

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-379
AND
CIVIL ACTION NO. 18-CI-414

Filed Electronically

COMMONWEALTH OF KENTUCKY,
ex rel. ANDY BESHEAR, ATTORNEY GENERAL, *et al.*

PLAINTIFFS

v.

**RESPONSE OF THE KENTUCKY EDUCATION
ASSOCIATION TO DEFENDANT'S ARGUMENT STANDING**

MATTHEW G. BEVIN, in his official capacity
As Governor of the Commonwealth of Kentucky, *et al.*

DEFENDANTS

*** **

The Kentucky Education Association (“KEA”) is an association representing the interest of its members in Kentucky. Accordingly, KEA has satisfied the lone requirement for Kentucky that at least one member in its association could have sued in their own right. Consequently, KEA has standing to bring this lawsuit against the Defendants regarding the issues surrounding SB 151.

The concept of associational standing is not well developed in Kentucky. *See Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 112 (Ky. Ct. App. 2014). According to the Kentucky Court of Appeals, “standing...focuses on whether the parties before the court have a personal stake in the outcome of the controversy.” *Id.* Further, in order to have standing to bring a lawsuit, “a plaintiff need only have a real and substantial interest in the subject matter of the litigation, as opposed to a mere expectancy.” *Id.* (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 202 (Ky. 1989)). In general, an association may have

standing to sue as a third party on behalf of its members if (1) its members would otherwise having standing to sue in their own right; (2) the interest the association seeks to protect are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Commonwealth ex rel. Brown v. Interactive Media Entm't & Gaming Ass'n, Inc.*, 306 S.W.3d 32, 38 (Ky. 2010) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)). Although Kentucky has never officially adopted all three-elements established by the Supreme Court of the United States, at a minimum, Kentucky requires that at least one member in the association have standing to sue in their own right. *Bailey v. Preserve Rural Roads of Madison Cnty., Inc.*, 394 S.W.3d 350, 356 (Ky. 2011).

In response to KEA bringing a lawsuit on behalf of its members, Governor Matt Bevin ("Bevin") has identified two reasons KEA lacks associational standing. First, Bevin claims that KEA failed to identify a single member in its association. The Kentucky Supreme Court recognized in *Commonwealth ex rel. Brown*, that "in some cases the surrounding particulars may not demand that an association identify specific members." 306 S.W.3d at 39. In *City of Ashland v. Ashland F.O.P No. 3, Inc.*, the Kentucky Supreme Court held that the Ashland Fraternal Order of Police had associational standing on behalf of its members—the police—because the police had a real and substantial interest in striking the ordinance, even though the Fraternal Order of Police did not identify affected members. 888 S.W.2d 667, 668 (Ky. 1994). Alternatively, the Kentucky Supreme Court ruled that where two associations purported to represent a number of relevant entities, the associations lacked standing because the associations did not reveal any of the registrants they purported to represent. *Commonwealth ex rel. Brown*, 306 S.W.3d at 38.

Here, KEA has clearly established associational standing by establishing that it is a not-for-profit organization, and that it is a voluntary membership association comprised of students, active and retired teachers, and active and retired education support professionals. *See* Verified Complaint at ¶ 6. Like the Fraternal Order of Police in *Ashland*, which brought a challenge to a city ordinance on behalf of its police members, KEA is bringing this claim on behalf of its members who will be impacted by SB 151 due to the change in the retirement system. Even assuming KEA failed to specifically identify a single teacher member that has standing to bring a claim, like *Ashland* and *Commonwealth ex rel. Brown*, the court does not always need to identify specific members within the association who have been harmed. Accordingly, it is unnecessary for KEA to identify a specific member who has been affected because any or all teachers, who are members of KEA, have a real and substantial interest in the consequences of SB 151. Also, unlike *Commonwealth ex rel. Brown*, KEA has identified the party that will suffer an injury in fact because it asserted that it represents active teachers. *See* Verified Complaint at ¶ 6.

Second, Bevin argues that KEA does not have standing because neither KEA nor its members have suffered an injury in fact due to SB 151. In *Commonwealth ex rel. Brown*, the Court declared that “before a favorable judgment can be attained, the association’s general allegations of injury must clarify into ‘concrete’ proof that ‘one or more of its members’ has been injured.” 306 S.W.3d at 40. Put another way, a plaintiff must suffer an injury in fact, meaning that the harm must be an “invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Here, KEA’s members suffer an injury in fact because SB 151 breaches both statutory and constitutional rights, which the teacher’s injuries’ fall within. Bevin asserts that the teachers

do not suffer an injury in fact because they are benefitted from SB 151 fixing the Kentucky retirement system. This language identifies the ongoing political debate, but does not address the legal implications of the legislation. Put another way, the overall benefit/detriment of SB 151 is irrelevant. So long as some of KEA's member are harmed by the legislation, the injury in fact requirement has been met. Bevin's argument ignores both the statutory and constitutional implications of the legislation on particular individual members of KEA. Accordingly, unlike *Lujan*, where the court determined the injury was speculative because it was unclear when the members planned to travel to see the endangered species, KEA's members will be affected by losing retirement benefits currently guaranteed to them.

KEA has represented and advocated for its members since 1857. In fact, last year KEA intervened in the Attorney General's action challenging Executive Order 2017-364. In that case, Bevin agreed to allow KEA's intervention, impliedly conceding that KEA had associational standing to appear and advocate on behalf of its members. *See* Agreed Order dated August 2, 2017 attached hereto as Exhibit 1. Therefore, the Court should not dismiss KEA from this action as it has sufficient associational standing to bring a claim on behalf of its members.

Respectfully submitted,

WALTHER, GAY & MACK, PLC

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COUNSEL FOR PLAINTIFF KEA

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was electronically filed via the Court's electronic filing system on this the 30th day of May, 2018, which will send a copy to all counsel of record.

/s/ Jeffrey S. Walther, Esq.

COUNSEL FOR PLAINTIFF KEA

AUG 03 2017
FRANKLIN CIRCUIT COURT
AMY FELDMAN, CLERK

FILED ELECTRONICALLY

RECEIVED AUG 07 2017

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 17-CI-00673**

**COMMONWEALTH OF KENTUCKY
ex rel. ANDY BESHEAR, ATTORNEY GENERAL**

PLAINTIFF

v.

AGREED ORDER

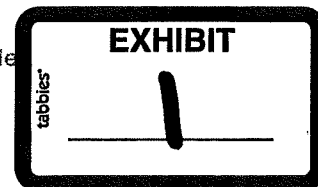
**MATTHEW G. BEVIN, in his official capacity
as Governor of the Commonwealth of Kentucky, et al.**

DEFENDANTS

*** **

Plaintiff, Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General (“Plaintiff”), Defendants, Matthew G. Bevin, in his official capacity as Governor of the Commonwealth of Kentucky and Hal Heiner, in his official capacity as Secretary of the Education and Workforce Development Cabinet (“Defendants”), and Intervenor Kentucky Education Association (“KEA”) being in agreement, and the Court finding itself sufficiently informed and advised, it is ORDERED as follows:

1. KEA’s Motion to Intervene is GRANTED and it shall be allowed to intervene in this matter as an Intervening Plaintiff. KEA’s Intervening Complaint shall be deemed filed as of the date of entry of this Order.
2. Defendants’ Motion to Dismiss filed on July 10, 2017, shall be deemed to have been filed in Response to KEA’s Intervening Complaint and the following briefing schedule shall apply:
 - a. Plaintiff and KEA’s Response(s) to Defendants’ Motion to Dismiss shall be filed by August 2, 2017.

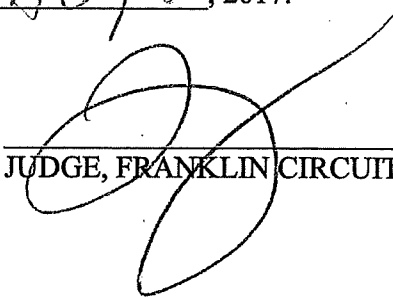


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- b. Defendants' Reply to Plaintiff and KEA's Response(s) to Defendants' Motion to Dismiss shall be filed by August 9, 2017.
- 3. Defendants' Motion to Dismiss shall be brought on for hearing at 9:00 a.m., August 9, 2017, at the Franklin County Courthouse, Frankfort, Kentucky as stated in Defendants' Amended Notice filed July 25, 2017.

Done this 2 day of August, 2017.



 JUDGE, FRANKLIN CIRCUIT COURT

AGREED TO BE ENTERED:

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CLERK'S CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing has been sent to the following on this 30th day of August, 2017:

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Hon. Matthew D. Doane
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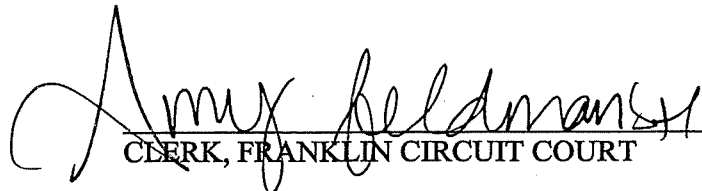
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