

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
NATION BUILDING
TECHNICAL ACADEMY,

Appellant,

v.

OHIO DEPARTMENT OF
EDUCATION,

Appellee.

Case No. _____

09-0003

On appeal from the
Franklin County Court of Appeals
Tenth Appellate District

APPELLANT NATION BUILDING TECHNICAL ACADEMY'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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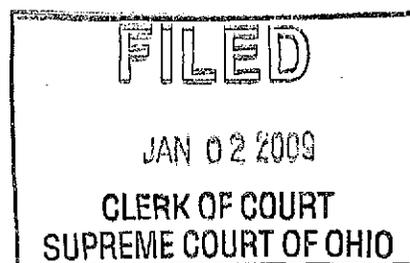


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**I. EXPLANATION OF WHY THIS CASE IS A CASE INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND A QUESTION OF
PUBLIC OR GREAT GENERAL INTEREST**

This case presents a question of public and great general interest worthy of this Court's jurisdiction for three reasons:

First, in holding that R.C. 3314.07 requires the request for an informal hearing as precondition to a formal appeal to ODE, the appeals court added a statutory requirement where none existed. Indeed, as the appeals court's own Magistrate found, R.C. 3314.07 does not include "any language imposing upon the school an obligation to request the informal hearing as a prerequisite to an appeal to [Ohio Department of Education]." Indeed, to the extent R.C. 3314.07 addresses an appeal to ODE, it does so without qualification or precondition. In sum, the appeals court penalized Appellant Nation Building Technical Academy ("NBTA") for failing to meet what the "statute requires" notwithstanding that the so-called requirement appears nowhere in the statute.

Second, to the extent R.C. 3314.07 can be considered ambiguous, the appeals court ignored the applicable statutory rules of construction by resolving that ambiguity against NBTA's right to appeal to ODE. R.C. 1.11, 1.42 and 1.49 – all mandated that the appeals court find in favor of the right to appeal. Instead of adhering to these rules, the appeals court relied upon its presumption about what the General Assembly *should have said* rather than what it actually *did say*. As such, it converted a community school's request for a hearing from its sponsor from the permissive and "informal" action that the General Assembly provided that a school "may" take into a mandatory precondition to a schools' right to appeal to ODE. In other words, the appeals court engaged in a wholesale rewriting of 3314.07.

Third, the impact of this decision is not limited to NBTA or even to the approximately 300 Ohio charter schools and 87,000 students which they educate. This decision threatens a broad assault on fundamental principles governing the construction of all Ohio statutes. The appeals court's imposition of a "statutory precondition" through pure judicial fiat sets a disturbing precedent. Without this Court's intervention, a court may now disregard the language of a statute and the rules of statutory construction and instead, alter a statute by adding or deleting language at whim. Even more troubling, a court may now, as the appeals court did here, penalize a party for failing to meet a statutory requirement that does not exist in the statute.

For these reasons, NBTA respectfully requests this Court grant jurisdiction.

II. STATEMENT OF THE FACTS AND CASE

A. STATEMENT OF THE FACTS

Nation Building Technical Academy ("NBTA") is a non-profit Ohio corporation that was licensed to operate as a community school under R.C. Chapter 3314. During the 2004-2005 academic year, NBTA enrolled approximately 220 inner-city Cincinnati youth and provided them with general education and vocational training in the fields of automotive management, cosmetology and healthcare.

In compliance with R.C. 3314.02, NBTA entered into a sponsorship agreement with Lucas County Educational Service Center ("LCESC") in March 2004. At that time, LCESC was one of Ohio's largest community school sponsors with over 100 schools.

In March 2005, the General Assembly amended R.C. 3314.015 to require community school sponsors, including LCESC, to decrease the number of community schools it sponsored to 75 by June 2006. That same month, LCESC notified NBTA that it intended to suspend the school's operations for the 2005-2006 school year, citing

several concerns. In May 2005, LCECSC officially suspended NBTA until it could remedy the concerns. By November 2005, NBTA remedied LCECSC's concerns and asked LCECSC to lift the suspension.

Instead, LCECSC notified NBTA on December 2, 2005 that it was terminating its sponsorship agreement for "good cause." The effect of LCECSC's "good cause" designation was not only to end NBTA's relationship with LCECSC, but to prevent it from contracting with any other sponsor in the future under R.C. 3314.07(B)(6). In other words, LCECSC's decision, if left to stand, prevented NBTA from ever operating again.

In reliance upon R.C. 3314.07(B)(4), NBTA timely appealed LCECSC's termination decision to ODE by letter dated December 12, 2005. On December 27, 2005, ODE responded to NBTA's request by identifying several concerns regarding the adequacy of LCECSC's notice of termination. However, ODE did not consider the merits of NBTA's appeal. In fact, ODE did not communicate with NBTA whatsoever between December 2005 and May 2006. On May 8, 2006, NBTA again wrote ODE and requested that it consider the merits of its appeal. On August 24, 2006, ODE finally responded, stating that it would not hear NBTA's appeal because NBTA had failed to request an informal hearing from LCECSC in December 2005. On November 20, 2006, NBTA, through legal counsel, asked ODE to reconsider its position. On January 10, 2007, ODE rejected NBTA's request.

B. STATEMENT OF THE CASE

On February 26, 2008, NBTA initiated this mandamus action in the Tenth District Court of Appeals requesting a writ compelling ODE to consider the merits of its appeal of LCECSC's termination decision as required by R.C. 3314.07(B)(4).

The Tenth District referred the appeal to its Magistrate, who **granted** the writ in a decision dated January 28, 2008. The Magistrate found that “[a]bsent [from 3314.07] is any language imposing upon the school an obligation to request the informal hearing as a prerequisite to an appeal to ODE.” *State ex rel. Nation Building Technical Academy v. Ohio Department of Education*, 10th Dist. Case No. 07AP-169, 2008-Ohio-5967 at ¶45.¹ The Magistrate further found that to the extent R.C. 3314.07 was ambiguous, R.C. 1.49 required resolution in favor of NBTA’s right to appeal. *Id.* at ¶¶47-48.

ODE objected to the Magistrate’s decision. On November 22, 2008, the appeals court reversed the Magistrate’s decision, holding that,

Presumably, had the drafters of R.C. 3314.07 intended to allow an appeal without a request for an informal hearing, the statute could have included language to the effect that the school may, with 14 days of receiving the notice, request an informal hearing before the sponsor *or appeal directly to the state school board*. While the provisions of R.C. 3314.07 may not be a model of clarity, in construing the language of R.C. 3314.07(B)(3),(4) and (5) as a whole, we agree with [ODE] that the statute requires a community school to first request an informal hearing and receive a written decision from the sponsor before appealing to the state board of education.” *Id.* at ¶17 (emphasis in original).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: R.C. 3314.07 does not require a community school request an informal hearing from its sponsor as a prerequisite to appealing to ODE.

It is well-established that statutory interpretation is proper only when a statute is ambiguous. *Cline v. Bureau of Motor Vehicles* (1991), 61 Ohio St.3d 93, 96, 573 N.E.2d 77. A court should not resort to the rules of statutory construction where no ambiguity exists, as “[a]n unambiguous statute is to be applied not interpreted.” *Sears v. Weimer* (1944), 143 Ohio St.312, 55 N.E.2d 413, paragraph five of the syllabus; *see also State v.*

¹ The Magistrate’s Decision is incorporated into the appellate court’s decision as Appendix A and appears in paragraphs 19 through 45.

Hairston, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471 at ¶13. A statute is not ambiguous simply because it does not answer all questions or address every possibility. *Tomisak v. Tomisak*, 111 Ohio St.3d 481, 2008-Ohio-6109, 857 N.E.2d 127 at ¶16. “It is not for [a] court to question what the statute accomplishes; its language works to inform those that it affects exactly how it affects them.” *Id.* Unambiguous statutes are to be applied according to the plain meaning of the words used; courts are not free to delete or insert other words. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 220, 631 N.E.2d 150.

As the Magistrate aptly observed, “[a]bsent [from 3314.07] is any language imposing upon the school an obligation to request the informal hearing as a prerequisite to an appeal to ODE.” *Id.* at ¶45 (emphasis added). In fact, the *only* provision of R.C. 3114.07 which addresses a school’s right to appeal to ODE is set forth in R.C. 3314.07(B)(4) which, without qualification, states that “[a] decision by the sponsor to terminate a contract may be appealed to the state board of education.”

To accept that a school must request an informal hearing as a statutory precondition to appealing to ODE, this Court must read into R.C. 3314.07 “language that does not exist” – something this Court has consistently refused to do. *See Hairston* at ¶22; citing *Middleburg Hts. v. Ohio Bd. of Bldg. Standards* (1992), 65 Ohio St.3d 510, 514, 605 N.E.2d 66. The appeals court decision was based upon its speculation of what the General Assembly “[p]resumably” *would have said* had it “intended to allow an appeal without a request for an informal hearing.” *Id.* at ¶17 (“the statute could have included language to the effect that the school may, within 14 days of receiving the notice, request an informal hearing before the sponsor *or appeal directly to the state school board*”)(emphasis in original). In so speculating, the appeals court ignored what

the General Assembly *actually did say*, namely that the decision “may be appealed to the state board of education” without qualification or precondition. R.C. 3314.07(B)(4).

Because R.C. 3314.07 contains **no** language – ambiguous or otherwise – that conditions a community school’s right to appeal to ODE upon first requesting an informal hearing from its sponsor, this Court should grant jurisdiction and apply R.C. 3314.07(B)(4) as the General Assembly wrote it.

PROPOSITION OF LAW NO. 2: THE RULES OF STATUTORY CONSTRUCTION REQUIRE THAT AMBIGUITY REGARDING THE EXISTENCE OF A PRECONDITION TO A COMMUNITY SCHOOL’S RIGHT TO APPEAL TO ODE UNDER R.C. 3314.07(B)(4) BE RESOLVED IN FAVOR OF PERMITTING THE APPEAL.

- 1. To the extent R.C. 3314.07 is ambiguous, the rules of statutory construction required the appeals court to resolve such in favor of a community school’s right to appeal.**

Assuming *arguendo* that the statute which does **not** include any language whatsoever imposing a precondition to appeal can be deemed “ambiguous,” the appeals court erred by failing to resolve such ambiguity consistent with statutory rules of construction. *See UBS Financial Services, Inc. v. Levin*, 119 Ohio St.3d 286, 2008-Ohio-3821, 893 N.E.2d 811 at ¶34 (“To construe the ambiguous term, we must ascertain the rule of construction that we should apply.”) R.C. 1.11, R.C. 1.42 and R.C. 1.49 all required the appeals court to resolve any perceived ambiguity in favor of a school’s right to appeal to ODE.

a. R.C. 1.11

R.C. 1.11 provides that “[r]emedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.” Statutory appeal procedures are remedial in nature and “should be given a liberal interpretation **in favor of appeal.**” *Waltco Truck Equipment Co. v. City of*

Tallmadge Bd. of Zoning Appeals (1998), 40 Ohio St.3d 41, 42, 531 N.E.2d 685; citing *Van Meter v. Segal-Shadel Co.* (1966), 5 Ohio St.2d 185, 214 N.E.2d 664, paragraph one of syllabus (emphasis added).

In the absence of any language requiring a school to request an informal hearing as a prerequisite to an appeal to ODE, R.C. 1.11 mandates that the appeals court read R.C. 3314.07 in a manner that upholds a community school's right appeal to ODE. Here, the so-called statutory requirement does not appear in the statute anywhere. Instead, the appeals court extrapolated such by "construing the language of R.C. 3314.07(B)(3), (4) and (5) as a whole." *Id.* The "precondition" – and the resulting prejudice to NBTA for failing to recognize its existence in the absence of any statutory language – is plainly inconsistent with assisting parties in obtaining justice as required by R.C. 1.11.

b. R.C. 1.42

R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." Although the appeals court claimed to have "constru[ed] the language of R.C. 3314.07(B)(3), (4) and (5) as a whole," *State ex rel. Nation Building Technical Academy* at ¶17, it apparently failed to consider the words actually employed by the General Assembly – namely, that "the school may, within fourteen days of receiving the notice, request an informal hearing before the sponsor."

The terms "may" and "informal," given their plain meaning and usage, militate against a finding that the General Assembly intended for a community school to request such a hearing before its sponsor as a precondition to requesting an appeal before ODE. Had such been the case, the General Assembly would certainly have employed the word

“must” or “shall” and refrained from referring to a mandatory statutory requirement to a right to appeal as “informal.” Indeed, had the General Assembly intended for the informal hearing to be a mandatory precondition to an appeal before ODE, it could have – and should have – plainly stated such in R.C. 3314.07(B)(4). It did not.

c. R.C. 1.49

Finally, R.C. 1.49 provides that “[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; (B) The circumstances under which the statute was enacted; (C) The legislative history; (D) The common law or former statutory provisions, including laws upon the same or similar subjects; (E) The consequence of a particular construction; (F) the administrative construction of the statute.”

The appeals court ignored the Magistrate’s careful application of R.C. 1.49 to resolve what he determined was ambiguity in R.C. 3314.07, namely whether the word “decision” used in R.C. 3314.07(B) referred to the decision of the sponsor to terminate the contract, the written decision either affirming or rescinding the decision to terminate, or both. *State ex rel. Nation Building Technical Academy* at ¶¶40-41.

Considering the list set forth in R.C. 1.49, the Magistrate noted that neither the legislative history, common law, nor ODE’s administrative rules offered any clarity on this issue. *Id.* at ¶42. He further considered the context of the “informal hearing” references, noting that the General Assembly did not include them among a school’s requirements, but rather among the notice requirements that the sponsor must include when terminating a school’s contract. *Id.* at ¶45. He also noted that “[a]bsent is any language imposing upon the school an obligation to request the informal hearing as a prerequisite to an appeal to ODE.” *Id.*

Finally, the Magistrate considered “[t]he consequence of a particular construction” as encouraged by R.C. 1.49. He noted that the informal hearing referred to in the statute was little more than a request for the sponsor to reconsider a termination decision it had already reached. *Id.* at ¶46; *see also* R.C. 3314.07(B)(3) (“the sponsor shall issue a written decision either affirming or rescinding the decision to terminate or not renew the contract”). He also found that requiring the informal hearing could delay a final resolution by ODE given that a sponsor can effectively delay the process for up to 70 days. *Id.* at ¶46. Ultimately, the Magistrate concluded that “the consequences of accepting [ODE’s] construction of the statute is to penalize a school for failing to appreciate the statute’s ambiguity and to create more delay when a school may feel that it has already exhausted its discussions with its sponsor.” *Id.* at ¶47. On flipside, if R.C. 3314.07(B)(4) was construed as allowing a direct appeal to ODE, a community school would have the benefit of a prompt and independent review of the sponsor’s decision to permanently discontinue its operations by ODE.

d. The appeals court ignored the rules of construction and instead, added judicially-crafted language into R.C. 3314.07(B)(4).

The appeals court ignored all of these rules of statutory construction. Its decision did not construe what the General Assembly *actually said* regarding an appeal to ODE in R.C. 3314.07(B)(4). Instead, the appeals court imposed a new and purely judicially-crafted precondition into R.C. 3314.07(B)(4) – the very type of insertion of words into existing statutes expressly prohibited by this Court in *State ex rel. Cassels*.

2. Absent this Court’s intervention, the appeals court’s decision threatens the fundamental principles governing the construction of all Ohio statutes.

The potential impact of this decision is not limited to R.C. 3314.07 or the more than 300 Ohio charter schools which it governs. The appeals court's judicially-imposed "statutory precondition" threatens an upheaval of the this Court's long-standing holdings regarding when and how a court may interpret *any* Ohio statute. An individual should not have to guess what a statute requires of him nor should his statutory right to an appeal be stripped for failing to satisfy a precondition imposed *post hoc* through pure judicial fiat.

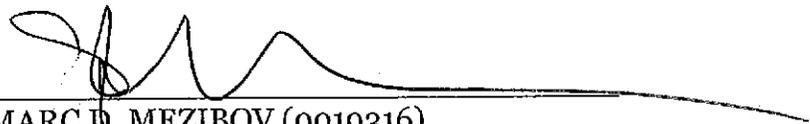
This Court's intervention is needed not just to correct this erroneous interpretation of R.C. 3314.07, but to send a clear message to lower courts that the function of the judiciary is to interpret laws as they have been written, not to rewrite them.

CONCLUSION

Because this matter presents a question of great public and general interest, NBTA respectfully requests this Court grant jurisdiction.

Respectfully submitted,

LAW OFFICE OF MARC MEZIBOV

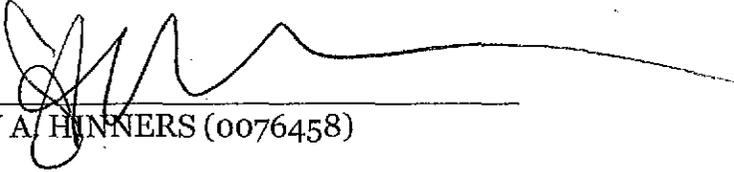


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CERTIFICATE OF SERVICE

A true copy of the foregoing Memorandum in Support of Jurisdiction was sent via electronic and regular mail to Counsel for Appellee Ohio Department of Education, Scott M. Campbell, 30 E. Broad Street, 16th Floor, Columbus, OH 43215, on this 2nd of January 2009.



STACY A. HINNERS (0076458)

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

State of Ohio ex rel. Nation Building
Technical Academy,

Relator,

v.

Ohio Department of Education,

Respondent.

No. 07AP-169

(REGULAR CALENDAR)

D E C I S I O N

Rendered on November 18, 2008

Law Office of Marc Mezibov, Marc D. Mezibov, and Stacy A. Hanners, for relator.

Nancy H. Rogers, Attorney General, and Scott M. Campbell, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Nation Building Technical Academy, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Department of Education, to hear relator's appeal pursuant to R.C. 3314.07(B)(4).

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a

decision, including findings of fact and conclusions of law, recommending that this court issue a writ of mandamus ordering respondent to determine relator's appeal. (Attached as Appendix A.)

{¶3} Respondent has filed objections to the magistrate's decision. In its objections, respondent argues that relator: (1) failed to exhaust administrative remedies; (2) seeks to compel a vain act; and (3) failed to properly appeal the decision of the sponsor under the plain language of R.C. 3314.07.

{¶4} The following facts, which are essentially not in dispute, are drawn primarily from the magistrate's decision. Relator is an Ohio non-profit corporation. The Lucas County Educational Services Center ("LCESC") is an approved statewide sponsor of community schools pursuant to R.C. 3314.015. In March 2004, relator entered into a written contract with LCESC, whereby LCESC agreed to sponsor relator's establishment of a community school in Hamilton County, Ohio, to begin operation by September 1, 2004.

{¶5} In March 2005, LCESC notified relator that its community school was being placed on probation pursuant to R.C. 3314.073. On May 17, 2005, LCESC conducted an on-site visit of relator's community school. On May 25, 2005, LCESC notified relator that its community school was suspended pursuant to R.C. 3314.072.

{¶6} By letter dated December 2, 2005, LCESC informed relator that its contract was being terminated. That letter provided in part: "The Governing Authority * * * may, within fourteen (14) days of receipt of this Notice, request in writing an informal hearing before LCESC's Governing Board." The letter further stated: "Upon receipt of proper written notice, LCESC will hold an informal hearing within seventy (70) days * * * [and]

LCESC will issue a written decision either affirming or rescinding the decision to terminate the contract. LCESC's decision to terminate the contract may be appealed to the State Board of Education."

{¶7} On December 12, 2005, relator filed an appeal with respondent from the decision of LCESC. In a letter to relator dated December 27, 2005, respondent's associate director outlined respondent's position that R.C. 3314.07(B)(3) sets forth a procedure whereby, once a request for an informal hearing is made, and a written decision is rendered either affirming or rescinding a sponsor's decision to terminate a contract, the school then has a right to appeal the decision to respondent. In a letter by the director of LCESC to respondent's executive director, dated January 10, 2006, LCESC represented that it had provided relator with notice of the relevant statutory procedures, and that, "[f]o date, there has been no request for an informal hearing before LCESC regarding its decision to terminate the contract with * * * [relator]."

{¶8} By letter dated May 8, 2006, relator requested that respondent hear its appeal. On August 24, 2006, respondent informed relator that an appeal was not available because relator had failed to request an informal hearing pursuant to R.C. 3314.07(B)(3). By letter dated November 20, 2006, counsel for relator challenged respondent's position that relator was not entitled to an appeal. On January 10, 2007, respondent informed relator that its position remained unchanged. Relator subsequently commenced the instant mandamus action.

{¶9} R.C. 3314.07 deals with the termination or non-renewal of a contract between a community school and its sponsor. R.C. 3314.07(B) states in part:

(B)(1) A sponsor may choose not to renew a contract at its expiration or may choose to terminate a contract prior to its expiration for any of the following reasons:

(a) Failure to meet student performance requirements stated in the contract;

(b) Failure to meet generally accepted standards of fiscal management;

(c) Violation of any provision of the contract or applicable state or federal law;

(d) Other good cause.

* * *

(3) At least ninety days prior to the termination or nonrenewal of a contract, the sponsor shall notify the school of the proposed action in writing. The notice shall include the reasons for the proposed action in detail, the effective date of the termination or nonrenewal, and a statement that the school may, within fourteen days of receiving the notice, request an informal hearing before the sponsor. Such request must be in writing. The informal hearing shall be held within seventy days of the receipt of a request for the hearing. Promptly following the informal hearing, the sponsor shall issue a written decision either affirming or rescinding the decision to terminate or not renew the contract.

(4) A decision by the sponsor to terminate a contract may be appealed to the state board of education. The decision by the state board pertaining to an appeal under this division is final. If the sponsor is the state board, its decision to terminate a contract under division (B)(3) of this section shall be final.

{¶10} In his decision, the magistrate found potential ambiguity in the statute as to whether the word "decision" in R.C. 3314.07(B)(4) (i.e., providing that "[a] decision by the sponsor to terminate a contract may be appealed to the state board of education") refers exclusively to the written decision of the sponsor that follows an informal hearing, or whether it refers to both the written decision following the hearing and the "proposed

action" of the sponsor referenced in R.C. 3314.07(B)(3). The magistrate concluded that, in light of the statute's ambiguity, the consequences of accepting respondent's interpretation of the statute would be to penalize a school as a result of such ambiguity.

{¶11} In order to be entitled to a writ of mandamus, a relator must demonstrate a clear legal right to the relief prayed for, that respondent has a clear legal duty to perform the acts, and that relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Manson v. Morris* (1993), 66 Ohio St.3d 440, 441.

{¶12} While respondent raises three objections, we focus upon its contention that relator failed to follow the requirements of R.C. 3314.07 in order to appeal the decision to terminate the contract. Respondent argues that, while the magistrate focused upon the language of R.C. 3314.07(B)(3) and (4), a consideration of R.C. 3314.07(B)(5) is pertinent to the issue of whether a school may, following notice from the sponsor of the proposed action, directly appeal without first requesting an informal hearing. Specifically, respondent argues that R.C. 3314.07(B)(5)(a) and (b), dealing with the issue of when the termination of a contract is effective, clarifies any perceived ambiguity under R.C. 3314.07(B)(4).

{¶13} R.C. 3314.07(B)(5) provides as follows:

(5) The termination of a contract under this section shall be effective upon the occurrence of the later of the following events:

(a) Ninety days following the date the sponsor notifies the school of its decision to terminate the contract as prescribed in division (B)(3) of this section;

(b) If an informal hearing is requested under division (B)(3) of this section and as a result of that hearing the sponsor affirms its decision to terminate the contract, the effective date of the

termination specified in the notice issued under division (B)(3) of this section, or if that decision is appealed to the state board under division (B)(4) of this section and the state board affirms that decision, the date established in the resolution of the state board affirming the sponsor's decision.

{¶14} According to respondent, the language of R.C. 3314.07(B)(5)(a) would control in circumstances in which a community school does not request an informal hearing; conversely, respondent argues, R.C. 3314.07(B)(5)(b) addresses the termination date when a community school pursues its administrative remedies.

{¶15} We find persuasive respondent's argument that the contract termination events set forth under R.C. 3314.07(B)(5) are relevant in considering the intent and scope of R.C. 3314.07(B)(4) regarding the right of appeal to the state board of education. As noted by respondent, the language of R.C. 3314.07(B)(5)(a) does not address extending the time by which a termination becomes effective assuming a direct appeal is taken; stated otherwise, the statute does not appear to provide for a termination event (or date) if the community school, instead of requesting an informal hearing within 14 days of receiving notice (a scenario addressed under R.C. 3314.07[B][5][b]), attempts to directly appeal the proposed action.

{¶16} Upon review, we agree with respondent that R.C. 3314.07(B)(5)(a) addresses termination of a contract in instances where a sponsor provides written notice to a school of the proposed adverse action, but the school fails to request an informal hearing within 14 days of such notice (i.e., the contract terminates "[n]inety days following the date the sponsor notifies the school of its decision to terminate the contract"). Further, the language of R.C. 3314.07(B)(5)(b) addresses the termination events for the following remaining scenarios: (1) "[i]f an informal hearing is requested" by the school and,

following the hearing, the sponsor affirms its decision to terminate the contract, the contract terminates as of the date specified in the notice, or (2) if "that decision" is appealed to the state board and the state board affirms that decision, the termination of the contract is the date established in the resolution of the state board.

{¶17} Presumably, had the drafters of R.C. 3314.07 intended to allow an appeal without a request for an informal hearing, the statute could have included language to the effect that the school may, within 14 days of receiving the notice, request an informal hearing before the sponsor *or appeal directly to the state school board*. While the provisions of R.C. 3314.07 may not be a model of clarity, in construing the language of R.C. 3314.07(B)(3), (4), and (5) as a whole, we agree with respondent that the statute requires a community school to first request an informal hearing and receive a written decision from the sponsor before appealing to the state board of education. Thus, we conclude that relator has failed to state a claim upon which relief in mandamus can be granted, and respondent's objection on this issue is well-taken.

{¶18} Based upon this court's independent review, we sustain respondent's objection to the extent provided above, rendering respondent's remaining objections moot. Further, we adopt the magistrate's findings of fact, but reject the magistrate's conclusions of law. Relator's request for a writ of mandamus is hereby denied.

Objection sustained and objections moot; writ of mandamus denied.

McGRATH, P.J., and FRENCH, J., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Nation Building
Technical Academy,

Relator,

v.

Ohio Department of Education,

Respondent.

No. 07AP-169

(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered on January 25, 2008

Mezibov & Jenkins, Co. LPA, Marc D. Mezibov and Stacy A. Hinners, for relator.

Marc Dann, Attorney General, and Scott M. Campbell, for respondent.

IN MANDAMUS

{¶19} In this original action, relator, Nation Building Technical Academy ("relator" or "NBTA"), requests a writ of mandamus ordering respondent, Ohio Department of Education ("respondent" or "ODE"), to hear relator's appeal pursuant to R.C. 3314.07(B)(4).

Findings of Fact:

{¶20} 1. Relator is an Ohio nonprofit corporation.

{¶21} 2. Lucas County Educational Services Center ("LCESC") is an ODE-approved state-wide sponsor of community schools under R.C. 3314.015.

{¶22} 3. In March 2004, relator entered into a written contract with LCESC. Under the terms of the contract, LCESC agreed to sponsor relator's establishment of a community school to begin operation by September 1, 2004, in Hamilton County, Ohio.

{¶23} 4. In March 2005, LCESC notified relator that its community school was being placed on probation pursuant to R.C. 3314.073.

{¶24} 5. On May 17, 2005, LCESC conducted a site visit of relator's community school.

{¶25} 6. On May 25, 2005, LCESC notified relator that its community school was suspended pursuant to R.C. 3314.072.

{¶26} 7. By letter dated December 2, 2005, LCESC notified relator that its contract was terminated pursuant to R.C. 3314.072. The letter advised:

The Governing Authority of [NBTA] may, within fourteen (14) days of receipt of this Notice, request in writing an informal hearing before LCESC's Governing Board. Upon receipt of proper written notice, LCESC will hold an informal hearing within seventy (70) days thereafter. LCESC will issue a written decision either affirming or rescinding the decision to terminate the contract. LCESC's decision to terminate the contract may be appealed to the State Board of Education.

{¶27} 8. By letter dated December 12, 2005, NBTA appealed to ODE.

{¶28} 9. By letter dated May 8, 2006, relator requested that ODE hear its appeal.

In support, relator attached a copy of its December 12, 2005 letter.

{¶29} 10. By letter dated August 24, 2006, ODE informed relator that an appeal was not available because relator had failed to request an informal hearing pursuant to R.C. 3314.07(B)(3).

{¶30} 11. By letter dated November 20, 2006, relator's counsel questioned ODE's position that relator was not entitled to an ODE appeal.

{¶31} 12. By letter dated January 10, 2007, ODE informed relator that ODE's position remained unchanged.

{¶32} 13. On February 26, 2007, relator filed this original action.

Conclusions of Law:

{¶33} The issue is whether a request for an informal hearing under R.C. 3314.07(B)(3) is a prerequisite to R.C. 3314.07(B)(4)'s grant of a right to an ODE appeal of the sponsor's notice of contract termination.

{¶34} Finding that the informal hearing is not a prerequisite to R.C. 3314.07(B)(4)'s grant of a right to an ODE appeal, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶35} R.C. 3314.07(B)(2) provides that a sponsor may choose to terminate a contract if the sponsor has suspended the operation of the contract under R.C. 3314.07(B)(2).

{¶36} R.C. 3314.07(B)(3) states:

At least ninety days prior to the termination or nonrenewal of a contract, the sponsor shall notify the school of the proposed action in writing. The notice shall include the reasons for the proposed action in detail, the effective date of the termination or nonrenewal, and a statement that the school may, within fourteen days of receiving the notice, request an informal hearing before the sponsor. Such

request must be in writing. The informal hearing shall be held within seventy days of the receipt of a request for the hearing. Promptly following the informal hearing, the sponsor shall issue a written decision either affirming or rescinding the decision to terminate or not renew the contract.

{¶37} R.C. 3314.07(B)(4) states: "A decision by the sponsor to terminate a contract may be appealed to the state board of education. The decision by the state board pertaining to an appeal under this division is final."

{¶38} Some observations regarding the statutory language are in order. To begin, the first and second sentences of R.C. 3314.07(B)(3) speak of the "proposed action" of the sponsor who intends to terminate the contract. Neither of those two sentences speak of the "decision" of the sponsor even though the second sentence requires that the sponsor's notice specify the effective date of the termination. Presumably, where a sponsor has decided to issue notice of the contract's termination, the sponsor has reached a decision to terminate the contract. However, unexplainedly, the word "decision" does not appear until the last sentence of R.C. 3314.07(B)(3).

{¶39} In the last sentence of R.C. 3314.07(B)(3), it is stated that promptly following the informal hearing, the sponsor shall issue "a written decision either affirming or rescinding the decision to terminate." Thus, the word "decision" is used to refer to both the "proposed action" and the written decision that follows an informal hearing.

{¶40} Given the above analysis, an ambiguity occurs when, in the next paragraph, R.C. 3314.07(B)(4) provides that "[a] decision by the sponsor to terminate a contract may be appealed to the state board of education." Does the word "decision" in R.C. 3314.07(B)(4) refer to either decision of the sponsor referenced in the previous

paragraph, or to only the "written decision either affirming or rescinding the decision to terminate"?

{¶41} If the word "decision" in R.C. 3314.07(B)(4) refers to either decision of the sponsor, then a request for an informal hearing cannot be a prerequisite for an ODE appeal. On the other hand, if the word "decision" in R.C. 3314.07(B)(4) refers exclusively to the written decision that follows an informal hearing, then a request for an informal hearing is a prerequisite for an ODE appeal.

{¶42} The magistrate further observes that ODE has not endeavored to clarify the ambiguity by promulgation of an administrative rule. See Ohio Adm.Code 3301-102-101 et seq. Thus, ODE's administrative rules do not aid this court in the interpretation to be given to the statute at issue here. See *Ohio Civ. Serv. Emp. Assn. v. Univ. of Cincinnati* (1982), 3 Ohio App.3d 302.

{¶43} How then shall this court resolve the ambiguity created by the statute's failure to specify which decision of the sponsor may be appealed to ODE.

{¶44} R.C. 1.49 provides:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

{¶45} The magistrate observes that R.C. 3314.07(B)(3)'s reference to an "informal hearing" is contained in the requirements for the sponsor's notice to the school. Absent is any language imposing upon the school an obligation to request the informal hearing as a prerequisite to an appeal to ODE.

{¶46} The magistrate also observes that neither the statute nor the administrative rules specify how the informal hearing is to be conducted or in what manner evidence or information is to be submitted at an informal hearing. Moreover, the adjudicator at the informal hearing is the same party who just issued notice of the contract's termination. In addition, a request for an informal hearing could delay a final resolution by the ODE given that the sponsor can delay the informal hearing up to 70 days after receipt of the request.

{¶47} Given the above analysis, it is the magistrate view that, under R.C. 1.49, the consequences of accepting respondent's construction of the statute is to penalize a school for failing to fully appreciate the statute's ambiguity and to create more delay when a school may feel that it has already exhausted its discussions with its sponsor.

{¶48} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering respondent to forthwith determine relator's appeal.

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).