ORIGINAL

IN THE SUPREME COURT OF OHIO

BROOKWOOD PRESBYTERIAN CHURCH,	)	
	)	09-1926
Appellants,	)	Case No. _____
-vs-	)	
	)	On Appeal from the Court of Appeals
OHIO DEPARTMENT OF EDUCATION,	)	For Franklin County, Ohio
	)	Tenth Appellate District
Appellee.	)	
	)	Court of Appeals Case No. 09AP -303

APPELLANT'S

MEMORANDUM IN SUPPORT OF JURISDICTION

James S. Callender Jr. (0059711)
Donell R. Grubbs (0034655)
BUCKLEY KING, LPA
grubbs@bucklaw.com
One Columbus, Suite 1300
10 West Broad Street
Columbus, Ohio 43215-3419
(614) 461-5600
(614) 461-5630 (*facsimile*)

Attorneys for Appellants

Richard Cordray (0038034)

ATTORNEY GENERAL OF OHIO
Christa T. Metzger (0058598)
Assistant Attorney General
Education Section
30 E. Broad St., 16th Floor
Columbus, Ohio 43215
(614) 644-7250
(614) 644-7634 (*facsimile*)
Attorneys for Appellees

FILED
OCT 23 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST 1

II. STATEMENT OF THE CASE AND FACTS 4

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 6

Proposition of Law No. 1: A decision of the Ohio Department of Education which denies a community school sponsor application under R.C. 3314.015 is subject to appeal under R.C. 119.12. (R.C. 3314.015[D] applied.) 6

Proposition of Law No. 2: A "final" determination by the Ohio Department of Education pursuant to R.C. 3314.015(B)(3) that an entity is not an "education-oriented entity" eligible to apply for sponsorship of community schools in Ohio does not preclude an appeal under R.C. 119.12 from the agency's denial of the application, but instead merely limits the scope of such an appeal. (R.C. 3314.015(B)(3) and (D), construed and reconciled.) 8

Proposition of Law No. 3: A decision of the Ohio Department of Education which denies a community school sponsor application under R.C. 3314.015(B)(3) on the ground that the applicant is not an "education-oriented entity" solely because it is a church violates the Equal Protection Clauses of the United States and Ohio Constitutions, as well as Art. I, §7 of the Ohio Constitution.. 12

Proposition of Law No. 4: Where an appeal from an order of an administrative agency has been duly made to the Common Pleas Court pursuant to R.C. 119.12, and the agency has not prepared and certified to the court a complete record of the proceedings within twenty days after receipt of the notice of appeal and the court has granted the agency no additional time to do so, the court must, upon motion of the appellant, enter a finding in favor of the appellant and render a judgment for the appellant. *Matash v. State Dept. of Ins.* (1964), 177 Ohio St. 55, at syllabus, applied. 13

IV. CONCLUSION 15

PROOF OF SERVICE

APPENDIX

A. September 8, 2009 Judgment Entry, Franklin County Court of Appeals

B. September 8, 2009 Decision, Franklin County Court of Appeals

C. May 9, 2008 letter decision, Ohio Department of Education

TABLE OF AUTHORITIES

Cases

Cleveland Elec. Illum. Co. v. Cleveland (1988), 37 Ohio St.3d 50 8

Giovanetti v. Ohio State Dental Bd. (1990), 66 Ohio App.3d 381 10

Heartland Jockey Club, Ltd. v. Ohio State Racing Comm'n (Aug. 3, 1999), Franklin App. No. 98AP-1465 ..... 10, 11

Honohan v. Holt (1968), 17 Ohio Misc. 57, 66-67, 244 N.E.2d 537, 543-44 13

Matash v. State Dept. of Ins. (1964), 177 Ohio St. 55 14

Rossford Exempted Village School Dist. v. State Bd. of Edn. (1989), 45 Ohio St.3d 356 ..... 2, 7

Shumaker v. Ohio Dept. of Human Serv. (1996), 117 Ohio App.3d 730 10

State, ex rel. Crockett, v. Robinson (1981), 67 Ohio St.2d 363 14

State ex rel. Smith v. Columbus (1986), 28 Ohio St.3d 94 8

Union Title Co. v. State Bd. of Edn. (1990), 51 Ohio St.3d 189 7

Constitutional Provisions

United States Constitution 12, 13

Article I, Section 2, Ohio Constitution 12, 13

Article I, Section 7, Ohio Constitution 12, 13

Statutes

R.C. 1.47(B) 9

R.C. 1.51 ..... 9, 10

R.C. 119.01(A)(1) 7

R.C. 119.12 ..... *passim*

R.C. 3301.13 6

R.C. 3314.015(A) 4

R.C. 3314.015(B) ..... *passim*

R.C. 3314.015(D)..... *passim*

Adminsitrative Code

O.A.C. 3314-102-02 12

O.A.C. 3314-102-03.....4, 7

I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case involves application of a facially neutral law by the Ohio Department of Education ("ODE") to deny a request by a church to be a sponsor of community (charter) schools in Ohio, solely on the ground that the request was made by a church. This arbitrary and discriminatory application of the law in question, R.C. 3314.015(B)(3), is contrary to the applicable statutory scheme governing community school sponsors in Ohio, and violates the Constitutions of the United States and the State of Ohio. This act by ODE should be examined in the most expeditious manner possible – through an R.C. 119.12 appeal as specifically provided by the General Assembly. This case thus presents a substantial constitutional question to the Court.

This case also presents the Court with the latest example of the application by ODE of the policy of the administration of Governor Strickland to effectively cap the number of new community schools permitted to be opened in Ohio – despite the absence of any such cap established by the General Assembly. The continued pursuit by ODE of the Administration's unwritten policy to stunt the growth of community schools jeopardizes Ohio's ability to effectively compete for Federal funds for education.

Acting under its oversight authority relating to the approval of community school sponsors, R.C. 3314.015(A)(2), ODE was presented with a detailed sponsorship application supported by voluminous documentary evidence submitted by the Appellant, Brookwood Presbyterian Church, d.b.a. Brookwood Community Learning Center ("Brookwood"), pursuant to R.C. 3314.015(B)(1). Rather than review the application materials, however, ODE here determined that "[n]either the national Presbyterian church nor Brookwood Presbyterian Church

is eligible to apply to become a sponsor" because they are not "education-oriented" entities as required by R.C. 3314.015(B)(3). Despite the fact that nothing in the Revised Code prohibits a religious organization as such from applying for or being approved as a sponsor of community schools in Ohio, ODE's decision made it clear that the applicant's status as a church alone was a disqualifying fact in the eyes of ODE: "[a]lso please know that no church has been approved as a sponsor." When Brookwood attempted to pursue an administrative appeal of ODE's decision under R.C. 119.12, as permitted by R.C. 3314.015(D), the court of common pleas dismissed the appeal for lack of subject matter jurisdiction because ODE's factual determination was deemed "final" under R.C. 3314.015(B)(3).

Settled precedent exists for the preference of 119-appeals over alternative forms of review, such as mandamus, to examine adjudicatory permit or licensing decisions of this type made by ODE. See, e.g., *Rossford Exempted Village School Dist. v. State Bd. of Edn.* (1989), 45 Ohio St.3d 356. Indeed here, the General Assembly expressly provided for a R.C. 119.12 appeal from any decision by ODE "to disapprove an entity for sponsorship of a community school." R.C. 3314.015(D). Yet the Court of Appeals' decision would forever foreclose such an appeal when ODE determines, by administrative fiat, that an applicant or category of applicants is not an "education-oriented" entity.

The Court of Appeals' decision thus effectively insulates ODE from review of its denial of any new public community school sponsors in Ohio, and thus fosters ODE's implementation of an unwritten cap on the opening of new community schools in Ohio. This significantly jeopardizes Ohio's ability to compete for and receive federal Title I, Title 20 and federal stimulus funds under the American recovery and Reinvestment Act of 2009 ("ARRA"). The purpose of the ARRA is to advance educational reforms and improve educational funding to create positive

results and opportunities for all students. In addition to other stimulus funds, the ARRA provides for over $4 billion in "Race to the Top" discretionary grants. These grants allow local education agencies ("LEAs"), which include public community schools in Ohio, to obtain significant amounts of federal funds beginning in 2010 if they can show that they are working toward the ideals and goals set forth in the State Fiscal Stabilization Fund Program ("SFSFP").

Both the U.S. Department of Education and the U.S. House Education and Labor Committee have indicated that the selection process for the "Race for the Top" grants is extremely selective. The federal government closely examines whether the states use the stimulus funds the way that Congress intended. One factor the federal government will likely consider in making any "Race for the Top" grants is the status of a state's public community schools. Based on statements made by U.S. Secretary of Education Arne Duncan, it is clear that one of the goals of these stimulus funds is to aid and promote public community schools, and that artificial caps placed on the number of public community schools do not make sense. The highly competitive nature of the "Race for the Top" grants coupled with the federal government's distaste for arbitrary caps placed on community schools means that Ohio and its public community schools will not be able to effectively compete for and receive such important federal funds unless current caps and restrictions – illustrated by the actions of ODE and the Court of Appeals' ruling in the present case – are removed.

The Court of Appeals' reasoning effectively gives ODE unfettered and un-checked power to deny any and all sponsorship applications for whatever reason – even unwritten policy reasons - merely by invoking one of its so-called "final" determinations under R.C. 3314.015(B). This in spite of the clear pronouncement of the General Assembly that ODE's denial of sponsorship applications may be appealed under R.C. 119.12. This case thus directly impacts the ability of

Ohio to obtain needed Federal funds for public education in our State, and is thus of great public and general interest warranting examination by this Court.

II. STATEMENT OF THE CASE AND FACTS

In November 2007, Appellant Brookwood completed and submitted to Appellee ODE a 49-page application, plus 22 pages of supporting documents, in an effort to be approved by ODE as a sponsor of community schools in Ohio. These submittals contained detailed information required by R.C. 3314.015(B) and O.A.C. 3301-102-03, relating to both Brookwood and its parent organization, the national Presbyterian Church USA. On December 3, 2007, ODE acknowledged receipt of the application.

Over the next several months, ODE selected a team of reviewers to conduct an extensive review of the application, sought at various times from Brookwood written clarification of items in the application, and received additional written responses and documents from Brookwood. On March 5, 2008, ODE advised Brookwood that as a result of this process, ODE had preliminarily determined that Brookwood was not an "education-oriented" entity qualified for sponsorship of community schools. On April 4, 2008, Brookwood submitted to ODE a three-page cover letter and a four-inch thick binder full of supporting documents concerning the educational contributions of both Brookwood and the Presbyterian Church USA, seeking ODE to reconsider its preliminary determination.

On May 9, 2008, however, ODE issued its final decision that Brookwood, as a church, is not eligible to apply for sponsorship of community schools in Ohio. ("ODE Decision," a copy of which is attached hereto at Appendix tab C.) Specifically, ODE determined: "Neither the national Presbyterian Church nor Brookwood Presbyterian Church is eligible to apply to become a sponsor. Also please know that no church has been approved as a sponsor." Id.

On May 22, 2008, Brookwood timely filed an administrative appeal pursuant to R.C. 3314.015(D) and R.C. 119.12, with the Court of Common Pleas for Franklin County, Ohio. Included with Brookwood's Notice of Appeal was a demand for ODE to "prepare and certify to the common pleas court a complete record of proceedings in this case." The Clerk's Original Briefing Schedule in the trial court required ODE to file the record on or before June 19, 2008.

On June 19, 2008, however, rather than file any documents comprising the record of its Decision below, ODE filed an affidavit claiming that there was no record to file because "no hearing has occurred." On July 17, 2008, the extension period for the filing of the record with the common pleas court as set by the Clerk's Original Briefing Schedule expired, without the filing of any documents or records of any kind comprising the record of ODE's hearing on Brookwood's application for sponsorship of community schools in Ohio.

On July 23, 2008, Brookwood filed a "Motion for Judgment in Favor of Appellant for Failure of Appellee to File Complete Record," pursuant to R.C. 119.12. On or about August 14, 2008, ODE filed its response to Brookwood's motion and a Motion to Dismiss the appeal for lack of jurisdiction.

On March 2, 2009, the common pleas court issued a combined Decision and Entry on the pending cross-motions. First, the court erroneously held that ODE "is not specifically named in R.C. 119.12(A), . . . the action that is the subject of this appeal does not involve ODE's licensing functions . . and there is no other statute that specifically makes ODE or its action subject to R.C. 119.12." Id.

Next, the common pleas court cited to R.C. 3314.015(B)(3) and held that ODE's determination that Brookwood was not an education-oriented entity "was 'final' and therefore not appealable pursuant to R.C. 119.12." The common pleas court thus denied Appellant's

motion, granted Appellee's motion and dismissed the appeal "for lack of subject-matter jurisdiction." Id.

Appellant timely appealed to the Court of Appeals for Franklin County, Ohio.

On September 8, 2009, the Court of Appeals affirmed the decision of the trial court, although on slightly different grounds. *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, 2009-Ohio-4645 ("Decision and Entry," a copy of which is attached hereto at Appendix tab B.) First, unlike the trial court, the Court of Appeals correctly determined that ODE is generally subject to Chapter 119 of the Revised Code "[i]n the exercise of any of its functions or powers," pursuant to R.C. 3301.13, and that R.C. 3314.015(D) specifically provides that "[t]he decision of the department to disapprove an entity for sponsorship of a community school . . . may be appealed . . . in accordance with section 119.12 of the Revised Code." Id., ¶8.

Yet like the common pleas court, the Court of Appeals determined that because R.C. 3314.015(B)(3) deems ODE's decision "final", the court lacked subject-matter jurisdiction over the 119 appeal, notwithstanding the dictate of R.C. 3314.015(D). Id., ¶10.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

<u>Proposition of Law No. 1:</u> A Decision of the Ohio Department of Education Which Denies a Community School Sponsor Application Under R.C. 3314.015 is Subject to Appeal Under R.C. 119.12. (R.C. 3314.015[D] applied.)

The Court of Appeals correctly held that ODE is an agency of the State which must comply with R.C. Chapter 119 generally, pursuant to R.C. 3301.13, and that an R.C. 119.12 appeal is expressly and specifically guaranteed to an applicant like Brookwood by the statutes governing the specific proceeding at issue here: an application to become a sponsor of community schools in Ohio. R.C. 3314.015(D).

This Court determined nearly 20 years ago that ODE is a state agency which must

comply with R.C. Chapter 119.

> Unlike some other state agencies, ... pursuant to R.C. 3301.13, the Department of Education is expressly included among the agencies that must comply with R.C. Chapter 119. This section provides in relevant part that "[t]he department of education shall be subject to all provisions of law pertaining to departments, offices, or institutions established for the exercise of any function of the state government * * *. In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards[,] the department of education, and any officer or agency therein, shall be subject to Chapter 119. of the Revised Code. * * *" This language is consistent with the definition of "agency" found in R.C. 119.01(A)[1]: "'Agency' means * * * the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code * * *."

(Footnote omitted.) *Rossford Exempted Village School Dist. v. State Bd. of Edn.* (1989), 45 Ohio St.3d 356, 358. See also, *Union Title Co. v. State Bd. of Edn.* (1990), 51 Ohio St.3d 189, 190.

Among the powers delegated by the General Assembly to ODE is the power to approve or disapprove an entity to sponsor community schools in Ohio. R.C. 3314.015. Quasi-judicial proceedings of ODE like the denial of Brookwood's application here may be appealed to the court of common pleas pursuant to R.C. 119.12. *Rossford*, 45 Ohio St.3d, at 362; *Union Title*, 51 Ohio St.3d, at 195.

Most importantly here, however, is the fact that in R.C. 3314.015(D), the General Assembly has expressly provided this right of appeal:

> "The decision of the department to disapprove an entity for sponsorship of a community school or to revoke approval for such sponsorship, as provided in division (C) of this section, may be appealed by the entity in accordance with section 119.12 of the Revised Code."

The applicable Administrative Rules also so provide. See O.A.C. 3301-102-03(G).

Appellant Brookwood's right to appeal ODE's Decision under R.C. 119.12 is not subject to any qualification or condition whatsoever by the plain words of the statute. R.C. 3314.015(D)

does not contain any words like "except as otherwise stated herein," nor does it make any reference to other sections of the statute. The statement of jurisdiction over this appeal in R.C. 3314.015(D) is unambiguous and unequivocal.

The Court of Appeals here violated settled rules of statutory construction by inserting words and phrases in this statute which were not included by the General Assembly. See, e.g., *State ex rel. Smith v. Columbus* (1986), 28 Ohio St.3d 94, 95; *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, paragraph three of the syllabus (a statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged, and that effect must be given to the words used, not to delete words or to insert words not used).

For all these reasons, and the specific unqualified language of R.C. 3314.015(D), the lower court's subject-matter jurisdiction over Brookwood's appeal from ODE's Decision pursuant to R.C. 119.12 cannot be questioned, and the lower court erred as a matter of law in dismissing Appellant's administrative appeal.

<u>Proposition of Law No. 2:</u> A "final" determination by the Ohio Department of Education pursuant to R.C. 3314.015(B)(3) that an entity is not an "education-oriented entity" eligible to apply for sponsorship of community schools in Ohio does not preclude an appeal under R.C. 119.12 from the agency's denial of the application, but instead merely limits the scope of such an appeal to whether the agency's decision was in accordance with law. (R.C. 3314.015(B)(3) and (D), construed and reconciled.)

The Court of Appeals ruled that Brookwood did not have a right to an administrative appeal because of the language of R.C. 3314.015(B)(3), which provides in pertinent part:

> "(3) [ODE] shall determine, pursuant to criteria adopted by rule of the department, if any tax-exempt entity under section 501(c)(3) of the Internal Revenue Code that is proposed to be a sponsor of a community school is an education-oriented entity for purpose of satisfying the condition prescribed in division (C)(1)(f)(iii) of section 3314.02 of the

Revised Code. Such determination of the department is final."[1]

Faced with this statute, the Court of Appeals concluded, without analysis, that it conflicted with subsection (D) of the same statute, and then resolved this "conflict" by reference to R.C. 1.51 – favoring the "specific" statute (B)(3) to the "general" one (D).

Respectfully, the Court of Appeals misapplied settled rules of statutory construction to achieve this result. These two subsections of R.C. 3314.015 are not in conflict at all. Indeed, the Court of Appeals should have started from the general rule of statutory construction that when the General Assembly enacts a statute, "it is presumed that . . . the entire statute is intended to be effective . . ." R.C. 1.47(B). Plus, as detailed above, the court failed to apply the settled rule of statutory construction that a statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged, and that effect must be given to the words used, not to delete words or to insert words not used. See discussion, supra.

Subsection (D) provides unqualified and unconditioned subject matter jurisdiction in the court of common pleas on an administrative appeal under R.C. 119.12 from a "decision of the department to disapprove an entity for sponsorship." This is the only statement of appellate jurisdiction in R.C. 3314.015. Neither subsections (B)(2) nor (B)(3) discuss, qualify, restrict, or even mention appellate jurisdiction under R.C. 119.12. The "final" language of (B)(3) is limited to the *determination* of a particular fact (i.e., whether the applicant is an "education-oriented entity"). In contrast, the administrative appeal language of (D) states that the final *decision* of ODE which flows from all of its individual factual and legal determinations is unambiguously subject to appeal under 119.12. Subsections (B) and (D) thus do not conflict. Because they do

1 Although not applicable here, subsection (B)(2) of this statute, dealing with another factual determination that could be made by ODE, also contains language that the agency's determination is "final."

not conflict, the court is NOT required to choose one over another. Resort to R.C. 1.51 is, therefore, unnecessary and inappropriate

Subsections (B)(2) and (B)(3) still must be construed in this case, of course, because of their statement that certain specific determinations of ODE are "final." Applying the presumption that the entire statute is to be effective is not difficult here, because of the standard of review under a 119 appeal, which includes both factual and legal standards. Specifically, R.C. 119.12 provides that a reviewing court may affirm the agency's decision if it finds "that the order is supported by reliable, probative, and substantial evidence and is in accordance with law."[2] Accordingly, the "final determination" language of R.C. 3314.015(B)(3) does not divest the court of appellate jurisdiction. Instead, subsection (B)(3) merely limits the scope of appellate review provided under subsection (D). Subsection (B)(3) prohibits a reviewing court from re-weighing the evidence and reaching a different factual "determination" than that reached by ODE, thus limiting the R.C. 119.12 review to whether the decision of ODE was "in accordance with law" on this issue.

The court below failed to give R.C. 3314.015 this consistent construction. Instead, in reaching its conclusion that subsection (B)(3) forecloses a 119 appeal, the Court of Appeals relied solely upon one of its previous decisions, *Heartland Jockey Club, Ltd. v. Ohio State Racing Comm'n* (Aug. 3, 1999), Franklin App. No. 98AP-1465. *Heartland Jockey* is neither controlling nor persuasive authority however, for the following reasons.

First, of course, is the fact that *Heartland Jockey* involved an entirely different agency

2 In applying this standard of review in an appeal taken pursuant to R.C. 119.12, the trial court is confined to the record of the proceedings below "as certified to it by the agency." R.C. 119.12; *Giovanetti v. Ohio State Dental Bd.* (1990), 66 Ohio App.3d 381, 383. "[T]he evidence must not only exist, it must be in the record in order to support an affirmance." *Shumaker v. Ohio Dept. of Human Serv.* (1996), 117 Ohio App.3d 730, 737.

(the Ohio Racing Commission) and an entirely different statutory scheme than that involved in this case. Second, this Court in *Heartland Jockey* limited its decision solely to the statute at issue, and did not base its decision upon any over-riding or generally applicable principles of law – nor did it announce any generally applicable principles of law in its decision. Indeed, *Heartland Jockey* is based entirely upon the statute before it, and no other case law or statutory law is even cited in the opinion.

Third, the determination at issue in *Heartland Jockey* involved an entity which had already been granted a permit to expand its permitted activities to televised simulcasts of horse races. In the instant case, by contrast, the issue is whether an entity will be granted a 'permit' or 'license' in the first instance to become a sponsor of community schools. That distinction is significant because the initial grant of a license or permit (or "approval" as in this case) is made subject to an administrative appeal under R.C. 119.12 by both statutory schemes: *see and compare*: R.C. 3314.015(D) applicable in this case as noted above, and R.C. 3769.03.

Fourth, the lower court's conclusion ignores the specific statutory structure and language of R.C. 3314.015, as detailed above. Finally, ODE's underlying Decision is not "in accordance with law" (which is completely separate and independent basis for appeal under R.C. 119.12), notwithstanding the lower court's interpretation of R.C. 3314.015(B)(3). ODE's argument seems to be that an entity can be an "eligible entity" only if ODE says it can – and by the way, this conclusion cannot be appealed. Essentially, ODE asserts that it can hide away from outside review all of the submissions, documents, discussions, and other documents considered by it as part of an application for sponsorship, and thus immunize its disapproval of an entity for community school sponsorship from appeal – despite the plain dictate of R.C. 3314.015(D). ODE's position is thus not merely unsupported by any facts of record, it is also wholly

unsupported by the very statutes upon which it relies.

Because the lower court's decision, like ODE's Decision upon which it is based, is not "in accordance with law," it must be reversed on that basis, pursuant to the applicable R.C. 119.12 appeal standard of review.

Proposition of Law No. 3: A decision of the Ohio Department of Education which denies a community school sponsor application under R.C. 3314.015(B)(3) on the ground that the applicant is not an "education-oriented entity" solely because it is a church violates the Equal Protection Clauses of the United States and Ohio Constitutions, as well as Art. I, §7 of the Ohio Constitution.

In its Decision here, ODE stated that neither the national Presbyterian Church USA nor Brookwood are an "eligible entity" to apply to become a sponsor because they are "clearly organized for religious purposes," specifically declared "that no church has been approved as a sponsor." (Apx. C.) This conclusion pre-supposes an unlawful policy decision by ODE that a church can never be an "education-oriented entity" as defined by O.A.C. 3301-102-02(H)(6)(c).

Ohio Admin. Code §3301-102-02(H)(6)(c) is based upon the requirement set forth in R.C. 3314.015(B)(3) and defines an "eligible entity" in a peculiarly circular manner as "[a]ny qualified tax-exempt entity under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), if . . . the department has determined that the entity is an education-oriented entity whose mission or operations demonstrate that it fosters education. . ." Nothing in this definition of an "eligible entity" requires that such an entity be exclusively organized for educational purposes – yet that is the construction erroneously given by ODE here.

ODE's application of R.C. 3314.015(B)(3) and its regulatory counterpart, O.A.C. 3301-102-02(H)(6)(c), is facially discriminatory against religious entities in Ohio, and is therefore unconstitutional, in violation of the Equal Protection Clauses of the United States and Ohio

Constitutions. (United States Constitution, Fourteenth Amendment; and Ohio Constitution, Art. I, §2.) On their face, the applicable statute and administrative rule are neutral in their application to "an education oriented entity." Yet, in the application of this law, ODE has applied a religious test and determined that any 501(c)(3) entity which is organized primarily for religious purposes will not be eligible to apply ODE to be a sponsor of community schools in Ohio. Such an unconstitutional application of R.C. 3314.015(B) is not "in accordance with law" and cannot be permitted to stand. R.C. 119.12.

In addition, or in the alternative, ODE's application of the "education orientated entity" law to exclude all religious entities as sponsors of community schools violates Article I, Section 7 of the Ohio Constitution. The final sentence of that Section provides, in pertinent part:

> "... Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

Because the direction in Article I, §7 for the General Assembly to pass laws to encourage schools and the means of instruction immediately follows references to religious denominations, such laws should not be construed as limiting this command to publicly owned and operated schools. *Honohan v. Holt* (1968), 17 Ohio Misc. 57, 66-67, 244 N.E.2d 537, 543-44.

The General Assembly here has arguably met its duty in this regard with the passage of facially neutral R.C. 3314.015(B)(3), as did ODE initially in its promulgation of a facially neutral Administrative Rule to carry out this statute. However, ODE's application of that statute in its Decision here violates this command, and should be reversed.

Proposition of Law No. 4: Where an appeal from an order of an administrative agency has been duly made to the common pleas court pursuant to R.C. 119.12, and the agency has not prepared and certified to the

court a complete record of the proceedings within twenty days after receipt of the notice of appeal and the court has granted the agency no additional time to do so, the court must, upon motion of the appellant, enter a finding in favor of the appellant and render a judgment for the appellant. *Matash v. State Dept. of Ins.* (1964), 177 Ohio St. 55, at syllabus, applied.

ODE was required by R.C. 119.12 to prepare and certify to the lower court "a complete record of the proceedings in the case" within thirty days after receipt of the notice of appeal. ODE wholly failed to do so, however. Where, as here, the agency fails to comply with this requirement, the Court is required by that statute to enter a finding in favor of the appealing entity. *State, ex rel. Crockett v. Robinson* (1981), 67 Ohio St.2d 363, 365.

Appellant filed with the lower court a Motion for Judgment based upon the unambiguous requirements of R.C. 119.12, which the lower court denied without analysis. Yet once this Court appropriately determines that subject-matter jurisdiction lies in this administrative appeal, an ultimate ruling in favor of Appellant is compelled by law: "Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected." Id.

It has long been the law in this state that:

> Where an appeal from an order of an administrative agency has been duly made to the Common Pleas Court pursuant to Section 119.12, Revised Code, and the agency has not prepared and certified to the court a complete record of the proceedings within twenty days after receipt of the notice of appeal and the court has granted the agency no additional time to do so, the court must, upon motion of the appellant, enter a finding in favor of the appellant and render a judgment for the appellant.

Matash v. State Dept. of Ins. (1964), 177 Ohio St. 55, at syllabus. This result is mandatory. *State, ex rel. Crockett,* 67 Ohio St.2d at 365.

Without a record before it, the common pleas court are precluded from making a finding in support of ODE's order under R.C. 119.12. Without a timely certified record, the parties - and

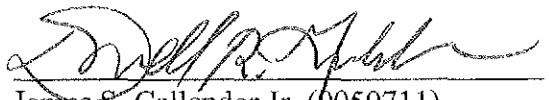
this Court - are left to speculate as to what evidence ODE even considered in reaching its order, let alone whether that evidence was reliable, probative or substantial. The requirement in R.C. 119.12 of the agency (ODE) file the record of its proceedings with the court is designed to prevent any such speculation.

Appellant respectfully requests this Court to re-affirm its decision in *Matash*, making clear the obligation of ODE to certify the entire record which forms the basis for its decision upon a community school sponsor application. Otherwise, the General Assembly's grant of an express right of administrative appeal from ODE's decision on the application would be hollow.

IV. CONCLUSION

For the reasons stated above, this case involves matters of public and great general interest and raises a substantial constitutional question. Appellants request that this Court grant jurisdiction over this appeal so that these important issues may be reviewed on their merits.

Respectfully submitted,



James S. Callender Jr. (0059711)
Donell R. Grubbs (0034655)
grubbs@buckleyking.com
10 West Broad Street, Suite 1300
Columbus, Ohio 43215-3419
(614) 461-5600
(614) 461-5630 (*facsimile*)

Attorneys for Appellant
Brookwood Presbyterian Church

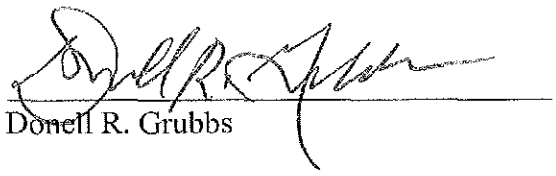
OF COUNSEL:

BUCKLEY KING LPA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction was served by regular U.S. Mail, postage prepaid, upon the following this 23rd day of October, 2009:

Christa T. Metzger
Assistant Attorney General
Education Section
30 E. Broad St., 16th Floor
Columbus, OH 43215



Donell R. Grubbs

IV

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2009 SEP -8 PM 3:57
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brookwood Presbyterian Church,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-303 (C.P.C. No. 08CVF05-07539)
Ohio Department of Education,	:	(ACCELERATED CALENDAR)
Appellee-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 8, 2009, appellant's first and second assignments of error are overruled, appellant's third, fourth, and fifth assignments of error are rendered moot, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

FRENCH, P.J., BROWN and SADLER, JJ.

By Judith French
Judge Judith L. French, P.J.

APPELLANT'S EXHIBIT
A

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2009 SEP -8 PM 3:28
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brookwood Presbyterian Church,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-303 (C.P.C. No. 08CVF05-07539)
Ohio Department of Education,	:	(ACCELERATED CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on September 8, 2009

Buckley King, LPA, and *Donell R. Grubbs*, for appellant.

Richard Cordray, Attorney General, and *Mia Meucci*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Appellant, Brookwood Presbyterian Church ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which dismissed appellant's administrative appeal for lack of subject-matter jurisdiction. For the following reasons, we affirm.

APPELLANT'S EXHIBIT
B

{¶2} Appellant, a tax-exempt, nonprofit entity, applied for community school sponsorship. Appellee, the Ohio Department of Education (the "department"), denied appellant's application. The department concluded that appellant was not eligible to apply for sponsorship. Appellant appealed to the trial court. The department filed a motion to dismiss the appeal. The trial court concluded that, under R.C. 3314.015(B)(3), the department's decision was final and not appealable. The court dismissed the appeal for lack of subject-matter jurisdiction.

{¶3} Appellant appeals, raising five assignments of error:

> APPELLANT'S ASSIGNMENT OF ERROR NO. 1
>
> A Decision of the Ohio Department of Education Which Denies a Community School Sponsor Application, Under R.C. 3314.015 Is Subject To Appeal Under R.C. 119.12.
>
> APPELLANT'S ASSIGNMENT OF ERROR NO. 2
>
> R.C. 3314.015(B)(3) Does Not Preclude An Appeal Under R.C. 119.12 From a Decision of the Ohio Department of Education That An Entity Is Not An "Education-Oriented Entity" Eligible To Apply For Sponsorship of Community Schools in Ohio, Where That Decision is Made Solely Because the Entity Is Organized For Religious Purposes.
>
> APPELLANT'S ASSIGNMENT OF ERROR NO. 3
>
> R.C. 3314.015(B)(3), as Applied By the Ohio Department of Education, Violates the Equal Protection Clauses of the United States and Ohio [Constitutions].
>
> APPELLANT'S ASSIGNMENT OF ERROR NO. 4
>
> R.C. 3314.015(B)(3), as Applied By the Ohio Department of Education, Violates Art. I, § 7 of the Ohio Constitution.

APPELLANT'S ASSIGNMENT OF ERROR NO. 5

The Ohio Department of Education's Failure to Certify Its Record to the Lower Court Compels Entry of Judgment in Favor of Brookwood on the Merits of Its Appeal, Pursuant to R.C. 119.12.

{¶4} We address appellant's first and second assignments of error together. In these assignments of error, appellant argues that the trial court erred by dismissing its appeal for lack of subject-matter jurisdiction. We disagree.

{¶5} Subject-matter jurisdiction refers to a court's power to adjudicate the merits of a case. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11. A motion to dismiss for lack of subject-matter jurisdiction inherently raises questions of law. *Crosby-Edwards v. Ohio Bd. of Embalmers & Funeral Directors*, 175 Ohio App.3d 213, 2008-Ohio-762, ¶21. Appellate courts review de novo the issue of subject-matter jurisdiction without any deference to the trial court's determination. *Cheap Escape Co., Inc. v. Tri-State Constr., L.L.C.*, 173 Ohio App.3d 683, 2007-Ohio-6185, ¶18.

{¶6} "The legislature, in general, has provided the court of common pleas with no jurisdiction over an appeal of an agency decision except as R.C. 119.12 grants." *Springfield Fireworks, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 10th Dist. No. 03AP-330, 2003-Ohio-6940, ¶17, citing *Asphalt Specialist, Inc. v. Ohio Dept. of Transp.* (1988), 53 Ohio App.3d 45. An R.C. 119.12 appeal cannot be taken from an agency action unless (1) the agency is specifically named in R.C. 119.01(A), (2) the agency action involves licensing functions, or (3) some other statute specifically makes the agency or agency action subject to R.C. 119.12. *Springfield Fireworks* at ¶19.

{¶7} Chapter 3314 of the Ohio Revised Code provides for the creation of community schools and prescribes the standards for their operation. In general terms, a community school is a school that operates independently from any school district pursuant to a contract with an authorized sponsoring entity. Although a private, nonprofit entity may apply to become a community school sponsor of a community school, a community school is a "public school" and is "part of the state's program of education." R.C. 3314.01(B).

{¶8} R.C. 3314.02(C)(1) defines those entities that are eligible to become community school sponsors, including local boards of education, for example. R.C. 3314.02(C)(1)(f) allows a tax-exempt, nonprofit entity to become a sponsor if it meets certain conditions. At issue here is the condition that the department must have approved the entity as an "education-oriented entity" pursuant to R.C. 3314.015(B)(3). See R.C. 3314.02(C)(1)(f)(iii).

{¶9} R.C. 3301.13 provides that, "[i]n the exercise of any of its functions or powers," the department is subject to Chapter 119 of the Revised Code. R.C. 3314.015(D) also provides that "[t]he decision of the department to disapprove an entity for sponsorship of a community school or to revoke approval for such sponsorship * * * may be appealed * * * in accordance with section 119.12 of the Revised Code." Appellant argues that these statutes gave the trial court jurisdiction over its appeal. We conclude, however, that the department's decision that appellant was not eligible to apply for community school sponsorship evokes a more specific statute, R.C. 3314.015(B)(3). That statute deems "final" the department's determination on whether

an entity is "an education-oriented entity" eligible to apply for community school sponsorship. With the exception of circumstances not applicable here, specific statutory provisions prevail over general ones. See R.C. 1.51. See also *State v. Volpe* (1988), 38 Ohio St.3d 191, 193 (recognizing that "[w]ell-established principles of statutory construction require that specific statutory provisions prevail over conflicting general statutes"). Thus, R.C. 3314.015(B)(3) applies, and we turn to the question of whether the statute disallowed appellant's appeal by deeming "final" the department's decision that appellant was not eligible to apply for community school sponsorship.

{¶10} In *Heartland Jockey Club, Ltd. v. Ohio State Racing Comm.* (Aug. 3, 1999), 10th Dist. No. 98AP-1465, this court concluded that a statute, R.C. 3769.089(E)(3), foreclosed appeals of the racing commission's decision to deny permission to simulcast a horse race because "the legislature included in the statute the sentence 'the determination of the commission is final.' " The statutory interpretation utilized in *Heartland Jockey* establishes that R.C. 3314.015(B)(3) forecloses appeals of the department's determinations on a nonprofit entity's eligibility to apply for community school sponsorship because the statute renders the department's decision final. Accordingly, R.C. 3314.015(B)(3) disallowed appellant's appeal, and the trial court did not err by dismissing the appeal for lack of subject-matter jurisdiction. Therefore, we overrule appellant's first and second assignments of error. Because we hold that the department's decision is not subject to appeal, we render moot appellant's remaining assignments of error. See App.R. 12(A).

{¶11} In summary, we overrule appellant's first and second assignments of error, and we render moot appellant's remaining assignments of error. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ., concur.

Ohio Department of Education

Susan Tave Zelman
Superintendent of Public Instruction

Office of Community Schools

May 9, 2008

Ellen Wristen
Brookwood Presbyterian Church
2585 E. Livingston Avenue
Columbus, Ohio 43209

Dear Ms. Wristen,

The following will summarize our position pursuant to Brookwood Presbyterian Church's request to reconsider it as an eligible applicant for sponsorship of community schools in Ohio. Members of our office met and discussed the issue on April 24, 2008, with senior leadership.

While the educational endeavors of the Presbyterian Church USA are clear in the supporting documentation you provided, they also parallel the efforts of other religious denominations. Regardless of which denomination has contributed the most to education, it is acknowledged that many have contributed greatly to education in America over the centuries.

Despite the contributions of the Presbyterian Church USA, in your original application and in the recently supplied supporting documentation, Brookwood Presbyterian Church *is* the legal entity making application for sponsorship; not the Presbyterian Church USA, nor any of the colleges associated with it. The 501 c (3) documentation is for the national Presbyterian Church. Thus the national Presybterian Church should be the applicant, not Brookwood Presbyterian Church. The national Presbyterian Church is clearly organized for religious purposes. Brookwood Presbyterian Church, however, is the named applicant indicated in the original sponsorship application and supported by conversations with John Taracko and others in our office. Neither the national Presbyterian Church nor Brookwood Presbyterian Church is eligible to apply to become a sponsor. Also please know that no church has been approved as a sponsor.

The original decision, while reconsidered, has therefore been upheld. The Office of Community Schools does not consider Brookwood Presbyterian Church to be an entity eligible to apply for sponsorship of community schools in Ohio.

Best Regards,

Joni Cunningham
Associate Director

Cc: James Callender, representing Brookwood Presbyterian Church
Paolo DeMaria, Associate Superintendent, Center for School Options and Finance
Kim Murnieks, Executive Director, Center for School Options and Finance
Bill Nelson, Associate Director
John Taracko, Consultant

25 South Front Street, Mail Stop 405, Columbus, Ohio 43215-4183
Telephone (614) 466-7058, (888) 510-3941 • Fax (614) 752-5551
www.ode.state.oh.us

APPELLANT'S EXHIBIT
C