IOWA STATE BOARD
OF EDUCATION
(Cite as 5 D.o.E. App. Dec. 258)

In re Pat Muehl, et al.	:	
Pat Muehl, Carolyn Timm, Theresa Sparks, Pat Boland, Stan Richards, Jo Ann Watters, Barbara Lederman, Appellants,	:	
v.	:	DECISION
Waterloo Community School District, Appellee.	:	[Admin. Doc. 917]

The above-captioned matter was heard on June 3, 1987, before a hearing panel consisting of Dr. Robert D. Benton, director, Department of Education and presiding officer; Mr. Dean Crocker, chief, Internal Operations Bureau; and Mr. James Athen, consultant, Career Education Bureau. Appellants were present and represented by Mr. Jay Nardini and Mr. David Stamp of Ball, Kirk, Holm & Nardini, P.C., Waterloo. Appellee Waterloo Community School District [hereafter the District] was present in the person of Dr. Gary Wegenke, superintendent, Mr. Ray Richardson, executive director of school-community services, and Ms. Sally Turner, coordinator of public relations, administrative employees of the District. Mr. Steven J. Powell of Swisher & Cohrt, Waterloo, represented the District. A mixed evidentiary and on-the-record hearing was held pursuant to departmental rules found at Iowa Administrative Code 670-51, adopted in furtherance of Iowa Code chapter 290.

Appellants timely appealed from a decision of the District board of directors [hereafter the Board] made on January 21, 1987, to "reorganize"[1] the school district, change boundaries, and consequently close certain attendance centers for the 1987-88 school year.

I.
Findings of Fact

The hearing officer finds that he and the State Board of Education have jurisdiction over the parties and subject matter of this appeal.

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1 As the term "reorganization" is used in the Iowa Code to mean the legal process of school district mergers, we prefer to use the term "restructure" for internal changes within a school district.

As a result of continued declining enrollment, several attendance centers out of compliance with the state desegregation guidelines, and a projected fiscal deficit of nearly $100,000 by June of 1988, the Board decided in early 1986 to study the issues and their impact on the District. A forty-six member task force was appointed in the spring of that year representing parents, employees, and various community groups. Assisted by alternative proposals devised by central administration, small groups within the task force studied possible options for dealing with the fiscal, racial, and enrollment problems. The administration's four options generated a substantial number of additional options as the small groups modified the alternatives to address or eliminate task force member's concerns.

Finding the results of the initial study too unwieldy or fragmented, the Board created a smaller group, "the Steering Committee," composed of eight of the task force members and eight representatives of the superintendent's staff. The challenge to the Steering Committee was to create a workable plan incorporating the suggestions and concerns of the task force as much as possible.

In the fall of 1986, the Steering Committee's plan was presented to the members of the task force, who were asked to vote on the plan and add recommendations. Each of the subgroups did so, often stating their recommendations in most emphatic terms. To the question of whether or not each individual on the task force approved or disapproved of the Steering Committee's plan, 19 said yes and 20 said no; seven members did not vote. To the question of whether or not the Steering Committee's plan would meet the identified (studied) issues of facilities, financial deficits, and racial distribution of students, the majority of task force members said yes. The only question to which most members responded no was whether the plan would maintain or improve educational programming; 16 said yes and 21 said no. Written comments were encouraged and were given to the Board verbatim.

A full written report was provided to each director at the regular meeting on November 10, 1986. The Board set November 24 as the date for establishing a timeline of activities leading to a decision. This was done. Between November 25 and January 21, the projected date of decision, the Board scheduled five public hearings, two work sessions of the Board, and one special meeting in addition to two regular meetings. The work sessions preceded the public hearings in order that the directors might study the proposed plan and the additional recommendations of the task force and make any modifications to the plan accordingly.

The plan proposed by the Steering Committee and studied by the Board involved boundary changes, school closings, reduction in administrative and teaching personnel, and conversions of other buildings. Cresthaven, Devonshire, Greenbrier, Krieg, and Washburn elementary attendance centers were slated to be closed in the first year (1987-88). No change was proposed in the five intermediate schools nor the four high schools, including Expo, the alternative high school. In the second year, three more elementary attendance centers would be closed: Castle Hill, Elk Run, and Jewett. Bunger and Edison intermediate schools would be converted to elementary schools, and Central High would be closed and converted to an intermediate school in the second year of the plan's implementation

(1988-89). In that year nine additional transportation routes would be added, but no new buses purchased. In the third year of the process, additional administrative cuts would be effected, boundary adjustments made, and boundary lines would be established. The projected savings over three years was $1,355,292. Twenty-one schools would be in existence and operating in 1989-90, down from 31 in 1986-87. Each building would have a full-time administrator.

The final, voted plan for District restructuring varied from the Steering Committee's proposal and increased the projected three-year savings to $2,790,081. The deviations included closing Devonshire Elementary School in the fall of 1988 rather than in the first year, keeping Elk Run elementary open indefinitely,[2] and various changes in the selected attendance centers for some 78 students. The final plan was approved as amended in a voice vote of 5-2 on January 21, 1987; Director Thorpe and President Furgerson voted no. Appellants filed an affidavit of appeal under chapter 290 of the Iowa Code on February 19. One continuance requested by Appellants was granted. A second request was denied.

On March 25, 1987, the House of Representatives of the 77th General General Assembly passed section 75 of H.F. 499, as amended by the Senate. The amended section reads as follows:

> For an appeal filed with the state board of education under chapter 290 between February 18, 1987 and February 20, 1987 relating to a decision of a board of directors of a school district for school district restructuring, the state board of education shall consider all of the following factors:
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> 1. The continuity of the educational program of the district.
>
> 2. Cost effectiveness when the restructuring is compared to other alternatives.
>
> 3. The quality and physical condition of the school district facilities affected.
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> 4. The past and present student enrollment in the affected area compared to the total past and present student enrollment in the district.
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> 5. Restructuring recommendations of a citizens task force appointed by the board of directors.
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> 6. Transportation changes required because of restructuring and their impact upon participation in student activities.

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2 Testimony by Superintendent Wegenke included an admission that Elk Run may have to be closed in the future if District enrollment declines continue as projected.

> 7. Presence or absence of violations by the board of directors of the school district of rules and guidelines adopted or promulgated by the state board.

H.F. 499 § 75, 72nd G.A., 1st Sess. (1987).

Appellants' original affidavit raised five issues, two of which related to the failure of the District's decision to cure the noncompliance problem with respect to the Department of Education's desegregation guidelines. One issue was the fact that the task force did not approve the plan (by one vote) that was submitted to the Board in the name of the task force. Two other "issues" concerned a remark made by an administration team member regarding the politics behind the decision, and the unknown ramifications of the decision to keep open Devonshire Elementary for another year.

An "amended, substituted and clarified" affidavit filed on May 29 raised thirteen issues or allegations of error said to be sufficient to reverse the Board's decision. These alleged errors include

1. inadequate consideration for student safety, vis a vis asbestos in certain schools;

2. failure to bring all District attendance centers into compliance with the desegregation guidelines;

3. inadequate consideration of enrollment stability at certain attendance centers;

4. increased transportation costs;

5. the administration's refusal to consider alternative proposals by citizens-at-large;

6. the suspect nature of the Steering Committee's report due to administrative influence on the Committee;

7. the task force report was not approved but was nevertheless presented to the Board;

8. outlying attendance centers were forced to bear the burden of the restructuring, in contravention of agreed guidelines for restructure;

9. Orange Elementary School was kept open instead of Washburn, Cresthaven, or both;

10. the failure of the administration to consider other methods of cost reductions besides school closings;

11. a violation of Barker guideline number 4;

12. the school closing process gave "lip service" only to the Barker guidelines;

13. failure to maintain existing pupil-teacher ratios as a goal agreed to by the Board, administration, and task force.

At the hearing before the presiding officer and panel, two of those issues were the focus of Appellants' case-in-chief: the alleged asbestos problems at Orange and the failure to meet state desegregation guidelines despite significant changes in boundaries and selection of attendance centers.

Considerable testimony and evidence was devoted to Orange School. It is a three story older facility that lies at the far south end of the District.[3] The third floor has not been used and is padlocked. Appellants allege that it is unusable because of asbestos problems; Dr. Wegenke, District superintendent, testified that the third floor has not been needed thus far. Including the third floor, the estimated capacity of Orange is between five and six hundred students, making it one of the biggest elementary buildings in the District. It has larger classrooms suitable for use as multipurpose rooms and a cafeteria and kitchen on the basement level. However, over $10,000 will need to be spent to renovate Orange, and because of its location most students attending Orange will be bused. Clearly the greater proportion of elementary students live closer to Cresthaven and Washburn, newer, one-story facilities, although Washburn, too, is "out in the country."

In addition to criticisms of Orange for location and condition[4], allegations of serious asbestos problems there fueled the opposition to the decision to keep Orange open. Testimony was introduced to the effect that the administration and Board ignored citizens' concerns about friable asbestos at Orange. Appellant Theresa Sparks, a nurse, testified impressively about her personal discussions with asbestos specialists at Iowa State University, the University of Northern Iowa, and the Environmental Protection Agency (EPA). She was told that there is no "safe" level of friable asbestos, as its very presence, even in minute amounts, can cause debilitating or fatal lung diseases which may not appear for 20 to 40 years after exposure.

Mrs. Sparks was also told that air sampling, a technique for determining the presence of asbestos fibers in the air, is not recognized by EPA officials as a valid method for analysis. See also Appellants' Exhibit E (letter from Roy Jones, technical field advisor for the EPA's Kansas City regional office, to Robert Stamp, business manager of the District, in 1979. "Air sampling is not appropriate to determine whether asbestos exists in the ceiling materials or whether asbestos fibers are being released into the air.")

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[3] Orange Township became part of the Waterloo District in 1964.

[4] Orange is also not currently 100% accessible to the handicapped, and physically disabled students may have to be carried up and down stairs until more permanent structural changes are made.

The Office of Safety and Health Administration (OSHA) standard accepts the air sampling technique, however, as a proper method of detection to prevent risk of asbestosis, a fibrotic lung disease. At least one of the tests for the presence of friable asbestos conducted in the District was an air sampling ("sniff test") in 1978-79. Significantly, although the District was cited by the EPA for violations of sections of the Toxic Substances Control Act, 15 U.S.C. §2601, et seq., and regulations adopted thereunder, the violations centered on record-keeping and public notice requirements rather than on the adequacy of inspection methods. See Appellants' Exhibit G.

Appellants also provided us with an excellent bibliography and articles related to asbestos in schools. A reading of those articles establishes several things. Asbestos itself, in its contained state, is not essentially harmful. The danger arises when its compressed form breaks down or becomes dust; the tiny fibers may be inhaled and remain in the lungs when packed asbestos is torn or falls apart. The fibers, unable to be broken down, become attached to or assimilated by cells in the lungs. Resulting detectible diseases may not appear for up to 40 years.

Ceilings and boiler furnace and pipe wrapping were primary targets of sprayed asbestos in buildings erected in the 1940s and '50s. Removal of this form of asbestos is dangerous, for by peeling it off the fibers may become airborne. Consequently, containment by covering with an effective sealant or enclosing the area with another covering poses lower risks than removal. Nevertheless, reducing or eliminating the hazards of asbestos is a costly proposition.

In 1976, Congress passed the Toxic Substances Control Act. The EPA then established a voluntary school asbestos program which led to a mandatory program in 1982. EPA regulations required schools to inspect for friable materials, identify the presence of asbestos and notify teachers, parents, and other potentially affected persons of the possible exposure. In 1984, Congress passed the Asbestos School Hazard Abatement Act, finally appropriating funds to assist local districts with removal and cleanup. Grants were made available in 1986 and 1987 for school districts with serious asbestos problems. At the time of this hearing, Dr. Wegenke had applied for federal assistance for cleanup operations at Orange School; the results of the loan application were not known.

With respect to the assessment of the asbestos-containing materials in the district, and specifically at Orange, Appellants' Exhibit E, the letter from EPA Technical Field Advisor Roy Jones, who had visited the District, stated as follows:

Orange Elementary School

> The ceiling materials in some corridors, classrooms and the lobby at Orange Elementary School create a different situation from all others we visited. Removal of these previously damaged materials would be the optimum method of abatement; however, due to the young age and small size of the current student population and the relatively minor damage they are now generating, the installation of gypsum board, fiber board or suspended acoustical tile ceiling is suggested.

Appellants' Exhibit E at pp. 3-4.

We find nothing to suggest that utilizing Orange School, assuming the containment is accomplished as suggested, would be a potential health threat sufficient to justify overturning the Board's decision to continue to occupy Orange School.

The remaining primary contention of Appellants is the fact that the District will continue to have three of its buildings out of compliance with the Department of Education's desegregation guidelines[5], despite the changes made in boundaries in the voted decision. Some background on this situation is in order.

Waterloo has the highest minority concentration in the state, at approximately 22% of the District population. When the Department of (then) Public Instruction developed the desegregation guidelines in 1972, several schools in Waterloo were out of compliance by wide percentages. The District created its first formal plan for desegregating its schools in 1973, which included greater busing of students and the maintaining of a magnet school, Grant Elementary, designed to educate a 50-50 minority/non-minority population. The plan has been modified several times since then, lowering considerably the margin by which the schools were outside the guidelines. In the 1986-87 school year, five attendance centers were out of compliance, including Grant Elementary School, the magnet school. As a result of the Board's decision on January 21, the number of schools anticipated to be out of compliance in 1987-88 decreases to two plus Grant Elementary School.

Although the District was unable to bring all schools into the 42% range, the Board's decision did reduce the number of Black children being bused. This was done in response to recommendations by both this department and the minority community population in Waterloo serving on the task force. This action represents a more equitable sharing of the burden of busing between the minority and majority population. While it is true that three of the east side "north of the river" schools will increase in minority percentage, this result is due to reassigning many Black children back to their neighborhood schools. This action also resulted in an increase in the total number of students being bused within the district, but this was done to reduce the burden on the Black community of busing to achieve desegregation. Instead of nearly 30% of minority children being bused, next year under the restructuring decision the projection is that only 22% will be bused. Unquestionably this increases the burden on the white population but with a proper motive.

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[5] The guidelines are not rules and noncompliance carries no automatic penalty. Overall compliance is established when the minority population in any given attendance center lies below the district minority population plus 20%. Therefore, to avoid citation, all Waterloo schools should, ideally, have no greater than a 42% minority population.

An offshoot issue of the increased busing raised by Appellants is that with higher numbers of pupils being transported, fewer students will be able to participate in extracurricular activities because they no longer walk to and from school. This allegation amounts to little more than speculation; furthermore, it assumes no activity buses will be run, a fact not in evidence. Many school districts find it more advantageous to establish activity buses following a needs assessment, frequently made after the school year begins.

Appellants' remaining issues essentially all relate to the makeup of the Steering Committee, the passing on of the plan to the Board despite the fact that it failed to be passed by a majority of the task force, and the portion of the decision closing Washburn and Cresthaven in lieu of Orange. There is ample evidence in the record illustrating that the Board was presented with every recommendation made by individual task force members and that each was considered by the directors. Dr. Wegenke and his administrative staff did an impressive job of responding to all questions and concerns raised by task force and community members. See Appellee's Exhibit "Previous Record," Book 2, Attachment D. We attach no significance to the composition of the Steering Committee.

With respect to the considerations in section 75 of H.F. 499, we make the following findings of fact. No evidence was presented to illustrate that disruptions of established programming will result from the Board's decision. Clearly, closing buildings is the most appropriate method to reduce school district costs of operation and maintain existing programs. Reduction of staff and "extras" seldom provides the type of financial savings needed when a district is faced with serious shortfall, and often has a negative impact on student services and education. The District clearly considered, as did the hearing panel, the quality and condition of facilities, and we find that, although closing newer, more modern buildings is regrettable, larger buildings will house more students and allow, in some cases, two buildings to be closed instead of only one.

The suggestion that past and present enrollment in the areas where schools are to be closed should be considered and given weight rather than the declining enrollment patterns of the district as a whole smacks of elitism or favoritism. We think a board would be remiss if it failed to take a broad view of the entire District in its decision.

The fifth consideration is to consider the comments and suggestions of a citizens task force. This the Board did and so did the hearing panel. It is wise to remember that citizen input is valuable and to be encouraged, but it is not binding on the Board. In re C. Donald MacCormack III, 5 D.o.E. App. Dec. 1 (1986).

We have already addressed and discussed and will expound upon items six and seven of the bill which relate to transportation changes and resulting impact on student participation in activities, and the Barker guidelines alleged to have been violated.

II.
Conclusions of Law

Since 1977, the standard against which the State Board has chosen to evaluate school closing decisions has been a seven-step procedural due

process guideline established in In re Norman Barker, 1 D.P.I. App. Dec. 145. Those steps and the process used to apply them were unsuccessfully challenged in Keeler v. Iowa State Bd. of Public Instruction, 331 N.W.2d 110 (Iowa 1983). The Iowa Supreme Court in that case recognized the unique and local nature of school closings, and cited our Barker guidelines with approval. Those seven steps are as follows:

> 1. A timeline should be established in advance for the carrying out of procedures involved in making an important decision. All aspects of such timelines would naturally focus upon the anticipated date that the board of directors would make its final decision in the matter.
>
> 2. All segments of the community in the school district should be informed that a particular important decision is under consideration by the board of directors.
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> 3. The public should be involved in providing sufficient input into the study and planning involved in important decision making.
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> 4. Sufficient research, study and planning should be carried out by the board and groups and individuals selected by the board. Such things as student enrollment statistics, transportation costs, financial gains and losses, program offerings, plant facilities, and staff assignment need to be considered carefully.
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> 5. There should be an open and frank public discussion of the facts and issues involved.
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> 6. A proper record should be made of all the steps taken in the making of the decision.
>
> 7. The final decision must be made in an open public meeting and a record be made thereof.

In re Norman Barker, 1 D.P.I. App. Dec. 145.

While it is true that our application of the guidelines has not resulted in many subsequent decisions to overturn school closing actions by local boards, we do not believe this is due to a predilection on our part to uphold local boards, but rather an increased sophistication and awareness by those boards of the importance of procedural due process when significant school decisions are undertaken.

The fact remains that Iowa law gives the board of directors of a school corporation exclusive decision-making power to "determine the number of schools to be taught, divide the corporation into such wards or other divisions for school purposes as may be proper, [and] determine the particular school which each child shall attend . . . ." Iowa Code § 279.11 (1987). See also Iowa Code § 280.2 (1987). The enumerated powers of electors, found in Iowa Code chapter 278, do not include a voice in determining attendance centers.

It is hornbook law that the burden of proof in a case is on the one challenging the action, absent a statute or other law allocating the burden elsewhere. In this case, the Appellants must prove by a preponderance of the evidence that the decision made by the Board on January 21, 1987, was made "fraudulently, arbitrarily or unreasonably, not supported by substantial evidence, not within the board's jurisdiction, or based on an erroneous theory of law." In re James Darst, et al., 4 D.P.I. App. Dec. 250, 258, citing In re Janis Anderson, 4 D.P.I. App. Dec. 87. In this case Appellants have raised several issues, many of which ask the hearing panel and State Board of Education to assess the wisdom of targeting Orange Elementary School as an attendance site. Under the Barker guidelines, we look at the process employed by the local board in reaching a decision. Of course, the assumption is that the decision reached will be factually supportable, but that assumption is a rebuttable one. If an Appellant can prove arbitrariness (the absence of reasoning and factual support) we will overturn a decision on its merits rather than merely evaluating the process.

Was it arbitrary of the Board to select Orange, a larger albeit older facility than Washburn or Cresthaven? We think not. There is ample evidence supporting Orange as a valid site. Did the Board fail to consider the costs of asbestos abatement and the concomitant potential hazards of friable asbestos at Orange? The evidence says no; the Board did consider the potential asbestos problems and found them to be surmountable and insufficient to override the benefits of a larger facility. We agree with the gist of the articles provided by Appellants on the asbestos issue: much remains to be known about friable asbestos, but identification and careful abatement procedures should eliminate the potential risks now becoming known. We trust that the Board, already under the scrutiny of the EPA, will do its homework and proceed to reduce or eliminate any risks with proper methods.

The other issues raised are double-edged. It is true that transportation costs will increase and that more students will be bused under the new plan. Looked at alone, that fact could easily give us pause. On the other edge, however, is the reduction of the burden of desegregation on the minority community. That is a worthy goal that also leads to the reduction in numbers of schools out of compliance with Department of Education guidelines. One cannot evaluate an action in a vacuum. If there is a visible drawback, the better path is to see what the off-setting benefits are, rather than assuming the action is unjustified or without reason. This appears to be the problem with Appellants' view of the January board decision. They have neglected to see the District in its entirety, instead focusing on how the decision negatively impacted on their neighborhood schools.

The Board did a very credible job in adhering to and exceeding the Barker guidelines. Appellants allege first that guideline number four was violated in that insufficient study was conducted into impact areas and programming. The evidence submitted in this case speaks loudly to the contrary. Much data were gathered and disseminated; questions raised were addressed by the Board; and the true picture was laid on the table, even knowing it would generate criticism in some respects such as increased transportation. We find no violation of Barker guideline #4.

Appellants next contend that the Board only gave lip service to the Barker guidelines. This contention seems to rest on two facts: (1) that the Board ultimately adopted a variation of one of the administration's four alternative proposals, and (2) the report and plan presented to the Board did not have the approval of the full task force. Both of these facts fail to prove that the Board members did not consider the information supplied to them. On the contrary, there is ample evidence that the data were pored over at two special work sessions. Appellants have apparently placed more emphasis on the importance of their involvement in the process than the State Board intended or envisioned when Barker was decided. Barker attempts to guarantee procedural due process. In a nutshell, that concept is exemplified in two elements: notice and an opportunity to be heard. The latter does not mean that one's advice must be taken.

In the alternative to the above two allegations of reversible error, Appellants urge us to forego Barker in favor of a new standard: the seven issues that appear in section 75 of H.F. 499, as amended and adopted during this past legislative session. We think it is no mere coincidence that the amendment which was passed originated in the Senate, proposed by Senator Larry Murphy who represents the patrons of the Elk Run area. So, too, it is no coincidence that no other affidavits of appeal were filed "between February 18, 1987 and February 20, 1987." In our view, this was an attempt to circumvent or augment the review of this case under the Barker guidelines alone.

Appellee raises constitutional questions regarding this particular piece of legislation in its brief. Specifically, the District argues that this legislation is unconstitutional as violative of the equal protection clause of the Fourteenth Amendment, and that it is violative of the constitutional prohibition against class legislation guaranteed in Article I section 6 of the Iowa Constitution. Appellee also recognizes that this agency lacks the authority to determine the constitutionality of a statute, that being the sole province of the judiciary.

Although we cannot address the constitutionality issue, we nonetheless feel compelled to comply with the directive found in H.F. 499. However, we view the considerations therein to be in addition to rather than in lieu of the established Barker guidelines. Having carefully examined these issues with respect to the evidence introduced at the hearing, we find nothing significant upon which to base a reversal.

All motions or objections not previously ruled upon are hereby denied and overruled.

III.
Decision

The decision of the Waterloo Community School District board of directors made on January 21, 1987, to restructure the District by closing buildings and realigning attendance boundaries is hereby affirmed.

Costs of this appeal, if any, under chapter 290 are assigned to Appellants. Verification of costs shall be forwarded to the Department of

Education within thirty days of receipt of the final decision in this case. If unappealed to district court within the time specifications established in Iowa Code chapter 17A.18, the District maps provided for the hearing and identified as Appellants' Exhibit D shall be returned to the District provided they are maintained and not permanently altered for the next five years.

August 21, 1987
DATE

LUCAS J. DEKOSTER, PRESIDENT
STATE BOARD OF EDUCATION

August 4, 1987
DATE

ROBERT D. BENTON, Ed.D.
DIRECTOR, DEPARTMENT OF EDUCATION
AND PRESIDING OFFICER