

**COMMONWEALTH OF KENTUCKY
KENTUCKY BOARD OF EDUCATION
ADMINISTRATIVE ACTION NO. 19-BOE-0019**

PINEVILLE INDEPENDENT BOARD OF EDUCATION

PETITIONER

vs.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

BELL COUNTY BOARD OF EDUCATION

RESPONDENT

* * * * *

A hearing was held in this matter at Farmer Helton Judicial Center, 101 West Park Ave., Pineville, KY 40977, on July 8 through 11, 2019. Timothy Crawford appeared as counsel for the Petitioner, Board of Education for Pineville Independent School District (“Pineville Independent”) along with the Petitioner’s Representative, Superintendent Russell Thompson. Larry Bryson appeared as counsel for the Respondent, Board of Education for Bell County School District (“Bell County”) along with the Respondent’s Representative, Tom Gambrel. Michael Head, Hearing Officer and Assistant Attorney General, conducted the hearing. The hearing was recorded by court reporter.

This case concerns Pineville Independent’s appeal to receive SEEK funds for Bell County resident students it enrolled without Bell County’s agreement. Pineville Independent argues its existence depends on receiving those funds. Bell County argues its students can use the money, and Pineville Independent has ignored the law in attempting to claim SEEK funds.

After consideration of the record and the factors set forth in KRS 157.350, and for the reasons that follow, the Hearing Officer RECOMMENDS that the Kentucky Board of Education AMEND the Commissioner’s Decision, as more particularly stated below.

HEARING RECORD

Pineville Independent called eight witnesses to testify:

- David Russell Thompson, Superintendent, Pineville Independent ¹;
- Paula K. Goodin, part-time Director of Pupil Personnel, Pineville Independent ²;
- Catrina McDermott, Principal of Pineville Independent School, Director of Special Education, and District Assessment Coordinator, Pineville Independent ³;
- Scott Jeffrey, Director of Food Service, Pineville Independent ⁴;
- James Dillon Strange, Director of Athletics, Pineville Independent ⁵;
- Jamie Lawson, Bus Driver, Driver Training Instructor, and Director of Transportation, Pineville Independent ⁶;
- Tammy Evans Jones, District Grant Writer and District Library Media Specialist, Pineville Independent ⁷; and
- James R. Golden, Chair of the Pineville Independent Board of Education ⁸.

Bell County called seven witnesses to testify:

- Christopher Allen Warren, District Office Administrator, Bell County ⁹;
- Steven Silcox, Chief financial officer, Bell County Board of Education ¹⁰;
- Regina Ann Collett, District Food Service Director, Bell County ¹¹;
- Angela Allen, District Instructional Supervisor and District Assessment Coordinator, Bell County ¹²;
- David Russell Thompson, Superintendent, Independent District ¹³;
- Yvonne Gilliam, Bell County School District Superintendent ¹⁴; and
- Terry Thomas Gambrel, Bell County Board of Education Administrator and Director of Facilities and transportation, Bell County ¹⁵.

¹ Transcript of Hearing, July 8, 2019, pp. 38–163 (“7/8/19 TH 38–163”).

² 7/8/19 TH 166–98.

³ 7/8/19 1 TH 200–52.

⁴ Transcript of Hearing, July 9, 2019, pp. 5–30 (“7/9/19 TH 5–30”).

⁵ 7/9/19 TH 32–72.

⁶ 7/9/19 TH 74–97.

⁷ 7/9/19 TH 99–106

⁸ 7/9/19 TH 108–71.

⁹ Transcript of Hearing, July 10, 2019, pp. 6–129 (“7/10/19 TH 6–129”).

¹⁰ 7/10/19 TH 145–252.

¹¹ 7/10/19 TH 258–76.

¹² 7/10/19 TH 278–350 and Transcript of Hearing, July 11, 2019, pp. 4–34 (“7/11/19 TH 4–34”).

¹³ 7/11/19 TH 35–36.

¹⁴ 7/11/19 TH 37–142.

¹⁵ 7/11/19 TH 146–75.

Seventy-six exhibits were offered at the hearing¹⁶, all of which were introduced into the record and considered in preparing this recommended order.¹⁷ Exhibit 76 was tendered after the hearing and introduced into the record according to the Post-Hearing Order dated July 29, 2019. The parties also submitted additional exhibits with their post-hearing briefs. After the Hearing Officer ordered by Post-Hearing Order dated May 14, 2020, that the parties file objections by May 22, 2020, neither party objected to the opposing parties' exhibits.¹⁸ Thus, these exhibits are admitted into the record.

PROCEDURAL BACKGROUND

Bell County did not agree to Pineville Independent's request to claim state funding for "any and all" Bell County resident students who attended Pineville Independent schools. On February 6, 2019, the Pineville Independent filed an appeal with the Commissioner of the Kentucky Department of Education pursuant to KRS 157.350(4)(a)(2).¹⁹

On or about April 17, 2019, the Commissioner issued his Decision stating,

Based on my analysis of the facts presented by both districts and considering factors affecting the districts, including but not limited to academic performance and the impact on programs, school facilities, transportation, and staffing of the districts, and in an effort to decrease the number of nonresident students ultimately enrolled in Pineville Independent as requested by Bell County, IT IS HEREBY ORDERED THAT:

1. As of the date of this decision, each district shall create a list accounting for all nonresident students as they relate to this appeal. The names and addresses of the

¹⁶ Each of the four volumes of the transcript has an Exhibit Index listing the page of the transcript where a particular exhibit was marked for identification.

¹⁷ Both parties filled the record with documents containing raw data about the two school districts. Often exhibits duplicate other exhibits. Some exhibits dealing with similar categories of data were created by different groups or individuals. Exhibits covered different periods of time, some were a forecast, others contained final figures. The differences almost never matter to the overall analysis. Nevertheless, where specific figures are given, the source is provided in footnotes.

¹⁸ The parties' attorneys both sent the Hearing Officer an email saying they did not object to the opposing parties' attachments to their respective post-hearing briefs.

¹⁹ See Pineville Independent's Post-Hearing Brief, p. 1.

nonresident students shall be exchanged, with a copy sent to me, by Friday, May 17, 2019.

2. All students identified per Paragraph 1 shall be permitted to conclude his or her elementary and secondary education in the school district he or she attends as of the date of this decision. Younger, non-school-age siblings of a nonresident student identified per Paragraph 1 shall be permitted to attend the district in which his or her older, school-age sibling attends through the graduation of the youngest sibling. This provision is simply included to accommodate families in both districts.

On or about May 13, 2019, Pineville Independent filed its Notice of Appeal to the Kentucky Board of Education (“KBOE”) under KRS 157.350(4)(a)(3). Pursuant to KRS 13B.030(1), the KBOE delegated conferred powers to a hearing officer to conduct an administrative hearing and to make a recommendation to the full board. The parties agree the full board issues the final order in this case pursuant to KRS 157.350(4)(a)(3), (4), and (5).

As previously stated, an evidentiary hearing was held July 8 through 11, 2019. Due to her serious injuries from a car accident, the court reporter failed to prepare a transcript for more than four months after the hearing.²⁰ After the transcript was produced, the parties tendered two agreed scheduling orders for post-hearing briefs, both of which the Hearing Officer signed.²¹ Pursuant to the last scheduling order, Pineville Independent filed a Post-Hearing Brief and a Post-Hearing Reply Brief; and Bell County filed a Post-Hearing Memorandum and a Post-Hearing Response Brief. Also pursuant to the last scheduling order, the case was submitted for the Hearing Officer’s recommendation on June 8, 2020. Due to the COVID-19 crisis and the Hearing Officer’s schedule, the Hearing Officer requested and received approval for an extension until August 8, 2020, to file this recommendation.

²⁰ See Hearing Officer’s Post-Hearing Conference Order dated November 14, 2019.

²¹ See Agreed Scheduling Order dated December 11, 2019, and First Amended Agreed Scheduling Order dated February 7, 2020.

DISPOSITIVE RULINGS

Two issues arose that the Hearing Officer ruled in prehearing orders were outside this tribunal's jurisdiction. Dismissing an issue or declining to rule constitutes a dispositive ruling that is a final order. Pursuant to KRS 13B.030(1), the agency head cannot delegate final order authority to a hearing officer in the absence of express statutory authority for such a delegation. KRS 157.350 does not expressly permit the KBOE, as agency head, to delegate its final order authority to the hearing officer. Therefore, the KBOE must incorporate into its final order rulings on the following two issues.

In one prehearing motion to dismiss, Bell County claimed its 2018 proposed agreement was "never presented to or rejected by the Pineville Independent Board at a public meeting, and thus, this [administrative] proceeding was not ripe for a decision."²² The Hearing Officer ruled that he does not have jurisdiction in this administrative proceeding to address Bell County's argument.²³ It is recommended that the Kentucky BOE rule the same. The second issue concerned Pineville Independent's motion for summary disposition claiming parents have a Constitutional right under the 14th Amendment to the U.S. Constitution "to direct the upbringing and education of their children."²⁴ The Hearing Officer ruled that Pineville Independent, in essence, asked the Hearing Officer to declare the residency requirement in KRS 157.350 facially unconstitutional, which under Kentucky case law neither the Hearing Officer nor the Kentucky BOE has authority to do.²⁵ It is recommended that the Kentucky BOE rule the same.

²² See Appellee's Post Hearing Memorandum, p. 3 and 1 TH 126.

²³ Hearing Officer's Prehearing Order Concerning Bell County's Motion To Dismiss & Concerning Pineville Independent's Motion For Summary Judgment, dated July 3, 2019.

²⁴ Pineville Independent's Response in Opposition to Motion to Dismiss and Motion for Summary Judgment, filed June 28, 2019, p. 5.

²⁵ *Id.*

FINDINGS OF FACT

Generally

1. The Petitioner, Pineville Independent Board of Education, has authority over the Pineville Independent School District (hereafter “Pineville Independent”). Pineville Independent has the following general characteristics:

- The City of Pineville is the county seat of Bell County.
- Pineville Independent is Bell County’s smallest school district.
- Its boundaries generally follow the corporate limits of Pineville.²⁶
- The population of Pineville is somewhere between 1,500 and 1,700 individuals, and it encompasses approximately 3.5 square miles.
- Pineville Independent operates only two buses within its district. None of its buses operate outside the district except to transfer its students to and from the vocational school facility outside Pineville.
- Pineville Independent has one school building containing grades K through 12, an indoor gym, and an outdoor athletic facility.
- 75% of Pineville Independent’s students qualify for free or reduced lunch.²⁷

2. Bell County also contains the Middlesboro Independent School District (“Middlesboro Independent”), which has the following general characteristics:

- Middlesboro Independent generally follows the corporate boundaries of the City of Middlesboro.
- Middlesboro is Bell County’s largest city and the largest city in southeastern Kentucky.
- Its population is in the neighborhood of 10,000 individuals, and it encompasses approximately 7.5 square miles.

3. The Respondent, Bell County Board of Education, governs the remaining area within Bell County, the Bell County School District (hereafter “Bell County”), which has the following general characteristics:

²⁶ Hearing Exhibit 36 (“HE 36”).

²⁷ HE 65.

- Bell County lies on the border with Tennessee and Virginia and includes the Cumberland Gap.
- Bell County’s total population is approximately 26,500 individuals.
- Bell County covers an area of approximately 361 square miles, much of it part of the Pine Mountain ridge.²⁸
- Bell County operates 60 buses and has 45 regular routes daily that average a total of 3,383 miles.²⁹
- Bell County operates one high school and six school “centers” that combine a middle school and an elementary school.
- Bell County’s schools have numerous indoor and outdoor facilities for student and public gatherings and for athletics.
- 81% of Bell County’s student population qualifies for free or reduced meals.³⁰
- Historically Bell County’s economy has been tied to the coal industry. That industry is in severe decline.
- In 2017 Bell County was one of five counties in the United States with more than 10,000 residents that have the lowest median household incomes.³¹

4. Pineville Independent introduced report cards for both districts for calendar years 2013-2016. These report cards contain data for Trends, Staffing, Demographics, Salaries, Finances, and Academic Performance in each district.³² Together these report cards provide additional general information about the parties that the KBOE can review.

²⁸ 7/11/19 TH 159.

²⁹ *Id.*

³⁰ HE 53.

³¹ HE 69.

³² HE 5 is the 2013-2016 Pineville Independent report card; HE 6 is the 2013-2016 Bell County report card.

Student Enrollment

5. Depending on the source and form of the evidence presented, the parties' total student enrollment figures differed slightly, but the significance of the numbers remains the same: over the last seven school years, Bell County's student population has declined and Pineville Independent's has increased.³³ That increase can be attributed, in large part, to Pineville Independent enrolling Bell County students without Bell County agreeing to Pineville Independent receiving SEEK funds for those students.

6. From the 2012-2013 SY to the 2018-2019 SY, Bell County's total student population declined by 364, from 3,010 students to 2,646 students, a 12% decline.³⁴

7. From the 2012-2013 SY to the 2018-2019 SY, Pineville Independent's total population increased by 36, from 529 students to 565 students, a 7% increase.

8. Pineville Independent's enrollment had decreased to a low of 483 in the 2015-2016 SY. Pineville Independent has increased its total enrollment by 82 over those three years through the 2018-2019 SY, a 17% increase.³⁵

9. Of Pineville Independent's 548 students enrolled in 2019,

- 197 were Pineville Independent residents (35.9%);
- 268 were Bell County residents (48.9%);
- 45 were Knox County residents (8.2%);
- 15 were Middlesboro residents (2.7%);
- 8 were Harlan County residents (1.5%); and
- 2 were Barbourville (Knox County) residents (.3%).³⁶

³³ Evidence about enrollment came in a confusion of exhibits with different enrollment numbers for the same years: *see* HE 9, 38, 39, 40, and 47. The parties did not clearly reconcile these numbers, and neither will the Hearing Officer. Instead, the Hearing Officer will merely cite the exhibits used to find a fact about enrollment numbers.

³⁴ 7/10/19 TH 26–27 and 38–39, and HE 38 and 39.

³⁵ 7/10/19 TH 26–27, and HE 39 and 47.

³⁶ HE 9.

10. In November 2018, 268 Bell County students were distributed throughout every grade level in Pineville Independent. Those numbers were as follows:

- Kindergarten, 17 Bell County students;
- 1st grade, 16 Bell County students;
- 2nd grade, 21 Bell County students;
- 3rd grade, 29 Bell County students;
- 4th grade, 11 Bell County students;
- 5th grade, 17 Bell County students;
- 6th grade, 15 Bell County students;
- 7th grade, 21 Bell County students;
- 8th grade, 21 Bell County students;
- 9th grade, 22 Bell County students;
- 10th grade, 29 Bell County students;
- 11th grade, 30 Bell County students; and
- 12th grade, 19 Bell County students.³⁷

11. The Bell County students were the only non-resident students enrolled at Pineville Independent without an agreement with the resident district.

12. Pineville Independent argues the KBOE should grant it the same treatment as Bell County receives from Middlesboro Independent. Bell County and Middlesboro Independent have an “any and all” agreement allowing Bell County to receive SEEK money for over 500 Middlesboro Independent students.

13. These facts are not the whole story. For many years, Middlesboro Independent has allowed a group of its elementary and middle school students continue to attend a long-standing Bell County K-8th school, Yellow Creek, that has come to be located within Middlesboro’s city limits. Middlesboro Independent defines an area of the City of Middlesboro

³⁷ HE 19.

the students within which attend Yellow Creek. Yellow Creek enrolled approximately 586 Middlesboro Independent resident students in the 2018-2019 SY. This is not the only Middlesboro Independent student population. Middlesboro Independent has an elementary school, a middle school, and a high school that enroll the remaining resident students within its district limits. Pineville Independent also enrolls 15 Middlesboro Independent students and receives SEEK money for them.³⁸

14. Over two-thirds of Bell County's student population in 2019 were its own resident students. Of the 2,646 total students,

- 1,929 were Bell County residents (72.9%);
- 59 were Pineville Independent residents (2.2%);
- 36 were Whitley County residents (13.5%);
- 31 were Harlan County residents (11.7%);
- 15 were Knox County residents (.6%);
- 2 were Barbourville (Knox County) residents (.08%); and
- 2 were Clay County residents (.08%).

15. In addition, eight Bell County enrollees were from Tennessee, and their parents paid tuition for their enrollment.³⁹

16. Under agreements with other school districts, Bell County receives SEEK money for all the other non-resident students it enrolls.⁴⁰

³⁸ 7/10/19 TH125-28 and HE 40.

³⁹ HE 40 and 58.

⁴⁰ Pineville Independent and Bell County have always agreed that Pineville Independent could receive SEEK monies for the same number of Bell County resident students as Pineville Independent students who attend Bell County schools.

Evidence Generally

17. The governing statute in this case directs that the KBOE “shall consider the factors affecting the districts, including but not limited to academic performance and the impact on programs, school facilities, transportation, and staffing of the districts.”⁴¹

18. Pineville Independent offered evidence containing a great deal of information about these factors, and Bell County responded in kind. That information concerns, in part:

- Academic performance-measures of many types, such as graduation rates, college readiness percentages, college test scores, etc.;
- Transportation data, including revenues and expenses;
- Food service data, including revenues and expenses;
- Construction debt service schedules;
- SEEK funding data and the SEEK calculation components;
- Other revenue sources such as grants and other sources of revenue, including cooperative agreements with colleges.

19. Many times the evidence consisted of summaries, projections, and comparisons over several years. Sometimes the evidence was raw data. Some evidence was from Kentucky Department of Education sources. Some data was compiled or calculated by the parties’ witnesses.

20. Despite this veritable flood of information about the districts, Pineville Independent frequently failed to make the evidence relevant to any legally cognizable claim. Specifically, Pineville Independent failed to explain from the evidence why the KBOE should abandon KERA’s residency-based funding scheme.

21. Instead, Pineville Independent merely argued that it will not be able to pay expenses, make construction debt payments, or meet its future goals without receiving the SEEK

⁴¹ KRS 157.350(4)(a)(4).

money attributable to “any and all” Bell County students who are enrolled at Pineville Independent, and it will be forced to close.⁴² Two points undermine the merit of these arguments.

22. It should be noted, first, that Pineville Independent’s construction bonds were approved based on average daily attendance numbers that included Bell County resident students for whom Pineville Independent had not secured SEEK funding over the life of the bond repayment schedule. Pineville Independent has continued to recruit enough Bell County students to continue to survive, even to grow. Obviously, Pineville Independent’s plans for which it requests SEEK funding are also based on enrollment numbers that include Bell County students.

23. Pineville Independent’s fiscal arguments are not compelling for another reason. Bell County also faces fiscal hardship without the SEEK money at issue. And although Pineville Independent tries to reduce Bell County’s motivation solely to receiving the SEEK money at issue⁴³, Bell County stands to lose staff, programs, support services for the students, even two rural elementary-middle schools without that SEEK money.⁴⁴ Bell County’s bonding capacity also is affected by the reduction in its average daily attendance, as are the state transportation funds it receives. Even the grant monies Bell County has been awarded are tied to its average daily attendance.⁴⁵

24. The districts’ transportation plans are detailed below. Those details show the loss of Bell County resident students impacts Bell County far more severely due to the far larger size

⁴² Pineville Independent’s Post-Hearing Brief, pp. 12–13.

⁴³ *Id.* at p. 15.

⁴⁴ 7/11/19 TH 49–58 and 63–64 and HE 68.

⁴⁵ 7/11/19 TH 57.

of Bell County, its mountainous topography, and the loss of state money for additional students on distant bus runs that must be driven regardless.

25. Pineville Independent argues that its school is an “integral part of the Pineville community,” and that it provides “a unique opportunity for a smaller, close-knit system for students who want a smaller system”⁴⁶

26. This argument compares the overall size of the school, not class size. Based on the evidence in the record, the two school districts have about the same average class size in their high school grades:

- Excluding its special education classes, Bell County High School averages 20.99 students per class; and
- Pineville Independent averages 19.06 students per class.⁴⁷

27. The details of the two school districts’ academic performance are set forth below. Suffice it to say at this point that Bell County’s academic performance is better than Pineville Independent’s. Bell County also appears to offer its students more advanced curriculum opportunities than Pineville Independent.

28. Pineville Independent also argues the KBOE should impose an “any and all” arrangement on Bell County because that arrangement “allows superior athletes who reside in Pineville to enroll in the larger Bell system, if desired, while, students who do not make the sports teams in Bell County often have more opportunities at Pineville Independent.”⁴⁸ In rebuttal, Bell County offered proof implying Pineville Independent actually attracts some Bell

⁴⁶ *Id.* at 13.

⁴⁷ HE 66 (4,723 Bell County enrollees in 225 classes); HE 41 (1201 Pineville Independent enrollees in 63 classes).

⁴⁸ *Id.*

County athletes who are leaders in their sport.⁴⁹ Obviously, attracting students based on their athletic ability complicates KHSAA decisions about student transfers to other districts.

29. Pineville Independent’s primary reason for this appeal is that it says it needs the money to survive.⁵⁰ This claim is unproven, at least in the sense that Pineville Independent did not attempt to raise revenue from a different source. For instance, Pineville Independent does not charge tuition for enrolling Bell County students. Pineville Independent did not offer any proof that it would fail even if it charged Bell County parents a tuition.

30. In response, the Bell County Superintendent testified,

We are at the point we cannot continue to lose students and deliver the level of instruction that we deliver, the level of student support services that we deliver. . . . And it keeps growing. You know, the discrepancy goes from . . . 110 now to 270 or 80.⁵¹

Pineville is going to have to do the things that I've done. They're going to have to live within their means. Their means, not our means. . . . [W]e've made adjustments; we've laid off people; we've closed schools.⁵²

31. Instead of charging tuition, Pineville Independent’s strategy since at least 2015 has been to enroll Bell County students without Bell County’s agreement.⁵³

32. Having the luxury to admit only those Bell County students who will fill its classes in each grade level, Pineville Independent can better plan its staffing, resources, and future growth, so long as it receives the SEEK funding for those students. Charging tuition would not provide this flexibility and predictability, obviously.

⁴⁹ 7/8/19 TH 141 and HE 18.

⁵⁰ *See, e.g.*, 7/9/19 TH 145 and 169; *and see* Pineville Independent’s first argument in its Post-Hearing Brief, p. 12 (entitled “The loss by Pineville of SEEK funds for 200 students would close Pineville”).

⁵¹ 7/11/19 TH 49.

⁵² 7/11/19 TH 63–64.

⁵³ 7/11/19 TH 109–10.

33. Pineville Independent asks the KBOE to allow it to admit, if not invite, whomever it wishes from Bell County to keep the Pineville Independent school open.

34. Pineville Independent's strategy has been to create "facts on the ground," so to speak, by continuing to enroll Bell County students during the pendency of this case.⁵⁴ By enrolling Bell County students during the pendency of this case, Pineville Independent hopes sympathy for these students' educational continuity will lead the KBOE to overlook the funding residency requirement.

35. Pineville Independent argues that Bell County receives the property tax revenues from parents of students attending Pineville Independent. Bell County responds that its property tax rate is higher than Pineville's to make up for the loss of SEEK money.⁵⁵ Bell taxpayers should not have to subsidize education through higher property taxes because Pineville Independent wants the SEEK money for its Bell County students.

36. Pineville Independent speculates about Bell County's "unspoken desire" to see Pineville Independent close and become part of the Bell County School District. Pineville Independent argues "[t]his nefarious motivation is more than enough reason to render a decision in favor of Pineville."⁵⁶ There is no evidence of this secret plan beyond pure speculation.

37. Several witnesses acknowledged that financial reasons might force Pineville Independent to consolidate with Bell County. That possible outcome is not a secret. It is the reason for this appeal. But there is no proof Bell County officials have a secret strategy to precipitate that end, no evidence that Bell County has taken any action other than resisting

⁵⁴ 7/11/19 TH 35-36.

⁵⁵ 7/10/19 TH 146-48; and HE 48.

⁵⁶ Pineville Independent's Post-Hearing Brief, pp. 16-17.

Pineville Independent’s demand for an “any and all” agreement. The proof shows Bell County merely wants its resident students to attend its schools so Bell County can better predict its enrollment and so it can take advantage of the economies of scale inherent in the KERA funding system.

38. While Pineville Independent offers mere speculation about Bell County’s intent, as explained below, the Pineville Independent BOE Chair admitted he and others in the district set out in 2015 to undermine the parties’ 2013 agreement.⁵⁷

History of Non-Resident Student Agreements

39. The parties’ dispute has a long history. Pineville Independent offered testimony about floods in the 70s and the resulting loss of housing in the floodwall construction that followed.⁵⁸ The dispute between the parties has even deeper roots only hinted at by the Pineville Independent School’s founding year of 1890.⁵⁹

40. To understand the current dispute, however, the relevant history begins twenty years ago. To resolve an earlier appeal, the parties signed an October 2000 agreement concerning their respective non-resident students (“NRS”). The agreement was to last through the 2003-2004 school year.⁶⁰

41. Pursuant to the agreement, each school district developed master lists of the other school district’s students attending their own schools. The master lists provided the following details about the students at issue⁶¹:

⁵⁷ See Finding of Fact paragraph 48 below.

⁵⁸ 7/9/19 TH 111–12.

⁵⁹ 7/9/19 TH 110.

⁶⁰ HE 71.

⁶¹ *Id.*

Master List Components	Pineville Independent NRS #s	Bell County NRS #s
NRSs in each district “grandfathered” by previous Commissioner order in 1999	299	68
Bell County resident students granted to Pineville Independent by 2000 Interim Commissioner order or Pineville Independent resident students “grandfathered” to Bell County by ‘92-‘93 change in law	14	28
NRSs the subject of cross-appeals in June 2000	23	33
NRSs enrolled in the previous year added to lists	38	40
Totals:	360	169

42. Based on the list above, beginning in the 2001-2002 SY, the agreement called for each district to reduce their non-resident population from the other district by “withdrawals of 46 or more continuous days and graduates” each of the three school years.⁶² Thus, in three years beginning in the 2001-2002 SY, any non-resident student on the other’s master list who withdrew (or graduated) would no longer be considered a part of the agreement. The agreement permitted state funding for the students on the master lists in addition to other one-to-one exchanges for which Pineville Independent received SEEK funds. The parties did not provide evidence of the average number of one-to-one exchange students during these years.

43. At the rate of reduction in the October 2000 agreement, each school district would lose a total 138 non-resident students⁶³ in three years. This potentially would leave, at the end

⁶² *Id.*

⁶³ 46 times 3 = 138.

of the 2003-2004 SY, 222 Bell County resident students at Pineville Independent⁶⁴ and 31 Pineville Independent resident students at Bell County.⁶⁵

44. Clearly, this agreement was not intended to resolve the dispute between the parties about non-resident Bell County students. But Bell County's attempt at that time to recover its resident students was clear.

45. In late 2012 the parties could not reach an agreement on SEEK funding for non-resident students. As a result, in January 2013, Pineville Independent filed another non-resident student appeal, which was dismissed in April 2013 based on an agreement between the parties.⁶⁶

46. The agreement was memorialized in two separate contracts signed in February 2013.⁶⁷ In the contracts, for each of four school years beginning in the 2013-2014 SY, the parties agreed on the number of Bell County students Pineville Independent could include in its enrollment above 71 one-to-one exchange students in each district.⁶⁸ The number of Bell County students at Pineville Independent as set by agreement would decline by 20 each year as follows:

- In the 2013-2014 SY, 71 one-to-one students plus 180 Bell County students
- In the 2014-2015 SY, 71 one-to-one students plus 160 Bell County students
- In the 2015-2016 SY, 71 one-to-one students plus 140 Bell County students
- In the 2016-2017 SY, 71 one-to-one students plus 120 Bell County students

⁶⁴ 360 minus 138 = 222.

⁶⁵ 169 minus 138 = 31. It is unclear from the proof whether or not this number included one-to-one exchange students.

⁶⁶ See HE 35.

⁶⁷ See attachments to HE 35.

⁶⁸ See HE 35: The contracts call for a one-to-one exchange of 71 students and "any and all" students from Bell County to Pineville Independent up to a certain number. The cap on total Bell County resident students means "any and all" refers to the lack of a justification for the non-resident students' attendance at Pineville Independent.

47. In his testimony, the Chair of the Pineville Independent Board of Education says the 2013 agreement was signed “under duress.”⁶⁹ There is no proof of this. Bell County merely refused Pineville Independent’s demand for an “any and all” agreement.

48. More to the point, the Board Chair admitted, “when we got rolling into the second year, and it was going to impact us, we made a decision that we had to make a public fight out of it, and we did.”⁷⁰ The Board Chair revealed that he and others in the district “decided to mount a resistance campaign . . . to try to change the outcome.” He reports that “minds were changed. Board members were replaced and things became different in a couple years.”⁷¹

49. The Pineville Independent Board Chair’s testimony dovetails with the Bell County Superintendent’s account of the last several years. Although the 2013 agreement covered the 2015-2016 and 2016-2017 SYs, she testified that newly-elected Bell County Board of Education members permitted Pineville Independent to receive “any and all” Bell County students during those school years without the February 2013 agreement’s limitations. The Bell County Superintendent, a credible witness, explained these Bell County board members did not make their loyalty to Pineville Independent known to anyone in Bell County before the election.⁷²

50. During the 2015-2016 SY through the 2018-2019 SY, Pineville Independent increased its Bell County student population. By the fall of 2018, Pineville Independent had increased its Bell County resident student enrollment to 268 students.

⁶⁹ 7/9/19 TH 143–44; *and see*, the argument in Pineville Independent’s Post-Hearing Brief, p.14.

⁷⁰ 7/9/19 TH 144.

⁷¹ 7/9/19 TH 145.

⁷² 7/11/19 TH 109–10.

51. In late 2018, Bell County asked Pineville Independent to reduce those 268 students by 50 students each year until in the 2022-2023 school year when the number of Bell County students at Pineville Independent's schools would be limited to a one-for-one exchange with Bell County.⁷³

52. This proposal essentially would have returned the parties to the schedule that they agreed upon in February 2013 if it had continued through the 2022-2023 SY. In other words, under the previous agreement Pineville Independent's Bell County students were reduced by 20 each year. The parties would have reached parity if Pineville Independent reduced its Bell County students by 20 each year through the 2022-2023 SY.

53. This is further evidence of Bell County's longstanding attempt to end Pineville Independent's practice of siphoning off its students.

54. The parties' one-for-one exchange numbers have averaged approximately 68 non-resident students in each school district each year through the 2018-2019 SY.⁷⁴

55. The SEEK revenue from the Bell County students at issue in 2018 was approximately the same amount for both parties. To explain, Pineville Independent received about \$5,899 in SEEK funds per student in the 2018-2019 SY.⁷⁵ In the 2018-2019 SY, Bell County's SEEK funding rate was approximately \$5,887 per student.⁷⁶ Thus, over four years at the 2018-2019 funding levels, between 2.94 and 2.95 million dollars in SEEK revenue were in dispute in their negotiations.⁷⁷

⁷³ See *Pineville Independent's Post-Hearing Brief*, pp. 1 and 3-4, and *Appellee's Post-Hearing Memorandum*, p. 2, and HE 19.

⁷⁴ 7/8/19 TH 53.

⁷⁵ HE 1.

⁷⁶ HE 50.

⁷⁷ The parties presented various numbers about the revenue at stake. These numbers changed depending on the enrollment figures used and computation method used. For example, the reduction of 50 Bell County students

56. Pineville Independent rejected Bell County’s proposal and filed this appeal.

57. Pineville Independent argues it should receive the SEEK money associated with the Bell County students it has enrolled. The Board Chair testified he does not think Bell County should be able to prevent Pineville Independent from receiving SEEK money for all its enrolled students. He says “the Commissioner or the State Board should adopt a rule that starts off as a default . . . to let everybody go to any public school that’s available to them and let the money go with their child.”⁷⁸ Pineville Independent essentially wants the KBOE to ignore existing law.

58. Bell County’s Superintendent gave her perspective on the parties 2013 negotiations. At the hearing, she testified that her proposal in 2018 was intended to start a discussion. She testified she understood the Commissioner’s compassion in allowing students to “stay in the school they have been in” When pressed, she said she was willing to allow Bell County residents to finish out their secondary education in the Pineville Independent school if they were enrolled there in the 2018-2019 SY. She also understood that thirteen years might pass before the last 2018-2019 SY Bell County student in Pineville Independent kindergarten graduated. She believed the benefit, even to this outcome, would be a definite end to Bell County losing state revenue to Pineville Independent for Bell County resident students.⁷⁹

59. Several points about the Superintendent’s testimony: foremost, the Superintendent showed her compassion for the students. She did not want any students treated unsympathetically in the dispute between district officials. Pineville Independent witnesses did

from Pineville Independent’s population each year through the 2022-2023 SY would result in a loss of approximately \$2,949,500 over four years at the 2018-2019 funding levels (50+100+150+200 times \$5,899). Bell County stood to gain approximately the same amount in SEEK funds from this many students, namely, \$2,943,500.

⁷⁸ 7/9/19 TH 149–50.

⁷⁹ 7/11/19 TH 65–66..

not show similar consideration of Bell County students in their testimony. The Bell County Superintendent also displayed her diplomacy skills towards Pineville Independent school officials with whom she must continue to work after this case has concluded. But in the end, she also revealed a fundamental goal for Bell County: a resolution that has finality.

60. Due to its lack of finality, the Bell County Superintendent also opposed the Commissioner's Decision regarding siblings of current Pineville Independent students. She pointed out that sibling students might not be born for 20 years. Whether half-siblings and step-siblings are covered by the order becomes an issue. The Superintendent also surmised that tracking these "grandfathered" students would be a "monumental task" requiring a "full-time person."⁸⁰ Perhaps the Superintendent exaggerated the difficulty in tracking these siblings, but the point about there being no clear finality to the Commissioner's Decision is well-taken.

Academic Performance of Districts

61. The Commissioner's considered the parties' academic performance:

As requested, both Pineville Independent and Bell County presented information about the educational quality of their respective districts. Based on my review of the material presented and information available on the KDE School Report Card, the districts are somewhat comparable in academic outcomes. For example, when reviewing district-wide high school proficiency rates from 2017-2018 for reading, 45.4% of Bell County students scored proficient compared to 43.9% of Pineville Independent students. Similarly, when reviewing district-wide high school proficiency rates from 2017-2018 for math, 30.3% of Bell County students scored proficient compared to 24.4% of Pineville Independent Students. In turn, based on the academic similarities in the districts, academic performance does not greatly influence my decision herein.

62. The parties introduced a plethora of information about the two districts' academic performance, but none of it invalidates the Commissioner's conclusion.

⁸⁰ 7/11/19 TH 67.

63. The proof about this factor did not influence the Hearing Officer's recommendation, except to the extent that it showed the parties' respective academic performance does not justify abandoning the residency requirement for state funding.

64. Nevertheless, because court decisions have required the KBOE to consider the statutory factors, and because proof about this factor was introduced into the record, the following findings are made.

65. Pineville Independent argues its school system is better than Bell County's. Pineville Independent says it is a "3-star" school and Bell County a "2-star" school system. Pineville Independent argues its graduating students' Transition Readiness score was higher than Bell County graduates' score. Pineville Independent argues Bell County's misbehavior rate is higher. And it argues Bell County provides a "less efficient" school system because Bell County spends more money per student than Pineville Independent.⁸¹

66. None of these arguments is persuasive.

67. The KDE data shows Bell County outperformed Pineville Independent academically. The districts' respective 2017-2018 SY KDE Report Cards were introduced into the evidence.⁸² They provide a detailed comparison of their academic performance. The following chart based on information from those report cards shows that in most categories, Bell County's scores exceed Pineville Independent's:

⁸¹ Pineville Independent's Post-Hearing Reply Brief, p. 4.

⁸² Pineville Independent's 2017-2018 SY Report Card is HE 65; Bell County's 2017-2018 SY Report Card is HE 53.

Category/ District/Grades	No. Tested	Novice	Apprentice	Proficient	Distinguished	Proficient/ Distinguished
READING						
PI Elem	105	21%	26.7%	37.1%	15.2%	52.4%
PI MS	115	14.8%	23.5%	48.7%	13%	61.7%
PI HS	41	34.1%	22%	34.1%	9.8%	43.9%
BC Elem	632	19%	27.7%	38.4%	14.9%	53.3%
BC MS	599	12.7%	21.5%	43.1%	22.7%	65.8%
BC HS	174	25.9%	28.7%	39.7%	5.7%	45.4%
MATHMATICS						
PI Elem	105	28.6%	37.1%	25.7%	8.6%	34.3%
PI MS	115	20.9%	40.9%	29.6%	8.7%	38.3%
PI HS	41	31.7%	43.9%	24.4%	0%	24.4%
BC Elem	632	18.8%	39.4%	30.7%	11.1%	41.8%
BC MS	599	11.4%	41.6%	38.4%	8.7%	47.1%
BC HS	175	30.9%	38.9%	26.3%	4%	30.3%
SCIENCE						
PI Elem	42	16.7%	66.7%	14.3%	2.4%	16.7%
PI MS	44	15.9%	65.9%	15.9%	2.3%	18.2%
PI HS	42	21.4%	59.5%	16.7%	2.4%	19%
BC Elem	209	12.4%	56%	25.8%	5.7%	31.6%
BC MS	199	12.6%	61.3%	22.6%	3.5%	26.1%
BC HS	175	24%	53.1%	20%	2.9%	22.9%
SOC STUDIES						
PI Elem	27	0%	48.1%	44.4%	7.4%	51.9%
PI MS	34	8.8%	50%	32.4%	8.8%	41.2%
PI HS	NA	NA	NA	NA	NA	NA
BC Elem	217	14.7%	34.6%	39.2%	11.5%	50.7%
BC MS	206	7.3%	30.1%	47.1%	15.5%	62.6%
BC HS	NA	NA	NA	NA	NA	NA
WRITING						
PI Elem	27	7.4%	44.4%	44.4%	3.7%	48.1%
PI MS	34	2.9%	55.9%	41.2%	0%	41.2%
PI HS	42	14.3%	42.9%	33.3%	9.5%	42.9%
BC Elem	217	12%	27.6%	41%	19.4%	60.4%
BC MS	206	11.7%	33.5%	35.9%	18.9%	54.9%
BC HS	175	13.1%	36.6%	39.4%	10.9%	50.3%

68. The 2017-2018 SY report cards also contain average ACT scores and the percentage of students who meet CPE benchmarks:

Avg ACT Scores:	No. Tested	English	Reading	Math	Science	Composite
PI	40	18.5	19.3	17.1	18.5	18.4
BC	173	18.9	19.1	17.8	18.4	18.7
% Meeting CPE Benchmark:	No. Tested	English	Reading	Math		
PI	41	56.1%	43.9%	24.4%		
BC	173	55.5%	45.1%	30.1%		

69. In 2016 (the last year that the KDE ranked schools in Kentucky), Bell County was ranked 44th out of 173 districts and Pineville Independent was ranked 168th.⁸³

70. No Bell County student attending Bell County schools receives an inadequate education. There is no proof that any Bell County student must go to the Pineville Independent school to receive an adequate education.

Impact on Districts’ Programs, School Facilities, Transportation, and Staffing

71. In the section of his Decision titled “Impact on Programs, School Facilities, Transportation, and Staffing of the Districts,” the Commissioner noted that both districts would suffer financially without SEEK funding. The Commissioner concluded as follows:

In regard to my decision, without question every school district in Kentucky presently faces financial constraints. Here, both Pineville Independent and Bell County highlight negative effects associated with the loss of funding based on the outcome of this nonstudent student resident agreement dispute. While financial hardships will be felt by both districts, I am conscious of the fact that counties, as opposed to independent school districts, are the principal school district entities in Kentucky.

72. None of Pineville Independent’s proof changes the Commissioner’s conclusions. None of its proof provides a compelling basis for abandoning the residency requirement of KERA funding.

⁸³ 7/10/19 TH 342–43.

73. Similarly, the proof about these factors did not influence the Hearing Officer’s recommendation, except to the extent that none of the evidence justifies abandoning the residency requirement for state funding.

74. Again, both parties introduced evidence about their academic programs, school facilities, transportation plan, and staffing. Because prior cases have required consideration of these statutory factors, and because proof about these factors was introduced into the record, the following findings are made.

75. PROGRAMS: The Bell County Superintendent extolled her district’s record in becoming “a very effective school district in terms of instructional delivery and student support services.”⁸⁴

76. Bell County has effectively used grant monies to introduce innovative curriculum and to address significant psychosocial issues facing many of its students. These monies enabled Bell County to raise its students’ educational expectations.

77. For instance, Bell County sought and was awarded two-million dollars in private grant support from the Elgin Foundation. It has received federal money through the GEAR UP grant, and private grant money through Berea College’s Save the Children program. Bell County has also received short term or year-to-year grants from KAGAN Strategies (innovative teaching), Charge grants (history and geography), Lead the Way grants (special education), STEM grants (technology), Read to Achieve grant (hearing and vision testing).⁸⁵ These monies paid for a needed district social worker, 20 certified teachers, and six other employees.⁸⁶

⁸⁴ 7/11/19 TH 46.

⁸⁵ 7/10/19 TH 288–300.

⁸⁶ 7/10/19 TH 295 and 7/11/19 TH 14–15 and 45–46.

78. The amount of grant monies is calculated using average daily attendance, that is, its enrollment.⁸⁷ In other words, Bell County would receive more in grant money if Bell County students returned from Pineville Independent.

79. No proof showed Pineville Independent has developed similar grant support.

80. The evidence shows Bell County provides more AP and dual credit classes for its students than does Pineville Independent. Also, all of Bell County’s dual credit courses were taught at Bell County High School at no additional cost to students’ parents.⁸⁸ Pineville Independent does not offer its students no-cost, dual-credit classes.

81. Again, the districts’ 2017-2018 SY Report Cards provide a detailed comparison of their class offerings.⁸⁹ Based on those report cards, Bell County offers more AP subjects:

COURSE TITLE	COURSE ENROLLMENT	COURSE COMPLETERS
AP Calculus		
PI	None	
BC	10	Not reported
AP Chemistry		
PI	None	
BC	21	20
AP Languages & Composition		
PI	23	Not reported
BC	28	18
AP Literature & Composition		
PI	13	11
BC	15	12
AP Statistics		
PI	None	
BC	27	Not reported
AP U.S. History		
PI	27	Not reported
BC	12	Not reported

⁸⁷ 7/11/19 TH 57–58.

⁸⁸ HE 64 and 7/10/19 TH 319–20.

⁸⁹ See HE 53 and 65.

82. In addition to its AP classes, Bell County has invested in its dual credit program. Beginning in 2017, Bell County offered teachers a \$5,000 stipend to teach dual credit courses, but teachers must obtain a Masters degree plus 18 hours in their subject field.⁹⁰

83. In 2016, Bell County had 40 students enrolled in 16 dual credit courses.⁹¹ In the 2018-2019 SY, Bell County had approximately 130 students who earned dual credit.⁹²

84. Pineville Independent offers no dual credit classes at its school. Its students can attend classes at Southeast Kentucky Community Technical College, but parents must pay tuition for those classes.⁹³

85. Bell County also provides career path courses and programs in business, marketing, agriculture, automotive maintenance and bodywork, computer networks, nursing, and construction.⁹⁴

86. Pineville Independent did not offer proof that it provides similar courses for its students.

87. FACILITIES: Pineville Independent did not offer any financial analysis showing the effect of the loss of SEEK funding on its facilities, or showing that different marketing or different funding strategies would not be successful in helping its school to survive. Instead, Pineville Independent merely argues that without the SEEK funding, “Pineville would essentially

⁹⁰ 7/10/19 TH 317–18.

⁹¹ HE 64 and 7/10/19 TH 319–20.

⁹² 7/10/19 TH 322.

⁹³ 7/8/19 TH 97.

⁹⁴ 7/10/19 TH 316–17.

be given the financial ‘death penalty’ resulting in the closure of the Pineville School System” and “a complete shutdown of all Pineville [Independent] facilities.”⁹⁵

88. Bell County has the capacity in its existing facilities to educate every student attending schools in all three school districts, Bell County, Middlesboro Independent, and Pineville Independent.⁹⁶

89. Bell County described its capital improvements. Bell County has closed schools beyond repair and, like Pineville Independent, has built newer facilities. Those newer facilities include creating middle schools within, or attached to, all six of its elementary schools.⁹⁷

90. Bell County built a vocational building beside its high school on which it makes an annual bond payment of approximately \$270,000 through 2029. The Community College System operates the school. Both Bell County and Pineville Independent send students to the school, but Pineville Independent does not contribute toward the bond payment.⁹⁸

91. TRANSPORTATION: As stated previously, Pineville operates two buses within its small district. Its buses leave the district to transport vocational students to the vocational school facility on the Bell County High School campus no more than 5 miles away.

92. Also stated previously, Bell County operates 60 buses and has 45 regular routes daily that average a total of 3,383 miles.⁹⁹

93. Bell County operates its own maintenance garage.

⁹⁵ Pineville Independent’s Post-Hearing Reply Brief, p. 1–2.

⁹⁶ 7/11/19 TH 118.

⁹⁷ 7/11 TH 50.

⁹⁸ 7/10/19 TH 232–34.

⁹⁹ *Id.*

94. Again, Pineville Independent merely states without elaboration that its school would close without the SEEK funding from Bell County students, and they will have no buses.

95. More to the point, Pineville Independent will not receive any transportation-related SEEK funds for the Bell County students because they are driven to school. Bell County, on the other hand, will receive additional transportation-related SEEK funds for those students, if they return.

96. Several figures from Bell County's transportation data reveal the disparate impact on the two districts from loss of SEEK funding for the disputed students.

97. Pursuant to the statutory calculation, SEEK funds include per-pupil funding for transportation costs.¹⁰⁰ The transportation portion of the SEEK amount is comparatively large for Bell County.¹⁰¹ In the 2018-2019 SY, Bell County received \$1,036,426 from the transportation component of its SEEK funds, compared to \$180,338 that Pineville Independent received. The transportation reimbursement is only approximately 60% of Bell County's actual costs.¹⁰²

98. It is also important to consider Bell County's transportation capacity. The district can transport 2,834 students using only the buses it used in the 2018-2019 SY.¹⁰³ Bell County's student population that year was 2,646 students, leaving an additional capacity of 188 students that could have been transported. In other words, with perhaps only one more bus, Bell County could transport the additional 268 students now attending Pineville Independent. That minimal

¹⁰⁰ KRS 157.360(2)(c) and 157.370.

¹⁰¹ 7/10/19 TH 64.

¹⁰² 7/10/19 TH 188.

¹⁰³ 7/11/19 TH 164.

additional cost would be rewarded with a substantial increase in SEEK transportation reimbursement.

99. The benefit to Bell County in its transportation budget would be far greater than the benefit to Pineville Independent if Bell County students returned to Bell County schools.

100. STAFFING: Again, Pineville Independent argues merely that its school will close without the SEEK monies from the Bell County students.

101. Bell County's staffing reductions are not existential, but nonetheless significant. It already reduced staffing because of declining student enrollment. Between the 2012-2013 SY and the 2018-2019 SY, Bell County has lost 57 certified personnel and 40 classified personnel.¹⁰⁴

CONCLUSIONS OF LAW

Jurisdiction and Procedure

1. In 2018–2019 school year, the Respondent, Bell County Board of Education, refused to enter into a written agreement with the Petitioner, Pineville Independent Board of Education, that would allow Pineville Independent to claim “any and all” Bell County resident students for SEEK funding purposes. As a result, pursuant to KRS 157.350, Pineville Independent appealed.

2. Because KRS 13B.020(3) does not specifically exempt the present type of administrative hearing from KRS Chapter 13B, the procedures in that chapter govern this proceeding.

¹⁰⁴ HE 68.

3. Under KRS 157.350 and KRS Chapter 13B, the Kentucky Board of Education is the agency head responsible for the final order in this administrative hearing.¹⁰⁵

4. Pursuant to KRS 157.350(4)(a)(3), the Commissioner of Education¹⁰⁶ issued a decision in an attempt to resolve the dispute between Pineville Independent and Bell County.

5. Pursuant to KRS 157.350(4)(a)(3), Pineville Independent appealed the Commissioner's decision to the Kentucky Board of Education.

6. Pursuant to its authority as agency head under KRS 13B.030, the Kentucky Board of Education delegated the authority to preside at the 13B hearing to a hearing officer in the Office of the Attorney General. The Hearing Officer is to issue a recommended order to the full board.

7. This recommended order is issued pursuant to KRS 13B.110.

Burden of Proof

8. In its Post-Hearing Brief, Pineville Independent endorses the opinion its BOE Chair expressed in his testimony that the appeal in 2013 “was the 7th or 8th time Bell County tried to avoid an ‘any and all’ agreement”¹⁰⁷ This statement reverses the obligations of the parties under the law.

9. The statute governing this appeal is a funding eligibility law. It obligates a school district that wishes to receive SEEK funds not to include in its average daily attendance (on which the funding is based) any non-resident students who are not the subject of a written agreement with the resident district. The relevant portions of the statute state,

¹⁰⁵ KRS 157.350(4)(a)(3) and (5) and KRS 13B.010(4) and (6).

¹⁰⁶ Although KRS 157.350 refers only to “the commissioner,” it is clear this is the Commissioner of Education. *See* KRS 156.010(1).

¹⁰⁷ Pineville Independent’s Post-Hearing Brief, page 14.

Each district which meets the following requirements shall be eligible to share in the distribution of funds from the fund to support education excellence in Kentucky . . . Includes no nonresident pupils in its average daily attendance, except . . . [p]upils listed under a written agreement, which may be for multiple years, with the district of the pupils' legal residence¹⁰⁸

10. The manner in which Pineville Independent frames the issue—saying Bell County extorted the 2013 agreement by refusing to sign an “any and all” agreement with Pineville Independent—reverses Pineville Independent’s obligation under the law and reverses its burden of proof in this case.

11. The burden of proof in this case is governed by KRS 13B.090(7). Pineville Independent asks the Kentucky Board of Education to take action and grant it a benefit that it does not currently possess, namely, inclusion of non-resident students in its average daily attendance for purposes of receiving state funding. Thus, Pineville Independent has the burden to show the propriety of the action it asks the Kentucky Board of Education to take and to show its entitlement to the benefit it seeks.¹⁰⁹

12. For the reasons stated hereafter, Pineville Independent has not met its burden, and the Kentucky Board of Education should deny Pineville Independent’s appeal subject to conditions based on other considerations.

¹⁰⁸ KRS 157.350(4)(a)(1).

¹⁰⁹ KRS 13B.090(7) states, “In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought.”

Issues and Applicable Law

13. Pineville Independent filed this appeal under KRS 157.350(4)(a). According to the statute's language, if two school districts cannot reach an agreement, either district can appeal to the Kentucky Board of Education.¹¹⁰

14. To resolve the dispute between districts when they cannot agree, KRS 157.350(4)(a)(4) states the "Kentucky Board of Education shall consider the factors affecting the districts, including but not limited to academic performance and the impact on programs, school facilities, transportation, and staffing of the districts."

15. A central issue in this case, therefore, is to determine how the factors in KRS 157.350(4)(a)(4) should be considered and applied.

16. There is no case on point that has interpreted the language of KRS 157.350(4)(a)(4).

17. The Kentucky BOE recently issued a final order in another appeal under KRS 157.350, *Board of Education for the Raceland-Worthington Independent School District vs. Board of Education for the Greenup County School District*.¹¹¹ The legal conclusions in the Board's final order govern the application of KRS 157.350 in this proceeding.¹¹²

18. In its final order, the Board's relevant legal conclusions are quoted below¹¹³:

¹¹⁰ KRS 157.350(4)(a)(2).

¹¹¹ *See Board of Education for the Raceland-Worthington Independent School District vs. Board of Education for the Greenup County School District*, Appeal No. 2019-03, Administrative Action No. 19-BOE-0081, Final Order effective February 4, 2020.

¹¹² *In re Hughes & Coleman*, 60 S.W.3d 540 (Ky. 2001) (Administrative agency either must conform with its own precedents or explain its departure from them).

¹¹³ In the Recommended Order adopted by the Board's Final Order, the paragraphs are numbered as indicated. The Final Order also contains the footnotes as indicated, but the numbers are different in the Final Order.

26. A careful examination of the KRS 157.350(4)(a)(4) language itself¹¹⁴ reveals that the primary focus is districts—specifically, districts’ academic performance and the impact on districts’ programs, facilities, transportation, and staffing. That is, the statute concerns funding of Kentucky school districts and “factors affecting the districts.” Based on this focus, if consideration is to be given to particular students, it must be in the context of a consideration of these “factors affecting the districts.”
27. This point is made clear by the fact that there is a separate statute—KRS 158.120—that concerns individual students’ attendance at non-resident district schools and the payment of tuition for such attendance. If there are issues concerning specific non-resident students attending schools outside their district of residency, a separate appeal process exists under KRS 158.120 to address those issues.¹¹⁵
28. Additionally, it also should be noted that under KRS 157.350(4)(a), the consideration of districts’ “academic performance” is separate from a consideration of the impact non-resident student attendance will have on a district’s programs, facilities, transportation, and staffing. This implies that a resident district’s academic performance in a specific area or as a whole may justify allowing or ordering another district to claim non-resident students for funding purposes. The question remains when this would be justified.
29. In rendering his decision in this case, the Commissioner states he “considered the importance of the continuity of educational benefits for students and the stability associated with remaining in a school district a student is already attending.”¹¹⁶
30. The Commissioner’s consideration of the parties’ past agreements is laudable and warranted. This consideration will be dealt with more fully below. However, the Commissioner also ordered that “[y]ounger, non-school-age siblings of a nonresident student identified per Paragraph 1 [of his order] shall be permitted to attend the district in which his or her older, school-age sibling attends through the graduation of the youngest sibling.”¹¹⁷ This would allow any later born sibling to attend the Independent District. The Commissioner

¹¹⁴ *Kentucky Board of Medical Licensure v. Strauss*, 558 S.W.3d 443, 448 (Ky. 2018), *reh'g denied* (Nov. 1, 2018), *cert. denied*, 139 S. Ct. 1354 (2019) (citations omitted) (“In discerning legislative intent, ‘the first rule is that the text of the statute is supreme.’”)

¹¹⁵ KRS 158.120 concerns payment of tuition for non-resident students’ attendance at a non-resident district’s schools, and the resolution of disputes concerning the amount of the tuition and the individual or entity who is required to pay the tuition.

¹¹⁶ *Raceland v. Greenup County Commissioner’s Decision*, page 5.

¹¹⁷ *Raceland v. Greenup County Commissioner’s Decision*, page 6.

states, “This provision is simply included to accommodate families in both districts.”¹¹⁸

31. With due respect to the Commissioner’s Decision, the Independent District offered no proof that any non-resident student or their siblings would be harmed by attending schools in the district where they reside. Of course, the districts can, themselves, enter into an agreement in any specific student’s case, if warranted. The KBOE also should consider the impact of sending students back to the schools in the district where they reside.
32. Issues concerning specific students are better left to the various school districts to work out on an individual, case-by-case basis.
33. The KBOE should countenance appeals—and especially appeals involving specific students—only if, after considering districts’ academic performance and the impact on their programs, facilities, transportation, and staffing, there is good reason to alter the basic rule that school districts should not be able to claim non-resident students for state funding purposes.
34. The issue, then, is what constitutes “good reason.”
Student Residency Governs School Districts’ State Funding
35. The guiding statute in this hearing, KRS 157.350 (a public school funding eligibility statute) must be interpreted in light of KRS 159.010(1)(a) (the primary public school residency statute).
36. The residency statute requires parents, guardians, and custodians to send children in their legal care to a school in the district “in which the child resides,” or “to the public school that the board of education of the district makes provision for the child to attend.”¹¹⁹
37. Again, in trying to divine the legislature’s intent, it should be noted that the provisions of the funding statute dovetail with the residency statute’s provisions.
38. To explain, the funding statute, as a first matter, prohibits school districts from including “nonresident pupils in its average daily attendance”¹²⁰ This underscores that, for funding purposes, school districts have a priority interest in students within their jurisdiction.

¹¹⁸ *Raceland v. Greenup County* Commissioner’s Decision, page 6.

¹¹⁹ KRS 159.010(1)(a) states, “[E]ach parent, guardian, or other person residing in the state and having in custody or charge any child who has entered the primary school program or any child between the ages of six (6) and sixteen (16) shall send the child to a regular public day school for the full term that the public school of the district in which the child resides is in session or to the public school that the board of education of the district makes provision for the child to attend.”

¹²⁰ KRS 157.350(4).

39. Furthermore, the key numerical figure used to determine the state monies a school district receives is a school district's "average daily attendance."¹²¹ That is, in the absence of an agreement otherwise, a school district's funding is based on the number of resident pupils in attendance at its schools. Thus, the resident student's attendance directly determines the school district's funding.
40. School districts who wish to include non-resident students in their average daily attendance figures are excepted from the residency restriction on funding eligibility only if the non-resident school district enters into "a written agreement . . . with the district of the pupils' legal residence."¹²² This exception allowing districts to enter into written agreements dovetails with the second phrase in KRS 159.010(1)(a).
41. To explain, the residency statute also requires parents, guardians, and custodians to send children in their legal care "to the public school that the board of education of the district makes provision for the child to attend."¹²³ This language emphasizes the General Assembly's placement of the responsibility for public education on the school district of residence. Furthermore, this language emphasizes the general intent that the school district of residence determines whether it will make provision for its students to attend out of district schools, subject to applicable law.
42. Nothing in KRS 159.010(1)(a) gives non-resident school districts a basis to demand public school funding based on a non-resident student's desire to attend the non-resident districts' schools.
43. Nor does KRS 159.010(1)(a) give non-resident school districts a basis to demand non-resident students' attendance at their schools based merely on the need for additional funding.
44. When interpreting the funding statute at issue, the resident district's priority in the residency statute should be acknowledged.
45. If, without good reason, non-resident school districts can alter the fundamental principle of residency in KRS 159.010(1)(a) merely by appealing to the Commissioner and Kentucky Board of Education under KRS 157.350(4)(a)(2)

¹²¹ KRS 157.320(1) states, "'Average daily attendance' means the aggregate days attended by pupils in a public school, adjusted for weather-related low attendance days if applicable, divided by the actual number of days the school is in session, after the five (5) days with the lowest attendance have been deducted."

¹²² KRS 157.350(4)(a)(1) states, "Each district which meets the following requirements shall be eligible to share in the distribution of funds from the fund to support education excellence in Kentucky: . . . Includes no nonresident pupils in its average daily attendance, except . . . [p]upils listed under a written agreement . . . with the district of the pupils' legal residence."

¹²³ KRS 159.010(1)(a).

and (3) when school districts of residence rebuff them, then the residency requirement in KRS 159.010(1)(a) is rendered meaningless.

46. It is a well-recognized principle of statutory construction to presume that the General Assembly intended a statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.¹²⁴ Harmonizing the appeal procedure in KRS 157.350(4)(a) with the residency directive in KRS 159.010(1)(a) should lead the KBOE to affirm the funding statute's theme that residency is primary unless, when considering the factors in KRS 157.350(4)(a)(4), there is good reason to reject that requirement.
47. This is a persuasive argument for limiting non-resident school districts' ability to use the funding statute's appeal provisions to alter the residency statute's mandate.

Legislative History and Constitutional Basis of KERA

48. In determining how to apply the factors identified in KRS 157.350(4)(a)(4) and in identifying what would constitute good reason to deviate from the residency basis of state funding, the [Board] looks for guidance in the legislative history of KRS 157.350.¹²⁵
49. It should be noted that every one of the nine prior versions of KRS 157.350—which go back to the version effective July 1, 1976—contains language that is virtually identical to the language of the current version of KRS 157.350, effective July 15, 2014: a district is eligible to receive state funding so long as it “[i]ncludes no nonresident pupils in its average daily attendance, except by written agreement with the district of the pupils’ legal residence.”¹²⁶
50. This, again, underscores the General Assembly's long-standing affirmation of the primary state funding requirement that only resident students should be counted in a district's average daily attendance unless the district in which a student resides agrees otherwise.
51. The [Board] also looks to the case law that resulted in the enactment of the Kentucky Education Reform Act (hereafter, “KERA”). This source of guidance makes clear that KERA's funding structure is at the heart of the

¹²⁴ See *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

¹²⁵ *Travelers Indemnity Co. v. Reker*, 100 S.W.3d 756, 764 (Ky. 2003) (citations omitted) (“In the face of statutory silence with respect to legislative intent, ‘we look for guidance to outside sources, such as legislative history.’”)

¹²⁶ See prior versions of KRS 157.350, Amended 2013 Ky. Acts ch. 56, sec. 1, effective June 25, 2013. -- Amended 2007 Ky. Acts ch. 104, sec. 1, effective June 26, 2007. -- Amended 2005 Ky. Acts ch. 52, sec. 1, effective June 20, 2005. -- Amended 1998 Ky. Acts ch. 309, sec. 2, effective July 15, 1998. -- Amended 1996 Ky. Acts ch. 318, sec. 50, effective July 15, 1996; and ch. 362, sec. 6, effective July 15, 1996. -- Amended 1992 Ky. Acts ch. 258, sec. 1, effective April 7, 1992. -- Amended 1990 Ky. Acts ch. 476, Pt. III, sec. 96, effective July 13, 1990. -- Amended 1978 Ky. Acts ch. 133, sec. 2, effective June 17, 1978. -- Amended 1976 Ky. Acts ch. 93, sec. 13, effective July 1, 1977. -- Created 1976 Ky. Acts ch. 93, sec. 24, effective July 1, 1976.

- General Assembly’s effort to provide Kentucky children with a constitutionally-required, adequate public school education.
52. The history of KERA is well-known. The Kentucky Supreme Court declared the prior public school system unconstitutional and directed the General Assembly to create an entirely new structure for primary and secondary education in Kentucky.
 53. That is, in *Rose v. Council for Better Educ., Inc.*¹²⁷, the Supreme Court opined “the [prior] statutory system as a whole and the interrelationship of the parts therein are hereby declared to be in violation of Section 183 of the Kentucky Constitution.”¹²⁸ That section of the Kentucky Constitution mandates “[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”¹²⁹
 54. In *Rose*, the Supreme Court made clear that adequate funding of all school districts in Kentucky is central to an efficient public school system that must provide constitutionally required adequate education to every child in Kentucky.¹³⁰ Thus, the Supreme Court directed the General Assembly to provide adequate funding for the public schools of Kentucky.¹³¹
 55. To implement the Supreme Court’s decision in *Rose*, the General Assembly included in its KERA enactments an entirely new statutory system for funding public education.¹³² That funding system retained the resident-student-based eligibility requirement in KRS 157.350.¹³³
 56. The General Assembly’s express intent in its funding chapter was to assure efficient, substantially equal public school educational opportunities for those in attendance in the public schools of the Commonwealth.¹³⁴

¹²⁷ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989) (“The ultimate issue is whether the system of common schools in the Commonwealth established by the General Assembly, with respect to the mandate of Section 183 . . . is ‘efficient’ in the constitutional sense”). The funding system that resulted, which includes KRS 157.350, is part of the overall educational reform in Kentucky that has come to be known as “KERA.”

¹²⁸ *Rose* at 215.

¹²⁹ Ky. Const. Sec. 183.

¹³⁰ *Rose* at 211 (“The system of common schools must be adequately funded to achieve its goals.”)

¹³¹ *Rose* at 216 (“The General Assembly must provide adequate funding for the system.”)

¹³² Found in KRS Chapter 157.

¹³³ See KRS 157.350, effective April 7, 1992.

¹³⁴ KRS 157.310 states, “It is the intention of the General Assembly to assure substantially equal public school educational opportunities for those in attendance in the public schools of the Commonwealth, but not to limit nor to prevent any school district from providing educational services and facilities beyond those assured by the state supported program. The program shall provide for an efficient system of public schools throughout the Commonwealth, as prescribed by Section 183 of the Constitution of Kentucky, and for the manner of distribution of the public school fund among the districts and its use for public school purposes, as prescribed by Section 186 of the Constitution.”

57. Thus, the funding system developed by the General Assembly in KERA is fundamental to the constitutionally mandated “efficient system of common schools throughout the State.”¹³⁵
58. Protecting the constitutionally mandated system of public school funding developed by the General Assembly furthers an important goal for every district. Namely, it gives districts the assurance of predictability that will allow them to plan for the most efficient use of the funding available.
59. Allowing non-resident districts to undermine the resident-student-based funding system without good reason to do so interferes with districts’ ability to plan for their future. Rather than being able to rely on the relatively more predictable residency-based school populations, resident districts can find their future plans thwarted by parents in their district who send their children elsewhere for no good reason.
60. It also is worthwhile to note that the version of KRS 157.350 enacted by the General Assembly when it first implemented the *Rose* Court’s directives did not contain the factors now found in KRS 157.350(4)(a)(4).
61. Instead, the General Assembly amended KRS 157.350 to require the final decision maker to “give preference to the best interest of the individual student” when districts appealed their inability to reach an agreement concerning non-resident students.¹³⁶
62. In the versions of KRS 157.350 enacted by the General Assembly that became effective July 15, 1996, and July 15, 1998, this same language requiring the final decision maker to “give preference to the best interest of the individual student” was repeated verbatim.

¹³⁵ Ky. Const. Sec. 183.

¹³⁶ The version of KRS 157.350(1) and (4), effective April 7, 1992, reads in pertinent part as follows:

- (1) Each district which meets the following requirements shall be eligible to share in the distribution of funds from the fund to support education excellence in Kentucky: . . . (4) Includes no nonresident pupils in its average daily attendance, except by written agreement with the district of the pupils' legal residence. If an agreement cannot be reached, either board may appeal to the chief state school officer for settlement of the agreement. The chief State school officers shall have thirty (30) days to establish the terms of agreement. Either board may appeal the chief state school officer's decision to the State Board for Elementary and Secondary Education. The State Board for Elementary and Secondary Education shall have sixty (60) days to approve or amend the agreement of the chief state school officer. In consideration of these appeals, the chief state school officer and the state board for Elementary and Secondary Education shall give preference to the best interest of the individual student.

63. Then, in the version of KRS 157.350 enacted by the General Assembly that became effective June 20, 2005, no factor for the final decision maker to consider was listed in the statute.¹³⁷
64. It was not until the General Assembly enacted the version of KRS 157.350 that became effective June 26, 2007, that language identical in every respect to the current version of the statute was included.
65. This legislative history illustrates a shift in the analysis required of the KBOE for appeals pursuant to KRS 157.350 to require consideration of the factors 'affecting the districts,' instead of individual student interest factors.
Identifying “Good Reason” To Alter the Residency Funding Requirement
66. It is important that the Kentucky Board of Education state legally cognizable “good reasons” for deviating from the General Assembly’s residency-based funding system.
67. Because the law concerning school funding emphasizes the residency requirement in KRS 159.010(1)(a), appellant school districts should be required to show there is good reason to alter the fundamental funding principle of residency when considering the factors in KRS 157.350(4)(a)(4). In other words, good reason to alter the residency basis of funding cannot merely be a need for additional monies that would flow from claiming non-resident students.
68. Announcing legally cognizable “good reasons” for deviating from the current residency-based funding system will provide clear direction to Kentucky school districts and will avoid exposing the Kentucky Board of Education to *ad hoc* appeals.
69. Although there may be other ways to divine legally cognizable reasons for deviating from the state’s residency-based funding system, the [Board] concludes that the Supreme Court’s pronouncements in the *Rose* case provide insight into what the General Assembly intended would constitute legally

¹³⁷ The version of KRS 157.350(1) and (4)(a), effective June 20, 2005, reads in pertinent part as follows:

- (1) Each district which meets the following requirements shall be eligible to share in the distribution of funds from the fund to support education excellence in Kentucky: . . . (4) Includes no nonresident pupils in its average daily attendance, except as follows: (a) Pupils listed under a written agreement, which may be for multiple years, with the district of the pupils' legal residence. If an agreement cannot be reached, either board may appeal to the chief state school officer for settlement of the agreement. The chief State school officers shall have thirty (30) days to establish the terms of agreement. Either board may appeal the chief state school officer's decision to the Kentucky Board of Education. The Kentucky Board of Education shall have sixty (60) days to approve or amend the agreement of the chief state school officer.

cognizable “good reasons” under the language of the current version of the statute.

70. The *Rose* Court stated:

The essential, and minimal, characteristics of an “efficient” system of common schools, may be summarized as follows:

- 1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
- 2) Common schools shall be free to all.
- 3) Common schools shall be available to all Kentucky children.
- 4) Common schools shall be substantially uniform throughout the state.
- 5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
- 6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
- 7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
- 8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
- 9) An adequate education is one which has as its goal the development of the seven capacities recited previously.¹³⁸

71. Thus, school districts can use the *Rose* Court's pronouncements that led to the General Assembly's passage of KERA, which includes the residency-based funding system at issue in this case, as guidance for factors affecting school districts as set forth in KRS 157.350(4)(a)(4).

72. Thus, school districts can use the *Rose* Court's pronouncements that led to the General Assembly's passage of KERA, which include the residency-based funding system at issue in this case, to argue legally cognizable “good reasons” for deviating from that funding system.

...

78. To be clear, it is not enough for a school district looking to nullify the residency funding eligibility requirement of KRS 157.350 to simply state that it educates its students better than the district of residency.

79. Similarly, it is insufficient for a non-resident school district to argue that an individual student would prefer to attend its schools. That is, “good reason” should also require that the appellant district show that the individual

¹³⁸ *Rose* at 212–13.

student's constitutionally mandated "right to an adequate education" would be abrogated if the student did not receive the benefit of the appellant school district's programs, facilities, transportation, or staffing.

19. Pineville Independent offered no argument about the evidence that would indicate Bell County was not providing its students with an "adequate education" or an "efficient school system" as required by the Kentucky Constitution.¹³⁹

20. School districts can use the *Rose* Court's pronouncements that led to the General Assembly's passage of KERA, which includes the residency-based funding system at issue in this case, to argue "good reasons" for deviating from KERA's funding system.

21. The clearest statement of "good reasons" for altering the current residency-based funding system is found in the sixth characteristic of an "efficient" system of common schools listed in the *Rose* case. Non-resident districts wishing to alter the residency funding requirement can argue a district of residency has been operated with waste, duplication, mismanagement, or political influence.¹⁴⁰ Thus, the KBOE can consider proof of waste, duplication, mismanagement, or political influence in school districts' programs, facilities, transportation, and staffing when deciding whether to alter the residency funding eligibility requirement central to KERA.

22. It is insufficient for a non-resident school district to argue that an individual student would prefer to attend its schools. In other words, "good reason" should require that the appellant district show that a student's constitutionally mandated "right to an adequate

¹³⁹ See *Rose* at 211 and Ky. Const. Sec. 183.

¹⁴⁰ *Rose* at 213 ("Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.")

education” would be abrogated if the student did not receive the benefit of the appellant school district’s programs, facilities, transportation, or staffing.

23. Furthermore, nothing in KRS Chapter 157, the *Rose* case, or the KBOE’s past decisions supports abandoning the residency requirements in KRS Chapters 157, 158, and 159 merely in order to keep a school district solvent.

Consideration of Other Factors

24. Based on the foregoing conclusions of law, considering the parties’ academic performance and the impact of the SEEK money at issue on the parties’ programs, school facilities, transportation, and staffing, Pineville Independent has not shown good reason for deviating from the residency-based funding rule in KRS 157.350.

25. Specifically, the Hearing Officer concludes Pineville Independent has not shown Bell County has been operated with waste, duplication, mismanagement, or political influence or that Bell County fails to provide its students with the education Kentucky’s Constitution mandates.

26. In this case, Bell County’s existence is not threatened by the Bell County students enrolled by Pineville Independent. But Bell County’s ability to continue providing programs, facilities, and staffing at current levels is jeopardized by the loss of the SEEK funds from the disputed students. And its transportation of its students is less cost-effective without those disputed funds, further reducing the money Bell County has available to educate the students. These are good reasons for not rewarding Pineville Independent for enrolling Bell County students without charging tuition and without an agreement with Bell County.

27. Significantly, if the KBOE grants Pineville Independent SEEK money from “any and all” Bell County students it enrolls, there would be no criteria to deny a similar request in the future by Pineville Independent or any other district in the Commonwealth, and no ability to prevent parents from sending their children to any school district that will have them.

28. As has happened in this case, if residency is not observed by one school district, another school district’s planning is made more difficult and its sustained effort at improvement is hampered. Enrollment becomes subject to politics. Students become the fodder of funding wars. Resources are wasted. In short, the most important role of school districts—to educate Kentucky’s children—is made more difficult.

29. This case should be seen for what it is. By enrolling Bell County students, Pineville Independent has allowed, perhaps even encouraged, parents to violate the residency law.

30. If the KBOE were to allow Pineville Independent to receive SEEK funding for “any and all” Bell County students it enrolls, the KBOE would encourage other independent districts in the Commonwealth to siphon off students from their neighboring county school districts.

31. Parents are required to send their children to a school “in the district in which the child resides.”¹⁴¹ The KBOE should not issue a final order that undermines the residency requirement for state funding in KRS 157.350(4).

32. If a non-resident student is enrolled without the resident district’s agreement, the non-resident district has the authority to charge the parents a tuition, which is to be paid by the

¹⁴¹ KRS 159.010(1)(a).

resident district “except in cases where the [resident district] board makes provision for the child's education within his district.”¹⁴² Thus, if the resident district can provide the child’s education, parents must pay tuition, if charged, to send the child to a non-resident district. By paying tuition, parents can exercise their right to choose where their children are educated.

33. The Hearing Officer recognizes it is likely that far fewer parents will send their children to a school that charges tuition. But this encourages parents’ compliance with the residency requirement in KRS 159.010(1)(a).

34. Obviously, if a student would benefit from attending a non-resident school, for instance if the resident district was incapable of providing the student with an adequate education, the resident district can sign an agreement allowing the non-resident district to receive SEEK funding for the student.¹⁴³

35. For all the foregoing reasons, the KBOE’s final order should not grant Pineville Independent SEEK funds for the Bell County students that it enrolled, unless the enrollment was permitted by a written agreement between the districts, as provided for in KRS 157.350(4)(a)(1).

36. The KBOE should extend SEEK funding to Pineville Independent for Bell County students who were enrolled pursuant to the 2013 written agreement with Bell County.

37. Such an order by the KBOE is complicated in this case by the fact that Bell County students in excess of the number allowed by the 2013 agreement were enrolled during the last two years of the four-year agreement. However, those additional enrollments were approved by the Bell County BOE. If Bell County disputes the legitimacy of its BOE’s actions, this is not the forum to resolve that matter. Because KRS 157.350(4)(a)(4) allows consideration

¹⁴² KRS 158.120(1).

¹⁴³ KRS 156.350(4)(a)(1).

of other factors than those listed, the Bell County BOE's approval of SEEK funding should be "grandfathered" for the same reason funding for students under a written agreement should be "grandfathered."

38. The proof did not make clear whether the Bell County BOE also agreed to Pineville Independent receiving SEEK funds for the Bell County students enrolled during the school year after the end of the 2013 agreement, that is, in the 2017-2018 SY. If the Bell County BOE did approve SEEK funding for those enrollments, it is merely a proof issue between the parties to identify those Bell County students. These students should be added to the list of the non-resident students for whom SEEK funding is approved until their withdrawal or graduation.

39. Unless there is a disqualifying circumstance, it is fair under KRS 157.350 for the KBOE to allow a school district to receive SEEK monies for students who are enrolled pursuant to an oral agreement until their withdrawal or graduation. This will prevent students' education and well-being from becoming secondary to funding disputes. If a district enters into an agreement to allow a student to attend another district's schools, the resident district should realize that the student's right to continuity in education, if possible, becomes a consideration in disputes under KRS 157.350.

40. The SEEK funding for Bell County students whom Pineville Independent first enrolled during the 2018-2019 SY, and subsequently, should not be accorded the same grandfathered status because there was no agreement with Bell County for these students' SEEK funding.

41. The KBOE should amend the Commissioner's decision to "grandfather" only those Bell County students enrolled by agreement with Bell County through the 2017-2018 SY.

42. Thus, the KBOE should not follow the Superintendent’s suggestion to extend the “grandfathering” through the 2018-2019 SY. If a case is not made with evidence under the listed factors, the KBOE should adhere to the only other exception allowed by the statute, the exception under KRS 157.350(4)(a)(1) for agreements between districts. The KBOE should consider this exception in this type of appeal because of the effect SEEK funding agreements have on students. But the KBOE should consider agreements between districts to be the only exception meriting SEEK funding if the non-resident district fails to make its case under the factors. Applying the law in this manner dissuades non-resident districts from attempting to undermine the residency-based attendance and funding system built into in Kentucky’s education laws.

43. Of course, the districts can always enter into a written agreement otherwise.

44. Finally, the Commissioner’s Decision should be amended to remove the “grandfathering” of siblings. There is no provision in the law allowing recognition of “grandfathered” students’ siblings if the siblings are not themselves “grandfathered,” that is, siblings who are not the subject of an agreement between the parties.

45. Another reason to amend the Commissioner’s Decision regarding siblings is that his decision extends the effect of the KBOE’s order potentially for decades and creates tracking complications. Definitional issues about half-siblings, step-siblings, adoptions, and guardianships are also raised by the Commissioner’s allowance. Bell County is entitled to an end to Pineville Independent enrolling its students in contravention of the law.

RECOMMENDED ORDER

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer RECOMMENDS that the Kentucky Board of Education enter a final order THAT ORDERS as follows:

1. Bell County Board of Education's claim that this administrative proceeding is not ripe for a decision because its 2018 proposed agreement was never presented to or rejected by the Pineville Independent Board of Education is dismissed.
2. Pineville Independent Board of Education's implicit claim that the residency requirement in KRS 157.350 is facially unconstitutional is dismissed.
3. In the absence of an agreement between the two school districts otherwise, the Pineville Independent School District may claim Support Education Excellence in Kentucky funds only for those Bell County School District resident students who were enrolled in the Pineville Independent School pursuant to an "any and all" agreement approved by the Bell County Board of Education for the 2016–2017 school year or the 2017-2018 school year, whichever is the later.
4. Pineville Independent School District may claim SEEK funds only for these Bell County School District resident students but it may claim those funds for these students until they graduate or withdraw from the Pineville Independent School.
5. Any other directions for implementation the Board may find appropriate.

NOTICE TO PARTIES OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4): “A copy of the hearing officer’s recommended order shall be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.”

Pursuant to Kentucky case law (*see Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004) and subsequent cases), when a party fails to file exceptions, that party’s appeal under KRS 13B.140 is limited to those findings and conclusions in the agency head’s final order that differ from those in the hearing officer’s recommended order.

Pursuant to KRS 13B.120(2): “The agency head may accept this recommended order of the hearing officer and adopt it as the agency's final order, or it may reject or modify, in whole or in part, the recommended order, or it may remand the matter, in whole or in part, to the hearing officer for further proceedings as appropriate.”

Pursuant to KRS 13B.120(4)(b): “The agency head shall render a final order in an administrative hearing within ninety (90) days after the hearing officer submits a recommended order to the agency head, unless the matter is remanded to the hearing officer for further proceedings.”

Pursuant to KRS 13B.140: “All final orders of an agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency’s enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.”

Pursuant to KRS 23A.010(4), “Such review [by the Circuit Court] shall not constitute an appeal but an original action.” Some courts have interpreted this language to mean that summons must be served when filing an appeal petition from an administrative action in the Circuit Court.

DONE this 24TH day of August, 2020.



MICHAEL HEAD
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CERTIFICATE OF SERVICE

I hereby certify that the original copy of this ORDER was served for filing this 24TH day of August, 2020, by email to:

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