RENDERED: SEPTEMBER 30, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001830-MR

CHRIS FELL, AS FATHER AND NEXT FRIEND OF L.F.; JENNIFER R. HOOVER, AS MOTHER AND NEXT FRIEND OF B.J.H; ABIGAIL FOWLER, AS MOTHER AND NEXT FRIEND OF A.F.; ERIN LAWRENCE, AS MOTHER AND NEXT FRIEND OF S.E.L. AND E.J.L.; ANGEL THOMPSON, AS MOTHER AND NEXT FRIEND OF W.C.T.; TERILYNN B. RALSTON, AS MOTHER AND NEXT FRIEND OF T.W.R.; DIANA J. ANJUM, AS MOTHER AND NEXT FRIEND OF K.N.; URSELLA RILES, AS MOTHER AND NEXT FRIEND OF N.W.; AND BELINDA ABERNETHY, AS MOTHER AND NEXT FRIEND OF B.A. — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 10-CI-004174

JEFFERSON COUNTY BOARD OF EDUCATION; AND DR. SHELDON BERMAN, SUPERINTENDENT, JEFFERSON COUNTY PUBLIC SCHOOLS — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This is a challenge to the Jefferson County Public School's (JCPS) student assignment plan filed by thirteen parents after their children received 2010-2011 school year assignments to schools other than schools nearest their homes.[1] The issue is narrowly framed: Does the involuntary assignment of a student to a school other than that nearest the student's home violate Kentucky Revised Statutes (KRS) 159.070? Thus, the resolution of this appeal requires that we construe the language used in that statute which provides:

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

(Emphasis added). We emphasize the final sentence because it is crucial to our decision.

[1] After their children were assigned to the school of their choice, four of the parents withdrew from the litigation, leaving nine appellants.

It is beyond the scope of this opinion to write a complete history of school desegregation. However, the parties have cited the history, and a brief synopsis relative to JCPS is helpful to place our discussion in context.[2]

The Mandate to Desegregate JCPS

In 1954, the United States Supreme Court pronounced its controversial and resisted landmark decision holding that segregation of children in public schools solely on the basis of race deprives minority children of equal educational opportunities, and that state-sponsored separate educational facilities are inherently unequal under the Fourteenth Amendment. *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). As a result, the Supreme Court ordered that local school boards remedy *de jure* segregation. Boards were to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board of New Kent County, Va.*, 391 U.S. 430, 437-438, 88 S. Ct. 1689, 1694, 20 L. Ed. 2d 716 (1968). To eliminate the vestiges of segregation, the Supreme Court placed the burden on the schools to demonstrate that assignments were genuinely nondiscriminatory. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971).

[2] When public schools were ordered to desegregate, Jefferson County and the City of Louisville operated separate school systems. However, for the purpose of clarity, our historical recitation refers to both systems as JCPS.

Although JCPS attempted to follow *Brown* and remedy its history of segregation, federal lawsuits were initiated challenging JCPS's plans. Ultimately, the Federal Sixth Circuit Court of Appeals held that JCPS did not adopt effective desegregation plans and imposed an affirmative duty to ensure that no school would become a racially identifiable black school. It directed that the Federal Court for the Western District of Kentucky hold "proceedings to formulate a desegregation plan for all school districts in Jefferson County." *Newburg Area Council, Inc. v. Board of Education of Jefferson County*, *Kentucky,* 489 F.2d 925, 932 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918, 94 S. Ct. 3208, 41 L. Ed. 2d 1160 (1973), *reinstated with modification*, 510 F.2d 1358, 1359 (6th Cir. 1974).

In 1975, a desegregation decree was issued by the Federal District Court for the Western District of Kentucky. Throughout the next twenty-five years, the decree and its corresponding desegregation plans would be subject to revision and subjected to litigation. However, for present purposes, it is unnecessary to recite the prolonged history of desegregation of JCPS. Further elaboration is found in *Hampton I*. *See Hampton v. Jefferson County Board of Education*, 72 F. Supp. 2d 753, 757-769 (W. D. Ky. 1999)("*Hampton I"*)(discussing the history of JCPS's attempt to desegregate after *Brown*).

The dissolution of the desegregation decree did not occur until 2000 when Jefferson County citizens moved to dissolve the decree. *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358 (W. D. Ky. 2000)

("*Hampton II*"). Prior to discussing the merits of the request, the court noted the unusual circumstances in which the motion was presented. "Usually, it is the school board trying to shed its obligations under a desegregation order . . . . Never before have the plaintiffs been African-Americans, for whose supposed benefit such decrees were entered." *Id.* at 359. The plaintiffs sought admission to Central High Magnet Career Academy but were denied because their admission would not meet the racial quotas unless additional non-black students attended. *Id*. at 377. Ultimately, the court held that the use of racial quotas in the Central High Magnet Career Academy violated the equal protection clause and ordered that race-based assignments be immediately stopped. *Id.* at 381.

The court dissolved the desegregation decree and held that JCPS had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its historical policy of segregation. *Id*. at 360. In doing so, it made certain pertinent observations.

The court recognized that JCPS had implemented a nationally acknowledged successful desegregation plan. It further discussed the Board's concern that the dissolution of the decree would result in a return to segregation because of racial demography. The court expressly rejected the notion that its decree was intended to rectify racial demography. "The constitutional purpose of all this was never to change housing patterns." *Id*. at 375. Indeed, the court cautioned that its decision was not a referendum on whether the federal courts

should prefer integrated schools or neighborhood schools but was about permitting choice without reference to race. It stated:

> African-Americans may choose to attend a neighborhood school, a majority-black school, or any other school or program. By allowing these choices, JCPS does not stigmatize those students at majority-black schools.
>
> If nothing much had changed since 1975, majority-black schools under any circumstances would be constitutionally impermissible. Yet a lot has changed. Students are no longer forced to attend certain schools with other children of their own race. The current racial balance in our schools proves this. For most children and their parents, the right to attend the public school of their choice is one unimpeded by fear, lack of knowledge, or intimidation. The thousands of voluntary choices African-American students and their parents make each year prove this. Some of our best schools now exist in some of our most economically depressed areas. Some of those schools were formerly majority-black. None of this happened overnight. Several generations of school age students have now experienced the benefits of a completely integrated school system and one which is increasingly so by the voluntary choices of its students and their parents. All of these accomplishments can be traced to the Board's policies, actions, and good faith. Therefore, the Court concludes that even the re-emergence of majority-black schools will not revive a message of racial inferiority from the pre-1975 school systems.

Id. at 376. It further held that after the dissolution of the decree, the fifteen-fifty percent student assignment quotas used by JCPS would be subject to constitutional scrutiny and that the use of race in student assignment "must be narrowly tailored measures that further compelling governmental interests." *Id*. at 377 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132

L. Ed. 2d 158 (1995)). Finally, the court cautioned the Board that while it was free to adopt whatever student assignment plan it deemed fit, it must be consistent with the court's opinion and the equal protection clause. *Id*. at 381.

The dissolution of the decree did not end public controversy over JCPS's student assignment plan or the federal court's scrutiny. The 2001-2002 plan would be challenged and eventually its constitutional compliance decided by the United States Supreme Court.

In April 2001, the Board approved and adopted a revised student assignment plan effective for the 2001-2002 school year that required all non-magnet schools to maintain quotas of a minimum black enrollment of fifteen percent and a fifty percent maximum black enrollment. In a 4-1-4 decision, the United States Supreme Court held that it was unconstitutional to consider the race of an individual student when assigning that student to a particular school. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007).[3] In doing so, the Court stated:

> The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote - racial diversity, avoidance of racial isolation, racial integration - they offer no definition of the interest that suggests it differs from racial balance.

[3] The JCPS case, *Meredith v. Jefferson County Board of Education*, was a companion case and was decided in the same opinion.

Id. at 732, 127 S. Ct. at 2758–2759. In their brief, the appellants strenuously object to the continuation of the use of quotas in the JCPS. We decline to address this argument because it is not relevant; however, we comment that we do not believe Judge Heyburn nor the United States Supreme Court engaged in judicial tyranny when they ruled the quota system unconstitutional in violation of the equal protection clause.

On May 28, 2008, in response to the Supreme Court's decision, the JCPS Board approved the superintendent's proposal for a new managed-choice elementary student assignment plan for the 2009-2010 school year.[4] That plan is the subject of this appeal. We now turn our attention to the characteristics of the JCPS system and the plan.

JCPS's 2010-2011 Student Assignment Plan

JCPS operates the public school system in metropolitan Louisville and serves over 98,800 children, including 90 elementary schools. Except for the system's magnet schools and the Brown School, schools are arranged in six clusters that are geographically contiguous and based on location; each school cluster is designated as either Area A or Area B.[5] Area A and Area B are designated in accordance with neighborhood demographics, including average household income and average adult educational attainment as determined from

[4] The plan remains in effect for the 2011-2012 school year, thus negating any argument that the issue is moot.

[5] The appellants' children are all elementary school children and, therefore, only the student assignment plan for elementary schools is relevant.

U.S. census data, and the percentage of racial minority students in the area as determined by JCPS records. The student's home address generates the student's "resides" school and identifies the cluster in which that student is assigned.[6]

In February of each year, parents of students entering kindergarten, first grade, and parents of students new to the district and those students who have moved to a new cluster must submit an application to attend a JCPS school.[7] The parent is asked to select four schools among the student's cluster resides schools, ranking the choices first through fourth. Of the four choices, two must be schools located within Area A and two located in Area B.

When the application is submitted, elementary students can also request assignment to an elementary magnet school or to a school other than the student's resides school that offers a magnet program or an optional program. For attendance at the majority of the system's magnet schools, the application process is open to any student at an elementary grade level and, unlike cluster schools, magnet schools are countywide.

After the time for applications has expired, the applications are processed by the district's optional, magnet, and advance program office. Assignment decisions are made by school principals and the office of

[6] The "resides" school is the school that serves the child's address. JCPS's website advises parents that the child's resides school can be determined by using the online school finder or by calling the JCPS Demographics Office.

[7] The application process does not apply to alternative schools, special education centers, or to self-contained special education units. Students are assigned or referred based on their educational needs, behavior, or personal circumstances.

demographics. Decisions to assign students within each cluster are based upon parental preference, assignment of siblings, the student's resides school, the needs of the student, school and program capacity and diversity guidelines in the district's current assignment plan. As adopted, the 2010-2011 student assignment diversity guidelines direct that each school once again enroll a quota of at least fifteen percent and no more than fifty percent of its students from identified neighborhoods with income and adult education levels below the district averages and higher than average populations of minority students. Thus, although very similar, unlike its prior plan held unconstitutional by the Supreme Court, JCPS contends that the current plan guidelines are not strictly based on race.

Decisions to admit or not admit a student to a magnet or optional program are based upon the following: (1) objective criteria established by the school or program, such as a survey, essay, recommendations, auditions, grades, or standardized test scores; (2) available space; (3) for students applying to Brown or a traditional program magnet school, a computer-generated random draw list; (4) for students applying to Brown, residence within a ZIP code that will make the student body representative of the entire county; and (5) for students in grades other than kindergarten and for elementary schools other than Brandeis Elementary School and Brown, the diversity guidelines in the current student assignment plan.

Generally, parents are notified of the child's school assignment by May 1 and can apply for a transfer to a school other than their assigned school except to a magnet school, a magnet program, or an optional program. Transfer

applications can be submitted for reasons such as day care arrangements, medical issues, family hardship and program offerings. However, the application will be denied because space constraints or a transfer renders the school noncompliant with the diversity guidelines.

The Parents

Scott Arnold initiated this action after his child was assigned to a JCPS elementary school approximately 14.5 miles by direct line from his home. He and his child reside in Jefferson County in a geographic location within Cluster 5, identifying Cochrane Elementary School as the child's resides school. In February, Arnold submitted an application for his child to attend kindergarten in the JCPS system and selected schools from Area A and Area B. His schools of choice in order of preference were: (1) Tully Elementary School; (2) Cochrane Elementary School; (3) Byck Elementary School; and (4) Englehard Elementary School. He also applied for admission to a magnet school, Audubon Elementary. The child was ultimately assigned to Englehard Elementary, 14.5 miles from his residence. Arnold filed a request for a transfer to a school closer to home that was denied. He then filed this litigation alleging that, pursuant to KRS 159.070, he was permitted to enroll his child in Cochrane Elementary, the school nearest his home. Twelve additional parents of diverse ethnic backgrounds later joined the action based on the same allegation that JCPS's student assignment plan violated KRS 159.070.

The Circuit Court Proceedings

JCPS filed a motion to dismiss, alleging that under Kentucky law, a parent or legal guardian has no right for his or her child to attend the school geographically nearest his or her residence. As is it did in *Hampton II*, JCPS maintained that it had the discretion to bus children to schools miles from their homes in an effort to diversify each school's student population. Thus, eleven years after the Federal Court dissolved the desegregation decree, JCPS still maintained the unusual legal position that it had the authority to mandate busing. However, presumably because the dispute is confined only to the construction of KRS 159.070, JCPS did not offer statistical data to support its view that student diversity has a positive effect on education.

At the center of the trial court's opinion and order dismissing the parents' claims was its interpretation of the statute and the language "parents or legal guardians shall be permitted to enroll their children in the public school nearest their home." The circuit court concluded that the term *enroll* means to "register" and not to attend the school. Our focus shifts to the issue presented.

The History of KRS 159.070

In 1976, the provision at issue was added to KRS 159.070 as a response to the desegregation decree and the public resistance to that decree, specifically busing children from their neighborhoods as a remedy for *de jure* segregation. The provision originally provided that "within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll their

children for attendance in the public school nearest their home." Immediately, the neighborhood school system mandated in KRS 159.070 was challenged as an unconstitutional exercise of state power as applied to JCPS. A declaratory judgment action was filed in the Federal Court of the Western District of Kentucky requesting that the amendment to KRS 159.070, House Bill 193, be declared unconstitutional.

In *Newburg Area Council, Inc. v. Board of Education of Jefferson County,* 583 F.2d 827 (6th Cir. 1978), the Court affirmed the District Court's holding that the amendment was unconstitutional insofar as it permitted the parents of children in Jefferson County to enroll their children in the public school nearest their home. It recited the District Court's reasoning:

> We believe House Bill 193 is patently unconstitutional in that it (1) conflicts with this Court's duty to remove all remaining vestiges of state-imposed segregation in the Jefferson County school district, a duty imposed on this Court by the Sixth Circuit Court of Appeals in its order of December 11, 1974. *Newburg Area Council, Inc. v. Board of Education*, 510 F.2d 1358 (6th Cir. 1974). *See also Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578 (6th Cir. 1975); (2) conflicts with this Court's desegregation plan issued July 30, 1975, a plan which was and is necessary to dismantle an unconstitutional school system and to create a system compatible with the guarantees of the Fourteenth Amendment; and (3) conflicts with the rights guaranteed to all citizens by the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

Id. at 828. The Court declined comment as to the constitutionality of the amendment as applied to other school districts in the Commonwealth. *Id*. at 829.

Thus, although all other school districts in the Commonwealth operated within the parameters of KRS 159.070, JCPS proceeded to desegregate under the decree without adherence to the neighborhood school policy.

Following *Rose v. Council for Better Education, Inc*., 790 S.W.2d 186 (Ky. 1989), the statute was amended in 1990 when the Kentucky Education Reform Act was passed. The total Act in Volume 1990 of the Kentucky Acts encompasses 270 pages and 8 different Parts. The amendment to KRS 159.070 contained in Part IV entitled "Amendments to Conform" deleted the words "for attendance."

At oral arguments, JCPS stated to the court that they had searched the legislative history and that they could find no legislative history of relevance to our discussion. However, JCPS contends that because of the amendment, the statute does not require Kentucky schools to permit a child to attend the school nearest his or her home but the school district must only permit the parent or legal guardian to complete the mechanical process of registration at the school nearest the child's home.

Discussion

So that our opinion is not misunderstood, we are compelled to begin by pointing out the issues not presented. In their briefs, the appellants strenuously argue that JCPS's student assignment plan uses racial quotas and that there is no need for social engineering without evidence that there is an improved educational outcome. JCPS cites to its unsuccessful litigation in *Hampton II* and *Parents*

Involved in Community Schools, which discusses neighborhood schools and quotas. However, there is no challenge to the 2010-2011 assignment plan's diversity goals and, specifically, no allegation that JCPS has failed to comply with the mandates of the United States Supreme Court. Thus, we are not requested to test the constitutionality of the plan and refrain from comment. Additionally, we emphasize that JCPS has not challenged whether KRS 159.070 is constitutional, either as written or applied to JCPS. Although considerable discussion occurred at oral argument on these issues, we decline to address these issues in this opinion because they are not relevant to a statutory interpretation of KRS 159.070.

JCPS has further cited to this Court and extensively briefed KRS 160.290(1), arguing that they control the transportation of students within the school system to promote the education and general welfare of pupils. We conclude that this argument cited by JCPS is not persuasive and is not relevant to the statutory interpretation of KRS 159.070. We turn to the issue presented.

As an appellate court reviewing an order dismissing the claim, our scrutiny is limited.

> It is well established that a court should not dismiss an action for failure to state a claim unless the pleading party appears not to be entitled to relief under any set of facts which could be proven in support of his claim. In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. Therefore, the question is purely a matter of law. Accordingly, the trial court's decision will be reviewed *de novo.*

Morgan v. Bird, 289 S.W.3d 222, 226 (Ky. App. 2009) (internal citations and quotations omitted). We stress that we are not asked to scrutinize whether JCPS's 2010-2011 student assignment plan is constitutional, arbitrary or reasonable. We are only asked to construe the statute.

Courts are bound to follow rules of statutory construction. "Although the legislative intent is the all-important or controlling factor in the interpretation of statutes, the statute is generally open to construction only where the language used requires interpretation or may be reasonably considered ambiguous." *Overnite Transp. Co. v. Gaddi*s, 793 S.W.2d 129, 131 (Ky. App. 1990). The rules of construction were summarized in *Cosby v. Commonwealth*, 147 S.W.3d 56, 58-59 (Ky. 2004):

> General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy. No single word or sentence is determinative, but the statute as a whole must be considered. In addition, we have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion. Moreover, in construing statutory provisions, it is presumed that the legislature did not intend an absurd result. The legislature's intention shall be effectuated, even at the expense of the letter of the law.
>
> We must further acknowledge that the General Assembly intends an Act to be effective as an entirety. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of the Act.

(Internal citations, quotations, and brackets omitted).

JCPS argues that the plain meaning of "enroll" is equivalent to "register" and is not interchangeable with the term "attendance." Thus, it contends that because the words "for attendance" were deleted from the statute in 1990, the legislature expressly intended that parents or legal guardians have only a statutory right to complete the necessary enrollment forms at the school nearest their home. According to JCPS, once the child is enrolled in the system, its student assignment plan designates the school for attendance. If its reasoning is correct, KRS 159.070 is relegated to a statute of convenience, permitting parents and legal guardians to collect or deliver forms to the nearest school to their residence rather than the central office. The counterargument presented is that the deletion of the phrase "for attendance" was merely to avoid redundancy because the word "attendance" was utilized on four occasions in the last four sentences of KRS 159.070, and that the neighborhood school policy expressed in KRS 159.070 remains the logical and reasonable law in this Commonwealth. We agree with the parents' contention and conclude that JCPS's construction of the statute is untenable.

There is no dispute that prior to 1990 the statute was construed to require school districts to permit children to enroll in the school nearest their home. Indeed, Jefferson County was exempted from compliance from the statute only because it operated under the federal desegregation decree. *Newburg Area Council, Inc*., 583 F.2d at 829. Logically, if KRS 159.070 still requires that parents and legal guardians have the right to choose for their children to attend

their neighborhood school, JCPS, no longer being under federal supervision and direction to desegregate, must comply with the statute.

JCPS advances numerous contentions. It relies on *Anderson v. Commonwealth*, 275 Ky. 232, 121 S.W.2d 46 (1938), where the Court construed the meaning of "enrolled" as used in Section 56 of the Kentucky Constitution and its provision that no bill shall become law unless it has been signed by the presiding officer of each of the two houses after the bill has been "correctly enrolled." The Court held that *enroll* means to "make a record in writing." *Id*. at 47. JCPS further notes that *enroll* is defined in *The AMERICAN HERITAGE DICTIONARY* (3rd) as "to enter or register on a roll, list or record." JCPS's strained application of *Anderson* and its isolated reading of the term "enroll" do not persuade this Court that the deletion of the words "for attendance" altered the mandate that a parent or legal guardian has the right to enroll his or her child in the school nearest their home.

The contention that "enroll" as used in KRS 159.070 merely confers a right to register a child in the JCPS system defies logic. If the legislature had used the word "enroll" in isolation or the phrase "enroll at" rather than "enroll in," we might be persuaded. We repeat that the statute states: "Within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll their children in the public school nearest their home." The phrase "enroll in*"* as commonly used means to be admitted to membership in a body or society.

Thus, "enroll in," in the context now discussed, reasonably means to become a student at the school nearest the child's home.

We also point out that KRS 158.110 provides for the boards of education to provide transportation for any pupil "to the nearest school to the pupil's residence within the district if the pupil does not live within a reasonable walking distance to such nearest school of appropriate grade level." Like KRS 159.070, the statute was passed in 1976. In 1977, it was held unconstitutional as applied to Jefferson County while under the desegregation decree. *Carroll v. Board of Education of Jefferson County, Kentucky*, 561 F.2d 1 (6th Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S. Ct. 1449, 55 L. Ed. 2d 494 (1978). Thus, our interpretation of KRS 159.070 is not inconsistent with the statutory scheme governing schools: To the contrary, the legislature has declared the right of every parent or legal guardian to enroll his or her child in the school nearest his or her home.

Finally, even after the amendment to KRS 159.070, this Court has recognized that there is a statutory mandate that students be permitted to enroll in the public school nearest their home. In *Swift v. Breckinridge County Board of Education*, 878 S.W.2d 810 (Ky. App. 1994), the school board adopted attendance area/transportation policies that did not provide bus transportation to a school outside the student's attendance area. Significantly, the Court noted that "[t]he purpose for the Board's adoption of a new attendance area/transportation policy was to satisfy two statutory mandates, one relating to class size maximum and *the*

other permitting students to be enrolled in the public schools nearest their homes." *Id*. at 811. (Emphasis added).

Our opinion today does not diminish the school board's discretion to administer its internal affairs. *Id.* However, we are bound to construe the law as written: The legislature has mandated that parents have the right to enroll their child in the school nearest their home.

Conclusion

JCPS is the largest school district in the Commonwealth and for the past thirty-five years has developed a complex system to rid itself of the vestiges of *de jure* segregation; it is to be commended. However, the history of segregation by itself cannot justify a judicial exemption from the statutory mandate. The day when involuntary busing was justifiable and necessary, based on the federal court's mandate to desegregate, ended in 2000 when the desegregation decree was dissolved. JCPS is no longer supervised by the federal courts but is once again operated by state and local authorities.

The legislature's mandate that parents and legal guardians have the right to choose the school nearest their home for their children to attend is not without reason nor fortuitous. The benefit of children attending neighborhood schools is obvious. Busing creates the impediment of distance among parent, child, and school and, therefore, increases the difficulty of family involvement. A child who attends a school other than one located in his or her neighborhood must

board the bus earlier and arrive home later, spending idle time without the supervision of teachers or parents. It is time otherwise that could be spent with family, participating in extracurricular activities, studying, and bonding with neighborhood friends. When located in proximity to home, the school is the center of a community, inviting parental participation in school events and offering personal connections among the school, students, and classmates. Thus, the legislature's mandate is neither illogical nor absurd.

JCPS has submitted to this Court a "doom and gloom" forecast if we bind it to the express law applicable to all other school districts in this Commonwealth. However, it has offered this Court no evidence, statistical or otherwise, to substantiate its prophecy. We express no opinion regarding the merits of its contention and limit our opinion to the reasonable construction of KRS 159.070.

We emphasize that JCPS's transportation system and student assignment plan cannot be reorganized with haste. This Court understands the complexity and difficulty JCPS has in the administrative and logistical operation of its schools, and that a plan permitting children to attend the school nearest their homes cannot be developed without debate and contemplation. As a result, our decision does not alter the student assignments for the 2011-2012 school year. However, our holding requires that JCPS develop a new student assignment plan for the 2012-2013 school year that is reasonably consistent with KRS 159.070 and this Court's opinion.

We reiterate that the statute does not require that every child enroll in the school nearest his or her home but only that the parent or legal guardian has a right to enroll the child in a school near his or her home. All children have the freedom, with JCPS's permission, to enroll in magnet schools and schools other than those located nearest their homes. Our decision does not mandate the abolition of specialized schools including, but not limited to, magnet schools, schools for the gifted, special language programs, and special education programs. That issue is not before this Court and is a matter appropriately addressed when the new plan is developed. On remand, and when submitting its student assignment plan for the 2012-2013 school year, JCPS will have the opportunity to request that specific schools not be included in the statutory mandate because the school serves specialized needs throughout the county. Moreover, JCPS and all school districts retain the discretion to establish attendance areas and implement transportation plans limited only by reasonable compliance with constitutional and statutory law. However, until the legislature declares otherwise, JCPS and all school districts in this Commonwealth must comply with KRS 159.070.

Based on the foregoing, the order of the Jefferson Circuit Court is reversed and the case remanded for proceedings consistent with this opinion.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I wholly concur with the majority opinion but write separately only to express my belief that KRS 160.290(1), as briefed and argued by the appellees, controls the transportation of students within the school system. Accordingly, the implementation of any plan or program, transportation or otherwise, by the school system must promote the "education and the general health and welfare of pupils." KRS 160.290(1).

The appellees' argument was replete with assertions that the continued implementation of its busing plan will avoid the racial isolation of pupils and, thereby, vault the pupils of the Jefferson County Public Schools to the pinnacle of their academic achievement. Even if the facts *sub judice* were sufficient to support this claim, this singular concept cannot be viewed in isolation from the mandates of KRS 160.290(1), which requires any plan or program implemented by the JCPS must not only promote the education but also the general health and welfare of pupils. I question how busing promotes the criteria identified by KRS 160.290(1).

Secondly, JCPS identifies pupils that need to be bused by using the race of the child and the lesser education and lower income level of the parents. JCPS designates those pupils as "particularly challenged." The appellees' argument focused on the desire to improve the education of those challenged pupils but offered no argument as to how busing improves the education, health and welfare of the pupils not in the group identified as challenged. Indeed, it appears that those students are simply bused to balance pupil enrollment to the

district from which the pupils identified as having particular challenges were removed.

Third, JCPS argues that the challenges faced by the identified students arise from lack of family support to the pupil and lack of parental involvement in the school. However, no explanation was given concerning how busing to other schools would increase the pupils' family support; or how busing would encourage parents not involved in their local schools to participate in schools further away. Lastly, there was no consideration given as to the effect on pupils not in the identified group that were bused to balance school population, nor whether their parental involvement would decline or remain the same.

COMBS, JUDGE, DISSENTING: This case involves only one issue on appeal: the proper construction of KRS 159.070. Although a bevy of issues erupted at oral argument, the case remains focused on that one issue alone. The significant sentence from KRS 159.070 is the last sentence:

> Within the appropriate school district attendance area, parents or legal guardians shall be permitted **to enroll their children in the public school nearest their home.**

(Emphasis added.)

Much discussion occurred in an attempt to construe the word "enroll." The circuit court had concluded that the term *enroll* means "to register" – not to attend school. The majority disagrees and essentially holds that *enroll* should – as a matter of public policy rather than definition – encompass attendance as well as

the act of registration. However, as aptly noted by the appellees' brief, ample caselaw demonstrates otherwise.

It is significant that the version of the statute in effect prior to its amendment in 1990 contained the phrase, "for attendance," providing as follows:

> Within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll their children **for attendance** in the public school nearest their home.

(Emphasis added). The General Assembly undertook a massive overhaul of all school statutes in Kentucky after they were declared unconstitutional by the Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.***,** 790 S.W.2d 186 (Ky. 1989). Although the *Rose* case and Section 183 of the Kentucky Constitution (upon which *Rose* was premised) were discussed at some length during oral arguments, *Rose* has absolutely no bearing on the case before us as to public policy issues. To reiterate, this is solely a case of statutory construction. *Rose* was merely the vehicle for causing the statutory amendments to be rewritten by the General Assembly.

It is noteworthy that the phrase *for attendance* was deleted in 1990. For what reason, we cannot ascertain, nor are we at liberty to speculate. As this Court held in *City of Somerset v. Bell*, 156 S.W.3d 321, 326 (Ky. App. 2005),

> The interpretation of a statute is a question of law. [*Kenton County Fiscal Court v. Elfers*, 981 S.W.2d 553, 556 (Ky. App. 1998)]. For that reason, it is suitably before this Court. When interpreting a statute, "it is appropriate to consider the contemporaneous facts and circumstances which shed intelligible light on the intention of the legislative body." [*Mitchell v. Kentucky*

> *Farm Bureau*, 927 S.W.2d 343, 346 (Ky. 1996)] **When a statute is amended, the presumption is that the legislature intended to change the law.** [*Whitley County Board of Education v. Meadors*, 444 S.W.2d 890, 891 (Ky. 1969)] Our Supreme Court has held that "[i]n determining legislative intent certain presumptions are indulged. One of these is that . . . where a clause in an old enactment is omitted from the new one, it is to be inferred that the Legislature intended that the omitted clause should no longer be the law." [*Inland Steel Co. v. Hall*, 245 S.W.2d 437 (Ky. 1952)]

(Emphasis added).

And so, we are left to construe the language of KRS 159.070 as amended, which now leaves the term *enroll* stripped of the modifying prepositional phrase *for attendance*. Without that modifying phrase, *enroll* now undoubtedly connotes the mere act of registering at a neighborhood school without the mandate, assurance, or even the implication that **attendance at that same school** should be guaranteed.

We have no choice but to construe this statute as it is presently written and in light of the guidance provided by the 1990 amendment deleting "for attendance." No doubt it would be ideal in the utopian sense for children to be able to attend schools nearest their homes. Even in remote, rural areas of the state, however, that idyllic preference is often not a reality. The local school board is an elected body vested with the discretion to implement the school statutes for its distinct set of demographics. The appellees' brief (p. 22) aptly notes as follows:

> Resource allocation is a delicate dance appropriately left to the devices of the Board, in the exercise of its powers as an elected governmental body. This dance is

> particularly complex in Jefferson County, given the size of the JCPS, but it is practiced by every school in the Commonwealth. Even in districts that offer so-called "neighbor-hood schools" without the broad menu of magnets and choices at JCPS, the boards of education must still decide where to draw boundaries for school assignment that account not only for distance but for school capacity and transportation routes.

There is absolutely no evidence of invidious racial discrimination implied in the formula developed by the JCPS for student assignment. On the contrary, the JCPS scrupulously sought strict compliance with the mandates set forth in the series of federal cases thoroughly discussed in both the appellants' and appellees' briefs. It is neither correct nor appropriate for this court, *sua sponte*, to take judicial notice of such a nonexistent racial factor or to attempt to conjure it into existence.

The concept of separation of powers is essential to both the Constitution of the United States and the Constitution of Kentucky (Sections 27 and 28). Clearly, it is not fitting that the judiciary should engage in construing statutes around its subjective concept of public policy issues. Such is neither our purview nor our prerogative. As our Supreme Court admonished in *Stephenson v. Woodward*, 182 S.W.3d 162, 186 (Ky. 2005):

> If the action of the legislature may be disregarded by the courts, then it is no longer an equal and independent branch of the government within its constitutional jurisdiction, but the courts become the final depository of the supreme power of the state. [Citing *Taylor v. Beckham*, 56 S.W. 177, 184 (Ky. 1900):] *Judicial tyranny is no less tyranny because couched in the forms of law. There was great wisdom in dividing the powers*

> *of a republic between [sic] three equal and independent sets of officers. One operates as a check upon the other, and no greater blow to the perpetuity of our institutions could be given than to destroy this check.*

A case of this widespread public impact was an appropriate one to bypass the Court of Appeals and to proceed directly to the Supreme Court of Kentucky. In hindsight, the volatile tenor of the oral argument made this alternative not only feasible but desirable – if not, indeed, necessary.

Accordingly, I file this dissent. I would affirm the well-reasoned opinion of Judge Irv Maze of the Jefferson Circuit Court.

BRIEF FOR APPELLANTS:

Teddy B. Gordon
Louisville, Kentucky

J. Bruce Miller
Norma Miller
Louisville, Kentucky

Sheila P. Hiestand
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Teddy B. Gordon
Louisville, Kentucky

J. Bruce Miller
Louisville, Kentucky

Sheila P. Hiestand
Louisville, Kentucky

BRIEF FOR APPELLEES:

Lisa C. DeJaco
Byron E. Leet
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES:

Byron E. Leet
Louisville, Kentucky