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## Not Without a Fight-Final Draft 14 June 2018

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**Not Without a Fight \_ Final Draft \_ 14 June  
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Richard E. Day



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## Not Without a Fight

By Richard E. Day, Ed. D.

When the pragmatically liberal Governor Bert T. Combs passed his 3% retail sales tax, in 1960, the people on the Cumberland Plateau felt a surge of confidence. After decades of neglect, local school boards in eastern Kentucky were finally able to offer qualified teachers with a college degree a raise of \$900 dollars per year, and perhaps, stem the tide of good teachers who were leaving the region for bigger cities, or leaving the state for greener pastures in Ohio or Tennessee. The tax helped military veterans and funded new classrooms. Teacher standards were raised, a network of vocational schools and ten community colleges opened, and work began on the ambitious Kentucky Educational Television network which would greatly expand educational programming in rural areas.

As lawyer and former Kentucky state legislator Harry M. Caudill reported, in his definitive *Night Comes to the Cumberlands*, that the public schools in eastern Kentucky lagged far behind. A 1960 University of Kentucky study found that high school graduates in Harlan County were performing three years and five months behind high school graduates nationally and were in no position to compete for good jobs. They were an impoverished citizenry surrounded by rich resources.<sup>1</sup> The legislature simply provided no source of revenue for poor school districts and the disparity between rich and poor would continue to grow - to the point that something had to be done. But it would take another thirty years for a substantial remedy to occur. That remedy did not come from any legislative awakening that recognized and cured longstanding fiscal deficiencies of the past. Rather, it was the result of a courageous nine-year political fight waged by local school superintendents, supported by a contemporaneous grass-roots policy effort, executed by creative legal statesmanship, and resolved by an activist Supreme Court decision.<sup>2</sup>

The conflict began on New Year's Day, 1984, after incoming state Superintendent of Public Instruction Alice McDonald made it known that she would release veteran school finance expert,

Arnold Guess, from the Kentucky Department of Education (KDE). Guess had supported McDonald's opponent in the election, James B. Graham, and the politically-minded McDonald had made it clear that the department would be moving forward without him, so he resigned the day before her arrival. His liberation freed him to scratch an age-old itch. Guess and two of his Kentucky Department of Education colleagues, James Melton and Kern Alexander, had always been bothered by the inequitable and inadequate funding of Kentucky's public schools. But you don't bite the hand that feeds you so, as state employees, they never felt like they could act on their concerns. Over time, Alexander and Melton had left the department and now, with his own departure, Guess was in a position to try to do something about it.

Guess took a part time job with the Commonwealth Credit Union recruiting school districts to use credit union services. But that put him on the phone with superintendents from around the state. One of his early calls went to Superintendent Tony Collins of Wolfe County. After making his credit union pitch, Guess guided the conversation toward school district financial problems and he brashly told Collins that he had heard he had a big mouth and that he was always complaining about school funding. Guess asked Collins if he had the guts it would take to do something about it. After about twenty such calls Guess was encouraged to call a meeting of superintendents from property-poor districts to explore filing a suit.

By that time, a few court cases in other states had cast serious doubt on the prospects for plaintiffs seeking more equitable funding in federal court. Despite this trend, Guess thought a case could be made that Kentucky's existing funding scheme was unconstitutional. In his mind, the problem was inequities built into the state's system of finance. But he never could have guessed that his narrow concern would ultimately become the catalyst for revamping Kentucky's entire system of public education.

At first, they simply saw themselves as 66 superintendents of struggling school districts hoping to get \$400 million put into the state's underfunded Power Equalization Program, which would add

funds for poor schools. The lack of equity between Kentucky's city schools and their country cousins was becoming embarrassingly obvious. But Governor John Y. Brown chose to reduce the Power Equalization Fund from \$40 million to \$31 million by executive order. Meanwhile, per pupil funding for students in Fayette County rose to eight times greater than funding for Whitley County students. But through the courage, tenacity, and reasoning of its leadership, the Council for Better Education would come to be seen as a surprisingly powerful force for all Kentucky school children and achieved a \$1.26 billion result with greater ramifications than anything they intended, or could have imagined.

On April 12, 1984, Guess called together a group of twenty three school superintendents from property poor districts to make his case. In a second meeting three weeks later, representatives from 28 school districts assembled to hear presentations from Guess, Melton, school finance experts from Virginia Tech, David Alexander and Richard Salmon, along with Jenkins Independent Superintendent Alex Eversole.<sup>3</sup>

Each superintendent agreed to ask their local board of education to fund \$.50 per child in attendance funds (ADA) to cover the expenses of filing a suit. Guess and Melton agree to handle communications for the organization through the Kentucky School Boards Association, where Melton had become Executive Director, and Council for Better Education bylaws were drafted. The group was incorporated by May. Bullitt County Superintendent Frank Hatfield was named president with Hardin County Superintendent Steve Towler serving as vice president with Dayton Independent Superintendent Jack Moreland serving as secretary/treasurer. Lead by a little core of truly convicted people, the Council launched a two-pronged attack: lobby the legislature for change; while threatening to sue.

Council members anticipated some hard feelings from legislators who did not want to be blamed for the existing conditions. Senator Mike Maloney (D-Fayette) warned that a suit would alienate legislators and the group took pains to explain that the suit would not be aimed at any particular lawmaker, and that the Council intended no malice, but rather, is only seeking to resolve

unanswered legal questions regarding inequitable school funding. But Council members were surprised when they received a harsh reaction from Superintendent McDonald whose job, they thought, was to nurture the state school system. Despite the local school boards' well-established corporate powers, she demanded that no school funds should be used to fund any legal actions against the state and that she would sue any school district that did so.

In June, Senator Nelson Allen (D-Lewis Co.) called Council leadership before the Interim Joint Committee on Education where they were promptly lambasted for their litigious saber rattling by displeased legislators from across the Commonwealth. The main complaint seemed to be that the Council was inserting itself into the General Assembly's business. The Senate immediately tried to starve the Council to death by passing Senate Bill 102 that would have outlawed the use of school funds to pay for a lawsuit against them or Superintendent McDonald and would declare any board of education that did so guilty of first-degree official misconduct. That bill served to underscore the animosity of some legislators who thought the Council members ungrateful. Attorney General David Armstrong had opined in OAG 85-100 "...that a local board of education may expend school funds to support litigation efforts relating to the equity of distribution of financial resources..." so Council leadership approached House Education committee Chairman Roger Noe (D-Harlan), whose home school district was a member of the Council, with a request to kill the bill in his committee, and the action died in the House. Some legislative notice was taken of the Council's argument and HJR 106 was proposed. The bill would have established a 15-member Governor's Commission on School Finance which would recommend funding methods and guidelines for an efficient school system, but the measure died in committee.

Relations between Council members and the Superintendent McDonald remained contentious. Tempers flared between Tony Collins and Alice McDonald at a meeting of the Joint Education Committee. She said Collins had no business filing the suit and that it was the dumbest thing she'd ever heard of. So, Collins invited her daughter to attend school in Wolfe County. 'Don't be silly,' McDonald

retorted. 'My daughter is going to go to Duke University. She needs a better education.' Collins then asked McDonald what made her daughter any better than his daughter? 'If my daughter's not going to get an adequate education, why should yours get one?' he demanded. Finally Collins turned to the legislators and offered them a deal; that if they would say students in some parts of Kentucky deserve an inferior education while students in other parts deserve a superior education, that he'd withdraw the suit. That struck a nerve. Representative Joe Barrow (D-Woodford) said, 'You're crazy if you think I'm going to get up there and say that. I'd never get reelected again.'<sup>4</sup> The next week the *Courier-Journal* came out with an editorial supportive of Guess and Melton and in favor of the Council's effort to answer the equity question once and for all.

For some legislators their hard feelings were expressed locally, and on a personal level. Superintendent Bob Gover came under pressure from members of his board of education who had been in conversation with the Warren County legislative delegation. Gover was asked to resign his position on the Council's board of directors and Warren County Schools withdrew from the Council; although, despite a request to do so, their dues were not refunded.

The Council's most consequential challenge was wrangling former Kentucky Governor and Federal Judge Bert Combs to be their pro bono attorney. Combs was not particularly easy to snag. He was out of politics and liked it that way. Obtaining his consent to represent the Council took six months of persistence and hung on the values he learned from his parents as a child in Clay County. Combs' father was a practical politician and his mother was an idealistic, religious woman who believed that God put you on this Earth for a purpose and that when the opportunity came for you to do something worthwhile, that God expected you to do it. Combs' agreement to represent the Council was announced in October and Jack Moreland saw it as a major turning point. Up until that time they were just a bunch of rabble-rousers. But after Combs agreed to represent their position, the Council for Better Education became a legitimate, bona fide organization, with legal counsel that was as good as any legal counsel in the Commonwealth, and they became something to be reckoned with.

The Council greatly benefited from powerful outside forces including the press and a host of civic, business, and education groups, all pressing for better schools – most notably the Prichard Committee for Academic Excellence, of which Combs was already a member. But the Committee had a tenuous relationship with Gov. Collins since Edward Prichard, the committee’s namesake, had actively worked for Louisville Mayor Harvey Sloane, Collins’ opponent in the Democratic primary. When Combs signed on to represent the Council, he replaced Prichard, who was in declining health, and University of Kentucky law professor Tom Lewis who had advised the group to that point. Two weeks later the Prichard Committee launched its Town Forum. But even before that, Combs had arranged for his daughter Lois Combs Weinberg to pick up a \$50,000 donation from coal operator B. F. Reed to kick start the Prichard Committee and fund KET’s broadcast of the statewide forum. With introductions by Combs, Governor Martha Layne Collins, Prichard Committee Executive Director Robert Sexton, and Superintendent McDonald, the strategy worked like a charm. The Prichard Committee was able to say that 20,000 people showed up at 145 different locations representing all of the school districts in the state. The Press reported it as a massive outpouring for better schools. The Prichard Committee did not join the suit, but Combs and Sexton continued to meet throughout the trial to organize evidence.

Governor Collins immediately put together a statewide helicopter and bus tour, with former governors and other celebrities to talk up the need to improve Kentucky education. She came forward with a reform program and called for a special session of the General Assembly for 1985. Council members agreed that any suit should wait until the legislature had an opportunity to fund the Power Equalization Program to a more appropriate level. That effort fell short and the Council filed suit.<sup>5</sup> But members of the General Assembly were not about to take the affront lying down.

Hardin County Superintendent Steve Towler’s board of education members had come under pressure from Joe Prather who was then the President Pro Tem of the Senate and a defendant in the suit. Prather felt he was one of their own, but was not properly notified by Towler that the Council was going ahead with the suit. For his part, Towler hadn’t seen the need to do so. He didn’t think it best to



schedule a meeting with someone to tell them that you are suing them. Soon after the suit was filed, in November 1985, Prather was in the Capitol rotunda for the announcement of the suit and when word reached him that Prather was up on the second floor and very upset that he had not been warned in advance. But unlike Gover in Warren County, Towler and Hardin County remained committed to the effort. The board suggested Towler make a gesture of conciliation toward Prather. Towler decided to step out of the spotlight by resigning from the board, but he remained active. Bert Combs would later recall the angry Prather saying, ‘This is a legislative matter and the judiciary ought to stay out of it. And Combs ought to stay out of it. And if Combs was so damn smart, why didn’t he fix it while he was here?’ Combs countered, ‘It’s been about 25 years ago and if I’d been a fortune-teller, I would have. But, I didn’t have the Wisdom of Solomon. And neither did Joe Prather.’<sup>6</sup>

Bert Combs had spent some time early on thinking about the best venue for filing. He believed that filing in U. S. Federal Court would be preferred since the case would come before lifetime federal judges who did not have to stand for re-election in Kentucky, and therefore, would be less susceptible to political pressures. But the Supreme Court’s ruling in the Rodriguez case eliminated that option with its declaration that education is not a fundamental right under the U. S. Constitution. Since the suit would have to be brought in state court, the law required the Council to file in Franklin County. That gave Combs a 50-50 chance of catching Judge Ray Corns who was very familiar with the testimony he would bring forward in the case. Combs even assumed that Judge Corns would be sympathetic to the Council’s cause, since he was already aware of the problems.<sup>7</sup>

By the February, 1986 Franklin Circuit Court Judge Ray Corns had been assigned the case, by lot, but there was some thought that he might declare himself ineligible to hear it. Combs was lead attorney for the plaintiff Council for Better Education and he added Debra Dawahare **as associate counsel, a relatively new Wyatt, Tarrant & Combs attorney who would come of age with the case.**

William Scent continued to represent the state government as he had for some time. As is common in Frankfort, the judge and lead attorneys knew each other. But the connections between the attorneys in

this case ran very deep indeed. Scent first became acquainted with Combs when he was on the Court of Appeals and Scent was a young lawyer in the Revenue Department. Scent used to fill out Combs' tax returns for him, and Scent was a Combs man, supporting him from 1955 on. In 1959, Scent did the legal work for Combs' gubernatorial campaign. When Combs was elected governor, Scent became his Revenue Commissioner and drafted Combs' 3% sales tax bill.

Judge Corns reminded the attorneys that he had been the Kentucky Department of Education attorney for 16 years and that he had coauthored a textbook on school finance with Kern Alexander who would be presenting testimony for the plaintiffs in the case. The judge offered to step aside, but both sides agreed that he should hear the case and 'call it as he sees it.'<sup>8</sup>

After determining where to sue, Combs had to figure out who he was suing - and how. It turns out that in the history of Kentucky jurisprudence the issue of how one goes about suing the General Assembly had remained relatively unexplored. Combs thought that the General Assembly certainly had to be made defendants because they were complaining that the General Assembly was violating the constitution. But the General Assembly had 138 members and this type of case tended to rock along for a while. They knew there would be resignations, new elections, and deaths, and if they tried to make all 138 people defendants, keeping the court up-to-date with the changes would have been daunting. Combs knew the suit would be strongly, perhaps bitterly defended, and that every technical question that an ingenious lawyer could dream up would be raised. Indeed the defense argued that the plaintiff's complaint failed to state a claim against any of the defendants; that the court had no jurisdiction because the subject matter was purely a 'political' one; that all school boards should have been joined as parties to the defense; that all plaintiffs lacked standing to bring the action; that, specifically, the plaintiff Council for Better Education, Inc., had no legal authority to sue; that the plaintiff school boards similarly had no legal authority to sue; that a class action was improper; and as would be expected, the defendants denied all of the alleged constitutional violations and the facts underlying such alleged violations.

One of the arguments made was that the Council couldn't sue the General Assembly except by suing each member – that the court could not compel actions of people not before the court. But as a practical matter, they just couldn't handle a case like that. Combs was familiar with the federal model, however, where the House of Representatives in Washington had been sued - on constitutional questions in particular - by making the congressional leadership a party to the suit. That was his chosen approach. He also believed the governor had to be made a defendant because the constitution requires the governor to report to the General Assembly on the state of the Commonwealth and to make recommendations to the General Assembly. And since she had announced her strong objections to the case, he added the Superintendent of Public Instruction for good measure.<sup>9</sup> They made it very clear in the complaint that all of these people were made defendants in their official capacity not as individuals - that they were not seeking relief against them as individuals.<sup>10</sup> On Monday June 2, 1986, Judge Corns heard oral arguments from the defense and required the addition of the State Board of Education as an indispensable party to the suit.

McDonald proved to be one of the more colorful characters in Frankfort at the time. She was a fierce opponent of Council for Better Education leadership and attempted on several occasions to intimidate the superintendents and quash the effort. As state superintendent she appeared less inclined to press for improvements to the schools than she was to maintain her political relationships within the General Assembly. Despite this, the troubles of McDonald's administration would contribute 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 extensive use of Department of Education personnel in support of her own political aspirations prompted an investigation by the state Personnel Board. The investigation revealed widespread abuses and said the McDonald administration was as arguably the most corrupt operation of a political spoils system ever.

The Alice McDonald case was offered to the U. S. Attorney for the Eastern District of Kentucky who declined to review the matter. But the public did respond. At half-time of the 1987 Kentucky High

School Sweet 16 Tournament, McDonald was scheduled to present the trophy for the best Cheerleading squad before a packed house at Rupp Arena. But when they introduced her, everyone stood up and booed to the point that she never came out and one of her deputies made the award.<sup>11</sup> Lexington Herald-Leader Editor, John Carroll recalled McDonald's administration with hopefulness and disappointment. Carroll liked McDonald and believed that she came into office with a very clear understanding of what was important and had to be done. But he also found her to be pathologically political. She just could not refrain from shaking down employees, coercing people, and playing political games. Carroll reasoned that every now and then you see somebody who just is constitutionally incapable of doing things properly, and she was one of them. She would later be arrested for shoplifting which Carroll considered to be just more of the same.<sup>12</sup>

Choosing plaintiffs was another crucial part of structuring the case. Specifically, the Council had to identify individuals who had been damaged according to the evidence that would be produced in the trial court. Combs wanted someone tough enough. He wanted people who would not succumb to pressure and go hide behind a log when the going got rough. But most importantly he wanted students that were being damaged by the state's failure to provide an adequate and uniform system of schools, and whose parents would agree to their names being used. Combs set out to convince the court that there were children who had standing and who were being discriminated against, regardless of school board members, superintendents, or parents.

The Council was immediately forced to fend off motions from the defense that were intended to laugh the case out of court. With motions for summary judgment, and dismissal, Scent argued for the defense that the Council for Better Education did not have standing to bring the suit, and that school boards were creatures of the legislature. He claimed that you can't sue your creator. Scent argued that these school districts would have enough money if they didn't waste it - even inferring that poor management and under the table stuff was going on. Combs countered, 'Well, here's an 8yr old child, Jimmy Duff. Has Jimmy Duff done anything? Has he stolen any money? Has he exercised any poor

management? He is the plaintiff.<sup>13</sup> Judge Corns overruled the defendants' motions without much delay and the plaintiffs were granted standing to bring the suit.

The complaint was filed on May 28, 1985 and listed the Council for Better Education, seven Kentucky school districts, and nineteen student-plaintiffs who were not only suing as individuals, but who also represented a class of all similarly situated students attending so-called poor school districts.<sup>14</sup>

To underscore Scent's argument of school district mismanagement, the legislature launched a Management Assistance Program meant to identify a number of Council member districts as needing assistance.<sup>15</sup>

The heart of the Council's case was the meaning of a phrase - from Section 183 of the state constitution - "an efficient system of common schools throughout the state" and its relationship to the issues of equity and adequacy. Clearly, when the Council leadership first approached Bert Combs with the idea of filing this suit, equity was foremost in their minds since they were acutely aware of the lack of uniformity. The Council presented evidence in court showing gleaming chemistry labs in the Fort Thomas schools and contrasted them with dilapidated facilities in eastern Kentucky districts. But Combs believed that they had a better shot on adequacy. The word "efficient" clearly inferred adequacy, and uniformity came into being by reason of the phrase 'throughout the state,' which was not as mandatory. So they built a case meant to attack both points. The case was argued more from an adequacy point of view, rather than equity, because they didn't want anyone going off on the idea that you had to have equitable mediocrity; that you had to take money away from Jefferson County so that Martin County could have more. Combs' theory was that no district in the state was over funded. 'Raise the tide and all ships will rise.'<sup>16</sup> This creative legal strategy launched a new wave of school finance cases nationally.

Always cautious not to breach the separation of powers, the Council for Better Education ultimately sought a declaratory judgment. Simply put, they wanted the court to advise the legislature

that the current funding system was unconstitutional, but then leave it to the legislature to fix in a special session called by the governor. They complained that the General Assembly and the Executive Branch controlled the public schools and their total financial resources, that inequities among school districts were due to inequities in assessed valuation of property per pupil, and that the consequences were devastating for thousands of Kentucky school children, and for the Commonwealth as a whole. The plaintiffs further complained that under Kentucky law, school children have a fundamental right to an adequate education, which school children trapped in poor districts do not receive because of the funding system's dependence on local property values, which in turn left them inadequately supported and powerless to extricate themselves.

The legislature claimed that its actions in the 1985 special session and 1986 regular session had corrected the problem and made much of the fact that several of the plaintiff districts never levied any of the permissive taxes, claiming that if they had, the disparities would not have existed.<sup>17</sup> To punctuate its argument, the defense asked plaintiffs to admit that some plaintiff districts (Elliott County, Knox County, McCreary County, Wolfe County, Dayton Independent and Harlan Independent) had ever levied any of the permissive taxes allowed by law.<sup>18</sup>

Bert Combs knew that Robert Sexton believed in the Council's cause, and had testified effectively for the plaintiffs, so he encouraged the Prichard Committee to take a stand by filing an amicus curiae brief.<sup>19</sup> The Prichard Committee was accustomed to making public statements on education issues and asked Ed Prichard's former law partner Phil Shepard, to draft the brief along with Committee member Phillip Lanier.<sup>20</sup> The brief filed on March 9, 1988 urged the Court to hold that education is a fundamental right under the Kentucky Constitution, to declare that the constitutional obligation to provide for an efficient system of common schools has not been met, and to reject the defendants' attempt to assert that waste and mismanagement of local school districts provides a defense to the plaintiffs' claims that the constitutional mandate for public education has been violated.<sup>21</sup>

By the time of the final oral arguments (April 18, 1988) a statewide election had been held, and

state education policy was being hotly debated behind the scenes. The new defendants included Governor, Wallace Wilkinson, replaced outgoing Governor, Martha Layne Collins and former Rowan County Superintendent and Council member John Brock replaced Alice McDonald as Superintendent of Public Instruction. Legislative officers and State Board of Education members were also substituted. While the trial continued, the General Assembly began meeting with its new governor and fresh frictions quickly emerged - not aimed at the Council for Better Education - but regarding statewide education policy.

Judge Ray Corns reached his momentous decision on May 31, 1988, declaring that it was the mandatory duty of the General Assembly to provide adequate educational opportunity to Kentucky school children, and that children could not be penalized educationally because of where they live.<sup>22</sup> Due to the importance of the case the entire legal community quickly resolved that a final opinion would have to come from the Supreme Court.

As Superintendent of the Rowan County School District, John Brock was a plaintiff since he was a member of the Council for Better Education. Upon his election to the state superintendency, he became a defendant in the Council's action - but not for long. He directed Kentucky Department of Education attorney Gary Bale to tell the judge that he did not wish to defend against that suit.<sup>23</sup> Governor Wilkinson followed suit, leaving members of the legislature as the only Appellants when the case skipped the Kentucky Court of Appeals and was instead expedited directly to the state Supreme Court. Underscoring the importance of the case, and perhaps anticipating a special session in January 1989, the Kentucky Supreme Court scheduled oral arguments for December 7<sup>th</sup>, waived page limits on the attorney's briefs, required them in two weeks, and allowed one hour per side for oral arguments instead of the usual fifteen minutes.<sup>24</sup>

In the meantime, having lost their 'mismanagement' argument at the circuit court, legislators sought to prove their point in another, more vindictive, fashion by calling for State Auditor Bob Babbage to conduct an investigation of the 66 Council districts who had filed the suit and report any

mismanagement. Superintendent Brock reacted strongly to the punitive audits threatening Babbage with a lawsuit if he proceeded.<sup>25</sup>

For his part, Babbage was acutely aware of the legislators' anger and motivation, but he read the law literally. As he saw it, the State Auditor's job was to audit the government on behalf of the taxpayers, and the legislature could call for an audit of any public institution at any time. The Attorney General agreed. But rather than auditing all 66 districts as requested, Babbage decided to audit a sample of three districts from each of Kentucky's six Congressional districts. Brock and the 18 districts selected for audit went berserk together. State newspapers had fun with the fuss, one publishing a political cartoon titled, 'School Lunch Menu' Babbage and Brock share a knuckle sandwich."<sup>26</sup> The Council for Better Education ultimately approved of the way the audits were handled.<sup>27</sup> Most audited districts were found to be doing a pretty good job, but they also learned of places where they might save significant money - as much as five and six figures in some cases.

On June 8, 1989 the Kentucky Supreme Court released a sweeping Opinion in *Rose v. Council for Better Education*, which went well beyond the fiscal issues contested by the plaintiffs in circuit court by invalidating every school law and declaring the entire system of schools to be unconstitutional.<sup>28</sup> Bert Combs would later quip, "My clients asked for a thimble full and instead they got a bucket full."<sup>29</sup>



In crafting the court's Opinion, Chief Justice Robert F. Stephens was strongly influenced by two delegates to Kentucky's Constitutional Convention of 1890. Delegate W. M. Beckner had described the



common schools as “A system of practical equality in which the children of the rich and the poor meet upon a perfect level and the only superiority is that of the mind.” Similarly Delegate Moore opined that, “Common schools make patriots of men who are willing to stand upon a common level. The boys of humble mountain homes stand equally high with those from the mansions of the city. There are no distinctions in the common schools but all stand upon one level.”<sup>30</sup> Justice Stephens settled on “Each child, every child in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in poor districts and the children who live in rich districts must be given the same opportunity and access to an adequate education.” An adequate education for each and every Kentucky student was declared to be a fundamental right under the Kentucky Constitution. The court’s focus on funding adequacy and equity throughout the state would soon reshape the system and provide fresh opportunities for many thousands of students on the Cumberland Plateau.

A brief period of uncertainty followed the decision. Legislative leaders were shocked to discover that the constitutional mandate for providing an adequate school system was entirely theirs and that the obligation could not be satisfied by simply delegating it to local school boards. The only mandate that had seemed to resonate with legislators was a resolve not to raise taxes but fixing the schools was going to require a large infusion of new resources. It was unclear whether the legislature would follow the Supreme Court’s ruling or engage in a constitutional struggle. Following the decision, Senator Michael Maloney (D- Lexington) needled Dawahare by raising the possibility that the legislature might simply ignore the decision saying, ‘Well, what are you going to do – put me in jail? I’d like to see the Council for Better Education try that’.<sup>31</sup> But legislators soon reasoned that the court’s ruling could provide political cover for raising taxes and turned their attention to school reform.

Wallace Wilkinson was a self-made millionaire, who had run for governor as a no-tax-increase candidate. He had devised his own reform plan without input from legislative or education groups, said it was the only plan he would support, and then made it clear that he expected the legislature to pass it.

But Wilkinson remained noncommittal on the tax issue unless he got unqualified support. There were many areas of agreement between Wilkinson and various education advocacy groups. Significantly, the KEA had even agreed to increased accountability in return for increased financial support. Wilkinson promised that if state education groups would support his plan first, then he would pass the biggest tax increase anyone had ever seen. But the Prichard Committee decided that it would not support any reform plan that did not come with dollars already attached to it and the legislature wanted a more comprehensive plan. House Speaker Don Blandford found Wilkinson's personality and desire to dominate the legislature difficult to work with.<sup>32</sup> Legislators and state education leaders alike did not trust Wilkinson to make good on his new revenue promise once their political leverage was gone and it got to the point that they didn't want Wilkinson to get any credit.<sup>33</sup>

Overall, interest group involvement in Kentucky school reform, particularly those directly involved with education, proved to be very weak. The General Assembly's growing strength was only made stronger when Judge Ray Corns made his ruling. The legislative leadership made it clear to all other interest groups that if indeed, as the judge ruled, the responsibility for an efficient system rested exclusively with the General Assembly, then they would decide who was in (and not in) the debate. The only uninvited entity that the legislature had to keep in the loop was the Governor, due to his responsibilities for the all-important state budget. Left unfunded, the best reform package in the world would not produce an efficient result.

The legislature passed the Kentucky Education Reform Act of 1990 less than a year after the Kentucky Supreme Court ruling. Remarkable for its ambition, KERA's reforms went well beyond finance and also reshaped curriculum, assessment and accountability, district employment, and school governance. Among the most significant and controversial changes was the replacement of grades K–3 with the multiage/multiability Primary Program. Instead of the customary letter grades a new kind of report card using a qualitative assessment of student work was mandated. School-based decision-making councils were created to ensure representation of parents and teachers in school leadership and

to localize matters of curriculum and instruction. Monetary rewards were distributed to schools that excelled on the Kentucky Instructional Results Information System (KIRIS), which was designed to measure school performance more than individual student performance. Anti-nepotism regulations altered some long-standing employment practices.<sup>34</sup>

Also significant were the expanded powers given to the Kentucky Department of Education (KDE) to intervene in troubled school districts. Suddenly, KDE could remove and replace any superintendents or board of education members who committed bad acts or who were determined to lack the capacity to move the district forward. For the first time, KDE was authorized to place troubled school districts under state management. Working in tandem, the Kentucky Office of Education Accountability (OEA), a watchdog agency attached to the Legislative Research Commission, was created to assure that Kentucky schools were efficiently operated without waste, duplication, mismanagement, and political influence by monitoring the reforms, reporting progress, and intervening whenever necessary to overcome resistance to KERA's mandates. Through the combined efforts of KDE and OEA, the legislature sent a strong message to school district personnel that any effort to ignore or undermine the implementation of KERA would be vigorously opposed. Since maintaining funding adequacy and equity were at the heart of the legislature's constitutional mandate, the OEA was also charged to analyze funding equity and report any issues to the legislature. But over time, the legislative response to OEA reports of a widening equity gap among school districts was less vigorous.

Arguably, no group would come to benefit more from education reform than the historically marginalized children of eastern Kentucky. However, due to the Appalachian peoples' tendency toward resistance to externally imposed reforms, adoption of school reform in southeastern Kentucky was slow. Information about KERA was seen as a particularly valuable, and at the same time, dangerous commodity. It was hoarded at the district level and seldom trickled out to the principal and teachers. Appalachian teachers knew little about KERA before 1994, other than that it had been decreed from afar, represented yet another attempt by the state to intervene in local affairs, and that it had generated

additional funds, including moderate teacher salary increases. More than that, their superiors decided, they need not know.<sup>35</sup>

With KERA came the dreaded “outsiders” serving in several capacities: as Distinguished Educators sent to raise test scores in schools designated as being “in crisis;” as OEA investigators sent in to audit books and monitor practices; as professional development instructors; as independent site-based decision-making trainers; and as consultants for the superintendent screening committee.

KERA combined two seemingly contradictory impulses. Local schools would be held accountable for meeting higher standards of student achievement, but they would also be given greater autonomy and flexibility to achieve those goals. KERA sought to cultivate local stakeholders who had the capacity to engage in public discourse and action in their local districts. Although systemic reform requires effective cooperation between local and state levels, the state government, the Kentucky Department of Education and the legislature's Office of Education Accountability were seen as inherently at odds with local governance. The Appalachian peoples’ concern for autonomy, independence, and self-reliance tended to trump any impulse toward concerted action and slowed the cultivation of ownership for local reform efforts. The more the state tried to regulate this state/local coupling, the more local educators resisted.

The new system of accountability also carried with it fresh data that could be used to confer prestige or to declare bankruptcy. These became effective levers for change. Low test scores gave school superintendents ammunition with which to motivate their most complacent colleagues to action. Faculty effectively used these same numbers to **legitimize** their claims that reforms were overdue and that they as a poor, rural, mountain district should be given priority for new funds and programs.

The sweeping opinion of the Kentucky Supreme Court and the passage of KERA elevated Kentucky’s public schools from a lightly regarded system to one that quickly became nationally renowned for the scope of its reform effort – a stark contrast to Kentucky’s historically weak commitment to public education.

Predictably, credit for achieving this historic result was claimed by various legislators - including some who bitterly opposed the efforts of the Council for Better Education - and there is no doubt that many people contributed to the outcome. Arnold Guess and his fellow school finance experts were indispensable catalysts who sparked the effort. The judicial activism of Judge Raymond Corns and Justice Robert Stephens made the outcome possible. Council members attributed their success to Bert Combs. For his part, Combs acknowledged the contemporaneous state-wide policy activism already being advanced by Bob Sexton and the Prichard Committee. But he also pointed to the group of courageous pioneers whom he said deserved more credit than he did, including Council presidents Frank Hatfield (Bullitt County) and Jack Moreland (Dayton Independent) along with a number of eastern Kentucky superintendents who initiated the movement and persisted throughout. The historical record confirms that the effort to bring fiscal adequacy and equity to eastern Kentucky school students was not achieved without a fight. Its legacy will be the courts' determination that an adequate education is the fundamental right of each and every student; that the General Assembly is solely responsible for maintaining an efficient system of schools; and that those schools must be equitable throughout the state - including eastern Kentucky - and adequately funded to meet the state's goals.

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<sup>1</sup> Caudill, Harry M., 1962, *Night Comes to the Cumberlands*, Boston: Little, Brown and Co., p. 372-378

<sup>2</sup> See generally, 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; which 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). This chapter, based largely on oral history interviews and legal research, provides some insight into the effort required to bring about such a historic result.

<sup>3</sup> 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.

<sup>4</sup> Tony Collins, Interview by William McCann Jr., Tape Recording. 28 February 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.

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- <sup>5</sup> Robert Sexton, Interview by Catherine Fosl. Tape Recording. 10 October 2000. Oral History Collection, University of Kentucky. See also, *Council for Better Education, et al. v. Martha Layne Collins, Governor, et al.*; Civil Action No. 85-CI-1759.
- <sup>6</sup> Bert Combs in Council for Better Education. Testimonial Banquet Honoring Bert Combs. Tape Recording. 10 August 1990. Author's Collection.
- <sup>7</sup> Bert Combs, Interview by Richard Day. Tape Recording. 18 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>8</sup> Raymond Corns, Interview by Richard Day. Tape Recording. 19 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>9</sup> Bert Combs, Interview by Richard Day. Tape Recording. 25 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>10</sup> Debra Dawahare, Interview by Richard Day. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>11</sup> Each Child, Page 131
- <sup>12</sup> John Sawyer Carroll, Interview by William McCann Jr. Tape Recording. 23 May 1990. Oral History Collection, University of Kentucky.
- <sup>13</sup> Bert Combs, Interview by Richard Day. Tape Recording. 25 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>14</sup> Civil Action No 85-CI-1759, Complaint, filed May 28, 1985.
- <sup>15</sup> Frank Hatfield letter to Bert Combs, 2 December 1986.
- <sup>16</sup> Debra Dawahare, Interview by Richard Day. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>17</sup> Bert Combs, Interview by Richard Day. Tape Recording. August 10, 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>18</sup> In the Hopper, #126, June 1986.
- <sup>19</sup> Bert Combs, Interview by Richard Day. Tape Recording. 18 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>20</sup> Robert F. Sexton, Interview by Catherine Fosl. Tape Recording. 10 October 2000. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>21</sup> Bert Combs, Interview by Richard Day. Tape Recording. Oral History Collection, University of Kentucky, Lexington, Kentucky, July 25, 1990.
- <sup>22</sup> Raymond Corns, Interview by Richard Day. Tape Recording. 29 May 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>23</sup> John Brock, Interview by William McCann Jr. Tape Recording. 9 November 1989. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>24</sup> Debra Dawahare, Interview by Richard Day. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>25</sup> John Brock, Interview by William McCann Jr. Tape Recording. 9 November 1989. Oral History Collection, University of Kentucky, Lexington Kentucky.
- <sup>26</sup> Robert Babbage, Interview by William McCann Jr. Tape Recording. 20 December 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
- <sup>27</sup> Jack Moreland, Council for Better Education. Testimonial Banquet Honoring Bert Combs. Tape Recording. 10 August 1990. Author's Collection.
- <sup>28</sup> *Rose v. Council for Better Education*, 790 S. W. 2d 186.
- <sup>29</sup> Ronald G. Dove, "Acorns in a Mountain Pool: The Role of Litigation, Law and Lawyers in Kentucky Education Reform." *Journal of Education Finance*, (1991), 21.
- <sup>30</sup> *Kentucky Constitutional Debates* (1890) at 4460 – 4463; and at 4531.
- <sup>31</sup> Debra Dawahare, Interview by Richard Day. Tape Recording. 7 January 1990. Oral

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History Collection, University of Kentucky, Lexington, Kentucky.

<sup>32</sup> Don Blandford, Interview by William McCann Jr. Tape Recording. 5 September 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.

<sup>33</sup> Robert F. Sexton, Interview by Catherine Fosl. Tape Recording. 10 October 2000. Oral History Collection, University of Kentucky, Lexington, Kentucky.

<sup>34</sup> Richard E Day and Jo Ann G. Ewalt, "Education Reform in Kentucky: Just What the Court Ordered" (2013). In *Kentucky: Government, Politics and Public Policy*, University Press of Kentucky, 265-266.

<sup>35</sup> Maureen K. Porter, "Moving Mountains: Reform, Resistance, and Resiliency in an Appalachian Kentucky High School," (1996), Ph.D. Dissertation, Stanford University, 476.

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