

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

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**COMMISSIONER OF EDUCATION
FRANKFORT, KENTUCKY**

**BOARD OF EDUCATION FOR THE
WARREN COUNTY SCHOOL DISTRICT**

**APPELLANT AND
CROSS-APPELLEE**

**VS. BOARD OF EDUCATION FOR THE BOWLING GREEN INDEPENDENT
SCHOOL DISTRICT'S RESPONSE TO APPELLANT'S BRIEF**

**BOARD OF EDUCATION FOR THE
BOWLING GREEN INDEPENDENT
SCHOOL DISTRICT**

**APPELLEE AND
CROSS-APPELLANT**

The Board of Education of the Bowling Green Independent School District, for its response to appellant's brief, states as follows:

OVERVIEW OF CRITICAL POINTS

- In 2001, the parties entered into a Memorandum of Agreement regarding the number of Warren County residents permitted to attend Bowling Green Independent. The Commissioner of Education recognized that the 2001 Memorandum of Agreement between the Bowling Green Board and the Warren County Board was a "good guide for future non-resident arrangements between the two school districts to provide stability for planning and to minimize strife..."
 - The Memorandum of Agreement would allow the current number of Warren County residents (750) to attend Bowling Green Independent plus an additional number of students calculated by applying Warren County's growth percentage to the current number of Warren County residents attending Bowling Green Independent.
- For the past two years, the Commissioner has found that 750 Warren County residents be permitted to attend Bowling Green Independent.
 - This number only minimally impacts Warren County, if at all, as Warren County's enrollment during the 2013-2014 school year totaled 14,629 students.
- If the Warren County Board is successful in its appeal, 55 fewer Warren County residents would have been permitted to attend Bowling Green Independent during the 2014-2015 school year.
 - This reduction would disproportionately negatively impact Bowling Green Independent with regards to each statutory factor set forth in KRS 157.350.

- If the Warren County Board continues to reduce the number of its residents permitted to attend Bowling Green Independent, the disproportionate negative impact on Bowling Green Independent will cause significant harm to Bowling Green Independent.
- If the Warren County Board is successful in its appeal, it will see no corresponding benefit to offset the harm caused to Bowling Green Independent.
- **SEEK funding of \$3,911 per student is not sufficient to educate a child.**
- Warren County will experience **no financial benefit** from the additional 55 students.
 - Even under the Warren County Board's best case estimate, which is unreliable as it does not take into account the actual students at issue, Warren County would only benefit by an amount equal to approximately 0.12% of Warren County's approximately \$86 million general fund budget.
- The Commissioner said it best in his Final Order for the 2013 nonresident student dispute between the Warren County Board and the Bowling Green Board. He found that "[t]he relatively small economic benefit to Warren County of phasing out non-resident agreements with Bowling Green is far outweighed by the harm to Bowling Green in doing so."
- This ongoing dispute has caused great turmoil in the Bowling Green/Warren County community. This community has relied on the historical arrangement between the Warren County Board and Bowling Green Board and would be negatively impacted for no compelling reason if the Warren County Board is allowed to reduce the number of its residents permitted to attend Bowling Green Independent.
- The Commissioner has recognized the strife this dispute has caused, and will continue to cause, the families and students who are affected by the Warren County Board's actions. The Bowling Green Board respectfully requests that the Kentucky Board of Education defer to the Commissioner's decision, for the second year in a row, to continue to allow 750 Warren County residents to attend Bowling Green Independent.

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INTRODUCTION

This appeal was taken by the Board of Education of the Warren County School District ("Warren County Board") against the Board of Education of the Bowling Green Independent School District ("Bowling Green Board") pursuant to KRS 157.350. This is the second year in an ongoing dispute between the Warren County Board and the Bowling Green Board regarding the number of Warren County School District ("Warren County") resident students permitted to attend the Bowling Green Independent School District ("Bowling Green Independent"). For the second year in a row, the Hearing Officer, Mike Wilson ("Hearing Officer"), heard three days of testimony regarding this dispute. During this year's hearing, the Hearing Officer heard from 16 witnesses and reviewed almost 150 exhibits. Each year, after an extensive hearing and briefing by both parties, the Hearing Officer issued thorough recommended findings of fact, conclusions of law, and final orders.¹ Last year, the Commissioner of Education, Terry Holliday ("Commissioner") adopted the Hearing Officer's findings with a few changes, including making the Final Order effective for only one year.² The parties did not appeal the Commissioner's decision to the Kentucky Board of Education. This year, the Commissioner adopted the Hearing Officer's recommendations in full. The Kentucky Board of Education will now be the third decision maker to examine this dispute.

This year, if the Warren County Board was successful in its appeal, 55 fewer students would be permitted to attend Bowling Green Independent than in previous years.³ Following a

¹ The Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Recommended Order in the 2013-2014 nonresident student agreement dispute are attached as Exhibit 1; the Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Recommended Order in this year's nonresident student agreement dispute are attached as Exhibit 2.

² The Commissioner's Final Order in the 2013-2014 nonresident student agreement dispute is attached as Exhibit 3.

³ As is explained in detail in the Bowling Green Board's post-hearing brief, the number of students at issue is most likely 55. The Hearing Officer and Commissioner agreed with this calculation. The Warren County Board's

hearing regarding the dispute for the 2014-2015 school year, for the second year in a row, the Hearing Officer recommended, and the Commissioner found, that 750 Warren County residents should be permitted to attend Bowling Green Independent under a nonresident student agreement between the districts. This number represents less than 5% of Warren County residents when combined with the 14,629 students enrolled in Warren County last year.

FACTUAL BACKGROUND

Prior to 2001, the Bowling Green Board and the Warren County Board entered into annual nonresident agreements allowing the free exchange of all students between the two districts pursuant to KRS 157.350. In early 2001, significant controversy arose in the Bowling Green/Warren County community as a result of the Warren County Board's action reducing the number of Warren County residents permitted to attend Bowling Green Independent under the nonresident agreement for 2001-2002. After negotiations following the Warren County Board's decision, the two districts entered into a Memorandum of Agreement and Understanding Regarding Non-Resident Student Contracts ("Memorandum of Agreement") providing the mechanism for determining the number of students for which Warren County would release SEEK funding to Bowling Green Independent under annual nonresident contracts. This agreement provided that each year the current number of Warren County students attending Bowling Green Independent would be permitted to attend in addition to a growth factor equal to the percentage of student growth experienced by Warren County in the previous year. In 2008, Warren County unilaterally amended the Memorandum of Agreement to remove the growth factor by striking through the growth factor on the nonresident student agreement. Warren County approved similar annual contracts for the 2008-2009 through the 2012-2013 school

calculation that only 41 (or 30 as argued in its exceptions) students are at issue fails to take into account several occurrences at the end of the school year that reduce the number of currently attending nonresident students.

years. Through the 2012-2013 school year, the number of students that Warren County permitted to attend Bowling Green Independent never decreased.

For the first time since entering into the Memorandum of Agreement, the Warren County Board did not approve an agreement with the Bowling Green Board for the 2013-2014 school year. Instead, in April of 2013, the Warren County Board voted to reduce the number of nonresident students permitted to attend Bowling Green Independent without any notice to Bowling Green Independent. As a result, on May 24, 2013, the Bowling Green Board initiated an appeal to the Commissioner pursuant to KRS 157.350 regarding the 2013-2014 nonresident agreement with the Warren County Board. Following the hearing on the appeal, the Hearing Officer recommended that 750 Warren County resident students be permitted to attend Bowling Green Independent with SEEK funding to follow the students for the 2013-2014 and the 2014-2015 school years. This was the number of students sought by the Bowling Green Board. In his Final Order, the Commissioner agreed with the Hearing Officer's recommendation for the 2013-2014 school year but did not extend his recommendations to the 2014-2015 school year. The Commissioner also found that the Memorandum of Agreement, including the growth factor, "provides a good guide for future non-resident arrangements between the two school districts."⁴

On December 17, 2013, the Warren County Board approved a proposed nonresident agreement for the 2014-2015 school year that would reduce the number of Warren County resident students permitted to attend Bowling Green Independent by 500 over a 10-year period by reducing the number by 50 students each year for 10 years. This proposed nonresident agreement included a random draw process to determine which new students would be permitted to attend Bowling Green Independent. On December 20, 2013, the Bowling Green Board approved its own proposed nonresident agreement that would have reduced the number of

⁴ See, Joint Exhibit 1, (Commissioner's Final Order, p. 61, bates no. 0467); attached hereto as Exhibit 3.

Warren County resident students permitted to attend Bowling Green Independent by 40 over a 10-year period by reducing the number by four students each year. On January 13, 2014, the Warren County Board rejected the Bowling Green Board's proposed agreement.

On February 8, 2014, the Bowling Green Board and the Warren County Board participated in mediation pursuant to the Commissioner's Order. Unfortunately, the parties did not reach an agreement at mediation. In an additional attempt to resolve this matter without the need for appeal, on February 17, 2014, the Bowling Green Board approved a second proposed nonresident student agreement. This agreement would have allowed 740 Warren County resident students to attend Bowling Green Independent during the 2014-2015 school year, with SEEK funding following those students, and would have reduced the number by 100 over a 10-year period by reducing the number of nonresident students under the agreement by 10 each year.

During the most recent hearing, Warren County Board members and Warren County Superintendent Rob Clayton ("Clayton") emphasized their desire to reach a compromise. However, their actions leading up to the hearing evidenced a contrary intent. The Bowling Green Board came to the mediation with all five of its members, prepared to make a binding decision, while the Warren County Board had only two of its members in attendance. The Bowling Green Board also made the last two proposals for a nonresident student agreement. Instead of making an additional proposal in an attempt to reach an agreement, on February 20, 2014, the Warren County Board voted not to accept the Bowling Green Board's second proposed agreement and voted to initiate this appeal. In its appeal, the Warren County Board requested the Commissioner to issue an order only allowing those Warren County residents currently enrolled

in Bowling Green Independent and their siblings to enroll in Bowling Green Independent for the 2014-2015 school year.

On March 10, 2014, the Bowling Green Board voted to initiate a cross-appeal. The Bowling Green Board's cross-appeal requested the Commissioner to resolve the nonresident student dispute by allowing a minimum of 750 Warren County resident students (the number previously approved by the Commissioner) to attend Bowling Green Independent for the 2014-2015 school year, with SEEK funding following those students, and requested a growth factor be applied similar to that contained in the Memorandum of Agreement. After a hearing on the appeal, on May 23, 2014, the Hearing Officer issued his Recommended Findings of Fact, Conclusions of Law and Recommended Order to the Commissioner. The Hearing Officer's Recommended Final Order allowed 750 Warren County residents to enroll in the Bowling Green Independent at the beginning of the 2014-2015 school year. The Commissioner's Final Order, issued on July 2, 2014, adopted the Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Recommended Order in full and dismissed Warren County's appeal.

STANDARD OF REVIEW

The Bowling Green Board recognizes that KRS 157.350 empowers the Kentucky Board of Education to examine the record and make a decision to alter or amend the Commissioner's Final Order regarding a nonresident student agreement dispute. The Bowling Green Board urges the Kentucky Board of Education in making its decision to give deference to the Commissioner's decision, which adopted the Hearing Officer's recommendations in full. Kentucky courts have recognized the deference agency heads should give to decisions made by hearing officers. The Kentucky Court of Appeals has pointed out that "there are strictures on an agency head's

discretion.”⁵ The court identified “a degree of deference owed by an agency head to the hearing officer.”⁶ The Hearing Officer in this case is a trained lawyer who made his decision after listening to three days of testimony and considering almost 150 exhibits admitted by the parties during the hearing. This is the second year that he has gone through a similar process with regards to the dispute between the Bowling Green Board and the Warren County Board, and he is familiar with the details of this case. The Bowling Green Board respectfully requests the Kentucky Board of Education to give such deference to the Commissioner’s Final Order, which was based entirely on the Hearing Officer’s recommendations.

ARGUMENT

I. The Warren County Board failed to request any proper relief in its appeal to the Kentucky Board of Education.

The Warren County Board admits that its appeal asked the Commissioner to settle the dispute for only the 2014-2015 school year.⁷ However, in its appeal, the Warren County Board 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.” At no point in its appeal does the Warren County Board request relief for the 2014-2015 school year. As such, the Commissioner’s Final Order, which is applicable to the 2014-2015 school year, should be upheld.

If the Kentucky Board of Education determines it is proper to apply its decision prospectively to the 2015-2016 school year, as requested by the Warren County Board, the Bowling Green Board requests that any decision to uphold the Commissioner’s Final Order be

⁵ *Baker v. Comm.*, 2007 WL 3037718, *22 (Ky. App. 2007).

⁶ *Id.*

⁷ *See*, Board of Education for the Warren County Schools’ Appellant Brief, p. 6.

applied prospectively to allow 750 Warren County residents to attend Bowling Green Independent during the 2015-2016 school year.

II. The Warren County Board does not have absolute discretion regarding nonresident student agreements.

The Warren County Board argues throughout its brief that it has discretion to decide whether it enters into nonresident student agreements with other school districts. While the Bowling Green Board recognizes that districts have some amount of discretion when deciding whether to enter into nonresident student agreements, that discretion is subject to factors set forth in KRS 157.350(4)(a). This statute states in relevant part as follows:

2. If an agreement cannot be reached, either board may appeal to the commissioner for settlement of the dispute.
3. The commissioner shall have thirty (30) days to resolve the dispute. Either board may appeal the commissioner's decision to the Kentucky Board of Education.
4. The 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 (emphasis added).
5. The Kentucky Board of Education shall have sixty (60) days to approve or amend the decision of the commissioner.

In addition to the four factors enumerated in the statute, the Commissioner and the Kentucky Board of Education have the authority to consider any factors deemed relevant in settling a dispute between two districts in the absence of an agreement. The Kentucky Board of Education is the ultimate decision maker, not the school board. The Commissioner recognized last year that

the terms "settlement of the dispute" and "resolve the dispute" appearing in KRS 157.350 means that the Commissioner has been given the power to determine, even though doing so negates the autonomy of school districts, and the residents therein, to decide what is in the best interest of the school districts and those they

serve, and though doing so could result in the loss of SEEK money to which a district would otherwise be entitled.⁸

If the Warren County Board's position regarding a board of education's discretion was valid, the authority given to the Commissioner and the Kentucky Board of Education in this statute would be meaningless.

The Warren County Board attempts to use the Hearing Officer's findings in an unrelated nonresident student dispute between the Somerset Independent School District and the Pulaski County School District to argue that it should have absolute discretion to choose whether or not to enter into a nonresident student agreement with the Bowling Green Board. This dispute is an entirely different set of factual circumstances, and the Hearing Officer's findings in another case are irrelevant. If anything, the Hearing Officer's findings in that case, in which he found against the independent school district, illustrate that he and the Commissioner are committed to carefully analyzing the unique factual circumstances of every case without bias. In the Somerset Independent-Pulaski County dispute, the Hearing Officer did not find a "sufficiently good reason" to impose a nonresident agreement on the districts. However, in this dispute, the Hearing Officer and Commissioner have found for the second year in a row that such a reason exists as is thoroughly explained in the Recommended Findings of Fact, Conclusions of Law and Final Order. The fact that a different result was reached under completely different factual circumstances provides no evidence that different legal standards were applied.

III. The Hearing Officer and Commissioner correctly considered evidence of the impact future reductions will have on Bowling Green Independent.

Warren County's actions surrounding this year's appeal and statements made by members of the Warren County Board over the course of the disagreement between the districts provide compelling evidence that the Warren County Board plans to continue reducing the

⁸ See, Commissioner's Final Order in the 2013 hearing, p. 53, attached as Exhibit 3.

number of students permitted to attend Bowling Green Independent with SEEK funds following and eventually intends to significantly reduce this number. As such, the Hearing Officer and Commissioner's consideration of the impact of a long-term reduction was proper.

Not only have several Warren County Board members stated that the Warren County Board will continue down the path of reducing the number of its residents permitted to attend Bowling Green Independent, but the nonresident agreement approved by the Warren County Board on December 17, 2013, confirms a clear intent to continue to reduce the number of students over the next 10 years and gives no indication that reduction will stop at the end of the 10-year period. The Warren County Board's action in attempting to reduce the number of nonresident students under the agreement with the Bowling Green Board for the second year in a row also shows a pattern and further demonstrates the Warren County Board's intent to continue these reductions each year.

During the 2013 hearing regarding the nonresident student agreement between the Bowling Green Board and the Warren County Board for the 2013-2014 school year, Ron Sowell ("Sowell") testified that Warren County Board member Don Basham ("Basham") told him that it was the Warren County Board's intent to lower the number of Warren County resident students allowed to attend Bowling Green Independent to zero.⁹ Basham admitted during the hearing that he told Sowell if resources continue to diminish, the Warren County Board "may have to continue to decrease the amount of kids...And zero may be the result. Or one to one..."¹⁰ When asked whether he believed this result is where the Warren County Board was headed, Basham stated "...[r]ight now, the future looks like we will all be fighting for resources for many years

⁹ See, Joint Exhibit 1 (testimony of Sowell, p. 553 of hearing transcript bates no. 655).

¹⁰ See, Joint Exhibit 1 (testimony of Basham, pp. 513-514 of hearing transcript, bates no. 645).

out.”¹¹ Basham did not testify at this year’s hearing. Joseph Meyer testified at the 2013 hearing that Warren County Board member Garry Chaffin (“Chaffin”) told him that the Warren County Board wanted to either go to zero or go to a one-to-one ratio of Bowling Green Independent residents attending Warren County and Warren County residents attending Bowling Green Independent.¹² The entire record from the 2013 hearing was filed and incorporated by reference at this year’s hearing by agreement of the parties.

The statements from current Warren County Board members demonstrate that the Warren County Board does not intend the reduction in the number of students allowed under the nonresident agreement with the Bowling Green Board for the 2014-2015 school year to be a one-time reduction. Basham and Chaffin’s statements also provide strong evidence that the Warren County Board will continue to attempt to reduce the number of nonresident students permitted to attend Bowling Green Independent even beyond the 10-year period set forth in the nonresident agreement approved by the Warren County Board on December 17, 2013.

Even though the Warren County Board’s last proposed nonresident student agreement with the Bowling Green Board suggested a reduction of 50 students per year, it appears based on the Warren County Board’s appeal that it now proposes a more rapid reduction. The appeal requested that only current students and their siblings be permitted to attend Bowling Green Independent with SEEK funds following the students. Using this formula, the number of Warren County residents attending Bowling Green Independent will reduce at a much more rapid pace than 50 students per year.¹³

In order to accurately examine the impact a nonresident agreement will have on Bowling Green Independent, it is necessary to take into account the yearly reductions the Warren County

¹¹ *Id.*

¹² *See*, Joint Exhibit 1 (testimony of Joseph Meyer, pp. 605-606 of hearing transcript, bates no. 668).

¹³ *See*, Bowling Green Independent Exhibit 5 and testimony of Dr. Susane Leguizamon.

Board has unmistakably indicated it plans to continue. For example, to examine the true impact of a nonresident student agreement on facilities, one must look beyond the impact of the upcoming school year as students move throughout the district's facilities as they progress through each grade. Because the Warren County Board has indicated it intends to continue reducing the number of students each year, it is impossible to examine the true impact on Bowling Green Independent's facilities without taking into account the reductions that will be made each year. The only way to get an accurate picture of how Bowling Green Independent's facilities will be affected in the future is to consider these continued reductions. This same long-term impact must be traced with regards to each of the factors listed in KRS 157.350 considered by the Commissioner.

Furthermore, even though there cannot be a current controversy regarding the nonresident agreements between the Warren County Board and the Bowling Green Board in the future, because Warren County intends to continue this reduction each year, this issue was properly decided under the exception to the mootness doctrine for controversies that are "capable of repetition yet evading review."¹⁴ The test for whether this exception is applicable is a two-part test: "(1) is the 'challenged action too short in duration to be fully litigated prior to its cessation or expiration and (2) [is there] a reasonable expectation that the same complaining party would be subject to the same action again."¹⁵ Warren County's actions are too short in duration to be fully litigated prior to the conduct's cessation or expiration, as has been made clear in this case by the fact that school has already started for the year to which this appeal is applicable. If either party decides to appeal the Commissioner's final order each year, the school year will have started before the litigation regarding that current year's contract is complete. Additionally, by

¹⁴ *Com. v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994) (citing *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983)).

¹⁵ *Com. v. Hughes* at 831.

the time this issue is fully litigated, approximately 15 years from now if there is a 50 student reduction each year, the damage will be done. There is more than a reasonable expectation that the parties will have to litigate this same issue time and time again, as this is the second consecutive year that an appeal has been filed regarding the reduction of Warren County residents permitted to attend Bowling Green Independent. Had this evidence not been admitted during the hearing, the issue of the long-term impact on Bowling Green Independent would have evaded review yet again. It would be improper to hear each year's controversy in isolation, with the long-term impact never considered. The Commissioner recognized as much in his August 22, 2013 final order in the 2013-2014 nonresident student appeal when he stated that "this conflict is likely to repeat itself annually."¹⁶

This year, following two separate motions in limine filed by the Warren County Board, the Hearing Officer found that evidence of the long-term impact on Bowling Green Independent was admissible. The following portions of the Hearing Officer's orders demonstrate the importance of evidence of the long-term impact of reductions and evidence of the Warren County Board's intent to continue these reductions in the future:

No purpose would be served by pretending that a resolution of this appeal, whether by a one-year agreement or a multi-year agreement, is not be (sic) part of an ongoing relationship between the two school systems that will have multi-year effects on budgets, programming, staffing and the like. The multi-year negotiations of the parties prior to this appeal demonstrate recognition of this fact.¹⁷

The statute [KRS 157.350(4)(a)(4)] requires the Commissioner to consider the future impact of a non-resident agreement. It does not restrict that future to only the upcoming school year. It is beyond dispute that student enrollment trends and expectations drive decisions by Boards, parents, and others that have effects beyond a single year. Budgets, programming, staffing, and the like often is planned and implemented from a perspective that estimates likely enrollments,

¹⁶ See, Commissioner's Final Order, p. 61 (Exhibit 3).

¹⁷ Hearing Officer's March 21, 2014 Order Denying Motion in Limine.

needs and resources over a period of time longer than one school year. Long-term trends, expectations, and plans may be relevant to resolving issues in this case.¹⁸

....

There is sufficient evidence of Warren County's commitment to substantially (if not entirely) eliminate non-resident attendance at Bowling Green to make relevant questions concerning the effect such reductions would have and to serve as a foundation for the hypothetical questions regarding the effect that such reductions would have. Even if there were not specific evidence that future reductions were likely, the potential effect of any reduction projected as a pattern in the future would be relevant to issues in this case.¹⁹

As the Hearing Officer and Commissioner have recognized for the second year in a row, it is necessary and proper for a decision maker in these types of cases to consider evidence of the long-term impact such a reduction in nonresident students would have on the affected school districts.

IV. Bowling Green Independent will be disproportionately negatively impacted if the Warren County Board reduces the number of its residents permitted to attend Bowling Green Independent.

The Hearing Officer and Commissioner correctly found that the detrimental impact on Bowling Green Independent if the Warren County Board's appeal was granted outweighs any minimal benefit to Warren County. Because the impact of a continued reduction is relevant, the Hearing Officer and Commissioner's consideration of the detrimental impact over a long period of time, as well as for the 2014-2015 school year, was proper.

The Warren County Board attempts to argue in its brief that the Bowling Green Board's entire argument was based on the impact of removing all Warren County students from Bowling Green Independent, but this is a complete mischaracterization of the evidence. With regards to each of the enumerated factors, as well as other relevant factors, the Bowling Green Board presented evidence of the impact on Bowling Green Independent for both the 2014-2015 school year and the long-term impact of a continued reduction. The various impacts on Bowling Green

¹⁸ Hearing Officer's April 28, 2014 Order Denying Second Motion in Limine in Part and Granting in Part.

¹⁹ *Id.*

Independent are analyzed in detail in the Bowling Green Board's post-hearing brief, attached hereto as Exhibit 4, and will not be reproduced in full in this brief. The Hearing Officer and Commissioner considered both the immediate and long-term impact in making their decision to continue to allow 750 Warren County residents to attend Bowling Green Independent during the 2014-2015 school year.

While the detrimental impact of a one-year reduction is less severe, the impact on Bowling Green Independent, even in the first year, is significant enough to warrant the Commissioner's decision because Warren County was unable to prove it would financially benefit from these students. Any marginal positive impact on Warren County with regards to the statutory factors is insufficient to justify a reduction in the number of students permitted to attend Bowling Green Independent given the disproportionately negative impact such a reduction would have on Bowling Green Independent.

A. Bowling Green Independent's internal growth is insufficient to offset the negative impact of a reduction in the number of Warren County residents attending Bowling Green Independent.

Bowling Green Independent's minimal internal growth is insufficient to offset the negative impact of reducing the number of Warren County residents permitted to attend Bowling Green Independent. At best, based on the Warren County Board's last proposed nonresident agreement, it proposes to reduce the number of its students permitted to attend Bowling Green Independent by 50 each year. However, based on the Warren County Board's appeal, and Western Kentucky University Professor of Economics Dr. Leguizamon's analysis, the Warren County Board actually proposes to reduce that number by more than 50 students each year. Bowling Green Independent is not growing at a rate sufficient to offset these reductions.

While Bowling Green Independent did grow internally by 53²⁰ students between the 2012-2013 and 2013-2014 school years,²¹ this growth is uncharacteristic of the typical growth within the district. Since the 2004-2005 school year, Bowling Green Independent's internal growth has exceeded 50 students only one other time.²² There have been several years where the internal growth was only in the single digits.²³ While Bowling Green Independent is growing internally at a very slow pace, Warren County, the sixth largest school district in Kentucky,²⁴ is experiencing much more rapid growth. Between the 2012-2013 and 2013-2014 school years, Warren County grew by 206 students.²⁵ Since the 2006-2007 school year,²⁶ Warren County has experienced only one year in which growth was under 100 students (99 students in 2011-2012).²⁷ The next lowest year's growth was 172 students between the 2007-2008 and 2008-2009 school

²⁰ The Warren County Board claims that Bowling Green Independent's internal growth was 76 students between the 2012-2013 and 2013-2014 school year. However, Tinius' testimony during the hearing (cited by Warren County in its appeal) failed to take into account several students that should not be included in that number. Other evidence presented during the hearing, including reconciling for the erroneous classification of several students pointed out by the Warren County Board, proved that Bowling Green Independent's internal growth was actually 53 students. *See*, Appellee's Post-Hearing Brief, p. 18 for a detailed accounting of Bowling Green Independent's internal growth. The Warren County Board claims in its exceptions that the calculations in this portion of Bowling Green Independent's brief are incorrect. However, the Warren County Board is comparing apples to oranges in its calculations. The Warren County Board calculates growth using a 2012-2013 resident number of 2,822 (which includes alternative school students) and a 2011-2012 resident number of 2,782 (which does not include alternative schools). The 2011-2012 number is taken from evidence presented in last year's hearing, and made part of this year's record as Joint Exhibit 1. During last year's hearings, neither district included alternative school students in their open records request responses regarding enrollment therefore, these students were not included in the exhibits. This year, both districts produced such information and to make the exhibits more complete, these students were included in the exhibits admitted this year. The Warren County Board also argues that during the 2013-2014 school year, CDE students should be counted as part of Bowling Green Independent's internal growth. However, because CDE students were not included in the resident population during 2012-2013, this again would create a false picture of Bowling Green Independent's internal growth. In every growth calculation made by the Bowling Green Board, it accounts for this discrepancy properly. The Warren County Board makes no attempt to do the same, and its calculations actually skew the data by comparing data sets that do not contain the same information for each school year, resulting in invalid calculations.

²¹ *See*, Appellee's Post-Hearing Brief, p. 18.

²² *Id.*

²³ *Id.*

²⁴ Transcript of Evidence from the 2014 Hearing ("TE") Volume II, p. 21.

²⁵ *See*, Appellee's Exhibit 26. The Warren County Board relies on Warren County Chief Financial Officer Willie McElroy's testimony that growth was only 40 to 50 students, however the data, provided by the Warren County Board in response to the Bowling Green Board's open record request, clearly depicts growth that is much more significant.

²⁶ The Warren County Board did not provide the Bowling Green Board with information prior to this school year.

²⁷ *See*, Appellee's Exhibit 26 and Appellee's Post-Hearing Brief, p. 20.

years. Warren County's enrollment and growth percentages, calculated from information contained in Warren County's School Report Cards, which are documents comprised of information the district reports to the Kentucky Department of Education after each school year, are listed below.²⁸

<u>School Year</u>	<u>Total Enrollment</u>	<u>Growth</u>
2012-2013	13,803	296 (2.19%)
2011-2012	13,507	99 (0.74%)
2010-2011	13,408	287 (2.19%)
2009-2010	13,121	374 (2.93%)
2008-2009	12,747	172 (1.37%)
2007-2008	12,575	481 (3.98%)
2006-2007	12,094	"over 300 students" ²⁹

Warren County's enrollment and growth from the year 2012-2013 to 2013-2014, calculated from information provided by Warren County in response to Bowling Green Independent's Open Records Request, are listed below.³⁰

<u>School Year</u>	<u>Total Enrollment</u>	<u>Growth</u>
2013-2014	14,629	206 (1.43%)
2012-2013	14,423	---

Based on this data, it is evident that any internal growth within Bowling Green Independent would be insufficient to offset any reduction in nonresident students attending Bowling Green Independent. This data further indicates that Warren County is growing significantly each year, and cannot justify its need to harm Bowling Green Independent by reducing the number of its residents permitted to attend Bowling Green Independent.

²⁸ See, Bowling Green Independent Exhibit 26.

²⁹ Warren County's 2006-2007 School Report Card reports a growth of "over 300 students" without reporting an exact number.

³⁰ See, Bowling Green Independent Exhibit 26.

The real estate market in the Bowling Green/Warren County community also plays a large role in Bowling Green Independent's slow internal growth. Ron Cummings ("Cummings"), a local realtor, presented significant testimony regarding the lack of housing available within Bowling Green Independent compared to the large selection of housing available within Warren County.³¹ The Warren County Board attempts to discredit Cummings' analysis of the availability of housing within the two school districts based on the fact that the Multiple Listing Service ("MLS") listings he relied upon do not include homes that are "for sale by owner" or sold at auction. However, Cummings testified that these homes that are not included on the MLS are such a small portion of the homes listed in the community as to not change his analysis. Cummings testified as follows after being questioned by the Warren County Board's attorneys on this subject:

But, historically, for-sale-by-owners only make up five percent of all houses on the market, and auctions are a dime a dozen. You might have – for the entire year, you might have ten auctions within the city school system for the whole year. And Master Commissioner, again, probably 90, 95 percent of those houses that Master Commissioner sells are also county properties, not city.³²

What Cummings' testimony actually proves is that there are more Warren County homes not included in the MLS listings than there are Bowling Green Independent homes. This demonstrates that the amount of housing available within Bowling Green Independent is even less when compared to that available in Warren County than is depicted by the MLS listings admitted as exhibits at the hearing.

The Warren County Board also attempts to argue that because most of the homes available for sale within Bowling Green Independent are homes valued well below the average home price for Warren County nonresident students, that this actually "provides a greater

³¹ TE II, pp. 289-330.

³² TE II, p. 321.

opportunity for families wanting to make the move to secure affordable housing in their price range.”³³ However, it presented absolutely no evidence at the hearing that Warren County residents desiring to attend Bowling Green Independent are in the market for “more affordable” housing or that housing within Bowling Green Independent is actually more affordable than comparable housing in Warren County. This is yet another attempt by the Warren County Board to mischaracterize the evidence presented at the hearing. The Warren County Board cannot argue that this lack of suitable housing within Bowling Green Independent does not significantly contribute to Bowling Green Independent’s slow internal growth.

B. Bowling Green Independent’s facilities will be negatively impacted by a reduction in Warren County resident enrollment.

Certain facilities within Bowling Green Independent will be significantly impacted if the number of Warren County residents attending Bowling Green Independent is reduced. Bowling Green Independent consists of five elementary schools, one middle school, and one high school. The Warren County Board attempted to argue that the Bowling Green Board presented no evidence on how school populations would be affected based on a one-time reduction and claimed that the 55 students would have been spread across the entire district, causing no impact. However, the Bowling Green Board did present evidence indicating exactly where these 55 students would be enrolled, demonstrating the negative impact on certain schools if the students were not permitted to enroll. Bowling Green Independent consists of five elementary schools (Potter Gray Elementary, McNeill Elementary, Dishman-McGinnis Elementary, T.C. Cherry Elementary, and Parker-Bennett-Curry Elementary), one middle school (Bowling Green Junior High School), and one high school (Bowling Green High School). 34 of the 55 applicants who would be admitted to Bowling Green Independent would attend Potter Gray Elementary or

³³ Board of Education for the Warren County School’s Exceptions to the Hearing Officer’s Recommended Findings of Fact, Conclusions of Law and Recommended Order, p. 27.

McNeill Elementary.³⁴ All of the remaining 21 applicants would attend Bowling Green Junior High or Bowling Green High School.³⁵ Each of these schools would feel an immediate impact of such a drop in enrollment.

If the reduction of 55 students is not a one-time reduction, and the Warren County Board continues to reduce the number of students allowed under the nonresident agreement each year as it has indicated it plans to do, Bowling Green Independent could be forced to close or consolidate some of its elementary schools. Joe Tinius ("Tinius"), Bowling Green Independent Superintendent, testified as follows regarding continued reductions in the number of Warren County residents attending Bowling Green Independent:

[I]nitially, the two schools that would be impacted the most would be Potter-Gray Elementary and McNeill Elementary... within the next three to five years, we would have to – we would certainly look to consider whether or not we still need to continue to have five elementary schools. Would it be more efficient to move to four elementary schools and close one of those elementary schools?³⁶

While Potter Gray Elementary and McNeill Elementary will experience the greatest immediate impact, in only a few years, both Bowling Green Junior High School and Bowling Green High School will also end up significantly under capacity if these reductions continue over time. One reason Bowling Green Independent is willing to absorb the additional costs associated with educating Warren County residents is to "maintain its course offerings, with A-P classes that are very important to the high school..."³⁷ If the Warren County Board continues to reduce the number of students allowed under the nonresident agreement with the Bowling Green Board, the four schools that will be most heavily impacted by the reduction will end up significantly

³⁴ See, Appellee's Exhibit 6.

³⁵ *Id.*

³⁶ TE III, p. 226.

³⁷ TE III, p. 284.

under capacity and their abilities to maintain current course offerings will be negatively impacted.

The Warren County Board also argues that Bowling Green Independent has not proven it would be harmed by a reduction of 55 students because its bonding capacity would only be reduced by approximately \$600,000. However, a reduction in bonding potential of over a half-million dollars, especially to a small independent school district, can hardly be characterized as insignificant enough to not harm the district. The Warren County Board also attempts to criticize the credibility of the bonding analysis conducted by Chip Sutherland ("Sutherland"), Bowling Green Independent's fiscal agent from Hilliard-Lyons, to support its argument. However, its only criticisms of this analysis are actually criticisms of Kentucky Department of Education requirements. The Warren County Board challenges Sutherland's analysis on the basis of its use of an ADA number that is less than the district's enrollment. However, ADA is the number that must be used in the bonding calculation, and ADA, which stands for average district attendance, is necessarily less than enrollment because not all enrolled students will be in attendance every day. The Warren County Board further challenges Sutherland's bonding calculations based on the fact that they do not account for growth over time. However, Sutherland testified that Kentucky Department of Education policies dictate that you cannot project growth in ADA when calculating bonding capacity.³⁸ Sutherland's calculations clearly show that Bowling Green Independent's bonding capacity will decrease with reductions in its nonresident population, thus negatively impacting Bowling Green Independent's facilities.

³⁸ TE II, p. 255.

C. Staffing at Bowling Green Independent would have been negatively affected had the Warren County Board been successful in reducing the number of its residents permitted to attend Bowling Green Independent.

The Warren County Board's attempt to decrease the number of nonresident students covered by the nonresident student contract between the Warren County Board and the Bowling Green Board would have negatively impacted the number of certified staffing position allocations at Potter Gray Elementary, McNeill Elementary, and Bowling Green High School for the 2014-2015 school year. The Bowling Green Board presented evidence at the hearing that if Bowling Green Independent maintained its current enrollment, including nonresident students, Potter Gray Elementary would be allocated 21 certified staffing positions, McNeill Elementary would be allocated 19 certified staffing positions, and Bowling Green High School would be allocated 55 certified staffing positions for the 2014-2015 school year based on a 3% discretionary increase approved by the Bowling Green Board.³⁹ If siblings were the only new Warren County nonresident students permitted to enroll in Bowling Green Independent in 2014-2015, Potter Gray Elementary would only be allocated 20 certified staffing positions, McNeill Elementary would be allocated 18 certified staffing positions, and Bowling Green High School would be allocated 54 certified staffing positions.⁴⁰ This reduction would have resulted in Bowling Green Independent being able to hire three less certified teachers than it would otherwise be able to hire if the nonresident student number were not reduced.⁴¹

As is apparent from the enrollment numbers presented in Joint Exhibit 17, and the reductions made to the 2013-2014 allocations, removing Warren County students from Bowling Green Independent will have a tremendous effect on the staffing levels needed at Potter Gray

³⁹ See, Appellee's Exhibit 28.

⁴⁰ See, Bowling Green Independent Exhibit 29.

⁴¹ TE III, pp. 237-238.

Elementary, McNeill Elementary, Bowling Green Junior High School, and Bowling Green High School in the future. If the Warren County Board is successful in decreasing the number of students allowed under the nonresident contract, the number of certified staffing allocations at Potter Gray Elementary, McNeill Elementary, Bowling Green Junior High School, and Bowling Green High School will continue to be reduced by an estimated three to five positions per year.⁴² In addition to the reductions in certified staff, if the number of Warren County residents attending Bowling Green Independent decreases, the number of classified staff positions will be reduced as well.⁴³

The Warren County Board attempts to argue that any staffing reductions would be due to decreased need, thus having no adverse effect on Bowling Green Independent. However, this is simply untrue. Tinius testified that in terms of classified staff reductions, one of the biggest areas impacted will be instructional assistants.⁴⁴ Because many of the instructional assistants work with special needs students and provide additional help in those classrooms, a reduction in the number of classified positions will have an adverse impact on the district overall.⁴⁵

D. Bowling Green Independent will not be in a better position than it was in 2012-2013 if the Warren County Board is successful.

The Warren County Board's argument that Bowling Green Independent will be in a better position than it was during the 2012-2013 school year if the Warren County Board is permitted to reduce the number of nonresident students is yet another mischaracterization of the evidence. As part of this argument, the Warren County Board focuses on errors in the student enrollment figures that were completely explained during the hearing and in the Appellee's Post-Hearing Brief, beginning on page 12.

⁴² TE III, pp. 238-239.

⁴³ *Id.*

⁴⁴ TE III, p. 239.

⁴⁵ *Id.*

Further, the Warren County Board's math, used to argue Bowling Green Independent would be in a better position, even after the reduction in nonresident students, is flawed. In 2012-2013, Bowling Green Independent was receiving SEEK funds for 850 Warren County nonresident students. Following the Commissioner's Final Order, in the 2014-2015 school year, Bowling Green Independent could enroll only up to 750 Warren County nonresident students. The 181 Children of District Employees (CDE) residing in Warren County are irrelevant to this calculation as Warren County now has no entitlement to SEEK funds from these students.

The law changed in 2013 to allow CDE students to attend the district in which their parents work without being included in a nonresident student agreement. At that time, Tinius proposed a reduction from 850 to 750 to account for what he thought were approximately 100 Warren County CDE students attending Bowling Green Independent. The Warren County Board's attempt to paint the picture that Bowling Green Independent incorrectly reported its number of CDE students was explained so that the Hearing Officer and Commissioner recognized any reports of that number being approximately 100 were simply estimates of an average over several years, as there was no mechanism or reason to track these students prior to the change in the law in 2013.⁴⁶ Even though Tinius proposed a reduction in the number at the time the law changed in an attempt to maintain the same number of Warren County residents attending Bowling Green Independent, at the time of the change in the law, CDE students became irrelevant to nonresident student agreements. As such, Bowling Green Independent was under no obligation to make the reduction it did. Because CDE students are not considered nonresident students, the Warren County Board's attempt to count them as such for purposes of this appeal is improper.

⁴⁶ See, Recommended Finding of Fact #12, TE III, p. 206.

E. Diversity at Bowling Green Independent will be negatively impacted if the number of Warren County residents attending Bowling Green Independent is reduced.

If the Warren County Board is permitted to continually reduce the number of its residents that attend Bowling Green Independent, Bowling Green Independent will become a less diverse school district. Diversity has a much broader definition than the Warren County Board would lead the Kentucky Board of Education to believe. The Warren County Board attempts to define diversity as a characteristic that can only be increased by increasing minority populations and decreased by decreasing minority populations. However, Dr. Roslyn Mickelson ("Dr. Mickelson"), who is a Professor of Sociology at the University of North Carolina at Charlotte and has conducted extensive research regarding school choice and its impact on diversity, explained throughout her testimony during the hearing that this is not the case. Diversity is defined as follows:

[D]iversity in a school setting depends on the community in which the school district resides...a diverse school is one that reflects the socioeconomic and racial and ethnic mix of the children who attend the schools and who live in the community.⁴⁷

If the number of Warren County residents attending Bowling Green Independent is continually reduced, Bowling Green Independent's diversity will be negatively impacted. While there would be little noticeable impact in the first year of a reduction, Dr. Mickelson testified that "[o]ne year is like pulling a thread out of a fabric. If each year more threads are pulled out of the fabric, eventually the fabric unravels."⁴⁸

Dr. Mickelson presented evidence regarding the importance of diversity in schools. She testified that diverse schools foster greater achievement and relate to positive academic and

⁴⁷ TE I, p. 118.

⁴⁸ TE I, p. 127.

nonacademic outcomes both during school and as students enter adulthood.⁴⁹ While these benefits accrue to children from all racial, ethnic and socioeconomic backgrounds, children from economically disadvantaged and minority backgrounds are positively impacted most, especially at the secondary school level.⁵⁰ If the Warren County Board is permitted to continually reduce the number of its residents it permits to attend Bowling Green Independent, the district's student population will no longer reflect the socioeconomic, racial and ethnic mix of the Bowling Green/Warren County community.

Dr. Mickelson also testified that ending the historical arrangement between the districts and substantially reducing the number of Warren County students permitted to attend Bowling Green Independent would reduce diversity in both districts over time.⁵¹ She testified as follows:

As I understand the nature of the two communities now and how I understand the – what the termination or changing of the arrangement would result in, Warren County would become more privileged, it would become more middle class and more white, whereas the Bowling Green Independent School District would become less privileged, it will have a higher proportion of children who are qualified for free and reduced lunch and it will have a higher concentration of disadvantaged minority students over time.⁵²

During the 2013-2014 school year, Bowling Green Independent was comprised of 41.09% minorities and Warren County was comprised of 25.46% minorities. Eventually, if the Warren County Board continues reducing the number of its residents permitted to attend Bowling Green Independent, Bowling Green Independent's minority population would increase over 5%, while Warren County's would decrease less than ½ of 1%.⁵³ This would only serve to widen the gap between Bowling Green Independent and Warren County's demographics.

⁴⁹ TE I, p. 119.

⁵⁰ TE I, pp. 119-120.

⁵¹ TE I, p. 121.

⁵² TE I, p. 121.

⁵³ See, Appellee's Exhibit 9.

Because diversity is defined not only in terms of race, but also socioeconomic status, Dr. Mickelson testified regarding the impact on free and reduced lunch percentages if Warren County residents are no longer permitted to attend Bowling Green Independent. She testified that the nearly 10% increase in free and reduce lunch percentages at Bowling Green Independent if Warren County residents are no longer attending Bowling Green Independent “is a striking and large change.”⁵⁴

The Warren County Board attempts to argue that the number of nonresident students attending Bowling Green Independent has polarized the schools within Bowling Green Independent. However, it has presented absolutely no evidence that Bowling Green Independent’s nonresident population is the reason that certain schools within Bowling Green Independent have high minority populations. Likewise, the Warren County Board has presented no evidence that Bowling Green Independent’s admission policy for nonresident students has any impact whatsoever on its minority or free and reduced populations. This assertion is based upon pure speculation as not a single piece of evidence was introduced during the hearing to support this conclusion.

The Warren County Board also mischaracterizes the testimony of Dr. Larry Vick (“Dr. Vick”). Dr. Vick is the former superintendent of both independent and county school districts, with 44 years in public education of which 39 years were spent as a superintendent, and mainly presented testimony regarding the cost of educating a student. Dr. Vick never testified that Warren County resident students reduce Bowling Green Independent’s *diversity*. He testified that these students reduce Bowling Green Independent’s *minority percentage*. As has been thoroughly explained above, a high minority percentage does not equal diversity. Dr. Mickelson explained that the opposite is true in this case.

⁵⁴ TE I, p. 153.

V. Warren County did not prove it would benefit financially from reducing the number of its residents permitted to attend Bowling Green Independent.

The Warren County Board continues to cite its need for additional revenue as the reason for the reduction of 41 or 55 students, but has presented no reliable evidence that it will experience any financial benefit from the return of these students to Warren County. Warren County is currently in good financial condition, with a contingency fund that continues to increase and is well above the state's required minimum. In the past year, Warren County's net position increased by approximately \$3.5 million and its general fund balance increased by over \$5.5 million.⁵⁵ This is hardly the picture of a district that is struggling financially.

Despite Warren County's sound financial position, it continues to argue that it needs these students because it is experiencing financial difficulty. The Warren County Board argues that because of several recent spending cuts it needs the additional nonresident students for their SEEK dollars. However, any benefit the additional SEEK dollars would bring to Warren County would be minimal. **Even with the unreasonable projection that these students will cause Warren County to incur no additional costs, Chris McIntyre, Warren County's Director of Finance, testified that the increase in funding would amount to only 0.12% of Warren County's general fund budget of approximately \$86 million.**⁵⁶ When the costs associated with educating these students, as well as the diminished benefit of the tax dollars associated with these students is factored in, this increase in funding and benefit to Warren County is even less.

Warren County spent \$8,533 per student during the 2012-2013 school year according to its School Report Card.⁵⁷ While some students cost more to educate and some cost less, Dr. Vick testified that this school report card number is the best indicator of the cost to educate a

⁵⁵ TE I, pp. 288-289, 375.

⁵⁶ TE I, p. 383.

⁵⁷ See, Binding Stipulation no. 17.

student, and is the only number he would feel comfortable as a superintendent using for planning purposes.⁵⁸ Jeff Herron (“Herron”), Bowling Green Independent’s Finance Director, also testified that a child cannot be educated on SEEK funds alone.⁵⁹ This is why districts collect local taxes.⁶⁰ With per student spending at over twice the amount of SEEK funding per student, it can hardly be said that requiring these students to attend Warren County will improve Warren County’s financial position. Additionally, Dr. Vick testified that focusing only on the SEEK funds that these students could bring to Warren County is short sighted.⁶¹ Warren County is actually receiving almost \$1 million in local revenue from property, utility and occupational taxes and spending nothing to educate those children attending Bowling Green Independent, thereby enhancing the education of the other students attending the county school system.⁶² What makes more sense economically is for Warren County to allow more of its residents to attend Bowling Green Independent so that it is spending even less on education costs while still keeping the same level of local revenue.⁶³

Herron created several charts analyzing the financial impact that the Warren County resident students attending Bowling Green Independent have on Warren County, and the impact the return of some or all of these students will have on Warren County.⁶⁴ Herron conducted a detailed analysis of the impact on Warren County’s staffing of returning 55 students to Warren County next year.⁶⁵ In conducting this analysis, he reviewed the list of Warren County applicants identified to attend Bowling Green Independent in the 2014-2015 school year, and determined the Warren County schools that the first 55 of these children, ranked by priority,

⁵⁸ TE II, pp. 362-363.

⁵⁹ TE II, pp. 224-225.

⁶⁰ TE II, p. 225.

⁶¹ TE II, p. 375.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See*, Appellee’s Exhibits 17-19.

⁶⁵ *See*, Bowling Green Independent Exhibit 19 and TE II, pp. 208-210.

would attend if not permitted to attend Bowling Green Independent.⁶⁶ He then used Warren County's own School-Based Decision Making Council ("SBDM") 2014-2015 tentative allocations for each school to determine whether each school would need to hire an additional teacher if the students enrolled in Warren County. Based on this analysis, he determined that Warren County would need to hire four additional teachers: one at Greenwood High School, one at Natcher Elementary, one at Richardsville Elementary, and one at Warren East High School.⁶⁷ At the time he prepared his analysis, Herron was unaware of the number of kindergarten students who were included in the list of 55, so he allocated full SEEK to each student in computing the financial impact, which was a conservative measure in Warren County's favor. Based on his conservative analysis, Herron concluded that Warren County would only benefit in the amount of \$21,679.36 from the additional SEEK dollars attributable to the 55 students after accounting for the four new teachers.⁶⁸

The Warren County Board argues that the Hearing Officer failed to consider that McIntyre's calculations do not account for half-SEEK for kindergarteners, but this argument actually works against Warren County. If some of the students considered in the financial analyses conducted by McIntyre will not get the full SEEK amount, then the financial benefit he calculated Warren County would receive for these students would be even less. When Herron became aware that of the 55 students, 24 would be kindergarteners, he recalculated his analysis based on the fact school districts only receive one-half of the SEEK funding amount for kindergarteners.⁶⁹ After conducting this analysis, he determined that Warren County would actually sustain a loss of \$25,252 next year if it hires the four teachers that it would need based

⁶⁶ *Id.* and TE III, pp. 137-138.

⁶⁷ *See*, Bowling Green Independent Exhibit 19 and TE II, pp. 208-210.

⁶⁸ *See*, Bowling Green Independent Exhibit 19 and TE II, 206-214.

⁶⁹ TE II, pp. 212-214.

on its own SBDM tentative allocations.⁷⁰ Herron's analysis is more reliable than the analysis conducted by McIntyre, discussed below, because Herron's analysis is based on the actual students who are at issue and their home schools, as opposed to the "trend analysis" used in McIntyre's analysis.

The SBDM allocations for Warren County produced in Joint Exhibit 65 also demonstrate that SEEK allocations are not sufficient to operate a school.⁷¹ Using one of these allocation sheets, Dr. Vick demonstrated that each student is allocated a certain amount of dollars of his or her SEEK funds to be used to operate the school he or she attends.⁷² Based on the example Dr. Vick used during the hearing, approximately \$2,600 of each student's SEEK funding at Alvaton Elementary is used to run the school.⁷³ This allocation does not take into account several additional costs, including utilities, transportation, expenditures for programs such as art, band and physical education, etc.⁷⁴ Dr. Vick testified that this allocation is not sufficient to run a school, but demonstrates that at a minimum, this amount must be allocated for every student attending that school. Dr. Vick definitively stated that in his opinion, "there is no way [Warren County] could operate on the SEEK funding."⁷⁵ He further testified that the fact that every district raises money in addition to state funding is "a good indication that nobody is able to educate a child strictly on SEEK dollars...every district has to supplement the SEEK dollars to some extent..."⁷⁶

⁷⁰ *Id.*

⁷¹ TE II, pp. 349-355; these SBDM allocations are attached as Exhibit 5.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ TE II, p. 355:19-20.

⁷⁶ TE II, p. 346.

Herron also prepared an analysis of the tax dollars that Warren County is currently collecting on the 764 of its residents that it is not educating.⁷⁷ This analysis is summarized in the chart below.

REVISED Nonresident Students Household Property information	
Number of Households	Property Values
55	\$2,379,000-\$500,000
112	\$495,000-\$300,000
139	\$299,000-\$200,000
148	\$199,000-\$100,000
37	<\$100,000
Average	\$291,829
511 Unduplicated Households 491 Unduplicated Property Owners	
Assessment total for 491 Unduplicated Households	\$143,288,039
WC School Property tax rate	42 cents per \$100 value (0.0042)
Property tax received by WC on BGISD Nonresident students living in WC	\$601,809.76
Household income required to afford home at the average property value of \$291,495	\$80,400
Estimated Income of 491 Unduplicated property owners	\$39,476,400
Occupational Tax rate	0.50%
Estimated Occupational Tax of 491 Unduplicated property owners	\$197,382.00
WCPS Utility Tax Collected in 12-13	\$5,765,295
Households serviced by BGMU assessed WCPS utility tax	13,540
Households serviced by WRECC assessed WCPS utility tax	22,769
Total Households services WCPS utility tax	36,309
Average WCPS Utility Tax Per Household	\$159
Estimated WCPS Utility Tax Revenue attributed to 511 unduplicated households	\$81,138.72
Total Utility, Property, and Occupational Tax Attributed to 761 WCPS resident students attending BGISD	\$880,330.48

In conducting this analysis, Herron began by estimating the property taxes that Warren County receives from the 764 Warren County residents attending Bowling Green Independent.⁷⁸

⁷⁷ See, Appellee's Exhibit 17.

Of the 764, there are 491 unduplicated property owners, excluding apartment complexes, and the average home value of these 491 residential properties based on information provided by the Warren County Property Valuation Administrator is \$291,829.⁷⁹ This average was used in other calculations within the document, but the property tax attributable to these homes was calculated by applying Warren County's 42 cents per \$100 in value property tax rate to the total assessed value of the 491 properties.⁸⁰ Based on this calculation, Warren County receives approximately \$601,809 in property tax revenue for students that it does not have to educate.⁸¹

Using the average home price of \$291,829, Craig Stahl, a Senior Vice President at American Bank and Trust, Co., estimated that the average income required to afford such a home was \$80,400 per year.⁸² Assuming this is the average household income of the 491 property owners, if Warren County's occupational tax of 0.50% is applied to these households, Warren County receives approximately \$197,382 per year in occupational tax revenue attributable to the 764 students for which it incurs no cost in educating.⁸³

Herron additionally calculated the average utility tax assessed per household in Warren County to be \$159.⁸⁴ If 511 households pay that average utility tax (this number includes families living in rental complexes), Warren County receives approximately \$81,138 in utility taxes on the 764 students.⁸⁵ Based on Herron's analysis, he estimates that Warren County receives in total approximately \$880,330 in tax revenue on the 764 students for which it incurs no cost because these students are being educated at Bowling Green Independent.⁸⁶ This

⁷⁸ TE II, pp. 193-202.

⁷⁹ *Id.* and Appellee's Exhibit 17.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See*, Appellee's Exhibit 16 and TE II, pp. 198-200.

⁸³ *See*, Appellee's Exhibit 17 and TE II, p. 200.

⁸⁴ *See*, Appellee's Exhibit 17 and TE II, p. 201.

⁸⁵ *Id.*

⁸⁶ *See*, Appellee's Exhibit 17 and TE II, pp. 201-202.

calculation does not include the homes of the CDE students living in Warren County but attending Bowling Green Independent, which the Warren County Board continues to erroneously insist are relevant. If these students were included, Warren County would receive even more tax revenue for its residents that it is not educating.

If the Warren County Board is successful in reducing the number of Warren County residents it permits to attend Bowling Green Independent, these tax assessments will not change, but the number of students Warren County is tasked with educating will increase, thereby diminishing the amount of tax dollars available to educate each student.⁸⁷ To illustrate this, Herron prepared an analysis of the tax revenue Warren County receives on a per pupil basis and determined to what level Warren County would have to raise its property tax rate in order to maintain the same level of funding per student if some or all of the Warren County residents attending Bowling Green Independent return to Warren County.⁸⁸

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⁸⁷ TE II, pp. 205, 340-341.

⁸⁸ Appellee's Exhibit 18.

Per Pupil Tax Revenue Collected by Warren County

2013 Tax	
Property	27,102,056
Motor Vehicle	2,987,807
Utilities	5,765,295
Occupational	7,327,449
Other	231,309
Total	43,413,916

Per Pupil (2013)	3,400.99	(Total divided by 12,765.083 ADA)
Per Pupil Tax Revenue if 55 Warren County residents are returned to Warren County	3,386.40	(Total divided by 12,820.083 ADA)
Per Pupil Tax Revenue if all 764 Warren County Residents are returned to Warren County	3,208.93	(Total divided by 13,529.083 ADA)

Revenue and Property Tax Rate Required to Maintain \$3,400.99 in Tax Revenue Per Pupil

	<u>Return 55 to WC</u>	<u>Return 764 to WC</u>
Revenue Required	\$43,600,970	\$46,012,272
Additional Revenue Required	\$187,054	\$2,598,356
Property Tax Rate Required to Collect Additional Revenue Required	0.423	0.46

During the 2014-2015 school year, if 55 more students attended Warren County as a result of the reduction in the nonresident student agreement between the districts, Warren County would have to raise its property tax rate from 42 cents per \$100 in value to 42.3 cents per \$100 in value order to maintain its current level of tax dollars spent per student of \$3,400.99.⁸⁹ If over time all Warren County residents are returned to Warren County, it would have to increase its property tax rate to 0.46% in order to maintain the same level of per pupil tax revenue.⁹⁰ This calculation is relevant to demonstrate if Warren County has more students to educate based on

⁸⁹ *Id.*

⁹⁰ *Id.*

the same tax funding, it has less funds to spend on each individual student, thereby diluting the local funding and diminishing the level of educational services to its students.⁹¹

McIntyre developed two alternate analyses projecting the financial impact the increase in 41 students will have on Warren County.⁹² Warren County contends that 41, as opposed to 55, is the number of students who will return to Bowling Green Independent if only siblings are allowed to enroll in Bowling Green Independent next year. Both of these spreadsheets estimate enrollment at each of Warren County's schools based on a trend analysis performed by the Warren County Board's attorney.⁹³ These estimates do not correspond to the actual schools these students would attend according to Bowling Green Independent Exhibit 6, which lists the students, in order of priority, who are affected by this decision. Because of the failure to take into account the schools that would be attended by the actual students at issue, McIntyre's calculations are inherently unreliable. It is also worth noting that Warren County has attempted to supplement the record regarding the number of staff it would need to hire with its footnote 9 on page 21. This additional evidence should not be considered since it is not a part of the record and cannot be tested or otherwise challenged.

In McIntyre's first spreadsheet, using the flawed enrollment allocations, McIntyre calculated the potential benefit to Warren County using actual enrollment numbers from Warren County as of December 1, 2013. He projected two scenarios in this spreadsheet: 1) Warren County will not have to hire any additional staff to absorb these 41 students, and 2) Warren County will need to hire one teacher and one aide at Natcher Elementary. Assuming Warren County will not have to hire any new staff to accommodate the 41 students, McIntyre predicts a

⁹¹ TE II, pp. 340-341.

⁹² Attached as Exhibit 6.

⁹³ TE I, pp. 320-321.

financial gain of approximately \$106,601.⁹⁴ Taking into account the possibility that Warren County may need to hire an elementary teacher and aide, McIntyre predicts that Warren County will see a financial gain of approximately \$32,056.⁹⁵

In McIntyre's second spreadsheet, McIntyre calculated the potential impact on Warren County using projected enrollment for the 2014-2015 school year based on Warren County's SBDM allocations. One of the two scenarios presented on this spreadsheet demonstrates that Warren County could actually sustain a loss during the 2014-2015 school year if a teacher and aide must be hired at Natcher Elementary and a teacher must be hired at Greenwood High School.⁹⁶ McIntyre's first scenario on this spreadsheet, assuming that no additional staff must be hired to accommodate the 41 students, predicts a gain of approximately \$108,941.⁹⁷ The second scenario, assuming the three additional hires, projects a loss of approximately \$28,292.⁹⁸ This scenario is the closest to that predicted by Herron based on the districted schools of the actual children affected, and still does not account for the hiring of four teachers as Herron predicted based on these actual districted locations. All of McIntyre's scenarios overestimate the amount of additional funding Warren County would receive, because there is an offset to the SEEK funding formula for the local property tax assessment.⁹⁹ This offset, referred to as the local effort, provides a deduction in the total SEEK funds allocated to a school district equal to 30 cents per \$100 of local property tax assessment.¹⁰⁰ Furthermore, because McIntyre's calculations do not accurately project where the 41 (or 55) students would attend within Warren

⁹⁴ TE I, p. 330.

⁹⁵ TE I, p. 338.

⁹⁶ TE I, pp. 346-347 and Appellant's Exhibit 13, p. 2.

⁹⁷ See, Appellant's Exhibit 13, p. 2.

⁹⁸ *Id.* and TE I, p. 381-382.

⁹⁹ TE I, p. 269.

¹⁰⁰ See, testimony of McElroy.

County, his analysis is less reliable than Herron's analysis that examined the students' actual addresses then used Warren County SBDM allocations to calculate additional teachers.

The Warren County Board also argues that because many of the Warren County residents applying to attend Bowling Green Independent are not classified as Limited English Proficiency ("LEP") or special education, they cost less than SEEK to educate. However, the data cited by the Warren County Board on page 19 of its brief actually supports the Bowling Green Board's position that no child can be educated for the SEEK amount, even those who do not require the additional services of LEP and special education students. The Warren County Board points out that the per pupil expenditure at Potter Gray Elementary, McNeill Elementary, Bowling Green Junior High School and Bowling Green High School is less than the district-wide per pupil expenditure. However, the per pupil expenditure at each of these schools is still between \$3,188 to \$4,297 in excess of the SEEK amount. The Warren County Board's own analysis demonstrates that the SEEK amount is inadequate.

VI. Bowling Green Independent's admission policy is fair and necessary for planning purposes and is not the proper subject of an appeal under KRS 157.350.

The Warren County Board maintains that it will not enter into a nonresident student agreement with the Bowling Green Board unless the agreement contains a provision that students will be admitted to Bowling Green Independent based on a random draw process, as opposed to the current priority system utilized by Bowling Green Independent. Bowling Green Independent should not be forced to implement an internal procedure insisted upon by another school district for multiple reasons.

KRS 157.350, the statute under which this appeal was sought, provides no mechanism for an appeal of a school district's application criteria. In fact, the statute makes no mention of admission criteria whatsoever.

Even if it were proper for the Kentucky Board of Education to decide on the appropriate admission process of nonresident students, Bowling Green Independent's current priority system is fair and necessary for adequate planning of upcoming school years. The Warren County Board did not demonstrate that Bowling Green Independent's priority policy is discriminatory in any way. Since 2001, when this priority policy was put into place due to Warren County's imposition of a cap on the number of its residents it would permit to attend Bowling Green Independent with SEEK funding following, there have been no complaints to the Bowling Green Board or to the Bowling Green Independent Central Office regarding the priority system.¹⁰¹ The Warren County Board takes issue with the Hearing Officer and Commissioner's finding that "Bowling Green can only consider those who apply."¹⁰² There is simply no way that the Warren County Board can justify its objection to this finding. The Bowling Green Board cannot consider any nonresident students for admission who do not apply. Further, because the Bowling Green Board has never heard a complaint regarding this policy, there is no evidence that the priority system discourages any group of students from applying. Considering the length of time this priority system has been in place, the fact that there have been no complaints is a strong indicator of the community's opinion of the fairness of the process.

Mike Bishop, Chair of the Bowling Green Board, described in detail during the hearing the rational basis behind each of the priorities listed on Bowling Green Independent's application for nonresident enrollment. After admitting currently enrolled students and siblings of currently enrolled students, priority is given to students transferring from private schools located within the Bowling Green Independent School District. These private schools are St. Joseph and Holy

¹⁰¹ TE III, pp. 16, 57, 163-164, 251.

¹⁰² See, Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Final Order, p. 33.

Trinity, two parochial schools located within the Bowling Green Independent attendance area.¹⁰³ Priority is given to these students to provide continuity of certain services and because of the longstanding relationship between Bowling Green Independent and St. Joseph in particular. Bowling Green Independent is tasked with providing certain services, including special education services, to private schools within its attendance boundaries. As such, Bowling Green Independent has already established a relationship with several of the children attending these private schools prior to their application to Bowling Green Independent.

Priority is given next to students of families owning property within the Bowling Green Independent School District.¹⁰⁴ This category is a priority because these families have supported Bowling Green Independent through paying property taxes on their property located within Bowling Green Independent's boundaries. The next priority, given for students of Western Kentucky University ("WKU") faculty and staff, is given for several reasons.¹⁰⁵ First, Bowling Green Independent has had a longstanding relationship with WKU through its participation in programs that have benefited not only the university but Bowling Green Independent as well. Additionally, McNeill Elementary is located adjacent to WKU, so it is extremely convenient for WKU employees to participate in their children's education at an elementary school located directly across the street.¹⁰⁶

Priority is also given to kindergarten and primary students.¹⁰⁷ This priority has several rational reasons for being included on Bowling Green Independent's application. First, Bowling Green Independent feels the first years of a child's education are critical, and if it is going to educate a student, the earlier the student can enroll in the district, the better. This priority is also

¹⁰³ TE III, p. 12.

¹⁰⁴ TE III, pp. 12-13.

¹⁰⁵ TE III, pp. 13-14.

¹⁰⁶ TE III, pp. 13-14.

¹⁰⁷ TE III, pp. 14, 135-136.

given to aid in planning. Enrolling students at the kindergarten or early primary levels serves to level out the grades each year and aids Bowling Green Independent in planning for the future if it knows the number of kindergarten students who will enroll in classrooms each school year.

None of Bowling Green Independent's priorities are included on its application to give any benefit to "students of means" as the Warren County Board argues. Each has a logical and nondiscriminatory basis. The Warren County Board cites an excerpt from a Kentucky Attorney General opinion regarding a nonresident student's right to be treated fairly. However, the same portion of the opinion that the Warren County Board cites actually supports the Bowling Green Board's position. The opinion states as follows:

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.*¹⁰⁸ (emphasis added)

The Bowling Green Independent priority system does not exclude or prioritize applicants based on a suspect class, and thus meets the Kentucky Attorney General's standards.

The Warren County Board takes issue with the fact that Bowling Green Independent has any policy that allows it to determine which nonresident students are admitted and in which order and insists that random selection is the only acceptable criteria. However, within its district, Warren County has an in-district transfer policy that is completely arbitrary in some instances. For example, in some of its high schools, the high school principal is given a 3% discretionary allowance within which he is free to admit the in-district transfer students of his choice.¹⁰⁹ This can hardly be said to be a "fair" policy, if Bowling Green Independent's logical priority system is not fair.

¹⁰⁸ Ky. OAG 79-327 (1979 WL 33461).

¹⁰⁹ TE II, pp. 47-49.

Furthermore, even assuming that Warren County did prove that Bowling Green Independent's priority policy gives preference to families based on financial position (which the Bowling Green Board disputes and the Warren County did not prove), Dr. Mickelson's testimony demonstrates that in a situation similar to that between Warren County and Bowling Green Independent, such a policy could foster or promote diversity. If the school that gives priority to students with more financial means is a school with a lower socioeconomic makeup, admitting students of greater financial means would actually produce greater diversity.¹¹⁰ This is precisely the case at Bowling Green Independent, a school system with a free and reduced lunch population of almost 55%.

A random draw process would make planning for future school years nearly impossible. Bowling Green Independent would not be able to predict the staffing needs of any of its schools for upcoming school years because there would be no certainty as to the grade levels in which the randomly selected students would fall. For these reasons, and because KRS 157.350 does not provide a mechanism to appeal a school system's application process, the Bowling Green Board maintains that this internal policy is not an issue that can or should be decided in this appeal.

VII. The Commissioner did not fail to consider the Warren County Board's exceptions filed in this appeal.

The Warren County Board's interpretation of the language of the Commissioner's Final Order in this case is illogical. In deciding an appeal under KRS 157.350, the Commissioner has before him the entire record, including any exceptions filed by the parties. If the Commissioner decides to adopt the Hearing Officer's recommendations in full, there is nothing in the statute that requires the Commissioner to specifically address a party's exceptions in his final order. If the language in the Commissioner's Final Order is narrowly construed, as the Warren County

¹¹⁰ TE I, p. 152.

Board proposes, it can be inferred that the Commissioner made his decision without reviewing any of the record, except for the Hearing Officer's recommendations. This restrictive reading of the Commissioner's Final Order is illogical as there has been no indication that the Commissioner actually failed to consider all portions of the record he deemed relevant in making his decision, including the exceptions filed by the Warren County Board.

VIII. Bowling Green Independent did not violate the Commissioner's Final Order in the 2013-2014 appeal.

Bowling Green Independent did not violate the Commissioner's Final Order or Kentucky law in allowing students whose residency status changed during the school year to remain enrolled in Bowling Green Independent until the end of the school year. The Hearing Officer and Commissioner correctly found that both schools have had a long-standing practice of allowing students whose resident status changes within the school year to remain enrolled. This practice is the only logical way to handle these students and prevent any unnecessary disruption to the students' educational process. Furthermore, this issue, related to the 2013-2014 school year, is not at issue in this appeal for the 2014-2015 school year.

CONCLUSION

For the past two years, the dispute surrounding the Warren County Board's decision to reduce the number of its residents who can attend Bowling Green Independent has caused significant turmoil in the Bowling Green/Warren County community. For the second year in a row, the Bowling Green Board has proven that any minimal benefit to Warren County is insufficient to justify the harm that would be caused to Bowling Green Independent and to the families and students affected by a reduction.

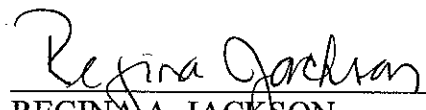
Warren County is a high achieving growth district and is in good financial position. Bowling Green Independent is not a vastly superior district whose enrollment of Warren County

residents drains academic and financial resources from Warren County in an amount sufficient to cause any kind of measurable detriment to Warren County. Both Bowling Green Independent and Warren County are currently academically, demographically, and financially sound.

For the second year in a row, the Commissioner has recognized that these are two strong districts whose historical arrangement has benefitted the community and students. In order to ensure that both districts continue to thrive, the Bowling Green Board requests that the Kentucky Board of Education uphold the Commissioner's Final Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

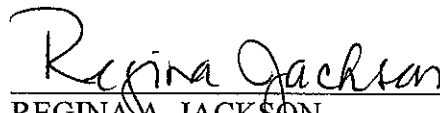
The undersigned hereby certifies that the foregoing has this day been sent via e-mail or regular U.S. Mail to the following:

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This the 5th day of September, 2014.



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