

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

BOARD OF EDUCATION FOR THE
PINEVILLE INDEPENDENT SCHOOL DISTRICT

APPELLANT

V. **EXCEPTIONS BY BELL COUNTY BOARD OF EDUCATION**

BOARD OF EDUCATION FOR THE
BELL COUNTY SCHOOL DISTRICT

APPELLEE

* * * *

Comes the Board of Education of Bell County, Kentucky and states:

- "...the Pineville Board Chair admitted he and others in the district set out in 2015 to undermine the parties' 2013 agreement." (Page 16 of Order).
- Pineville's long time Board Chair: "....when we got rolling into the second year, it was going to impact us, we made a decision that we had to make a public fight out of it and we did." He said that he and others in the Pineville district "decided to mount a resistance campaign...to try to change the outcome...," and that "...minds were changed. Board members were replaced (by Pineville efforts in Bell County) and things became different in a couple years." (7/9/19, TH 144-145).
- Of Pineville's 548 students enrolled in 2019, 35.9% (197) were Pineville residents, but 48.9% (268) were Bell resident students, and in every grade level from Kindergarten to 12th grade. Bell students were the only Pineville students enrolled in the Pineville schools without a non-resident student agreement between the districts. (Page 8-9 of Order).

- The Hearing Officer found much evidence “...of Bell County’s longstanding attempt to end Pineville Independent’s practice of siphoning off its students.” (Page 20 of Order).
- The result of the SEEK funding formula, based on funding level in the school year 2018-2019, over four years, the Hearing Officer found between \$2.94 million to \$2.95 million dollars in SEEK revenue was in dispute in this case. (Page 20 of Order).
- The KDE data shows Bell County outperformed Pineville Independent academically. (Page 23 of Order).
- In 2016 (the last year that KDE ranked schools in Kentucky), Bell County was ranked 44th out of 173 districts and Pineville was ranked 168th. (Page 25 of Order).
- 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. Pineville Independent does not offer its students no-cost, dual-credit classes. (Page 27 of Order).
- In 2016, Bell County had 40 students enrolled in 16 dual credit courses. In the 2018-2019 SY, Bell County had approximately 130 students who earned dual credit.
- 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.

- Bell County also provides career path courses and programs in business, marketing, agriculture, automotive maintenance and bodywork, computer networks, nursing, and construction.
- Pineville Independent did not offer proof that it provides similar courses for its students. (Page 28 of Order).
- Between 2012 and 2013 school year and 2018-2019 school year, Bell actually lost 57 certified personnel and 40 classified personnel. (Page 31 of Order).
- “Pineville Independent essentially wants the KBOE to ignore existing law.” (Page 21 of Order).
- The Hearing Officer recognized that if residency was not observed by Pineville, it negated Bell’s planning and improvement and more specifically “Enrollment becomes subject to politics. Students become the fodder of funding wars. Resources are wasted.” (Page 45 of Order).
- “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 residence law.” (Page 45 of Order).
- This Board “....final order should not should not grant Pineville Independent SEEK funds for the Bell County student it enrolled....” (Page 46 of Order).

The Hearing Officer’s Decision in this case comes from several days of testimony from witnesses from each of the school districts. This matter has a tortured past for several reasons. Undersigned counsel has been involved in more of these nonresidential student contract disputes, but never have I seen or heard of the procedural moves of this case, primarily because of the actions of former Commissioner Lewis.

Bell County has preserved all of the arguments previously made at various stages of this process and continues to do so. The Hearing Officer and Office of the Kentucky Attorney General have stated that, “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.”

At the very beginning of this appeal process, Pineville filed an appeal with Commissioner Lewis in keeping with KRS 157.350. In keeping with past procedure by the Kentucky Department of Education, a Hearing Officer was appointed pursuant to KRS 13B and notice was mailed to Counsel for both districts. Commissioner Lewis decided to follow a different and wrong path. No hearing was allowed, Commissioner Lewis ripped the decision-making process from the Hearing Officer (at that time) and instead requested a “written position paper” within 14 days from each school district. From that convoluted and illegal process denying Bell County any due process under KRS 13B, Commissioner Lewis made his decision. After he made his decision, exceptions were filed by both school districts and the case was then properly placed back on its legal track and the Hearing Officer heard testimony and saw exhibits in a hearing allowing due process. We also raised issues of Pineville’s violations of the Open Meetings laws (which the Hearing Officer in this case refused to consider), that Pineville did not present or vote to reject Bell’s proposed “Agreement,” and other failures by former Commissioner Lewis in following Kentucky law. The minutes of the Pineville Board meetings do not reflect that the proposed agreement of Bell County was ever presented by the Board Chair or Superintendent to the Pineville Board, so it was never officially rejected or voted upon by Pineville. The Bell County Schools preserved all of these legal positions in “Exceptions” that were filed by Bell on May 2, 2019 and wishes to preserve those in

this appeal as well and therefore files these exceptions from May 2, 2019, as if they were copied at length herein.

Pineville and Bell did not reach an agreement on nonresident Bell students, attending Pineville Independent Schools.

- As a result, on February 6, 2019, Pineville Independent appealed to Commissioner Lewis.
- On April 17, Commissioner Lewis issued his Opinion.
- On May 13, 2019, Pineville Independent filed a Notice of Appeal to this Board and this Board properly conferred powers to the Hearing Officer from the Attorney General's Office.
- An Evidentiary Hearing was conducted from July 8 - July 11, 2019.
- Pineville Independent filed a Post Hearing Brief and Reply and Bell filed a Post Hearing Brief and Response.
- The case was submitted to the Hearing Officer on June 8, 2020.
- The Hearing Officer made his Decision on August 24, 2020.

Michael Head, the Hearing Officer assigned to this case has presented this Board with an outstanding summary of both the evidence presented to him and has made a remarkable and logical statement of both the Kentucky Education Reform Act (KERA), the case law in this Commonwealth and the historical interplay behind the reason for the law requiring a “written agreement” between school districts for the state funding that is derived through SEEK based on the Average Daily Attendance (ADA) of students. The Hearing Officer was able to view the demeanor and sincerity of witnesses as they offered testimony to him; if either attorney left an evidentiary stone unturned, the Hearing Officer asked questions of witnesses.

The Hearing Officer has made extensive Findings of Fact in his Decision. The general findings of fact are contained on page 6 and 7 of his Findings of Fact, Conclusions of Law, and Recommended Order (“Order”).

In *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, the Kentucky Supreme Court found that there was unequal funding among school districts in Kentucky and directed the Kentucky General Assembly to address and provide equity among the public schools in Kentucky, based on the Kentucky Constitution:

“General Assembly to provide for school system—The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”
Ky. Const. Sec. 183.

In the *Rose* decision, the Court quoted from the

“....comments of Delegate Beckner on the report which led to the selection of the language in Section 183 reflect the framers' cognizance of the importance of education and, emphasized that the educational system in Kentucky must be improved. Referring to the education of our children, he admonished the delegates, “do not let us make a mistake in dealing with the most vital question that can come before us.” III Debates Constitutional Convention 1890 4459.”

The Court also quoted from Delegate Beckner who,

“...set out four permanent justifications for and characteristics of state provided schools:

- 1) The education of young people is essential to the prosperity of a free people.
- 2) The education should be universal and should embrace all children.
- 3) Public education should be supervised by the State, to assure that students develop patriotism and understand our government.
- 4) Education should be given to all—rich and poor—so that our people will be homogeneous in their feelings and desires.” *Rose*, pg. 205-206.

Delegate Moore, at the same Convention said:

“Common schools make patriots and men who are willing to stand upon a common land. The boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, but all stand upon one level.”

In its decision, the Kentucky Supreme Court said:

“The system of common schools must be adequately funded to achieve its goals. The system of common schools must be substantially uniform throughout the state. Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education. This obligation cannot be shifted to local counties and local school districts.” (Pg 211).

Even though KRS 157.350(4)(a)(4) has existed since July 1, 1976, with nine (9) different amendments to date, the requirement that no school district is eligible to receive state funding for nonresident students attending its school “...except by written agreement with the district of the pupils’ legal residence.” There was no written agreement for such between Bell County and Pineville Independent.

In *Thomas v. Spragens*, 308 Ky. 97,98; 213 SW2d 452, 453 (1948), the Court said, “Under our statutes, counties are the principal school district units.” KRS 159.010(1)(a) requires that a child attend “the public school of the district in which the child resides”.

The lack of an agreement did not stop Pineville from soliciting and enrolling Bell County students during and after this Hearing was conducted. It was as if Pineville’s day of reckoning would never come. That day for the transgressions by Pineville for intentionally violating Kentucky law and making a mockery of the Hearing is now here. And if the Kentucky funding laws mean anything, this Board must uphold the Hearing Officer’s recommended Order. The Hearing Officer found that “Pineville Independent’s strategy since at least 2015 has been to enroll Bell County students without Bell County’s agreement.” (Page 14 of Order). It is likely that

Pineville has used student enrollment numbers of Bell County students during this time to receive state funding for those students.

While Pineville pleaded strongly to the Hearing Officer that this Board to “...allow it to admit, if not invite, whomever it wishes from Bell County to keep the Pineville Independent school open. Pineville Independent’s strategy has been to created ‘facts on the ground,’ so to speak, by continuing to enroll 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.” There is no legal reason to reward Pineville SEEK money for its illegal enrollment of Bell students.

Disturbing facts emerged from this hearing; among those were that “...the Pineville Board Chair admitted he and others in the district set out in 2015 to undermine the parties’ 2013 agreement.” (Page 16 of Order). The shenanigans of the Pineville Board over the preceding years were without any embarrassment and on full display in the testimony of Pineville’s long time Board Chair: “....when we got rolling into the second year, it was going to impact us, we made a decision that we had to make a public fight out of it and we did.” He said that he and others in the Pineville district “decided to mount a resistance campaign...to try to change the outcome...,” and that “...minds were changed. Board members were replaced (by Pineville efforts in Bell County) and things became different in a couple years.” (7/9/19, TH 144-145). The Bell County Superintendent corroborated this testimony and further that those newly elected Bell County Board members did not make known their loyalty to Pineville known until after the election, so during the 2015-16 school year through the 2018-19 school year, so by the fall of 2018, Pineville had increased its Bell County student population to 268 students. (Page 19 Order). The Hearing Officer found that these actions perpetrated by Pineville on the Bell County Board in the past the Bell

Board had entered into nonresident student agreements with Pineville and that “Pineville Independent has continued to recruit enough Bell County students to continue to survive, even to grow.” (Page 12 of Order).

It is the hope of the Bell County Board, for the sake of the students of Bell County, that this Board will not allow Pineville’s behavior to benefit the Pineville schools to the already significant damage of the Bell County Schools. The Bell Schools have struggled to find grant money from any source to supplant the loss of Bell students’ funding to Pineville, Pineville has done nothing but recruit Bell students. Pineville should survive on its own two financial feet and not be supported by Bell. If this is allowed to continue, it will be the financial ruin of the Bell County schools. That process has already begun.

This Board should launch an investigation of the Pineville Board’s actions in interfering in the election of Bell County School Board members, especially after the Pineville Board’s Chair shameless brag of having done so in the past. It is the fear of many in Bell County that Pineville is once again interfering with the Bell County Board elections.

The only solution that is practical is a long-term decision by this Board that cannot be changed by election interference described by the Pineville Board Chair. The future of the students of Bell County are in the hands of this Board.

One of the most significant findings by the Hearing Officer is that over the past seven (7) school years, Bell’s student population has decreased and Pineville’s has increased and that the increase is attributed to Pineville enrolling Bell students without Bell agreeing that Pineville could receive SEEK funds for those students. The Hearing Officer also found that Bell has lost and “stands to lose even more staff, programs, support services for students, even two (2) elementary-middle schools without SEEK money.” Bell’s bonding capacity, state transportation funds and

even grant monies have decreased or will decrease even more because all are tied to the average daily attendance which is a part of the SEEK formula outlined in the Kentucky statutes. (Page 12 of Order). While very detailed findings of the two school district's academic performance but, the Hearing Officer stated "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." While Pineville argued that the appeal was based on its need for money to survive, the Hearing Officer found that that claim was unproven. While Pineville does not charge tuition of Bell students, the Hearing Officer found that "Pineville Independent's strategy since at least 2015 has been to enroll Bell County students without Bell County's agreement." (Page 14 of Order).

The Hearing Officer reviewed all of the data and testimony both sides provided that was for years prior and leading up to the date of the hearing, all of this reflected a declining student enrollment from 2012-2013 school year to the hearing date in the Bell Schools and an increasing student enrollment in the Pineville Schools, culminating in the majority of Pineville students being Bell resident students.

Of Pineville's 548 students enrolled in 2019, 35.9% (197) were Pineville residents, but 48.9% (268) were Bell resident students, and in every grade level from Kindergarten to 12th grade. Bell students were the only Pineville students enrolled in the Pineville schools without a non-resident student agreement between the districts. (Page 8-9 of Order). However, in 2019, only 2.2% (59) of Bell's students were Pineville resident students. A higher percentage and number of Bell's nonresident students were from either Whitley County or Harlan County, but all attended Bell under nonresident student agreements with each of those school districts. (Page 10 of Order).

The Hearing Officer noted that while Pineville offered much evidence, it was not relevant to any legal claim and Pineville offered no explanation as to why KERA's residency-based funding in the Kentucky statutes and regulations should be abandoned. While the Hearing Officer addressed Pineville's conspiracy theory or "unspoken desire" that Bell wanted Pineville to close, the Hearing Officer found there was no evidence of such a "secret plan" or "secret strategy" and that there was no evidence of such, just "pure speculation" by Pineville (Page 15 of Order).

On the other hand, the Hearing Officer found that Bell "...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." (Page 16 of Order).

Pineville and Bell have, in the past, entered into nonresident student agreements. These agreements have changed over the years, but the Hearing Officer found much evidence "...of Bell County's longstanding attempt to end Pineville Independent's practice of siphoning off its students." (Page 20 of Order). Pineville attempted in the Hearing to shift the burden of proof to Bell County to have Bell prove why it refused to sign "any and all agreements with Pineville". The Hearing Officer refused to take this bait and clearly and concisely stated that the burden of proof was governed by KRS 13B.090(7). (Page 33 of Order). The Hearing Officer stated "...Pineville has not met its burden, and the Kentucky Board of Education should deny Pineville Independent's appeal subject to conditions based on other considerations." (Page 33 of Order).

The result of the SEEK funding formula, based on funding level in the school year 2018-2019, over four years, the Hearing Officer found between \$2.94 million to \$2.95 million dollars in SEEK revenue was in dispute in this case. (Page 20 of Order).

The importance of the demeanor of witnesses is apparent in reading parts of the Hearing Officer's recommendation: "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 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.” (Page 21-22 of Order).

Perhaps the most important findings by the Hearing Officer were

- The KDE data shows Bell County outperformed Pineville Independent academically. (Page 23 of Order).
 - In 2016 (the last year that KDE ranked schools in Kentucky), Bell County was ranked 44th out of 173 districts and Pineville was ranked 168th. (Page 25 of Order).
 - 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. Pineville Independent does not offer its students no-cost, dual-credit classes. (Page 27 of Order).
 - In 2016, Bell County had 40 students enrolled in 16 dual credit courses. In the 2018-2019 SY, Bell County had approximately 130 students who earned dual credit.
 - 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.
 - Bell County also provides career path courses and programs in business, marketing, agriculture, automotive maintenance and bodywork, computer networks, nursing, and construction.
 - Pineville Independent did not offer proof that it provides similar courses for its students.
- (Page 28 of Order).

The Hearing Officer also made findings regarding all of the relevant factors outlined in KRS 157.350(4)(a)(2), finding Bell can easily meet the return of Pineville students. The loss of the Bell students greatly contributed to Bell’s expenses and would have little effect on Pineville; to wit: Bell’s SEEK funds transportation component in 2018-19 school year was \$1,036,426 compared to Pineville’s \$180,338 for the same time period (Page 30 of Order). Adding the resident

Bell students (280) back into the Bell schools would require the purchase of only one (1) additional bus, the benefit to Bell being much greater than to Pineville. (Page 30-31 of Order).

The effect on staffing in Bell had already caused a devastating effect on Bell. The Hearing Officer stated and found that while Pineville presented an existential argument that to return students to Bell, the loss would cause Pineville schools to close, Bell's evidence was real—not existential—between 2012 and 2013 school year and 2018-2019 school year, Bell actually lost 57 certified personnel and 40 classified personnel. (Page 31 of Order). Its devastating effect in the Bell Schools is real, not imagined. The decision of this Board will have a far reaching and permanent effect on the future of the Bell County Schools. Pineville has continued to flaunt Kentucky law, enroll nonresident Bell students when it knew it should not and even interfere in Bell School Board elections to elect Pineville sympathetic county board members. Bell Schools and the future of Bell County students is at stake.

This case is not an anomaly; this Board recently issued a Final Order in another appeal in *Raceland v. Greenup County* (Administrative Action No. 19-BOE-0081) and the Hearing Officer in this case followed that precedent.

In this case, as in the Raceland case, the Commissioner had made the same recommendation that siblings of nonresident students also be allowed to attend the nonresident district. (Page 35 of Order.)

As in the Raceland case, the Hearing Officer in this case found that “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.” (Page 36 of Order).

KRS 159.010 and KRS 157.350 are conjoined to produce the result of equality in education provided by funding of the *Rose* case. KRS 159.010 requires a parent or guardian having custody

of a child send that child to the public school “of the district in which the child resides”. KRS 157.350 is the funding eligibility statute based on student residency. Any deviation from a student attending the school district in which he resides is an exception and must be agreed upon by the two (2) school districts.

Pineville has included Bell resident students in their ADA figures for some time without a written agreement with Bell to do so. Bell County has lost this funding. Pineville continues, even to this day to recruit and enroll Pineville students. Pineville should not be allowed to benefit from this wrong. The current version of KRS 157.350 (effective 7/15/14) specifically states that a school district such as Pineville cannot include nonresident pupils in its ADA “except by written agreement with the district of the pupil’s legal residence.”

The Hearing Officer further found that Pineville offered no evidence or argument that Bell was not providing its students with an adequate education as required by the Kentucky Constitution. (Page 43 of Order). The Hearing Officer specifically found “Pineville Independent essentially wants the KBOE to ignore existing law.” (Page 21 of Order). The factors that the Hearing Officer considered were those outlined KRS 157.350(4)(a)(4) of “academic performance and the impact on programs, school facilities, transportation, and staffing of the districts.” (Page 34 of Order).

Pineville seeks to overturn the intent of *Rose* as well as the statutory enactments of KERA for funding public education. The Hearing Officer specifically found that “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.” (Page 40 of Order).

The Hearing Officer stated that, “It is insufficient for a non-resident school district to argue that an individual student would prefer to attend its schools.” (Page 43 of Order).

The Hearing Officer concluded that, “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.” (Page 44 of Order). Further the Hearing Officer found that, “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.” (Page 44 of Order).

The Hearing Officer recognized that if residency was not observed by Pineville, it negated Bell’s planning and improvement and more specifically “Enrollment becomes subject to politics. Students become the fodder of funding wars. Resources are wasted.” (Page 45 of Order).

Pineville’s rallying cry at the beginning of this case was “school choice” and urged the Hearing Officer to find KRS 157.350 and other Kentucky statutes unconstitutional. Riding the wave of “school choice” promoted by Kentucky’s previous Governor Bevin, Commissioner Lewis and the previous State Board was thought by Pineville as a winning slogan. Even though recognizing he did not have the legal authority to do so, the Hearing Officer recognized that if this Board allows Pineville to benefit from its enrollment of Bell students without an agreement with Bell by grandfathering those students, other school districts could do the same and effectively abrogate the funding mechanism of KERA.

The Hearing Officer said that “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 residence law.” (Page 45 of Order). We urge this Board to investigate and interview parents of those Bell students to determine if Pineville Independent has been the motivating reason or force behind parents are violating the residency school attendance laws.

The Hearing Officer said that if this Board allowed Pineville to benefit from receiving the funding for these Bell students, it would “...encourage other independent districts in the Commonwealth to siphon off students from their neighboring county school districts” and that this Board should not “undermine the residency requirement (KRS 159.010(1)(a)) for state funding in KRS 157.350” (Page 45 of Order) and that this Board “....final order should not should not grant Pineville Independent SEEK funds for the Bell County student it enrolled....” (Page 46 of Order).

With the mandate of KRS 159.010(1)(a) that parents are required to send their children to a school in the district in which the child resides, the Hearing Officer has recommended that the KBOE not issue an Order that “undermines the residency requirement for state funding in KRS 157.350(4)” (Page 45 of Order).

To add insult to the legitimacy of the hearing process, during the time between the evidence was taken in this case, even during the COVID crisis, Pineville has thumbed its nose at the Hearing Officer recommendations and this Board’s authority and continued to enroll Bell County students. At this time, according to the affidavit of Bell County’s Director of Pupil Personnel (DPP), Christopher Warren, Pineville has continued to enroll Bell students and the number of Bell resident students that have transferred to Pineville since the 2018-2019 school year is 120 students. (See Affidavit of Christopher Warren attached hereto as Exhibit 1).

We encourage this Board to incorporate all of the Findings of Fact and to follow, in its entirety, the Recommended Order of the Hearing Officer in this matter, including a binding Order

for the future of both school districts to avoid the transgressions of the past and prevent this behavior by Pineville in the future.

Respectfully submitted,

/s/ Larry G. Bryson _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by e-mailing to the following:

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This the 8th day of September, 2020.

/s/ Larry G. Bryson
LARRY G. BRYSON

