

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-073**

DONNA HURLEY, et al.

PLAINTIFFS

v.

ORDER

**WAYNE D. LEWIS, in his official
capacity as Kentucky Commissioner
of Education, et al.**

DEFENDANTS

This matter is before the Court on parties' respective Motions for Summary Judgment and Plaintiffs' Motion to Enforce. Plaintiffs seek relief from the actions of various governmental entities including the Kentucky Commissioner of Education ("the Commissioner") and the Knott County Board of Education ("KCBOE" or "the Board"), whose actions have threatened to close the Lotts Creek Community School ("the Cordia School" or "LCCS"). The Court entered a temporary injunction to compel KCBOE to continue operating the Cordia School to ensure that the education of the Lotts Creek students would not be unduly interrupted during the 2018-2019 schoolyear while this matter is adjudicated. Having reviewed the parties' arguments and filings regarding the Motion for Summary Judgment and various other related Motions, and being otherwise sufficiently advised, the Court hereby:

1) **GRANTS IN PART** the Commissioner of Education's Motion for Summary Judgment to the extent that Plaintiffs' claims against him, the Kentucky Department of Education, and the Kentucky Board of Education are moot and should be dismissed;

2) **GRANTS IN PART** Plaintiffs' Motion for Summary Judgment for reasons more fully described below;

3) **GRANTS IN PART** Plaintiffs' Motion to Enforce;

- 4) **CONVERTS** the Temporary Injunction into a Permanent Injunction; and
- 5) **DENIES** Plaintiffs' Motion for Attorney's Fees.

BACKGROUND

Plaintiffs Donna Hurley and Tonya Melton are residents of Knott County and have minor children who attend the Cordia School in Knott County, Kentucky. Plaintiff Lotts Creek Community School, Inc. ("LCCS"), is a non-profit corporation that owns and operates the Cordia School in Knott County. The Cordia School is a "settlement school" which provides K-12 education to 230 students in a remote area of Knott County.¹

Dr. Stephan Pruitt was, at the time this action was initiated, the Kentucky Commissioner of Education ("Commissioner"); the Commissioner is appointed by the Kentucky Board of Education ("KBE") as the chief executive of the Kentucky Department of Education ("KDE"). Since the initiation of this lawsuit, Dr. Pruitt has been succeeded as Commissioner by Dr. Wayne Lewis. The Commissioner is primarily tasked with "administering, structuring, and organizing the department and its services" which includes monitoring the management of school districts and implementing state laws and policies. KRS 156.010. The Commissioner's duties as chief state school officer are set forth in KRS 156.148, which states that he shall "execute under the direction of [KBE] the educational policies, orders, directive, and administrative functions of [KDE]." KRS 156.148(3). The Commissioner's powers as chief state school officer are set forth in KRS 156.210. KDE and KBE operate under KRS Chapter 156.

Defendant Knott County Board of Education ("County Board") is charged with general control and management of the public schools in Knott County. KRS 160.160. The County Board consists of members Randy Combs, Dennis Jacobs, Gladys Epperson, Patricia Miller, and David

¹ See Hinkle, Minton, & Flavell, *Settlement Schools of Appalachia*, KET (available at <https://www.ket.org/education/resources/settlement-schools-appalachia/>).

Messer. The County Board has certain investigatory powers under KRS 160.300. Defendant Kim King is Superintendent of the Knott County School District, and her duties are set forth in KRS 160.350.

A lease was executed by LCCS and the County Board that went into effect on July 1, 2016. *See* Pl.s' Compl. & Pet. for Decl. Relief, Ex. 1 at 1. The agreement indicates that the approval of KDE is required before the County Board can lease the Cordia facility. *Id.* at 1-2. The lease agreement contained an option to extend the lease for the 2017-2018 school year, which LCCS exercised. *Id.* at 4-5. This portion of the lease agreement also states that if the County Board determines that it is no longer in the best interest of the Knott County School District to operate the Cordia School, the Board shall be under no obligation to do so beyond the 2016-2017 school years; the factors to be contemplated for not extending the lease are "based upon projected revenues, actual and projected student enrollment at the Cordia school and other schools in the county, and other relevant factors...." *Id.* at 5. In Section 4.3 of the lease, a precondition of the facility lease details LCCS' responsibilities to have an engineer inspect the facilities and make structural repairs necessary for protecting the health and safety of the staff. *Id.* at 6. The lease also reserves to the County Board and LCCS the unrestricted right to terminate the new facility lease effective June 30 of any year by giving written notice to that effect on or before April 30 of the same year. *Id.* at 8.

In July 2017, structural issues were discovered in the roof of the Cordia School's Auditorium; contractors and engineers were immediately brought in to inspect the roof. *See* Pl.s' Compl. & Pet. for Decl. Relief at 7. LCCS' insurance carrier Lloyd's of London refused to pay the claim for the roof and cancelled their policy. *Id.* at 8. In response, LCCS filed suit against Lloyd's, which action was pending at the outset of this matter. *Id.* In August 2017, a KDE-approved

structural engineer made repairs to the building, although the auditorium was not to be used thereafter. *Id.* On December 17, 2017, the County Board Attorney instructed LCCS to have a structural engineer inspect the auditorium again; the engineer who performed the inspection wrote a letter on December 29, 2017 stating that the cordoned-off areas should remain so, but that other areas of the school could remain in use. *Id.* at 9. The Department of Housing, Buildings and Construction conducted inspections and approved the continued use of the school building with the restrictions on use of the auditorium.

LCCS was given until January 26, 2018 to make suggested improvements; however, letters were sent to Cordia students on January 15, 2018 informing them that the school would be closing. *Id.* On January 17, 2018, Commissioner Pruitt notified LCCS Director Alice Whitaker that the school would be subject to closure on February 2, 2018 pursuant to KRS 156.010, 156.148, 156.210, and 162.060. *Id.* at 9. The letter states, “[a]fter reviewing the findings of three (3) separate inspections by KDE staff and the reports of the state fire marshal, health department, and a certified engineer, it is clear that the continued occupancy of the leased Cordia School building threatens the safety and well-being of the students and staff.” *Id.* A second letter from the Commissioner cited the cancellation of LCCS’ insurance policy as evidence of either LCCS inability to afford insurance coverage or unwillingness of property and liability insurers to issue coverage on the structurally damaged Cordia School building. *Id.* at 10. LCCS Director Whitaker responded to the Commissioner’s letters in an undated letter disputing the safety claims, summarizing the ongoing action against Lloyd’s of London, complaining that LCCS had not been given until the January 26, 2017 date to make repairs, and stating that significant efforts were being made to complete all requested repairs. *Id.* at 10-11.

On January 23, 2017, the County Board called a special meeting to decide whether to implement the decision made by the Commissioner in his two letters regarding the safety conditions at Cordia School; Commissioner Pruitt allegedly stated that he had already made his decision regarding the safety of Cordia School. *Id.* at 11. County Board Attorney Tim Crawford advised the County Board that they had no choice but to close the school because the Commissioner had jurisdiction over the decision. *Id.* The County Board then voted 4-1, without any notice or hearing, to accept the Commissioner's allegations; they then opted to close the Cordia School mid-school-year beginning February 2, 2018. *Id.* This Court found that the statute and regulations cited by the Commissioner as authority for his decision to close the school did not appear to be applicable to this situation involving the repair of a building, constructed with private funds, that was already in use as a school. Moreover, the Commissioner's unilateral determination was made without giving LCCS any notice or opportunity to be heard.

Plaintiffs brought suit, and this Court issued a Restraining Order on January 31, 2018 to allow the Cordia School to remain open while this action was litigated. In the interim, and without notice to or participation by LCCS or the Commissioner, KCBOE voted to terminate the LCCS lease on April 10, 2018. On June 29, 2018, the Court heard arguments on the pending motions (Defendants' motions to dissolve the Restraining Order, and Plaintiffs' motion to convert the Restraining Order to a Temporary Injunction). At that hearing, the Court was advised that the LCCS lawsuit against its insurer had been settled, that the funds for making the roof repairs to the auditorium had been placed in escrow, and that a contractor had been engaged to complete the repairs. Plaintiffs argued that KRS 157.420(11) specifically requires that "historic settlement schools" that were in operation on January 1, 1994, are required by law to continue to operate under "a cooperative agreement" with the appropriate local school board. The Knott County Board

of Education terminated the cooperative agreement with LCCS, even though the evidence demonstrated that the health and safety concerns caused by the roof problems had been or were being corrected. After that hearing, the Court ordered the parties to Mediation, but was notified on Friday, July 13, 2018, that the mediation was unsuccessful. To preserve the status quo pending briefing and final resolution of this matter, the Court converted the Restraining Order to a Temporary Injunction on July 19, 2018.

At a hearing on November 20, 2018, Plaintiffs stated that the auditorium roof reconstruction will be complete by mid-December, that the multipurpose room will likely be usable in December, and that electricity and heating issues in other areas of the building will likewise be resolved shortly. Plaintiffs also stated that the County Board has still refused to fulfill its janitorial obligations and that this has led to outstanding deferred maintenance issues. Addressing the arguments in its Motion for Summary Judgment, the Plaintiffs argued that LCCS had due process rights that were violated when KCBOE decided to close the Cordia School without creating a record, considering evidence, or allowing LCCS to appear in any way. Plaintiffs also argued that they still seek a declaration of rights regarding the Commissioner's authority to intervene in a settlement school's dispute with a local school board and that they remain willing to negotiate a new lease agreement with KCBOE which they argue is required under KRS 157.420.

Defendant KCBOE argued in response that KRS 157.420 is unconstitutional because it produces absurd results and inexcusably restricts the County Board's authority; KCBOE also argued that the statute does not actually apply in the present case because the current primary education facility at LCCS did not exist in 1994. Counsel for KCBOE added that the lease agreement contemplates the Commissioner's approval and that students at the Cordia School currently receive an unfairly large per-student share of Knott County resources. Counsel for

Defendant Commissioner Lewis stated that because the Commissioner had previously acknowledged that LCCS had already addressed the building problems he had identified and that he did not want any further steps taken, this case was moot as pertains to the Commissioner or KBE. Counsel accordingly argued that any further dispute is between KCBOE and LCCS.

On December 5, 2018, the Court partially granted Plaintiffs' Motion for Summary Judgment. The Court found that the Cordia School is a "Settlement School" under KRS 157.420(11); the Court also found that this statute unequivocally requires KCBOE to continue to use LCCS' Facilities despite language in the lease to the contrary and changes to the LCCS facility since 1994. The Court reserved ruling on other issues, maintained the temporary injunction, and ordered the parties to mediate.

A status conference was held on May 1, 2019, at which Timothy Crawford appeared on behalf of KCBOE, Ashley Lant appeared on behalf of the Commissioner, and Clay Barkley appeared on behalf of LCCS. The parties stated that they had agreed during mediation to operate under the previous lease until this legal dispute has concluded. The parties also agreed that the damaged auditorium roof—the primary issue giving rise to this dispute—had been completely repaired and that the auditorium was in active use. Although the parties stipulated that repairs were complete, several contested issues remain. LCCS maintains that KCBOE's attempts to close the Cordia School constitute a breach of contract, that the parties' janitorial and maintenance obligations are unresolved, and that LCCS is owed attorney's fees. The Commissioner maintains that the KDE, KBE, and Commissioner of Education ought to be dismissed from this action as the claims against these entities are moot.

STANDARD OF REVIEW

Summary judgment is appropriate when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.01.

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show that there is a genuine issue of material fact for trial. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. App. 2011). The movant should not succeed unless it has shown “with such clarity that there is no room left for controversy.” *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W.2d 476, 482 (Ky. 1991). “The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.” *Welch v. Am. Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). In reviewing motions for summary judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor, and summary judgment should only be granted when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest*, 807 S.W.2d at 480.

The Court recognizes that summary judgment is a device that should be used with caution and is not a substitute for trial. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Jones v. Abner*, 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity

from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

ANALYSIS

In bringing this action, Plaintiffs seek a declaration of rights regarding several points: 1) whether KCBOE violated KRS 157.420(11) when it attempted to close the Cordia School on January 23, 2018, and again on April 10, 2018; 2) whether the Kentucky Commissioner of Education has authority under KRS 156.010, 156.148, 156.210 or 162.060, to impose remediation standards for health and safety concerns, unilaterally withdraw the approval of a valid lease entered into between Knott County Board of Education and the Lotts Creek Community School, Inc. to operate Cordia School on its property; or reassign the attendance boundaries and relocate children to alternative facilities in Knott County; 3) whether KCBOE's vote to close the Cordia School on January 23, 2018, and again on April 10, 2018, was a violation of due process and lacked substantial evidence in the record to support such decision. The Plaintiffs also request attorneys' fees.

I. The Claims against KDE, KBE, and the Commissioner are Moot.

In our December 5, 2018 Order, we concluded that the Cordia School is a "Settlement School" as defined by KRS 157.420(11), and that accordingly the local school board is required to continue to use those facilities as long as they meet health and safety standards for education facilities. KRS 157.420(11). At a status conference on May 1, 2019, the parties stipulated that the health and safety problems giving rise to the dispute have been resolved. Furthermore, former Kentucky Commissioner of Education Dr. Stephen Pruitt stated as far back as April 16, 2018 that even if the Restraining Order was dissolved, he no longer supported the relocation of Cordia students during the remainder of the schoolyear because LCCS had addressed the immediate safety concerns he identified in his January 17, 2018 letter to Ms. Whitaker and KCBOE

members. *See Defendants' Response*, Exhibit A (filed April 16, 2018). Dr. Pruitt also stated that he had no interaction with KCBOE Superintendent Kim King or any other individual associated with KCBOE's meeting on April 10, 2018 at which the Board voted to terminate the lease with LCCS. *Id.* As KCBOE's April 10, 2018 vote to unilaterally terminate the LCCS lease is the action that remains at issue in this dispute, the prior, superseded actions of KDE, KBE, and the Commissioner of Education are no longer at issue. Plaintiffs' claims against these Defendants are hereby **DISMISSED** as moot.

II. KCBOE Must Enter a New Agreement and Continue to Use the Facilities of the Cordia School.

On April 10, 2018, KCBOE voted to terminate its lease agreement with LCCS. Section 6.2 of the lease agreement allows either LCCS or KCBOE to do so. *See Plaintiffs' Complaint and Petition for Declaratory Relief*, Exhibit 1 at 8. However, even if KCBOE terminates the lease with LCCS, KRS 157.420(11) requires them to make a new agreement and continue to use LCCS' facilities. The clear purpose of KRS 157.420(11) is to protect Settlement Schools from closure, with a sole exception for such schools when their facilities do not meet health and safety standards. Accordingly, KCBOE has no authority to unilaterally close the Cordia School for any other reason; if the Board exercises its right to terminate the lease, it must enter into a new agreement to continue using LCCS facilities as required by KRS 157.420(11).

Under CR 65.01, “[a]n injunction may restrict or mandatorily direct the doing of an act.” CR 65.04(1) states that an injunction is warranted when the moving party demonstrates that its “rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.” Under *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978), three factors are considered when a Court is evaluating a motion for

injunctive relief. Under *Maupin*, the party seeking an injunction must establish “immediate and irreparable” injury to his personal rights; that the equities weigh in favor of an injunction; and that the case raises a substantial legal question. *Id.* at 698–99.

Because KCBOE voted to close LCCS and terminate the lease, Plaintiffs will suffer immediate and irreparable harm without a permanent injunction because LCCS students will be forced to spend a large amount of time in transit, the mission of LCCS will be severely impacted, and the school’s closing will result in significant financial damages for which there is no remedy because of sovereign immunity. The equities in this matter favor issuance of a Permanent Injunction. Before his retirement, former Commissioner Pruitt stated that LCCS had already addressed the safety concerns raised by his January 17, 2018 letter. *See Defendants Pruitt, KDE, & KBE’s Motion to Supplement Motion to Dissolve Restraining Order* at 1-3 (Affidavit of Stephen Pruitt). If KCBOE’s true purpose was to close the Cordia school due to safety concerns, they no longer have any reason to seek closure.

The equities strongly favor the issuance of a permanent injunction to preserve the status quo until a new cooperative agreement is executed in compliance with KRS 157.420(11). The Court had previously found that this case presented several substantial legal questions, including the proper application of KRS 157.420(11), the proper scope of the Commissioner’s authority with respect to closing a school, and the ability of the County Board to act independently of the Commissioner’s decision. The legal questions regarding the Commissioner’s authority are no longer ripe due to the dismissal of claims against him. The proper application of KRS 157.420(11) remains a substantial legal question.

Moreover, the Court finds that the public interest supports the issuance of injunctive relief, in light of the unique role that the Cordia School plays in the Lotts Creek community in providing

education and social services in an area where the need for such outreach is great and the available services few. As Ms. Whittaker's testimony established, the termination of funding for the Cordia School will severely undermine the ability of LCCS to provide its ancillary social services, such as a food bank and adult education, to the community. The public interest in injunctive relief is further established by the policy that is reflected in the enactment of KRS 157.420(11), in which the General Assembly directed that the operation of historic settlement schools such as Cordia School be continued through cooperative agreements with local school boards. In balancing the hardships, the Court is mindful that injunctive relief will impose a financial burden on the Knott County Board of Education, but finds that the burden on the students, parents and community in immediate closure of the Cordia School outweighs that financial burden.

Finally, the Plaintiffs have shown entitlement to summary judgment in a final judgment. For the reasons stated above, the Court finds that conversion of the Temporary Injunction to a Permanent Injunction is warranted. To prevent the disruption of LCCS students' education and the violation of KRS 157.420(11), the Court converts its entry of a Temporary Injunction to a Permanent Injunction under CR 65.01. The Knott County Board of Education is hereby **PERMANENTLY ENJOINED AND ORDERED** to continue to operate the Cordia School under the terms and conditions of its prior lease agreement with Lotts Creek Community School, Inc. until the parties have entered into a new cooperative agreement satisfying the requirements of KRS 157.420(11). This includes the obligations of each party with respect to janitorial and maintenance services as required by the lease agreement, namely: 1) Section 4.2 of the lease agreement requires KCBOE to operate the Sewer Plant; and 2) Section 6.1 of the lease agreement requires KCBOE to maintain and repair the interior of the Facility, maintain the lawn and shrubbery around each, and otherwise maintain the Facility in a clean and acceptable

condition. *See Plaintiffs' Complaint and Petition for Declaratory Relief*, Exhibit 1 at 5, 8. The status quo prevailing immediately prior to the entry of this Court's Restraining Order shall be maintained with regard to the funding of Cordia School, the assignment of teachers, administrators, support personnel and students, and all other aspects of the school's operation until a new cooperative agreement is entered.

However, while the law requires KCBOE and LCCS to enter into another agreement, the future agreement between KCBOE and LCCS need not match the terms of prior arrangements. The Court is well aware of the financial difficulties facing Knott County, and KCBOE must be allowed to change funding and staffing levels among Knott County schools to ensure that its limited resources are distributed fairly. Because the Commissioner of Education, KDE, and KBE have been dismissed from this case, they are likewise released from the terms of the Permanent Injunction. All other findings and terms and conditions of the Restraining Order and Temporary Injunction previously entered on January 31, 2018 and July 19, 2018 respectively, not inconsistent with this Order, are incorporated into this Order by reference.

CONCLUSION

Having determined that KRS 157.420(11) unambiguously requires KCBOE to enter into a cooperative agreement and continue to use LCCS facilities, the Court hereby **ORDERS** the following:

1. The Court **GRANTS** the Commissioner of Education's Motion for Summary Judgment to the extent that Plaintiffs' claims against him, the Kentucky Department of Education, and the Kentucky Board of Education are moot and should be dismissed. These parties are likewise **DISMISSED**;

2. The Court **GRANTS IN PART** Plaintiffs' Motion for Summary Judgment to the extent that the Court finds that KCBOE's attempt to close the Cordia School and withdraw from the lease agreement violates KRS 157.420(11), and that permanent injunctive relief is warranted per CR 65.01(c);

3. The Court **CONVERTS** the Temporary Injunction into a Permanent Injunction, and that accordingly KCBOE is **PERMANENTLY ENJOINED AND ORDERED** to continue to operate the Cordia School under the terms and conditions of its prior lease agreement with Lotts Creek Community School, Inc. until a new cooperative agreement complying with the requirement of KRS 157.420(11) is executed. The parties are directed to negotiate in good faith any changes to the agreement that are required by changes in circumstances and to complete such negotiations with all deliberate speed upon the finality of this judgment. The Court directs that the \$300.00 bond previously posted to secure the Restraining Order and Temporary Injunction shall continue to secure the Permanent Injunction.

4. The Court **DENIES** Plaintiffs' Motion for Attorney's Fees.

5. The Court **GRANTS IN PART** the Motion to Enforce to the extent that the mediated agreement between the parties shall be enforced until the legal issues still in dispute are resolved by final judgment, after any appellate review. The Court directs compliance with the terms of this Order and continued compliance with the Permanent Injunction, pending any appellate review. In the absence of such compliance, the Court reserves the right to order any and all remedial relief (including injunctive relief, fines and penalties) necessary to secure compliance with the Orders of the Court.

6. The Court **DENIES** the parties' other Motions for Relief.

7. This final judgment shall readjudicate finally, as of this date, “in the same terms all prior interlocutory orders and judgments” including the Court’s prior granting of summary judgment to the plaintiffs and the Court’s prior entry of temporary injunctive relief. CR 54.02(2).

SO ORDERED, this 16th day of May, 2019. This is a final and appealable Order, and there is no just cause for delay.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

DISTRIBUTION:

Dr. Wayne D. Lewis
Interim Commissioner of Education
300 Sower Boulevard, 5th Floor
Frankfort, KY 40601

Clay Barkley
Randal A. Strobo
Strobo Barkley PLLC
239 South Fifth Street, Suite 917
Louisville, Kentucky 40202
Cbarkley@strobobarkley.com
Rstrobo@strobobarkley.com

Todd Allen
300 Sower Boulevard 5th Floor
Frankfort, KY 40601

Ned Pillersdorf
124 West Court Street
Prestonsburg, Kentucky 41653
pillersn@bellsouth.net

Timothy Crawford
P.O. Box 1206
Corbin, Kentucky 40702
tim.crawford@timecrawfordlaw.com

Ashley Lant
Kentucky Department of Education
300 Sower Blvd., 5th Floor
Frankfort, Kentucky 40601
Ashley.Lant@education.ky.gov