

ORIGINAL

IN THE SUPREME COURT OF OHIO

BROOKWOOD PRESBYTERIAN CHURCH)

Appellant,)

-vs-)

OHIO DEPARTMENT OF EDUCATION,)

Appellee.)

Case No. 2009-1926

Appeal from the Court of Appeals for
Franklin County, Ohio

(Court of Appeals Case No. 09AP -303)

APPELLANT'S MERIT BRIEF

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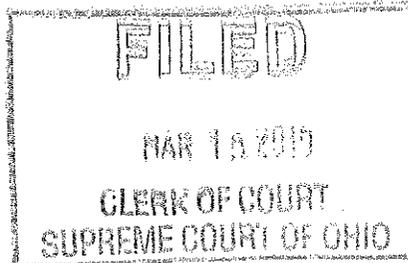


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I. STATEMENT OF FACTS

This case involves an application of law by the Ohio Department of Education in violation of the Ohio Constitution, an issue which should be dealt with in the most expeditious manner possible – through an R.C. Chapter 119 appeal, as recognized by the Supreme Court of Ohio in *Rossford Exempted Village School Dist. v. State Bd. of Edn.* (1989), 45 Ohio St.3d 356; and *Union Title Co. v. State Bd. of Edn.* (1990), 51 Ohio St.3d 189, and as expressly provided by the General Assembly in R.C. 3314.015(D).

In November 2007, Appellant Brookwood Presbyterian Church (“Brookwood”) completed and submitted to Appellee Ohio Department of Education (“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, pursuant to R.C. 3314.02. 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 Brookwood’s Application to become a sponsor of community schools in Ohio. Over the succeeding 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 was attached to Brookwood’s Notice of Appeal in the lower court, R. 2, and is attached hereto at Appendix p. 11, “Apx. 11.”) 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.” (Apx. 11.)

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. (Common Pleas Record [“C.P.R.”] 2.) 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.” *Id.* The Clerk’s Original Briefing Schedule in the trial court required ODE to file the record on or before June 19, 2008. (C.P.R. 3.)

On June 19, 2008, however, rather than file any documents comprising the record of its Decision below, ODE filed a “Notice” and affidavit claiming that there was no record to file because “no hearing has occurred.” (C.P.R. 14 and 15.) This was erroneous as a matter of law. On July 17, 2008, the extension period for the filing of the record with the court as set by the Clerk’s Original Briefing Schedule in this matter expired, without the filing of any documents or records of any kind comprising the record of ODE’s consideration of 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. (C.P.R. 15.) On or

about August 14, 2008, ODE filed its response to Brookwood's motion as well as ODE's own motion to dismiss the appeal for lack of jurisdiction. (C.P.R. 23.)

On March 2, 2009, the common pleas court issued a combined Decision and Entry on the pending cross-motions. (C.P.R. 27.) First, the lower 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.)

Second, the common pleas court cited to R.C. 3314.015(B)(3) in its combined Decision and Entry and held that the determination made by ODE that Brookwood was not an education-oriented entity "was 'final' and therefore not appealable pursuant to R.C. 119.12." (Id.) The court then concluded that because R.C. 119.12 "does not govern this case . . . ODE was not obligated to certify a record of its proceedings to this Court." The lower court 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. (C.P.R. 32; Court of Appeals Record ["C.A.R."] 4.)

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 p. 5.) 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., Apx. 8, ¶9.)

Yet like the common pleas court, the court of appeals determined that notwithstanding the plain language of R.C. 3314.015(D), because ODE’s conclusion that Brookwood is not an education-oriented entity is deemed “final” by R.C. 3314.015(B)(3), the court lacked subject-matter jurisdiction over the 119 appeal. (Id., Apx. 8-9, ¶¶9, 10.)

II. ARGUMENT

A. Appropriate Standard of Review

This is an administrative appeal from the decision of the lower court to dismiss the appeal for lack of subject-matter jurisdiction. This court’s review of a trial court’s decision to dismiss a case is de novo. *State ex rel. Drake v. Athens Cty. Bd. of Elections* (1988), 39 Ohio St.3d 40.

The original appeal was filed in the common pleas court pursuant to R.C. 119.12 and R.C. 3314.015(D), from the Decision of the Appellee ODE which determined that Appellant Brookwood is not an entity eligible to apply for sponsorship of community schools in Ohio. ODE’s Decision is thus appealed to this Court under the standard of review set forth in R.C. 119.12, which provides in pertinent part:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

In applying this standard of review, 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.

In this case, as detailed in the arguments below in support of Propositions of Law 1 and 2, the common pleas court had subject matter jurisdiction over Brookwood’s administrative appeal pursuant to R.C. 3314.015(D) and R.C. 119.12. The court’s jurisdiction over the appeal is not negated by R.C. 3314.015(B)(3), and thus it was reversible error for the court to dismiss Brookwood’s administrative appeal for lack of subject matter jurisdiction.

As argued in support of Proposition of Law No. 3, applying the standard of review required by R.C. 119.12 leads to the inescapable conclusion that ODE’s decision is not in accordance with law. First, ODE’s decision was arbitrary and made without reference to any criteria adopted by rule, in violation of R.C. 3314.015(B)(3). Second, the sole arbitrary criterion that ODE invented to justify its disapproval was discriminatory and unconstitutional. ODE disapproved Brookwood’s application for one reason: because Brookwood and its national parent is a church. Although presented in the guise of a determination under R.C. 3314.02(C)(1)(f)(iii) that Brookwood was not an “education-oriented” entity entitled to serve as a sponsor of community schools in Ohio, the agency issued a sweeping statement that the terms “church” and “education-oriented entity” are mutually exclusive for purposes of R.C. Chapter 3314. Yet this religious test for qualification as a sponsor of community schools in Ohio does not appear in R.C. Chapter 3314. It was created from whole cloth by the agency, without statutory support or authorization and contrary to the Constitutions of the United States and the State of Ohio. This discriminatory religious test must be rejected as a matter of law.

Finally, as explained in support Proposition of Law No. 4, because ODE failed to file its record in the court of common pleas, there also exists no reliable, probative, and substantial

evidence of record upon which this or any court may affirm ODE's decision, as required by the standard set forth in R.C. 119.12. As a result, ODE's decision to disapprove Brookwood's application to become a sponsor of community schools in Ohio must be reversed on its merits as a matter of law, pursuant to R.C. 119.12 and *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 363, 365.

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.)

The court of appeals below, in its first two sentences of ¶9 of its decision, 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. The court also correctly observed that an R.C. 119.12 appeal is expressly and specifically guaranteed to an applicant like Brookwood by the statute which governs the specific proceeding at issue here: disapproval by ODE of 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. This Court in *Rossford* and *Union Title* held, at syllabus, that the actions of the State Board of Education upon a request for transfer of school territory under R.C. 3311.24 and R.C. 3311.06 are quasi-judicial acts appealable to the court under R.C. 119.12.

More compelling, however, is the fact that the specific statutory scheme at issue in this case, relating to the approval by ODE of an entity to be a community school, expressly provides for a right of administrative appeal. R.C. 3314.015(D).

Among the powers delegated by the General Assembly to ODE is the power to approve an entity to be a sponsor of community schools in Ohio. R.C. 3314.015(A)(2). A “sponsor” is any entity listed in R.C. 3314.02(C)(1) “which has been approved by the department of education to sponsor community schools and with which the governing authority of the proposed community school enters into a contract pursuant to” R.C. 3314.02. R.C. 3314.02(A)(1). There are six categories of entities listed in division (C)(1) of the statute which may be approved as a sponsor: four categories include various types of local boards of education, one category includes any entity designated by the board of trustees of one of the state universities in Ohio, and the final category relevant here consists of any qualified tax-exempt entity under section 501(c)(3) of the Internal Revenue Code which satisfies the following conditions:

- (i) the entity has been in operation for at least five years prior to applying to be a community school sponsor;
- (ii) the entity has assets of at least \$500,000 prior to applying;
- (iii) “the department of education has determined that the entity is an education-oriented entity under division (B)(3) of section 3314.015 of the Revised Code and

the entity has a demonstrated record of successful implementation of educational programs;” and

- (iv) The entity is not a community school.

R.C. 3314.02(C)(1).

No entity, regardless of category, may enter into a contract with a proposed community school until it has received approval from ODE to be a sponsor. R.C. 3314.015(B)(1), first sentence. ODE was required to adopt rules “containing criteria, procedures, and deadlines for processing applications for such approval.” *Id.* ODE has, with one major relevant exception discussion in Proposition of Law No. 3, generally adopted such rules. See O.A.S. 3301-102-03.

Most important here, in R.C. 3314.015(D) the General Assembly expressly provided the right of a Chapter 119 administrative appeal to a party whose application to become a sponsor of community schools in Ohio is not approved by ODE:

“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.” (Emphasis added.)

The applicable Administrative Rule mirrors this jurisdictional language: “The decision of the department to disapprove an entity for sponsorship of a community school may be appealed by the entity in accordance with section 119.12 of the Revised Code.” O.A.C. 3301-102-03(G).

Section 3314.015(D) is unambiguous and definite. It grants jurisdiction for an administrative appeal in accordance with R.C. 119.12 to “an entity” that has been “disapproved ... for sponsorship” by ODE. Where, as here, statutory text is unambiguous and definite it must be applied as written and no further interpretation is necessary. *HIN, L.L.C. v. Cuyahoga City Board of Revision*, 2010-Ohio-687, ¶15; *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio.St.3d 543, 545, 660 N.E.2d 463.

The type of entity which has been granted appeal rights is not limited or conditioned in any way by the General Assembly, other than being an entity disapproved for sponsorship by ODE. That is, the statute does not grant a right of appeal to only certain types of entities, such as an *eligible* entity, whatever that may mean, or only to an entity from one 3314.02(C)(1) category but not to another.

Neither is the type of decision which is appealable ambiguous. The statute provides that “the decision of the department to disapprove an entity for sponsorship” may be appealed in accordance with R.C. 119.12. The statute does not state that only certain aspects or categories of the department’s decision may be appealed, while others may not. Instead, the statute clearly states that “the decision . . . to disapprove an entity for sponsorship” may be appealed – period, regardless of the reason or reasons for the decision of the department.

Finally, R.C. 3314.015(D) does not contain any qualifying words of reference to other statutes or subsections. That is, the statute does not provide a right of appeal “except as otherwise stated herein,” nor does it use any similar words which would serve to alter or limit the jurisdictional right of an entity to an administrative appeal from ODE’s decision to disapprove that entity for sponsorship. The statute is plain and definite on its face, as a matter of law.

Brookwood is “an entity.” Brookwood submitted an application to ODE to receive its approval for sponsorship of community schools, as permitted by R.C. 3314.015(B)(1). ODE decided “to disapprove an entity [Brookwood] for sponsorship of a community school.” Brookwood, may appeal that decision in accordance with R.C. 119.12, pursuant to the unambiguous and definite grant of appellate jurisdiction in R.C. 3314.015(D). Section 119.12 of the Revised Code provides that such appeal is to the court of common pleas. The courts of common pleas have “such powers of review of proceedings of administrative officers and

agencies as may be provided by law.” Art. IV, Sec. 4(B), Constitution of Ohio. No qualification to the General Assembly’s express grant of subject matter jurisdiction to the court of common pleas here may be grafted onto the statute by a court.

For all the foregoing reasons, the lower courts erred as a matter of law in dismissing Appellant’s administrative appeal for lack of subject matter jurisdiction. The decision of the court of appeals must be reversed.

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 to whether the agency’s decision was in accordance with law. (R.C. 3314.015(B)(3) and (D), construed and reconciled.)

Yet the court of appeals also ruled at ¶9 of its Decision and Entry that Brookwood did not have a right to an administrative appeal because of the language of R.C. 3314.015(B)(3). That division of the statute 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 division (D) of the same statute, and then resolved this “conflict” by reference to R.C. 1.51 – favoring what it termed the “specific” division (B)(3) to the “general” one, (D).

Respectfully, the court of appeals misapplied settled rules of statutory construction to achieve this erroneous result. These two divisions of R.C. 3314.015 are not in conflict at all, nor

¹ Although not applicable here, division (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.”

is one more “specific” with relation to the other. 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, “and each part has some import.” R.C. 1.47(B); *Ford Motor Co. v. Ohio Bur. Empl. Serv.* (1991), 59 Ohio.St.3d 188, 190. When properly viewed through that prism of construction, at least two things become immediately clear.

First, R.C. 3314.015(D) is a statement of appellate jurisdiction, while division (B)(3) is not. As set forth above, division (D) expressly provides subject matter jurisdiction to the courts of common pleas over a decision by ODE to disapprove sponsorship. This is the only statement of appellate jurisdiction in R.C. 3314.015. Division (B)(3) does not discuss, qualify, restrict, or even mention appellate jurisdiction under R.C. 119.12.

Second, R.C. 3314.015(B)(3) instead requires ODE to make a specific factual determination along its road to reaching the ultimate decision about whether to approve an entity as a sponsor of community schools. The language of (B)(3) is limited to the determination of whether the applicant is an “education-oriented entity.” This is certainly one part of ODE’s required chain of determinations in reaching its ultimate decision of whether to approve or disapprove an entity as a sponsor; but it is only one of many determinations the agency must make in reaching its final decision.

Division (B)(3) and (D) thus deal with different subjects and have different importance. These two divisions do not present the situation contemplated by R.C. 1.51 of a “general statute” conflicting with a “special or local provision.” These two divisions do not conflict, and the court is not required to choose one over another. Resort to R.C. 1.51 is, therefore, unnecessary and inappropriate.

Even if R.C. 3314.015(B)(3) and (D) were viewed as specific versus general provisions, which they are not, R.C. 1.51 requires first that “they shall be construed, if possible, so that effect is given to both.” In this respect, R.C. 1.51 is consistent with R.C. 1.47(B)’s presumption that “the entire statute is intended to be effective.” The court of appeals made no effort to reconcile these divisions of the statute, contrary to the very rule it cited to favor the one over the other. This was reversible error.

The Court of appeals violated settled rules of statutory construction in at least two additional respects: (1) by looking beyond the unambiguous terms of a statute in an effort to “construe” that statute; and (2) by inserting words and phrases in this statute which were not included by the General Assembly. *Erb v., Erb* (2001), 91 Ohio St.3d 503, 507; *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).

First, the court of appeals improperly added words to the unambiguous R.C. 3314.015(D) when it looked to another paragraph of this section, R.C. 3314.015(B)(3). Because division (B)(3) does not mention appellate jurisdiction, the only way the court of appeals court get from division (D) to division (B)(3) was by adding the words “except as otherwise provided herein” to division (D), or by otherwise qualifying appellate jurisdiction where none exists in the language used by the General Assembly. This was error.

Second, the lower court compounded its error when it added words to what it viewed as the “more specific” statute, R.C. 3314.015(B)(3). The only way the court of appeals could construe this division to foreclose the entity’s right to an administrative appeal, where

administrative appeal is not even mentioned in the division, is to add words such as “and may not be appealed notwithstanding division (D) of this section” after the word “final.”

The question remains, of course, what is the meaning of the word “final” as used by the General Assembly in R.C. 3314.015(B)(3)? Division (B)(3) still must be reconciled with division (D). Yet applying the presumption of R.C. 1.47(B) 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 an agency’s decision if it finds “that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.”² The reviewing court must thus find that the agency order is both factually supported (“by reliable, probative, and substantial evidence”) and legally supported (“is in accordance with law”).

Accordingly, the “final determination” language of R.C. 3314.015(B)(3) does not divest the court of appellate jurisdiction. Instead, this division at most limits the scope of appellate review provided under subsection (D) and renders “final” the factual determination called for by division (B)(3). It does not cancel out appellate review altogether. Division (B)(3) thus merely prohibits a reviewing court from re-weighing the evidence viewed by ODE and reaching a different factual “determination” than that reached by ODE.

The result is that the R.C. 119.12 review on appeal is limited to whether the decision of ODE was “in accordance with law” on this issue, *i.e.*, whether the agency’s ultimate decision

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.

[see R.C. 3314.015(D)] properly applied the law relevant to the factual determination of whether the entity is education-oriented and was not arbitrary, capricious or an abuse of discretion.³

The court below failed to give the various divisions of R.C. 3314.015 this, or any other, consistent construction. Instead, in reaching its conclusion that division (B)(3) forecloses a 119 appeal, the court of appeals relied solely upon one of its previous unreported decisions, *Heartland Jockey Club, Ltd. v. Ohio State Racing Comm'n* (Aug. 3, 1999), 1999 WL 566857, to completely divest itself of subject matter jurisdiction. *Heartland Jockey* is neither controlling nor persuasive authority for this position however, for the following reasons.

First, of course, is the fact that *Heartland Jockey* involved an entirely different agency (the Ohio Racing Commission) and an entirely different statutory scheme than that involved in this case. Second, the 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

³ As explained in Proposition of Law No. 3, ODE’s determination that Brookwood is not education-oriented is necessarily arbitrary and not in accordance with law, because ODE has promulgated no rules to guide its determination. This is in spite of the General Assembly’s specific command in R.C. 3314.015(B)(3) that ODE’s factual determination is to be made “pursuant to criteria adopted by rule of the department.” ODE has never adopted such a rule, nor even published any criteria to guide its “education oriented” determination.

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.

In sum, ODE's "final" determination 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 from ODE's final decision pursuant to R.C. 3314.015(D). Instead, the scope of review upon an appeal from the agency's "education-oriented" determination may be limited to whether the ultimate decision to disapprove sponsorship was in accordance with law, pursuant to R.C. 119.12. Because the lower court's decision, like ODE's Decision upon which it is based, is not "in accordance with law" (see discussion in Proposition of Law No. 3, below) it must be reversed.

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," and specifically declared "that no church has been approved as a sponsor." This conclusion pre-supposes an unlawful policy decision by ODE that a church can never be an "education-oriented entity."

Initially, ODE's decision is arbitrary and contrary to law. The applicable statute upon which ODE's Decision is based, R.C. 3314.015(B)(3), requires that the question of whether an entity is education-oriented is to be determined "pursuant to criteria adopted by rule of the department." But ODE has never adopted any such criteria, by rule or otherwise. Thus, because ODE's determination that Brookwood was not an education-oriented entity was not made "pursuant to criteria adopted by rule of the department," it is not in accordance with law and must be reversed.

A diligent search of Chapter 3301, Section 102 of the Ohio Administrative Code, the rules applicable to sponsors of community schools, reveals no mention whatsoever of any criteria to guide ODE's determination of whether an entity is "education-oriented." In fact, the term "education-oriented" is mentioned only once in the entire Administrative Code, at O.A.C. 3301-102-02(H)(6)(c). This rule is nothing more than a rote copy of the list of entities able to become sponsors set forth in R.C. 3314.02(C)(1), and merely repeats the requirement that ODE "has determined that the entity is an education-oriented entity whose mission or operations demonstrate that it fosters education." R.C. 3314.02(C)(1)(f)(iii).

Thus, despite the specific command of the General Assembly to adopt rules which set forth the criteria for when an entity is “education oriented” for purposes of becoming a sponsor of community schools, ODE wholly failed to do so. Instead, upon receipt of Brookwood’s application, ODE decided to “wing it” and somehow came up with a discriminatory and unconstitutional religious test for this key term, with nothing in the Revised Code or its own rules to justify it. Nothing in O.A.C. 3301-102-02(H)(6)(c), and indeed nothing in the Revised Code, requires that an entity must be exclusively organized for educational purposes to become a sponsor – yet that is the conclusion erroneously reached by ODE here. Under these circumstances, to treat ODE’s arbitrary determination as “final” and beyond appellate review would be a gross abdication of governmental authority to bureaucratic officers of the executive branch.

ODE’s application of R.C. 3314.015(B)(3) and its regulatory counterpart, O.A.C. 3301-102-02(H)(6)(c), is also 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.” Compare, R.C. 3314.015(B)(3) and O.A.C. 3301-102-02(H)(6)(c). Yet in its application of this law ODE has applied a religious test and determined that any 501(c)(3) entity organized primarily for religious purposes will not be eligible to apply ODE to be a sponsor of community schools in Ohio, regardless of the scope or degree of that entity’s orientation towards education. 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 oriented entity" requirement 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 to pass a facially neutral requirement that private non-profit sponsors of community schools must be "education oriented" entities. R.C. 3314.015(B)(3). ODE's application of that statute in its Decision here, however, draws an unlawful distinction between religious entities and non-religious entities and thereby violates Constitutional guarantees of equal protection and non-discrimination against religious entities, 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.

Brookwood filed with the common pleas court a Motion for Judgment based upon the unambiguous requirements of R.C. 119.12 and *Crockett*, which the lower court denied without analysis. Yet once this Court appropriately determines that subject-matter jurisdiction lies in this administrative appeal, an immediate ruling in favor of Appellant is compelled by R.C. 119.12: “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. Judgment on the merits against the agency is mandatory. *Crockett*, 67 Ohio St.2d at 365 (“The language of the statute is clear; if the agency fails to comply, then the court must enter a finding in favor of the party adversely affected. The statute entitles the party to be put in the same position as if the court had ruled on the merits.”).

Moreover where, as here, the agency totally fails to certify the record to the court, the court is not required to determine whether the omission has prejudiced the appellant in the presentation of his appeal. *Luther v. Bur. of Emp. Serv.* (1984), 14 Ohio App.3d 267, 268. See also, *Geroc v. Ohio Veterinary Medical Bd.* (1987), 37 Ohio App.3d 192, 197 (where no timely extension of time is granted to the agency, “an agency’s failure to certify the record in a timely

manner as required by R.C. 119.12 mandates that the trial court, upon motion, enter a judgment in favor of the party adversely affected”). This is because the prejudice to the appellant by the complete failure to certify the administrative record on appeal is patent.

Without a record before it, the common pleas court is thus precluded on remand from making a finding in support of ODE’s order under R.C. 119.12. Without a timely certified record, the parties - and the courts - are left to speculate as to what factors ODE even considered in reaching its decision. The requirement in R.C. 119.12 of the agency to file the record of its proceedings with the court is designed to prevent such speculation.

ODE is not entitled to a “do-over” on remand of this appeal to the court of common pleas. ODE deliberately failed to file the record in this case, and did so on the mistaken ground that no record existed because there was no “hearing” or “proceeding.” (C.P.R. 14.) Significantly, ODE did not refuse to file its record on the ground that its decision was not appealable under R.C. 119.12.

Brookwood respectfully requests this Court to re-affirm its decision in *Matash*, making clear the obligation of ODE in the future to certify the entire record which forms the basis for its decisions 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 pursuant to R.C. 3314.015(D) would be meaningless.

Pursuant to the unambiguous language of R.C. 119.12, the total failure of ODE to comply with the obligation to file the administrative record in this case requires this Court to reverse the decision of the trial court and enter a finding in favor of Brookwood, granting the relief requested by Brookwood’s statutory Motion for Judgment in its favor, that is, entry of judgment

in favor of Brookwood and an order directing ODE to grant Brookwood's application to become a sponsor of community schools in Ohio.

III. CONCLUSION

For all the foregoing reasons, Appellant Brookwood respectfully urges this Court to reverse the decision of the lower courts which dismissed Brookwood's R.C. 119.12 appeal for lack of subject matter jurisdiction, and to reinstate that appeal. In addition and pursuant to R.C. 119.12, Appellant also respectfully urges this Court to issue a mandate directing the common pleas court to enter a final order and entry which: (1) finds that ODE's Decision is not in accordance with law; (2) reverses the Decision of ODE for failure of that agency to file its record on appeal; (3) renders judgment in favor of Brookwood upon its eligibility to be a sponsor of community schools in Ohio; and (4) awards compensation to Brookwood for its fees in accordance with R.C. 2335.39, upon its original Motion for Judgment and for this appeal, as authorized under R.C. 119.12.

Respectfully submitted,



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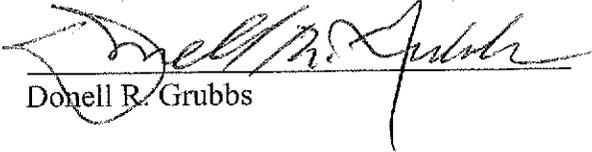
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Attorneys for Appellant
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Appellant was served by regular U.S. Mail, postage prepaid, upon the following this 15th day of March, 2010:

Mia Meucci
Assistant Attorney General
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Donell R. Grubbs

APPENDIX

1.	Notice of Appeal	Apx. 1
2.	September 8, 2009, Judgment of the Court of Appeals.....	Apx. 4
3.	September 8, 2009, Opinion of the Court of Appeals.....	Apx. 5
4.	May 9, 2008, Decision Letter, Ohio Dept. Education.....	Apx. 11
5.	O.A.C. 3301-102-02.....	Apx. 12
6.	O.A.C. 3301-102-03.....	Apx. 15
7.	Ohio Constitution, Article I, Section 2.....	Apx. 17
8.	Ohio Constitution, Article I, Section 7.....	Apx. 18
9.	Ohio Constitution, Article IV, Section 4(B).....	Apx. 19
10.	<i>Heartland Jockey Club, Ltd. v. Ohio State Racing Comm'n</i> (Aug. 3, 1999), Franklin App. No. 98AP-1465	Apx. 20

IN THE SUPREME COURT OF OHIO

BROOKWOOD PRESBYTERIAN CHURCH,

Appellants,

-vs-

OHIO DEPARTMENT OF EDUCATION,

Appellee.

09-1926

Case No. _____

On Appeal from the Court of Appeals For Franklin County, Ohio Tenth Appellate District

Court of Appeals Case No. 09AP -303

NOTICE OF APPEAL OF APPELLANT

BROOKWOOD PRESBYTERIAN CHURCH

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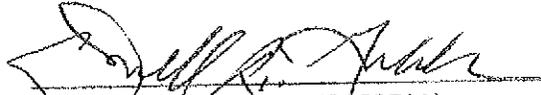
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OCT 23 2009
CLERK OF COURT
SUPREME COURT OF OHIO

ALL-STATE LEGAL
Apx. 1

Notice is hereby given that Appellant, Brookwood Presbyterian Church, appeals to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District of Ohio, entered in Case No. 09-AP -303 on September 8, 2009.

This case raises a substantial constitutional question and is one of public or great general interest. A Memorandum in Support of Jurisdiction has been filed contemporaneously with this Notice.

Respectfully submitted,



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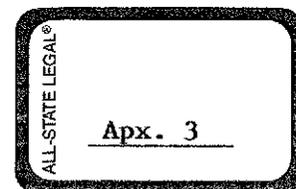
Attorneys for Appellant
Brookwood Presbyterian Church

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Notice of Appeal was served via first class U.S. mail, postage prepaid, this 23rd day of October, 2009, upon:

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Counsel for Plaintiffs-Appellants



IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

Brookwood Presbyterian Church, :
Appellant-Appellant, :
v. :
Ohio Department of Education, :
Appellee-Appellee. :

No. 09AP-303
(C.P.C. No. 08CVF05-07539)
(ACCELERATED CALENDAR)

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

{¶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

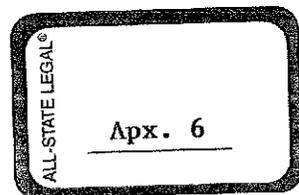
R.C. 3314.015(B)(3) Does Not Preclude An Appeal Under R.C. 119.12 From a Decision of the Ohio Department of Education That An Entity Is Not An "Education-Oriented Entity" Eligible To Apply For Sponsorship of Community Schools in Ohio, Where That Decision is Made Solely Because the Entity Is Organized 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

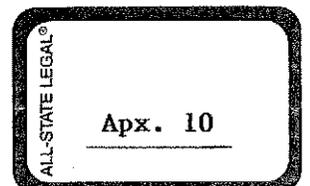
an entity is "an education-oriented entity" eligible to apply for community school sponsorship. With the exception of circumstances not applicable here, specific statutory provisions prevail over general ones. See R.C. 1.51. See also *State v. Volpe* (1988), 38 Ohio St.3d 191, 193 (recognizing that "[w]ell-established 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.



Office of Community Schools

May 9, 2008

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

Dear Ms. Wristen,

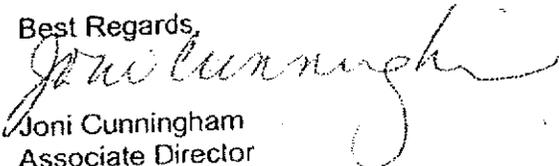
The following will summarize our position pursuant to Brookwood Presbyterian Church's request to reconsider it as an eligible applicant for sponsorship of community schools in Ohio. Members of our office met and discussed the issue on April 24, 2008, with senior leadership.

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 Presbyterian 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

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Ohio Administrative Code

3301. Department of Education - Administration and Director

Chapter 3301-102. Community Schools

All regulations passed and filed through November 1, 2009

3301-102-02. Definitions

The following terms are defined as they are used in the rules in this chapter:

(A) "Administrative office" means the primary center as designated by the community school that houses the following items, including, but not limited to:

- (1) Student records;
- (2) Personnel files;
- (3) Financial records;
- (4) School policies and procedures; and
- (5) The school's main telephone line.

(B) "Base of operation" means a central facility where an internet- or computer-based community school maintains its administrative office.

(C) "Challenged school district" means any of the following:

- (1) A school district that is part of the pilot project area;
- (2) A school district that is in a state of academic emergency under section 3302.03 of the Revised Code;
- (3) A school district that is in a state of academic watch under section 3302.03 of the Revised Code;
- (4) A big eight school district means a school district that for fiscal year 1997 met the following conditions:

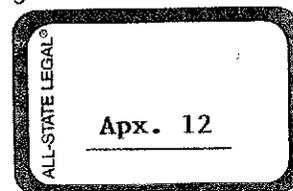
(a) Had a percentage of children residing in the district and participating in the predecessor of Ohio works first greater than thirty per cent, as reported pursuant to section 3317.10 of the Revised Code; and

(b) Had an average daily membership greater than twelve thousand, as reported pursuant to former division (A) of section 3317.03 of the Revised Code.

(D) "Community school" means a public school created under Chapter 3314. of the Revised Code, independent of any school district and part of the state's program of education.

(E) "Community school contract" means a written agreement and any amendments thereto, between the sponsor and the governing authority of a community school that establishes the duties, rights and responsibilities of both parties in accordance with all sections of the Revised Code and all rules of the Administrative Code that are applicable to sponsors and community schools.

(F) "Conversion school" means a community school created by converting all or a portion of an existing traditional public school to a community school.



(G) "Department" means the Ohio department of education.

(H) "Eligible entity" means any of the following:

(1) The board of education of the district in which the school is proposed to be located;

(2) The board of education of any joint vocational school district with territory in the county in which is located the majority of the territory of the district in which the school is proposed to be located;

(3) The board of education of any other city, local, or exempted village school district having territory in the same county where the district in which the school is proposed to be located has the major portion of its territory;

(4) The governing board of any educational service center, as long as the proposed school will be located in a county within the territory of the service center or in a county contiguous to such county;

(5) The board of trustees of any of the thirteen state universities listed in section 3345.011 of the Revised Code [university of Akron, Bowling Green state university, Central state university, university of Cincinnati, Cleveland state university, Kent state university, Miami university, Ohio university, the Ohio state university, Shawnee state university, university of Toledo, Wright state university, and Youngstown state university], or a sponsoring authority designated by any such board of trustees, as long as a contractually specified mission of the proposed community school will be the practical demonstration of teaching methods, educational technology, or other teaching practices that are included in the university's teacher preparation program approved by the state board;

(6) Any qualified tax-exempt entity under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3) (March 2005), if all of the following conditions are satisfied:

(a) The entity has been in operation for at least five years prior to the application date;

(b) The entity has assets of at least five hundred thousand dollars and must demonstrate a record of financial responsibility;

(c) The department has determined that the entity is an education-oriented entity whose mission or operations demonstrate that it fosters education; and

(d) The department has determined that the entity has successfully implemented educational programs; and

(e) The entity is not a community school.

(f) "Fiscal year" means July first through June thirtieth.

(J) "Governing authority" means a board of not less than five individuals who are charged with the responsibility of establishing policies and procedures for the operation and management of a community school and responsible for carrying out all of the provisions of a community school contract. The following stipulations apply to members of a governing authority:

(1) No person shall serve on the governing authority or operate the community school under contract with the governing authority so long as the person owes the state any money or is in a dispute over whether the person owes the state any money concerning the operation of a community school that has closed;

(2) No person shall serve on the governing authorities of more than two start-up community schools at the same time; and

(3) No present or former member, or immediate relative of a present or former member of the governing authority of any community school established under Chapter 3314. of the Revised Code shall be an owner, employee or consultant of any nonprofit or for-profit operator of a community school, as defined in section 3314.014 of the Revised Code, unless at least one year has elapsed since the conclusion of the person's membership.

(K) "Immediate relatives" means spouses, children, parents, grandparents, siblings, and in-laws.

(L) "Internet- or computer-based school" has the same meaning as defined in division (A)(7) of section 3314.02 of the Revised Code.

(M) "New start-up school" means a new community school other than one created by converting all or a portion of an existing traditional public school.

(N) "Office of Community Schools" means the office in the department established to provide advice and services for the community schools program established pursuant to Chapter 3314. of the Revised Code.

(O) "Pilot project area" means the school districts included in the territory of the former community school pilot project established by former section 50.52 of Am. Sub. H.B. No. 215 of the 122nd general assembly. This "pilot project area" includes the entire territory of any school district having the majority of its territory in Lucas County.

(P) "Preliminary agreement" means a written agreement and any amendments thereto, between a proposing person or group and a sponsor that sets forth the intention of both parties to negotiate in good faith towards the execution of a community school contract in accordance with Chapter 3314. of the Revised Code.

(Q) "Site visit" means a visit in person by a representative of the sponsor, or of the department, on-site at the location of the school with the school administrator, fiscal officer, and/or member(s) of the governing authority to review and verify contractual, local, state and federal compliance as to the following matters, including, but not limited to: health and safety, educational program, including student academic assessment, fiscal operations, governance and administration, and assessment and accountability.

(R) "Sponsor" means an eligible entity which has been approved by the department to sponsor community schools and which has entered into a sponsorship agreement with the department regarding the manner in which it will conduct its sponsorship, or an entity other than the state board of education that has entered into a community school contract to sponsor a community school on or before April 8, 2003.

(S) "Sponsorship agreement" means a written agreement, and any amendments thereto, between the department and an entity approved by the department to be a sponsor which establishes the duties, rights and responsibilities of both parties in accordance with all sections of the Revised Code and all rules of the Administrative Code that are applicable to sponsors and community schools.

(T) "State board" means the state board of education.

(U) "Technical assistance" means providing relevant knowledge and/or expertise and/or assuring the provision of the following resources to assist the community school in fulfilling its mission, including, but not limited to: training, information, written materials and manuals.

History. Effective: 04/19/2008

R.C. 119.032 review dates: 01/31/2008 and 04/19/2013

Promulgated Under: 119.03

Statutory Authority: 3301.07, 3314.015, 3314.08

Rule Amplifies: 3314.015, 3314.02, 3314.03, 3314.08

Prior Effective Dates: 7/7/03

Ohio Administrative Code

3301. Department of Education - Administration and Director

Chapter 3301-102. Community Schools

All regulations passed and filed through November 1, 2009

3301-102-03. Approval of sponsors

(A) The department shall establish the annual application and approval process, including cycles and deadlines during the fiscal year, for eligible entities who may become sponsors of new start-up community schools in challenged school districts and post that information on the department's website by July first each year.

(B) An eligible entity shall obtain a written application from the department to become a sponsor and shall complete it and submit it to the department no later than the deadlines posted on the department's website.

(C) Confirmation of applications received shall be posted on the department's website.

(D) The department shall provide written notice to each applicant of the department's approval or reasons for disapproval of each application after completion of the department's review process.

(E) An eligible entity shall provide as part of its initial written application, as well as during the application review process, evidence requested and deemed necessary by the department, including, but not limited to, evidence of its ability (e.g., possessing, or assuring the provision of, the relevant knowledge and/or experience and the human and financial capacity) and willingness to do all of the following:

(1) Demonstrate that the entity is an eligible entity capable of sponsoring a new start-up school(s) to be located in a challenged school district(s);

(2) Demonstrate that if the entity sponsors or operates schools in another state, at least one of the schools sponsored or operated by the entity must be rated comparable to or better than the performance of Ohio schools rated in continuous improvement;

(3) Demonstrate that the entity or its representative(s) possess, or are capable of providing access to, resources in order to monitor and provide technical assistance and that it shall be located within fifty miles of the location of each community school that it sponsors, or in the case of an internet- or computer-based community school, within fifty miles of each community school's base of operation, in order to provide monitoring and technical assistance;

(4) Comply with all sections of the Revised Code and all rules of the Administrative Code which are applicable to sponsors and community schools;

(5) Indicate fees, if any, which may not exceed three percent of the total amount of payments for operating expenses that the community school receives from the state, that will be charged each community school for oversight and monitoring pursuant to section 3314.03 of the Revised Code. Any additional services and the associated fees, which a sponsor may offer a community school it sponsors, shall be defined in the community school contract and acceptance of such additional services may not be a precondition for sponsoring the community school;

(6) Monitor and evaluate the community school's compliance with all laws and rules applicable to community schools and with the terms of the preliminary agreement and the community school contract;

(7) Monitor and evaluate the academic and fiscal performance and the organization and operation of the community school at least once each fiscal year based upon all information obtained from site visits, fiscal meetings every two months, and any other information obtained;

(8) Report the results of the evaluation conducted under paragraphs (E)(6) and (E)(7) of this rule to the parents of

the students enrolled in the community school, and submit a written report of the evaluation to the department by November thirtieth of each year;

(9) Provide technical assistance to the community school in complying with all laws and rules applicable to community schools and with the terms of the preliminary agreement and the community school contract;

(10) Intervene in the community school's operation to correct problems in the community school's overall performance, declare the community school to be on probationary status pursuant to section 3314.073 of the Revised Code, suspend the operation of the community school pursuant to section 3314.072 of the Revised Code, or terminate the contract of the community school pursuant to section 3314.07 of the Revised Code as determined necessary by the sponsor; and

(11) Have in place a written plan of action to be undertaken in the event that the community school experiences financial difficulties or closes prior to the end of a school year, consistent with requirements of division (E) of section 3314.015 of the Revised Code, and submit for approval the written plan of action (including, but not limited to, the handling of facilities, equipment, materials, supplies, employees, students, school records and addressing any other obligations of the community school) to the department within ten business days of the execution of the community school contract.

(F) Any eligible entity that has been approved to act as a sponsor of a community school shall enter into a sponsorship agreement with the department regarding the manner in which the entity shall conduct such sponsorship before it enters into any preliminary agreement or community school contract.

(G) The decision of the department to disapprove an entity for sponsorship of a community school may be appealed by the entity in accordance with section 119.12 of the Revised Code.

History. Effective: 04/19/2008

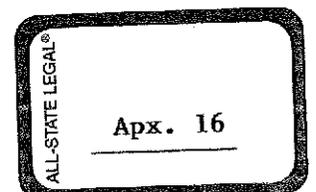
R.C. 119.032 review dates: 01/31/2008 and 04/19/2013

Promulgated Under: 119.03

Statutory Authority: 3301.07, 3314.015, 3314.08

Rule Amplifies: 3314.015, 3314.08

Prior Effective Dates: 7/7/03



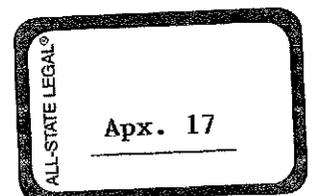
Ohio Constitution

Article I. Bill of Rights

Current through the November, 2009 Election

§ 2. Right to alter, reform, or abolish government, and repeal special privileges

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.



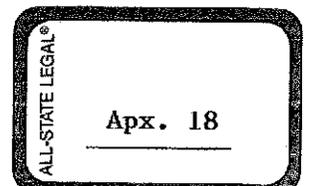
Ohio Constitution

Article I. Bill of Rights

Current through the November, 2009 Election

§ 7. Rights of conscience; education; the necessity of religion and knowledge

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. 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.



Ohio Constitution

Article IV. Judicial

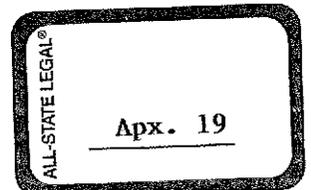
Current through the November, 2009 Election

§ 4. Common pleas court

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the Supreme Court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.



Not Reported in N.E.2d

Not Reported in N.E.2d, 1999 WL 566857 (Ohio App. 10 Dist.)

(Cite as: 1999 WL 566857 (Ohio App. 10 Dist.))

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT
RULES FOR REPORTING OF OPINIONS
AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District,
Franklin County.

HEARTLAND JOCKEY CLUB, LTD.,
Appellant-Appellant,

v.

OHIO STATE RACING COMMISSION,
Appellee-Appellee.

No. 98AP-1465.

Aug. 3, 1999.

Appeal from the Franklin County Court of
Common Pleas.

Wiles, Boyle, Burkholder & Bringardner
Co., L.P.A., and Jay B. Eggspuehler, for
Appellant.

Betty D. Montgomery, Attorney General,
and Matthew L. Westerman, for Appellee.

OPINION

TYACK.

*1 Heartland Jockey Club, Ltd., operates a race track known as Beulah Park. Heartland Jockey Club, Ltd., (hereinafter "Heartland") sought to simulcast the racing card from Santa Anita. R.C. 3769.089 allows for the simulcasting of horse racing for a "special racing event" as that phrase is defined by the statute. However, for the simulcast to occur, the local "horsemen's organization" must

give its permission. If the "horsemen's organization" does not give its permission, the entity seeking to simulcast the event may appeal to the Ohio State Racing Commission ("commission"). If the commission determines that the "horsemen's association" unreasonably withheld its permission, the commission can grant permission for the simulcast of the event anyway.

R.C. 3769.089(E)(3) provides that "the determination of the commission is final." On this appeal, we are asked to determine how final the word "final" is in R.C. 3769.089(E)(3).

Heartland did not obtain the permission of its local "horsemen's organization" to simulcast the card from Santa Anita. As a result, Heartland filed an objection with the commission. The racing commission also refused to grant permission to simulcast the card.

Heartland then attempted to pursue an administrative appeal to the Franklin County Court of Common Pleas. Heartland alleged that it was entitled to pursue the appeal under the provisions of R.C. 119.12, the statute which governs administrative appeals generally. The Office of the Ohio Attorney General, acting on behalf of the commission, filed a motion asking that the administrative appeal be dismissed. The court of common pleas then dismissed the appeal, finding that R.C. 3769.089(E)(3) foreclosed routine administrative appeals when it indicated that the determination of the commission was final.

Not Reported in N.E.2d
 Not Reported in N.E.2d, 1999 WL 566857 (Ohio App. 10 Dist.)
 (Cite as: 1999 WL 566857 (Ohio App. 10 Dist.))

Heartland has now pursued a direct appeal to this court, assigning a single error for our consideration:

The Franklin County Court of Common Pleas erred in dismissing Heartland Jockey Club, Ltd.'s Revised Code Section 119.12 Administrative Appeal for Lack of Subject Matter Jurisdiction.

We believe that the legislature intended to foreclose direct administrative appeals from decisions involving R.C. 3769.089 when the legislature included in the statute the sentence "the determination of the commission is final." Thus, the trial court was correct to dismiss the administrative appeal attempted under the provisions of R.C. 119.12.

However, fundamental concepts of due process and Article I, Section 16 of the Ohio Constitution require that parties who are harmed by a decision made by a governmental entity have some sort of remedy through the courts. Article I, Section 16 reads:

*2 All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

The remedy traditionally granted by the courts of Ohio in those circumstances where the legislature has foreclosed a direct administrative appeal has been a remedy through the use of the special writs, specifically, the

writ of mandamus. Thus, each year hundreds of mandamus actions are filed in the courts of Ohio. This appellate court alone routinely has over five hundred mandamus actions filed in it each year, most frequently seeking review of the those decisions of the Industrial Commission of Ohio. While such cases burden the docket of this court, litigants must be provided remedy required by Article I, Section 16 of the Ohio Constitution.

Since a remedy through the court system is available, our interpretation of R.C. 3769.089 does not render that statute unconstitutional either under due process principles or under the requirements of Article I, Section 16 of the Ohio Constitution.

As a result, we overrule the sole assignment of error. We, therefore, affirm the judgment of the trial court dismissing the appeal treated as an appeal under the terms of R.C. 119.12

Judgment affirmed.

LAZARUS, P.J., and DESHLER, J., concur.
 Ohio App. 10 Dist., 1999.
 Heartland Jockey Club, Ltd. v. Ohio State Racing Com'n
 Not Reported in N.E.2d, 1999 WL 566857
 (Ohio App. 10 Dist.)

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