

**STATEMENT OF CONSIDERATION
RELATING TO 703 KAR 5:260
Implementation of Intervention Options in Priority Schools and Districts**

**Kentucky Department of Education
Office of Next Generation Schools and Districts**

Not Amended After Comments

1. A public hearing was scheduled on the above regulation on September 29, 2014 at 10:00 a.m. Eastern Time, in the State Board Room, Kentucky Department of Education, 500 Mero Street, 1st Floor, Frankfort, Kentucky but was cancelled when no one registered to attend or attended the hearing.
2. The following individuals submitted written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Stephanie Winkler, President	Kentucky Education Association (KEA)
Mary Ann Blankenship, Executive Director	Kentucky Education Association (KEA)

3. The following people from the promulgating administrative body responded to written comments:

Name and Title
Dr. Kelly Foster, Associate Commissioner, Office of Next Generation Schools and Districts
Kevin C. Brown, General Counsel/Associate Commissioner, Office of Guiding Support Services
Donna Tackett, Director, Division of Consolidated Plans and Audits
David Wickersham, Policy Advisor, Office of Next Generation Schools and Districts
Amy Peabody, Assistant General Counsel, Office of Guiding Support Services

Summary of Comments and Responses

- (1) Subject Matter: Statutory powers of a school council
 - (a) Comment: Commenters stated that the proposed regulation interferes with local governance of public schools. Commenters stated that Board of Education of Boone County v. Bushee (889 S.W.2d 809 (Ky. 1992)) interpreted the statutes that created school-based decision making in Kentucky, including KRS 160.345 and KRS 158.6455. Commenters stated that the General Assembly has taken no action that alters this model for public school governance.

Commenters stated that no agency in the executive branch of state government has the authority to use its regulatory power to change the statutory governance model, and cited KRS 13A.120 in support.

Commenters stated that KRS 156.6455, read in concert with KRS 160.290, KRS 158.6472, and KRS 13A.120, does not permit the Kentucky Board of Education to reduce the statutory authority of a local school board, council, or superintendent, or increase the oversight authority of the KDE or the education commissioner in formulating and executing the school intervention decisions that are required by KRS 160.346.

Commenters stated that under both KRS 160.345 and KRS 160.346, the school council is the central player in the creation and revision of any school improvement plan. Commenters stated that, by statute, schools that are in need of improvement require *more* [italics in original], not less, school-based decision making. Commenters stated that even a prolonged inability to improve a struggling school's performance does not necessarily deprive a school council of its independent, statutory authority to govern the school.

Commenters stated that the first seventeen pages of the proposed regulation, everything above the signatures, mention the commissioner of education thirty-two times. Commenters stated that in almost every instance, the proposed regulation grants some new authority over the affairs of priority schools to the commissioner of education. Commenters stated that this statistic demonstrates the disconnection that exists between the school-based decision making model that was created by the Kentucky General Assembly and the Kentucky Board of Education's view of priority school intervention.

Commenters stated that KRS 13A.120 does not permit the Kentucky Board of Education to ignore the state statutes that require local school governance.

Commenters stated that the Kentucky Education Association urges the thorough revision of the proposed regulation so as to fully effectuate the independent statutory authority of school councils, and to address the rights and interests of school councils' constituents, as required by KRS 160.345 and 160.346.

Those offering written comments related to the statutory powers of a school council were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response: The agency has carefully reviewed these thoughtful comments.

KRS 160.345, which exhaustively addresses the adoption, composition, and responsibilities of school councils, contains an explicit provision that refutes these comments. KRS 160.345 (10) states

Notwithstanding subsections (1) to (9) of this section, a school's right to establish or maintain a school-based decision making council and the powers, duties, and authority granted to a school council may be rescinded or the school council's role may be advisory if the commissioner of education or the Kentucky Board of Education takes action under KRS 160.346.

The agency agrees that Board of Education of Boone County v. Bushee (889 S.W.2d 809 (Ky. 1992)) interpreted the statutes that created school-based decision making in Kentucky, including KRS 160.345 and KRS 158.6455. The agency disagrees with the commenters that the General Assembly has taken no action that alters this model for public school governance, as KRS 160.345 and KRS 158.6455 have

been repeatedly amended since 1992, and KRS 160.345(10) explicitly anticipates the modification of public school governance during intervention.

The Kentucky Board of Education (KBE) has the clear authority to require approval of comprehensive school improvement plans under the mandate in KRS 158.6455 (1) (a) to create an accountability system to classify districts and schools. Paragraph (1) (b) specifies the elements of the accountability system, which includes the results of program reviews, student assessment results, and school improvement results, as well as other factors deemed appropriate by the board. Paragraph (4) requires the KBE to promulgate an administrative regulation to establish appropriate consequences for schools failing to meet their accountability measures. One of the consequences that may be required is a school and district improvement plan. Paragraph (7) allows the KBE to promulgate a regulation outlining a system of district accountability. KRS 158.6453 (3) (a) and (4) require the KBE to create and implement a balanced statewide assessment program that measures schools' and districts' student achievement to ensure compliance with the federal NCLB, and to ensure school accountability. The language throughout KRS 158.6453 and 158.6455 mandating accountability for schools and districts clearly evidences an intent that schools and districts who are not achieving satisfactory success under the assessment system may be required by the KBE to meet additional requirements, including submission of plans for review and revision.

The commenters argued that the holding in Bushee does not allow the KBE to promulgate regulations that require a school council to get approval of the school board, local school administration, or the KDE of any revision that the school might make to its school improvement plan in order to comply with KRS 160.346. The agency respectfully disagrees. KRS 160.346 *requires* [emphasis added] the Kentucky Board of Education to promulgate administrative regulations to establish the process and procedures for implementing available intervention options. KRS 160.346 (10.) The General Assembly has given the agency and the district specific statutory authority to audit and review school programs, as described in KRS 158.6453, when school accountability and quality of educational experiences is at issue. The holding in Bushee focused on the granting of authority to school councils in KRS 160.345 and the district's inability to require school councils to submit their exercises of KRS 160.345 power to the district for review and approval, where no such requirement was provided in statute.

The agency notes that the Kentucky Supreme Court has recently addressed KRS 13A.120 in Bowling v. Kentucky Dep't of Corr., 301 S.W.3d 478 (Ky. 2009), as corrected (Jan. 4, 2010.) The Court noted that the general matters for which an administrative body in the Executive Branch of our government *must* [emphasis added] adopt administrative regulations are identified in KRS 13A.100 entitled "Matters Which Shall Be Prescribed by Administrative Regulations." Id. at 486, 487.

The Court noted that KRS 13A.120 appears to contradict KRS 13A.100. Id. at 490. The Court determined that the General Assembly intended for the statutes to be construed together and for both to have meaning, and held that the statutes may be harmonized by noting that while KRS 13A.120 provides for when regulation is *permitted* [emphasis added], KRS 13A.100 provides for when regulation is *required* [emphasis added.] Id. at 491. The Court noted that even if KRS 13A.120 and KRS 13A.100 were thought to conflict, KRS 13A.100, the more recently adopted statute, would control over KRS 13A.120. Id. Because 13A.100 *requires* statements of general applicability, policy, and procedure to be addressed through the promulgation of administrative regulation, the agency does not violate KRS 13A.120 in promulgating 703 KAR 5:260.

No amendments have been made in response to these comments.

(2) Subject Matter: Replaced or advisory school councils

(a) Comment: Commenters stated that the proposed regulation gives undue weight to three of the four possibilities for reforming a school council that is unable to lead an intervention in a persistently low-achieving school. Commenters stated that the proposed regulation gives undue weight to the options that confer the greatest level of authority on unelected school administrators, the superintendent, and the education commissioner. Commenters stated that the proposed regulation treats three of the four options listed in KRS 160.346(3) as a single option.

Commenters stated that the authority and duty of a replaced school council is not subservient to the will of any school superintendent or education commissioner. Commenters stated that the regulation should not ignore the real possibility that an ineffective school council could be replaced and then carry out its intervention duty under the first option that is listed in KRS 160.346 (3.) Commenters stated a belief that replacement of a school council means that that reconstituted school council continues to manage a priority school in the manner that is described in KRS 160.345 and KRS 160.346.

Commenters stated that it would be helpful if the proposed regulation clarified the scope of a school council's advisory capacity and addressed the role, if any, that will be played by the leadership teams that have already been created at many priority schools. Commenters stated the hope that the omission of these details does not indicate that the education commissioner has no intention of ever returning priority schools to the control of a locally-elected school council.

Those offering written comments related to replaced or advisory school councils were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response: The agency has carefully considered these thoughtful comments.

KRS 160.345, which exhaustively addresses the adoption, composition, and responsibilities of school councils, contains an explicit provision that refutes these comments. KRS 160.345 (10) states

Notwithstanding subsections (1) to (9) of this section, a school's right to establish or maintain a school-based decision making council and the powers, duties, and authority granted to a school council may be rescinded or the school council's role may be advisory if the commissioner of education or the Kentucky Board of Education takes action under KRS 160.346.

KRS 160.345 directs that a school council's powers may be either rescinded or advisory upon action under KRS 160.346. KRS 160.345 does not address the replacement of a school council.

KRS 160.346 (6) resolves the comment.

If a decision is made to transfer powers, duties, and authority under subsection (4) of this section, the local superintendent, subject to the policies adopted for the district by the local board of education, or the commissioner or the or the commissioner or the commissioner's designee shall assume all powers, duties, and authority

granted to a school council under KRS 160.345 thirty (30) days following the commissioner's action on the audit teams' recommendations if no appeal to the Kentucky Board of Education is submitted or following the final determination of the Kentucky Board of Education on an appeal, whichever is appropriate.

Subsection (4) referenced by the commenters and by KRS 160.346 (6) discusses the retention of authority by a school council and also references school council replacement. Pursuant to the plain language of KRS 160.346 (6), the exercise of either option results in the assumption of all powers, duties, and authority by the local superintendent, the commissioner, or the commissioner's designee.

The agency respectfully submits that the statute will not bear the interpretation advanced by the commenters.

The commenters suggested that the proposed regulation is silent as to the role of an advisory council. KRS 160.346 (7) addresses the comment. The statute clearly states that within thirty days after assuming the powers, duties, and authority of a school council, whether there is an advisory council, the superintendent, the commissioner, or the commissioner's designee must consult with stakeholders at the school, including parents, the principal, certified staff, and classified staff, and prepare a plan for developing capacity for sound school-based decision making at the school. The statute answers the commenters' concern that the commissioner may have no intention of ever returning priority schools to the control of a locally-elected school council, by prescribing a clear path to developing the capacity to resume control.

No amendments have been made in response to these comments.

(3) Subject Matter: Elected or appointed school councils

(a) Comment: Commenters stated that Section 7 of the proposed regulation does not clearly state that, in appointing advisory school council members when the existing school council is replaced, the commissioner must choose from a list of nominees submitted by the superintendent.

Commenters stated that the regulation does not explain or justify excluding teachers, parents, and other members of the local school community from the process by which new council members are nominated and selected.

Commenters stated that the nomination by the school superintendent and selection by the commissioner do not align with KRS 160.345(2) and KRS 160.346(6-7.) Commenters stated that school councils exist, and are democratically elected, to serve as a check on the abuse of administrative authority.

Commenters stated that the proposed regulation irrationally attributes a priority school's lack of demonstrated achievement to the democratic process created in KRS 160.345(2) (a) by which all school councils are chosen.

Commenters stated that if, despite logic and law, the Kentucky Board of Education really believes that the democratic election of school councils hinders effective school management, teachers, employees, and parents at a priority school should at least be permitted to nominate qualified candidates for their school council.

Commenters stated that the remedial procedures created in Sections 6 and 8 of the proposed regulation are too hasty in authorizing state and school district administrators to decide local issues, that the proposed regulation deprives local school officers and their constituents of an effective voice in guiding school intervention, and that that kind of administrative arrogance is inconsistent with the statutory concept of school-based decision making.

Those offering written comments related to elected or appointed school councils were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response:

The agency has carefully studied these comments.

KRS 160.345 (10) states

Notwithstanding subsections (1) to (9) of this section, a school's right to establish or maintain a school-based decision making council and the powers, duties, and authority granted to a school council may be rescinded or the school council's role may be advisory if the commissioner of education or the Kentucky Board of Education takes action under KRS 160.346.

160.345 (2), cited by the commenters, is not controlling if the commissioner of education or the Kentucky Board of Education take action under KRS 160.346.

KRS 160.346 (7) addresses the commenters' concern that teachers, parents, and other members of the local school community are excluded from the process by which new council members are nominated and selected. The statute clearly states that within thirty days after assuming the powers, duties, and authority of a school council, whether there is an advisory council, the superintendent, the commissioner, or the commissioner's designee must consult with stakeholders at the school, including parents, the principal, certified staff, and classified staff, and prepare a plan for developing capacity for sound school-based decision making at the school. These specific statutory provisions enfranchise, explicitly, the very groups about which the commenters expressed concern.

Further, the school's right to establish a council or the school's right for the council to assume the full authority granted under KRS 160.345 shall be restored if the school is not classified as persistently low achieving for two (2) consecutive years. KRS 160.346 (8.)

No amendments have been made in response to these comments.

(4) Subject Matter: Selection of intervention plans

(a) Comment: Commenters stated that Sections 6(2) and 6(4) of the proposed regulation allow either the local school superintendent or the state education commissioner to choose the appropriate intervention option whenever a school diagnostic review determines that the school council should be limited to an advisory role. Commenters stated that, in all other situations, Sections 6(1) and 6(3) apply

such that, after a school council chooses an intervention option, the council must submit its choice to either the local board of education or the commissioner of education.

The commenters stated that if a school council selects the intervention option, unless the authority of the school council has been necessarily and lawfully limited pursuant to KRS 160.346 sections three, four, and six, the council of a recovering school, including a replaced council, is empowered and required to select the appropriate intervention option and the council's selection shall be approved by either the school board or the commissioner of education. Commenters stated that the regulation should make it clear that school administrators have no authority to veto the school council's intervention plan.

Those offering written comments related to the selection of intervention plans were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response:

The agency has carefully considered these comments.

Pursuant to the plain language of KRS 160.346 (6) and (7), a school council that is replaced, or has its authority transferred, or continues in an advisory capacity, is subject to the assumption of all school council powers, duties, and authority by the local superintendent, the commissioner, or the commissioner's designee. Only a school council that retains the authority granted to it under KRS 160.345 maintains the authority to select an intervention option and to impose that intervention option upon the school board or the commissioner of education or the commissioner's designee.

No amendments have been made in response to these comments.

(5) Subject matter: Diagnostic reviews

(a) Comment: Commenters reviewed the composition of a diagnostic review team, as described in the proposed regulation, and posed the question: *“Could the disproportionate number of school administrators on the team have been influenced by the fact that only the Local Superintendents Advisory Council was permitted to review and comment upon the proposed regulation prior to its adoption?”*

Commenters stated that the Kentucky Education Association believes that the proposed regulation unwisely ignores teachers in leading priority school intervention. Commenters stated a preference that the number of currently practicing teachers on the diagnostic review teams be at least equal to the number of local school administrators.

Addressing Section 2(2) (g) of the proposed regulation, commenters questioned the appointment of a past or present university representative on every diagnostic review team, and stated that universities have no experience or expertise in managing K-12 schools.

Addressing Sections 3(2) (a) and 4(2) (d) of the proposed regulation, and the provision that a diagnostic review be scheduled within ninety days after the identification of a priority school, commenters asked whether the word “scheduled” means that the review must be completed within ninety days, initiated within ninety days, or merely calendared on the review team's schedule by that time.

Commenters stated that the bureaucracy of the proposed regulation's provisions for the diagnostic review, the preparation for a comprehensive report, the commissioner's opportunity to act upon the team's recommendations, and the time for appeal, deprives schools and school districts of valuable time during which they could be working to address pertinent education issues rather than fighting about the specifics of proposed school leadership and intervention plans.

Commenters stated that the diagnostic review of the maintenance and communication of a visionary purpose and direction committed to high expectations for learning as well as shared values and beliefs about teaching and learning is subjective and that even the most diligent school principal, school council, or school district may have difficulty documenting their adherence to this standard of effectiveness.

Commenters stated that the standards for principal evaluation mentioned in Section 3(2) are not consistent with 704 KAR 3:370, sections 10-12.

Commenters stated that Sections 3(3) (c) and 4(3) (d) of the proposed regulation do not, and should, provide guidance about the procedures to be used in conducting interviews and observations, and stated that, because the proposed regulation provides no guidance, there is a possibility that the diagnostic review team's data collection may be one-sided or that the data collected will not be representative of the groups and individuals that are interviewed or observed.

Commenters stated that if Sections 3(3) (e) and 4(3) (f) of the proposed regulation, in requiring working conditions surveys, mean the TELL Kentucky surveys, the proposed regulation should say that. Commenters stated that there is no need for additional surveys of this kind.

Commenters stated that reliance upon interviews and surveys of students, parents, and community members may allow the results of the diagnostic review to be skewed by the opinions of those who may have retaliatory or vengeful motives or political agendas that oppose public education. Commenters stated that many who are interviewed will have no realistic opportunity to be informed on the educational issues about which a school diagnostic review team might legitimately inquire, or might even have a motivation to sabotage that inquiry. Commenters stated that it is ironic that the proposed regulation places such importance on the wishes and opinions of the community when school leadership is being evaluated, while simultaneously circumventing the community, school staff, and their elected representatives when it comes to choosing an intervention plan.

Commenters stated that the education commissioner's dominant supervision of struggling schools is made even more apparent in Section 3(6) of the proposed regulation. Commenters stated that Section 4(5) of the proposed regulation says that there can be no more than one district diagnostic review per year, but that individual schools do not get even that level of respite from the commissioner's oversight, as Section 3(6) permits the repeat of a school diagnostic review as often as the commissioner deems necessary.

Commenters stated that Sections 3 and 5 of the proposed regulation allow the commissioner and his diagnostic review teams to remove school councils for almost any reason at any time.

Commenters stated that if the commissioner has the power to order a school diagnostic review at any low-achieving school as often as he wishes, using a diagnostic review team that the commissioner chose pursuant to Section 2 of the proposed regulation, then the commissioner is directly or indirectly running the schools from Frankfort on a day-to-day basis.

Those offering written comments related to diagnostic reviews were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response:

The agency has carefully studied these comments.

KRS 158.6455 (5) compels the Kentucky Board of Education to promulgate an administrative regulation that establishes guidelines for conducting program reviews and audits. In response to the inference by the commenters that the Local Superintendents Advisory Council exerted some untoward influence on the content of the proposed regulation, the agency notes that KRS 156.029 (7) lists, exclusively, the Local Superintendents Advisory Council, as the body from whom the Kentucky Board of Education shall seek advice in developing and adopting policies and administrative regulations.

As noted above, the General Assembly, through KRS 160.345 (1) and 160.346, has recognized that under the dire circumstances faced by students in the lowest-performing schools, the temporary disruption of school-based decision making may be necessary.

The diagnostic review team provisions of the proposed regulation includes teachers, and the number of teacher participants on the diagnostic review team have not been changed from that contained in the present regulation, 703 KAR 5:120 (7.)

The diagnostic review team provisions of the proposed regulation regarding a university representative have not been changed from those contained in the present regulation, 703 KAR 5:120 (7.)

The word “scheduled,” as used in Sections 3(2) (a) and 4(2) (d) of the proposed regulation has its regular dictionary meaning, and will not be further defined. See KRS 13A.222 (4) (e) (1.)

The agency has carefully considered the commenters concerns regarding the “bureaucracy” of the procedural provisions of the proposed regulation, and notes that the proposed regulation contains no changes from the procedural provisions contained in the present regulation governing review, 703 KAR 5:180.

The agency notes that the diagnostic review of the maintenance and communication of a visionary purpose and direction committed to high expectations for learning as well as shared values and beliefs about teaching and learning is no more subjective than the provisions of the present regulation regarding intervention systems, 703 KAR 5:180, under which evaluations are made of such general indicia as teaching and learning, organizational direction, high performance expectations, and developing a learning culture.

The agency disagrees that there is inconsistency between Section 3 (2) of the proposed regulation and 704 KAR 3:370 Sections 10-12. The proposed regulation regards the implementation of intervention

options in priority schools and districts, and 704 KAR 3:370 Sections 10-12 regard the statewide professional growth and effectiveness system for the purposes of supporting and improving the performance of all certified school personnel. Pursuant to KRS 13A.221 (1), a separate administrative regulation shall be promulgated for each topic. It is necessary and appropriate that the proposed regulation does not address the evaluation of a school principal, which is governed by 704 KAR 3:370, but rather the principal's role in the implementation of intervention options.

Because the provisions for diagnostic review dictate interviews with students, parents, all school council members, school and district personnel, and community members, the agency believes that the commenters' concerns that the diagnostic review team's data collection may be one-sided or that the data collected will not be representative of the groups and individuals that are interviewed are obviated.

TELL Kentucky is an anonymous statewide survey of licensed school-based educators to assess teaching conditions at the school, district and state level. The use of the term "working conditions survey" permits flexibility in the implementation of the proposed regulation which would be absent if the proposed regulation was tied exclusively to the use of a single survey.

Regarding the frequency of diagnostic reviews, the agency notes that the proposed regulation makes the same provisions for school and district diagnostic reviews as contained in present regulations.

The comments that Sections 3 and 5 of the proposed regulation allow the commissioner and his diagnostic review teams to remove school councils for almost any reason at any time are conclusory, and not in the nature of comments to which response may be made.

Comments that if the commissioner has the power to order a school diagnostic review at any low-achieving school as often as he wishes, using a diagnostic review team that the commissioner chose pursuant to Section 2 of the proposed regulation, then the commissioner is directly or indirectly running the schools from Frankfort on a day-to-day basis are conclusory, and not in the nature of comments to which response may be made.

No amendments have been made in response to these comments.

(6) Subject matter: Termination of the statutory authority of school councils

(a) Comment: Commenters stated that Sections 3, 6, 7, and 8 of the proposed regulation cannot extinguish the statutory authority of school councils. Commenters stated that KRS 160.345 (2-3) requires school councils to adopt policies that govern most operations of the school that the council serves. Commenters stated that school councils at priority schools continue to exercise these statutory duties and powers after school intervention. Commenters stated that school intervention is not necessarily an exception to school-based decision making.

Those offering written comments related to the termination of the authority of school councils were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response:

The agency has carefully studied these comments.

KRS 160.345 (10) states

Notwithstanding subsections (1) to (9) of this section, a school's right to establish or maintain a school-based decision making council and the powers, duties, and authority granted to a school council may be rescinded or the school council's role may be advisory if the commissioner of education or the Kentucky Board of Education takes action under KRS 160.346.

The General Assembly has unambiguously provided for the interruption of the authority of school councils upon the taking of action, by the commissioner of education or the Kentucky Board of Education, pursuant to KRS 160.346. Contrary to the implication of the comments, KRS 160.345 (10) contains no reservation of continuing authority in a school council that has had its authority rescinded or that has been replaced or that has been denominated as advisory.

KRS 13A.120 (e) prohibits the promulgation of administrative regulations when a statute prescribes the same or similar procedure for the matter regulated; accordingly, the agency declines to repeat the text of the statute in the proposed regulation.

No amendments have been made in response to these comments.

(7) Subject matter: Repeal of existing school council policies

(a) Comment: Commenters stated that while the proposed regulation purports to require new programs at priority schools in many, if not all, of the areas that come within the statutory purview of school councils, the proposed regulation does not rescind the existing policies of the school council at a priority school or require any such rescission.

Commenters stated that the proposed regulation does not, and cannot, authorize school superintendents or the state education commissioner to ignore or to summarily rescind the preexisting policies of the school board and school council after a school intervention, and that all of those policies will continue to govern the operations of the priority school after school intervention occurs.

Those offering written comments related to the repeal of existing school council policies were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response:

The agency has carefully considered these comments.

KRS 160.345 (10) states

Notwithstanding subsections (1) to (9) of this section, a school's right to establish or maintain a school-based decision making council and the powers, duties, and authority granted to a school council may be rescinded or the school council's role may be advisory if the commissioner of education or the Kentucky Board of Education takes action under KRS 160.346.

The General Assembly has unambiguously provided for the interruption of the authority of school councils upon the taking of action, by the commissioner of education or the Kentucky Board of Education, pursuant to KRS 160.346. Contrary to the implication of the comments, KRS 160.345 (10) contains no reservation of continuing authority in a school council that has had its authority rescinded or that has been replaced or has been denominated as advisory. Because the school council's responsibility to set school policy is enumerated in subsection (2) of KRS 160.345, that authority is explicitly subject to rescission, or the reduction to advisory, if the commissioner of education or the Kentucky Board of Education takes action under KRS 160.346.

No amendments have been made in response to these comments.

KRS 13A.120 (e) prohibits the promulgation of administrative regulations when a statute prescribes the same or similar procedure for the matter regulated; accordingly, the agency declines to repeat the text of the statute in the proposed regulation.

(8) Subject matter: Authority to implement intervention options

(a) Comment: Commenters stated that Section 8 of the proposed regulation improperly expands state government's authority to implement intervention options in ways that are not permitted by KRS 160.346(9.) Commenters stated that four school intervention options are specifically defined in KRS 160.346(9) and that the statutory definitions may not be changed or expanded in an administrative regulation.

Commenters stated that Section 8 of the proposed regulation unlawfully attempts to redefine the intervention options described in KRS 160.346(9) so as to give more authority to the Kentucky Board of Education and the Kentucky Department of Education than the applicable statutes require or allow.

Commenters stated that KRS 160.346(9) (b) does not specify the status of the faculty and staff members who are not retained at a restaffed school; Commenters stated that the controlling statute does not explicitly require or authorize the termination of their employment. Commenters stated, regarding the restaffing option in persistently low-achieving schools, that if Section 8(1) (c) and the phrase "rehiring no more than fifty percent" is intended to compel the discharge of those who are not retained at the restaffed school, rather than the transfer of those employees to another worksite or program, then the regulation unlawfully extends the meaning of the applicable statute.

Commenters stated that KRS 160.346(9) (b) does not require or authorize changes in the traditional working conditions and employment contracts of local school employees. Commenters stated that the only statutory requirement for the future operation of a restaffed school is development and implementation of a plan of action that uses research-based school improvement initiatives designed to turn around student performance. Commenters stated that Section 8(1) of the proposed regulation improperly attempts to prescribe employment qualifications for, and grant additional supervisory authority to, school principals.

Commenters stated that the proposed regulation improperly prescribes flexible working conditions, longer work days, and increased opportunities for career growth for members of the school staff.

Commenters stated that the proposed regulation improperly prescribes increased learning time and social, emotional, and community-oriented services and supports for students.

Commenters stated that the proposed regulation improperly prescribes a new governance structure and operational requirements for restaffed schools.

Commenters stated that selection and implementation of the appropriate criteria, standards, methods, and services at restaffed schools should be left to the statutory discretion of local school officials.

Commenters cited KRS 160.345(3)(d) and 158.070(4)(a) for the propositions that the professional development of teachers at all schools falls within the statutory authority of school councils, and that the Kentucky Department of Education is only authorized to facilitate and assist locally-designed professional development programs. Commenters stated that the Kentucky Board of Education, as a policymaking body, has no statutory authority to take control of these local decisions.

Commenters stated that KRS 160.346(9) (d) defines the transformation option for school intervention, and noted that the statute does not specify the required transformation strategies.

Commenters stated that Section 8(3) of the proposed regulation redefines the transformation option to require local school officials to use an extensive list of school transformation strategies that are chosen by the Kentucky Board of Education.

Commenters stated that the most invasive items on the list are these:

“Use rigorous, transparent, and equitable evaluation systems for teachers and principals that take into account data on student growth” and “professional practice reflective of student achievement and increased high school graduations rates”;

“Provide additional leadership and compensation opportunities to school leaders, teachers, and other staff who have increased student achievement and high school graduation rates...and identify and remove those who...have not done so”;

“Increase opportunities for career growth which shall include more flexible working conditions” for school staff;

“Use of student data from formative, interim, and summative assessments to inform and differentiate instruction”;

“Increase learning time and...provide ongoing mechanisms for family and community engagement”;

“Provide operational flexibility...including staffing, calendar, time, and budgeting”; [and]

“Provide quarterly progress reports to the local board of education and the” Kentucky Department of Education.

Commenters stated that the selection and implementation of the appropriate strategies, criteria, standards, methods, and services at each transformed school should be left to the statutory discretion of local school officials. Commenters stated that specific transformation strategies should not be mandated by state regulation because there is no statutory authority for doing so.

Commenters stated that as a state policymaking body, the Kentucky Board of Education is in no position to know the problems that exist at individual schools or to choose the strategies that will effectively address those problems.

Commenters stated that Section 8(3) (c) of the proposed regulation should not be interpreted or enforced so as to implement a system of employee evaluation at a priority school that is different from the state wide standards for evaluation and support that are mandated by KRS 156.557(1.)

Commenters stated that it is not wise, fair, or permissible to implement a special employee evaluation system in priority schools that does not include all of the safeguards and procedures that make up Kentucky's new Professional Growth and Effectiveness System.

Commenters stated that school employees should not be removed from their employment, involuntarily transferred to a new worksite, negatively evaluated, or subjected to a reduction in compensation or a substantive change in the terms of their employment without just cause and due process of law.

Commenters stated that favoritism, discriminatory compensation programs, and other forms of autocratic management do not aid education.

Those offering written comments on authority to implement intervention options were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response:

The agency has carefully considered these comments.

KRS 160.346 (9) states that the Kentucky Board of Education *shall* [emphasis added] promulgate administrative regulations to establish the process and procedures for implementing the intervention options available to local boards of education and the commissioner of education. The KBE is thus required to establish processes and procedures that guide the implementation of intervention options, and is not over-reaching its statutory authority in complying with a statutory mandate.

Regarding status of the faculty and staff members who are not retained at a restaffed school, the agency notes that KRS 160.346 (9) (b) indicates that the "Restaffing option" requires the replacement of the principal and the existing school-based decision-making council unless the audit reports recommended otherwise, screening of existing faculty and staff with the retention of no more than fifty percent (50%) of the faculty and staff at the school, development and implementation of a plan of action that uses research-based school improvement initiatives designed to turn around student performance. KRS 160.346 (9) (b)

adds that personnel actions shall comply with KRS Chapter 161 and notwithstanding KRS 160.380(1) (d) relating to filling vacant positions and KRS 160.345(2) (h) 1. relating to transfers. KRS 13A.120 (e) prohibits the promulgation of administrative regulations when a statute prescribes the same or similar

procedure for the matter regulated; accordingly, the agency declines to repeat the text of the statute in the proposed regulation.

KRS 160.345(2) (i) (2) states that school councils shall adopt policies that address the assignment of all instructional and noninstructional staff time. KRS 160.345 (3) states that the local school board implements school-based decision making by addressing professional development plans pursuant to KRS 156.095. However, each of these provisions of KRS 160.345 is subject to KRS 160.345 (10), which states

Notwithstanding subsections (1) to (9) of this section, a school's right to establish or maintain a school-based decision making council and the powers, duties, and authority granted to a school council may be rescinded or the school council's role may be advisory if the commissioner of education or the Kentucky Board of Education takes action under KRS 160.346.

The General Assembly has unambiguously provided for the interruption of the authority of school councils upon the taking of action, by the commissioner of education or the Kentucky Board of Education, pursuant to KRS 160.346. Contrary to the implication of the comments, KRS 160.345 (10) contains no reservation of continuing authority in a school council that has had its authority rescinded or that has been replaced or has been denominated as advisory.

The proposed regulation does not contradict or extend these statutory requirements.

No amendments have been made in response to these comments.

(9) Subject matter: External management organizations

(a) Comment: Commenters stated that Section 9 of the proposed regulation misleads external management organizations by omitting reference to the enforcement of collective bargaining agreements.

Commenters stated that, for some reason, the proposed regulation omits one statutory criterion that must be considered in selecting and approving an external management organization. Commenters noted that KRS 160.346(9) (a) and (10) give external management organizations the duty to comply with KRS Chapter 161 and any employee-employer bargained contract that is in effect after a school board contracts with such an organization for the day-to-day management of the school.

Commenters stated that it would be helpful to local school boards and their employees if organizations that apply for approval were required to disclose their experience in dealing with public employee labor unions and in enforcing labor agreements in public and private school settings.

Commenters stated that publication of the applications submitted by both successful and unsuccessful external management organization applicants would help to insure the fairness and transparency of the government's selection procedures and aid the public and the applicants in understanding the process and the criteria that were actually used to select the approved organizations. Commenters stated that all applications submitted pursuant to Section 9 of the proposed regulation should be made public.

Those offering written comments regarding external management organizations were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response:

The agency has carefully considered these comments.

External management organizations are subject to KRS 160.346 (9) (a), which notes that the management organization's authority shall include the right to make personnel decisions that comply with KRS Chapter 161 and any employee-employer bargained contract that is in effect.

KRS 160.346(10) states that professionally negotiated contracts by a local board of education shall not take precedence over the requirements of paragraphs (b), (c), and (d) of subsection (9) of this section, but omits reference to subsection (a.)

KRS 13A.120 (e) prohibits the promulgation of administrative regulations when a statute prescribes the same or similar procedure for the matter regulated; accordingly, the agency declines to repeat the text of the statutes in the proposed regulation.

The agency has carefully considered the comments that publication of the applications submitted by both successful and unsuccessful external management organization applicants would help to insure the fairness and transparency of the government's selection procedures and aid the public and the applicants in understanding the process and the criteria that were actually used to select the approved organizations. The agency notes that KRS 61.878(1)(c)1 excludes, from the Open Records Act, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records. The agency disagrees that there is, or will be, a discrepancy between published criteria and the criteria "actually used." To apply, external management organizations must supply comprehensive and detailed information regarding business practices and successes. The agency believes that the adoption of a blanket rule, in the proposed regulation, compelling the release of such information is contrary to the letter and intent of KRS 61.878. In any event, external management organizations are chosen through an RFP process, all records of which are subject to disclosure, except as provided by KRS 61.878(1)(c)(1.)

No amendments have been made in response to these comments.

(10) Subject matter: Intervention standards and exit criteria

(a) Comment: Commenters stated that KRS 160.346(1) and (8) address the restoration of the authority of school councils and a school's exit from priority status in terms of "adequate yearly progress," while the proposed regulation addresses these issues in terms of "annual measurable objective," or "AMO," which is defined in 702 KAR 5:225(1)(1.) Commenters inquired whether "AMO" is synonymous with "adequate yearly progress."

Commenters stated that the proposed regulation fails to address when the two and three consecutive year periods addressed in Sections 3(7) and 3(8)(a) will begin, and whether priority schools that have already

achieved one or more years of adequate yearly progress receive credit for those years for the purposes of satisfying their AMO.

Commenters stated that the proposed regulation completely fails to address the transition from the existing statutory standards for school achievement and intervention to the standards that were created by an agreement between the state and federal governments pursuant to a procedure that has never been authorized by any Kentucky statute.

Those offering written comments related to exit criteria were Stephanie Winkler (KEA) and Mary Ann Blankenship (KEA).

(b) Response:

The agency has carefully considered these thoughtful comments.

“Adequate yearly progress,” as used in KRS 160.346, is synonymous with “annual measurable objective” as defined in 702 KAR 5:225(1)(1) and in the proposed regulation.

Priority schools that have already achieved one or more years of adequate yearly progress receive credit for those years for the purposes of satisfying their annual measurable objective.

The agency interprets comments regarding an agreement between state and federal governments to address the ESEA waiver. The agency is, through the repeal of 703 KAR 5:120 and 703 KAR 5:180 and the promulgation of the proposed regulation, updating Kentucky’s regulations to match the requirements of the ESEA waiver. In other words, the promulgation of the proposed regulation supplies the procedural gap suggested by the commenters.

No amendments have been made in response to these comments.

Summary of Statement of Consideration And Action Taken by Promulgating Administrative Body

The Kentucky Department of Education has responded to comments from the public regarding 703 KAR 5:260. These comments can be broadly categorized as related to: 1) Statutory powers of a school council; 2) Replaced or advisory school councils; 3) Elected or appointed school councils; 4) Selection of intervention plans; 5) Diagnostic reviews; 6) Termination of the authority of school councils; 7) Repeal of existing school council policies; 8) Authority to implement intervention options; 9) External management organizations; and 10) Intervention standards and exit criteria.

Commenters stated that the proposed regulation interferes with the local governance of public schools. Commenters stated that no agency in the executive branch of state government has the authority to use its regulatory power to change the statutory governance model and cited KRS 13A.120. The agency states that KRS 160.345, which exhaustively addresses the adoption, composition, and responsibilities of school councils, contains an explicit provision that refutes these comments. KRS 160.345 (10) states that a school’s right to establish or maintain a school-based decision making council and the powers, duties, and authority granted to a school council may be rescinded or the school council’s role may be advisory if the commissioner of education or the Kentucky Board of Education takes action under KRS 160.346.

The agency states that the Kentucky Supreme Court has recently addressed KRS 13A.120 and noted that KRS 13A.120 appears to contradict KRS 13A.100. *Id.* at 490. The Court determined that the General Assembly intended for the statutes to be construed together and for both to have meaning, and held that the statutes may be harmonized by noting that while KRS 13A.120 provides for when regulation is *permitted* [emphasis added], KRS 13A.100 provides for when regulation is *required* [emphasis added.] *Id.* at 491. The Court noted that even if KRS 13A.120 and KRS 13A.100 were thought to conflict, KRS 13A.100, the more recently adopted statute, would control over KRS 13A.120. *Id.* Because 13A.100 *requires* statements of general applicability, policy, and procedure to be addressed through the promulgation of administrative regulation, the agency does not violate KRS 13A.120 in promulgating 703 KAR 5:260.

Commenters stated that under KRS 160.345 and KRS 160.346, the school council is the central player in the creation and revision of any school intervention plan. As noted, a school's right to establish or maintain a school-based decision making council and the powers, duties, and authority granted to a school council may be rescinded or the school council's role may be advisory if the commissioner of education or the Kentucky Board of Education takes action under KRS 160.346.

Commenters stated that the proposed regulation gives undue weight to three of the four possibilities for reforming a school council that is unable to lead an intervention in a persistently low-achieving school. Commenters stated that the authority and duty of a replaced school council is not subservient to the will of any school superintendent or education commissioner. Commenters stated that the proposed regulation should not ignore the real possibility that an ineffective school council could be replaced and then carry out its intervention duty. The agency states that, pursuant to the plain language of KRS 160.346 (6) and (7), a school council that is replaced, or has its authority transferred, or continues in an advisory capacity, is subject to the assumption of all school council powers, duties, and authority by the local superintendent, the commissioner, or the commissioner's designee. Only a school council that retains the authority granted to it under KRS 160.345 maintains the authority to select an intervention option and to impose that intervention option upon the school board or the commissioner of education or the commissioner's designee.

Commenters stated that if, despite logic and law, the Kentucky Board of Education really believes that the democratic election of school councils hinders effective school management, teachers, employees, and parents at a priority school should at least be permitted to nominate qualified candidates for their school council. The agency states that KRS 160.346 (7) addresses the commenters concern that teachers, parents, and other members of the local school community are excluded from the process by which new council members are nominated and selected. The statute clearly states that within thirty days after assuming the powers, duties, and authority of a school council, whether there is an advisory council, the superintendent, the commissioner, or the commissioner's designee must consult with stakeholders at the school, including parents, the principal, certified staff, and classified staff, and prepare a plan for developing capacity for sound school-based decision making at the school. These specific statutory provisions enfranchise, explicitly, the very groups about which the commenters expressed concern.

Commenters stated that the proposed regulation should make it clear that school administrators have no authority to veto a school council's intervention plan, unless the authority of the school council has been necessarily and lawfully limited pursuant to KRS 160.346. The agency states that, pursuant to the plain language of KRS 160.346 (6) and (7), a school council that is replaced, or has its authority transferred, or continues in an advisory capacity, is subject to the assumption of all school council powers, duties,

and authority by the local superintendent, the commissioner, or the commissioner's designee. Only a school council that retains the authority granted to it under KRS 160.345 maintains the authority to select an intervention option and to impose that intervention option upon the school board or the commissioner of education or the commissioner's designee.

Commenters stated that the proposed regulation unwisely ignores teachers in leading priority school interventions, and expressed a preference that the number of currently practicing teachers on the diagnostic review team be at least equal to the number of local school administrators. The agency states that the diagnostic review team provisions of the proposed regulation includes teachers, and the number of teacher participants on the diagnostic review team has not been changed from that contained in the present regulation, 703 KAR 5:120 (7.)

Commenters stated that some diagnostic review measures are subjective and that even the most diligent school principal, school council, or school district may struggle to document adherence. The agency submits that the diagnostic review measures contained in the proposed regulation are no more subjective than those contained in the present regulation regarding intervention systems, 703 KAR 5:180, under which evaluations are made of such general indicia as teaching and learning, organizational direction, high performance expectations, and developing a learning culture.

Commenters expressed that the TELL Kentucky survey should be specifically identified if it is to be used as a working condition survey, and that there is no need for additional working conditions surveys. The agency states that the TELL Kentucky is an anonymous statewide survey of licensed school-based educators to assess teaching conditions at the school, district and state level. The use of the term "working conditions survey" permits flexibility in the implementation of the proposed regulation which would be absent if the proposed regulation was tied exclusively to the use of a single survey.

Commenters stated that reliance upon interviews and surveys of students, parents, and community members may allow the results of the diagnostic review to be skewed by the opinions of those who may have retaliatory or vengeful motives or political agendas that oppose public education. The agency states that, because the provisions for diagnostic review dictate interviews with students, parents, all school council members, school and district personnel, and community members, the agency believes that the commenters' concerns that the diagnostic review team's data collection may be one-sided or that the data collected will not be representative of the groups and individuals that are interviewed are obviated.

Commenters stated that the proposed regulation reveals the commissioner's dominant supervision of struggling schools and allows the commissioner and his diagnostic review teams to remove school councils for almost any reason at any time. The agency states that these comments are conclusory, and not in the nature of comments to which response may be made.

Commenters stated that the proposed regulation permits the commissioner to directly or indirectly run the schools from Frankfort, on a day-to-day basis. The agency states that these comments are conclusory, and not in the nature of comments to which response may be made.

Commenters stated that the proposed regulation cannot extinguish the statutory authority of school councils, and that school councils at priority schools continue to exercise their statutory powers and duties after school intervention. The agency states that, pursuant to the plain language of KRS 160.346 (6) and (7), a school council that is replaced, or has its authority transferred, or continues in an advisory

capacity, is subject to the assumption of all school council powers, duties, and authority by the local superintendent, the commissioner, or the commissioner's designee.

Commenters stated that the proposed regulation does not, and cannot, rescind the existing policies of the school council at a priority school, or require such rescission. The agency states that the General Assembly has unambiguously provided for the interruption of the authority of school councils upon the taking of action, by the commissioner of education or the Kentucky Board of Education, pursuant to KRS 160.346. Contrary to the implication of the comments, KRS 160.345 (10) contains no reservation of continuing authority in a school council that has had its authority rescinded or that has been replaced or that has been denominated as advisory.

Commenters stated that the proposed regulation improperly expands state government's authority to implement intervention options, in ways that are not permitted by KRS 160.346(9.) The agency notes that KRS 160.346 (9) states that the Kentucky Board of Education *shall* [emphasis added] promulgate administrative regulations to establish the process and procedures for implementing the intervention options available to local boards of education and the commissioner of education. The Kentucky Board of Education is thus required to establish processes and procedures that guide the implementation of intervention options, and is not over-reaching its statutory authority in complying with a statutory mandate.

Commenters stated that the proposed regulation unlawfully attempts to redefine the intervention options described in KRS 160.346(9) so as to give more authority to the Kentucky Board of Education and Kentucky Department of Education. The agency notes that KRS 160.346 (9) states that the Kentucky Board of Education *shall* [emphasis added] promulgate administrative regulations to establish the process and procedures for implementing the intervention options available to local boards of education and the commissioner of education. The Kentucky Board of Education is thus required to establish processes and procedures that guide the implementation of intervention options, and is not over-reaching its statutory authority in complying with a directive.

Commenters stated that the proposed regulation redefines the transformation option for school intervention. The agency notes that KRS 160.346 (9) states that the Kentucky Board of Education *shall* [emphasis added] promulgate administrative regulations to establish the process and procedures for implementing the intervention options available to local boards of education and the commissioner of education. The KBE is thus required to establish processes and procedures that guide the implementation of intervention options, and is not over-reaching its statutory authority in complying with a directive.

Commenters stated that the proposed regulation should not be interpreted or enforced so as to implement a system of employee evaluation at a priority school that is different from the state wide standards for evaluation and support that are mandated by KRS 156.557(1.) The agency states that 704 KAR 3:370, Professional Growth and Effectiveness System, applies to all certified school personnel, and that the proposed regulation does not vitiate 704 KAR 3:370.

Commenters stated that Section 9 of the proposed regulation misleads external management organizations by omitting reference to the enforcement of collective bargaining agreements. The agency states that external management organizations are subject to KRS 160.346 (9) (a), which notes that the management organization's authority shall include the right to make personnel decisions that comply

with KRS Chapter 161 and any employee-employer bargained contract that is in effect. The agency notes that KRS 13A.120 (e) prohibits the promulgation of administrative regulations when a statute prescribes the same or similar procedure for the matter regulated; accordingly, the agency declines to repeat the text of the statute in the proposed regulation.

Commenters stated that KRS 160.346(1) and (8) address the restoration of the authority of school councils and a school's exit from priority status in terms of "adequate yearly progress," while the proposed regulation addresses these issues in terms of "annual measurable objective," or "AMO," which is defined in 702 KAR 5:225(1)(1.) Commenters inquired whether "AMO" is synonymous with "adequate yearly progress." The agency states that "adequate yearly progress," as used in KRS 160.346, is synonymous with "annual measurable objective" as defined in 702 KAR 5:225(1)(1) and in the proposed regulation.

Commenters stated that the proposed regulation completely fails to address the transition from the existing statutory standards for school achievement and intervention to the standards that were created by an agreement between the state and federal governments pursuant to a procedure that has never been authorized by any Kentucky statute. The agency interprets comments regarding an agreement between state and federal governments to address the ESEA waiver. The agency is, through the repeal of 703 KAR 5:120 and 703 KAR 5:180 and the promulgation of the proposed regulation, updating Kentucky's regulations to match the requirements of the ESEA waiver. In other words, the promulgation of the proposed regulation supplies the procedural gap suggested by the commenters.