

KENTUCKY DEPARTMENT OF EDUCATION
NONRESIDENT STUDENT AGREEMENT FOR 2014-2015 SCHOOL YEAR
APPEAL NO. 2014-01

BOARD OF EDUCATION FOR THE
WARREN COUNTY SCHOOLS

APPELLANT AND
CROSS-APPELLEE

V. **RECOMMENDED FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDED ORDER**

BOARD OF EDUCATION FOR THE
BOWLING GREEN IND. SCHOOL DISTRICT

APPELLEE AND
CROSS-APPELLANT

BACKGROUND

KENTUCKY DEPARTMENT OF EDUCATION
NONRESIDENT STUDENT AGREEMENT FOR 2014-2015 SCHOOL YEAR
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This case involves a dispute between the parties concerning how many non-resident

students from Warren County may attend school in Bowling Green in 2014-2015. While entering into non-student agreements normally is a matter of discretion for the respective school boards of the districts involved, there is a statutory mechanism to resolve disputes where one or both districts want an agreement but fail to agree. KRS 157.350(4)(a) provides that "[i]f an agreement [concerning nonresident students] cannot be reached, either board may appeal to the commissioner for settlement of the dispute." This case is such an appeal.

This is the second year in a row that these two parties have been involved in an appeal concerning how many Warren County non-residents may attend Bowling Green. In last year's appeal, much of the proof concerned the creation of a multi-year agreement, referred to as the "2001 memorandum," that was adopted in 2001 and substantially followed until last year's appeal. The 2001 memorandum set a "base number" minimum of Warren County residents who would be permitted to attend Bowling Green and provided for an annual increase using a

“growth factor.” However, as a contract the 2001 memorandum was legally defective, not having been formally approved by vote of the respective boards. Nonetheless, in last year’s appeal, the Commissioner found in the Commissioner’s conclusions of law that “[t]he 2001 memorandum provides a good guide for future non-resident arrangements between the two school districts to provide stability for planning and to minimize strife, absent significant changes in relevant facts” and ordered that 750 Warren county residents, the base number that would have been required under the 2001 memorandum without any growth factor, be permitted to attend Bowling Green.

The parties attempted to negotiate an agreement for 2014-2015 but were not successful.

Mediation, ordered by the Commissioner, also was unsuccessful. On appeal, Warren County seeks to limit non-residents to current non-residents plus siblings of those non-residents. Warren County mainly emphasizes in its brief two arguments: (1) Warren County can benefit financially if its proposal regarding non-resident students is adopted; (2) that Bowling Green has a discriminatory admissions policy. Bowling Green’s cross-appeal seeks to set the non-resident number at 750 plus a percentage of Warren County’s growth, based upon the 2001 memorandum that was the subject of much of the testimony in last year’s appeal.

An issue raised this year by Warren County concerned how “resident” and “non-resident” should be interpreted when residency status changes during the school year, and whether, when this occurs, the school may continue educating the student for the duration of the semester or school year and, if so, continue receiving SEEK money for that student.

When a student residing in a district moves out during the middle of the school year, does that student becomes a non-resident at that moment in time? This question is further complicated by the change in law that makes CDEs “residents” for purposes of KRS 157.350(4). When a district employee residing outside a school district quits, retires or is fired, do his or her children

who were attending in the district where he worked change from resident to non-resident? Events such as these are outside the control of the school district. This situation is not unique to these two parties, or even to schools that have non-resident agreements. This issue is relevant to implementation of the non-residency arrangement that will be ordered in this case.

A second issue raised in this case involves how to minimize errors in classification of students.

A hearing in this case was conducted on May 1, 2 and 3 of 2014 in Bowling Green, Kentucky. In addition to the testimony and exhibits introduced in this year's appeal, the evidence, findings of fact, and conclusions of law from last year's appeal have been included in the record in this year's appeal. Having reviewed the record and the briefs of the parties, the hearing officer makes the following recommended findings of fact, conclusions of law, and recommended order.

(The hearing officer notes the following: references to transcripts are "TE" followed by the volume number, i.e. "II" followed by the page number; and witnesses referred to students receiving services due to lack of English proficiency both as "ELL" and "LEP.")

RECOMMENDED FINDINGS OF FACT

1. The parties entered into a de facto multiple-year non-resident agreement in 2001 that allowed a fixed number of Warren County residents to attend Bowling Green and provided for an increase in that number as Warren County's own enrollment grew.

Last year's findings of fact detail the creation of this agreement. The superintendents were authorized by their respective boards to negotiate and sign the agreement and a joint press release was issued assuring the public that the controversy between the two school systems had been resolved. As detailed in last year's findings, a purpose of the agreement was not only to

resolve that year's dispute but to provide stability and predictability for student numbers in the future. As detailed in last year's findings, the board members from both school systems authorized the superintendents to enter into the agreement and communicated to their respective superintendents approved of the agreement that was reached. Warren County's superintendent at the time testified at last year's hearing that he spoke with each Warren County board member individually and obtained their approval. As explained in last year's findings, neither board officially brought the 2001 agreement up for a vote in a formal meeting because "a public vote might open Warren County board members to criticism or generate more strife and controversy in the community." (See FOF 1-6 of last year's appeal).

2. The 2001 memorandum provided for a "base" number of Warren County residents who would be permitted to attend Bowling Green plus an increase each year based upon the percentage of growth Warren County experienced that year.

This is undisputed.

3. The Commissioner ruled in last year's appeal that the 2001 agreement was not legally binding upon the parties because neither board voted on the agreement.

This is undisputed.

4. The parties behaved in conformity with all terms of the 2001 agreement through 2007-2008.

This is undisputed.

5. In 2008-2009 and subsequent years through 2011-2012 Warren County approved for the upcoming year the number of Warren County residents that had been approved

for the prior year but declined to approve any percentage growth; this effectively set the cap at 850 students.

This is undisputed.

7. The superintendents of both districts agreed that Bowling Green's board should not vote on whether to approve the failure to apply the growth percentage in order to avoid creating turmoil in the community.

See FOF #10, last year's appeal.

8. In April of 2013, without warning or notice to Bowling Green or consulting Warren County's own superintendent regarding the wisdom of doing so, Warren County's Board voted to restrict the number of Warren County residents permitted to attend Bowling Green in 2013-2014 to Warren County students that had attended Bowling Green in 2012-2013, reduced by the number of Warren County students graduating that year.

See FOF #23-25 from last year's appeal.

10. Concurrent with last year's appeal, the legislature passed a law excluding children of district employees who reside out of district from being considered "non-residents" for purposes of the statute concerning non-residents and SEEK funding.

This is undisputed.

11. As a consequence of said impending legislation concerning , Bowling Green sought approval of only 750 students, rather than 850 (which had been the number approved in the previous year), reasoning that children of Bowling Green district employees had averaged about 100 per year in prior years.

Although Warren County disputes the premise relied upon by Bowling Green, in its reasoning, this is undisputed.

12. Bowling Green's superintendent did not misrepresent the past or then –current number of children of district employees residing in Warren County in last year's appeal.

Warren County contended that Bowling Green's superintendent had misrepresented to Warren County the number of children of district employees (CDE) that resided in Warren County and argue that this is relevant because the 750 number proposed by Bowling Green in last year's appeal should have been smaller.

After the CDE legislation was passed or about to be passed, shortly before last year's appeal, Joe Tinius, superintendent of Bowling Green, recognizing that excluding CDEs should reduce the base number under the 2001 agreement, at his own initiative sent an email to Warren County personnel stating

Over the past five years the average number of employees' children who live in Warren County Public School District but attend one of our schools has been just over a hundred. This current year it is higher, but next year will likely drop again based on employees who are either retiring or resigning and students who are graduating

(TE I 74). There was no proof that his statement regarding the past numbers averaged just over a hundred was incorrect.

The statement that "[t]his current year it is higher [than just over a hundred]" is not misleading based on what was known at the time – Tinius attempted a rough estimate and thought the number at the time was closer to 120. (TE III 206). Also, there was not evidence that the actual number substantially differed from this estimate.

What made the CDE number an issue in the view of Warren County was the fact that at the time of this year's hearing the number of CDEs had risen to 180, presumably making Warren

County suspicious that it may have been that high back in April of 2013. At least some of the apparent increase since the hearing is attributable to large turnover of personnel and new hires who had children. Tinius testified "we had a significant amount of turnover of -- of staff last year. Forty-three new employees as we started the school year." (TE I 70). Some of the additional numbers may represent errors. (TE III 209)

There was considerable proof that Bowling Green did not keep track of the number of CDEs at the time the estimate was made, and had no reason to do so as the law concerning CDEs had just been adopted, and did not make a count of CDEs before making this communication. (See TE I 69-70). Based upon what was known to Bowling Green, representations concerning past and then-current CDEs were not misleading.

13. In last year's appeal, after considering the evidence and all relevant factors, the Commissioner ruled that 750 Warren County residents could attend Bowling Green in 2013-2014.

This is undisputed.

14. The Commissioner concluded in his conclusions of law in last year's appeal that "the 2001 memorandum provides a good guide for future non-resident arrangements between the two school districts to provide stability for planning and to minimize strife, absent significant changes in relevant facts."

This is undisputed.

15. There have been no significant changes in relevant facts between last year's appeal and this year's appeal.

Neither party argues that there have been significant changes in demographics or other

relevant facts. The proof in this year's appeal generally attempted to bolster its analysis of that data or, in the case of Warren County, raised entirely new issues.

16. The number of students at issue in this case is most likely 55.

The parties in this case do not agree on the number of students at issue (Warren County says 41, Bowling Green says 55) because they do not agree on the number of students from this year that will be returning next year. Each party has a footnote on page one of the party's brief explaining its calculation. As the hearing officer understands it, Bowling Green predicts its numbers based upon an expectation that 35 Warren County students currently enrolled and not graduating will not return due to failure to pay tuition or other reasons, and base this upon the past experiences with Warren County students from one school year to the next. Bowling Green witnesses testified that this has always been how Bowling Green has estimated the number of Warren County residents expected to return for an upcoming school year. If true, this would free up more spots for new enrollees from Warren County. If precisely true, it would make the number higher than 55. Bowling Green uses the number 55 as the number of slots that will actually be available this fall.

Warren County assumes that all students enrolled and not graduating will return and, if literally true, actually would make the number lower than 41. Warren County uses the number 41.

Weighing the testimony, the hearing officer finds that 55 is more likely than 41. However, analysis of the effect of each party's proposed non-resident arrangements is not substantially different using either number.

17. Warren County intends to reduce the number of Warren County students permitted to attend Bowling Green as much as it can and as fast as it can, making longer-term patterns of reduction and their consequences highly relevant .

Although the specific remedy sought by Warren County in this appeal pertains only to the 2014-2015 school year, it is clear that Warren County wants to reduce the number of its residents that are permitted to attend Bowling Green as much as it can and as fast as it can. At last year's hearing, credible testimony was introduced showing that two Warren County Board members individually had stated that the intent and desire of Warren County was to reduce the number to zero or a one-to-one exchange. (See testimony of Sowell, p. 533 of last year's transcript, bates no. 655; testimony of Joseph Meyer, pp. 605-606 of last year's transcript, bates no. 668). While most Warren County Board members testifying at last year's hearing professed ignorance as to what Warren County might have planned, Warren County now openly admits in its pleadings in this year's case that it is committed to a long-term reduction of the number of students permitted to attend Bowling Green.

As the parties know, in prior non-resident cases where a school district seeks to abandon a previous pattern of "any and all" non-resident agreements, and the Commissioner has not ordered that previously-existing non-resident arrangements continue, the Commissioner has limited the impact of his decision by ordering that returning non-resident students and their siblings nonetheless be permitted to attend. That is the remedy Warren County seeks in this year's appeal. However, Warren County plans to extend that over time. In negotiations with Bowling Green prior to the appeal, Warren County's long-term proposal was to eliminate 50 students a year for 10 years, a reduction from 750 to 250. The basis of this plan was not an analysis of the educational or fiscal effect such a plan would have but simply a rough recasting

of the "returning students and siblings" approach extended over time. Kerry Young, Chairman of the Warren County Board, testified that the 250 number in Warren County's proposal represented Warren County's estimate of the likely net reduction each year if only returning Warren County resident and their siblings were permitted to attend Bowling Green. (TE II 10). (An analysis by Dr. Susane Leguizamon, a Professor of Economics at Western Kentucky University, indicates that the actual reduction from the "returning students and siblings" approach over 10 years would actually reduce the number from 750 to 212 - see Bowling Green Exhibit 5).

In last year's appeal, the Commissioner ordered that 750 students could attend Bowling Green, consistent with the past practices of the two schools and the 2001 memorandum, and found that the 2001 memorandum, which provided for an ongoing fixed number of Warren County residents to continue attending Bowling Green, was a good guide for future non-resident agreements. Notwithstanding last year's decision, Warren County's proposal in negotiations preceding this year's appeal bore no resemblance to the 2001 memorandum and indicates a fixed purpose to turn its back on the past practices of the schools that have allowed a fixed number of Warren County residents to attend Bowling Green each year.

18. Bowling Green still depends heavily on Warren County residents to maintain its student population.

It is undisputed that for the past several years, 25% of Bowling Green students are Warren County residents.

19. Bowling Green still is unlikely to experience growth internally in the future.

One of the facts found last year was that "Bowling Green is unlikely to experience

growth internally in the future due to development inside the Bowling Green District and in Warren County and depends heavily upon non-resident students to maintain its population.”

(FOF #47 in last year’s appeal). As stated in last year’s findings:

At one time, Bowling Green had nearly 6000 students. It now has less than 4000. Joe Tinius, superintendent at Bowling Green, explained why:

“[M]ost of that’s the result of the way residents have changed. And as the community had grown, more and more homes being built outside of the school district boundaries. As you’re probably aware, school district boundaries were set in 1958 across the state-- across the Commonwealth. Independent districts and county school district boundaries were set at that time.

That certainly impacts all independent districts across the state with that being the case. But in our case here locally meant that new growth as far as homes has developed outside of the City School District. Not always necessarily outside the city limits, but outside the City School District. The two are not the same, which sometimes causes a little confusion with homes that - homes that, literally, their backyard backs up to City School property that are districted in Warren County School District because of that decision in 1958.

So as a result of that, many families who are third and fourth generation of children in our school district, over time their residence has changed from living in the city limits, in the City School District, to living outside the City School District, but still feel a real allegiance and connection to the school district.”

(TE 614-615 in the transcript from last year’s hearing).

Although the overall student population in Bowling Green increased by only 15 students this past year (TE III 204), there was a 2.5% increase in the number of students attending Bowling Green who reside in Bowling Green. There was a similar increase back in 2009-2010, but historically in all other recent years internal growth has been at around ½ of 1% . (See chart on page 18 of Bowling Green’s brief). Additional evidence on factors that account for slow or no growth in Bowling Green are discussed in fact-findings hereinbelow.

20. Warren County has historically enjoyed growth and is projected to experience continued growth of its student population; Bowling Green’s student population has declined over the years and is not experiencing growth.

Warren County's student population exceeds 14,000. Willie McElroy, the chief financial officer of Warren County, testified that Warren County's growth had decreased some this past year (TE I 309) but that based upon historical data of consistent growth, Warren County's enrollment is projected to increase over the next few years. (TE I 292-293).

In contrast, as described elsewhere hereinabove, Bowling Green once had nearly 6000 students but now has less than 4000. The overall student population in Bowling Green increased by only 15 students this past year (TE III 204),

21. Bowling Green has disproportionately fewer residential homes available for purchase than does Warren County.

Ron Cummings is a real estate broker who, using data available on the Multiple Listing Service, which reflects all but an insignificant percentage of residential real estate activity (TE II 291), compared housing available in the respective school districts. Taking as a sample from April, 14, 2014, 66 properties were for sale in Bowling Green on April 14, 2014, which Cummings said was typical (TE II 300), compared to 516 properties were for sale in Warren County outside of the Bowling Green district.

22. The Bowling Green properties are mostly lower-end properties.

Half of the Bowling Green properties were selling for under \$100,000 (TE II 301), compared to less than 12% in Warren County outside Bowling Green (TE II 304).

23. Bowling Green has significantly fewer houses for sale in the most active and desirable market range for housing.

According to Cummings, the most active market for housing is \$150,000 to \$250,000. However, only 23 houses were available in Bowling Green between \$100,000 and \$300,000. (TE II 302) compared to 326 in Warren County outside the Bowling Green district (TE II 304).

24. What houses Bowling Green has are less attractive to prospective purchasers because they are old.

One of the top factors in choosing a house is the age of the house. (TE II 306). Bowling Green houses are old – only 2 of 66 for sale were 10 years old or newer, compared to 243 in Warren County outside of the Bowling Green district. (TE II 307).

25. It is unlike that many new houses will be built in the Bowling Green district.

Economic development and growth in Warren County is taking place outside of the Bowling Green district because development inside Bowling Green is not considered economically feasible. (TE II 309). Over the past two years, 86% of all property sales in Warren County were for properties outside the Bowling Green district. (TE II 311)

26. Bowling Green has very few houses in the price range comparable to the average value of houses where Warren County residents attending Bowling Green currently reside.

Warren County argues that parents who want their children to attend Bowling Green should simply move there. In addition to the lack of housing generally, there are very few houses in Bowling Green comparable to the current residences of Warren County children attending Bowling Green.

Jeffrey Herron is the finance director at Bowling Green. Herron looked up addresses of all Warren County non-resident students and, after controlling for siblings, identified 511 households. Then he looked up the PVA valuation of those addresses. (TE II 195). Where the address represented an apartment complex, duplex, or the like, those were excluded so as not to skew the data, resulting in 491 properties that were the subject of his analysis. (TE II 196). The average of the PVA valuation of these Warren County properties where Warren County residents attending Bowling Green reside was \$291, 829. (TE II 196).

However, per Cummings' analysis and the data he presented, only ten houses were available in the \$300,000 and over price range in Bowling Green. (TE II 301-302) compared to 132 in Warren County outside of the Bowling Green district. (TE II 304). If Warren County residents currently attending Bowling Green were required to move to Bowling Green to continue matriculation there, they would have to live in housing significantly inferior to their current housing in order to do so.

27. Reduction of Warren County residents attending Bowling Green would adversely affect diversity in Bowling Green and harm Bowling Green students both during their school careers and after graduation.

In last year's appeal, there was a fact-finding that reduction of Warren County students would affect diversity in Bowling Green but there was not sufficient evidence to support finding that this would cause harm. This year, there was proof of such harm.

Dr. Roslyn Mickelson is an expert in the field of the effect diversity or lack of diversity has on academic and non-academic education outcomes and has testified as an expert witness in other cases. She has multiple advanced degrees and her 39-page curriculum vita was entered into evidence as Bowling Green exhibit 24. She has multiple advanced degrees. She has done research on the effect of classroom racial and socioeconomic composition on educational outcomes (TE I 114), and funded by grants awarded to her "searched and summarized the expanse social, educational, and behavioral science literatures on the relationship of school and classroom socioeconomic, ethnic, and racial composition to academic and nonacademic outcomes of education." (TE I 114).

Dr. Mickelson explained that "a diverse school is one that reflects the socioeconomic and racial and ethnic mix of the children who attend the schools and who live in the community."

(TE I 118). While laypersons may think diversity applies only to racial composition, it also includes the important element of socioeconomic status. She testified that "I would also point out that diversity is not only racial. It's socioeconomic. And I believe that that needs to be taken into account." (TE 144).

Dr. Mickelson's opinions were based upon hundreds of studies over the past 70 years, and particularly the past 30 years, which has been the focus of her research. (TE I 119). She testified as follows regarding the conclusions of scholarly studies with respect to the importance, or lack thereof, of diversity in school districts:

The preponderance of the social, educational, and behavioral kinds of research on the relationship of school diversity and outcomes shows that attending a diverse school has -- is related to positive outcomes in the short term while children attend K-12 schools and across the life course as they enter adulthood and citizenship in the community. The outcomes are both academic and nonacademic.

(TE I 119). Diversity has an effect on academic achievement:

Diverse schools foster greater achievement in -- as measured by test scores and grades in mathematics, science, reading, and verbal outcomes, some evidence in the humanities, history and so on. The effects accrue to children from all racial, ethnic, and socioeconomic backgrounds. However, children from the most disadvantaged families -- both economically and from disadvantaged minority backgrounds -- gain most. We see evidence in the early grades, but the strongest evidence is as children enter secondary school, because the effects of diversity accumulate. And, conversely, the effects of segregation cumulate.

(TE I 119). She described non-academic benefits of diversity:

First of all, the children who are learning in less diverse schools will not have an optimal learning environment. They are -- they are going to miss out on the many benefits of diversity that accrue to them; not only the academic ones but the nonacademic ones. And I'll --

Q. Can you elaborate on that.

A. Yes. Well, we know that children who attend diverse schools are more likely to have cross-racial friendships. They're more likely to -- to gain what we call intercultural navigation skills so that they can function appropriately in environments that are culturally distinct from the one which they grew up in. Intergroup contact reduces prejudice and fears and stereotypes.

(TE I 122). Children in diverse schools are less likely to get in trouble with the law. (TE I 122).

Even after graduating, students are less likely to get in trouble with the law. Dr. Mickelson testified that police chiefs have filed amicus briefs supporting diversity because "there's lots of research that supports that [persons educated in diverse schools are] less likely to be involved as adults in the criminal justice system." (TE I 123).

Students in diverse schools also are more likely to attend college:

Children who attend diverse schools --and this is all -- all children -- are more likely to have higher educational aspirations, they are more likely to graduate from high school, they're more likely to attend college and graduate from college. Everyone will -- will -- will suffer from the absence of this.

(TE I 122). Students from diverse schools are more desirable to employers:

Now, businesses are very keen on hiring people who have experienced diverse education, because then they don't have to pay for expensive diversity training. That's why the Chamber of Commerce -- the National Chamber of Commerce has issued amicus briefs in several Supreme Court cases around this issue. That's why the military supports, you know, diverse K-12 schools.

(TE I 122). Diversity also makes the students more successful economically and as citizens:

People who have been in diverse schools K-12 who then go on to college are more likely to have higher occupational attainment, higher income attainment --people from all backgrounds -- and they are -- they are -- together, all of these outcomes foster what social scientists call the conditions that are conducive to creating a cohesive, just, multiethnic, democratic society.

(TE I 123).

Dr. Mickelson applied the results of research to the specific demographic data of Warren County and Bowling Green:

I received descriptions -- what I would call demographic descriptive statistics about the number of children in each school broken down by race and ethnicity, by special education and gifted status. I received information about teachers, teacher qualifications, teacher experience by school by -- by district.

(TE I 137). Dr. Mickelson testified that if Warren County is permitted to restrict the number of students to simply siblings and current students that are in the Bowling Green system as nonresidents over a period of time, it will have a negative effect on Bowling Green's diversity. (TE I 121; 138). Her opinion is not premised on reducing the number of Warren County residents to zero. (TE I 136) "One year is like pulling a thread out of a fabric. If each year more threads are pulled out of the fabric, eventually the fabric unravels. (TE I 127). The end result, she testified, is that " the more privileged students will, over time, be in the Warren County School system and the less privileged students will be in the Bowling Green School system." (TE I 128).

The research conducted on this issue shows that the change in diversity that would result from reducing Warren County residents attending Bowling Green also will have an effect on the kinds of teachers who will be willing to teach in Bowling Green:

There's a great deal of evidence that once a school system becomes racially isolated and has concentrations of low income children, it becomes a less desirable place to teach for many educators, because low income children are more difficult to teach, they have less stable lives, poor people move a lot and that constitutes a great deal of shifting around in classrooms. And so the most highly qualified teachers, being rational actors, are often -- more often than not seek employment in -- in school systems where there is more stable student populations, students who have greater academic readiness and skills. And as a consequence, what we see is that high poverty districts have teacher labor market cues where openings appear as the best qualified teachers leave to go to suburban schools and, therefore, the least qualified teachers are the ones who are hired. And I am defining "least qualified" as people who have -- new -- new teachers, fewer years of experience, lateral entry teachers, and so on. People with advanced degrees, years of experience, national teacher certifications are less likely to teach in high poverty schools with concentrations of disadvantaged and minority children.

(TE 124-125). The change in diversity also will reduce the number of parents who want their children to attend Bowling Green:

If schools begin to be associated as a high poverty school or a middle-class school, a diverse school or a non-diverse school, then that's going to become more and more a factor in how parents with options about where they live are going to choose to live. And

that, then, begins a vicious cycle -- a downward cycle that perpetuates the kinds of momentum toward developing school systems that is -- has concentrated poverty and racial isolation.

(TE I 126-127)

28. If all Warren County students attending Bowling Green were returned to Warren County, it would have a dramatic effect on the student populations at McNeil Elementary and Potter-Gray Elementary and will significantly impact their operation.

This was FOF #49 and #66 from last year's hearing. The data supporting those findings have changed some due to re-classification of CDE students as residents, regardless of actual residence, with 31.75% of Potter Gray students and 29.48% of McNeill students now being classified as Warren County residents. However, removal of that many students would still have a dramatic effect.

29. Substantial reductions in elementary population likely will lead to closing an elementary school.

The logical consequence of removing Warren County residents from the student populations in these two elementary schools is self-evident. Bowling Green will eventually have to consider closing one of its elementary schools.

30. If all Warren County students attending Bowling Green were returned to Warren County, it would have a significant effect on the student populations at Bowling Green Junior High School and Bowling Green High School and will impact their operations.

This was FOF #50 and #66 from last year's hearing. The data supporting those findings have changed some due to re-classification of CDE students as residents, regardless of actual residence, with 16.46 of BGJHS students and 27.29% of BGHS students now being classified as

Warren County residents. However, removal of that many students would still have a significant effect.

31. Reductions in Warren County residents attending Bowling Green will increase significantly the percentage of Bowling Green students receiving free and reduced (FR) lunch , but probably will not result in a significant increase in the percentage in FR lunch numbers for Warren County

This was FOF #55 from last year's hearing and the data supporting it have not changed significantly.

32. A significant percentage of the gifted and talented students in Bowling Green are Warren County residents; eliminating Warren County residents will significantly impact the number of gifted and talented students in Bowling Green, especially in McNeil elementary, Potter-Gray Elementary, Bowling Green Junior High School, and Bowling Green High School.

This was FOF # 58 from last year's hearing and the data supporting it have not changed significantly.

33. Reducing the number of Warren County residents attending Bowling Green will lower the student performance scores of Bowling Green students on a variety of academic tests and measurements.

See FOF #59 and 60 from last year's appeal.

34. Elimination of Warren County residents attending Bowling Green will affect the classes that can be offered on the junior high and high school level and will significantly reduce the student population that can support Bowling Green's advanced placement offerings.

This was FOF # 61 from last year's appeal. The data support it has not changed significantly.

Bowling Green Superintendent Tinius testified that

reduction in enrollment likely reduces the number of [advanced placement] offerings, because you do not have many -- as many students there to request to take these classes. And if you cannot fill a class, you know, to a certain level, you're not going to be able to offer that class. So if we begin to lose students at the high school level, it has the potential for some of these offerings to -- to go away just by the fact that you don't have as many students there requesting to take those classes.

(TE III 232).

35. Elimination of Warren County students, resulting in a 25%

reduction in student population at Bowling Green, logically would lead to elimination of existing certified and classified positions at Bowling Green.

Bowling Green Superintendent Tinius testified that "you likely will see a reduction of -- of a minimum three, sometimes as many as five, teaching positions a year, if we were to experience the same type of reduction [as proposed by Warren County for 2014-2015] in successive years." (TE III 238-239). He also testified that same sort of reductions would be required for classified staff as well. (TE III 239)

36. Reduction of Warren County residents permitted to attend Bowling Green will inconvenience and impose some degree of hardship on parents and students who relied upon the agreement between Bowling Green and Warren County allowing non-residents to attend.

See FOF #71 and discussion of same in last year's decision. The facts and reasoning set forth therein still apply.

37. The ability to attend school in either school district regardless of

where one lived was a feature that made Bowling Green attractive to businesses the Bowling Green Chamber of Commerce recruited; a change in the policy will negate that benefit.

See FOF #79 and discussion of same in last year's decision. The facts and reasoning set forth therein still apply.

38. Bowling Green has a symbiotic relationship with parochial schools located within the Bowling Green District and those parochial students are given priority in non-resident applications; a reduction in Warren County residents attending those schools who are permitted to attend Bowling Green will negatively impact that relationship and the parents and students benefiting from it.

See FOF # 77 and discussion of same in last year's decision. The facts and reasoning set forth therein still apply.

39. Bowling Green has a longstanding relationship with Western Kentucky University and children of its employees are given priority in non-residency applications; a reduction in Warren County residents who are children of WKU employees who are permitted to attend Bowling Green will negatively impact that relationship and the parents and students benefiting from it.

See FOF # 78 and discussion of same in last year's decision. The facts and reasoning set forth therein still apply.

40. If only returning Warren County residents and their siblings are allowed to attend Bowling Green, as requested by Warren County, Bowling Green's bonding capacity will drop from \$10.7 million to \$5.9 million over the next 20 years.

Chip Sutherland, Bowling Green's bonding agent, described the process by which he was able to estimate the decline in bonding capacity non-resident students were returned to Warren County. Bonding capacity is affected by cash flow, which in turn is affected by the presence or absence of SEEK money provided based upon average daily attendance. Sutherland concluded that, over a period of 20 years, a continuing declining balance of average daily attendance representing a gradual decline of SEEK money attributable to Warren County non-resident students permitted to attend Bowling Green would reduce Bowling Green's bonding capacity from \$10.7 million to \$5.9 million. The expert analysis (See TE II 240-271) is too arcane to summarize in these findings, but the witness was confident that given a steady decline in the average daily attendance figures that would correspond to a steady decline in Warren County residents permitted to attend Bowling Green, the projected decline in bonding capacity would occur.

Willie McElroy, the chief financial officer of Warren County, testified that Warren County's current bonding capacity is \$29 million (TE I 278). , roughly five times greater than Bowling Green's bonding capacity would be if Warren County residents are not allowed to attend Bowling Green.

Warren County argues that the adequacy of bonding capacity is a function of need. Bowling Green Superintendent Tinius testified that roof repairs between \$2 and \$3 million and high school swimming pool repairs of \$3-4 million were needed. (TE III 223-224). He testified that "[m]y concern is that some of our most urgent projects, if you will, we -- we may have trouble if our bonding capacity were to drop to just under \$6 million. (TE III 224)

41. Warren County failed to prove that it would receive any appreciable economic benefit from reducing the number of Warren County residents attending Bowling Green;

in fact, awarding Warren County the relief it seeks may result in a net loss and require Warren County to raise its taxes.

The only benefit or detriment Warren County claims it will experience from the outcome of this non-resident dispute is economic. It claims it will benefit from SEEK dollars if Warren County residents permitted to attend Bowling Green are reduced.

a. Warren County demonstrated no appreciable benefit from the SEEK dollars it would receive if Warren County students attending Bowling Green attended Warren County instead.

Chris McIntyre, director of finance at Warren County, testified as to the financial effect, if Warren County's proposed non-resident arrangements are adopted, that return of Warren students (and the SEEK money that follows them) would have. He estimated the most likely result in the upcoming year would be a gain of \$108,000, though there could be a loss of \$28,000 under one scenario. (TE 380-381). A gain of \$108,000 is only about 1/10 of one percent of Warren County's budget.

However, even that insignificant amount is an unreliable estimate for two reasons. First, the estimates were not based upon where the actual students involved lived but upon assumptions given to the witness by Warren County's law firm about where these theoretical students would likely attend:

The assumptions are surrounding the percentages given to me based on the data supplied to Bell, Orr, Ayers and Moore by Bowling Green Independent School District of trend analysis of the historical nonresidents that came from Warren County Schools to Bowling Green Independent Schools.

(TE 321). The witness himself did not know what the law firm did to come up with the trend analysis (TE 363; 366). There was no testimony from any witness laying a foundation to establish what those trends were, how they were calculated, or establishing their reliability as projection.

Second, Warren County's analysis assumes that *none* of the Warren County residents that would return to Warren County under its proposal would be special needs or ELL. McIntyre testified he assumed, in his calculations, that none of the students would be ELL or special needs (TE I 366-367). "The information that's been given to me is that they're not the population of E-L-L or special needs students." (TE I 360). This assumption was provided to him by Warren County's attorneys:

Q. Explain how it is that you're able to say that the district would benefit economically from these 41 students, if you're only receiving SEEK funding of around \$3900 and the state report card says that the district spends \$8500 a student.

A. Sure. You have various students throughout a school district. And based on the data supplied to Bell, Orr, Ayers and Moore by the Bowling Green Independent School District, the 41 that would potentially be realized in -- that we're talking about, are not the E-S-L students, they're not special ed students.

(TE I 358). The same assumption was made regarding whether students would be entitled to free and reduced lunch:

Q. What are some characteristics of the student -- an example of the students attending the Warren County Public Schools that would cost substantially less than \$3900 a school year to educate?

A. It would be the average student who just takes the normal classes, who does not need any of the special services, such as speech, occupational therapy, physical therapy, aide, or anything of that nature.

Q. Non-english as a second language?

A. English speaking student.

Q. Non-free and reduced lunch?

A. Correct. They would not be on free and reduced lunch.

(TE I 360-361). There was no proof why these assumptions were warranted.

Regarding special education, Warren County Superintendent Clayton testified that 5.37% of Warren County residents attending Bowling Green receive special education (TE II 82-83). If

that same percentage is applied to the number of students at issue, then 2 or 3 (depending upon whether you believe the numbers of Warren County or Bowling Green) would be special education. Many witnesses testified that the expense of such students can exceed \$20,000 per student. Superintendent Clayton testified with reference to special education students that "[w]e can tell you there are students that cost tens of thousands of dollars to educate. Nobody in education will dispute that." (TE II 66)

Regarding LEP students, Warren County Superintendent Clayton also testified that 2.36% of Warren County residents attending Bowling Green are LEP "and so we know on average that those students do require more services" (TE II 84) and "English language learners, some of them are very expensive to educate." (TE II 67-68). Regarding free and reduced lunch, the percentage of Warren County residents attending Bowling Green that are eligible for free and reduced lunch is 13.09%. (See Joint exhibits 25 and 26). If this percentage is applied to the students at issue, 6 or 7 (depending upon whether you believe the numbers of Warren County or Bowling Green) of the students will receive free and reduced lunch.

In short, once special education, LEP and free and reduced lunch are factored back in, even while using the unexplained "trend analysis" assumptions Warren County uses, the costs of having these students would largely offset the gain that Warren County claims.

b. Bowling Green presented evidence that demonstrates there will be no economic benefit to Warren County.

Jeffrey Herron is the finance director at Bowling Green. Herron took the actual list of Warren County residents who have applied to be non-resident students in Bowling Green for the upcoming year. Although Herron did not personally know if the list he was given had been prioritized according to Bowling Green's priority policy (TE II 230), it was evident from

examining the face of the exhibit and questions on re-direct that the list had been so prioritized. (TE II 232).

Herron projected the impact of if the top 55 Warren County residents on that list were instead enrolled in Bowling Green, identifying, using their addresses to identify the specific school in Warren County they would attend. (TE II 207). Herron projected the cost of additional staffing that would be needed at specific schools as a result. His conclusion was that return of these students would result in a net \$25,000 loss, being the additional SEEK money attributable to these students reduced by the additional staffing costs required for these students. (TE II 213).

However, Herron's projections do not take into account special education, LEP and free and reduced lunch. If those factors are added in, per the discussion in (a) above, the net loss to Warren County would be even greater.

c. Larry Vick demonstrated that it is unrealistic to project any net financial gain to Warren County and that Warren County will have to raise taxes or find other revenue to supplement the SEEK money in order to educate the students at issue.

Larry Vick has a doctorate in educational administration from Vanderbilt University and has served as a school superintendent in various counties in Kentucky and Tennessee for 39 years before retiring. (TE II 332). He has been superintendent of both county districts and independent districts. (TE II 332-333) During each of the 39 years he was a superintendent, he was involved in non-resident student agreements for the schools he superintended. (TE II 335). Of all the witnesses who testified concerning whether Warren County would benefit economically from a reduction in the number of Warren County students currently attending Bowling Green, his testimony seemed the most realistic.

Vick analyzed data taken from Warren County's audit report regarding the sources of Warren County's funding through tax revenues and SEEK funding, concluding that Warren County would have to raise its taxes if Warren County residents attending Bowling Green began attending Warren County in order to maintain the same per pupil expenditures as currently exist. (TE II 340-341).

Vick explained the fallacy of thinking about "least expensive to educate" students in isolation as a kind of windfall:

I don't think that you can look at an individual child, whether it's a child that might fit where you have a space, you might have a seat on the bus, or I don't think you can take the special needs child that may cost you 15- or \$20,000 per year to educate. I think the only sound planning method is to look at your per-pupil expenditure and assume that you're going to have that same per-pupil expenditure for all of your students. That's the only way I would be able to plan for additional students is look at what my current students are costing me per-student, totally, and projecting that's what I'm going to spend -- because I would want them to receive the same education that my current students are getting. So the only way I could reasonably plan and budget would be to use the total per-pupil expenditure, because that's eventually what each student is going to cost you collectively and not isolate either a low-cost or a high-cost student.

Q. In this case, is that the \$8533 figure on the report card for Warren County?

A. Yes. I have -- I have no doubt that eventually every student in Warren County will have that amount of money spent on them to provide them an appropriate education.

(TE II 356-357).

After Vick's explanation that additional students end up being a net expense rather than a windfall of SEEK money, Vick was asked on cross-examination to account for why, if his analysis was correct, Bowling Green would want these students. Vick explained that the reason would have to be non-financial:

Now, sir, explain to me why the independent district would be willing to lose \$6,000 times 750?

A. It -- the students -- I'll explain it to you. The students coming from Warren County enhance the Bowling Green's program. First, they're -- they're less efficient because they have fewer students. They'd have 3,000 student range without these kids. So it improves

their efficiency. It improves their -- it lessens their diversity, and they have a better balance, the socioeconomic group of students, looking at the households -- looking at -- looking at the households that they are coming from, they -- it appears that socioeconomically that they are probably in the higher group compared to the average Bowling Green student. So they are willing to educate these students at a loss for two or three reasons. One, people apparently want their program that's being provided and willing to send their kids, and choose to do so, because they --they -- they apparently like the program and the offerings better than the ones that they would be offered in their home district.

(TE II 366). In summary, Vick testified that when estimating what a student will cost to educate

[t]he only measure that makes any sense is your average cost of your school report card. And so when you average these kids out, you'll end up spending, in my opinion, over \$8,000 per child if they're going to receive the same education that your students are currently receiving.

(TE II 370). Given Vick's 39 years as a superintendent of both county and independent schools and his PhD in educational administration from Vanderbilt, the hearing officer found Vick's opinion very credible.

42. The testimony of Walter Hulett concerning the Knox County/Corbin

Independent non-resident dispute was not relevant because that situation is not analogous to that of Warren County and Bowling Green.

Warren County called Walter Hulett, former superintendent in Knox County, as a witness. Initially the hearing officer ruled that Hulett could not testify because his testimony would be irrelevant, but then changed the ruling to allow the testimony.

Hulett testified that Knox County had operated under an 'any and all' agreement with Corbin Independent under which 450 to 500 Knox students were attending Corbin (TE I 205). In contrast, the parties in the present case have operated under a fixed number agreement that allowed for modest increases for a few years and since 2008 there has been no increase in the base number.

Hulett testified that Knox County had a declining enrollment (TE I 199) and is a poverty district. (TE I 196). Warren County's enrollment has increased every year and is considered a "growth" district.

Knox County had to close schools and sell off its properties (TE 170-171). "I sat through packed buildings when we were closing schools of a community. They knew when they closed it, it was their last lifeline." (TE I 183). In contrast, Warren County has built new schools and has a steady record of growth.

This hearing officer finds that the Knox County/Corbin Independent situation described by Hulett is not analogous to the circumstances in this case and that Hulett's testimony was irrelevant.

43. Bowling Green only enrolls non-residents at the beginning of the school year.

See (TE III 66). Bowling Green usually enrolls 7 or 8 students less than 750 to allow for the expected increase in non-residents due to residency status changes beyond the control of Bowling Green or potential errors in classification of students that may have occurred. (TE III 67).

44. Both schools have a long-standing practice of allowing students whose residence status changes during the school year to complete the school year in the district in which they were enrolled prior to the change in the status.

Pat Stewart, Warren County director of student services, testified that when a student's resident or non-resident status changes during the school year, neither Bowling Green nor Warren County notifies the other school. (TE I 231). Stewart testified that if it is learned that a Warren County student has given an invalid address and actually resides in another county, the school where the student attends has the option of allowing the student to complete the school

year rather than be sent back immediately to his or her district of residence. (TE I 245). Stewart further testified that due to a court ruling

[w]e've advised our schools that if they accept an out-of-district student, the out-of-district student would stay 'til the end of the year.

Q. Okay. And would you expect the same of districts who have Warren County students?

A. Yes.

Q. That they would be educated through the remainder of the school year, and then if they needed to be returned because of whatever the reason, they would go back -- Yes.

Q. -- at the beginning of the next school year, so not to interrupt their educational experience; would that be correct?

A. Yes. That would be correct.

Q. All right. And are you aware that that has been the longstanding practice between Warren County and Bowling Green as it pertains to nonresident students who attend Bowling Green, that if they become nonresident, then they stay in Bowling Green until such time as the school year concludes?

A. What do you mean by, when they become nonresidents?

Q. Okay. So they're living in the city --

A. Uh-huh.

Q. -- when school starts?

A. Right.

Q. Then they move to the county?

A. Uh-huh.

Q. What is your understanding of the arrangement that Warren County and Bowling Green have in that regard?

A. I -- I don't have an understanding of that arrangement. What we typically do in Warren County when a kid moves out of an attendance area to another school, our policy is they can stay through the remainder of that semester. (TE I 247).

Bowling Green's superintendent also testified that Bowling Green had a similar policy, allowing students to complete a semester or school year if that was what the parents wanted.

45. In the past, when a student's physical residence changed from in-district to out-of-district, but the student has been permitted to complete the school year or semester in the school where he had been enrolled, the superintendents of the respective school districts have not treated the change as a change in residency status for SEEK funding purposes until after the student completed that school year or semester.

Warren County residents attending at the end of the school year is always higher than at the beginning. (TE III 63). This is attributable to students moving from Bowling Green's district to Warren County's district. Jon Lawson, Bowling Green's director of pupil personnel, has had

discussions with his counterpart in Warren County regarding these fluctuations and Warren County has never had a problem with it. (TE III 64-65). The same holds true regarding the understanding of the respective Superintendents prior to the hearing in this case:

And I guess my question, Mr. Tinius, did the Bowling Green City Schools try to hide the number of nonresident students from Warren County or how the number fluctuates over the course of a school year from Warren County?

A. No. I mean, over the years, I mean, I've had conversations with -- with [former Warren County Superintendent] Mr. Brown, with [former Warren County Superintendent] Mr. Murley as to how that happens and -- and -- and we've always, anytime they've asked about the numbers or wanted the numbers, we've provided the numbers. So it -- it's not something we've -- we've not had conversation with anyone about.

Q. And up to this day, has anyone at Warren County ever suggested that you should be paying SEEK dollars back to the state?

A. No, ma'am.

(TE III 200-201).

46. Some errors occur in maintaining accurate lists of student residency due to software glitches and human error on the part of both school districts but there is no evidence of intentional or negligent conduct.

A considerable amount of proof was given concerning discrepancies in various listings of students and their residencies. For example, 13 students were omitted from the list on non-residents due to a software error at Infinite Campus over which Bowling Green had no control. (TE III 93). There are various lists generated from different sources that may not match. Some students do not appear on lists generated by Infinite Campus as even being enrolled in Bowling Green. (TE III 99). There was testimony indicating that because a non-resident student coding appeared on a different tab than other information, some data entry personnel may have failed to enter the data. There was testimony that specific street addresses could be confusing where district boundary lines intersect those streets. Some students have multiple addresses due to post-divorce arrangements. Some students may even give the wrong address.

To complicate matters more, the fact that students move in and out of the districts means the number of non-residents is constantly changing. After going through various analysis of who should be on or not on the list, it was determined that the number of Warren County residents attending Bowling Green on the day this hearing began was 775. (TE III 98) Details of the processes the schools used to try to make this determination, which continued up into the very week of the hearing, were the subject of testimony during the hearing. Something that seemed, to this hearing officer, to help resolve discrepancies was when, at one point, the schools generated lists of all students and their addresses and used those addresses to identify, from scratch so to speak, the district of residence of each student.

Neither school was more or less adept than the other in maintaining a correct list. Although Bowling Green had more non-resident students to account for, in terms of percentages of error Warren County matched Bowling Green. Pat Stewart, Warren County director of student services, acknowledged that although Warren County provided Bowling Green a list of 74 Bowling Green residents attending Warren County, an additional 7 should have been listed, constituting a 10% error in the non-resident student list. (TE 241-242).

After hearing hours of mind-numbing testimony in which witnesses added and subtracted from various lists generated at various times from various sources, the hearing officer concludes that there was no intentional or negligent conduct regarding the maintaining of these records. A certain amount of human and computer error is inevitable and due to events beyond the control of the respective districts, such as students moving and CDEs changing due to employment changes, non-resident numbers are a constantly moving target. As Superintendent Tinius pointed out in defense of both districts:

Most people don't understand how many daily changes there are. Certainly a school district the size of Warren County with 14,000 and certainly in a school

district of our size even of 4,000 because of the amount of rental property in our district and the transiency rate among many of our students.

(TE III 217).

47. There was no evidence that Bowling Green's prioritization policy used to select which Warren County residents applying to attend Bowling Green are accepted is unfair; a prioritization policy allows Bowling Green, parents, and students to rationally plan for the future.

Based upon data presented last year and this year, there are usually about twice as many applicants as slots available for Warren County residents who want to attend Bowling Green. Bowling Green has had a policy since 2001 to prioritize applicants, giving priority to children of employees; children who were already enrolled whose residence changed during the school year; siblings; kindergarten and primary school students; students in parochial schools located in Bowling Green's district; individuals owning property in the district; and children of employees at WKU. There is nothing secret about the policy and there are rational reasons for all of the priorities.

The policy was discussed with Warren County personnel in meetings prior to last year's hearing and no objection was expressed (TE III 199). The policy was discussed in last year's hearing (See pp 634-635 of the transcript of last year's hearing, and FOF 77 and 78 from last year's appeal). The rationale for the policy, with references to testimony and exhibits in this year's appeal, is discussed in pages 66-68 of Bowling Green's brief. Rather than make lengthen these findings of fact, this hearing officer adopts same by reference as part of the findings of fact. Bowling Green's rationale for its policy is thought-out and reasonable.

Warren County argues that the policy has the effect of dis-favoring the poor. However, Bowling Green can only consider those who apply. Walter Hulett, Warren County's witness who

was formerly superintendent of Knox County, testified that under an "any and all" policy with no prioritization, 95% or more of Knox County students who applied to Corbin Independent were middle to upper income. (TE 173-174). It appears that the applicant pool for those who wish to attend school outside their district of residence is not a function of the admissions policy. Jon Lawson, Bowling Green's director of pupil personnel for the past 16 years (TE III 64), testified that Bowling Green has never received any complaints about the prioritization policy for non-resident applications. (TE III 57).

48. There was no evidence that a random draw selection process would accomplish any educational purpose.

A random draw takes away the ability of Bowling Green and parents and students to rationally plan. No evidence was presented of any benefit from a random draw that would offset that detriment. There was no proof that the applicant pool contained poor persons that would have a better chance of being accepted if selection was based upon a random draw, much less proof that increasing the number of poor students attending Bowling Green would provide a benefit to Bowling Green or to Warren County. In fact, per the analysis of Dr. Mickelson, such a result actually would be harmful under the particular circumstances in which Bowling Green operates as it would lessen socioeconomic diversity.

49. Warren County is in good financial condition, based upon its last audit.

See FOF # 73 from last year's decision. Chris McIntyre described cost-cutting measures that have been taken by Warren County. (TE 351-354) but testified that all districts have had to engage in cost-cutting. (TE 362).

50. Bowling Green did not introduce evidence that Bowling Green needed to increase its student population beyond its currently existing number.

51. There continues to be turmoil regarding the non-residency agreement dispute.

Warren County's superintendent and Chairman testified that they had been the recipients of negative comments from persons in the community concerning this issue. As was the case last year, a relatively large number of people attended the three days of hearings and there was TV coverage. Community turmoil even intruded on the hearing process itself, when Warren County attempted to elicit testimony during the hearing to refute a "tweet" that was occurring social media in real time during the hearing itself. (See TE I 118)

RECOMMENDED CONCLUSIONS OF LAW

The concept of res judicata applies to administrative proceedings. "Kentucky has for many years followed the rule that the decisions of administrative agencies acting in a judicial capacity are entitled to the same res judicata effect as judgments of a court." *Godbey v. University Hospital of Albert B. Chandler Medical Center, Inc.*, 975 SW2d 104, 105 (Ky. App. 1998). The hearing last year constituted action by the Kentucky Department of Education in a judicial capacity. Res judicata has two aspects, claim preclusion and issue preclusion. Claim preclusion does not apply as this case involves a claim concerning the 2014-2015 school year. However, as the Commissioner's decision last year was not appealed, and is final, collateral estoppel or issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in the earlier action. Issue preclusion applies to issues that (1) are the same in both cases; (2) were actually litigated in the first case; (3) were decided in the first case; (4) and were necessary to the decision in the first case. *Yeoman v. Commonwealth Health Policy Board*, 983 SW2d 459 (Ky. 1998).

In last year's appeal, the Commissioner concluded that the 2001 memorandum provided a good guide for future non-resident agreements, absent a significant change in relevant facts.

There has been no significant change in relevant facts from what were presented in last year's appeal, which could make issue preclusion applicable to many of the issues in this appeal.

However, the evidence presented has been considered in this case without the limitations that would result from application of the doctrine of issue preclusion in order to ensure that the merits of the appeals are fully and fairly considered.

Below appear the resulting conclusions of law.

1. Statutes provide that students shall attend schools within the district in which they reside unless the board of education of that district provides for them to attend elsewhere.

KRS 159.010.

2. Districts are ineligible to share in SEEK funding if they include in their average daily attendance non-residents unless pursuant to a written agreement with the school district of the student's legal residence, subject to exceptions set forth in the statute.

KRS 157.350.

3. The Commissioner has the duty to resolve disputes when two or more districts cannot reach agreement concerning non-resident attendance and a school district requests the Commissioner's intervention by appealing pursuant to KRS 157.350.

KRS 157.350(4)(a)(2) provides that "[i]f an agreement cannot be reached, either board may appeal to the commissioner for settlement of the dispute."

4. KRS 157.350(4)(a)(4) sets forth the standard to be used in resolving such disputes.

KRS 157.350(4)(a)(4) provides that when resolving disputes arising from the inability to reach an agreement regarding non-resident students

[t]he commissioner and the Kentucky Board of Education shall consider the factors affecting the districts, including but not limited to academic performance and the impact on programs, school facilities, transportation, and staffing of the districts.

5. Weighing all the factors for which evidence was presented, per the findings of fact there are no appreciable benefits to Warren County or its students from changing the status quo and long-standing practice of allowing 750 Warren County residents to attend Bowling Green.

6. Weighing all the factors for which evidence was presented, per the findings of fact there are significant benefits to Bowling Green, and to its students and their parents, in maintaining the status quo and long-standing practice of allowing 750 Warren County residents to attend Bowling Green.

7. Weighing all the factors for which evidence was presented, per the findings of fact there would be significant harms to Bowling Green Bowling Green, and to its students and their parents, if the status quo and long-standing practice of allowing 750 Warren County residents to attend Bowling Green were abandoned and the number of Warren County residents permitted to attend Bowling Green were reduced.

8. As found last year, the 2001 memorandum remains a good guide for future non-resident arrangements between the two school districts to provide stability for planning and to minimize strife, absent significant changes in relevant facts.

9. The prioritization policy used by Bowling Green to select which applicants from Warren County are permitted to attend Bowling Green is an internal matter for Bowling Green's administration to address and does not require the Commissioner's involvement.

10. A final order should address how changes in residency during the 2014-2015 school year will affect student classification as resident or non-resident for purposes of KRS 157.350.

It is impracticable for a school to check the residency of every student on a daily basis, which would be required to ensure that former residents had not become non-residents due to the student's family moving to Warren County's district. It would similarly be burdensome to identify CDEs whose residency status is affected by termination of their parents' employment at Bowling Green. Also, it is reasonable to allow such students, if their parents so wish, to continue attending Bowling Green to for the duration of the semester or school year, as they wish, to maintain continuity in their education. It also is reasonable for Bowling Green to continue receiving SEEK money for their attendance if they continue to attend.

11. The schools should adopt a mechanism to enhance the accuracy of the initial list Warren County residents enrolled in Bowling Green schools at the beginning of the school year.

RECOMMENDED FINAL ORDER

1. Bowling Green may enroll 750 or less Warren County residents at the beginning of the 2014-2015 school year, referred to as "the initial list."
2. Bowling Green shall share with Warren County address or other data agreed upon by the parties so that Warren County can check, at the beginning of the school year, the residency of students on the initial list and timely object to residency errors discovered, if any.
3. Bowling Green may not enroll any additional Warren County residents during the school year after the initial list of 750 or less is established at the beginning of the school year, even if some of those 750 leave the Bowling Green district during the school year.
4. Students that may be included in Bowling Green's average daily attendance for purposes of KRS 157.350 during 2014-2015 shall include the following:
 - a. The students on the initial list;

b. Warren County residents who were residents of Bowling Green or who were CDEs at the time they enrolled in Bowling Green, and who are permitted by Bowling Green to continue attending Bowling Green during 2014-2015, even though their residency has changed to Warren County at some time during the school year or their district employee parent no longer is employed by the Bowling Green district at some time during the school year.

c. Warren County residents, if any, required to attend school in Bowling Green pursuant to court order or applicable law.

NOTICE OF APPEAL RIGHTS

Pursuant to KRS 13B.110, (4) A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

Pursuant to KRS 157.350, each party has may appeal the Commissioner's final order to the Kentucky Board of Education.

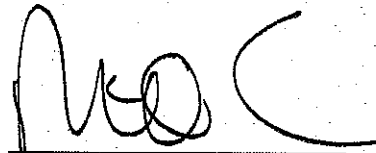
The final order of the Kentucky Board of Education may be appealed pursuant to KRS 13B.140 which states:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of

all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

(2) A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

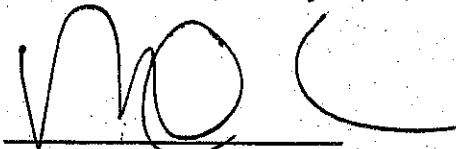
RECOMMENDED ON MAY 23, 2014.

A handwritten signature in black ink, appearing to read 'Mike Wilson', with a long horizontal stroke extending to the right.

MIKE WILSON, HEARING OFFICER

CERTIFICATION:

The original of the foregoing was mailed to Kevin Brown, KDE, CPT, 500 Mero St., Frankfort, KY 40601, with copies mailed to Jacinta Porter, 1010 College Street, Bowling Green KY 42102, and Regina Jackson, 1101 College Street, Bowling Green, KY 42102, on May 23, 2014.

A handwritten signature in black ink, appearing to read 'Mike Wilson', with a long horizontal stroke extending to the right.

MIKE WILSON, HEARING OFFICER