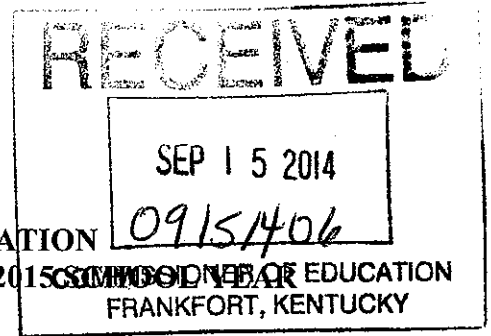


**KENTUCKY DEPARTMENT OF EDUCATION
NONRESIDENT STUDENT AGREEMENT FOR 2014-2015 SCHOOL YEAR
APPEAL NO. 2014-01**



BOARD OF EDUCATION FOR THE
WARREN COUNTY SCHOOLS

APPELLANT/
CROSS-APPELLEE

v. **BOARD OF EDUCATION FOR THE WARREN
COUNTY SCHOOLS' REPLY 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 Reply Brief, states as follows:

I. Introduction

The law in this state regarding public education is very simple: a student must go to school in the district where he or she resides. Only when two districts *agree* should there be a different result. It is clear there is no agreement in this case. Warren County is ready, willing and able to educate its resident students, and there is absolutely **no significant reason** to force it to send students – and their state funding – to another district.

In its Appellee Brief, Bowling Green Independent School District ("Bowling Green") distorts the facts and analysis in an effort to paint a picture of a district completely dependent on nonresident students. But its arguments boil down in simplest terms to entitlement. Bowling Green believes simply because it has been permitted to enroll students before, it is entitled to these students now. That is not the law, and it is certainly not a basis for the Kentucky Board of Education ("the Board") to uphold the Commissioner's Final Order.

The framework of Bowling Green's entire analysis is the unsubstantiated argument that Warren County intends to reduce the number of nonresident students to zero. Warren County acknowledges it seeks a gradual reduction of the number of nonresident students permitted to attend Bowling Green over a long period of time. But at this time, there is simply no way to know what that number ultimately will be. Warren County made one offer to reduce the contract to 250 nonresident students gradually over a ten year period. However, during the hearing, both Superintendent Rob Clayton and Board Chair Kerry Young testified that the Warren County Board is still willing to negotiate.¹ One thing is certain: Warren County established unequivocally during the hearing that it does not intend to reduce the number to zero. In its brief, Bowling Green claims the Hearing Officer's analysis looks at the long-term impact, but a review of the record establishes that every bit of evidence it presented ultimately had the number of nonresident students at zero. To say now that that the analysis did not look to the impact of going to zero, but rather looked simply at a "long term" impact, is disingenuous.

The issue currently before the Board is how many Warren County students should have been permitted to attend Bowling Green during the 2014-2015 school year. The impact of that single reduction is all that is relevant to the Board's decision. It is undisputed that no one sought to reduce the number of Warren County nonresident students to zero during the 2014-2015 school year, so any analysis that is based on such an extreme reduction unsupported by the evidence should not be considered.

¹ In its brief, Bowling Green suggests that Warren County's willingness to negotiate a contract is insincere. In support of this claim, it argued that only two members came to mediation, while it brought its entire board. In Compliance with the Commissioner's 2013-2014 Order, the Warren County Board was represented by its Chair and Vice Chair at mediation. ("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 nonresident student agreement ...")

As it has for two years, Bowling Green once again harkens back to a 2001 Memorandum of Agreement (“MOA”) – a document that was never voted on by either board – in its claim that it is entitled to 750 nonresident students. The Commissioner made clear in his Final Order during the 2013-2014 dispute that an agreement not voted on by the Board could not be binding on the board, and thus the MOA was not a valid or enforceable contract. Despite the fact the Commissioner has on record ruled the MOA has no effect, and therefore is essentially meaningless, Bowling Green attempts to rely on what it coins the “historical arrangement” between these districts in further support of its position of entitlement to students not residing within its district’s boundaries. But the law does not allow for “historical arrangements” to circumvent the rule that children attend school where they. It is specific that only when a child is listed under a “written agreement” may a nonresident district receive state funding for a child. *See KRS 157.350(4)(a)(1)*. The Warren County Board has determined that this is no longer an arrangement that is in the best interest of its district. Its discretion in the matter is entitled to great weight in this analysis. Without considering the discretion that is afforded to the Warren County Board as a matter of law, it is impossible to make a thorough and objective determination in this matter.

II. Warren County’s Requested Relief is Appropriate

Warren County has asked the Board to reverse 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. That is the only appropriate relief that could be awarded to Warren County because the students impacted by this appeal have already been permitted to enroll in

Bowling Green. By all means possible, Warren County does not seek to interrupt the educational process of those students. Accordingly, the only change that can be made is to allow it to limit the nonresident students who attend Bowling Green next year to those who are currently enrolled and their siblings. Of course, if the districts are able to reach a nonresident agreement for the 2015-2016 school year, that agreement would supersede the Board's decision.

On the other hand, Bowling Green's argument that if it is successful, the Board should apply its decision prospectively is unnecessary. If the Board should somehow find for Bowling Green, despite the law that dictates otherwise, then Bowling Green will have already received the benefit of last year's appeal because it has already enrolled those students.

III. The Proportionality of the Impact on the Districts is Irrelevant to this Decision

The majority of Bowling Green's brief is spent arguing what it perceives will be a "disproportionate impact" on its district if the number of nonresident students is reduced. Bowling Green uses 24 pages to try and argue that any benefit to Warren County will be outweighed by the negative impact to Bowling Green. But proportionality is not the standard by which the Kentucky Board of Education should judge this case. Pursuant to **KRS 157.350 (4)(a)(4)** "[t]he commissioner and the Kentucky Board of Education shall consider the factors affecting the districts, including but not limited to academic performance and the impact on programs, school facilities, transportation, and staffing of the districts." Nowhere in the statute does it require – or even suggest – that the impact on one district should be compared in proportion to the other. Warren County is a much larger district than Bowling Green. For that reason alone, any impact – positive or negative – will almost always be disproportionate between these two districts because of their relative size. What is more, the fact that an impact is

disproportionate does not automatically mean that the impact, positive or negative, on Warren County is of less importance.

Bowling Green attempts to use that fact to distort the impact a reduction of nonresident students will have on its district. But this argument is nothing more than a smoke screen meant to distract the Board from the fact that the return of some Warren County nonresident students will not have a *detrimental impact* on Bowling Green. A negative impact is not necessarily detrimental. Children are a school district's most valuable resource. If that was not the case, these two parties would not be fighting so passionately over these students. The reduction of any of these students will necessarily be negative to either district. However, an impact may be negative without carrying with it any significance. If the negative impact is insignificant to Bowling Green – which was clearly established by Warren County regarding the reduction of the affected nonresident students – then it is not detrimental to the district. As is thoroughly discussed in Warren County's Appellant Brief, Bowling Green's demographics would have shifted mere tenths of a single percentage point if the affected students were not enrolled at Bowling Green. See Appellant Brief, pg. 16. And even with the reduction, it still added one new teacher position this year.

Bowling Green presented absolutely no evidence that with fewer nonresident students – regardless of what the ultimate number may be – it would no longer be able to provide the services that it is statutorily required to provide. The district will continue to operate its schools. It will continue to employ enough teachers and staff, and most importantly will continue to educate its students. In an effort to deflect from that, Bowling Green seeks to exaggerate the

perceived impact that will be felt by arguing that impact will be out of proportion to the benefit that will be gained by Warren County.

Warren County established it will be able to benefit financially from the addition of the affected students. Warren County Chief Financial Officer Chris McIntyre established that the district could see as much as an increase of more than \$100,000 in the first year. As the affected students continue to matriculate through the Warren County system, that number will only increase. Bowling Green claims the financial analysis prepared by its staff is more accurate because it is based on the "actual students" who would be affected. But that simply is not true. Until the first day of school, when students are actually enrolled there can be no "actual" way to know which students will attend as nonresidents, or what their home school would have been. Before the start of any school year, families may move, either into Bowling Green's district, or into another school district in Warren County, or they simply may change their minds and decide they no longer wish for their child to attend Bowling Green as a nonresident student. Moreover, because of Bowling Green's highly selective enrollment policy for nonresident students, children that have a higher priority in the policy may apply later, moving students with lower priorities down the list. There was absolutely no evidence presented to establish these particular students are the ones who actually enrolled in Bowling Green this year as nonresident students. Furthermore, Bowling Green's analysis fails to address the Site Based Council's ability to authorize a school to exceed certain student/teacher ratios, which would eliminate the need to hire additional employees and would maximize the financial impact to Warren County.

When Bowling Green argues that the financial benefit to Warren County is "insignificant," it focuses only on the return of the students at issue for the 2014-2015 school

year for the However, when Bowling Green discusses the negative impact it perceives will result from the loss of these students, it looks at a long term reduction of nonresident students to zero.

The impact on these two districts should be viewed independently of the other.

Will Warren County experience a benefit from the return of these affected students: Yes.

Will Bowling Green experience a detrimental impact from the reduction of the affect students: No.

If proportionality of the impact were truly the, Warren County would *never* be able to make a reduction in the number of nonresident students it agrees to allow to attend Bowling Green with SEEK dollars following. Nor, for that matter, would any similarly larger county district in Kentucky vis-à-vis a smaller independent district. The Board is aware that disputes are occurring in this state. And in every instance the affected county school district is larger than the independent that lies within or near its boundaries. If the beneficial impact to the county district had to be proportionate to the negative impact felt by independent, then no change could ever be made, which is not consistent with the law.

Moreover, it cannot be overlooked that Bowling Green is experiencing growth which will offset reductions. While Bowling Green claims its growth is too minimal to offset any negative impact, that is simply not a true or accurate statement. The Hearing Officer found Bowling Green experienced internal growth of 2.5% last year. If the affected 41 students had been returned to Warren County for the present school year, that would have equated to just over 1% of Bowling Green's entire student population. Even if the affected number is 55, as Bowling Green claims, it still would amount to a reduction of less than 1.5%. Clearly, the growth Bowling Green experienced more than offset any negative impact that would have been felt. When this is

coupled with the internal growth that was felt through the change in the law that allows nonresident children of district employees ("CDEs") to attend the district where their parents work without being counted as "nonresident students," it is obvious that any negative impact would not have had a detrimental effect on Bowling Green.

IV. Bowling Green's Own Superintendent Testified that its Prioritization Policy is Unfair

Bowling Green claims its prioritization process is fair and necessary for planning purposes, and that Warren County did not demonstrate it is discriminatory in any way. It is almost impossible to reason how the district can make that claim, given the fact its own Superintendent, Mr. Joe Tinius, described the process as "unfair" and said it provides students with greater financial resources "advantages" and "opportunities" over students with lesser financial means:

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.

Bowling Green goes on to question how Warren County could take issue with the Hearing Officer's finding that it can only consider those who apply. The Recommended Order is rife with errors, inaccuracies and mischaracterizations, but this Finding is perhaps one of the most egregious in the entire document. Warren County takes issue with this Finding because Bowling Green failed to provide any evidence that established the socioeconomic status of the students who applied to Bowling Green. 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 makes absolutely no sense that he would rely on this testimony, which he had previously found to be irrelevant due to the fact "that situation is not analogous to that of Warren County and Bowling Green" to establish something as fact specific as who actually applied. His testimony unequivocally cannot support this Recommended Finding and the Hearing Officer's attempted use of it is without basis.

Moreover, there was no evidence presented that Bowling Green's ability to plan is somehow improved by this selective and discriminatory selection process. The vast majority of categories of students who are given priority under the process used by Bowling Green do not include any elements that would allow Bowling Green to know the school or grade in which the nonresident students would attend prior to the selection process being finalized. For example, the child of an individual with financial means to own property in the Bowling Green district in

addition to a residence in the Warren County district, which is a current category of students who receive priority, does not provide any notice to the district on the age of the child who will apply. The same is true for students transferring from private schools (who has the financial means to pay tuition to those schools). siblings of currently enrolled students, and children of Western Kentucky University employees. None of these categories provide any information about the student that would allow Bowling Green more opportunity to plan than if the children were selected in a more fair and random process. As long as Bowling Green is aware of the number of students who will be attending as nonresidents, it will have the same opportunity to prepare as it would under the highly selective process it currently uses.

Unbelievably, Bowling Green argues that even if its prioritization policy does favor students from families with higher income, that such a process actually promotes diversity because it is allowing students with greater financial means to attend a school with a lower socioeconomic composition. Given the fact that the vast majority of nonresident students attend the four schools in Bowling Green that actually have the lowest percentage of students on free and reduced lunch, it can easily be said that this policy actually fosters more segregation based on socioeconomic status than it does diversity.

If this dispute was actually about diversity within Bowling Green's district, Bowling Green would distribute incoming nonresident students to the schools that have the highest percentage of minority students or the highest percentage of free and reduced lunch population. But that is not the case. Instead, Bowling Green has through this historical operation, created public schools in its district that only some with means enough are permitted to attend. This flies

in the face of the mission of public education and Warren County Board refuses to enter into any agreement that allows such behavior to continue.

***V. The Commissioner's Failure to Consider Warren County's
Exceptions is a Fatal Error in his Final Order***

Finally, there is no evidence that the Commissioner considered the Exceptions filed by Warren County in response to the Recommended Order. The only evidence of what the Commissioner considered in his determination is his Final Order, which clearly states he "considered the Finding of Fact, Conclusions of Law and Recommended Order dated May 23, 2014," and nothing else.

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. This is not a "narrowly construed" reading of the Commissioner's Order, as Bowling Green suggests. It is a literal reading, which clearly does not support the conclusion that Warren County's Exceptions were considered. This failure to consider the duly filed exceptions is contrary to the law, and a fatal error in the Commissioner's Final Order.

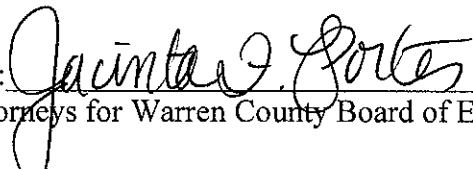
CONCLUSION

School choice in public education is not the law in Kentucky, and Bowling Green is not entitled to students who do not reside in its district. The members of the Warren County Board of Education have the right and the duty to do what is best for their district, and that includes setting the parameters of a nonresident agreement. Its discretion should be respected, and the Kentucky Board of Education should allow these districts to determine the terms of any such nonresident agreement between them.

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

This 12th day of September, 2014.

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Certificate of Service

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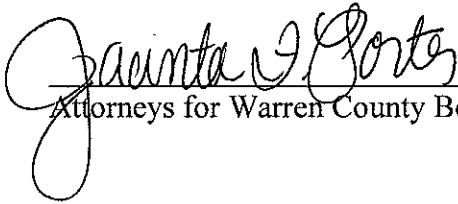
Dr. Terry Holliday
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and a true and exact copy of the foregoing has this day been mailed and/or emailed to:

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This 12th day of September, 2014.

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

Attorneys for Warren County Board of Education