



## I. INTRODUCTION

Instead of presenting a shred of evidence to counter the clear economic value of the Semester Exams to Respondent Cincinnati Public Schools (“CPS”), Relator Paul Perrea has moved to strike portions of the affidavit of Dr. Elizabeth Holtzapple as “inadmissible hearsay” under Ohio Civ. R. 801(C) and S. Ct. R. X, § 7. Perrea’s motion is both meritless and immaterial to the disposition of this matter. The portions of Dr. Holtzapple’s affidavit highlighted by Perrea are not hearsay because they do not convey out of court statements; they convey Dr. Holtzapple’s sworn testimony based on her personal knowledge. Moreover, even if the statements were ultimately excluded by the Court, which they should not be, it remains undisputed that CPS paid more than \$533,000 for the development of the 9th and 10th grade Semester Exams. This evidence alone is sufficient to establish both the value CPS would lose if the tests were made public and the cost to develop new exams in the future. Perrea’s motion to strike should be denied.

## II. ARGUMENT

### A. Dr. Holtzapple’s Affidavit Does Not Contain Hearsay.

None of the portions of Dr. Holtzapple’s affidavit highlighted by Perrea are out of court statements offered to prove the truth of the matter asserted.<sup>1</sup> In his motion, Perrea objects to the following portions of Dr. Holtzapple’s sworn statement:

9. On June 27, 2008, I received a quote from West Ed regarding the cost of developing the 11th grade Semester Exams from scratch and replacing half of the exam questions currently used in the 9th and 10th grade Semester Exams. The cost for West Ed to provide these services would be \$547,034.

10. The cost of revising the 9th and 10th grade exams alone would be \$270,000. If CPS were forced to revise its Semester

---

<sup>1</sup> Under Ohio Evid. R. 801(C), hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.”

Exams each year (grades 9-11) because the exams are made public, CPS would have to spend approximately 405,000 per year. Because of this cost, CPS would have to discontinue the Semester Exams altogether if the exams were made public.

\*\*\*

21. Exhibit G (Document Nos. CPS 057- CPS 058) is a true and accurate copy of a quote submitted to CPS by West Ed disclosing the cost of developing the 11th grade Semester Exams and revising the 9th and 10th grade Semester Exams by developing new questions for half of each exam.

(Holtzapple Aff. ¶¶ 9-10, 21) (emphasis added) These passages are not hearsay.

Neither of the assertions contained in paragraph 9 of Dr. Holtzapple's affidavit are out of court statements -- they are Dr. Holtzapple's own statements based on her personal knowledge. Dr. Holtzapple's statement that she "received a quote from West Ed regarding the cost of developing the 11th grade Semester Exams from scratch and replacing half of the exam questions currently used in the 9th and 10th grade Semester Exams" is clearly not hearsay. It is a statement describing her personal receipt of this information in the performance of her job duties. Likewise, her statement that "[t]he cost for West Ed to provide these services would be \$547,034" is based on her personal knowledge as the Director of Research, Evaluation and Test Administration for CPS (Holtzapple Aff. ¶ 1) and her *personal* experiences working with WestEd from the inception of the Semester Exams. (Id. ¶ 3) Dr. Holtzapple was *personally* involved in the development of each of the Semester Exams; she has direct knowledge of how much CPS has previously paid for WestEd's services and learned of the cost of recreating the Semester Exams during her investigation into the matter. Under these circumstances, the fact that Dr. Holtzapple's personal knowledge may have been informed by WestEd's price quote does not turn her sworn statement into inadmissible hearsay. Helm Financial Corp. v. Iowa Northern Ry. Co., 214 F.Supp.2d 934, 957-58 (N.D. Iowa 2002) (holding that affiant's testimony

based on third party's cost estimate was not hearsay because affiant personally participated in conference call in which repair costs were discussed).<sup>2</sup>

The assertions in paragraph 10 of Dr. Holtzapple's affidavit are even further from hearsay. Here, Dr. Holtzapple merely states from her personal knowledge -- based on her interactions with WestEd, the cost to CPS of developing Semester Exams in the past, and her knowledge as the Director of Research, Evaluation and Test Administration at CPS -- the cost of revising the Semester Exams. Perrea's guess that Dr. Holtzapple is merely "breaking down" the WestEd price quote is incorrect. If that were the case, the cost of revising the 9th and 10th grade exams would have been higher than \$270,000. Moreover, the price quote does not even discuss revising the 11th grade exams. Dr. Holtzapple's personal knowledge regarding the \$270,000 and \$405,000 figures are derived from a number of sources, including the past actual cost of developing complete exams (\$257,800 and \$276,000) and Dr. Holtzapple's continuous personal interactions with WestEd from the inception of the Semester Exams. (Holtzapple Aff. ¶ 3) The fact that the WestEd quote may have further informed Dr. Holtzapple's personal knowledge is irrelevant. Helm, 214 F.Supp.2d at 957-58.

Paragraph 21 of Dr. Holtzapple's affidavit is also not hearsay. Here, Dr. Holtzapple merely authenticates Exhibit G as "a true and accurate copy of a quote submitted to CPS by West Ed." Because Dr. Holtzapple actually received this document, paragraph 21 contains sworn testimony based on her personal knowledge. Similarly, Exhibit G itself is not objectionable. The exhibit has not been offered to prove the truth of the matter asserted. Instead, it has been offered because it partially informed Dr. Holtzapple's state of mind (along with her previous interactions with WestEd, previous costs associated with developing the Semester Exams, and

---

<sup>2</sup> Perrea cites no case law to support his motion, and instead asks this Court to find that no one at CPS could have personal knowledge of the cost of recreating their own exams. Perrea's position is meritless.

her experience as the administrator charged with developing the Semester Exams) as to the value of the materials at issue in this case.

CPS has not used any out of court statements to prove the truth of the matter asserted. The district has merely relied on the personal knowledge of its Director of Research, Evaluation and Test Administration, which is derived from a variety of sources, to convey the lost value to CPS if the Semester Exams were disclosed to the public. There is no hearsay. All of the assertions in Dr. Holtzapple's affidavit are admissible in evidence. Perrea's motion should therefore be denied.<sup>3</sup>

**B. Perrea's Motion Is Immaterial To The Disposition Of This Matter.**

Even if the Court were to strike all of the portions of Dr. Holtzapple's affidavit Perrea finds objectionable, which it should not, CPS has still met its burden of establishing the value of the Semester Exams as trade secrets. Perrea does not dispute that CPS paid more than \$533,000 for the development of the 9th and 10th grade Semester Exams. (CPS 035, 040-041) This evidence is sufficient to establish both the value CPS would lose if the tests were made public and the cost to CPS to develop new tests in the future. Using these undisputed figures, the cost to CPS to develop three sets of Semester Exams (one each for grades 9-11) would be nearly \$800,000. If anything, Dr. Holtzapple arguably understated the cost to CPS to recreate the Semester Exams each year in her affidavit by setting forth her personal knowledge regarding the cost of replacing only half of the test questions. In any case, CPS has met its burden of establishing the value of the Semester Exams as trade secrets with or without the affidavit testimony at issue.

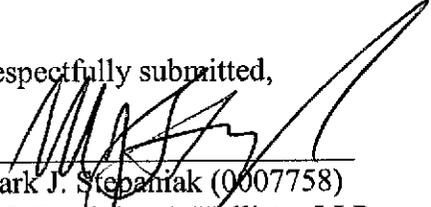
---

<sup>3</sup> To the extent the Court may desire additional verification of Dr. Holtzapple's personal knowledge, CPS requests that the Court consider the attached affidavit of Joanne Jensen, a WestEd employee who personally determined the cost to recreate the Semester Exams as described in Dr. Holtzapple's affidavit. This affidavit should be considered because the parties did not submit stipulated facts to the Court and because Perrea failed to raise any argument with respect to Dr. Holtzapple's affidavit until after CPS submitted its merits brief.

### III. CONCLUSION

For each and all of the foregoing reasons, Respondent Cincinnati Public Schools respectfully requests that the Court deny Relator's Motion to strike portions of the affidavit of Dr. Elizabeth Holtzapple in its entirety.

Respectfully submitted,



---

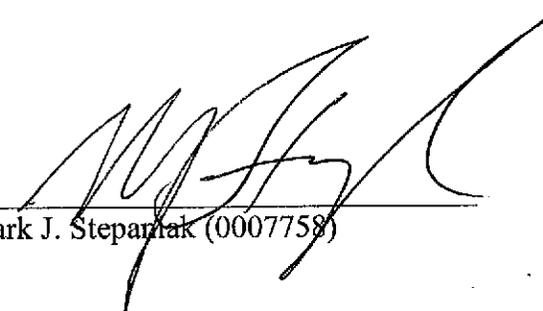
Mark J. Stepaniak (0007758)  
Taft Stettinius & Hollister LLP  
425 Walnut Street, Suite 1800  
Cincinnati, Ohio 45202  
(513) 381-2838  
(513) 381-0205 fax  
stepaniak@taftlaw.com

Counsel of Record for Respondent  
Cincinnati Public Schools

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition to Relator's Motion to Partially Strike the Affidavit of Dr. Elizabeth Holtzapple of Respondent Cincinnati Public Schools has been served upon the following via Regular U.S. Mail, postage prepaid, this 8th day of January, 2009:

Ted L. Wills  
414 Walnut Street, Suite 707  
Cincinnati, Ohio 45202



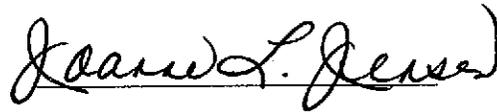
Mark J. Stepaniak (0007758)



4. Exhibit A (Document Nos. CPS 057-CPS 058) is a true and accurate copy of a quote submitted to CPS by West Ed disclosing the cost of developing the 11th grade Semester Exams and revising the 9th and 10th grade Semester Exams by developing new questions for half of each exam. This quote was created in the regular course of business and it is the regular practice of WestEd to develop and retain such quotes.

5. Exhibit B provides a statement of the services provided for the Grade 11 exams.

Further affiant sayeth naught.



Dr. Joanne L. Jensen  
Director of Assessment Client Relations  
WestEd

Sworn to and subscribed before me this 6<sup>th</sup> day of January, 2009.



---



**Budget Submitted to Cincinnati Public Schools  
for Development of Assessments for Grade 11  
and Revision of Grades 9 and 10**

**Costs for Semester One for Grade 11**

Review of Pacing Guide  
 Development of Item Specifications for Semester One  
 Development of Test Blueprint for Semester One  
 Item writing  
 Edit round 1  
 Edit round 2  
 Facilitation of Item Review with CPS Teachers  
 Selection of items for the test forms  
 Layout of test forms  
 Final content review of test forms  
 Delivery of final, print-ready PDF of test forms  
 Development of scoring guides for constructed response items  
 Creation of answer document  
 Layout of answer document  
 Payment of copyright permissions for four years

<b>Total Direct Costs:</b>	\$115,034
<b>Indirect Costs (12.4%):</b>	14,264
<b>Management Fee:</b>	<u>6,465</u>
<b>Total Costs</b>	<b>\$135,763</b>

**Content Areas**

English 11  
 Algebra II  
 Chemistry  
 American Government  
 Economics

**Costs for Semester Two for Grade 11**

Development of Item Specifications for Semester Two  
 Development of Test Blueprint for Semester Two  
 Item writing  
 Edit round 1  
 Edit round 2  
 Facilitation of Item Review with CPS Teachers  
 Selection of items for the test forms  
 Layout of test forms  
 Final content review of test forms  
 Delivery of final, print-ready PDF of test forms  
 Development of scoring guides for constructed response items  
 Creation of answer document  
 Layout of answer document  
 Payment of copyright permissions for four years

<b>Total Direct Costs:</b>	\$119,200
<b>Indirect Costs (12.4%):</b>	14,781
<b>Management Fee:</b>	<u>6,669</u>
<b>Total Costs</b>	<b>\$140,680</b>

(Reflects 5% adjustment across WestEd fiscal years)

**Costs for Revision of Grades 9 and 10 Assessments Semester One**

Review of item statistics from 2007 and/or 2008 semester one test administrations  
 Review of Pacing Guides  
 Selection of content to be newly developed  
 Development of items to refresh test by 50%  
 Item writing  
 Edit round 1  
 Edit round 2  
 Facilitation of Item Review with CPS Teachers (requires four additional staff)  
 Selection of items for the test forms  
 Layout of test forms  
 Final content review of test forms  
 Delivery of final, print-ready PDF of test forms  
 Development of scoring guides for constructed response items  
 Creation of answer document  
 Layout of answer document  
 Payment of copyright permissions for four years

<b>Total Direct Costs:</b>	\$112,601
<b>Indirect Costs (12.4%):</b>	13,963
<b>Management Fee:</b>	<u>6,328</u>
<b>Total Costs</b>	<b>\$132,892</b>

**Costs for Revision of Grades 9 and 10 Assessments Semester Two**

Review of item statistics from 2007 and/or 2008 semester two test administrations  
 Review of Pacing Guides  
 Selection of content to be newly developed  
 Development of items to refresh test by 50%  
 Item writing  
 Edit round 1  
 Edit round 2  
 Facilitation of Item Review with CPS Teachers (requires four additional staff)  
 Selection of items for the test forms  
 Layout of test forms  
 Final content review of test forms  
 Delivery of final, print-ready PDF of test forms  
 Development of scoring guides for constructed response items  
 Creation of answer document  
 Layout of answer document  
 Payment of copyright permissions for four years

<b>Total Direct Costs:</b>	\$116,674
<b>Indirect Costs (12.4%):</b>	14,468
<b>Management Fee:</b>	<u>6,557</u>
<b>Total Costs</b>	<b>\$137,699</b>

(Reflects 5% adjustment across WestEd fiscal years)

Note: The refreshment of 50% of the test requires full new layout of the test forms.

### **Scope of Work**

WestEd will develop end of term exams (winter and spring) in four Grade 11 content areas:

- English 11
- One semester of American Government and one semester of Economics
- Algebra II
- Chemistry

WestEd will deliver camera-ready versions of the exams. Cincinnati Public Schools is responsible for printing, scoring, and reporting. WestEd will develop the forms and the support materials only, no ancillary documents (e.g., answer documents, administration manuals).

WestEd will provide staff to facilitate the teacher review meetings for both semesters.