common schools"; however, the actual state of education in the Commonwealth has traditionally been anything but efficient. For most of its existence, Kentucky's attitude towards the funding of public education has been marked by indifference, and its historical reputation for a poorly educated citizenry continues to this day. By the 1980s, the public school system in Kentucky had reached a crisis point, ranking as one of the worst in the nation. In 1989, the Kentucky Supreme Court noted the inefficiency of the Commonwealth's public school system in Rose v. Council for Better Education, Inc. The court recognized the vast disparity in funding between the wealthiest school districts and the poorest. The court ruled that the inequities between the "haves" and the "have-nots" were so great as to be inefficient—in other words, unconstitutional. However, as lofty as Rose's goals were, the fact remains that Kentucky still ranks near the bottom of national educational rankings. For example, Kentucky ranks forty-seventh in the nation in percentage of persons twenty-five years and older with a bachelor's degree or further postsecondary education. This troubling statistic begs the question of what can be done to improve Kentucky's public schools?

See Ky. Const. § 183.

See Ark. Const. art. XIV, § 1; Colo. Const. art. IX, § 2; Del. Const. art. X, § 1; Idaho Const. art. IX, § 1; Md. Const. art. VIII, § 1; Minn. Const. art. XIII, § 1; Mont. Const. art. X, § 1; N.J. Const. art. VIII, § 4, ¶ 1; N.D. Const. art. VIII, § 1; Ohio Const. art. VI, § 3; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; Tex. Const. art. VII, § 1; Va. Const. art. VIII, § 1; W.Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1. See also Thro, supra note 6, at 16.

See Cal. Const. art. IX, § 5; Ind. Const. art. VIII, § 1; Iowa Const. art. 9, 2d, § 3; Nev. Const. art. XI, § 2; R.I. Const. art. XII, § 1; S.D. Const. art. VIII, § 1. See also Thro, supra note 6, at 16.

See Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1, ¶ 1; Ill. Const. art. X, § 1; Me. Const. art. 8, pt. 1, § 1; Wash. Const. art. IX, § 1. See also Thro, supra note 6, at 16.

See Ky. Const. § 183.


See id. at 32.


See id. at 196.

See id. at 215.

The solution to Kentucky’s educational woes might be charter legislation. A charter school is a publicly funded school that is free from many rules, regulations, and statutes that apply to traditional public schools.20 Each charter school is held accountable for certain results, which are set forth in its charter.21 A charter school must meet particular goals within a certain timeframe or risk losing its charter to operate.22 Charter schools are completely tuition-free and admit students through a lottery system.23 Many charter schools are founded by teachers, parents, or educational reformers who are dissatisfied with the restrictions and the lack of innovation found in traditional public schools.24 Charter schools are usually smaller than traditional public schools.25 According to researchers, small schools offer “higher achievement, more individualized instruction, greater safety, and increased student involvement.”26 Charter schools have greater autonomy than traditional public schools, and therefore, are seen as a way to offer greater educational choice and innovation within the public school system.27 Charter schools frequently emphasize particular fields, such as technology or the arts, and they may also serve special student populations, such as special education or at-risk students.28

The goal of this note is not to advocate for school vouchers or any other public funding for private education in Kentucky, because these options would almost certainly run afoul of section 189 of the state constitution.29 Rather, the goal of this note is to advocate for the establishment of charter schools in Kentucky. Part I of this note provides a brief history of the evolution of public schools in Kentucky and examines how, two decades after Rose, the Commonwealth still needs to drastically improve its education system—a need that would be partially ameliorated by charter school legislation. Part II is a survey of the states with charter school legislation and the differences between charter legislation among the states. Part III analyzes New Orleans’s public school system in the

21 See id.
22 See id.
25 See id.
26 See id.
27 See id.
28 See id.
29 See Ky. Const. § 189 (stating that “[n]o portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school”).
aftermath of Hurricane Katrina—New Orleans is the locale with by far the most radical experimentation in charter schooling, a phenomenon sparked by the hurricane. Part IV discusses recent state court challenges to charter legislation. Part V examines the recent attempts to enact charter legislation in Kentucky. Finally, Part VI argues that charter school legislation would not violate *Rose* or any other precedent in Kentucky constitutional law.

I. THE EVOLUTION OF THE KENTUCKY PUBLIC SCHOOL SYSTEM FROM SETTLEMENT TO *ROSE* AND BEYOND

Kentucky, initially a part of Virginia, was first settled in the 1770s by American colonists who crossed over the Appalachian Mountains in waves. Even at its initial settlement, Kentucky faced daunting obstacles in education: a semi-literate population, the institution of slavery, and an inequitable and undemocratic land-distribution system. Elementary education began in one-room schoolhouses in Fort Harrod and Fort Boonesborough, the first two settlements in Kentucky. These schools focused on religious and moral education with the Bible as the main source of reading.

After seceding from Virginia, Kentucky took a decidedly hands-off approach to education. Neither the 1792 nor the 1799 state constitution made any mention of education. The elites of the time believed that the purpose of schools were “to give an elementary education to a more or less select group of students to serve the professions, unsupported by taxes.” The prevailing attitude was that Kentucky needed trained ministers, lawyers, and other public servants—not an educated general public. Formal education was reserved for white males of status.

It was not until 1838 that the Kentucky General Assembly passed a law creating a common school system. A state school board was formed, which appointed five commissioners in each county to oversee the local schools. Furthermore, each county could levy taxes equal to the educational funds it received from the state. Students generally attended these

31 See id.
32 See id. at 4.
33 See id.
34 See id. at 7.
35 Id. at 8.
36 See id.
38 See Ellis, *supra* note 30, at 21.
39 See id.
40 Id.
schools through the third grade. Biblical literacy was usually deemed sufficient education. This educational reform was a failure because most Kentuckians did not see a need for the common school system. In fact, several counties refused to levy a school tax until the late nineteenth century. This became apparent in 1840 when Governor Robert Perkins Letcher announced that "there was not enough money available to pay the interest on the bonds in the School Fund"; as a result, no more state money went to the county schools. In terms of education, Kentucky compared miserably to its neighbors. In 1840, for example, Ohio dwarfed Kentucky in the amount of students educated in common schools by a ratio of roughly 10:1, and in Tennessee, 22.4% of students were being educated in common schools compared to 1.4% in Kentucky.

Ten years later, education in the Commonwealth had a glimmer of hope as a state constitutional convention debated the merits of including a provision that would guarantee a common school system in the new constitution. The proposal to include this provision drew considerable opposition. One member of the convention even asserted that common schools "[were] generally under the management of a miserable set of humbug teachers at best." Despite such opposition, the provision passed and was included in the 1850 constitution. For the first time in history, Kentucky constitutionally guaranteed both a common school system and a school fund protected from legislative siphoning.

The 1850 constitution was only one part of the educational progress Kentucky made shortly before the Civil War. Between 1847 and 1853, enrollment increased from 20,402 to 201,223, average attendance in elementary schools went from 10,220 to 72,010, and the school fund increased by approximately $400,000. The improvement in education was not uniform in Kentucky as a number of mountain counties lagged behind. The 1850 census showed that Perry and Owsley counties had no public schools at all. On the whole, however, Kentucky was making significant strides in education. By 1860, Kentucky had 431 more teachers than

41 Id.
42 Id.
43 See id.
44 Id. at 23.
45 See id. at 22.
46 See id.
48 Id.
49 See id.
50 See id.
51 Id. at 150.
52 See Ellis, supra note 30, at 31-32.
53 See id. at 35-36.
Tennessee, a state with a similar population. In fact, among the southern states, Kentucky trailed only North Carolina in public education.

This educational renaissance would be dealt a severe blow by the Civil War. The war was devastating for Kentucky, taking it from its place as one of the ten wealthiest states in 1860 to one of the ten poorest states in 1865—a spot it has never left. Education took a back seat to survival as teachers went off to war and schools closed in the face of advancing armies. Both student attendance and the school fund decreased dramatically; furthermore, few districts would tax themselves to support their schools.

It has been said that Kentucky joined the Confederacy after the Civil War. Always a conservative state, Kentucky drifted ideologically toward the South after the war. Historian Alfred E. Meyer remarked about the South, "The bald fact is that [it] was in no position to come to terms with its public education, nor, for that matter, was it in the mood." Kentucky was no different than its Southern brethren, as a quarter of Kentuckians over the age of ten were illiterate in 1870.

As bad as the state of education was in Kentucky, it was even worse for black Kentuckians. Almost no state funding supported education for African-Americans, as they owned very little property on which to be taxed. An early attempt to rectify this disparity in school funding occurred in 1884. In Claybrook v. City of Owensboro, black taxpayers challenged a state statute that stipulated tax dollars collected from white citizens were required to go to whites-only schools and tax dollars collected from black citizens were required to go to blacks-only schools. The court in Claybrook held that the statute unconstitutionally denied black citizens equal protection of the law; however, the court concluded that it had no power to issue a mandatory injunction to rectify the inequity.

In 1891, Kentucky drew up yet another constitution. As in 1850, the state's constitutional delegates added provisions to ensure a free public school system for all. Pursuant to section 183, "The General Assembly

54 Id. at 36.
55 See id.
56 Id. at 69.
57 Id. at 67.
58 Id. at 68.
59 See id. at 70.
60 See id. at 69-70.
61 Id. at 70.
62 See id. at 70.
63 See id. at 73.
64 Claybrook v. Owensboro, 23 F. 634 (C.C.D. Ky. 1884).
65 See id. at 635.
66 See id.
67 See Dawahare, supra note 14, at 29.
shall, by appropriate legislation, provide for an efficient system of common
schools throughout the State."68 However, the constitution does not
define what constitutes an "efficient system of public schools."69 Despite
ambiguities in the 1891 constitution, the delegates had egalitarian ideals in
mind. One delegate expressly noted that the purpose of section 183 was to
rectify the old system's uneven and unequal distribution of funds among
the school districts.70 Another delegate opined that the ideal system was
one of "practical equality in which the children of the rich and poor meet
upon a perfect level, and the only superiority is that of the mind..."71

As lofty as these goals were, the quality of education in Kentucky
dwindled over the next ninety years. This was due to inequitable funding
among rich and poor areas of the state, producing inadequate schools.72
After Rodriguez held that public education was not a right guaranteed
by the U.S. Constitution in 1973, solutions to fix public education were
attempted across the nation on a statewide level.73 In 1989, the Kentucky
Supreme Court decided Rose v. Council for Better Education, Inc.74 In Rose,
sixty-six school districts and twenty-two public school students sued the
government of Kentucky for inadequate and unequal school funding.75
Among the complaint's allegations were that the system of school funding
provided by the General Assembly was inadequate and placed too much
emphasis on local school district resources, resulting in wide disparities
between rich and poor districts.76 These disparities, the plaintiffs alleged,
were in violation of sections 1, 3, and 183 of the Kentucky Constitution and
the Fourteenth Amendment to the United States Constitution.77

The facts regarding the state of education in Kentucky set forth in the
plaintiffs' brief were appalling by any measure. Kentucky's educational
system had produced: (1) the most illiterate citizens in the country; (2)
the highest percentage of counties with undereducated populations; (3) a
functional literacy rate of 48.4% in Eastern Kentucky; (4) a state ranking
of forty-third in the nation for per student expenditures; (5) a state ranking
of last place in the nation for citizens over twenty-five years old with high
school diplomas; (6) a state ranking of forty-ninth in the nation with citizens
over twenty-five years old with four or more years of college; (7) a state
ranking of forty-seventh in the nation for per capita expenditures of state

68 Ky. Const. § 183.
69 Dawahare, supra note 14, at 29.
70 See id.
71 Id.
72 See id. at 30.
73 Id. at 31.
75 Id. at 190.
76 Id.
77 Id.
and local governments for schools; and (8) students lagging behind national standardized test scores, with students in Eastern Kentucky districts scoring considerably lower than those in other regions of the state.\textsuperscript{78} The quality of school buildings in rich districts and poor districts was grossly unequal: Elliott County elementary students even had to attend classes in a trailer salvaged from a recent flood.\textsuperscript{79}

The court realized these stark realities could not continue, holding that the entire Kentucky public school system was inefficient, and therefore, unconstitutional.\textsuperscript{80} According to the court, an efficient public school system must have the seven following capacities as its goal:

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.\textsuperscript{81}

However, the court left the overhauling of the Kentucky school system in the hands of the General Assembly, which was mandated to use the nine following factors in setting up a new and efficient system:

(1) the establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly; (2) common schools shall be free to all; (3) common schools shall be available to all Kentucky children; (4) common schools shall be substantially uniform throughout the state; (5) common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances; (6) common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence; (7) the premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education; (8) the General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education; and (9) an adequate education is one which

\textsuperscript{78} Dawahare, \textit{supra} note 14, at 32.
\textsuperscript{79} See id. at 32-33.
\textsuperscript{80} See Rose, 790 S.W.2d at 209.
\textsuperscript{81} Id. at 212.
has as its goal the development of the seven capacities recited previously.\textsuperscript{82}

With the entire state school system ruled unconstitutional by \textit{Rose}, the Kentucky General Assembly had to rebuild it from the ground up. The year after \textit{Rose}, the General Assembly passed the Kentucky Educational Reform Act ("\textit{KERA}").\textsuperscript{83} \textit{KERA} included many new departures from the pre-\textit{Rose} era. Preschools for disadvantaged children were implemented.\textsuperscript{84} Family Resource and Youth Services centers were developed in school districts with large numbers of impoverished students.\textsuperscript{85} Anti-nepotism laws were put in place.\textsuperscript{86} The General Assembly authorized an extra $1 billion for public school education, and efforts were made to tax property statewide at its full market value.\textsuperscript{87} The KIRIS test (later CATS) began testing students in grades four, five, seven, eight, eleven, and twelve.\textsuperscript{88}

In 2004, several school districts banded together and filed a new case, \textit{Young v. Williams}, challenging the General Assembly's budget cut backs in education.\textsuperscript{89} According to plaintiffs, school funding was between $1.08 billion and $1.2 billion short of what was necessary to provide an adequate education.\textsuperscript{90} Furthermore, the plaintiffs emphasized that the General Assembly's funding decisions were unconstitutionally arbitrary.\textsuperscript{91} Three years later, the Franklin Circuit Court dismissed the case, finding that there was no objective evidence of a "constitutional shortcoming as to any actual inadequacy of a Kentucky common school education."\textsuperscript{92} Franklin Circuit Court Judge Thomas Wingate agreed with the plaintiffs that the Kentucky General Assembly needed to conduct a cost study, but Judge Wingate ultimately held that the Kentucky Constitution's strong separation of powers forbade him from ordering a study.\textsuperscript{93}

While Kentucky has made some progress in the two decades following \textit{Rose}, there is still much to be done as the Commonwealth's schools are still underfunded. In 2006, one historian commented, "Currently, the state ranks fourteenth nationally in highway spending, but last in education

\begin{itemize}
\item \textsuperscript{82} \textit{Id.} at 212-13.
\item \textsuperscript{83} \textit{See Ellis, supra} note 30, at 402.
\item \textsuperscript{84} \textit{See id.} at 403.
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{See Young v. Williams,} 03-CI-00055, at *2 (Frankin Cir. Ct. Feb. 13, 2007) \textit{available at} http://ftthomasschools.files.wordpress.com/2009/02/wingate-ruling.pdf.
\item \textsuperscript{90} \textit{Id.} at *3.
\item \textsuperscript{91} \textit{See id.} at *2.
\item \textsuperscript{92} \textit{Id.} at *15.
\item \textsuperscript{93} \textit{See id.} at *17.
\end{itemize}
spending per person.... Asphalt often seems more valued [in Kentucky] than a young mind." If Kentucky is unwilling to spend more to educate its youth, then the state has the duty to innovate its school system through non-traditional means.

II. A Survey of Charter Legislation Across the Country

Minnesota became the first state in the nation to adopt charter legislation in 1991, and by the next year, the first charter school opened its doors. Forty states and the District of Columbia have adopted charter legislation as of 2012. Approximately 2,056,996 students attend the 5,611 charter schools in existence across the nation. California, Texas, Florida, and Arizona have the most students attending charter schools.

State charter school statutes vary considerably in their approach to defining charter schools and their employees, their methods for regulating schools, and their prescribed ways of holding schools accountable. Most jurisdictions define charter schools as "public schools." These statutes also differ in how they define the charter schools' relationship to the state's regular public education system. The charter schools are either wholly included in a state's regular public education system, are characterized as "independent," or are governed through a unique contractual relationship with the state or state board of education.

Most charter school laws specify how the state will regulate the charter schools in matters of school employment, student accountability, and other issues. Most states issue charters contingent on factors such as school setting, the school's ability to meet educational performance goals defined by the charter itself, the mandate that enrollment be completely open to all who wish to enroll, and the requirement of a lottery in the event that demand for enrollment exceeds the number of spots in the school. Furthermore, charter statutes usually identify which state laws are applied.

94 Ellis, supra note 30, at 422 (quoting historian Jim Klotter).
96 Id.
98 Id.
99 Id.
100 See Hulden, supra note 95, at 1254.
101 Id. at 1255.
102 See id.
103 Id. at 1255-56.
104 Id. at 1256.
105 See id.
to charter schools. In Colorado, charter schools are audited in the exact same manner as other government entities. In Hawaii, charter schools are required to disclose records in the same exact fashion as the regular public schools in accordance with the Uniform Information Practice Act. Illinois's charter schools are subject to the Local Governmental and Governmental Employees Tort Immunity Act, the Illinois School Student Records Act, and the Freedom of Information Act. In contrast, private schools are not typically subject to such instances of governmental disclosure or audit requirements.

The National Alliance for Public Charter Schools ranks states' charter legislation by several factors. These factors include adequate funding, the amount of variety of charter schools allowed, whether performance-based charter contracts are required, and charter school autonomy. Maine, Florida, and Minnesota are considered to have the strongest charter school laws while Mississippi, Maryland, and Alaska have the weakest laws.

III. A LOOK AT THE SUCCESS OF CHARTER SCHOOLS IN NEW ORLEANS

In 2005, Hurricane Katrina took a devastating toll on the livelihoods of inhabitants of New Orleans and the rest of the Gulf Coast. Public schools in New Orleans were facing hard times even before Katrina. The district had incurred a debt of over $400 million with annual payments of approximately $35 million. This debt severely curtailed any attempt to renovate or replace the deteriorating school buildings within the city. Orleans Parish was the second-worst performing school district in Louisiana, and in some schools thirty percent of seniors dropped out over the course of the year. On Louisiana's 2004 state high school exit examination, ninety-six percent of New Orleans public school students fell below basic proficiency in English, and ninety-four percent fell below basic proficiency in mathematics. In fact, in 2003, one valedictorian was not
allowed to graduate after failing the mathematics portion of the state exit examination five times.\textsuperscript{117}

After Katrina struck, only sixteen of the one hundred twenty-six New Orleans school buildings were undamaged, and thirty-five percent of the buildings were rendered completely unusable.\textsuperscript{118} Nearly all school employees were laid off, and all of the public schools were closed for the duration of the year.\textsuperscript{119} However, by the beginning of 2006, the public schools had begun to reopen and the majority of them were charter schools.\textsuperscript{120} The federal government earmarked nearly $21 million to stimulate the development of charter schools in Louisiana, and the Recovery School District was created by the Louisiana legislature to run the bulk of the charter schools in New Orleans.\textsuperscript{121}

The transformation of New Orleans schools from failing traditional schools to charter schools appears to be an unqualified success. In 2008, Orleans Parish’s District Performance Score increased by ten percent from 2005,\textsuperscript{122} and the gap between the parish’s scores and the rest of the state has been cut in half.\textsuperscript{123} While two-thirds of New Orleans public school students were attending failing schools pre-Katrina, less than one-third attended failing schools during the 2010-2011 school year.\textsuperscript{124} Out of the top fifteen public schools in New Orleans, thirteen were chartered and two were traditional; out of the bottom fifteen schools, ten were traditional and only five were chartered.\textsuperscript{125}

IV. State Court Challenges to Charter Legislation

Charter legislation has not gone without controversy, and a few states have had major litigation over the constitutionality of their charter schools. In the 2006 case of State ex rel. Ohio Congress of Parents & Teachers v. State Board of Education, the Ohio Supreme Court struck down a facial challenge to the state’s system of charter schools.\textsuperscript{126} The appellants argued that charter school legislation violated the Thorough and Efficient Clause of the Ohio

\begin{footnotes}
\item 117 Laskow, supra note 115.
\item 118 Public Education in New Orleans, supra note 116.
\item 119 Id.
\item 120 Id.
\item 121 Id.
\item 122 Public Education in New Orleans, supra note 116, at 2.
\item 123 Laskow, supra note 115.
\item 124 Id.
\item 125 Public Education in New Orleans, supra note 116, at 3.
\end{footnotes}
Constitution. The appellants complained that charter schools were not part of the common school system; rather, they were publicly funded private organizations that were not subject to the same state standards as traditional public schools. Furthermore, the appellants argued that charter schools diverted money away from the traditional schools, depriving local school districts of providing a thorough and efficient education.

The court disagreed with the appellants on both arguments. First, the court pointed out that charter schools in Ohio were being held accountable under the same standards as traditional schools: charter schools were required to administer the same achievement and graduation tests as other public schools as well as maintain all of the same health and safety standards. Furthermore, the court noted that the state had the authority to shut down failing charter schools, an option not available for even the worst traditional school. As to the appellants’ second argument, the court held that there was nothing in the Ohio Constitution that “prohibited the General Assembly from reducing funding to a school district with decreasing enrollment.” The court reasoned that if a child left a district for any reason, be it for a private school or homeschooling, the state was required to reduce funding for the district the child left.

The Florida Supreme Court took a different approach in the 2006 case of Bush v. Holmes. In Holmes, the court struck down the state’s Opportunity Scholarship Program (“OSP”), which allowed students in failing schools to use school vouchers to obtain a private school education. The court determined that the OSP violated the state constitution because it diverted public dollars into private school systems, not only reducing funds for public schools, but also subsidizing private schools that are not “uniform” to each other or to the public school system.

Although strictly limited to private schools, if vouchers are found to unconstitutionally divert public money to non-uniform private schools, an argument can be made that Florida’s charter schools could also be held unconstitutional under Holmes. Specifically, if the OSP’s diversion of funds from public schools to private schools is unconstitutional, then

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127 Id. at 1156.
128 Id.
129 Id.
130 See id. at 1158.
131 Id.
132 Id. at 1159.
133 Id.
134 Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).
135 See id. at 397-98.
136 See id. at 398.
charter schools' similar diversion of funds from traditional public schools would be unconstitutional as well.  

Furthermore, if a voucher program violates the "uniformity" provision because private schools are not subject to the full range of regulations as traditional public schools, then charter schools similarly violate the provision.  

However, this argument has not always carried the day, as illustrated by the Ohio Congress of Parents & Teachers court's holding that charter schools in Ohio did not divert public money to private entities and that the schools were not non-uniform in comparison to traditional public schools. The uniformity of accountability between charter and traditional schools seems to be of utmost importance in determining whether charter legislation is constitutional on a statewide basis.

Perhaps the strongest rebuke a state supreme court has taken against charter schools occurred in Georgia. In 2011, the Georgia Supreme Court decided the case of Gwinnett County School District v. Cox, holding that the state's Charter School Commission Act was unconstitutional. According to the Georgia Constitution, "[a]uthority is granted to county and area boards of education to establish and maintain public schools within their limits." The Georgia General Assembly, alone or with the local districts, may establish "special schools" as deemed necessary. The 2008 Charter School Commission Act authorized a state commission to establish charter schools under the title of "special schools." The appellants argued that the charter schools commissioned by the Act were not "special schools," which made the Act unconstitutional. The court agreed, reasoning that "special schools" enrolled students with special needs or taught only certain subjects (i.e., vocational schools). "Special schools" were not meant to teach a general K-12 education, nor were they to compete with local school districts. The ruling in Cox struck down a statewide system of charter schools commissioned by the Act, leaving the option of whether to open a charter school to the local school districts.
V. RECENT ATTEMPTS TO ENACT CHARTER LEGISLATION IN KENTUCKY

The recent debate regarding charter legislation in Kentucky has coincided with Race to the Top, a $4.35 billion dollar program administered by the U.S. Department of Education. Race to the Top is essentially a contest between the states, rewarding innovation and reform in K-12 education. States are rewarded points on how well they implement various educational reforms. The first round of grants in March of 2010 awarded $200 million each to the two states with the highest scores. One of the scored criteria for Race to the Top is whether or not a state has charter legislation, and because Kentucky lacked such legislation, it immediately started thirty-two points behind virtually every other state. A bill to enact charter legislation was introduced in the House of Representatives by Reps. Stan Lee (R-Lexington) and Brad Montell (R-Shelbyville) on January 5, 2010, two weeks before the January 19 deadline for Race to the Top applications. The bill failed to make it out of the House, and Delaware and Tennessee were awarded the $200 million dollar grants, with Kentucky coming in ninth place. Kentucky would have been awarded the grant if it had been rewarded with the full thirty-two points for charter legislation. A second attempt to secure Race to the Top funding failed in August of 2010 as Kentucky simply could not overcome the thirty-two points lost by not having charter legislation. Kentucky finally secured a $17 million Race to the Top grant in December of 2011, a far cry from the $200 million grant it could have won in the first round.

150 See Warren, supra note 148.
151 Id.
152 Id.
155 See Warren, supra note 148.
156 See id.
Two high-profile charter-related bills were introduced in the General Assembly in 2012. Rep. Montell sponsored House Bill 77 on January 3, 2012,159 however, the House Education Committee voted not to send the bill to the House floor.160 House Bill 37 was also introduced on January 3, 2012, containing the novel concept of “districts of innovation”—school districts that develop an educational plan in compliance with the bill in exchange for an exemption from certain administrative regulations and statutory provisions.161

This charter-like compromise, while a step in the right direction, falls short. Not only do “districts of innovation” lack true school choice, but a seventy percent majority of school staff have to vote in the affirmative in order for an individual school to request inclusion in the program.162 House Bill 37 was amended on March 27, 2012 to include a charter program of up to twenty charter schools, half of them in economically distressed areas.163 This amended bill passed the Senate Educational Committee,164 but the amendment was eventually withdrawn and the bill was passed without any mention of charter legislation.165

VI. WHY CHARTER LEGISLATION WOULD NOT VIOLATE THE KENTUCKY CONSTITUTION

If the General Assembly were to enact charter legislation in the future, it is probable that litigation over the issue would reach Kentucky courts. However, the enactment of charter schools in Kentucky would not violate any of the nine constitutional factors of an efficient public school system set forth in Rose.166 Furthermore, House Bill 37 would have satisfied all factors had it been enacted in its entirety, including the provision authorizing up to 20 charter schools in distressed areas.


162 See id. § 2(3)(b)(1).

163 See id. § 3(2).


165 See Ky. REV. STAT. ANN. § 160.107 (West 2012).

166 See discussion supra Section I.
A. The Establishment, Maintenance and Funding of Common Schools in Kentucky is the Sole Responsibility of the General Assembly

Only the General Assembly could establish any charter schools in Kentucky. Local school districts would be unable to establish a charter school without the authorization of a charter school commission established by the General Assembly—the exact opposite of the situation in Cox, which held that Georgia local school districts had the sole power to establish charter schools. Furthermore, charter schools would be completely nonsectarian and would not violate the educational separation of church and state mandated by the Kentucky Constitution.

B. Common Schools Shall be Free to All

As charter schools would be completely public funded and tuition-free as are traditional public schools, charter legislation would not violate this factor.

C. Common Schools Shall be Available to All Kentucky Children

Charter schools would not be able to discriminate against any student on the basis of ethnicity, national origin, gender, disability, or any other ground that would be unlawful if done by a traditional public school. Charter school admission is primarily through lottery; however, this fact is not damning. If charter schools are to be considered common schools, as they should be, then they are no different than public magnet schools. Generally, magnet schools admit students through admission examinations, first-come, first-serve applications, lotteries, or through percentage set-asides for neighborhood residents (students residing in a magnet school's original zone may be allowed to attend without participating in any of the other processes through which admission is granted).

Magnet schools are already in operation in Kentucky, most notably in the Jefferson County school district. DuPont Manual High School in...
Louisville selects students through a competitive process that evaluates achievement test scores, academic achievement, personal essays, teacher recommendations, as well as portfolios and performing arts auditions for its performing arts program. If a public magnet school is allowed to base its enrollment totally on selective criteria and still be considered wholly within the public school system, then it would be disingenuous for a charter school that determines admission primarily through lottery not to be considered as such.

D. Common Schools Shall be Substantially Uniform Throughout the State

As long as charter schools are held to the same accountability standards as other public schools in Kentucky, this factor should not be a problem. Charter schools in Kentucky would adhere to the same health, safety, civil rights, and disability rights requirements as traditional public schools; ensure compulsory attendance requirements; ensure the minimum high school course offerings; ensure that students participate in standardized testing; adhere to all generally accepted accounting principles as traditional public schools; require state and criminal background checks for school employees and volunteers; comply with open records requirements; comply with purchasing requirements and limitations; provide the minimum instructional time as required by law; and provide data to the Kentucky Department of Education to generate a school report card as required by law.

E. Common Schools Shall Provide Equal Educational Opportunities to All Kentucky Children, Regardless of Place of Residence or Economic Circumstances

Charter schools would not geographically discriminate between students in any meaningful sense. Magnet schools do not exist in every school district in Kentucky, therefore, these schools could be considered geographically discriminatory in the strictest sense. Taking this argument to its logical extreme, local school districts geographically discriminate as local school districts are generally designed to serve only the students residing in their district. In Kentucky, a board of education is permitted to charge a reasonable monthly tuition for each child whose legal guardian is not a resident of said district. Contracts for non-resident pupils between

com/admission.htm (last visited Mar. 21, 2012).

175 Id.

176 See generally State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1158 (Ohio 2006) (discussing how charter schools in Ohio are held to the same achievement, health, and safety standards as traditional public schools).


178 See Ky. REV. STAT. ANN. § 158.120(1) (West 2012).
neighboring districts are required for a student in one district to be allowed to attend a school in another district without paying tuition. If charter legislation were passed, charter schools may not be available in all parts of Kentucky and could lead to outcries of discrimination based on geography. However, since Kentucky school districts already legally geographically discriminate, there seems to be little difference between traditional public schools and charter schools in this regard. As previously stated in section B, charter schools would be tuition-free and therefore would not discriminate on the basis of economic circumstances. In fact, House Bill 37 would have helped economically distressed students as it stipulated that at least fifty percent of charter schools were to be located within a three mile radius of a public school in which a minimum of fifty percent of the students qualify for free or reduced lunch.

F. Common Schools Shall be Monitored by the General Assembly to Assure That They are Operated with No Waste, No Duplication, No Mismanagement, and With No Political Influence

All charter schools are not created equally. Some charter schools succeed at high levels, and some charter schools fail to meet the goals set forth in their charter and are shut down. Each charter school would be responsible for combatting issues of waste or mismanagement that would impede its educational goals. The charter school commission would have the authority to close down a school for failure to meet standardized assessment goals, violations of the law, or substantial violations of the school's charter, including fiscal mismanagement. An inference that charter schools will also be considered to operate without duplication can be drawn by the coexistence of duPont Manual High School and traditional public high schools in Louisville. Finally, it would be the General Assembly's responsibility to ensure that both charter schools and traditional public schools are operated without political influence.

G. The Premise for the Existence of Common Schools is that All Children in Kentucky Have a Constitutional Right to an Adequate Education

This has been a guarantee that Kentucky has ostensibly provided since the 1850 constitutional convention. Despite this guarantee, Kentucky

179 See id. § 157.350(4).
184 See HARRISON, supra note 47, at 118-19.
still ranks near the bottom of the country in education. It can be argued that Kentucky does not provide an adequate education to all children. Adding charter schools to public education would at least be an attempt to innovate the Commonwealth’s ailing schools.

H. The General Assembly Shall Provide Funding which is Sufficient to Provide Each Child in Kentucky an Adequate Education

Pursuant to Rose, the General Assembly must establish a uniform property tax rate to counteract the great disparity of local tax efforts in public schools. All owners of real and personal property throughout Kentucky are to make a comparable effort in financing the public school system. This implies that charter schools in Kentucky would be as well-funded as traditional public schools. While it can be argued that charter schools would unfairly siphon off funds from local school districts, Ohio Congress of Parents & Teachers offers a strong counterpoint: the state will reduce funding for a district for each child the district loses if a child leaves a district for any reason, be it for a private school or homeschooling. Kentucky is no different as a school district’s funding is calculated by the average daily attendance of its students, and children who are educated by a private school or at home would not be included in a school district’s average daily attendance.

I. An Adequate Education is One Which Has as Its Goal the Development of the Seven Capacities Recited Previously

Charter schools have demonstrated that they can provide an adequate education in an alternative setting. Kentucky charter schools that fail in developing the seven capacities listed in Rose would struggle to meet their mandated academic goals and would risk being shut down.

Arguably, charter legislation may not even need to pass the Rose factors in order to be deemed constitutionally valid. In Young, the Franklin Circuit Court dismissed the plaintiffs’ case for more equitable school funding as the court determined that the doctrine of separation of powers prevented it from deciding such an issue. The implications of this case are not

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188 See discussion supra Section I.
fully clear and lead to several questions for Kentucky courts to consider in the future. The ruling in Young suggests that Kentucky courts may be backing away from Rose and are more likely to find school-funding issues nonjusticiable in the future.

CONCLUSION

This note has examined the issues surrounding the incorporation of charter schools into the realm of public education, both nationally and in Kentucky. Charter schools produce tangible benefits and have served public school students across the country—the most dramatic example taking place in post-Katrina New Orleans. Charter legislation has been the subject of several high-profile state supreme court cases. However, each state’s constitution is not identical. As evidenced by the cases cited in this note, each state must determine the validity of alternative schooling in light of each state’s particular constitution. Any litigation over charter legislation in the Commonwealth would be decided under the Kentucky Constitution alone.

Charter schools would not violate the Kentucky Constitution as the inclusion of charter schools would meet the standards of an efficient public school system set out in Rose. The inclusion of charter schools in Kentucky would not be run afoul of an efficient public school system; instead, charter schools would enhance and add new blood to the system. Furthermore, Kentucky courts may be becoming increasingly reluctant to intervene in state educational matters as demonstrated by Young. Kentucky charter schools would be tuition-free, available to any student regardless of economic circumstances, and would be held accountable to the same standards that govern traditional schools. The success of charter legislation nationwide demonstrates that there is a need for non-traditional public education in Kentucky. Kentucky has lagged behind its sister states in education for far too long, and the Commonwealth owes its citizens some innovation in public schooling before it slips further behind.