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BERT COMBS AND THE COUNCIL FOR BETTER EDUCATION:
CATALYSTS FOR SCHOOL REFORM

By Richard E. Day

Support for an efficient system of common schools has been a serious problem throughout Kentucky's history. The General Assembly has been content to allow Kentucky's schools to rank among the least supported in the nation. But the struggle for adequately funded public schools got a major boost, in 1989, when the Kentucky Supreme Court issued its landmark decision in *Rose v Council for Better Education*, declaring a proficient education the fundamental right of each and every child.¹

¹ My study, Richard E. Day, "Each Child, Every Child: The Story of the Council for Better Education, Equity and Adequacy in Kentucky's Schools." Ed. D. diss., University of Kentucky, 2003; chronicles the activities of the Council for Better Education from its inception in 1984 through the Supreme Court's landmark ruling in *Rose v Council for Better Education*, 790 S. W. 2d. 186 (1989). (Available at http://works.bepress.com/richard_day/doctype.html#popular_press) Kentucky sought to implement a new system of common schools under the Kentucky Education Reform Act of 1990. This article, based largely on oral history interviews and legal research, provides some insight into the effort required to bring about such an historic result.

The activities of the Council for Better Education were part of a national effort to determine a set of standards for equitable and adequate school funding that could be used by the courts. Equity is a question of whether school funds are distributed to Kentucky's school districts in a relatively balanced fashion. Adequacy is an issue of whether schools have the resources necessary to meet the goals set by the state.

In earlier times, when good jobs were available to less educated citizens and the state's educational goals were low, minimal funding may well have provided an adequate education for most citizens. But an adequate education is not a fixed standard. As society grew more technologically advanced, low-skill jobs evaporated, and the competitive demands of a global marketplace required a greater percentage of highly-educated Kentuckians. The demands placed on the schools increased significantly. An adequate education for all Kentucky children, as required by law, is a very high standard in the twenty-first century.

Kentucky educators were not alone in their struggle for better schools. An initial wave of federal litigation emerged in the late 1960s to challenge state systems of school finance. But plaintiffs seeking to provide equitable public schools were frustrated in their attempts to use the U. S. Constitution as a basis to overturn state funding schemes. Initially, federal courts seemed sympathetic to plaintiffs' 14th Amendment claims that unequal schools denied students "equal protection of the law" and were therefore unconstitutional. But the court

was frustrated by a lack of standards that judges might use to determine whether or not a state legislature had provided equitable schooling.² In California, a 1971 victory in *Serrano v Priest* offered plaintiffs hope, but it was short-lived.³

By 1973, the U S Supreme Court had closed the door to any further 14th Amendment claims in *San Antonio Independent School*

² *McInnis v. Shapiro*, 293 F. Supp. 327 (1968).

³ *Serrano v Priest*, 5 Cal. 3d 584, 487 P.2d 1241 (1971). *Serrano* was the first major school case to be filed in a state rather than federal court. It was also the first time a state system of school finance was found to be unconstitutional. The state court found that the state system of funding violated the federal equal protection clauses of both the state and federal constitutions. Compulsory attendance was used as partial rationale supporting education as a fundamental right.

District v Rodriguez.⁴ A second wave of equity cases, based on education clauses in state constitutions, shifted litigation to the state courts.⁵

In Kentucky, a group of public school administrators formed the Council for Better Education and won a landmark decision. Former Governor Bert Combs served as lead counsel to the plaintiffs and employed a new approach that focused on both equity and adequacy. His legal strategy launched a third wave of American school finance litigation that was modeled nationally.

The Kentucky Supreme Court, in *Rose v. Council for Better Education* (1989), defined the constitutional mandate by declaring the “fundamental right” of each and every child in the Commonwealth to an adequate education. The court also reaffirmed the General Assembly’s exclusive responsibility for providing an efficient system of common schools and broadly defined the elements of that system.

⁴ *San Antonio Independent School District v Rodriguez* 411 U. S. 1 (1973). The U. S. Supreme Court effectively precluded plaintiffs from using the equal protection clause of the U. S. Constitution by finding that education was not a fundamental right under the U.S. Constitution. The court also noted that the equal protection clause applies to individuals, not governmental entities.

⁵ William E. Thro, “Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model,” 35 BC L Rev 597 (1994).

In the end, the Kentucky Supreme Court, under Chief Justice Robert Stephens, declared the entire system of schools unconstitutional, which led to the most sweeping education reform in Kentucky history.

It is difficult to say exactly where any movement toward change actually begins. Every action has its antecedents. But by the 1920s, fiscal inequities between city schools and rural schools were well documented. The 1920 General Assembly created the Kentucky Education Commission to study the schools. In their report, the commission made a strong plea for more adequate funding arguing that “The tide of prosperity does not rise in countries that pay little for education; it rises in those that pay much.”

The commission argued for the "elimination of educational inequities which arise chiefly from the differences in the amount of taxable wealth in different sections of the state, as well as in different communities within the same section of the state." The Commission found, for example, that Woodford County had \$7,615 of taxable property per school age child, while Wolfe County had only \$545. But equalizing those differences would require a constitutional amendment.⁶

⁶ H. W. Peters, *History of Education in Kentucky, 1915-1940* (Frankfort, Kentucky: Department of Education, 1939), 37; *Public Education in Kentucky* (New York: General Education Board, 1922), 140-141.

In 1930, the Teacher Equalization Act applied \$1,250,000 to the equalization of school funds but the State Auditor challenged the law on the grounds that the constitution permitted only a per capita, or flat grant method of fund distribution. The Kentucky Court of Appeals overturned the Teacher Equalization Act and the General Assembly spent the next quarter century looking for a solution. Superintendent John W. Booker succeeded in convincing the 1940 legislature to place an amendment to Section 186 of the constitutional on the ballot. Once ratified, the General Assembly allocated ten percent of the state education fund to equalize property poor school districts up to \$30 per pupil. Again in 1949, Kentucky voters approved a constitutional amendment that permitted twenty-five percent of the school fund to be allocated to tax-poor districts. Yet another amendment to Section 186 in 1952 nullified the distribution of school funds on a per capita basis and completely vested the General Assembly with the power and responsibility for creating an efficient system of common schools.⁷

In 1954, the General Assembly created the Minimum Foundation Program (MFP) as its vehicle for funding the schools. The MFP was based on the Strayer-Haig Foundation Program model which combined state and local tax dollars to fund the schools.

The idea was to provide a minimum level of funding that the legislature believed was adequate for all schools to operate; distributed

⁷ Ibid. Peters.

equitably throughout the state. Then, if a community wanted to sweeten the pot, additional taxes could be levied locally. But in order for the program to work, at least two things had to be true: property in the state had to be assessed at 100 percent of its fair market value, and the program had to be adequately funded. Unfortunately, neither was true in Kentucky.

To participate, a school district was required to levy a minimum real property tax of at least \$1.10 per \$100 of assessed value, up to \$1.50 per \$100.00 of assessed value, or as much as 1 ½ percent of the total assessed value of the real property in the district. Most districts levied the maximum rates, because the assessed values were very low, ranging from 33 1/3 percent of the fair market value, to as low as 12 ½ percent of that value. The median statewide assessment rate was 27 percent.⁸

⁸ *Rose v Council, for Better Education*, 790 S. W. 2d 186, 7 (1989). In *Russman*, taxpayers, who were parents of school children, sought injunctive relief in the Franklin Circuit Court requiring the assessment of property at fair market value. The appeals court ruled that the constitutional requirement was not repealed simply because public officials had refused to follow it for 75 years. The statewide median real estate assessment ratio was approximately 27 percent. “It is apparent the situation is bad from almost any standpoint, is becoming worse, is

As a result there was court action. In 1965, the Kentucky Court of Appeals ruled in *Russman v. Lockett* that all property had to be assessed at its fair market value.⁹ That decision would have had the effect of immediately tripling taxes for every property owner in the state – all of whom had previously benefited from the artificially low assessments.¹⁰

The General Assembly had other ideas, however. Convinced that they would lose their seats if they were perceived to have raised taxes, state legislators decided to change the tax structure of the Commonwealth instead. Intending that *Russman v. Lockett* would not produce an additional penny of new taxes, the General Assembly passed

unfair, is administratively inefficient, and gives tax Commissioners an unwarranted and arbitrary control of the tax base” the court wrote.

⁹ *Russman v Lockett*, 391 SouthWest 2d 694 (1965). The author's father John L Day, a member of the Kentucky House of Representatives in the 1954 and 1956 sessions, and an expert real estate appraiser in Kentucky for over 50 years, taught that fair market value is the price an owner willing (but not under compulsion) to sell, ought to receive from a buyer willing (but not under compulsion) to buy. Appraisers derive an estimate of that price by studying comparable sales for residential property; and use other methods for other kinds of property.

¹⁰ Scott C. Trimble and Andrew C. Forsaith “Achieving Equity and Excellence in Kentucky Education” 28 *University of Michigan Journal of Law Reform* 3, 601-604 (1995).

House Bill 1, better known as the “rollback law.” This effort changed several statutes including K.R.S. 160.470, which prohibited any district board of education from submitting a budget which would require more revenue than the preceding year.¹¹

The practical effect was that school districts were locked into the unequal pattern of assessment that had existed in the prior year. From that point on, the discretion of the local district to levy taxes was restricted by the state. As a district increased in assessed valuation, the law required a corresponding reduction in the tax rate, so that revenues did not increase. In an adequate, efficient and equitable system of schools this might not have been a problem. However, as it was in Kentucky, the passage of the “rollback law” froze inequities into the system and, as a by-product, 180 different permissible tax rates were created for the 180 school districts.¹² Even the most enterprising of school superintendents found themselves powerless to catch up with higher-performing school districts.

In 1966, the General Assembly recognized the taxation difficulties faced by the local school districts as a result of the “rollback law” and allowed school districts the authority to levy one of three permissive

¹¹ KRS 160.470, (1965).

¹² Richard E. Day, “Each Child, Every Child: The Story of the Council for Better Education, Equity and Adequacy in Kentucky’s Schools, Ed. D. diss., University of Kentucky 2003, 73.

taxes: the Occupational License Tax, the Utility Gross Receipts Tax or an Excise Tax on gross income. These permissive taxes were subject to recall by the voters, however.¹³ The other problem with these “marketplace taxes” was that they were, in and of themselves, additionally disequalizing since the disparity among school districts for non-property taxes was even greater than the disparity for property taxes. A poor school district that is not a marketplace would gain little if any revenue from these permissive taxes so it was not worth the headache levying the tax. The legislature simply provided no source of revenue for the poor school districts and increased the disparity between rich and poor because a few of the more affluent districts were able to levy a tax and raise more money.¹⁴

The General Assembly responded to concerns raised by educators and voted to permit school districts to take a one-time, ten percent increase in both 1967 and 1968. However, local politicians, like the state legislators before them, proved to be too worried about being blamed for

¹³ Rose v Council, 7.

¹⁴ Kern Alexander, *Council for Better Education v. Martha Layne Collins, Governor, et. al.*, Civil Action no.85-CI-1759, deposition, 23 June 1987, 32.

additional taxes and as a result, few districts took advantage of the opportunity.¹⁵

For about a four-year period after the rollback law was enacted, local participation continued to erode since the law allowed for additional revenue only from new property going on the tax rolls for the first time, such as a new hotel. An increase in the assessment on an existing home precipitated a reduction in the tax rate. As a result of this, some districts, such as Pulaski County, ended up with no local tax rate at all. Over time, the rich got rich and the poor got poorer.¹⁶

¹⁵ *Rose v Council*, 7-8. Since its beginnings in 1837, the Kentucky school system was built on the notion of local control. This was not to assure a quality education. Rather it was to assure that no suspicious doctrines were taught that might argue against local beliefs and to control costs so that taxes would not have to be raised. See Pearce, John Ed. (1987) *Divide and Dissent: Kentucky Politics 1930-1963*. Lexington, KY: University Press of Kentucky, 126-128.

¹⁶ Woody Barwick, "The Antecedents to the School Financial Crisis in Kentucky," Ed. D. diss., Virginia Polytechnic Institute and State University, 1989, 80-87; Kern Alexander, *Council for Better Education v. Martha Layne Collins, Governor*, et. al., Civil Action no.85-CI-1759, deposition, 23 June 1987, 10; *Report of the Minimum Foundation Program* (Study conducted for the Commission on Public Education. Meridian, Mississippi: Associated Consultants in Education, 1961), 47.

The final antecedents to the Council for Better Education came during the Carroll and Brown administrations of the late 1970s and early 1980s. Intending to equalize school funding, Governor Julian Carroll was successful in passing House Bill 4 which created an equalization fund called the Power Equalization Program. However in 1979, his Lieutenant Governor Thelma Stovall, during Carroll's absence from the state, called a special session of the General Assembly where House Bill 44 was enacted. This law required school districts to reduce their tax rates on real property each year such that current revenue could not exceed the previous year's revenue by more than 4 percent. As a direct result, the property tax rate declined 33% statewide from 1979 to 1981, even though total assessed value had increased. Revenue for schools remained stagnant with substantial inequities now frozen in place.¹⁷

The hope of school superintendents in poor districts lay with the Power Equalization Program. But the lack of funding for the program during the administration of Governor John Y. Brown failed to reduce disparities between poor and wealthy districts.

Frustrations surrounding inequitable funding for the public schools were also felt by several administrators within the Kentucky Department of Education who, as Arnold Guess put it, “fancied”

¹⁷ *Rose v. Council*, 8; Alexander, 52; James Melton, interview by Richard Day. Louie B. Nunn Center for Oral History, University of Kentucky, 17 July 1990.

themselves to be “scholars of school finance.”¹⁸ Guess, James Melton and Kern Alexander believed that the Kentucky school finance program was not constitutionally sound because it did not provide the same quality education for children throughout the Commonwealth. The value of property supporting the tax assessments varied greatly, as much as eight times more in Fayette County than in Whitley County, for example. And with no significant equalization program, they felt that a case could be won in court.¹⁹

But you don't bite the hand that feeds you and they were all working for the state. So lacking the ability to pull the injured parties

¹⁸ Arnold Guess, interview by Richard Day Louie B. Nunn Center for Oral History, University of Kentucky, 10 May 1990.

¹⁹ Day (2003), 80-81; Woody Barwick, “A Chronology of the Kentucky Case,” *Journal of Educational Finance*, 15, (1989) 136-137. Melton was a former district superintendent who later served as Associate Superintendent of Public Instruction, and Executive Director of the Kentucky School Boards Association. Alexander became President of Western Kentucky University (1985-1988) and Murray State University (1994-2001) before holding distinguished Professorships at Virginia Tech and the University of Illinois at Urbana-Champaign. Guess was a former district superintendent and later Associate Superintendent of Public Instruction. All were school finance experts.

together, nothing came of their disgruntlement. Over time, Alexander and Melton left the department.²⁰

Nothing came of the issue, that is, until the election of State Superintendent of Public Instruction Alice McDonald (D- Jefferson County) started a chain of events which ended in litigation. McDonald proved to be one of the more colorful characters in the story of the Council for Better Education.²¹ She served as state superintendent from 1984 until January 1988, during the time of the Council's formation and trial in the Franklin Circuit Court. Surprisingly, McDonald would become a fierce opponent of the Council leadership, who were local school district superintendents, and attempted on several occasions to intimidate them and quash their efforts. She touted the virtues of Kentucky's public school system but did little to move beyond the status quo, preferring to

²⁰ Ibid. Guess.

²¹ Day (2003), 109-110. According to Jack Moreland, the name "Council for Better Education" was conceived by Guess and transmitted to attorney Ted Lavit who drew up the articles of incorporation. But due to a spelling error, for a brief time, the group was officially the "Counsel" for Better Education. Names like Citizens for Better Schools, were commonly used throughout history by education advocacy groups.

bolster her personal aspirations by maintaining her political relationships within the General Assembly.²²

During the 1983 campaign for state superintendent, Guess, the last remaining member of the trio, supported the unsuccessful candidate, former state superintendent James Graham (D-Warren County). McDonald made it very clear that she would not be keeping Guess on as assistant superintendent and sent him a letter asking for a meeting to discuss his separation from the Kentucky Department of Education. Guess didn't wait for the meeting, retiring effective December 31st, before McDonald came into office January 1, 1984.²³

Guess soon took a part-time job with the Commonwealth Credit Union, promoting services for school district employees. Because he was

²² See Day (2003), 81, 122-132. The troubles of McDonald's administration contributed greatly to the elimination of the office of Superintendent of Public Instruction, which legislators ultimately came to see as part of the problem with Kentucky's schools. McDonald's approach to her duties as state superintendent and her extensive use of department of education personnel in support of her own political aspirations stand in sharp contrast to the approaches employed by the education commissioners who would come later. McDonald was convicted of two felonies in 1998 for destroying documents being sought by investigators and getting paid for state work she didn't do.

²³ Ibid. Guess.

communicating regularly with superintendents, and was no longer a state employee, Guess began to chat with them about their school finance problems. After about twenty such conversations he concluded that it might be worthwhile to explore a *Serrano*-like equity suit against the state.²⁴

Among the first local district superintendents Guess called was Frank Hatfield in Bullitt County. Hatfield was particularly aware of the issue due to his district being in the shadow of Jefferson County. Many Bullitt County students lived “next door” to Jefferson County students who enjoyed classroom expenditures as much as \$60,000 more than the classroom expenditure in Bullitt County - based on living 50-feet across a county line. Hatfield thought schools should be able to expect an adequate and somewhat equitable amount of money to operate the schools in every community. As Guess and Hatfield saw it, the Constitution required the General Assembly to assure that each and every Kentucky child was equally, and highly valued.²⁵

Guess soon called Hatfield again and asked if he would be interested in meeting with a group of other superintendents to talk over

²⁴ Ibid. Guess. *Serrano* was filed in the California state court and argued the equal protection clauses of the US and California constitutions.

²⁵ Frank Hatfield interview by Richard Day. Louie B. Nunn Center of Oral History, University of Kentucky, 5 April 1990.

the school funding situation and see if there was any avenue they could take to correct the inequities, or at least get the constitution's requirement of an efficient system of schools clarified.²⁶

Guess also called on Dayton Independent School District Superintendent Jack Moreland, Elliott County Superintendent Eugene Binion, Jenkins Independent Superintendent Alex Eversole and Wolfe County Superintendent Tony Collins. They, in turn, began calling others. Guess had challenged the superintendents to put their money where their mouths were. Collins recalled his first phone call from Guess.

He called me one day and said he understood I had a big mouth and that I'd been going around the state speaking about the funding.

And I said, 'That's exactly right.'

He said, 'If you feel that way about it, do you have enough guts to file a lawsuit about it?'

I think my answer was, 'You're damn right I have.'²⁷

Guess began his work with the Commonwealth Credit Union in February, 1984. In two months, he had sufficient encouragement from 23 superintendents that he issued a memorandum. Dated April 12, 1984, the memorandum was sent to "Selected Superintendents" whose

²⁶ Ibid. Hatfield.

²⁷ Tony Collins, interview by William McCann Jr., Louie B. Nunn Center for Oral History, University of Kentucky, 28 February 1990.

school districts were among the bottom third of the state as measured in assessed value per pupil. Superintendents and their local board of education chairs were invited to meet in Frankfort, on May 4, 1984, at 10:00 A.M. This meeting marked the beginning of the Council for Better Education.²⁸

The meeting was held at the Capital Plaza Hotel and was chaired by Guess. Thirty-nine people representing twenty-eight school districts heard presentations from David Alexander and Richard Salmon, both professors of school finance at Virginia Tech, as well as Melton and Guess. As a result of the presentations and discussion, a consensus was formed that the General Assembly had not adequately taken into consideration the differences in ability of school districts to support adequate programs of education.²⁹

With consensus achieved on the issue of possible litigation, officers were selected. Hatfield became president; Hardin County's Steve Towler was named vice president; and Jack Moreland served as secretary/treasurer along with a steering committee including Collins, Eversole and Clarence Bates of Wayne County. The officers and steering

²⁸ Guess memo to Selected Superintendents, 12 April 1984

²⁹ Council for Better Education (CBE) memo from Steering Committee to Selected Superintendents, 14 May 1984.

committee were charged with the responsibility of pressing the objectives of the Council.³⁰

Another important action taken at that first meeting was the request of an official pledge of up to \$.50 per child in Average Daily Attendance for the purposes of filing a suit to test the constitutionality of the state school finance program during the 1984-85 school year.³¹

Politically, Council members were getting very little encouragement and no action. The group needed legal counsel of some stature, so they set their sights on former Kentucky governor and former federal judge Bert Combs. As governor (1959-1963) Combs had stumped for an “adequate education for all those who are willing to assimilate it” and noted that increases in technology created the need for a better school system.³² During his administration a 3 percent sales tax helped fund

³⁰ Ibid. CBE memo.

³¹ Ibid. CBE memo.

³² Combs’s address to the graduating class of 1961, Eastern Kentucky University, in *The Public Papers of Governor Bert T. Combs, 1959-1963*, 212. George W. Robinson (Ed.) University Press of Kentucky: Lexington, KY (1979). For more information regarding Kentucky education policy during Combs’ term as governor see also in Robinson, 123 (aid to education), 192 (importance of local school boards), 211 (adequate education), 220 (educational administration), 239 (a sound educational system), 246 (enemies of education, local control), 292

the largest education budget in state history which Combs said had to be protected from the enemies of public education. “The victor in the struggle between communism and democracy will emerge, not from a fallout shelter, but from a classroom,” Combs argued. ³³

It was decided that Guess and Hatfield would go talk to him.

At the time, Combs was “getting along pretty well” practicing law in Louisville. “I had forgotten that I had ever been governor of this state. At least, I was trying to forget it,” Combs said. Combs recalled their first meeting on May 30, 1984 where Guess and Hatfield prodded him.

‘You’re the “Education Governor,” aren’t you?’

And I said, ‘oh yeah, yeah, I’m the Education Governor.’

And then they said, ‘Well you know what’s happened don’t you? You know that the children of this state are not getting a fair shake. They’re not getting an opportunity for an adequate education. And you do know what the constitution says, don’t you?’

(exceptional children), 332 (rights of schoolchildren); and Robinson, George W. (Ed.) (1991). *Bert Combs the Politician: An Oral History*. Lexington, KY: University Press of Kentucky, 100-106.

³² Robinson (1979), 212.

And, of course, I do know. I read it. I had ignored it, as had most of the people in Kentucky.

‘And it does say that we shall have an efficient system of common schools, and that it shall be efficient throughout the state. Not just in Fayette County or Jefferson, but throughout the state.’

And they said, ‘Why don’t you join with us in filing a lawsuit, and see if the courts will intervene in the situation?’³⁴

News of the Council's formation and their plan to sue spread throughout the state.³⁵ Hatfield decided to talk to some legislative leaders and just see what their opinion was. One such member was Joe Clarke (D- Boyle County), who was chair of the House Appropriations and

³⁴ Bert Combs, interview by Richard Day, Louie B. Nunn Center for Oral History, University of Kentucky, 18 July 1990.

³⁵ The CBE issued an undated public statement, and a memo to every state school superintendent informing them of their plans. Frank Hatfield’s phone log shows an April 4th contact from Assistant State Superintendent Laurel True, a meeting with Sen. Mike Maloney on May 25th, an invitation to meet with Sen. Nelson Allen, and a May 30th meeting with Bert Combs. On June 19th, the CBE issued a statement assuring the General Assembly that the anticipated action is without malice.

Revenue Committee. Hatfield asked Clarke if he thought the legislature might “define what they considered to be an efficient system of common schools, and then lay out some kind of path for meeting whatever they thought it would be.” Clarke was dubious. Clarke told Hatfield it was a noble goal but that their chances were almost nil. “I don't like to get sued,” Clarke told Hatfield, “but if you all really want this question answered that's probably the only way it's going to be done.”³⁶

On May 25th, Hatfield and Guess met with Fayette County Senator Michael Maloney (D) and received similar advice. As Hatfield recalled,

At first, he was - I think he was a little bit irritated by it. And then we went on talking and we suggested the idea, well, ‘Would somebody define... what [an efficient system] is, and whether we have it and whether we don't.’ He finally said, ‘Well, that's a valid question.’

He said, ‘I'm an attorney. And I know the process you go about to get those kind of things answered. The court is probably who'll have to answer it. Although,’ he said, ‘I don't relish the thought of a lawsuit’.³⁷

³⁶ Frank Hatfield, interview by Richard Day, Louie B. Nunn Center for Oral History, University of Kentucky, 5 April 1989.

³⁷ Ibid.

Maloney talked about a “friendly lawsuit” but said there really wasn’t such a thing in the end. Maloney was later quoted in the *Louisville Times* objecting to the filing of a suit saying that such a suit would alienate legislators. “Action in a lawsuit would not be well received by those people in the General Assembly who have been working on the situation. Everyone's being accused of not doing their job,” Maloney said.

38

By the end of June, 39 districts had committed to join the Council for Better Education. But, most of the Council work was being carried out by a little core of superintendents who felt most passionately about the issues.

The newly formed Council for Better Education was essentially a loose confederation of superintendents who were talking up the idea of an equity suit against legislators who would soon become defendants. Needless to say, many in the General Assembly were not terribly receptive.

In fact, the mood in Frankfort was beginning to turn ugly. Jack Moreland described the legislators’ attitude at the time.

The mood we experienced...was a very hostile mood... It all came about because the General Assembly had just met... Money was short. We were just coming off of the cuts of the Brown Administration in the

³⁸ Rob Cunningham, “Bullitt Chief Fights to Close Gap between Rich, Poor Schools,” *Louisville Times*, June 8, 1984, sec. A, 16.

early 80's. Of course, there never has been a lot of money, but at the time we had some \$30 million in Power Equalization. The House had appropriated some \$12 million to the Power Equalization Fund and when the Senate met on the Budget Bill they didn't put any money in the...fund. [After the Conference Committee met the] fund wound up with zero. That was the straw that broke the camel's back....³⁹

On June 25, 1984 – well before the lawsuit was filed - Hatfield, Eversole, Moreland and Kern Alexander testified before a joint session of the Senate and House Education Committees. As Moreland recalled, “We were just kind of rattling the chains a little...and those legislators were just absolutely hostile.”⁴⁰

Later that afternoon Moreland, Hatfield, Bates, Eversole, and Collins had an unpleasant meeting with State Superintendent McDonald. McDonald had come out very strongly against the Council for Better Education. She told the *Louisville Times* that charging member districts \$.50 per child to fund their suit was illegal. “She told us, essentially, that she would own our houses if we went into this,” Moreland recalled.⁴¹

³⁹ Jack Moreland, interview by Richard Day, Louie B. Nunn Center for Oral History, University of Kentucky, 21 April 1989; Ibid. Collins.

⁴⁰ Ibid. Moreland.

⁴¹ Ibid.

It was a lonesome time there when the Senate and House were all mad as hell at us and Alice McDonald was mad as hell at us. And it was a time when you either stood up and were counted or you went home. The mood at that time was just really nasty.⁴²

Frank Hatfield expressed surprise that any superintendent of public instruction would react as McDonald had. “I think we really assumed that being superintendent, she would be for equity and for improved funding for students. We were really surprised at her and her response to it,” Hatfield said.⁴³

At the heart of the superintendents’ complaint was the need for a legal definition of the word “efficient” and its relationship to the issues of equity and adequacy as they appear in Section 183 of the Kentucky Constitution. Clearly, when the Council leadership first approached Combs, equity was foremost in their minds. Indeed, Moreland, Hatfield and Guess said privately that if the legislature had only funded the Power Equalization Program to an adequate level, talk of a suit would have simply gone away. But the legislature did not see fit to fund the program.

So Guess and Hatfield paid another visit to Combs in the Lexington office of Wyatt, Tarrant and Combs, and pressed their

⁴² Ibid.

⁴³ Ibid, Hatfield.

argument that the present school system was completely inadequate for the majority of the school children in Kentucky and that the General Assembly had steadfastly refused to appropriate enough money. They claimed they could easily prove that the system was inadequate, inefficient, and not uniform because some of the more affluent counties had almost twice as much money to spend per student, as did some of the property-poor districts, and the legislature was not doing anything about it.⁴⁴

Combs was worried about finding a state judge who would act on the law without politics getting in the way. He pointed out to them that if they could bring a suit in federal court, they would have lifetime federal judges. He reminded them that in Kentucky, judges, even appellate judges, are elected and they look to the taxpayers for reelection and thus were more susceptible to political pressure.

However, the federal courts were an unattractive option legally, and Combs predicted they would lose in federal court because of the Supreme Court's holding in *Rodriguez* that education was not a fundamental right under the U. S. Constitution. Combs was less than encouraged about the situation. As he put it,

I double-talked them a little, and I said, 'Let's think about it a little,' and so on. And I'm glad to see you... [Y]ou think about it

⁴⁴ Interview with Bert Combs by Richard Day. Louie B. Nunn Center for Oral History, University of Kentucky. 18 July 1990.

and so will I. And they left. And I was hoping they would go away. Actually I hoped that was the last of it.⁴⁵

Combs said he “had no feel for getting into this sort of thing.” It was a very difficult sort of a lawsuit and he knew the Council didn't have any money. “I had no great desire to work for nothing,” he said. As a name-partner in one of Kentucky’s largest law firms, Combs “needed to sue the Governor and the General Assembly about as much as a hog needs a sidesaddle.”⁴⁶

In fact, Combs had begun to research the case. Part of that research was to test the idea of a lawsuit with other individuals who were also interested in improving Kentucky’s schools. He approached a relatively new citizen’s advocacy group that had formed under the name of the Prichard Committee for Educational Excellence.⁴⁷

An offspring of the Kentucky Council for Higher Education⁴⁸, the Prichard Committee had shifted its focus to elementary and secondary

⁴⁵ Bert Combs, interview by Richard Day, Louie B. Nunn Center for Oral History, University of Kentucky, 18 July 1990.

⁴⁶ Ibid.

⁴⁷ Robert F. Sexton interview with Catherine Fosl. Louie B. Nunn Center for Oral History, University of Kentucky, 19 January 2000.

⁴⁸ The Council on Higher Education, originally called the Council on Public Higher Education, was created by statute in 1934 to share the

education a year earlier. The group was working to create grassroots reform in the schools through a state-wide Town Forum, the creation of local citizens groups, business groups and a strong relationship with the press.⁴⁹ The timing was very fortunate for the Council, as many of the Prichard Committee's activities supported the Council for Better Education.

Prichard Committee Executive Director Robert Sexton's first recollection the lawsuit was Bert Combs approaching Ed Prichard and Sexton in 1984, not long before the Town Forum on October 15th. Combs wanted to know if the Prichard Committee might like to be some part of it. As Sexton recalled,

Combs was famous for being somewhat inelliptical and indirect. He didn't come in and say, 'I want you to be part of this, here's the deal.' He was kind of exploring. He hadn't decided to be their lawyer at that time....⁵⁰

governance and coordination of public higher education along with the individual institutional boards of trustees/regents.

⁴⁹ Robert F. Sexton, interview by Catherine Fosl, Louie B. Nunn Center for Oral History, University of Kentucky, 19 January 2000; See also, Robert F. Sexton, *Mobilizing Citizens for Better Schools*. Teacher's College Press: New York, 2004.

⁵⁰ Ibid. Sexton.

But Prichard and Sexton did not think they should get into the case because, in their view, an equity lawsuit didn't really deal with some of the fundamental problems in public education that the Prichard Committee thought had to be dealt with. Ed Prichard thought Combs's chances of winning were slim and discouraged him from taking the case. The two men "didn't take it all that seriously" and since "Bert Combs wasn't pushing it that hard," they declined to be involved.⁵¹

Apparently, Combs was not too discouraged by the response. He continued to ponder the proposition and it was clear that Guess and Hatfield weren't going away. They told Combs that something had to be done. They vowed that they were willing to make the effort, but they needed a lawyer. "True, we don't have any money," they told Combs, "but we think you ought to do this for the benefit of the school children of the state."

And so we talked some more and I finally said to them, 'I don't want to embark on a losing cause and I don't think you do. But if you can get a substantial number of school district superintendents and boards of education, in a substantial number

⁵¹ Ibid.; Tracy Campbell, *Short of the Glory: The Fall and Redemption of Edward F. Prichard, Jr.* University Press of Kentucky: Lexington, 1998, 277.

of school districts in this state that would say to me that they want to file this suit, I will give it some serious consideration.⁵²

Combs was concerned with how many people would not only join in the suit, but stay there when the going got tough -- as his political experience taught him it would. He said he did not want people who would "yield to pressure and perhaps go behind a log when the pressure comes." As Combs put it, "By that time we knew that Alice McDonald... was bitterly opposed to such a proposal." Combs thought that the leadership of the General Assembly would resent the lawsuit as being an attempt to invade legislative territories. He wondered how then Governor Martha Layne Collins would react to such a lawsuit since she had been a schoolteacher and was "an advocate for better schools but she hadn't been able to do much about it." He wondered what a state judge would do when he knew that if he ruled in the plaintiffs' favor it would mean an increase in tax revenues and whether he would think he could make such a ruling and survive politically.⁵³

When the Council leaders left, there was still no commitment from Combs to represent the group, although he indicated that if they could

⁵² Ibid. Combs; Day (2003), 106-109; Rob Cunningham, "Chance that School Leaders Will File Equity Suit Increases." *Louisville Times*. December 4, 1984.

⁵³ Ibid.

get “a substantial number of school districts in this state” that would say they wanted him to file this suit, he would “give it some serious consideration.” But Hatfield and Guess had gone ahead and used Combs’ name to help recruit new member districts.⁵⁴

When Hardin County Superintendent Steve Towler was approached to join the Council, he recalled being impressed.

They had a steering committee. They were serious and indicated that they had Judge Combs agreeing to file this suit... To have a person the stature of Kern [Alexander] and the former Governor's law firm... When I went to that first meeting, I said, ‘Boy, this is going to happen. This is absolutely going to happen.’⁵⁵

In fact, Combs knew they had used his name to help recruit members and he did not complain. But after the men left, Combs spent more time thinking. The Council members knew their subject and that proved to be persuasive. In addition, Combs came to reflect on his own responsibilities and how he was raised. He still wasn’t excited about suing the state, but his conscience began to worry him.

My father was a practical politician and my mother was an idealist, a very dedicated religious woman who believed that God put you on this Earth for a purpose and that when...the

⁵⁴ Ibid.

⁵⁵ Steve Towler, interview by Richard Day, Louie B. Nunn Center for Oral History, University of Kentucky, 16 July 1990.

opportunity came for you to do something worthwhile that God expected you to do it. I get a little of both.

I did know that what they said was true. I didn't know how easy it'd be to prove it. But I knew that the school system in Clay County was not as good as the school system in Fayette County. I knew that. I was gradually coming to the conclusion that an effort ought to be made, and that I ought to be part of that effort.⁵⁶

Regardless, Combs continued to withhold his commitment a little longer. He realized the men were making a great sacrifice and they committed to make even more sacrifices if necessary. "I had some concern whether they would be tenacious enough to carry this thing to a final conclusion," Combs said. He was trying to calculate their chances for success. But when the Council got agreement from sixty-six districts, they said to Combs, 'We've done what you've told us to do. Now we want you to file the suit.' Combs agreed to do it.⁵⁷

According to the Council's own records, they did not have sixty-six paid members and that number of supporters would not be reached until October 19, 1988, when the Frankfort Independent school district

⁵⁶ Ibid, Combs.

⁵⁷ Ibid.

joined.⁵⁸ This was well after May 31st when the Council won at trial in Franklin Circuit Court.⁵⁹ Regardless, Combs kept his end of the bargain and agreed to represent the sixty-member Council on October 3, 1984 along with Lebanon attorney Ted Lavit. Attorney and public intellectual Ed Prichard, for whom the Prichard Committee was named, also agreed to serve along with University of Kentucky constitutional law Professor Tom Lewis.⁶⁰

⁵⁸ Since the Council for Better Education is still an active organization, its records have not yet been archived. CBE documents were initially collected by Frank Hatfield, the first president, and then passed on from president to president and added to over the years. The author has photocopies of all council documents as of approximately 2003. As of this writing, the originals reside with current President Tom Shelton, Superintendent of the Daviess County Schools.

⁵⁹ Day (2003), Appendix, Council Membership Chronological.

⁶⁰ Debra Dawahare, "Public School Reform: Kentucky's Solution," *27 Little Rock Law Review* 27, (2004), 9. Unfortunately Prichard, then blind and suffering from diabetes, died that December of renal failure. See Campbell 1998. Lewis consulted with the Council attorneys on initial drafts of the complaint before recusing himself due to a feared conflict of interest with his work at the University of Kentucky.

It was widely held that the Council's ability to get Combs to sign on was the key to turning around what had become a very negative attitude on the part of legislators. According to Moreland,

Up until that time we were just a bunch of rabble-rousers. After that we became a legitimate, bona fide organization, with legal counsel that was as good as any legal counsel in the Commonwealth, and somebody who had name recognition all over the state speaking for our position, and we were something to be reckoned with. That's when the legislature began sinking money into this thing... That's when we really started gaining credibility.⁶¹

Combs brought in Debra Dawahare, a younger member of Wyatt, Tarrant and Combs, to assist with the legal preparations for the case. He “sold” Dawahare on the idea by stating bluntly that “the case would not be popular, that we would not get paid, and that we probably would not win either.”⁶² But Dawahare was not inclined to turn down a senior partner in her new firm, particularly Combs.

Combs served as primary counsel and made all of the legal decisions. He described himself as “more a mouthpiece and a PR man.” Combs said, “Debbie Dawahare did most of the research, she did most of

⁶¹ Jack Moreland, interview by Richard Day, Louie B. Nunn Center for Oral History, University of Kentucky, 21 April 1989.

⁶² Ibid Dawahare, p. 8.

the pleadings; wrote most of the memos...” Theodore Lavit, who incorporated the group, stayed on to advise since he knew the subject and had been involved in previous school funding litigation.⁶³

At the same time, local school superintendents were encouraged by the Council to help recruit more member districts and to talk to the local media and opinion leaders about the organization's position.

The Council next met in Louisville on September 4, 1984, with Combs, Alexander and Lavit making presentations. It was decided that the Steering Committee would continue to act on behalf of the Council for the time being, until the addition of other members who were expected in October and November.⁶⁴

Dawahare realized that as prudent litigators, the attorneys would have to concern themselves with building relationships with the media in support of their proposals long before any suit was filed. It is in this regard that the Council for Better Education received more help than it could have wished for from the Prichard Committee. While the Prichard

⁶³ Debra Dawahare, Interview by Richard Day, Louie B. Nunn Center for Oral History, University of Kentucky, 7 January 1990; also Bert Combs remarks made at the Council for Better Education, testimonial banquet honoring Bert Combs. Tape Recording. 10 August 1990. Lexington, Kentucky. Author's Collection.

⁶⁴ Steering Committee memorandum to Local Superintendents, 21 September 1984. Author's collection.

Committee did not become a partner in the suit, the two groups coexisted in a symbiotic fashion providing an effective one - two punch that fed material to the press and helped fuel public interest.

Particularly helpful was Prichard's publication of *A Path to a Larger Life* (1985) which involved many influential citizens in its creation including Bert Combs, Ed Prichard, Dot Riddings, Brereton Jones, Wade Mountz, A. D. Albright, Pam Miller, Raymond Barber and many others. The report articulated Prichard's vision of common schooling with specific policy recommendations covering the entire sweep of the educational enterprise focusing on teacher quality and working conditions, the curriculum, governance, finance, and what constitutes an effective school. The report advocated increased public involvement in the schools, improving teaching, a seamless system from preschool to higher education, and that education reformers had to be ready to make the "long march."⁶⁵

⁶⁵ Prichard Committee for Educational Excellence, *The Path to a Larger Life: Creating Kentucky's Educational Future*. Prichard Committee: Lexington, KY, 1985; Bob Sexton, interview by Richard E. Day, Louie B. Nunn Center for Oral History, University of Kentucky, Lexington, KY, 6 July 2011. But Sexton didn't know just how long the march would be. Looking back, in 2010, Sexton acknowledged his surprise that school reform had not been more fully accomplished over the past thirty years.

By 1987, after legislative efforts failed, the Prichard Committee did file an amicus brief and supported the suit. *Path* was published by the University Press of Kentucky (1989), was accepted as evidence in the trial, and appears to have influenced Chief Justice Stephens’s writing of the court’s opinion, particularly as it outlined the elements of an efficient system of schools.

Much of the Prichard Committee’s objective was to garner the support of Kentucky’s newspapers. In fact, Sexton had systematically approached each of the major papers. Sexton acknowledged that the Herald-Leader and the Courier-Journal “had...done big education stories before we even got created. We were talking to them behind the scenes about these stories before we even established ourselves.”⁶⁶

The origin of the Prichard Committee went back to late 1979, when the Council for Higher Education passed a resolution to create a “Committee on Higher Education and Kentucky’s Future.” The Council needed somebody to put that together. Harry Snyder, who served as director of the Council on Higher Education, recruited Sexton. Snyder and Sexton wanted to create a group structure that would promote buy-in from its members by spending real effort on the relevant topics.

“I would have thought you could have made more progress than we’ve made,” Sexton said.

⁶⁶ Robert Sexton, interview with Catherine Fosl, Louie B. Nunn Center for Oral History, University of Kentucky, 10 October 2000.

The Prichard Committee was created to “build a fire under this system in the right places so that something better than we’ve been able to accomplish will happen.”⁶⁷ Before long, the focus gravitated from higher education to elementary and secondary education. As Sexton put it,

In a state like Kentucky, your worst educational nightmare was elementary and secondary. Second, the people in the group were just as interested in elementary and secondary as they were higher education. Third, there was a growing national movement. [There had been reform programs in Arkansas and Mississippi. The report “A Nation at Risk” had created waves nationally.] We had to paint a vision that was more compelling for donors.⁶⁸

The typical means for generating public interest in a topic, during the John Y. Brown administration, was through the creation of a Blue Ribbon Panel that would issue a report. Sexton dismissed that approach. He was looking for a more meaningful and long-term commitment. He did not want to simply gather a bunch of successful business people who would pop in, pop off and pop out. The selection of members, and particularly the chair, had to reflect that sustained commitment.

⁶⁷ Ibid; Sexton 2004, 17-18.

⁶⁸ Sexton 2000.

Sexton and Snyder thought about many possible candidates for chair (including then Lt. Governor, Martha Layne Collins) but ultimately decided on Lexington attorney, Edward Prichard. Prichard was seen as bright, well respected and he had become the informal spokesperson for higher education in Kentucky. He had been a national figure of some stature in Democratic politics; part of Franklin D. Roosevelt's "Brain Trust." President Lyndon B. Johnson once told Governor Ned Breathitt, "I'd rather have my pecker cut off than deny Ed Prichard."⁶⁹ Prichard had clerked for U. S. Supreme Court Justice Felix Frankfurter and was seen as a public intellectual. He had been on Kentucky's Council for Higher Education for fifteen years. The staff knew him. He was well liked (by most) and was effective working with the press. After his selection as chair, the group adopted his name.

Throughout 1982, Bert Combs and Ed Prichard solicited funds from individuals and corporations to make the committee possible.⁷⁰ The

⁶⁹ Campbell (1998), 227.

⁷⁰ Campbell (1998), 273. Combs had won Prichard's affections in 1955, when during his campaign for governor, Combs stood up for Prichard's involvement in his campaign following Prichard's 1948 ballot box stuffing conviction. The two men maintained a close relationship throughout the rest of their lives including Combs arranging a position for Prichard with the Wyatt, Tarrant & Combs law firm. In the 1970s, Bob Sexton and Harvey Sloane had been among those who read to

Prichard Committee became an independent, non-profit organization in the fall of 1983, just in time to assist the Council's efforts. It began with a plan to deliberately create change in the K-12 system. In Sexton's words,

From the very beginning there was a notion that we had to do things in a manner that caused action... Governor Collins was not a friend of the Prichard Committee. By that, really, I mean that Edward Prichard actively worked for Harvey Sloane in that campaign, and was actively against her... [He] said some things that were really negative about her. So we didn't have much of a relationship. We did however establish one. It wasn't close, but at least we established a relationship that allowed us to suggest things to the Governor or to her staff and to kind of push her along.

She came forward with a reform package for the 1984 legislature. As I remember it was not particularly bold, but it was a

Prichard following his blindness from diabetes. Prichard's later support for Sloane's gubernatorial candidacy against eventual winner Martha Layne Collins made a close relationship between the Prichard Committee and the governor difficult. See also Campbell (1998), 198-200 (the Combs-Prichard connection), 262-263 (Prichard's readers), 276 (Prichard joins Wyatt, Tarrant and Combs).

step. She also included some revenue increases, and she lost that in the legislature.⁷¹

The defeat was galling to Governor Collins. She saw herself as an education governor but was Kentucky's first woman governor and apparently was reminded of that on occasion. As Sexton saw it, "there was a little bit of that kind of element throughout."⁷²

Behind the defeat were the Kentucky Education Association and a small group of legislators called the 'Young Turks' which included Harry Moberly (D - Madison County), Roger Noe (D - Harlan County) and Joe Barrows (D - Woodford County). They were fairly progressive, very interested in education and were very close to the KEA. The KEA was interested in protecting teachers' salaries, working conditions, class loads, and such. These legislators wanted to be the ones who put

⁷¹ Sexton (2000); See also *The Public Papers of Governor Martha Layne Collins, 1983-1987*. Elizabeth Duffy Fraas (Ed.) The University Press of Kentucky: Lexington, KY, 2006, 5-6. In 1984, Collins had proposed income tax reform and a sales tax to improve education in the state, but her plan was defeated.

⁷² Ibid. Sexton.

together the legislative program but they couldn't reach agreement with Governor Collins. Her package and the tax bill to fund it were defeated.⁷³

The Prichard Committee wanted the governor to try again by calling a special session on education, but it was uncertain that it would happen. Committee members were receiving some positive indications, but they could also tell that she "had really been bothered by being beaten on the issue."⁷⁴

The Prichard Committee strategy was to look for some kind of way to encourage her, and that's where the Town Forum idea originated. "We got the idea that we needed to start in Kentucky a movement that was made up of more people than the Prichard Committee," Sexton said. The Town Forum had three goals: 1) to expand the Prichard Committee's reach by forming a political force of some kind, 2) attracting media attention so that politicians would get a sense people cared, and 3) encouraging the Governor by letting her know that there were some people on her side.

But given the Prichard Committee's tenuous status with Collins, it was not likely they could just call her up and get the job done. They

⁷³ Penny M. Miller, *Kentucky Politics and Government: Do We Stand United?* (University of Nebraska Press: Lincoln, NE.) 1994, 194-195.

⁷⁴ Ibid Sexton.

thought about two strategies. Sexton said, “One was to go to the governor and say, we wanted to put together this forum, would you help us? Or, we could have said, would you do it?” which was the model being used in other states at that time.⁷⁵

Prichard decided, instead, to organize it and make it very clear that it was going to happen, and then go to the governor. But the man who made that possible was Bert Combs. The Prichard Committee received a \$50,000 check from an anonymous donor to pay for staff and work on the Town Forum. That donor was later revealed in a *Kentucky School News and Commentary* blog post to be B. F. Reed an east Kentucky coal operator and friend of Combs⁷⁶. This start up money allowed Sexton to

⁷⁵ Ibid.

⁷⁶ Confirmed in a personal conversation with Lois Combs Weinberg at Bob Sexton’s Memorial Celebration, 16 October 2010. Weinberg was sent to pick up the check by Combs, her father. Boyd F Reed was a self-made man who started out shoveling coal and rose to become the largest coal operator in Floyd County by the 1960s. Even before he agreed to become lead attorney for the Council for Better Education, Bert Combs was already laying the groundwork for what would become the grassroots movement that ultimately made KERA possible. *Kentucky School News and Commentary*, <http://theprincipal.blogspot.com/2010/10/laughter-tears-and-call-to-action.html>.

approach KET⁷⁷ and establish a date for the Town Forum which was broadcast statewide. Governor Collins agreed to appear.

On October 15, 1984, two weeks after the official announcement that Combs would be representing the Council for Better Education, the Prichard Committee launched its Town Forum. The Kentucky Educational Television network broadcast the forum statewide with introductions by Governor Collins, former Governor Combs, Sexton, and State Superintendent McDonald. After the broadcast introductions at KET, Governor Collins drove to the forum in Lexington and wound up on the covers of all the newspapers because they took a great picture of her (with Sexton's 7-year old son). The strategy worked like a charm.⁷⁸

As a political activity it was uncommonly successful. Prichard was able to say that 20,000 people in 145 different locations, representing every school district in the state, came out for better schools. The press carried the story as a massive outpouring and it was a very important part of the movement. Governor Collins followed that up with a statewide helicopter and bus tour with all of the former governors and other celebrities to talk up the need to improve Kentucky education. "So she

⁷⁷ Kentucky Educational Television was created in 1962 during the Combs administration.

⁷⁸ Sexton (2000).

really took charge. She started really getting energized and came forward with a reform program in 1985,” Sexton said.⁷⁹

After the Town Forum, Collins indicated that a special session of the General Assembly would be called in 1985. By this time, Governor Collins and the Young Turks had resolved their differences by revising the proposed teacher salary structure and the KEA supported the new plan. Governor Collins brought new energy to the matter by forming the Governor’s Council on Educational Reform and touring the state with a host of politicians, dignitaries and business leaders all drawing attention to the need for better schools.⁸⁰ There was general agreement among members of the Council for Better Education that any suit should wait, thus giving the legislature an opportunity to fund the Power Equalization Program to a more appropriate level. Action to initiate the suit was temporarily suspended but preparations continued.⁸¹

In the interim, the Council's steering committee took care of organizational concerns. A position paper outlining the Council’s objectives was mailed to all members of the General Assembly as well as

⁷⁹ Ibid Sexton; Campbell (1998), 279. Combs was a substitution for Ed Prichard whose declining health prevented him from speaking on behalf of the Committee.

⁸⁰ Fraas (2006), 5-6.

⁸¹ Tony Collins interview by William McCann Jr. Louie B. Nunn Center for Oral History, University of Kentucky, 28 February 1990.

all newspapers, radios and television editors. Members of the General Assembly were assured that the contemplated suit was being considered without malice but was seen as yet another way to assist in defining the role of the state in providing an efficient system of common schools.⁸²

The Courier-Journal responded with an editorial supporting the Council's efforts saying, "In any event, courts are available to answer these and other questions. In a free country, there is no valid reason why anyone shouldn't make use of them, and there are some convincing arguments that this issue should be settled once and for all."⁸³

The Council changed from a steering committee to a Board of Directors, which met in Frankfort on May 8, 1985 to act on several organizational matters. Frank Hatfield remained president and Chair of the Board. Jack Moreland was named Secretary-Treasurer and Steve Towler, Vice President. A depository was also named. The legal firms of Wyatt, Tarrant & Combs and Theodore Lavit attorney-at-law were directed to develop all legal documents necessary to bring suit in accordance with the purposes of the Council in a court of proper jurisdiction at the earliest possible time. Kern Alexander was hired to act

⁸² Council for Better Education Board of Directors, minutes, 8 May 1985.

⁸³ Editorial, *Courier Journal*, 19 June 1984.

as principal consultant to the Council and its attorneys in developing evidence.⁸⁴

Throughout the summer of 1985, the attorneys met with Guess and the board of directors as well as school finance consultants Kern Alexander and Richard Salmon. The attorneys became educated about the severe disparities that existed among Kentucky's public schools and Dawahare began to research the legal issues.⁸⁵

A special session of the Kentucky General Assembly was called for July and the legislature attempted to reconcile itself with the issues raised by the Council. Even so, as more political pressure was applied some superintendents became uncomfortable with the pursuit. On August 12, 1985, the Board of Directors met to review the Governor's Education Improvement Program as it related to the suit.

By that time, due to "internal pressure from [State Representative] Jody Richards" (D - Warren County),⁸⁶ the Warren County Board of Education voted to rescind its action to join the Council. The Board minutes stated,

⁸⁴ Council for Better Education Board of Directors, minutes, 8 May 1985.

⁸⁵ Dawahare (2004), 9.

⁸⁶ Steve Towler, Interview by the author. Tape Recording. 16 July 1990. Oral History Collection. University of Kentucky, Lexington, Kentucky.

The reason for this action is that Governor Martha Layne Collins' proposed Education Improvement Program, to be considered in Extra-ordinary session of the Kentucky General Assembly beginning on July 8, 1985, contains considerable funding for elementary and secondary education, including a substantial increase in the level of support in the Power Equalization Program.⁸⁷

Council financial records show that the refund of \$4,328.80 requested by the Warren Co. Board was never made. The Warren County school district was, however, removed from the membership roles.

Governor Collins was concerned that a suit, such as the Council was anticipating might undermine her efforts to lure the Toyota Motor Manufacturing Company to Kentucky, something that was seen as a major economic boost for the Commonwealth. She did not want to be in the position of assuring Toyota leadership that Kentucky could provide highly educated workers at the same time she was being sued for not having done so. But if she bore any acrimony toward the Council or strong disagreements with its cause, it was not readily apparent. Combs confirmed his understanding of the governor's sympathy toward better

⁸⁷ As quoted in Bob Gover's letter to Frank Hatfield, 11 July 1985.

schools. As he later stated publicly, “I understood that Martha Layne didn’t object to the suit being brought.”⁸⁸

The 1985 special session of the General Assembly brought some help. Legislators increased corporate license fees and taxes to produce \$287 million for smaller class sizes, teacher’s aides for kindergarten and pay increases.⁸⁹ But had the General Assembly gone far enough to satisfy the CBE leadership?

It was time for the Council to make a decision. Council attorney Lavit tried to “rally the troops” composing a letter of encouragement to Frank Hatfield saying,

I hope that we have not lost our fervor in pursuing the equity in education case for Kentucky school children... Sixty million dollars, which is still unappropriated, over a period of three years, is but a pittance of what is needed to equalize the school districts. We can do much better, and in fact, if we have the courage to begin the suit, we will win because we have the law squarely in our corner... [T]o fold up now is an admission that we are satisfied or should be satisfied. In fact, we have received but a promise of so

⁸⁸ Bert Combs comments during the Council for Better Education. Testimonial Banquet Honoring Bert Combs. Tape Recording. 10 August 1990. Author’s Collection.

⁸⁹ Fraas (2006), 6.

small proportions that I would not hesitate to recommend ignoring same in light of prospects of the suit.⁹⁰

On August 12, 1985, the Board of Directors met to review the Governor's Education Improvement Program as it related to the suit. Kern Alexander reported back to the group in September that the “wealth differentials between rich and poor school districts [would] not be appreciably altered” by the new legislation.⁹¹

Despite his opinion, Alexander was sensitive to the political pressure the members had come under. He wrote,

Frank, as always, there is both a funding and a political question involved here. From a funding perspective, the 1985 Special Session achieved very limited success. In fact, the provisions were so modest that fiscal disparities may well increase rather than decrease by 1987-88. The fiscal inequities which existed prior to the Special Session are changed little, if at all, by the new legislation... Politically, only the superintendents are in a

⁹⁰ Theodore Lavit letter to Frank Hatfield, 28 August 1985.

Author's collection.

⁹¹ Kern Alexander letter to Dr. Frank Hatfield, 3 September 1985.

Author's collection.

position to analyze their local conditions to determine if further pursuit of change through judicial action is advisable.⁹²

On September 5, 1985, Jack Moreland responded, sending identical letters to Kern Alexander, Dawahare and Lavit stating, "the proposed law suit was in a form ready for filing." He called for all bills to be submitted for payment and alerted all consultants that they would "proceed on an assignment basis."⁹³

At last the Council was in a position to file. The only thing remaining was a green light from the membership, which the Board of Directors hoped to obtain by mailed ballot. The members were asked to respond to two options: 1) proceed with filing the lawsuit at the earliest possible date; or 2) remain active as an organization but not file suit prior to the regular session of the Legislature in 1986. Prior to that session, lobby the legislature to define efficiency and set a timetable for establishment of an efficient school system. Then, based upon the

⁹² Ibid. Alexander letter.

⁹³ Jack Moreland letters to Kern Alexander, Debra Dawahare and Theodore Lavit, 5 September 1985. Author's collection.

outcome of this activity, decide the proper course of action following the regular 1986 session.⁹⁴

The response from the membership, however, proved to be "less than overwhelming."⁹⁵ The twenty-two responses gave the Board of Directors little direction:

For Option 1 (to File now)

Dawson Springs
Bracken County
Harlan City
Owen County
Fulton County
Butler County
McLean County
McCreary County
Hart County
Hardin County

For Option 2 (to wait)

Wayne County
Spencer County
East Bernstadt
Knox County
Crittenden County
Rockcastle County
Clay County
Williamsburg
Ludlow
Laurel County

⁹⁴ Frank Hatfield letter to Jack Moreland, 16 September 1985; Executive Committee memorandum and ballot to Council for Better Education Members, 16 September 1985. Author's collection.

⁹⁵ Jack Moreland memorandum to the Council for Better Education Board of Directors. 21 October 1985. Author's collection.

Augusta
Hickman County ⁹⁶

The lukewarm input prompted Hatfield to call for a special meeting of the Board of Directors. The meeting was held at the Kentucky School Boards Association headquarters in Frankfort on November 8, 1985. In attendance were Frank Hatfield, Ray Hammers, Steve Towler, Clarence Bates, Dennis Lacy (by proxy), Arnold Guess, Alex Eversole, Charlie Brown and Jack Moreland. After some discussion, Hammers and Towler moved and seconded that the suit should be filed "with all due speed to

⁹⁶ Ballots and letters from Council for Better Education members to Jack Moreland, September 25th through October 16th, 1985. Author's collection. Most members of the Board of Directors did not vote, apparently viewing the ballots as input to the Board. The balloting highlights the confusion over what constituted membership in the CBE. At the time of the vote there were 51 paid members. But other districts had passed local board resolutions or otherwise committed their support and their input was accepted. For example, Wolfe County could not pay their \$705.40 dues until November, 1985 despite the fact that Superintendent Tony Collins was among the most active members. Votes were also counted from Laurel County (which paid in September, 1988), Rockcastle County (Feb 8, 1990) and Knox County (Feb 16, 1990). See Day (2003), 116.

answer constitutional questions contained therein.” The motion carried.⁹⁷ As Eugene Binion explained,

You’ve got to realize that the 66 of us took a lot of risk to begin with. If we had been scared or if we hadn’t believed in what we were doing we wouldn’t have done it to start with. We know several local superintendents who would not participate for that very reason, because they were told not to. And that’s not being critical of them - that’s just fact. There were superintendents who were afraid to become involved in the case even though they knew it was the right thing to do. That’s their problem and they have to live with that.⁹⁸

In preparation for the press conference that would announce the Council’s suit, Hatfield released two statements to further explain the Council’s action. In the press release titled “*Statement*,” the Council took the position that, “For the past 31 years the General Assembly has been committed to a substantially equal educational opportunity for all Kentucky school children.” When enacting the Minimum Foundation Program in 1954 the General Assembly clearly stated in KRS 157.310 its

⁹⁷ Council for Better Education Board of Directors, minutes, 8 November 1985. Author’s collection.

⁹⁸ Eugene Binion, interview by William McCann Jr., Louie B. Nunn Center for Oral History, University of Kentucky, Lexington, KY, 20 June 1990.

intention, "to assure substantially equal public school educational opportunities... Contending forces, circumstances, and the assignment of financial priorities have combined to substantially diminish the progress made toward meeting their stated intention."⁹⁹

In a second statement titled, "*Why This Action at This Time*" the Council stated,

The Council, in general, supports the educational reform legislation passed by the special session and the last regular session...however...many of the reform measures...make the issue of equal funding more imperative than it has been at any previous time.

The Council cited a new testing program and statewide accreditation along with the general trend toward more state control as motivation for seeking an answer to the questions: What is meant by our Constitution when it speaks of an efficient system of common schools throughout the state? and, What did the legislature intend in 1954 when it passed KRS 157.310 assuring substantially equal public school educational opportunities statewide?¹⁰⁰

⁹⁹ Council for Better Education, Statement, 19 November 1985. Author's Collection.

¹⁰⁰ Council for Better Education, statement titled, "Why This Action at This Time," 19 November 1985.

The action styled *Council for Better Education, et. al. v. Martha Layne Collins, Governor, et. al.*; Civil Action No. 85-CI-1759 was filed November 20, 1985. Again, the press was supportive of the Council's actions. *The Courier Journal* argued that, "unless the word 'efficient' is given an exceedingly loose interpretation, nothing fitting the description yet exists. The wonder is that it has taken this long for anyone to mount a court challenge to Kentucky's ramshackle, inequitable methods of financing the education of its children."¹⁰¹

The trial before Franklin Circuit Court Judge Ray Corns would not begin until August 4th 1987 and the circuit court ruling was not rendered until May 31, 1988, 30 months after the suit was filed. By that time, motions of substitution were filed to update the court on the newly-elected defendants, Governor Wallace Wilkinson for former Governor Collins, along with several other state and legislative officers.¹⁰²

At trial, defense attorney William Scent argued on behalf of the General Assembly that the inequities cited in the complaint would not exist if the plaintiffs had not mismanaged funds and had passed permissive taxes in their districts. He claimed the General Assembly had

¹⁰¹ Editorial, "Unequal State Schools Face a Long-overdue Challenge," *Courier Journal*, 22 November 1985.

¹⁰² Day (2003) Chronology of Events, 343-353; Barwick (1989) 140-141.

done the best they could since the people of Kentucky did not want more taxes and Kentucky is a poor state.¹⁰³

In his momentous decision Corns held that the legislature had failed in their duty to provide an efficient system of schools. Having lost their mismanagement argument before the court, the General Assembly punitively called for audits of the plaintiff school districts. After some wrangling with newly-elected state superintendent John Brock, himself a member of the Council, State Auditor Bob Babbage agreed to a plan that would audit a broader sampling of schools districts, and ultimately found that schools were managing their resources fairly well.¹⁰⁴

The case was immediately appealed to the Kentucky Supreme Court where Scent argued that the General Assembly had as its goal the best school system possible in Kentucky. He said that recent legislative changes had already had a salutary effect and that “efficient” means doing the best with the dollars one is given. He challenged the standing of the plaintiffs, calling the Council for Better Education a funding vehicle created solely for the purpose of suing the state using tax dollars. He claimed that school districts could not sue their creators and that an Education Committee, formed by Judge Corns to advise the court, was

¹⁰³ Day (2003), 120-121; 134-143; 147-151; 157-159.

¹⁰⁴ Day (2003), 157-164.

simply a “dog and pony show” which violated the separation of powers doctrine.¹⁰⁵

Bert Combs and Debra Dawahare countered Scent's claims but focused most of their effort on confirming the lower court's conclusion that the General Assembly had failed in their duty to provide an efficient system of schools. Combs was particularly careful arguing the separation of powers issues and guiding the court to conclude the system was unconstitutional without demanding specific remedies of the legislature.¹⁰⁶

The Kentucky Supreme Court came to its landmark decision on June 8, 1989, under the leadership of self-described activist Chief Justice Robert F. Stephens who assigned the writing of the majority opinion to himself. After 325 hours of research and writing, Stephens had produced a first draft he didn't like; and it was keeping him up nights. After tossing and turning one evening, Stephens awoke and went downstairs in his apartment, fixed himself a vodka and tonic, and sat in

¹⁰⁵ Day (2003), 165-174.

¹⁰⁶ Day (2003), 175-181; *Young v Williams*: 03-CI-00055 & 03-CI-01152. The wisdom of Combs's restraint was later verified in *Young v Williams*, when Franklin Circuit Court Judge Thomas Wingate dismissed a second CBE suit, in 2007, acknowledging the court's “unwillingness to pierce the separation of power doctrine.”

the darkened room staring out at Lexington's city lights. “All of a sudden it occurred to me,” Stephens said, “what we’re talking about here is not just money because there’s a lot of other evils in the system, a lot of other things that are wrong, a lot of inefficiencies.”¹⁰⁷ That revelation caused him to broaden the opinion, from one tailored narrowly to the funding issues, into a sweeping rejection that declared the entire school system to be unconstitutional.¹⁰⁸

The ruling was initially shocking to the General Assembly, but after a brief flirtation with defying the court, legislative leaders embraced the decision and used its political leverage to reform the public schools. Moreover, the symbiotic relationship between the Council for Better Education on the legal front, and the Prichard Committee on the political and policy fronts, had articulated a consistent vision of common school reform that garnered a broad consensus.¹⁰⁹ University of Kentucky

¹⁰⁷ Robert F. Stephens, Interview by Robert Sexton and Debra Dawahare. Tape Recording. 15 December 2001. Prichard Committee Collection, Lexington, Kentucky.

¹⁰⁸ Day (2003), 189-200.

¹⁰⁹ Day (2003), 201-205; Paris, Michael. (2010) *Framing Equal Opportunity: Law and Politics of School Finance Reform*. Stanford, CA: Stanford University Press, 212-215.

Survey Research Center polling showed that in 1990, education was perceived by the public to be Kentucky's most important problem.¹¹⁰

On April 11, 1990, the legislature passed the Kentucky Education Reform Act, the most sweeping school reform package ever passed by any state at any one time.¹¹¹

¹¹⁰ Miller, 69.

¹¹¹ Results Matter: A Decade of Difference in Kentucky's Schools, 1990-2000. (2000) Kentucky Department of Education: Frankfort, KY; Schrag, Peter (2003) *Final Test: The Battle for Adequacy in America's Schools*. The New Press: New York, 61-62.