

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

BOARD OF EDUCATION FOR THE
WARREN COUNTY SCHOOLS

APPELLANT/
CROSS-APPELLEE

v.

**BOARD OF EDUCATION FOR THE WARREN
COUNTY SCHOOLS' APPELLANT BRIEF**

BOARD OF EDUCATION FOR THE
BOWLING GREEN INDEPENDENT SCHOOL DISTRICT

APPELLEE/
CROSS-APPELLANT

Comes the Appellant/Cross-Appellee Board of Education for the Warren County Schools ("Warren County Board"), and for its Appellant Brief, states as follows:

The Commissioner's two-page Final Order simply adopted the Hearing Officer's Recommended Order. However, when the Record from this Appeal, including the Exceptions filed by the Warren County Board, is viewed in its entirety, it is evident that the Recommended Order was rife with error and did not provide a thorough, objective analysis upon which an ultimate decision should be based. The Warren County Board has successfully demonstrated that it could and would have benefited financially from the addition of forty-one (41) students¹ if only currently enrolled nonresident students and their incoming siblings were permitted to attend Bowling Green Independent School District ("Bowling Green") for the 2014-2015 school year. Conversely, Bowling Green failed to show that it would experience any adverse affect from the

¹ At the hearing Warren County used the figure of 41 students who would return if the hearing officer found in its favor and allowed all currently enrolled students plus incoming siblings attend Bowling Green for the 2014-2015 school year. That number was determined by taking 764 nonresident students and subtracting 92 seniors on track to graduate and then adding to that number the 37 siblings of currently enrolled nonresident students who have applied for the 2014-2015 school year. ($764 - 92 = 672 + 37 = 709$.) However, during the hearing, Bowling Green acknowledged that its calculation was in error and that it actually has enrolled 775 nonresident students from Warren County. As the analysis at the hearing addressed the potential return of 41 students, so shall the analysis in this brief.

loss of those students. Furthermore, the Warren County Board conclusively demonstrated that the highly selective process used by Bowling Green to choose which nonresident students are permitted to attend its schools is discriminatory, and should be replaced by a process that is fair, equitable and transparent.

As a result of the Commissioner's Order, the affected students were permitted to begin their school year at Bowling Green. The Warren County Board does not seek to disrupt the educational process of any student. Accordingly, the Warren County Board respectfully requests that the Kentucky Board of Education amend the Commissioner's Final Order, and apply the holding prospectively, allowing only currently enrolled students and their siblings to attend Bowling Green in the 2015-2016 school year, unless some other agreement is reached by the parties for that school year.

FACTS

This is the second year in the dispute over nonresident students between these two districts. Under Kentucky law, students are to attend the public school in the district where they reside.² State funding for school districts is allocated on a per-student basis through the Support Education Excellence in Kentucky ("SEEK") fund. **KRS 157.330**. Each district receives an amount equal to the base funding level for each pupil in daily attendance in the district in the previous year. Prior to 2013, students could only be counted in a district's average daily attendance if the student resided in the district or was listed under a nonresident agreement. *See KRS 157.350(4)(a)*.

² See **KRS 159.010**; **KRS 159.020** and **KRS 159.010**.

For many years, hundreds of Warren County students – and their state funding – have left the Warren County School District each year to attend Bowling Green as nonresident students under a nonresident agreement between the districts. During the 2012-2013 school year the number of nonresident students permitted to attend Bowling Green from Warren County under such an agreement was 850. In 2013, the Kentucky General Assembly amended **KRS 157.350**, to allow children of district employees (“CDEs”) to attend the school district where their parent is employed without being counted under a nonresident agreement. *See KRS 157.350(4)(b)*. Bowling Green Superintendent Joe Tinius (“Mr. Tinius”) contacted Warren County Director of Student Services Pat Stewart (“Mr. Stewart”) and suggested that the nonresident agreement for the upcoming year should be reduced to 750 to account for the approximately 100 CDEs³ that he claimed were enrolled in Bowling Green.

In April 2013, faced with reduced funding and increasing costs, the Warren County Board voted to reduce the number of nonresident students permitted to attend Bowling Green for the 2013-2014 school year by eighty-six (86) students. This represented the number of nonresident Warren County students who were graduating from Bowling Green at the end of the 2012-2013 school year. That reduction, coupled with the reduction of the 100 children of district employees initiated by Mr. Tinius due to the change in the law, would have brought the number of Warren County students permitted to attend Bowling Green under a nonresident agreement in 2013-2014 to 664.

³ During this year’s dispute it was discovered that Bowling Green misrepresented the facts regarding the number of CDEs attending its district. During the 2013-2104 school year, there were 181 CDEs residing in Warren County, but attending Bowling Green – an 81% increase from the number provided by Bowling Green.

The Board of Education for the Bowling Green Independent School District (“Bowling Green Board”) refused to agree to the reduction, and filed the first appeal to the Commissioner of Education. Three days of testimony and voluminous exhibits were presented during the hearing. Much of the evidence focused on a 2001 Memorandum of Agreement (“MOA”), a document that was entered into by former superintendents and never voted on or ratified by either School Board. In addition, the evidence presented during last year’s hearing also established that Bowling Green has in place a highly selective process for choosing which nonresident students it allows to attend its district. Prior to the 2013 dispute, Warren County Board Members were not fully aware of Bowling Green’s selection process.

The Hearing Officer’s 2013 Recommended Findings of Fact, Conclusions of Law, and Recommended Order determined that the MOA was not a binding or enforceable contract, but directed the Warren County Board to maintain the status quo of 750 students for the 2013-2014 and the 2014-2015 school years. The Recommended Order further directed the parties to reach a new agreement before the start of the 2015-2016 school year.

In his 2013 Final Order, the Commissioner of Education agreed that the MOA was not enforceable. However, he required the Warren County Board to maintain the status quo of 750 students for the 2013-2014 school year only and directed the respective Boards to negotiate a 2014-2015 Nonresident Student Agreement. In the event the parties could not reach an agreement for the 2013-2014 school year, the Commissioner ordered them to participate in mediation.

The parties, through their respective superintendents, engaged in informal negotiation discussions for several months, during which no agreement was reached. At the outset of these negotiations, Warren County Superintendent Rob Clayton ("Mr. Clayton") informed Mr. Tinius that the selection process was necessarily a part of the agreement and that the Warren County Board would not enter into any agreement that was not fair and equitable to all students.

On December 17, 2013, the Warren County Board approved a proposed nonresident agreement, which would have reduced the student cap by 500 over a ten (10) year period. Accordingly, the number of nonresident students would be reduced by fifty (50) students each year during the contract period. The Warren County Board's proposal included a random draw, similar to the process used by Hardin County School District and Elizabethtown Independent School District, to determine what new students would be permitted to attend Bowling Green for the 2014-2015 school year. The reduction would not include nonresident students already enrolled in Bowling Green schools or their siblings. *See Contract, Joint Exhibit 5.*

The Bowling Green Board rejected the offer and submitted its own proposal on December 20, 2013, which would have reduced nonresident students by four (4) each year over a ten (10) year period, eliminating only forty (40) students. Under the Bowling Green Board's proposal, 746 county students would be allowed to attend Bowling Green schools during the 2014-2015 school year. In addition, the proposal did not address the process for determining how new students would be admitted to Bowling Green. *See Contract, Joint Exhibit 3.* On January 13, 2014, the Warren County Board rejected this proposal. Pursuant to the Commissioner's Order, the parties attempted mediation on February 8, 2014, but did not reach an agreement.

On February 17, 2014, the Bowling Green Board passed a second proposed nonresident student agreement that would reduce the student cap by ten (10) each year over a ten (10) year period, bringing the total number of nonresident students who could attend Bowling Green schools to 650 at the end of the contract period. The proposal also incorporated a process for determining how new students would be admitted to Bowling Green, based upon date of application. *See Contract, Joint Exhibit 4.* The Warren County Board rejected the proposed contract and voted to initiate the current appeal.

In its appeal, the Warren County Board asked the Commissioner to settle the dispute for the 2014-2015 school year. As relief, it requested that only the nonresident students who are currently enrolled in a district and their siblings be permitted to continue to attend their respective district. The Bowling Green Board filed a Cross Appeal, which like the Warren County Appeal, addressed the 2014-2015 school year only. Bowling Green sought 750 students plus a growth factor for the upcoming school year.

Immense discovery was conducted by the districts prior to the hearing. Bowling Green originally produced to Warren County a number of 726 nonresident students who were attending Bowling Green, but who resided in the Warren County district. Upon review of Bowling Green's student directory information, Warren County presented Bowling Green's counsel with potentially 78 additional nonresident students from Warren County. Bowling Green acknowledged its nonresident count was in error, and later produced a number of 764. Further potential mistakes were pointed out during the hearing, and on the final day of testimony Bowling Green acknowledged that it had 775 Warren County nonresident students currently enrolled, twenty-five (25) more than the Commissioner's 2013 Order allowed.

The Hearing Officer issued his Recommended Order on May 23, 2014. The Recommended Order employed a lopsided analysis that disregarded crucial evidence and judged the proof presented by the districts by different standards. Likewise, vital conclusions of law, such as Bowling Green's violation of the Commissioner's 2013 Final Order or the discretion that is vested in a local board regarding nonresident agreements, do not appear anywhere in the 40-page Recommended Order. It is impossible that in light of these omissions that the evaluations made in the Recommended Order considered all applicable law or serves as a valid basis for the ultimate decision in this matter.

The Warren County Board filed nearly 80 pages of exceptions to the Recommended Order, discussing in detail of the blatant errors found in the analysis. The Commissioner's Final Order, issued on July 2, 2014, did not even address the exceptions, but merely adopted the Recommended Order in its entirety.

The Warren County Board voted to appeal the dispute to the Kentucky Board of Education for an ultimate decision.

ANALYSIS

I. Standard of Review

Pursuant to **KRS 13B.120**, after considering the record, including the recommended order and any exceptions duly filed, the agency head "*may* accept the recommended order of the hearing officer and adopt it as the agency's final order, or it *may* reject or modify, in whole or in part, the recommended order, or it may remand the matter, in whole or in part, to the hearing officer for further proceedings as appropriate." Emphasis supplied.

The agency head, as the ultimate trier of fact, is “afforded great latitude in its evaluation of the evidence heard and the credibility of the witnesses appearing before it.” Justice and Public Safety Cabinet, Dept. of Juvenile Justice v. Kentucky Personnel Bd., 2009 WL 2475335, *2 (Ky. App. 2009). *See also* Justice and Public Safety Cabinet, Dept. of Corrections v. Kentucky Personnel Bd. 2013 WL 375589, *1 (Ky. App. 2013). The agency head is not required to accept the recommended order of a hearing officer. Whittaker v. Kentucky Retirement Systems, 2009 WL 103221, *4 (Ky. App. 2009). It must review the entire record and “determine whether there is justification—according to the facts and the applicable law—for adopting the recommended order.” Rapier v. Philpot, 130 S.W.3d 560, 563 (Ky. 2004).

Upon due consideration of the entire record, an agency head enjoys the prerogative of making factual findings independent of, and even contrary to, those of the hearing officer. **KRS 13B.120(2)**.

Pursuant to **KRS 157.350(4)(a)(3)**, the Kentucky Board of Education is the body which will make the final determination in this matter. (“Either board may appeal the commissioner's decision to the Kentucky Board of Education.”) See also KRS 157.350(4)(a)(5) (“The Kentucky Board of Education shall have sixty (60) days to approve or amend the decision of the commissioner”). As the ultimate decision maker, the Kentucky Board of Education is not bound by the Commissioner’s decision, but is free to exercise its own judgment regarding the facts before it.

II. The Hearing Officer Judged the Evidence By the Incorrect Standard

The respective appeals from the Warren County Board and the Bowling Green Board sought resolution for the 2014-2015 school year only. Accordingly, the proof regarding the

impact on the issues identified in **KRS 157.350(4)(a)(4)** – academic performance, programs, school facilities, transportation and staffing of the districts – is only relevant as it relates to the 2014-2015 school year. Though the parties disagreed on what the exact number of students in dispute was,⁴ it was undisputed that no one was seeking to reduce the number of Warren County nonresident students to zero during the 2014-2015 school year. However, that was the standard by which the Hearing Officer judged the vast majority of the proof presented during the hearing. Despite the fact that no long-term resolution was sought or reached through this appeal process, the Hearing Officer wrongly focused on what he incorrectly perceived as long-term consequence. Any consequence that may or may not occur because of future reductions have no relevance on the issue at bar. This Appeal addresses only what will happen for the 2014-2015 school year. To admit evidence that looks beyond 2014-2015 – regardless of when this matter might be resolved long term – is outside the scope of what the Hearing Officer was asked by both parties to decide, and thus is irrelevant.

Moreover, even if future consequences were relevant to this appeal, which is denied, there was absolutely no evidence that the Warren County Board has any intent to ever reduce the number of nonresident students permitted to attend Bowling Green to zero or to a one-to-one ratio. During the hearing, Warren County produced an abundance of evidence – ***none of which was contradicted by Bowling Green*** – that it does not seek to reduce the number of nonresident students permitted to attend Bowling Green to zero. Notwithstanding the evidence presented, the Hearing Office continually judged the evidence by that standard. He even went so far as to make a finding of fact that the Warren County Board wants to reduce the number of students permitted

⁴ As is discussed above, prior to the hearing, the Warren County Board determined the number of students in dispute was 41. The Bowling Green Board argued the number of students at issue was 55, and based its evidence and testimony upon that number.

to attend Bowling Green “as much as it can and as fast as it can.” In reaching this unsubstantiated finding, he relied solely on irrelevant testimony presented during the 2013 hearing while disregarding testimony from this year’s hearing that is both more current and relevant to the issue of Warren County’s long-term intent.

All of the evidence presented during the hearing established unequivocally that there has been **no action** taken by the Warren County Board to reduce the nonresident student cap to zero or to a one-to-one ratio. In December 2013, the Warren County Board passed a contract that would reduce the number of Warren County resident students allowed to attend Bowling Green as nonresident students to 250 over a 10-year period. *See* Joint Exhibit 5. To say that the Warren County Board seeks to reduce the number of nonresident students “as much as it can and as fast as it can,” fails to recognize that Warren County’s contract proposed a gradual reduction over a long-period of time that allows for a substantial number of nonresident students to attend Bowling Green.

Warren County Board Chair Kerry Young (“Mr. Young”) testified that there has never been any action – or even discussion for that matter – of the Warren County Board of Education to reduce the nonresident cap to zero or to a one-to-one ratio:

Q. Sir, has the Warren County Board ever taken any official action to reduce a contract with Bowling Green to zero?

A. No, ma'am.

Q. Has there ever been any action taken that would reduce it to a one-to-one ratio?

A. No, ma'am.

Q. Sir, do you have any intent to reduce the contract with Bowling Green to zero?

A. No, ma'am.

Q. Do you have any intent to reduce this contract to a one-to-one ratio?

A. No, ma'am.

Q. Are you speaking on behalf of yourself, sir, or are you speaking on behalf of the board as its chairman?

A. Speaking on behalf of myself but as the chairman, I'm also speaking on behalf of the Warren County School Board.

Q. In any conversations that the board members have had, has there ever been a discussion about taking it to zero?

A. No, ma'am.

Q. And, again, ever any discussions about taking it to one-to-one ratio?

A. No, ma'am.

TE II, p. 12-13. Mr. Young testified that he personally never intends to reduce the cap to zero.

TE II, p. 52.

Warren County Superintendent Mr. Clayton further testified that while the Warren County Board sought a long-term reduction over an extended period, at no time was eliminating the contract or reducing it to a one-to-one ratio an option that the Board was considering.

Q. Sir, at any of those conversations did you ever indicate to Mr. Tinius that going to zero was an option or something that the Warren County Board was considering?

A. I made it very clear to him that, in my – at that time five, six, seven months in discussions with board members whether it be closed session or out of session, that at no time had any board member ever expressed an interest to take it to zero. And, in fact, shared with him that had several board members that said we do not and would not support taking it to zero.

Q. Sir, as we sit here today, what is your understanding of the Warren County Board of Education's intent as it relates to the nonresident contract with Bowling Green?

A. Our board simply is committed to developing a transparent, fair, and equitable process, and then coming together on an acceptable number. Certainly not the 750 or 850, 900 whatever that number is because we -- we really don't know what that number is when you take it all into consideration. But -- but certainly want to see it be gradually, over time, reduced. And at this point, a ten-year period was suggested, but I think our board is certainly open to -- to anything that's long term.

TE I, p. 79-80.

Bowling Green presented absolutely no evidence during the Hearing that contradicted the above testimony or established that Warren County had any intent to reduce the nonresident cap to zero. Even Mr. Tinius, Bowling Green's Superintendent, acknowledged that at no time during this process has there ever been a discussion of taking the nonresident cap to zero:

Q. Did Mr. Clayton ever indicate to you that the Warren County Board was going to go to zero or one-to-one ratio?

A. No. He indicated to me that they were looking very seriously at the process and the number that Hardin County was currently using. And the one proposal they made very much is in line with that final number of 250.

Q. Uh-huh. But he never said zero, did he?

A. No, ma'am. No.

Q. And he never said one-to-one?

A. Not that I can recall, no.

Q. Did any plan that has been presented to you ever look at bringing the number below 250?

A. No. Not -- not that's been shared with me, no.

Q. So since May of 2013, you directly have never received any sort of further information from anybody at Warren County, a representative or a board member, that they intend to take this contract to zero at any time?

A. No. Nothing's been presented to me to go to zero, no.

See TE 1, 84-85.

The Hearing Officer unreasonably equates a long term reduction to a desire to eliminate the nonresident agreement completely or reduce the cap to a one-to-one ratio. There was no evidence presented during this year's hearing that would support such a conclusion. To support this finding, despite three days of testimony, the Hearing Officer had to resort to citing to testimony from last year's dispute that he claims shows that two Warren County Board members stated that the intent was to reduce the nonresident cap to zero or one-to-one. There is ample reason why this testimony is not sufficient to support such a finding. First, in citing to the 2013 testimony, the Hearing Officer failed to even mention that Don Basham and Garry Chaffin, the two Warren County Board members who allegedly made comments about going to zero or one-to-one, denied that they had made such unequivocal statements. Furthermore, even if these alleged comments had been made, which has been denied, they are no longer relevant because the facts have changed so significantly over the past year. The testimony relied upon by the Hearing Officer was offered during last year's hearing when the only official action taken by the Warren County Board was a one-time, one-year reduction of 86 students. The contract approved this year by Warren County Board was a long-term reduction over ten (10) years that ultimately reduced the nonresident student cap to 250. Comments allegedly made more than a year ago regarding the intent of the Warren County Board for further reductions are no longer relevant because the Warren County Board has spoken on its intent through its official action, which in no way indicates the drastic reduction that the Hearing Officer's Recommended Order finds.

This Recommended Finding, which is the basis for every other determination made by the Hearing Officer, is arbitrary, capricious and not supported by substantial evidence.

III. Warren County has shown it can benefit from the return of students, and Bowling Green has failed to show that it will be adversely affected this school year

The issue that was before the Hearing Officer – and the issue now before the Kentucky Board of Education – is how many Warren County students should have been permitted to attend Bowling Green during the 2014-2015 school year. The only impact that is important and relevant to this analysis is the impact that would have been felt during the 2014-2015 school year. That is the lens through which the factors identified in **KRS 157.350(4)(a)(4)** – academic performance, programs, school facilities, transportation and staffing of the districts – should be viewed. When the appropriate standard is applied, it is evident that any impact to Bowling Green would be so insignificant that it could not be viewed as adverse in any way. Conversely, Warren County proved that it will see a financial benefit from the addition of these students.

A. Bowling Green Failed to Establish It Would Have Experience a Detrimental Impact If Fewer Nonresident Students were Permitted to Attend During This School Year

The Hearing Officer found that the detrimental impact to Bowling Green if the affected students were not permitted to attend its district would outweigh any benefit that Warren County would gain from their return. However, there was absolutely no evidence that any detrimental impact would occur during the 2014-2015 school year, which is the only year at issue in this dispute. Bowling Green's entire argument, and the Hearing Officer's analysis, is prefaced on the return of **ALL** Warren County nonresident students. As is discussed thoroughly above, it is undisputed that no party sought the complete elimination of the nonresident agreement for the 2014-2015 school year.

The Hearing Officer paints a bleak picture of the Bowling Green district without any Warren County nonresident students. However, the dire aftermath that he claims is looming just ahead would not have occurred in the 2014-2015 school year if Warren County was successful in

this appeal. Likewise, it would not occur the year after, or the year after that, or the year after. Bowling Green's own expert testified that if an attrition model was continued, Bowling Green would not reach zero nonresident students from Warren County until the 2035-2036 school year, more than 20 years down the road. *See* Bowling Green Exhibit No. 5. And that assumes that Warren County intends to take the number to zero, which it does not. Such a far-reaching projection is nothing more than speculation. Moreover, despite the fact that the Hearing Officer found that Bowling Green experienced an internal growth of 2.5% this year, and that it has grown internally every year for the past decade, he fails to recognize that any impact felt by the loss of Warren County students would be offset, at least in part, by internal growth.

There is no evidence that Bowling Green would have experienced any adverse affect if 55⁵ fewer nonresidents students had been permitted to attend its district. According to its own evidence, the reduction of 55 students would reduce its bonding capacity less than \$600,000, leaving the district with more than \$10 million available in bonding. There was no evidence that the district would close any of its schools if it had 55 fewer students. Despite findings that four individual schools (Potter Gray Elementary School, W.R. McNeill Elementary School, Bowling Green Junior High School and Bowling Green High School) would suffer a "dramatic effect" from the loss of the Warren County nonresident students, the truth is Bowling Green actually presented no evidence on how these school populations would be affected by the reduction of 55 students. However, common sense dictates that this few of students, spread across an entire district, would not have a great impact on any one individual school.

⁵ Though Warren County contends that the number of students at issue is lower, it uses 55 when discussing arguments made by Bowling Green during the Hearing because that was the number upon which it based the evidence and testimony it presented.

The district's demographics would shift only slightly with 55 fewer Warren County students. Student populations would change only tenths of a single percentage point. For example, Bowling Green's free and reduced lunch population would increase approximately one half of one percent (.5%). *See* Bowling Green Exhibit 8; its minority population would increase just over three tenths of one percent (.3%). *See* Bowling Green Exhibit 9; its special education population would increase less than one tenth of one percent (.1%) *See* Bowling Green Exhibit 10; and its limited English proficiency ("LEP") population would increase approximately one tenth of one percent (.1%). *See* Bowling Green Exhibit 11.

Likewise, despite the Hearing Officer's conclusion that Bowling Green's academics would greatly suffer from the change, the evidence demonstrated that Bowling Green's Gifted and Talented population would decrease by less than one quarter of one percent (.25%). *See* Bowling Green Exhibit 12. Bowling Green presented no evidence that any of its course offerings would be reduced or hindered at the junior high or high school level, or that any advanced placement offerings were being reduced if Warren County was successful in this appeal. There was no evidence that there would be any negative impact whatsoever on Bowling Green's certified and classified staff. In fact, Mr. Tinius testified that prior to the hearing, the Bowling Green Board approved a 3% discretionary staffing formula for 2014-2015, including only currently enrolled nonresident students and their siblings. *See* TE III, p. 237-38. Under this formula, even with the loss of 55 students, Bowling Green hired an *additional* teacher for the 2014-2015 school year. **Id.**

The Hearing Officer also fails to acknowledge that any reduction or elimination that may occur would be based on reduced need as well. If the district has fewer students, it will have a need, for example, for fewer teachers. There is no evidence that the district or the students would somehow be negatively affected by fewer teachers, if in fact, there is a need for fewer such positions. As long as the district's *needs* are being satisfied there is no adverse effect. Bowling Green presented no evidence that with fewer nonresident students, it would not be able to meet its needs.

In actuality, if Warren County is successful, and Bowling Green was limited to only the currently enrolled nonresident students and their incoming siblings during the 2014-2015 school year, the district would actually have been in a *better* position than it was in 2013, before Warren County initially voted to reduce the student cap.

As is mentioned above, for several years prior to 2013, 850 students were permitted to attend Bowling Green from Warren County under a nonresident agreement. The law changed that year to allow children of district employees to attend a nonresident district without being included under a nonresident agreement. The Bowling Green Superintendent claimed that the district had approximately 100 children of district employees enrolled and reasoned that those students should be reduced from the overall contract number. Applying Mr. Tinius' theory, Bowling Green would have retained in the exact same *total* number of nonresident students it had in the 2013-2014 school year: 850.

A final head count of Warren County nonresident students enrolled at Bowling Green at the conclusion of the 2013-2014 school year was 775. In addition to these students, there are also 181 children of district employee's who reside in the Warren County district. This brings the

total number of Warren County residents who attended Bowling Green that year, and for whom Bowling Green is receiving SEEK funds, to 956. This equates to more than \$380,000 additional state dollars Bowling Green is receiving for the 2013-2014 school year for nonresident students than it did the year before.

Of those 956 students, 92 nonresident students and 13 children of district employees were on track to graduate at the end of the 2013-2014 school year. After graduation, that brought the number to 851 students. This is still more than Bowling Green received under the 2012-2013 contract, even without any new sibling enrollees. But when the 37 siblings are added to that number, the total number of potential nonresident students who would have been permitted to attend Bowling Green if Warren County was successful would have been 888. There is simply no way to argue that Bowling Green would have somehow been negatively affected, when in fact it actually would have had *more* Warren County nonresident students than in recent years.

B. Warren County Would Benefit Financially From the Addition of These Students

The Warren County Board provided substantial evidence that it will likely see an immediate benefit, and that it will unequivocally see a long-term benefit, from the addition of these students.

Witnesses for both parties acknowledged that some students are less expensive to educate than others, agreeing that students with special needs and students who are classified as Limited English Proficiency ("LEP") generally require substantially more education costs than those students in the general student population. The vast majority of the students who are leaving Warren County to attend Bowling Green as nonresident students do not fit into either of these categories.

Bowling Green's own data shows that the children who are leaving Warren County to attend Bowling Green are less expensive to educate. According to Bowling Green's district report card, it spends \$10,914 per pupil. However, the cost per student at each of the four schools that have the highest number of Warren County nonresident students is significantly lower. *See* Joint Exhibit 73. The majority of Warren County nonresident students are concentrated in four Bowling Green schools: Bowling Green High School, Bowling Green Junior High School, Potter Gray Elementary School, and W.R. McNeill Elementary School. All four of those schools have lower percentages of students classified as LEP, fewer students enrolled in special education and their per pupil expenditures that are thousands of dollars less than the district's average:

School	2013-2014 Total Percentage of LEP⁶	2013-2014 Total Percentage of Special Education⁷	Per Pupil Expenditure⁸
Potter Gray Elementary School	3.85%	7.71%	\$8,205.89
W R McNeill Elementary School	3.69%	11.79%	\$8,208.71
Bowling Green Jr. High School	6.56%	11.74%	\$7,099.88
Bowling Green High School	5.74%	7.74%	\$8,022.62

Compare these Bowling Green schools with Parker-Bennett-Curry Elementary School, which has just six (6) Warren County nonresident students enrolled. Almost 37% of its student population is classified as LEP and 11.63% of its students are enrolled in special education. *See* Joint Exhibits 33 and 29, respectively. Its per pupil expenditure is \$12,088.26, nearly \$1,200 more than the district's average per pupil cost. *See* Joint Exhibit 73. More telling, however, is

⁶ *See* Joint Exhibit 33

⁷ *See* Joint Exhibit 29

⁸ *See* Joint Exhibit 73

the fact that Parker-Bennett-Curry Elementary School's average per pupil expenditure is more than \$4,000 more than the average spent at Bowling Green's four schools with significant Warren County nonresident students.

Warren County's Director of Finance Chris McIntyre ("Mr. McIntyre") testified that Warren County could experience a gain of up to \$106,000 this school year through the addition of 41 students. TE I, p. 357. While he did acknowledge there was a possibility that the district could experience a loss of \$28,000, he stated unequivocally that in upcoming years, even if an initial loss occurred, a financial benefit would be experienced from the addition of these students. TE I, p. 381-82.

For the 2014-2015 school year, the base SEEK amount is \$3,911 per student. Accordingly, if 41 additional students had attended Warren County this year, the district could have seen a potential gross increase of \$160,351. Mr. McIntyre created four scenarios for the addition of these students, three of which the district would see a gross benefit from the addition of these students the first year. Under all the scenarios Warren County would financially benefit long-term from the return of these students. *See Generally*, Mr. McIntyre testimony, TE I, p. 381-386. *See also*, Warren County Exhibit 13.

Because districts receive only half SEEK funding for kindergarten students, McIntyre projected that Warren County would receive a total of \$119,285.50 in Fiscal Year 2015 for the addition of 41 students. *See* Warren County Exhibit 13. Using both the 2013-2014 year's enrollment, and the projected 2014-2015 year enrollment, he calculated that the district could have netted as much as \$114,333.59 this year from the addition of these students if no new staff were added as a result of the additional students.

Mr. McIntyre projected⁹ that as many as two teachers or one teacher and one aide may have been needed to accommodate the additional students. However, he explained that each school's site based counsel has the discretion to authorize the school to exceed the current teacher/student ratios, so additional staff would not necessarily have been added. TE I, p. 334. If one teacher and one kindergarten aid had been added, the district would have still netted more than \$33,000 in the 2014-2015 school year under his projections. *Id.* That figure would increase the following year as the kindergarten students moved into first grade, and the district began receiving the full SEEK amount for each student. TE I, p. 346-47.

If two new teachers were added as a result of the additional students, it would have cost the district approximately \$28,000 in 2014-2015. TE I, p. 381. However, as the kindergarten students move into first grade, and the district will begin receiving full SEEK for those students, and it would turn into a "net gain" in year two that would continue until the students graduated from Warren County schools. *See* Mr. McIntyre testimony, TE I, p. 346-47. Again, the Site Base Counsel could have authorized the school to exceed the current student/teacher ratio, which could have eliminated the need to hire any new staff.

The Hearing Officer failed to even acknowledge the partial funding received by districts for kindergartners and the impact that would have on the financial analysis, or the fact that these students would continue to generate SEEK revenue throughout their tenure at the district. There was also no discussion of overhead costs, which remain fixed regardless of the number of students attend a school. Mr. McIntyre testified that if 41 additional students came to Warren County in the 2014-2015 school year, the district would be able to absorb these students without

⁹ Upon review of the actual 2014-2015 enrollment numbers, Warren County has determined that it would not have had to hire any additional teachers to accommodate the 41 affected students.

incurring much increase in its overhead costs, allowing the district to experience a financial benefit from the return of these students. Warren County Chief Financial Officer Willie McElroy testified that Warren County would have ample space in its schools to accommodate the new students. *See* TE I, p. 270-71. Warren County has a total capacity of 16,031 in its 22 schools. *Id.* There are currently 14,457 students enrolled in the district, leaving more than 1,500 available seats. *Id.* Those 41 students could be absorbed without any increased costs to the district's facilities.

The Hearing Officer makes the conclusory statement that even if the maximum funds are gained next year under Mr. McIntyre's analysis, such an amount is an "insignificant" portion of Warren County's budget. However, there was absolutely no evidence to support such an evaluation of the benefit. In fact, the evidence established that no portion of Warren County's budget, no matter how small, is insignificant, especially in light of the financial struggles that are facing all school districts across Kentucky. Mr. McIntyre's testimony evidenced that the funds could directly benefit students:

Q. So circling back around, Mr. McIntyre, to my original question: What would you as director of finance for the district say to somebody that says, well, your projections are such a small amount of your general fund budget, why would it even matter that you take these 41 additional students?

A. I would say to them: I go through the budget in very great detail. And if I can look at saving a dollar, I'll save the dollar. \$30,000, \$40,000, \$50,000, you're getting into aides, you're getting into teaching units, you're getting into the classroom at that point. You have a direct impact on kids at that point.

TE I, p. 356-57.

Despite ample evidence on the long-term financial effect a one-time reduction would have on Warren County, the Hearing Officer's analysis addressed only the financial impact that would be experienced next year. His analysis has continually measured proof by the maximum

harm that would be done to Bowling Green, but looked only at the minimal benefit that could be felt by Warren County. Such analysis distorts the facts and leads to arbitrary conclusions.

The Warren County Board, through its official action, has acknowledged that it seeks a long-term gradual reduction in the number of nonresident students that attend Bowling Green. When a gradual reduction is the plan, the initial loss and benefit felt by each school district is minimal. This allows each district to adjust to and absorb the changes. But over time, the benefit will be increased. To dismiss the value of the first step in a gradual plan as insignificant is to hold the Warren County Board hostage and refuse to allow for change. Such an analysis is neither logical nor legal.

IV. Bowling Green's Diversity Will Not Be Adversely Affected By the Reduction of Warren County Students

The Hearing Officer made a Recommended Finding, which was adopted in the Commissioner's Final Order, that allowing a reduction in the number of nonresident students attending Bowling Green would adversely affect diversity in that district and harm its students.

Like all of his analyses, the Hearing Officer incorrectly looked at the impact that would be felt if all Warren County nonresident students were removed from the Bowling Green district. The analysis in this Recommended Finding of Fact should have looked solely at what impact would be felt from allowing currently enrolled students and their siblings to attend Bowling Green in the 2014-2015 school year. There is absolutely no evidence that a significant shift in student demographics would occur if Warren County is successful in this appeal. If 55 students return to Warren County for the 2014-2015 school year, Bowling Green's overall minority population would increase less than .4%, going from 41.09% to 41.42%. *See* Bowling Green Exhibit 9. Its free and reduced lunch population would increase just .59%, going from 54.41% to

55%. *See* Bowling Green Exhibit 8. Bowling Green provided no evidence that such miniscule shifts in student population would be anything but inconsequential.

The Hearing Officer relies heavily on the testimony of Dr. Roslyn Mickelson (“Dr. Mickelson”), an expert Bowling Green hired to testify on its behalf. However, her testimony failed to support this finding.

Even if all the Warren County nonresident students are returned to Warren County, which Warren County is not seeking, the increase in the district’s overall minority population would increase just over 5% to 46.67% minority. Dr. Mickelson declined during her testimony to classify any of the changes as significant or insignificant because “significance has enormous statistical indications. I’m not prepared to make any of those statements.” TE I, p. 143. *See also* TE I, p. 153-154. Even if such a change were to occur, Bowling Green would still consist of a majority of nonminority students. There is a dearth of evidence to support that such demographics would be adverse to the district.

The Hearing Officer points out in his Recommended Finding that Dr. Mickelson characterized a diverse school as “one that reflects the socioeconomic and racial and ethnic mix of the children who attend the schools and who live in the community.” *See* Recommended Order, p. 14. However, Dr. Mickelson never offered any testimony that would establish that the current percentages of minorities in Bowling Green’s population reflect such a makeup of the Bowling Green or Warren County community. Accordingly, she never testified that Bowling Green’s current population is diverse, or that district would not reflect the socioeconomic and racial and ethnic makeup of the community if fewer Warren County residents were permitted to attend. In fact, Dr. Mickelson, who had never been to Bowling Green or Warren County prior to

the hearing, testified that her opinions were based on her “familiarity with the corpus of scholarly research that has been conducted on other school systems around the country in the past 30 years, *not on my analysis of any data pertaining to either of these two school districts.*” TE I, p. 135. (Emphasis supplied). Her testimony provides absolutely no support for the finding that Bowling Green would be adversely affected by a reduction in Warren County nonresident students.

Moreover, even if Dr. Mickelson’s opinions were based on Bowling Green and Warren County specific demographics, which she testified they were not, her testimony still does not support a finding that the students would be adversely affected. All of Dr. Mickelson’s testimony about the benefit of diversity focused on a diverse school, not a diverse district. Every passage of Dr. Mickelson’s testimony quoted by the Hearing Officer discussed the benefits of diversity at the school level:

“*Diverse schools* foster greater achievement ...” Recommended Order, pg. 15

“children who are learning in less *diverse schools* will not have an optimal learning environment ...” Recommended Order, pg. 15

“children who attend *diverse schools* are more likely to have cross-racial friendships...”; Recommended Order, pg. 15

“Children who attend *diverse schools* – and this is all – all children – are more likely to have higher educational aspirations ...” Recommended Order, pg. 16

“That’s why the military supports, you know, diverse *K-12 schools.*” Recommended Order, pg. 16

“People who have been in *diverse schools K-12* who then go on to college are more likely to have higher occupational attainment, higher income attainment ...” Recommended Order, pg. 16

A Recommended Finding that Bowling Green's diversity is adversely affected based on this evidence is disingenuous, as the analysis completely disregards the demographics at Bowling Green's individual schools. The Recommended Order never addresses the fact that the excessive number of nonresident students has actually polarized, not diversified, the elementary schools in Bowling Green.

Currently, the majority of the Warren County nonresident students attend four schools: Bowling Green High School, Bowling Green Junior High School, Potter Gray Elementary School and W.R. McNeill Elementary School. According to Bowling Green's 2013-2014 demographic information, Potter Gray Elementary School, which had a total student population of 441, 140 of which are Warren County nonresident students, had just 15.42% of its then-enrolled students classified as minorities. *See* Bowling Green Exhibit 9. Only 22.22% of the Potter Gray Elementary School's student population was on free and reduced lunch. *See* Joint Exhibit 25. W.R. McNeill Elementary School, which had a total student population of 407, 120 of which were Warren County nonresident students, had a currently minority population of just 25.31%. *See* Bowling Green Exhibit 9. Only 28.5% of its total student population received free and reduced lunches. *See* Joint Exhibit 25.

Parker-Bennett-Curry Elementary School, on the other hand, which had only six (6) nonresident students enrolled during the 2013-2014 school year, was made up of 79.84% minorities. *See* Bowling Green Exhibit 9. More than 95% of its students were on free or reduced lunch. *See* Bowling Green Exhibit 8. Likewise, Dishman McGinnis Elementary School, which had just fourteen (14) Warren County nonresident students, had a student population comprised of 62.93% minorities, and 91.59% students on free and reduced lunch in the 2013-2014 school

year. T.C. Cherry Elementary School's 2013-2014 population was 38.82% minority and 59.22% of its students were on free and reduced lunch. *See generally*, Bowling Green Exhibits 8 and 9. It had just twelve (12) Warren County nonresident students. All three of these schools' student percentage of free and reduced lunch already greatly exceeded what Bowling Green's overall percentage would be if all Warren County nonresident students return to their home district. Parker-Bennett-Curry and Dishman McGinnis Elementary Schools already had minority populations that far exceed what Bowling Green's overall student minority population would be if the cap was taken to zero. Bowling Green has done absolutely nothing to even out the distribution of nonminority students across its schools. In light of Dr. Mickelson's testimony it can only be reasoned that Bowling Green's current distribution of its nonresident students is actually harming, not helping, the elementary students of its district.

School	2013-2014 Total Enrollment	Warren County Nonresident Students	Percentage of Minorities	Percentage on Free and Reduced Lunch
Potter Gray Elementary School	441	140	15.42%	22.22%
W R McNeill Elementary School	407	120	25.31%	28.5%
Parker-Bennett-Curry Elementary School	387	6	79.84%	95%
Dishman McGinnis Elementary School	321	14	62.93%	91.59%
T.C. Cherry Elementary School	255	12	38.82%	59.22%

Two of Bowling Green's elementary schools have an extremely low number of minority students and students on free and reduced lunch, while three have a significantly higher percentages of these populations. But none of the district's elementary schools are anywhere near the district's overall percentages. These elementary schools all lay at far ends of the spectrum. It

does not stand to reason that any student reaps the benefits of diversity simply because a district as a whole has what an expert considers to be a diverse population, when the schools themselves do not reflect such demographics.

Through its highly selective admittance policy, Bowling Green has fostered homogeneous student populations -- either extremely high percentages of minority students or extremely high percentages of nonminority students -- in all of their elementary schools. Dr. Mickelson testified that the concept of "school choice" often times leads to segregation. She testified that she knows "nothing about [the procedure used by Bowling Green to place nonresident students.]" See TE I, p. 147. However, she has authored an article regarding the dangers of school choice, and testified generally that when a school is allowed to arbitrarily select the students it receives from the host school district, the process actually fosters segregation. TE I, p. 149-50. It is obvious that is what has happened in Bowling Green.

Bowling Green's diversity argument is further diluted by the position of its other "expert witness," Dr. Larry Vick ("Dr. Vick"), who testified that Bowling Green is willing to educate nonresident students at a significant financial loss because the students are predominantly Caucasian and come from a higher socioeconomic group. According to Dr. Vick, these nonresident students *reduce* the district's diversity, and thus make the school a more "acceptable" environment:

- Q. Sir, you say, "more acceptable." When you testified to this, you said that it lessens diversity and that the student body is more acceptable. Explain what you mean by that, sir.
- A. Well, I think I misspoke. It -- it doesn't lessen the -- well, it lessens the -- I -- I don't know this. But I assume that most of these students are Caucasian. I know that the minority percentage in Bowling Green is higher than Warren County's, and so I think this would lessen their minority percentage by -- by accepting the students from Warren County.

Q. Well, sir, you just said, a school population that's more acceptable. Do you find a school population that has more Caucasians more acceptable than a population that has more minorities?

A. The world does.

See Dr. Larry Vick Testimony, TE II, p. 367.

The Recommended Order fails to even address Dr. Vick's comments.

**V. Bowling Green's Highly Selective Process is Unfair and
Must be Addressed by the Appeal**

Perhaps the most blatantly inaccurate Recommended Finding made by the Hearing officer was his finding that there was no evidence that Bowling Green's prioritization policy used to select which nonresident students are admitted is unfair. Mr. Tinius, Bowling Green's own superintendent, testified under oath during the hearing that the selection process gives an unfair advantage to students with more financial means. *See Mr. Tinius testimony, TE I, p. 102-03.*

Bowling Green's highly selective nonresident admission process is discriminatory and must be changed to a process that is fair, equitable and transparent. Bowling Green has a policy that gives priority to the following individuals:

1. Students enrolled at the conclusion of the current school year
2. Siblings of students enrolled at the conclusion of the current school year
3. Students transferring from private schools in the Bowling Green Independent School District attendance area
4. Students of families owning property in Bowling Green Independent School District
5. Students of Western Kentucky University Faculty and Staff
6. Kindergarten/Primary students

7. Other students in priority order in date of application

See Joint Exhibit 16.

Unless one is financially capable of owning real estate in the Bowling Green school district (i.e. rental property owner, business owners, multiple home owners), works for Western Kentucky University, has the financial means to pay tuition to a private elementary school, or is a sibling of the foregoing, one would fall fairly far down the list of those who Bowling Green will accept as a non-resident. Bowling Green's policy may not explicitly discriminate against students based on race or financial resources, but there is no question that in practice its application has a disparate impact on such groups. Such discrimination is illustrated by the homogenous student populations found in the Bowling Green Elementary Schools

Bowling Green's superintendent acknowledged that the process, which favors students from families with more financial resources, is unfair:

Q. Well, I'm asking, sir --

A. Yes.

Q. -- is it acceptable that that student, regardless of the working relationship that Bowling Green --

A. Uh-huh.

Q. -- has with the private school, I'm asking if it's fair and acceptable to you as the superintendent knowing that you have a priority list that would allow students who have more money a better shot at getting into Bowling Green than a student that didn't?

A. I -- I -- I guess the -- the -- the answer to that for me is that every situation is a little different and -- and yes, it -- it could provide a better opportunity.

Q. But I --

A. And -- and I understand what you're saying, is -- is that -- is that necessarily fair? In -- in my mind, it is an advantage.

Q. It is an advantage. Is it fair?

A. It -- it wouldn't be -- no, it would not be fair to everyone.

TE I, p. 102-03.

The Hearing Officer does not even address this testimony in his analysis. Instead, he simply gives Bowling Green a pass because according to his analysis it is not the district's fault that only people with financial means apply. However, Bowling Green failed to provide any evidence that established the socioeconomic status of the students who applied to Bowling Green. In fact, the only evidence the Hearing Officer cites in support of this conclusion is the testimony of Walter Hulett, the former Knox County Superintendent, who testified that the majority of people who applied to be nonresidents at Corbin Independent were upper to middle class. *See Recommended Order*, pg. 34. It is completely unreasonable that the Hearing Officer relied on testimony that he had previously found to be irrelevant due to the fact "that situation is not analogous to that of Warren County and Bowling Green." *See Recommended Order*, p. 28.

The Hearing Officer also gives weight to testimony that Bowling Green has not received any complaints about the selection process as an indicator of its fairness. Simply because no one has complained *yet* doesn't mean the process is fair. Such reasoning takes the responsibility out of the hands of the district to do the right thing, and places it into the hands of parents to police district policies and practices to make sure that all students are treated equally.

The Attorney General has opined that the only rights conferred under the law to a nonresident student is "to be treated fairly in a reasonable nonarbitrary and nondiscriminatory manner by the 'foreign' school district." Ky. OAG 79-327 (1979 WL 33461).

If a school district is going to permit nonresident children to attend its schools, ***all nonresident children must be treated alike***, which is to say a board may not exclude children of a particular suspect classification, such as sex, race or religion.

Id. (Emphasis supplied).

Even Bowling Green's own superintendent acknowledges that the process it has in place does not treat all students alike. The Warren County Board has committed itself to only entering into an agreement that is fair, equitable and transparent. The most fair and transparent selection process is the random draw incorporated by Warren County in its December 2013 contract. This process should be implemented so that all Warren County students who are interested in attending Bowling Green as a nonresident student have an equal opportunity to do so.

VI. The Hearing Officer Fails to Recognize the Discretion Vested in the Board

The Commissioner of Education has previously concluded as a matter of law that "the decision to enter into a non-resident student agreement is a matter of local discretion." (See Commissioner's Finding of Fact and Conclusions of Law, Warren County Exhibit 10). However, the Hearing Officer's analysis fails to recognize, much less discuss, the discretion of the Warren County Board. Local discretion is not mentioned one time throughout the Hearing Officer's 40-page Recommended Order. Without considering the discretion that is afforded to a Board as a matter of law, it is impossible that the Hearing Officer made a thorough and objective analysis in this matter.

This omitted portion of the analysis is highlighted further by the fact that the same Hearing Officer presided in a second nonresident dispute just months later, in which he specifically recognized that no statute or regulation requires a district to enter into a nonresident agreement with another district, and the decision to do so is a matter of discretion left to the local

Board. See Board of Education For the Somerset Independent School District v. Board of Education for the Pulaski County School District Recommended Findings of Fact, Appeal No. 2014-02, Conclusions of Law and Recommended Order¹⁰. In the Recommended Order in that case, the Hearing Officer made the following recommended conclusions of law:

Out of respect for the autonomy of districts, the Commissioner should not require that a district that is willing and able to educate its residents allow them to be educated elsewhere, absent a sufficiently good reason.

Id., Recommended Conclusion of Law No. 7. Emphasis in original.

It is completely arbitrary to apply one legal standard in one dispute involving a nonresident agreement while applying another standard in a separate dispute involving the same issue. The Warren County Board was well within its authority to limit the number of students who leave its district to attend Bowling Green under a nonresident agreement. In the Recommended Order, the Hearing Officer made a conclusion of law that the 2001 Memorandum of Agreement (“MOA”), which the Commissioner had already determined was not a binding or enforceable agreement. Yet, the Hearing Officer opines that it is a “good guide” for future agreements and seeks to bind the Warren County Board to a contract to which it never agreed. There have been significant changes that have occurred in education over the past several years that prevents a 13-year-old document, that was never even voted on, from being a good guide for future agreements.

¹⁰ The Hearing Officer made a number of findings in his Recommended Order in the Somerset v. Pulaski County case that blatantly conflict with his findings in this matter. For example, in the case at bar, the Hearing Officer made a Recommended Finding that a reduction of Warren County residents permitted to attend Bowling Green will inconvenience and impose some degree of hardships on parents and students who relied on the agreement between the districts. See Recommended Finding of Fact, ¶36. However, in his Recommended Order in the Somerset v. Pulaski County dispute, he stated “The law entitles students to a public education in the district in which they reside, not in any district that is most convenient to the parent’s schedule or whichever district the parent believes will provide the best education.” Somerset Independent School District v. Board of Education for the Pulaski County School District Recommended Findings of Fact, Appeal No. 2014-02, Conclusions of Law and Recommended Order. It is illogical that parental choice and convenience is valid in one dispute, yet not in the other. These contradictions are evidence of the Hearing Officer’s arbitrary and capricious application of the facts and the law.

Ample testimony was given at the hearing about the increasingly bleak financial outlook for schools over the past few years. Funding is dwindling as costs continue to increase. Warren County Director of Finance Chris McIntyre testified to the numerous cuts Warren County has made in an attempt to maintain the highest standard of education for its students:

A. To reduce \$3 million out of our budget -- 3.3 was the goal -- I had to look at every expense line item and see what -- and challenge each expense to see what we could reduce with the least impact on kids. And we did a range of things. We eliminated cell phones for superintendent, assistant superintendent, and some administrators.

Q. To save how much?

A. Well, that cost reduction is included with -- we also bid out phone services that year and went with a new phone carrier. And it was approximately a \$55,000 projected savings at that point in time. We reduced 19 extended days from each of the middle schools, which saved a little over \$19,000.

...

A. On up to large line items, such as we changed the high school staffing formula from 21 to 1 to 23 to 1. That's a roughly \$643,000 estimated savings. We chose to outsource custodial services at the middle schools and high schools, savings of roughly, a little over \$343,000. We did a multitude of things to come up with that 300,000 savings. Asphalt at schools for continued maintenance of schools. We had historically been spending about \$100,000 a year on asphalt. We dropped that down to \$60,000, a \$40,000 reduction in maintenance.

...

A. Yes. We eliminated the print shop; we had two people in that facility. Preschool, we changed from four half days to two full days, Monday/Wednesday and Tuesday/Thursday schedule to save on midday transportation of students. The board was picking up some textbook expenditures whereby the state had eliminated the textbook funding for our schools; so we eliminated that. Professional services, Mr. McElroy had been getting title searches on properties; we eliminated that. Roof replacement, we deferred that. Renovations, we scaled down. Asphalt resurfacing, I talked about.

Telephone, I talked about. Energy savings is due to our energy conservation; Bristow Elementary coming online. And then various others to get to \$205,000. And, then, within the staffing changes, we did each of those.

TE I, p. 352-54.

These changes – all of which were not necessary a few years ago – are evidence that the finances in education are significantly different today than they were in 2001, when the MOA was contemplated (though not entered into). As a result of those significant changes, the Warren County Board has determined that it is no longer in the best interest of its district to allow such a large number of students – and their state funding – to walk out of its district each year. Yet, the Board’s discretion is never even considered in the Hearing Officer’s analysis.

The Warren County Board should not be held hostage by a 13-year-old document that was never voted on by either Board. It has the discretion -- and the duty -- to do what it believes is in the best interest of its district.

VII. The Commissioner’s Failure to Consider Warren County’s Exceptions is a Fatal Error in his Final Order

Finally, the Commissioner’s failure to consider the exceptions filed by Warren County in response to the Recommended Order is a fatal error to the Final Order.

The Warren County Board filed nearly 80 pages of exceptions to the Recommended Order, thoroughly detailing the errors contained therein. The Warren County Board adopts and incorporates by reference, as if copied in full, its Exceptions to the Recommended Order, filed with the Kentucky Department of Education on June 9, 2014. Pursuant to KRS 13B.120, “in making the final order, the agency head *shall consider* the record including the recommended order and any exceptions duly filed to a recommended order.” emphasis supplied.

The Commissioner's Final Order states:

The Commissioner having considered the Finding of Fact, Conclusions of Law and Recommended Order dated May 23, 2014 and being duly advised,
IT IS HEREBY ORDERED that the Finding of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and are hereby approved, adopted and incorporated herein by reference as part of this Order and the Appellants Appeal is therefore **DISMISSED**.

See Final Order, July 2, 2014.

According to his Final Order, the only thing that the Commissioner considered in reaching his decision in this matter was the Hearing Officer's Recommended Order. Failure to consider the duly filed exceptions is contrary to the law, and a fatal error in the Commissioner's Final Order. *See Petro Commercial Services, LLC v. Com., Cabinet for Health and Family Services*, 2012 WL 2051955, *2 (Ky.App. 2012) ("Although PCS Market considered the filing of exceptions to be an exercise in futility, it fatally misperceived the administrative process because a Cabinet Secretary *must* consider any filed exceptions before rendering a final order.") emphasis in the original.

CONCLUSION

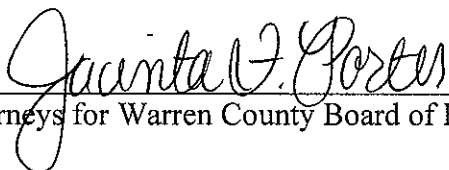
This dispute over nonresident students is not exclusive to Warren County and Bowling Green. As funding continues to dwindle, districts across this state are fighting over their most precious resource: students. It is well established law in Kentucky, that a child must attend the school where he or she resides. It is also well established that a district is not required to enter into a nonresident agreement. As the Hearing Officer pointed out in his Recommended Order in *Somerset v. Pulaski County* dispute, "the Commissioner should not require that a district that is willing and able to educate its residents allow them to be educated elsewhere, absent a sufficiently good reason."

Warren County is willing and able to educate its residents, and there is absolutely no good reason to require it to allow its students to be educated elsewhere. If the Kentucky Board of Education approves the Commissioner's Final Order, it will be administratively creating school choice for a select few. That is not the law in this state, and it is not the right thing to do.

WHEREFORE, the Board of Education of Warren County respectfully requests that the Kentucky Board of Education to amend the Commissioner's July 2, 2014 Final Order, perspectivevely and allow only currently enrolled nonresident students and their siblings to attend Bowling Green for the 2015-2016 school year.

This 22nd of August, 2014.

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Certificate of Service

This is to certify that the original of the foregoing has this day been mailed to:

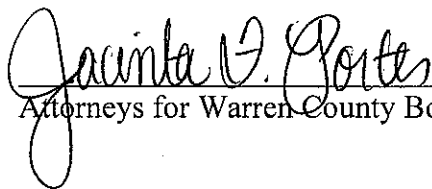
Dr. Terry Holliday
Commissioner of Education
Kentucky Department of Education
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and a true and exact copy of the foregoing has this day been mailed and/or emailed to:

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This 22nd day of August, 2014.

A handwritten signature in cursive script, reading "Jacinta G. Porter". The signature is written in dark ink and is positioned above a horizontal line.

Attorneys for Warren County Board of Education