

KENTUCKY DEPARTMENT OF EDUCATION
NONRESIDENT STUDENT AGREEMENT FOR 2013-2014 SCHOOL YEAR
APPEAL NO. 2013-05



BOARD OF EDUCATION FOR THE
BOWLING GREEN INDEPENDENT SCHOOL DISTRICT

APPELLANT

V

BOARD OF EDUCATION FOR THE
WARREN COUNTY SCHOOL DISTRICT

APPELLEE

FINAL ORDER
SUSTAINING IN PART AND DENYING IN PART
HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER AS ALTERED

The Commissioner having considered the Findings of Fact, Conclusion of Law and Recommended Order of the Hearing Officer dated July 29, 2013, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be sustained to the extent the Hearing Officer recommends that Warren County shall continue to permit 750 Warren County residents to attend Bowling Green schools in 2013-2014.¹

IT IS FURTHER ORDERED that the Findings of Fact and Conclusions of Law of the Hearing Officer be altered in form and substance as indicated below:²

¹ If prior year agreements were repeated the number of Warren County residents in the upcoming school year would be 750 students (excluding the non-contract students and children of school employees from the calculations). This decision also does not include a "growth factor."

² For the purposes of clarity, the Findings of Fact, Conclusions of Law and Recommended Order have been duplicated below with alterations in form and substance identified within the text of the document rather than issuing a separate document that incorporates the Findings of Fact, Conclusions of Law and Recommended Order where no change has been made by reference.

I. PROCEDURAL BACKGROUND

This case involves an agreement or failure to reach agreement regarding non-resident attendance in Bowling Green Independent School District by students residing in the Warren County School District. 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."

An important issue in this case is the effect of a 2001 agreement signed by the superintendents of both school districts. This agreement set a base number as of 2001 for non-residents from Warren County and included a formula for growth percentage increases each year based upon Warren County's growth in student population. Historically, for many years thereafter, as will be found in the recommended findings below, the two Boards approved non-resident agreements that calculated the number of non-residents using the formula from the 2001 agreement. Beginning in 2008-2009, Warren County stopped agreeing to the growth percentage but each year would agree that 850 Warren County non-residents (the number applicable from the 2007-2008 calculation) could attend Bowling Green. This number included children of school employees residing in Warren County, who no longer are counted in non-resident calculations due to a change in KRS 157.350.

Regarding the numbers of students at issue for 2013-2014, there were about 950 Warren County non-residents attending Bowling Green in 2012-2013, but this included about 100 children of employees (who no longer are counted due to a change in the law) and 100 non-contract Warren County non-residents being educated without the benefit of SEEK money at the choice of Bowling Green. Excluding the non-contract students and

children of school employees from the calculations, if prior year agreements were repeated the number of Warren County residents in the upcoming school year would be 750.

Bowling Green tendered a proposed annual agreement for 2013-2014 that, as in prior years proposed the traditional 850 minimum (but that parties later understood would be reduced by the 100 children of school employees) plus a growth percentage (discussed elsewhere herein below). Had Warren County acted as it had during every year since 2008-2009, it would have crossed out the growth percentage, approved the 850, and that would have been the parties' agreement. Instead, Warren County approved only 664 students from Warren County to attend Bowling, deducting from the 750 number 86 Warren County students in the Bowling Green system who had graduated that year.

Bowling Green accepted the 664 students and appealed regarding the additional students. On appeal Bowling Green seeks to allow an additional 86 Warren County residents to attend in Bowling Green. By prior order herein, it was ruled that Bowling Green's acceptance of the 664 did not bar its right to appeal with regard to the additional 86.

A hearing was conducted on July 11-13, 2013, at the MMTH Auditorium at Western Kentucky University in Bowling Green. In addition to the testimony and documentary evidence introduced during the hearing, the deposition of Dr. John Settle, a former Bowling Green superintendent, and a set of stipulations of the parties were made part of the record. The parties have submitted post-hearing briefs. Being sufficiently advised, the hearing officer makes the following recommendations.

RECOMMENDED FINDINGS OF FACT

A. FACTS RELATED TO NEGOTIATION AND ADOPTION OF THE 2001 AGREEMENT

1. There was a notorious public controversy regarding Warren County's action in 2001 to place a cap on the number of non-residents who could attend Bowling Green.

It is undisputed that prior to 2001 the two schools had followed a "free exchange" policy under which there were no caps or restrictions either way regarding non-resident students. It also is undisputed, as reflected in Petitioner Exhibit 5, that on April 23, 2001, the Warren County Board voted to impose a cap of 656 as the number of residents from Warren County attending Bowling Green that could exceed the number of Bowling Green residents that could attend Warren County.

The preponderance of the evidence established that at the time this was all occurring, it was a public controversy that was notorious and had created turmoil in the community, leading to public meetings, newspaper articles, and editorials speculating that the cap was prompted by jealousy over sports. See, for example, testimony of Dr. Settles dep. p. 11, 13; testimony of Hamp Moore, TE 26, 30; testimony of Michael Bishop, TE 76).. As a consequence the two districts attempted to find a resolution of the issue through agreement.

2. The respective boards informally authorized their superintendents to negotiate an agreement to address non-resident student arrangements and such an agreement was executed by the superintendents.

There is no dispute that the 2001 agreement was executed by the superintendents of both districts. Warren County, however, in this litigation takes issue with whether the superintendents, in negotiating the 2001 agreement, were acting as agents for their respective Boards, observing correctly that neither board ever formally voted to approve the 2001 agreement.

Dr. Settles, then superintendent of Bowling Green and who negotiated on behalf of Bowling Green, testified that he and Dale Brown, then superintendent of Warren County, negotiated for several days and

I was in contact with my Board [and] [h]e was in contact with his Board. I drafted a version of this, and we communicated back and forth about the terms of the proposed agreement, and ultimately came to final resolution on June 1.

(Brown dep. 13). Settles testified that "my Board was constantly informed of the discussion that was going on between us [and]... I understood from Mr. Brown, and I think emails will substantiate that - that his board also was involved in that discussion."

(Brown dep. 14). Hamp Moore, a Bowling Green Board member at the time of these events corroborates the involvement of the Bowling Green Board, testifying that he understood what the agreement said before it was executed (TE 29) met with Bowling Green board members prior to the signing of the agreement to discuss it. (TE29-30).

Settles testified that "ultimately we both signed as representative of our Board of Education on June 1, 2001" (Settles dep. 12) and that "I served as both superintendent and executive officer, and I negotiated - as Mr. Brown did for his Board - the agreement." The testimony of Dale Brown, superintendent of Warren County at the time, is consistent with Dr. Settles' testimony that both superintendents understood they were acting on behalf of their respective Boards. Hamp Moore, a Bowling Green board member at the

time, testified that he was aware of the contents of the agreement prior to its execution, that Bowling Green board members were involved in the resolution of this matter on a daily basis, and that he also met with Warren County board members regarding resolution of this matter. (TE 29-30). Michael Bishop, also a board member at the time, corroborated this testimony. (TE 75; 79-80).

3. The purpose of negotiating an agreement was to provide stability and predictability for student numbers in the future.

Dale Brown, then superintendent of Warren County and who negotiated the agreement testified as follows:

That agreement was signed by the two superintendents. I was a new superintendent. Our responsibility each year is to allocate staff to the ...school-based decision-making committee based upon your numbers.

With the financial situation within the state, we felt like it was necessary for us to be able to predict our students - a number of students who would be in attendance. [Bowling Green Superintendent] Dr. Settle and I had several conversations regarding this...

(TE 199). Mr. Brown's described the strategy devised in his discussions with the chairman of the Warren County board at the time, Earl Manco, as "the main thing is, we wanted to reach stability with our numbers knowing what to expect." (TE 206). Brown testified "our intent was to have a base number so we could know how to plan for the future of Warren County schools." (TE 218).

4. Negotiations resulted in a Memorandum of Understanding executed by both superintendents on June 1, 2001, providing a base number for 2001 and a formula for calculating future growth in the number of non-resident students attending Bowling Green that would be approved by Warren County in future contracts.

The "Memorandum of Understanding," signed by superintendents of both schools, provided that both parties agreed "to the following provisions for current and future action in respect to mutual approval of non-resident student contracts." Paragraph (3) of the Memorandum of Understanding states:

In years subsequent to 2001-2002, the superintendents of the Bowling Green and Warren County School Districts will meet and agree upon a number of non-resident students contracts that will be approved by Warren County Schools. At a minimum the number of additional non-resident contracts that will be approved by Warren County schools shall be the percentage of student growth experienced by Warren County Schools in the prior year. The minimum number of additional non-resident contracts to be approved by Warren County Schools shall be calculated by multiplying the rate of growth in Warren County Schools in the prior year by the number of non-resident contracts existing in Bowling Green City Schools at the time of calculation.

The language in the agreement speaks for itself, and the testimony of Dr. Settles and Mr. Brown, the superintendents who negotiated the agreement, and their behavior in subsequent years, makes it clear that both of them saw the agreement explicitly as applying to future non-resident agreements.

Dr. Settles testified that the agreement was intended not only to resolve enrollment issues for 2001-2002, but to provide a perpetual formula in paragraph 3 of the agreement to address future non-resident issues:

We decided - Warren County agreed and we agreed - that whatever the growth rate in any subsequent year, in terms of student enrollment in Warren County schools, would become the index for how many additional students could enroll in Bowling Green City schools who were a resident of Warren County Schools.....the intent was for the base number to be the number that was on our waiting list as of May 18 [2001]. And then in subsequent years, the growth - the percentage of growth of students in Warren County would become the index for the increase in all of the years subsequent.

(Settles dep. 17-18). Dale Brown, then superintendent of Warren County, testified that it was his understanding that both boards understood and approved that the 2001 agreement would govern future annual contracts. (TE 214).

5. The 2001 memorandum has a good faith clause.

There is a "good faith" clause in paragraph (4):

It is agreed that both the Warren County and Bowling Green City School District will act in good faith to accommodate the needs and desires of parents in the Bowling Green/Warren County community consistent with student capacity in Bowling Green City Schools and the best interests of Warren County Schools.

6. Announcement of the agreement was made through a joint press release on behalf of both schools.

As stated above, the context for the 2001 agreement was that prior to that date the parties had a "free exchange" policy under which students in either district could attend where they liked and the respective boards would approve. Then, Warren County imposed a cap, creating public turmoil. The 2001 agreement resolved that turmoil and was advertised in a press release accordingly in order to quell public opinion. Although it appears the release was faxed out of Bowling Green's office (TE 211), Dale Brown, then superintendent in Warren County, testified that it was a joint release because "we [both superintendents] agreed that it was necessary for us to go as one to release this to the public." (TE 210). The press release, Petitioner Exhibit 4, reads as follows:

The Superintendents of Warren County and Bowling Green Independent School District have reached an agreement to allay community unrest and concern regarding the recent controversy over non-resident student contracts.

We have agreed to a level of enrollment of non-resident students in the Bowling Green Independent School District that will, in our view accommodate the expressed desires of parents wishing to cross district boundaries while protecting the integrity and financial operation of both districts.

Specifically, we have mutually agreed to a voluntary limit of growth of non-resident students that is commensurate with the capacity of Bowling Green City Schools and the desires of both school systems.

(emphasis added). It is noteworthy that the percentage growth formula is referenced in the joint press release.

The press release was issued to all major media reflecting that the superintendents of the respective school districts had reached an agreement to resolve the nonresident student issue and the fact of the agreement was publicized in newspaper stories. (Settles dep. 22-23). The then chairman of Warren County's Board, Earl Manco, was quoted in the article (Petitioner Exhibit 6) as stating "Now, everyone is on the same page." The article, title "Schools Make Cap Deal," states the following:

They also agreed that the county board will determine the number of nonresident students who will be allowed to attend city schools in the future. That number will be based on the county's growth rate.

"If the county school's growth is 10 percent, then the board will consider new requests up to 10 percent above last year's numbers," Settle said.

Starting 2002-2003 school year, both Settle and Brown will start reviewing the county's growth pattern every fall. "I feel that we both worked for the benefit of both districts," Brown said.

Neither board formally voted on the 2001 agreement; this was by Design; the agreement was approved informally by each Warren County board member.

Dr. Settles, the Bowling Green Superintendent testified that neither board took formal action on the 2001 agreement "by design." (TE 20). What was implied from the testimony of this witness and others was that a public vote might open Warren County board members to criticism or generate more strife and controversy in the community. Instead, the superintendents agreed that Warren County's board would recognize the June

1, 2001 agreement by rescinding the cap previously imposed, which the Warren County board did. (Settles' dep. p. 24-26). Hamp Moore testified that it was understood that rescission of the cap signified Warren County Board's approval of the agreement (TE 31).

Dale Brown, Warren County superintendent at the time the agreement was entered into, was questioned regarding whether the agreement was approved by the Warren County board members:

Individually, I called the board members and told them it was what we were going to do.... But it was not in a group setting, per se. I called each one of them.

Q. Okay. So before you signed off on this June 1, 2001 memorandum on behalf of the Warren county School District, you made sure that all of your board members, five of them knew, were aware of, and didn't have any objection to you as the executive agent for the Warren County Board making this agreement; would that be a fair statement?

A. Without question.

(TE 208-209).

B. FACTS CONCERNING IMPLEMENTATION OF THE 2001

AGREEMENT

7. After the 2001 memorandum was signed by the superintendents, the superintendents and boards for both school districts behaved in conformity with the 2001 agreement until the 2008-2009 school year, calculating the number of non-residents that would be permitted by using the formula in the 2001 agreement.

Prior to entering into the 2001 agreement, Warren County had adopted an order placing a cap on the number of Warren County residents that could attend Bowling Green. This precipitated negotiations that led to the 2001 agreement. After the 2001 agreement was adopted and a press release issued to announce that agreement had been reached, Warren County's Board voted to rescind that order and voted to approve a

number calculated in conformity with the formula in the 2001 memorandum. As stated elsewhere hereinabove, Hamp Moore and Dr. Settles testified that it was understood that rescission of the cap signified Warren County Board's approval of the agreement.

Thereafter, each year for a period of time the respective directors of pupil personnel would calculate the number of Warren County residents that would be permitted to attend Bowling Green. (see, for example, Settles dep. p. 26). The contracts themselves had language such as "any and all" but referenced a list, and that list was created using the formula set forth in the 2001 agreement. Each year the number of permitted Warren County non-residents for that school year would be calculated with involvement of both superintendents and directors of pupil personnel using the formula and each board would approve an agreement for that year using the number arrived at by the formula. (Settles dep. p. 33-34; 41; Moore testimony TE 34-37; emails between Dale Brown and John Settle, Pet. Ex. 8, 9 and 10; testimony of Jon Lawson, TE 124-130, describing the process). Beginning in 2006-2007, due to a change in when non-resident agreements were supposed to be submitted, the contracts included the specific number from the prior year plus a direct reference to growth percentage formula in the 2001 agreement. (TE 42-43).

8. For 2008-2009, Warren County did not agree to the annual percentage growth provisions in the 2001 agreement.

Dale Brown, superintendent of Warren County at the time, testified that in 2008 he asked the superintendent for Bowling Green to accept that year's agreement using the number of students from the prior year (850) but without additional students under the growth provision of the agreement.

9. Warren County did not represent to Bowling Green that money was the reason it would not agree to the growth percentage in 2008; instead, the reasons given were that Bowling Green was over-promoting itself and was sending Warren County residents back if they became truants or behavioral problems.

Warren County's superintendent at the time, Dale Brown, testified at the time the 2008-2009 contract was up for consideration that

I recall the budget situation. I recall the reduction in staff. I recall the things restricting some of our decisions in operating of the schools. And then the decision was made to strike the percentage of growth....I'm quite sure that I was the one that said, we need to take a look at thisto the [Warren County] board and Dr. Melton.

(TE 225). Kerry Young, a Warren County board member at the time and currently the chairman, testified that

[b]est I remember, I think we had a working session and going over a lot of stuff with finances and stuff and trying to figure out ways to save money, cuts, bring moneys in. An I think during that working session, it was discussed, what would it do to us financially if some of the numbers were stopped at Bowling Green, that we could keep some of the kids or keep the number from growing. And, I guess, from that working session, we decided that we'd put the cap of the 850 on there.

(TE 404). Don Basham, a board member at the time, testified "[the Warren County board] had talked about that, finances, and that we should start limiting the growth 'cause that was in this [proposed 2008-2009 contract]." (TE 496).

However, if money was the reason for not complying with the growth percentage, Warren County did not reveal that to Bowling Green. Joe Tinius, superintendent of Bowling Green, described the situation as follows:

As Mr. Brown and I met, as we did on a monthly basis, prior to the February [2008 Warren County] board meeting, he indicated, shared with me that at that point in time he had a board member that was not real comfortable with the agreement. Did not share who, but just said he had some issues, concerns that had been raised to him by a board member, and that he could not at that point in time

promise me, guarantee me that the growth aspect would be followed.... I quickly inquired, does that mean, then, that we're going to look at a different agreement. And his response was, no, that he did not want to go back down that road again that we went down in 2001; that he wanted to maintain the agreement, did not want to call attention to the situation, asked if I would work with him in that regard....

....

I think his exact words were, the best I may be able to do this year is to keep the number at 850.

(TE 623-624).

Although Tinius prepared the Bowling Green board for what to expect, the board was nonetheless concerned when the growth percentage was not approved by Warren County and suggested a meeting between the two schools. As a result, a letter was sent to Brown and then-chair of Warren County's board, Teresa Lowe, expressing concern and requesting a meeting. (TE 628; TE 44-45; Pet. Exhibit 11).

A meeting took place in July of 2008 between the two superintendents, Brown and Tinius, Mr. Murley, then Warren County's assistant superintendent, and Bowling Green Board member Hamp Moore. At that meeting, Mr. Brown explained he was having trouble getting his board to approve the growth percentage. However, Bowling Green board member Hamp Moore testified that the reason given for that unwillingness to approve the growth percentage was that

[i]t was perceived by the [Warren County] school administration that the city schools were overly promoting ourselves; that we were saying to people in the community good things that we believed were going on in the city schools; and that when we did that, that was perceived by the county school board members as being destructive of their - of the many good things that they were doing in their district and that served as the basis [for refusing to apply the growth percentage].

(TE 46-47). Similarly, Bowling Green superintendent Tinius testified "[t]here was a concern about what they felt was a little bit too much promotion on our part, sharing or

highlighting the accomplishments of our school district." (TE 629). At the meeting, specific examples that concerned this over-promotion were given. The other concern raised was that Bowling Green was sending back Warren County residents who became truants or disciplinary problems. (TE 630). Notably absent was any mention of money or finance (TE 631), and there was no testimony from Brown or Murley, the two representatives from Warren County who attended the meeting, that money was mentioned at the meeting.

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

Tinius testified

Mr. Brown and I had conversation about whether or not there was a need for us to take board action again regarding this modified, if you will, or revised contract. The two of us came to the conclusion that that, in and of itself, was going to call attention to the fact that the agreement had not been followed to the letter.

We agreed that for that year, I would talk to my board about, were they willing to simply accept what was sent back to us and move forward in an effort not to raise a great deal of concern and alarm, with the idea that we would try to move forward in the future.

(TE 625).

11. Agreements approving 850 and marking out the percentage of growth clause became a pattern in subsequent years.

Although it was left open in 2008 whether Warren County would be willing to resume implementing the growth provisions in future years (see testimony of Dale Brown, TE 230), the agreement that year became a pattern in subsequent years. Each year thereafter, Bowling Green would tender a proposed contract consisting of last year's

number (850) plus language stating "the percentage of growth" and Warren County would interlineate through the growth percentage language and approve 850. The modifications made by Warren County were not voted upon by Bowling Green, but the parties operated under the modifications as the de facto agreement based upon what Warren County would accept.

12. The 2009-2010 agreement approved by Warren County expressly refer to the 2001 agreement.

See TE 66; 134-135; Joint Ex. 2.

13. At no time prior to the events of 2013 did Warren County attempt to cancel or repudiate the 2001 agreement.

The interlineation of the growth percentage was not interpreted by Bowling Green to be a termination of the 2001 agreement (TE 47). Michael Bishop, a Bowling Green board member at the time, testified

[t]here was never any indication from Mr. Moore or Mr. Tinius that Mr. Brown or anyone from the Warren County Board had - we're forgetting about the agreement, we're striking the agreement. They were simply striking the growth because of some difficulties they were having with new board members and - and having that plus the growth language in there. But there was never any indication that they were striking the agreement or bre - or doing away with the agreement.

(TE 81). Similarly, Bishop testified that after Dale Brown was replaced by Mr. Murley as superintendent of Warren County, there still was no indication that Warren County wished to cancel the agreement. (TE 82). Murley served as superintendent at Warren County until February 2013, a few weeks before Warren County voted to cap non-residents at 664, the act that prompted this appeal.

Joe Tinius, superintendent at Bowling Green for the last eight years, also testified that Warren County had never expressed any intent to cancel the 2001 agreement. (TE 626). Hamp Moore testified, regarding the 2008 meeting that took place when Warren County first declined to apply the growth percentage, discussed in the fact-finding above, that "[t]he resolution was for Mr. Brown, as I recall it, that he intended to try to do better. He intended to try to follow the agreement in the future." (TE 47). Michael Bishop testified that Mr. Murley for Warren County

expressed to [Bowling Green superintendent] Joe [Tinius], we're not going into the 850; we'll address this growth issue at some point in time. Give me some time. And no one ever gave us any indication that, the deal's off, you're never going to get the growth.

(TE 111). Similarly, Mr. Tinius testified that Dale Brown "never indicated to me that [the agreement] was being terminated." (TE 625; also, see testimony of Dale Brown, TE 230).

When Tinius asked Brown whether the respective boards needed to approve a new agreement, Brown told him that "we need to keep what we have." (TE 626).

Thus, neither party intended the failure to implement the growth percentage as a termination of the 2001 agreement. Toleration of this on a year to year basis by those who were aware of the agreement was consistent with the good faith obligations imposed by the 2001 agreement as well as a mutual desire to avoid public controversy.

14. Current Warren County Board members who testified at the hearing did not intend to ratify the 2001 agreement by approving annual contracts that implemented the 2001 agreement in whole or part, nor repudiate it by adopting contracts that failed to implement it fully because they did not know about the 2001 agreement.

Regardless of the legal effect of the 2001 agreement, it is clear that all Warren County superintendents up until Kathy Goff's appointment in March of 2013 were aware of the 2001 agreement and either applied the growth percentage formula or were aware they were deviating from the formula.

However, none of the board members who were on the Warren County Board in 2001 when the agreement was executed testified at the hearing. Witnesses who are current board members, who became board members after the 2001 agreement was made, and who testified at the hearing claim not to have known about the 2001 agreement, notwithstanding the fact that they approved agreements based upon it and that contained language referencing the 2001 agreement.

Kerry Young, who has been on the board 7 years and became the chairman in 2013, claimed that he had no knowledge whatsoever of the 2001 agreement. (TE 395). Mike Wilson, a board member since 2003, also claims to have had no knowledge of the 2001 agreement. (TE 445). Don Basham, who has been on the board since 2005, testified he was unaware of the 2001 agreement prior to voting for the 664 cap on April 18, 2013. (TE 486-487).

All of these persons voted on the contract for 2009-2010 that expressly referenced the 2001 agreement. All of these persons were on the board at the time Dale Brown and Mr. Murley met with Bowling Green representatives to tell them that some Warren County board members would not approve continuing the percentage growth provisions of the 2001 agreement for the 2008-2009 school year. However, Mr. Young testified that he could not recall being aware of the meeting at the time it took place. (TE 407). Mr. Young also testified he was unaware of a letter sent in 2008 by Mr. Tinnius addressed to

the superintendent and the Warren County board chairman complaining about failure to approve the growth percentage. (TE 408). Mr. Basham testified that he recalled discussing at a work session around that time the idea that Warren County should discontinue agreeing to the growth percentage but does not recall learning why the growth percentage had come into existence in the first place. (TE 496).

Board member Garry Chafin, who did not join the Board until 2009, also denied knowing about the 2001 agreement. (TE 519).

Given this testimony, the hearing officer finds that the votes of these board members to approve annual contracts based upon or referencing the 2001 agreement were not intended by the board members as ratifications of the 2001 agreement.

15. Bowling Green did not appeal regarding Warren County's failure to include the growth percentage from 2008-2009 through 2012-2013 in reliance upon Warren County superintendent representation that Warren County would reconsider the percentage in the future and consistent with the obligations of both districts under the "good faith provisions" of the 2001 agreement.

See TE 108-110 and earlier fact-finding that neither district viewed failure in years 2008-2009 forward to apply the percentage growth factor as a repudiation of the contract.

C. FACT FINDINGS CONCERNING ADOPTION OF THE 664 CAP

16. Bowling Green tendered to Warren County, a proposed contract, signed January 14, 2013 by Bowling Green, for 2013-2014 that applied the formula from the 2001 agreement.

As it had in years past, Bowling Green tendered to Warren County a proposed contract that applied the formula from the 2001 agreement.

17. Mr. Murley, Warren County superintendent at the time, intended to submit and expected to have approved Bowling Green's proposed 2013-2014 contract for 850 students, but with the growth percentage marked out as in prior years, and had no intimation that anyone on the Board was considering reducing the number.

Mr. Murley, superintendent of Warren County at the beginning of 2013, testified that he prepared and intended to submit for approval in February an agreement just as in prior years, agreeing to the 850 and marking out the growth percentage. Murley testified that he had no indication at the time he left that Warren County did not intend to continue the nonresident agreement with Bowling Green at 850 students. (TE 258). Given that the superintendent Murley had expected to present and have approved the standard 850 student contract (see TE 259), it is clear that he had no wind of any movement by the Board to do something different.

18. The Bowling Green contract was inadvertently not placed on the Warren County board's February, 2013 agenda.

Pat Stewart, Director of Student Services at Warren County, testified that he received the proposed 2013-2014 contract from Jon Lawson of Bowling Green early in 2013 and that Stewart "prepared a memo to go with that to be approved, as we have done previous contracts." (TE 352). The item was then sent to the superintendent's office by the first week in February and was modified, per Superintendent Murley's instruction the same way as previous contracts, with the growth percentage marked through. (TE 354-

357). The number was to be 850, as it had been in the past. (TE 359). However, the contract did not appear on the February agenda. Mr. Murley testified that the contract was on his desk, "ready to go," but "I remember [the contract] was on my desk and I didn't get it in at the board meeting.... Well, actually I missed it. I didn't get it in. ...I just didn't." (TE 253).

19. During March, Warren County personnel began collecting information concerning the number of Warren County residents who were attending Bowling Green.

Kathy Goff became Warren County superintendent on March 1, 2013. Stewart testified that Goff directed him to obtain information about all Warren County students attending Bowling Green. (TE 366). The information was obtained from Bowling Green and was compared with additional information requested from KDE and received by Mr. Stewart, Ms. Goff and other Warren County personnel on March 6, 2013. (TE 367), five days prior to the Warren County board meeting scheduled for March 11, 2013.

Bowling Green's was the only non-resident contract for which such information was requested. (TE 368). Ms. Goff did not tell Mr. Stewart why she wanted the information. She also instructed him to prepare a report breaking down by grade the Warren County residents attending Bowling Green to have ready for the board meeting. (TE 374). The report was completed approximately 2 weeks after receiving the information from KDE on March 6, 2013. (TE 374).

Warren County board chairman Young testified that he had not asked Goff or anyone at Warren County to collect this information and was not aware of any other board members asking for such information. (TE 416). Mike Wilson, another board

member, testified he had asked Pat Stewart for information about the number of Warren County students graduating from Bowling Green prior to the April 18, 2013 board meeting and was told that the number was 86. (TE 465-467).

20. Bowling Green's proposed contract was not placed on Warren County board's March agenda for reasons that were not established at the hearing.

That the contract was not on the March agenda is undisputed. According to Mr. Stewart, after Mr. Murley inadvertently failed to submit the proposed contract in time for the February agenda, but before he left, he gave it to Mr. Stewart to be placed on the March agenda. (TE 364-365). Stewart testified he did not know why it did not appear on the March agenda. (TE 377).

What is disputed is why it was not on the agenda. One possible explanation could be the disruption in transitioning from Mr. Murley to Ms. Goff. When asked why the proposed contract was not on the March agenda, Ms. Goff testified

I have no idea. I understand that I took over March 1. Prior to that time, I did not deal with those. It was just a few days before the March board meeting. I had no idea it wasn't on there. But after [Bowling Green superintendent] Mr. Tinius brought it to my attention, we addressed it in April.

(TE 286).

Another possible explanation is that consideration of the contract was delayed in order to allow time to complete gathering information about Warren County residents attending Bowling Green that would be relevant to a reduction in the non-resident contract. Ms. Goff testified that she did not even know that a non-resident contract with Bowling Green was pending until she got an email from Mr. Tinius asking why it had not been addressed at the March meeting (TE 270-271). However, Warren County's March

meeting took place on March 11, 2013, and as described elsewhere in these findings, the process of collecting data on Warren County students attending Bowling Green, at the direction of Ms. Goff, had already begun well before that meeting. Mr. Stewart testified that he did not know why the Bowling Green contract was not placed on the March agenda (TE 386), although he also was involved in collecting the data on Warren County residents attending Bowling Green.

21. Ms. Goff reviewed Bowling Green's proposed contract with Stewart and caused it to be placed on the agenda for the April board meeting.

Mr. Murley was replaced by Kathy Goff. Ms. Goff testified that after she took Mr. Murley's place as superintendent she reviewed Bowling Green's contract, joint exhibit #3, with Pat Stewart, Warren County's Director of Pupil Personnel and told the secretary to place it on the April Board meeting agenda. (TE 278). The contract she reviewed was the standard one routinely proposed by Bowling Green providing for the current number of non-residents plus a percentage of growth.

22. Five to seven days before the meeting, Kerry Young, who had become chairman of the Warren County Board in January of 2013, instructed Ms. Goff to substitute blank contracts for the contract that Bowling Green had tendered.

Ms. Goff testified that five to seven days before the board meeting, she was instructed by Board member Mr. Young to substitute blank contract forms to the agenda for the meeting (TE 279). Mr. Young testified that Ms. Goff brought the matter up rather than him:

I was in Central Office, and [Ms. Goff] asked me, hey, how about the - the Bowling Green contract for the April meeting; how do you want it on there.

....
When she asked me that, I said, you know, I don't know what's going to happen at the meeting. You never know what a motion could be for anybody. I said, put a blank contract on there.

(TE 413).

Ms. Goff testified she did not know why Mr. Young asked her to submit blank contracts (TE 300) other than Mr. Young said to do it "cause I'm not sure what the board is going to do." (TE 279). Ms. Goff relayed that request to Mr. Stewart. (TE 378). Mr. Stewart initially testified that he thought blank contracts were being used because he had found out from Mr. Tinius at a meeting at the Corvette Museum, and then informed Ms. Goff, that the legislature had recently passed a law excluding children of employees from the non-resident student account. (TE 379). However, upon being examined about the dates of communications between Mr. Tinius and Mr. Stewart concerning the new law, it was clear that Stewart was instructed to include blank contracts by Ms. Goff before Mr. Stewart was even made aware of the new law. (TE 381). Stewart corrected his testimony to be that the new law had nothing to do with the blank contracts - that he was simply following orders from Ms. Goff. (TE 382). Stewart testified he did not ask Ms. Goff why the contracts would be blank or discuss with her or any board member the contract proposed by Bowling Green that he had submitted previously for inclusion on the Board agenda. (TE 382).

23. Warren County's superintendent was not consulted regarding the wisdom of reducing Bowling Green's non-resident contract.

Other than obeying Mr. Young's instruction to substitute blank contracts for the one proposed by Bowling Green, Ms. Goff testified that she had no conversations with

any board members concerning the Bowling Green non-resident contract (TE 301), and that she made no recommendation concerning the reduction at the board meeting in April when it was approved. (TE 301).

Superintendent Goff testified that she didn't have any idea what the Board was going to do. (TE 279; 300). If so, the Warren County Board decided, without consulting its own superintendent, to change a long-standing practice regarding non-residents attending Bowling Green that it knew would upset many persons.

24. Warren County voted on April 18, 2013 to reduce from 850 to 664 the number of students permitted to attend Bowling Green by excluding the 100 students of employees, no longer counted due to a change in the law, and subtracting the 86 Warren County residents attending Bowling Green who were scheduled to graduate.

This is undisputed. See TE 305. Board member Mike Wilson testified that he had requested from Mr. Stewart, several days prior to the April 18, 2013 board meeting, the number of Warren County residents who would be graduating because it was going to be part of his consideration in deciding the number that would be approved for 2013-2014. (TE 466)

At the April 18, 2013 board meeting Wilson made a motion to reduce the non-resident contract numbers with Bowling Green by the number of Warren County residents who were graduating. (TE 468-469). Wilson asked Mr. Stewart how many Warren County residents would be graduating from Bowling Green and Mr. Stewart read from the report that he had prepared at Ms. Goff's direction that there would be 86. (TE 385).

25. Warren County did not warn Bowling Green that it was considering reducing its numbers or consult with Bowling Green prior to doing so.

This is undisputed. In multiple communications with Bowling Green concerning the agreement prior to the night of the vote, no Warren County personnel gave Bowling Green a "heads up" that Warren County board members were considering reducing the non-resident number (138-140).

Even after the vote, no one told Bowling Green about the reduction. Bowling Green first learned of the reduction after the meeting when a newspaper reporter who phoned Bowling Green's superintendent to get a comment. Ms. Goff, Warren County's superintendent, testified "[h]indsight probably is, I should have told Mr. Tinius on that evening that that number was less than he expected." (TE 310).

26. The decision to reduce the non-resident contract was made without analysis of the effect the reduction would have other than to increase revenue for Warren County by claiming the SEEK money that would follow the students back to Warren County if they were no longer allowed to attend Bowling Green.

Goff, the Warren County superintendent, testified that no board member consulted with her regarding the impact the 664 cap would have or asked her to determine it. (TE 281). At the meeting held between representatives of the two districts after the 664 cap was imposed, Michael Bishop testified regarding his conversation with Mr. Young, a Warren County board member, as follows:

I asked Mr. Young specifically, I said, did you have any conversations with any individual board members, with any staff, with anyone about the action that you took that night....?

And he said, no, we didn't talk about - no one's ever talked about that prior to that happening....And I kept saying, you took this action that night to start this turmoil, and you didn't speak with any board members individually,

privately, any interim superintendent, past superintendents, anyone. And he assured me that he had not.

(TE 88-89). Garry Chaffin testified that prior to voting for the 664, he had given no consideration to the impact the decision would have on families in the community. (TE 545).

Bishop testified that "[f]inances were really never brought up" (TE 91) at the meeting between the two districts and that it was only later, from reading articles in the newspaper, that Bishop learned Warren County was claiming that the reason for the cap was financial. (TE 91). However, it appears that money was the motivation. Bishop testified further concerning his conversation with Mr. Young at the meeting that

they wanted their children in their schools and they didn't think it would - was wise to have a policy in place that allowed their children to go to other schools and facilitate that move. There was, I guess a great deal of talk about their children and our children. And I - at some point, I recall I interjected, they're not your children. They're the parent's children and their guardian's children.

(TE 87-88) Young also stated at the meeting that there was little chance that Warren County's board would consider making an exception for the 30 Warren County residents who would not be able to attend Bowling Green with their siblings as a result of the 664 cap. (TE 94).

It is clear from the testimony of Warren County board members and personnel that the only consideration for the decision at the time it was made was simply was to assert its right to the SEEK money it could claim by discontinuing non-resident agreements with Bowling Green. Some witnesses for Warren County testified that Warren County board members often talked about revenue generally and the idea of reducing non-resident agreements had come up in board work sessions as a way to increase revenue, that testimony indicated that even at the work sessions the extent of the

analysis was to multiply the amount of SEEK money per student times the number of students. Mr. Murley, Warren County superintendent who left at the end of February 2013, testified

[a]t different times I've had board members [Mr. Wilson and Mr. Young] say something to me about [the Bowling Green nonresident contract]. And it may be in the hallway or wherever, but it was never a - it was always just a very quick discussion, a fleeting thing and go on.

(TE 258). Murley testified he never asked anyone internally to look at the financial implications because "I could just, in my head, figure...\$3,900 per student times 100, that sort of thing." (TE 258).

Similarly, testimony regarding the discussion at the Warren County board meeting where the reduction was approved indicates that no financial data was presented other than the dollar amount of the SEEK money per student. Mr. Young, the chairman of the Warren County board, described it as follows:

What [chief financial officer for Warren County Willie McElroy] said was ... if we got the 86 students, if they enrolled in Warren County schools and the SEEK money followed them, and the longer - more years that you had those students, the more moneis monies that would bring in; so, yes, it could have a long-term positive effect on our district.

....
I don't think he gave a number that night. I thing he pretty much just said 86 times 3827, and - and then just kind of left it at that.

(TE 420-421). Also, see Mr. Young's testimony, TE 428-430. Mr. Young testified that at the time the reduction was approved, he did not have any specific information or calculation about the financial impact of the reduction on Warren County. (TE 433-434).

Ms. Goff suggested that one reason she didn't reveal to Mr. Tinius after the meeting that there had been a reduction is that she was unable to give any explanation for why it occurred:

I really didn't have an explanation at length to explain to Mr. Tinius why that contract had been reduced by additional numbers. That's what our Board voted to do. And not having conversation - in depth conversation with - I hadn't had it with anyone except for Mr. Young as far as putting a black contract on there. I didn't have any background information to be able to share. And at the close of that meeting, I think that it was said that it was for financial reasons.

(TE 310).

27. The minutes of the May 6, 2013 Bowling Green Board of Education meeting reflect that the BG Board voted, in Order 15121, to approve a "portion of the Contract" tendered by Warren County and to appeal "to settle a dispute... regarding 86 (eighty-six) students for which the Warren County School District has refused to release funding...."

See Exhibit 4, Appellant's appeal.

28. KDE sent an email to Bowling Green, in response to Bowling Green's inquiry, opining that Bowling Green could agree to the 664 students conceded by Warren County and appeal the 86 students not approved by Warren County, provided clear notice was given to Warren County regarding Bowling Green's intent to do so.

This is not disputed.

29. Bowling Green sent a letter to the Commissioner dated May 23, 2013, copied to Warren County's representatives, setting forth the Bowling Green's intent to appeal concerning the 86 students but asking that funding be released for the 664 students while the appeal proceeded, and to protect Bowling Green from "inadvertently waiving any appeal rights by signing the April 18, 2013 contract signed by Warren County School District."

This is not disputed.

**D. FACTS RELATED TO DEMAND OF WARREN COUNTY RESIDENTS
TO ATTEND BOWLING GREEN SCHOOLS**

30. Since 2003-2004, more non-residents from Warren County wanted to attend Bowling Green than were permitted to attend under non-resident agreements.

See TE 633.

31. Bowling Green has developed a policy to determine which students on the waiting list or list of applicants will have priority, giving preferences to children of employees; children who were already enrolled whose residence changed during the school year; siblings; students in private schools located in Bowling Green's district; individuals owning property in the district; children of employees at WKU.

(See TE 634-635).

32. In addition to students enrolled under non-resident agreements, Bowling Green, in 2011-2012 and 2012-2013, agreed to take 100 additional Warren County students as non-contract, without SEEK money.

Jon Lawson, director of pupil personnel testified at Bowling Green, testified that when Warren County said they were only going to release funding on 850 students and they were holding the line, I guess, on that number, at least over the past two or three contracts, then it was really putting us in a situation when you also factor in the students that move during the year and become nonresident, that if we were going to still be able to work in students - not more students than we normally take, but just students in generally that had normally gotten in - then we were going to have to designate the students as noncontract and not get funding for them.

And that's not something we really wanted to do, but we felt some obligation to our community and to the parents, to the families, you know, to try and get that worked out. Being at the 950 number, myself and Mr. Tinius, we had

some conversations about, you know, this is not something we can just continue to do for years upon end.

You know, if Warren County's not going to honor the 2001 agreement, then we need to, you know, we need to take a look at maybe working at least some of those hundred noncontract kids off, because we're not getting funding.

(TE 150-151).

33. Notwithstanding accepting additional non-contract students, each year Bowling Green turned away some Warren County non-resident applicants.

See TE 639.

34. As a consequence of Warren County's imposition of a cap, Bowling Green has modified its tuition policy to require Warren county non-residents who are not included in the 664 cap to attend Bowling Green by paying tuition equal to the SEEK money plus \$300.

See TE 102, 154 and Petitioner Ex. 14.

**E. FACTS RELATED TO CHARACTERISTICS OF WARREN COUNTY
RESIDENTS ATTENDING BOWLING GREEN OR WHO WISH TO ATTEND**

35. 72.6% of Bowling Green students reside in Bowling Green and 25.2% of Bowling Green's students are non-residents from Warren County.

This is undisputed. See TE 615 and joint exhibits #17 and #19.

36. Historically in recent years, the percentage of Warren County residents attending Bowling Green has remained at or near 25%.

(TE 186).

37. 37.02% of Warren County residents attending Bowling Green are gifted and talented.

See joint exhibit 34.

38. Warren County non-residents attending elementary school in Bowling Green attend McNeill and Potter-Gray, Bowling Green's two top-performing elementary schools; the percentage of the student population residing in Warren County; 43.41% of the students attending McNeil and 43.36% of the students attending Potter-Gray are Warren County residents.

See TE 187, 190; Joint exhibit 17.

39. 21.54% of students attending Bowling Green Junior High School and 32.38% of those attending Bowling Green High School are Warren County residents.

See Joint exhibit 17.

40. Bowling Green has over 200 applicants for the 86 spots at issue in this appeal.

See TE 154.

41. The 86 students at issue in this appeal consist of 63 elementary age students (47 of whom are kindergartners), 5 middle-schoolers and 18 high schoolers.

See TE 160; Petitioner Exhibit 27.

42. Thirty of the 86 have siblings currently attending Bowling Green.

See Petitioner Exhibit 28.

43. Ten of the 86 are students who were enrolled in Bowling Green and formerly resided in Bowling Green but have become residents of Warren County during the school year (and are not also among the 30 who have siblings attending Bowling Green).

See Petitioner Exhibit 27.

44. Twenty-nine of the 86 have parents who work at WKU.

See Petitioner Exhibit 27.

F. FACTS RELATED TO STUDENT POPULATION AND GROWTH

45. Warren County has experienced significant growth in recent years.

Kerry Young, chairman of the Warren County Board, testified that Warren County is a "growth district," growing about 300-400 students per year (TE 424). Warren County's total enrollment increased by 1,713 students from 2006-2007 to 2011-2012, to a total enrollment of 13,507. (Jt. Exhibit 18), an increase of 14.5% over six years and an average of 2.24% per year. (TE 157).

46. Bowling Green has experience less growth than Warren County and derives very little growth from residents of the Bowling Green district.

Bowling Green's enrollment increased by 322 from 3518 in 2006-2007 to 3840 in 2012-2013 (Jt. Exhibit 17), an increase of 9.1%. However, the total enrollment in Bowling Green schools declined slightly from 2011-2012 to 2012-2013.

Only 175 of the 322 additional students gained since 2006 in Bowling Green are residents of the Bowling Green district. This means growth in student population internally (from students residing in the BG district) was only about 5% over a 7 year period.

47. 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.

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). Bowling Green experienced a gain from 2011-2012 to 2012-2013 of only 7 students in the number of its students who live in Bowling Green. (Joint Ex. 17).

48. If Warren County had continued to follow the percentage growth provisions of the 2001 agreement, the number of non-residents from Warren County would have been 969 in 2013-2014.

See TE 158.

49. 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.

If all Warren County residents were returned to Warren County, McNeil's population would drop from 417 to 230 (a reduction of 55.16 %) and Potter-Gray's population would drop from 459 to 260 (a reduction of 56.64%). See Petitioner Exhibit 17.

50. 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.

If all Warren County residents were eliminated, the student population at BGHS would drop from 1124 to 745 (32.38%), and the student population at BHIrHS would drop from 868 to 681 (21.54%). See Petitioner Ex. 17.

G. FACTS RELATED TO MINORITY DEMOGRAPHICS

51. Reductions in Warren County residents attending Bowling Green will increase the percentage of Bowling Green students who are minority students, and will slightly decrease Warren County's percentage of minority students.

Currently, 37.48% of Bowling Green's students are minorities and 22.91% of Warren County's students are minorities. 149 of the 1010 (14.75%) Warren County residents attending Bowling Green are minority students. If all Warren County residents attending Bowling Green were eliminated, this would reduce Bowling Green's student population by 25% to roughly 2880, and 1343 would be minority students, increasing the percentage of minority students in Bowling Green from 38.78% to 46.6%. In contrast, if all Warren County residents attending Bowling Green were returned to Warren County, this would increase Warren County's total population but decrease slightly its percentage of minority students as only 14.75% of Warren County residents currently attending Bowling Green are minorities. Thus, any significant effect regarding minority percentages will accrue only to Bowling Green.

52. Eliminating Warren County residents would result in a minority

population in Bowling Green of 46% elementary, 48.5% junior high, and 42% high school.

Figures in Joint Exhibit 17 and Joint Exhibit 26 can be used to examine the effect on individual schools and categories of schools.

Bowling Green elementary schools have 1848 students, of whom 755 are minority students, just under 41%. If all Warren County residents were removed, the total elementary population would be 1432, of whom 657 or just under 46% would be minorities.

If all Warren County residents were returned to Warren County, there would be very little effect on demographics in Dishman-McGinnis Elementary and Parker-Bennett-Curry, as $\frac{2}{3}$ to $\frac{3}{4}$ of the students in these schools already are minority students but only a small number are Warren County residents. T.C. Cherry Elementary has 38.59% minority students but only 8 of them are Warren County residents. The percentage minority population at McNeil would actually decrease if Warren County residents were eliminated and the percentage minority population at Potter-Gray would increase from 14.16% to 16.15%

The biggest changes per school demographically would be in the upper grades. Bowling Green High School (BGHS) is currently 33.3% minority students and Bowling Green Junior High School (BGJrHS) is 40.9%. If all Warren County residents were eliminated, the student population at BGHS would drop from 1124 to 745, of which 315 or 42% would be minority students, and the student population at BGJrHS would drop from 868 to 681, of which 48.45% would be minority students.

Viewed collectively, eliminating Warren County residents would result in a minority population in Bowling Green of 46% elementary, 48.5% junior high, and 42% high school.

53. There is insufficient evidence to determine that the increase in percentage of minority students would harm Bowling Green.

Mr. Tinius testified that systematic reduction of Warren County non-residents would change the fabric of the Bowling Green schools as follows:

There's a point in time where the demographics of the Bowling Green Independent School District will be more in line with a large, metropolitan, inner-city school district as it relates to the percentage of free and reduced lunch, students in poverty, and minority percentages.

(TE 667). Demographics that relate to free and reduced lunch are discussed below.

Regarding minority as such, it is not clear how the percentage shifts in minority population that would occur if Warren County residents were eliminated from the Bowling Green student body would cause significant harm to Bowling Green.

H. FACTS RELATED TO OTHER DEMOGRAPHICS THAT HAVE PROGRAMATIC COSTS

54. Eliminating Warren County residents attending Bowling Green would not have a significant effect on LEP student percentages.

Warren County board member Mike Wilson testified that Warren County had seen an increase in students for whom English was a second language, that Warren County did not receive additional funds to cover that cost, and that it ate into Warren County's contingency fund. (TE 475). However, Warren County's LEP population as of 2011-2012, the last date for which such data was presented in Joint Exhibit 28, is 1,180

or 8.8%. Bowling Green's percentage is 360, or 9.87% , 15 of whom are Warren County residents (Joint Ex. 27). If all Warren County residents attending Bowling Green were eliminated, this would reduce Bowling Green's student population by 25% to roughly 2880, of which 11.9% would be LEP students, an increase but not a significant increase.

55. 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

Bowling Green has 55.7% of its students receiving free or reduced lunch, compared with 52.87% of Warren County's students. (See joint exhibits 22 and 23). However, only a little over 11% of the FR lunch students in Bowling Green are Warren County residents. This means a shift of some or all FR lunch Warren County residents will include a relatively small number of FR lunch students. However, returning to Warren County all Warren County residents attending Bowling Green would reduce Bowling Green's student population by 25% to roughly 2880, and 2006 of whom would be Bowling Green resident FR students (see joint exhibit22), making the percentage of FR students in Bowling Green approximately 70%. While loss of only the disputed 86 would not have such a great impact, continued reductions would have a long-term effect.

56. Reductions in Warren County residents attending Bowling Green will increase the percentage of Bowling Green students receiving special education, but not significantly.

Currently there are 56 Warren County residents attending Bowling Green who receive special education services. If all Warren County residents went back to Warren

County, the percentage of Bowling Green students receiving special education would increase from 11.25% (see Petitioner exhibit 25) to about 13%.

I. FACTS RELATED TO THE STATUTORY FACTOR OF ACADEMIC PERFORMANCE AND PROGRAMS

57. Teacher-student ratios in the two districts are very similar, with Warren County having slightly lower teacher-student ratios in some schools.

See Joint Exhibit 33.

58. 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.

Over 37% of the Warren County residents attending Bowling Green are gifted and talented (GT), roughly the same percentage as in 2006-2007, and the percentage has been more or less the same since then. Warren County residents comprise 102 of the 251 GT students in Bowling Green Junior High School and 134 of the 296 GT students in Bowling Green High School. Warren County residents comprise 58 of the 107 gifted students in McNeil Elementary and 56 of the 100 GT students in Potter-Gray Elementary. (See Joint Ex. 24).

59. Eliminating Warren County residents from Bowling Green's student population will reduce the percentage of Bowling Green students who score proficient or distinguished on standardized testing.

Examining the figures appearing in Joint Exhibit 30, the following can be deduced.

Of 197 Warren County residents attending Bowling Green elementary schools who were tested, 158 (80%) scored proficient or distinguished in reading (as contrasted with 53.3% of all Bowling Green elementary students tested) and 137 (69.5%) did so in math (as contrasted with 41.5% of all Bowling Green elementary students tested). Of the 221 Warren County residents attending Bowling Green middle school who were tested, 179 (81%) scored proficient or distinguished in reading (as contrasted with 55.1% of all Bowling Green middle school students tested) and 156 (70.5%) did so in math (as contrasted with 46.3% of all Bowling Green middle school students tested).

If Warren County residents were eliminated, Bowling Green elementary students testing proficient or distinguished in reading would drop from 53.3% to 45%. The number of Warren County elementary students who currently score in this range is 1422 or 46.1% (Joint Ex. 31) and if all returned to Warren County and the numbers are adjusted to account for the increased total elementary ($3085 + 197 = 3282$) and increased proficient/distinguished ($158 + 1422 = 1580$), this would result in a percentage of 48%. Thus, the net impact would be that Bowling Green drops from 53.3% to 45% and Warren County increases from 46.1% to 48%.

Applying the same analysis to proficient/distinguished in elementary math, Bowling Green would drop from 41.5% to 33.1%. The number of Warren County students who currently score in this range is 1203 or 39% (Joint Ex. 31) and if all returned to Warren County and the numbers are adjusted to account for the increased total elementary ($3085 + 197 = 3282$) and increased proficient/distinguished ($137 +$

1203 = 1340), this would result in a percentage of 40.8%. Thus the net impact would be that Bowling Green drops from 41.5% to 33.1% and Warren County increases from 39% to 40.8%.

The net impact regarding middle school would be roughly the same. The percentages of proficient/distinguished students in Bowling Green middle school would drop from 55.1% to 45.8% for reading and 46.3% to 37.5% for math, with slight increases for Warren County.

60. Reduction in Warren County residents attending Bowling Green will decrease GPAs at Bowling Green High School, currently averaging 2.83, and will have an unknown impact on Warren County.

Joint Exhibit 34 illustrates that the average GPA at Bowling Green High School is 2.83, with Warren County residents average 3.21 GPA.

61. 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.

Joe Tinius testified that the impact of continued reduction of Warren County residents from Bowling Green

As it relates to programming would be predominately at the ~~junior~~ junior high and high school, where many of the classes are dependent upon students' choice and what they want to take. And it could certainly have an impact on the offerings just based on the fact that you have fewer students and the choices that would be made.

(TE 683).

Bowling Green High School currently offers 20 advanced placement classes and plans to offer 22 in 2013-2014. As found elsewhere, Warren County residents comprise 102 of the 251 GT students and 21.54% of all students in Bowling Green Junior High School and 134 of the 296 GT students and 32.38% of all students in Bowling Green High School. Eliminating Warren County students will, both because of total numbers and the percentage who are advanced students, will significantly reduce the student population that can support Bowling Green's advanced placement offerings.

J. FACTS RELATED TO THE STATUTORY FACTOR OF FACILITIES

62. Warren County has added three new schools and built two replacement schools since 2007.

The three new schools are Jody Richards elementary, South Warren Middle School, and South Warren High School, and the two replacement schools are Bristow Elementary and Richardsville Elementary. (TE 426).

63. Warren County recently added six classrooms at Briarwood Elementary to add capacity for an additional 150 students, because Briarwood was full or at capacity.

See the testimony of Warren County superintendent Kathy Goff. (TE 268) and testimony of Willie McElroy, TE 740.

64. Warren County has two elementary schools that are overcrowded, Lost River and Warren Elementary, but otherwise is not overcrowded currently.

Kathy Goff, the current superintendent of Warren County, testified that these two schools are overcrowded and are using mobile units. (TE 266). Board member Garry Chafin said the mobile units were being used because of overcrowding. (TE 532). Other

board members testifying indicated they would prefer to characterize these schools as "full" but not necessarily over-crowded or over capacity.

Warren County's 2012 financial audit makes the statement that growth is a challenge for Warren County. However, except for the statement by Ms. Goff regarding Lost River and Warren Elementary, the testimony of Warren County witnesses was that Warren County was not overcapacity. See TE 265. Testimony from various witnesses indicates that except for the two schools mentioned, Warren County has capacity to absorb additional students. As found elsewhere, the teacher-student ratios of the two schools are similar, with Warren County having a slightly lower teacher-student ratios in some schools.

65. An additional elementary school for Warren County to relieve overcrowding at Lost River and Warren Elementary, at a projected cost of \$13 million, is scheduled within the 2012-2014 biennium but Warren County's board has not approved construction plans for it yet.

See TE 443. Kerry Young testified that the language in Warren County's facility plan, Joint Exhibit 50, referring to "new elementary School, 600-student capacity on a new site to be determined to relieve overcrowding" is a reference to the overcrowding at Warren Elementary and Lost River. (TE 441). Young testified that no land has been purchased for it nor construction plans drawn up. (TE 442).

66. Elimination of Warren County students will significantly impact the operation of Potter-Gray Elementary and McNeil Elementary, and will have an impact on the operation of Bowling Green Junior High School and Bowling Green High School.

As found elsewhere herein, If all Warren County residents were returned to Warren County, McNeil's population would drop from 417 to 230 (a reduction of 55.16 %) and Potter-Gray's population would drop from 459 to 260 (a reduction of 56.64%). See Petitioner Exhibit 17. If all Warren County residents were eliminated, the student population at BGHS would drop from 1124 to 745 (32.38%), and the student population at BHIrHS would drop from 868 to 681 (21.54%). See Petitioner Ex. 17.

67. Reduction of 86 students will significantly reduce Bowling Green's bonding capacity; elimination of all non-resident Warren County students by reducing, each year, the number who graduate from Bowling Green, would bring bonding capacity close to existing debt service by 2016 and ultimately would reduce the effective bonding capacity to zero.

Robert "Chip" Sutherland, a senior vice president, public finance banker at ~~Hilard Lyons~~ Hilliard-Lyons, who works with city and county schools, hospitals, and universities concerning tax exempt debt, is Bowling Green's fiscal bonding advising agent. He performed an analysis of the effect that reduction of 86 students would have on Bowling Green's capacity. Sutherland testified that both existing debt service obligations and adjusted average daily attendance are important factors in calculating bonding capacity. He testified that losing 86 students would reduce bonding capacity by \$2 million, from \$9.2 million to \$7.2 million. (TE 322).

Sutherland also analyzed how bonding capacity would be affected in subsequent years if Warren County residents who graduated from Bowling Green were not replaced with new non-resident students. He explained that over time bonding capacity would be reduced to \$615,000, which he testified in existing markets is effectively zero because it

is insufficient to fund a major renovation, much less construction, of a school. (TE 323-326; also, see Petitioner's Exhibit 24). He testified that by 2016, if Warren County continued to reduce the non-resident contract by the number of Warren County residents graduating out of Bowling Green, the revenues would be very close to the existing debt service. (TE 337).

K. FACTS RELATE TO THE STATUTORY FACTOR OF TRANSPORTATION

68. A cap would have no effect on Bowling Green's transportation costs because Warren County non-residents attending Bowling Green are not transported by Bowling Green; a cap would not impact Warren County's transportation directly.

See TE 690.

L. FACTS RELATED TO THE STATORY FACTOR OF STAFFING

69. Both schools eliminated positions last year and in the upcoming year to deal with general financial issues that are affecting all schools; five positions were cut by Bowling Green after the adoption of the 664 cap.

See TE 694.

70. 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.

M. FACTS RELATED TO CONTINUITY AND PARENT CONVENIENCE

71. Parents and students relied upon the agreement between Bowling

Green and Warren County and the 86 students and their parents will be inconvenienced and suffer some degree of hardship if the cap is not set aside.

Michael Bishop testified that

[e]ven though we do have a cap, [parents and students] still relied on that agreement, as far as where they could do - if they fit the priority list. Everybody knew what the priority list was. I mean, anyone that wanted to send their children knew where they could check off and see, did I fit into this category, do I fit into - am I an employee, do I have a sibling, do I own property in the city, do my children go to private schools elsewhere, what have you.

(TE 100). With an agreement in place, and a priority system for assigning the non-resident spots, non-residents from Warren County were able to know if their children would be able to attend or continue attending in Bowling Green. When students living in Bowling Green moved to a new house in Warren County "they would have the top priority to get whatever spot [was available]." (TE 176; also, see TE 179-180). Before the controversy that is the subject of this appeal "if [a Warren County non-resident] met one of those higher priorities or if you were previously enrolled, you were pretty much guaranteed to get in [Bowling Green]." (TE 177-178).

Bowling Green called three representative parents of the 86 Warren County residents who will not be permitted to attend Bowling Green to illustrate both the fact of reliance and the disruption that would result if the cap is not set aside. Issues that are addressed elsewhere in these findings, such as siblings being able to attend the same school, inconvenience to parents who work at WKU, availability of A.P. programs, and transitioning with their classmates from private schools located in Bowling Green to public schools in Bowling Green. Bowling Green also introduced a number of affidavits from the parents of the affected 86 to illustrate the inconvenience that would result from not setting aside the cap. (See Pet. Ex. 26).

This hearing officer observes that this finding could have been made without any parent testimony or affidavits, simply by inference from other facts in the record. Some evidence from parents and students affected illustrates or makes tangible for the record the effect a cap on non-resident students can have on families. However, inferences of a general nature regarding reliance and inconvenience in the context of other relevant facts, rather than greater or lesser inconvenience to specific families, along with arguments of counsel, controls the weight this factor should have.

N. FACTS RELATED TO BUDGET

72. All school districts have been affected by cuts in funding.

See TE 730 and TE 694.

73. Warren County is in good financial condition.

See joint exhibit 41, 2012 audit, p. 8.

74. Warren County's contingency fund of \$4.3 million, at roughly five percent, is well above the state minimum of 2%.

See TE 723, 734.

75. Bowling Green has a contingency fund of \$2.6 million, roughly seven and a half percent of its \$37 million budget, also above the state minimum of 2%.

See TE 690.

76. The additional SEEK funding that Warren County could receive if all 86 students at issue in this appeal enrolled in Warren County, reduced by costs of educating, has been estimated by Warren County at \$200,000, roughly .17% of Warren County's total budget of approximately \$116-117 million; a more elaborate calculation under the scenario set forth in Respondent exhibit 12, found the net

benefit long term, after a loss of \$98,353 the first year, would be a net gain of \$132,336.36 per year or .11% of Warren County's current budget.

See TE 729, 745. Testimony attempting to calculate the net benefit to Warren County varied slightly between witnesses. In addition, in addition, cross-examination brought out variables and uncertainties that could change these figures. Nonetheless, this finding approximates the range of financial benefit to Warren County - a benefit of roughly 1/10 to 2/10 of one percent of Warren County's current budget.

O. FACTS RELATED TO IMPACT OF THE REDUCTION UPON THE COMMUNITY

77. Bowling Green has a symbiotic relationship with private schools located within the Bowling Green District and gives students from those schools priority when applying for non-resident status.

Mr. Tinius explained why these students are given priority:

The main reason was, we had already had a working relationship with those schools. Certain areas in which you must provide services if they're requested, certain federal funds that you must notify private schools; they are eligible for certain funding that comes to the public school district.

A working relationship with many of those families. If students were receiving possibly special education services or ESL services, and a lot of the families wanted them to be able to continue and not have a disruption in those services. So it was just a longstanding relationship that had developed over the years. And the board decided that the students at those schools would fall in that spot on the priority list.

(TE 635-636). Students attending private school in Bowling Green are permitted to play on sports teams in the Bowling Green system if the private school does not offer that particular sport as a program. (TE 577).

78. Bowling Green has a longstanding relationship with Western

Kentucky University and gives children of non-resident WKU employees priority.

McNeill Elementary School in the Bowling Green district is within walking distance for parents who work at WKU. Tinius testified that

with the university being physically inside of our school district and the strong working relationship we had with many of the faculty and staff and programs with the university - we go back years to when the university and City Schools operated McNeill as a laboratory school and ~~aeutally~~ actually had a ~~storn~~ strong working relationship there - the feeling was, they needed to be placed on the priority list.

(TE 637). Bowling Green "has had a lot of partnerships with Western Kentucky University" and WKU practically surrounds McNeill Elementary. (TE 181).

79. 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.

Ron Sowell, former chairman of the Bowling Green Chamber of Commerce, who had been involved in recruiting business and industry to the area, testified that

[t]he ability to locate, to purchase a home pretty much anywhere in Warren County with the idea and pretty good understanding that you could either attend school in that district or you could apply to be transferred into the city district, or vice versa, if you lived in the city, you could go to the county, that was appealing to businesses.

(TE 550-551). Sowell testified it was also appealing to individuals the Chamber had been recruiting, medical professionals specifically. (TE 551). Michael Bishop, a Bowling Green board member, testified that

[w]e are very blessed in this community to have two great school districts. Employers come in and are just amazed at what we are capable of doing and what we have done in working together in the past. But I think that's because there has been choice and people have appreciated that.

(TE 100).

P. FACTS RELATED TO THE NEED FOR A MULTI YEAR REMEDY

80. Unless otherwise addressed by a decision in this case, it is likely that it is highly likely that this controversy will repeat itself annually.

At a meeting held between representatives from both districts after the 664 cap was imposed, Mr. Young, a Warren County board member, explaining why the cap had been reduced, indicated a sentiment on the Warren County board to eliminate non-resident contracts, explaining that

they wanted their children in their schools and they didn't think it would be wise to have a policy in place that allowed their children to go to other schools and facilitate that move.

(TE 87).

Mr. Young testified that "what we did this year was for this year.... But to say what's going to happen next year, I don't know." (TE 431). Mike Wilson testified that he couldn't say what the Board's intention was in the future and it would be looked at on a yearly basis. (TE 478). Don Basham testified that what happened in the future would depend upon the economy and resources but "the future looks like we will all be fighting for resources for many years out." (TE 514). Garry Chaffin testified that he did not have a future plan on reducing Bowling Green further. (TE 542).

However, there are indications that Warren County indeed does plan to continue the reductions. In an April 20, 2013 article in the Daily News, Mike Wilson was quoted as saying that the cap decision was a "step in the right direction." (TE 558). Basham testified that at the May, 2013 board meeting, Basham had suggested that a solution to these disputes would be consolidating Bowling Green into the Warren County system and that he continues to see that as a possible option. (TE 515).

____ Mr. Basham testified that in his phone conversation with Ron Sowell, a parent living in his district, he had said "there is the possibility at some point, if resources continue to diminish, that we may have to continue to decrease the amount of kids" and that "zero may be the result. Or one to one, where one child comes from the County, one child can come from the city." (TE 513-514). Basham testified that when Mr. Sowell asked if this was about athletics, he replied "flippantly" that "isn't it always" but then corrected himself that it was about the money. (TE 514).

____ Mr. Sowell's recollection of the phone conversation was quite different:

[Basham] explained to me that it was a financial decision and went on to say that it was the board's intent to lower the cap to zero.

....

And he explained to me that, you know, it was about finances, and then he said, it was about athletics. And I said, did you just say athletics? And he said, yes, we have good athletes and we want to keep them because we have good facilities.

(TE 553). Sowell testified that Basham, not Sowell, was the first to bring up athletics, and described more about the conversation:

[H]e said, it's about finance and about athletics. And I was actually shocked that he said it, because, quite frankly, going back to 2001, we suspected it was about athletics back in that year. Because there was some rumor in the community that a star athlete from the county had attended and played basketball in the city and that that had annoyed some of the board members at the time.

And so when he mentioned athletics, I said back to him, I said, did you just say athletics. And he said, yes. And I said, well, I've always kind of thought that might have something to do with it, but I never thought I would hear a board member say that.

....

____ Well, after he told me that it was about finances, it was about athletics, it was they were going to take the cap down to zero over time....he explained to me that if somebody wanted to attend the City School system, they should live in the city schools. They should live where they want to go to school. That was his--that was his position.

(TE 554-555). Mr. Sowell testified that he was able to recall the conversation well because he took a great deal of notes during the conversation and then immediately typed

himself an email and mailed it to memorialize the conversation. (TE 555). This hearing officer finds that Mr. Sowell was a very credible witness.

When asked at the May 2013 board meeting by Jenny Greenwell whether Basham indeed had told Sowell that this was about athletics and that Warren County was going to take the cap down to zero, Basham declined to respond. (TE 560).

Joe Meyer, a parent residing in Warren County who wishes his child to attend Bowling Green because the child's brother attends there, testified that he phoned Gary Chaffin, whom he knows through business, after reading about the vote:

I said, Garry, I don't understand. If you cut it to 664 now, you don't let any new students attend, every year you're going to graduate students out, and you're going to get down to zero. Everybody's going to graduate out.

And he said, that's right. We'll go to zero. And he said well, we don't want to go to zero, we want to go one to one. And I said, well, how many students go from the city to the county. I think he said, around 20 or 30.

(TE 605-606). When Meyer told Chaffin this would wreck havoc, Chaffin responded "that's what we've got to do to make money or to make make the funds work out."

(TE 606). In a subsequent phone conversation with Meyer, Chaffin denied making these statements (TE 607) and he denied making these statements in his testimony at the hearing. (TE 541-542).

Given the statements made by Warren County board members regarding the future of non-resident contracts, the purely financial basis presented for the reduction to 664 for 2013-2014, the fact that this litigation may continue into, if not beyond, the 2013-2014 school year, and the fact that the 2014-2015 non-resident contracts will be up for discussion in a few months, it is highly likely that this controversy will repeat itself annually. This finding is relevant to whether a remedy in this case should address more than just the 2013-2014 school year.

RECOMMENDED 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 provides that

each parent, guardian, or other person residing in the state and having in custody or charge any child who has entered the primary school program or any child between the ages of six (6) and sixteen (16) shall send the child to a regular public day school for the full term that the public school of the district in which the child resides is in session or to the public school that the board of education of the district makes provision for the child to attend.

KRS 159.020 provides that

[a]ny parent, guardian, or other person having in custody or charge any child who has entered the primary school program or any child between the ages of six (6) and sixteen (16) who removes the child from a school district during the school term shall enroll the child in a regular public day school in the district to which the child is moved, and the child shall attend school in the district to which he is moved for the full term provided by that district.

Districts have a jurisdiction based upon geographic boundaries. Districts have a duty to educate students residing within those boundaries and no duty to educate students outside those boundaries. Taxes may be imposed on citizens residing within those boundaries to fund the district's school system. Citizens within the boundaries are eligible to determine democratically who should serve on the district's board and thereby influence the policies of the district's school system by voting.

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.

See KRS 157.350.

3. The Commissioner has the power to resolve disputes when two or more districts who have not entered into an agreement concerning same invoke the Commissioner's intervention by appealing pursuant to KRS 157.350.

The terms "settlement of the dispute" and "resolve the dispute" appearing in KRS 157.350 means that the Commissioner has been given the power to determine, even though doing so negates the autonomy of school districts, and the residents therein, to decide what is in the best interest of the school districts and those they serve, and though doing so could result in the loss of SEEK money to which a district would otherwise be entitled.

4. Because the two districts cannot agree on non-resident student arrangements and have appealed to the Commissioner pursuant to KRS 157.350, the Commissioner has jurisdiction, as explained in this hearing officer's earlier ruling on Respondent's motion to dismiss.

5. Warren County's imposition of a 664 cap does not deny Bowling Green due process.

Bowling Green argues that it was denied due process when Warren County adopted the 664 cap without giving Bowling Green a chance to participate in the process. However, any entitlement or right for which process is due exists due to KRS 157.350 and this appeal process constitutes the process due Bowling Green.

6. School districts may enter into multi-year contracts that are binding upon future boards.

KRS 160.160 provides local boards authority to enter into contracts KRS 157.350

expressly contemplates the possibility of multi-year contracts. This means that OAG 78-452, cited by Warren County as authority that a governmental body cannot have contracts extending beyond the terms of its members does not apply to multi-year non-resident contracts.

7. **Bowling Green's failure to appeal prior to this year when Warren County did not apply the percentage growth clause of the 2001 memorandum did not constitute waiver or preclude asserting the validity of the 2001 memorandum.**

The 2001 memorandum had a good faith clause that would allow for some flexibility, provided parties act in good faith. When the superintendent of Warren County represented that his board would not be comfortable approving the growth percentage in 2008-2009, Bowling Green was acting in good faith in by not pressing Warren County at that time. Bowling Green made it clear that it still wanted the growth percentage applied but did not press the issue in order to avoid creating strife in the community, hoping that Warren County would resume full performance of the agreement at some point. If Warren County wished to repudiate the 2001 memorandum, good faith would require that it have done so openly. It was only after the 664 cap was adopted in 2013 and Warren County took the position in subsequent meetings with Bowling Green that the 2001 memorandum was not binding that Bowling Green was on notice that Warren County was repudiating the 2001 memorandum.

8. **The superintendents had de facto authority to enter into the 2001 non-resident student agreement as the executive agents for their respective school districts, but did not have legal authority to do so.**

The superintendent is the Board's executive agent and can act on behalf of the board, as long as he or she remains subject to the board's control. KRS 160.370 provides that

[t]he superintendent shall be the executive agent of the board that appoints him and shall meet with the board, except when his own tenure, salary, or the administration of his office is under consideration. As executive officer of the board, the superintendent shall see that the laws relating to the schools, the bylaws, rules, and regulations of the Kentucky Board of Education, and the regulations and policies of the district board of education are carried into effect. He may administer the oath required by the board of education to any teacher or other person. He shall be the professional adviser of the board in all matters. He shall prepare, under the direction of the board, all rules, regulations, bylaws, and statements of policy for approval and adoption by the board. He shall have general supervision, subject to the control of the board of education, of the general conduct of the schools, the course of instruction, the discipline of pupils, and the management of business affairs. He shall be responsible for the hiring and dismissal of all personnel in the district.

(emphasis added). In this particular case, the superintendents of both Warren County and Bowling Green understood themselves to be acting as agents for their boards, consulted with members of their respective boards, and entered into an agreement resolving the non-resident dispute, both for 2001 and subsequent years, with knowledge not only of the boards but of the entire community through a press release. The fact that for many years thereafter superintendents and the boards of both districts behaved in conformity with the 2001 memorandum is evidence that the 2001 memorandum expressed the will of the respective boards regarding a long-term solution to the non-resident student issue at the time the 2001 memorandum was entered into.

However, neither board formally voted either to authorize the superintendents to act on their behalf or to ratify the 2001 agreement. This matters because KRS 160.160 expressly authorizes boards to enter into contracts. KRS 160.290 provides that boards

"shall have general control and management of the public schools" and "shall have control and management of all school funds and all public school property." OAG 65-411 opined that a superintendent cannot enter into a contract without authorization from the board. *Ramsey v. Board of Educ. of Whitley County*, 789 S.W.2d 784, 787 (Ky.App.,1990) held that a superintendent cannot make a contract for a board acting without proper authority from the board. .

A non-resident student agreement also has the consequence of reducing SEEK money received by one district and authorizing application of resources in the other district to educate students to whom no statutory duty to educate is owed otherwise. OAG 92-65 opined that a local board of education, not the superintendent, has authority over the expenditure of school funds and control over all public school property in the district.

This hearing officer believes that both boards genuinely intended to delegate authority to their respective superintendents to enter into an agreement as they did. However, to act lawfully, boards must act through voting. *Lone Jack Graded School Dist. v. Hendrickson*, 200 S.W.2d 736, 737 (Ky. 1947) states:

It is well settled that a Board of Education, like any other municipal body, speaks only through and by its record of what was done when acting as a body in a corporate meeting. No two members no all of them acting individually or separately could bind the Board or make a contract for it.

9. Under contract law, the 2001 agreement was not ratified, adopted by implication or binding by reason of estoppel.

The minutes of a school board meeting constitute the only legal evidence of all that was done by the board. Thus regardless of what board members intended or thought,

it is the actions of the board reflected in the minutes that constitutes the board's lawful actions. Deficiencies in the minutes of the board's proceedings cannot be corrected by a *nunc pro tunc* order which is based upon oral testimony or even upon affidavits. OAG 78-346.

Ramsey v. Board of Educ. of Whitley County, 789 S.W.2d 784, 786

(Ky.App.,1990) addresses the issues of implied contracts, ratification of contracts, and estoppel through accepting the benefits of a contract:

Public agencies cannot become liable under implied contracts. *Boyd Fiscal Court v. Ashland Public Library Board of Trustees*, Ky., 634 S.W.2d 417, 418 (1982). To be bound, a public agency must act through its records. *Id.* Consequently, the Board could only be bound through its minutes. *Lewis v. Board of Education of Johnson County*, Ky. 348 S.W.2d 921, 923 (1961); *Lone Jack Graded School District v. Hendrickson*, 304 Ky. 317, 200 S.W.2d 736, 737 (1947).

The Board could become bound, however, if it ratified the contract. Ratification involves an after-the-fact validation by the Board in the same manner and form prescribed in initially making the contract. *Knott County Board of Education v. Martin*, 256 Ky. 515, 76 S.W.2d 601, 603 (1934). In fact, even where a public agency has accepted the benefit of the contract, it will not be bound by its act (or inaction) unless the contract was formally ratified. *Boyd Fiscal Court*, 634 S.W.2d at 418; *Oberwarth v. McCreary County Board of Education*, 275 Ky. 319, 121 S.W.2d 716, 717 (1938).

A board can ratify any contract it can make, but ratification must be done in the same manner and with the same formality required to bind the board and must be unequivocal in character. *Goin v. Board of Education, City of Frankfort*, 183 SW2d 819 (Ky. 1944).

10. Equitable estoppel does not apply to the 2001 agreement.

Bowling Green argues that equitable estoppel applies. *Iles v. Commonwealth*, 320 SW3d 107 (Ky. App. 2010) holds that equitable estoppel cannot be invoked against a governmental entity, except in unique circumstances where the court finds exceptional and extraordinary equities involved.

Elements of estoppel, according to *Gray v. Jackson Purchase Production Credit Association*, 691 SW2d 904 (Ky. App. 1985) are the following: (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied on this conduct to his detriment.

In the present case, Warren County did not, at least until possibly a few weeks before repudiating the 2001 agreement, engage in acts, language or silence amounting to misrepresentation or concealment of a material fact. The superintendents and the boards at the time the 2001 agreement was entered into thought they had an agreement and they abided by it fully up until 2008-2009 and partially thereafter. There is no evidence that prior to the departure of Mr. Murley as superintendent in February of 2013 that Warren County planned to repudiate the agreement. Events from March 2013 forward are less clear, but prior to that date there is no suggestion that anyone was misleading anyone. Assuming *arguendo* that Warren County, or members of its board, formed a plan to reduce non-residents in the weeks or days leading up to the vote on the 664 plan, there's no evidence that such plan was concealed with an intention or expectation that Bowling Green would change position in reliance upon prior non-resident student agreements to its detriment. To the extent Bowling Green had to make changes in its plans when surprised by the 664 cap, those changes would have to have been made anyway if the cap had been adopted earlier.

Per *Iles*, it does not appear that the elements of equitable estoppel are present in this case, so the question of whether exceptional and extraordinary equities are involved need not be reached.

11. ~~The Commissioner~~ Commissioner must resolve this dispute by deciding whether and under what terms students will be educated in districts other than the one in which they reside. The Commissioner must consider relevant factors, including those expressly listed in KRS 157.350.

12. ~~Relevant factors support raising the minimum number of Warren County students permitted to attend Bowling Green to 850 for 2013-2014 and also for 2014-~~ 2015. Relevant factors support continuing to allow 750 Warren County students to attend Bowling Green pursuant to a non-resident student agreement that does not include a growth factor for the 2013 – 2014 school year.

Neither school district is in financial straits. Though SEEK money follows students, the students themselves are more important in this case than the dollars.

The fact-findings above demonstrate that Warren County is growing, not shrinking, and has no pressing financial need to increase its population by reducing the number of Warren County residents it permits to attend Bowling Green. Bowling Green, on the other hand, is not growing, is unlikely to grow much internally for reasons set forth in the findings, and to maintain stability depends upon a predictable influx of non-residents.

To avoid this very problem of determining the number of Warren County attendees Bowling Green could rely upon and how future growth in Warren County would be parceled out between the two school districts, superintendents of the two

schools entered into the 2001 agreement to provide a formula for resolving non-resident issues that protected both school systems and avoid community strife. As stated in the findings, the goal of the 2001 agreement was to create predictability. Legally, failure to formally vote on the agreement made it not a legal contract as such, but even the decision not to present the 2001 agreement for a formal vote was driven by the desire of both superintendents to avoid strife in the community. The statesmanlike efforts of Dr. Settles, Mr. Tinius and Mr. Brown to manage this non-resident issue consistent with a respect for the welfare of both school systems and the students and families within both systems was exemplary.

Regardless of the legal status of the agreement, the community reasonably relied upon existing arrangements in choosing where to buy homes, enroll their children, and accept employment. A reduction of 86 students impacts certain families immediately, regardless of whether the Bowling Green school system can absorb the change or not. Also, reductions over only a few years based upon Warren County residents who graduate from Bowling Green will by 2016 bring Bowling Green's bonding capacity close to its existing debt service.

However, long-term it is clear that a continued reduction to zero or one-to-one would severely impact Bowling Green, particularly two of Bowling Green's elementary schools, and to a degree the junior high school and the high school. It would adversely impact the population that could support advance placement offerings in high school. The relatively small economic benefit to Warren County of phasing out non-resident agreements with Bowling Green is far outweighed by the harm to Bowling Green in doing so. ~~Given that the time for agreeing to non-resident contracts of 2014-2015 will~~

arrive in only months, the remedy fashioned by the Commissioner should address that school year as well.

13. 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.

One of the fact findings is that this conflict is likely to repeat itself annually. The 2001 agreement, including the provision for a percentage of growth, was a good solution crafted by the superintendents of the two districts.

RECOMMENDED ORDER FINAL DECISION

~~1. Warren County shall permit 750 Warren County residents to attend Bowling Green schools in 2013-2014 pursuant to a non-resident student agreement.~~

~~2. Warren County shall permit 750 Warren County residents to attend Bowling Green in 2014-2015.~~

1. The 2013 – 2014 school year non-resident student agreement between the Bowling Green Independent School District and the Warren County School District shall only include 750 students. This 2013 – 2014 school year non-resident agreement between the Bowling Green Independent School District and the Warren County School District represents the agreement that would have been in place if prior year agreements were repeated (excluding the non-contract students and children of school employees from the calculations), and does not include a growth factor.

2. The 2014 – 2015 non-resident student agreement shall be

negotiated by the respective Boards of Education for the Bowling Green Independent School District and the Warren County District pursuant to KRS 157.350.

3. It is further ordered that if an agreement regarding the 2014 – 2015 non-resident student agreement cannot be reached by April 1, 2014, the superintendents of both districts and the chairs and vice chairs of the respective boards of education shall participate in a formal mediation of the 2014 – 2015 non-resident student agreement with the cost of mediation shared equally by the parties. The parties shall select a mediator from the list of mediators approved by the Administrative Office of the Courts.

NOTICE OF APPEAL RIGHTS

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.

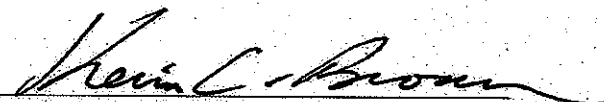
SO ORDERED this 22d day of August, 2013.


TERRY HOLLIDAY, PH.D.
COMMISSIONER OF EDUCATION

CERTIFICATION

The foregoing served by ^{email}~~facsimile~~ and first class mail upon upon Regina Jackson, English, Lucas, Priest & Owsley, 1101 College Street, Bowling Green, KY 42101, and Bart Darrell, c/o Warren County Public Schools, 303 Lovers Lane, Bowling Green, KY 42103, on August 22, 2013.

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KEVIN C. BROWN,
GENERAL COUNSEL