[Cite as *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 2005-Ohio-5072.]

IN THE COURT OF CLAIMS OF OHIO

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ALTERNATIVES UNLIMITED-SPECIAL, INC., et al.	:	
	:	CASE NO. 2002-04682
Plaintiffs		Judge Joseph T. Clark
	:	
v.		DECISION
	:	
OHIO DEPARTMENT OF EDUCATION		
	:	
Defendant		

: : : : : : : : : : : : : : : : :

{¶ 1} Plaintiffs, Alternatives Unlimited, Inc. and Alternatives Unlimited-Special, brought this action against defendant, Ohio Department of Education (ODE), asserting claims of breach of contract and unjust enrichment.[1] The issues of liability and damages were bifurcated and the case proceeded to trial on June 2, 2003, before Judge Everett Burton on the issue of liability. In the intervening period between trial and the rendering of a judgment, Judge Burton died. This case was subsequently reassigned to Judge Clark for trial.

{¶ 2} Plaintiff, Alternatives Unlimited, Inc. (AU-Inc.), is a Maryland for-profit corporation. One of the principals of AU-Inc., Dr. Stuart Berger, expressed an interest in developing and operating a community school,[2] to be named the Cleveland Alternative Learning Academy (CALA). The State Board of Education (SBE)[3] agreed to act as sponsor and entered into a five-year

[1]For the purposes of this decision, plaintiffs shall be referred to as AU.

[2]Community schools are independently governed public schools that are funded from state revenues according to the provisions of R.C. Chapter 3314.

[3]Pursuant to R.C. 3301.13, ODE is the administrative unit charged with

community school contract with the governing authority of CALA beginning on September 1, 1999, and ending June 30, 2004. (Plaintiffs' Exhibit 2, Defendant's Exhibit TT.) According to Dr. Berger, AU-Inc. managed and directed CALA. Dr. Berger created Alternatives Unlimited-Special (AU-Special) as a nonprofit corporation in Ohio in accordance with the requirements of R.C. Chapter 3314.[4] (Plaintiffs' Exhibit 1.)

{¶ 3} According to ODE, CALA was intended to attract "at-risk" students in grades 3, 4, 5, and 6, who were beginning to underachieve in public schools. The school's program was developed as a means to intervene and assist those students to help them to achieve academic progress. The developers also had planned to institute the "Bridges" program which was an assessment tool used to both evaluate learning impediments and enhance learning ability. (Defendant's Exhibit A.) During the start-up period for the school, some parents expressed a desire to have all their school-age children attend the same elementary school while others wanted an option to have their children remain at the same school through the eighth grade. CALA responded by proceeding to also enroll and educate students in second, seventh, and eighth grade classes. In October 1999, Nick Spinnato, an associate of Dr. Berger, notified ODE of the expanded class offerings and requested ODE's approval of the change.

{¶ 4} According to AU, ODE refused to amend the agreement and remit funds for students taught in the additional grades during both the 1999-2000 and the 2000-2001 school years until such time as CALA submitted, inter alia, updated financial records, budgets, and curriculum goals specific to grades 2, 7, and 8. (Defendant's

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implementing the policies and directives of the State Board of Education.

[4]R.C. 3314.03(A)(1) mandates that "the school shall be established as a nonprofit corporation ***."

Exhibits M-P.) Despite several attempts to comply with ODE's request, CALA never submitted sufficient data to justify a contract modification and ODE never released the school district funds allocated for grades 2, 7, and 8. AU asserts that ODE breached the agreement by repeatedly and arbitrarily altering the list of criteria necessary to amend the contract. In the alternative, AU argues that the amendment was unnecessary as the original contract contemplated teaching all elementary students to include grades 2 through 8.

{¶ 5} When CALA opened for the 1999-2000 academic year, it was initially funded for the first half of the school year based upon the school's pre-opening estimate of 200 students. Like traditional public schools, community schools receive funding based upon the number of students that are enrolled during the school term. R.C.3314.08 sets forth the formula for calculating community school funding. Community schools cannot charge tuition, are not supported by bond issues or tax levies, and are almost entirely dependent on state funding.

{¶ 6} An enrollment count was taken during the first week of October 1999, when all public schools, including community schools, were required to report their enrollment. (R.C. 3317.03). It is undisputed that CALA received an overpayment during the first year of operation when the school's enrollment fell far short of the projected number of students. Although the parties are in dispute about the exact amount of the overpayment, ODE nevertheless instituted a repayment schedule and commenced recouping the overpayment from the monthly allocation of tuition funds paid to CALA. AU alleges that because ODE both unfairly reduced their allotment and refused to remit any payments for students who were being taught in grades 2, 7, and 8, the school suffered severe financial hardships.

{¶ 7} During the second school year, CALA was again unsuccessful in obtaining payment for the disputed grades. According to ODE, staff turnover at CALA, as well as poor communication between CALA employees and the management company, contributed to the school's inability to effectuate contract modification and the anticipated release of funding. ODE conducted site visits to CALA in May and October 2000, and noted that the Bridges program had not been implemented. (Defendant's Exhibits T, U, W, and Y.) ODE personnel began to document their concerns that the school was not in compliance with the educational plan outlined in the contract. (Defendant's Exhibits L-P.)

{¶ 8} ODE communicated its concerns to staff both at CALA and at AU-Inc. ODE asserted that the addition of grades 2, 7, and 8 needed first to be approved pursuant to a resolution passed by the school's governing authority. ODE emphasized to both entities that the community school contract, as well as the relevant portions of the statute, established the duties of the governing authority. ODE also referenced Article VII of the contract which stated that "any changes or modifications of this agreement shall be made and agreed to in writing." According to ODE, there was confusion as to who was in charge at CALA and who ODE should notify regarding the need for specific documentation and the procedures yet to be completed. ODE contends that the personnel changed frequently at CALA and that consistent contact was not kept with ODE.

{¶ 9} After the end of the second school year, ODE notified AU that Elijah Scott and David Smith (who were original signatories on the contract) had been located, that they had rescinded the contract, and that therefore CALA was no longer authorized to operate as a community school. AU contends that the rescission was invalid since Scott and Smith were not affiliated with CALA or AU at the time that they purportedly rescinded the contract.

{¶ 10} Dr. Berger insists that the community school contract was executed by the board of directors of AU-Special and SBE. Dr. Berger testified that the tuition payments and disbursements from ODE for CALA were usually mailed to AU-Special or to AU-Inc., although some checks may have been mailed to CALA. In addition, AU contends that ODE knew that AU (whether Inc. or Special) was the entity controlling the school and that in order to circumvent the protracted steps outlined in the contract for termination, ODE instead sought out Scott and Smith and allegedly convinced them to rescind the contract. Thus, AU asserts that ODE acted improperly when, in effect, it unilaterally terminated the community school contract after only two years.

{¶ 11} Defendant denies liability and argues first that AU does not have standing to bring this action. ODE maintains that only Scott and Smith signed the contract with the SBE, that they signed as the governing authority of CALA, that the powers and duties of the governing authority are specified in the contract as well as in the statute, and that since Scott and Smith were never formally removed from or replaced as the governing authority, they retained the authority to rescind the contract, which they did on August 1, 2001. ODE also maintains that the contract did not contemplate enrollment of grades 2, 7, and 8 nor was the contract ever modified such that ODE was required to pay CALA for educating those students.

{¶ 12} On June 3, 2003, the parties filed the following stipulations of fact:

{¶ 13} "1. The Cleveland Alternative Learning Academy instructed students in grade levels two through eight for the School Year 1999-2000 and the School Year 2000-2001.

{¶ 14} "2. The Cleveland Alternative Learning Academy operated as a community school in the Cleveland Municipal School

District during the School Year 1999-2000 and the School Year 2000-2001.

{¶ 15} "3. The Ohio Department of Education acknowledges that the Cleveland Alternative Learning Academy is a community school within Ohio's public education system. As such, the students properly enrolled at the Cleveland Alternative Learning Academy were publicly educated.

{¶ 16} "4. The Ohio Department of Education did not provide state funding to the Cleveland Alternative Learning Academy for those students enrolled in grade levels two, seven, and eight for either the 1999 School Year or the 2000 School Year."

{¶ 17} The primary question for the court to decide is who the parties were to the contract. However, the parties informed the court that the contract could not be located despite the fact that R.C.3314.021(B) requires that a "copy of every contract entered into under section 3314.03 of the Revised Code shall be filed with the office of school options and the superintendent of instruction." Additionally, in reconstructing the contract, the parties could not agree on which documents comprised the written agreement. AU and ODE submitted separate copies of an agreement signed by ODE and Scott and Smith. The copy submitted by AU (Plaintiffs' Exhibit 2), contains seven pages of contract language that include Articles I through IX, which specifically incorporate by reference the remaining 32 pages identified as Exhibits I through IV. Defendant acknowledges that those documents submitted by AU constitute part of the contract, but not the entire contract. According to defendant, the contract also includes pages 40 through 154, entitled Appendix A and B, which contain portions of the student handbook and various course outlines and educational goals. (Defendant's Exhibit TT.)

{¶ 18} A contract is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty." *Ford v. Tandy Transp., Inc.* (1993), 86 Ohio App.3d 364, 380, citing Restatement of the Law 2d, Contracts (1981) 5, Section 1. In order for a party to be bound to a contract, the party must consent to its terms, the contract must be certain and definite, and there must be a meeting of the minds of both parties. *Episcopal Retirement Homes, Inc. v. Ohio Department of Indus. Relations* (1991), 61 Ohio St.3d 366, 369.

{¶ 19} After review of the evidence submitted, the court finds that the terms of the contract at issue have been established by statutory law. R.C. 3314.01(A)(2) states that "[a]ny person or group of individuals may propose the creation of a community school pursuant to the provisions of this chapter. ***." Pursuant to R.C. 3314.02(C)(1)(d), each community school has a public sponsor. R.C. 3314.02(C)(2) states that the proposing person or group may enter into a preliminary agreement with the sponsor, and upon finalizing the preliminary agreement, may establish a governing authority for the school and negotiate a contract. In accordance with section 3314.03 of the Revised Code, the sponsor shall enter into the contract.

{¶ 20} Pursuant to contract specifications outlined in R.C. 3314.03, the court hereby determines that the contract at issue in this matter consists of pages one through seven and the accompanying Exhibits I-IV, as contained both in Plaintiffs' Exhibit 2 and in the first 39 pages of Defendant's Exhibit TT. Upon review, the court declines to adopt defendant's argument that Appendix A, a portion of the student handbook addressing disciplinary matters, and/or Appendix B, are a part of the community school contract at issue in this case.

{¶ 21} Having identified the documents that make up the contract, the court must now address the issue of standing. According to ODE, Scott and Smith constitute the governing authority of CALA, having signed the contract as such. AU maintains, however, that the board of directors of AU-Special contracted with the SBE and that Scott and Smith signed as agents or representatives of AU-Special.[5]

{¶ 22} In looking at the language of the contract, the court notes that the first paragraph states that the contract is entered into "***, by and between the Ohio State Board of Education and the Board of Directors of the Cleveland Alternative Learning Academy Community School ***."

{¶ 23} The second and third paragraphs read, as follows:

{¶ 24} "The names and addresses of the individuals who act as the governing authority of the Cleveland Alternative Learning Academy Community School, and who are responsible for carrying out the provisions of this contract are listed as follows:

{¶ 25} "Elijah M. Scott, [Cleveland, Ohio]

{¶ 26} "David L. Smith, [Cleveland, Ohio]

{¶ 27} "This contract is entered into pursuant to the provisions of Chapter 3314. of the Ohio Revised Code whereby the State Board of Education, hereinafter termed the 'SPONSOR' agrees to sponsor the Cleveland Alternative Learning Academy Community School as established by the Governing Authority of the Cleveland Alternative Learning Academy Community School, hereinafter termed 'Governing Authority.'"

{¶ 28} In the next section, labeled Article I. Purpose, the contract states:

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[5]Dr. Berger acknowledged at trial that he was not claiming that the contract was between AU-Inc. and the SBE.

{¶ 29} "***. Upon the *signature of all parties* as set forth below, a new community school shall be created. *** Pursuant to Ohio Revised Code section 3314.01, the new community school may sue and be sued, acquire facilities as needed and contract for services necessary for the operation of the school. The GOVERNING AUTHORITY of the new community school may carry out any act and ensure the performance of any function that is in compliance with *** the terms of this contract as set forth below." (Emphasis added.)

{¶ 30} On page seven, the contract is signed in the following manner:

{¶ 31} "ON BEHALF OF THE STATE BOARD OF EDUCATION

{¶ 32} "BY: Susan Tave Zelman, Superintendent of Public Instruction

{¶ 33} "THE GOVERNING AUTHORITY OF CLEVELAND ALTERNATIVE LEARNING

{¶ 34} "ACADEMY COMMUNITY SCHOOL

{¶ 35} "BY: Elijah Scott

{¶ 36} "David Smith"

{¶ 37} R.C. 3314.03(A) states that the community school contract is entered into "between a sponsor and the governing authority of a community school." Thus, it would appear to this court that the parties to the contract are the SBE and the governing authority of CALA, Elijah Scott and David Smith. Nowhere in the document do the signatories identify themselves as agents or employees of AU-Special, nor is there any indication in the agreement that they are signing on behalf of AU-Special. Again, this is consistent with R.C. 3314.071 which states, in part, that "[a]ny contract entered into by the governing authority or any officer or director of a community school, including the contract required by sections 3314.02 and 3314.03 of the Revised Code, is

deemed to be entered into by such individuals in their official capacities as representatives of the community school."

{¶ 38} In the contract at issue, although the first paragraph references the "board of directors" of CALA, subsequent paragraphs list the "governing authority" of CALA. ODE argues that the terms are synonymous, while AU cites the difference in support of its position that the contract is actually between the SBE and the board of directors of AU-Special. As a general rule, the goal of the court in construing written contracts is to arrive at the intent of the parties, which is presumed to be stated in the document itself. See *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority*, 78 Ohio St.3d 353, 1997-Ohio-202; *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 1996-Ohio-393. In construing a written agreement, common words appearing in the written instrument are to be given their plain and ordinary meaning "unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." Id. at 361 quoting *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus.

{¶ 39} In the instant case, when the contract is viewed as a whole, the court finds that the term "board of directors of CALA" as used in the first paragraph of page one means the governing authority of CALA.

{¶ 40} This finding is also consistent with the statutory requirements outlined in R.C. 3314.03. The only other reference in the contract to the term board of directors is contained in Exhibit III, the governance and administration plan, wherein the school is directed to create a "board of directors" composed of various members representing parents, the community, and AU-Special.

{¶ 41} After careful consideration, the court finds that the use of the term "board of directors" of CALA in the first paragraph

of the contract followed by use of the term "governing authority of CALA" does not create ambiguity. The contract emphasizes that the agreement is between the governing authority of the school and the sponsor. Indeed, the statute requires the contract to be executed in such manner. Both of those terms are defined in the body of the contract. In addition, the court finds insufficient evidence to support Dr. Berger's position that the contract was actually between AU-Special and the SBE. AU-Special is first mentioned in the section titled Article III. Responsibilities of the Governing Authority which states that "[t]he GOVERNING AUTHORITY has established the Alternatives Unlimited-Special as a nonprofit corporation established under Chapter 1702. of the Revised Code." There is no language either in the contract or in the statute that defines any role of a nonprofit corporation nor does the contract identify such corporation as a party to the contract.

{¶ 42} A court is not required to go beyond the plain language of an agreement to determine the parties' rights and obligations if a contract is clear and unambiguous. *Custom Design Technologies, Inc. v. Galt Alloys, Inc.*, Stark App. No. 2001CA00153, 2002-Ohio-100. Indeed, "the interpretation of a written contract is a question of law, absent patent ambiguity." *P & O Containers, Ltd. v. Jamelco, Inc.* (1994), 94 Ohio App.3d 726, 731. If no ambiguity appears on the face of the instrument, parol evidence cannot be considered in an effort to demonstrate such an ambiguity. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638, 1992-Ohio-28; *Stony's Trucking Co. v. Public Utilities Commission* (1972), 32 Ohio St.2d 139, 142.

{¶ 43} Upon review of all the evidence and in accordance with the requirements articulated in the law, the court makes the following determination. The reference in the first paragraph of the contract is to the board of directors of CALA; it does not

mention or reference the board of directors for AU-Special. In addition, neither Scott nor Smith are listed in the articles of incorporation for AU-Special as trustees or members of the nonprofit. (Plaintiff's Exhibit 1.) Given the absence of any language in the written agreement evidencing the parties' intentions to treat AU-Special or AU-Inc. as a party to the contract, the court finds plaintiffs' arguments are not well-taken. For all the foregoing reasons, the court finds that neither AU-Special nor AU-Inc. are parties to the contract.

{¶ 44} AU contends, alternatively, that under the doctrine of judicial estoppel, this court is bound by the determination in another court that found AU to be a party to the contract and, as such, the obligor for monies owed to the State Teachers Retirement System for payroll pension contributions on behalf of the teachers employed by CALA. However, the evidentiary basis for such argument was not admitted at trial, and the court therefore does not find the agreement to be persuasive.

{¶ 45} Mr. Berger next contends that AU-Special is the real party in interest because AU initiated the proposal for the school and received ongoing correspondence from ODE. In addition, Dr. Berger explains that he and his associate, Nick Spinnato, were involved in the initial contract negotiations and that the only reason their names do not appear on the contract documents is because they were not permitted to sign the contract since the required criminal background checks for each of them had not been completed. The court does not find this argument persuasive. The contract and the statute upon which it is based cite the term "governing authority" and define its roles and responsibilities in detail. Moreover, the contract permits the assignment of rights, duties, and responsibilities only with prior written consent of the sponsor and the governing authority. The contract also contains an

integration clause which states that the contract "constitutes the entire agreement among the parties ***." The court finds that Dr. Berger's association with AU and his participation in the community school proposal process does not confer upon him the status of a party to the contract at issue.

{¶ 46} There is a presumption that parties to a contract express their intent through the language they employ in the written agreement, particularly in the instance where the written contract expressly states that it constitutes a complete and accurate integration of the parties' intent. See *Shifrin*. The so-called parol evidence rule is a rule of substantive law which provides that extrinsic evidence is not admissible to contradict or vary the terms of an unambiguous contract. *Ed Schory & Sons, Inc. v. Soc. Natl Bank*, 75 Ohio St.3d 433, 440, 1996-Ohio-194. In other words, parol evidence cannot be used to demonstrate a "latent ambiguity" in a contract. *Shifrin*, supra. See, also, *Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313; *Cassilly v. Cassilly* (1897), 57 Ohio St. 582. This court has already determined that the contract is not ambiguous on its face, and the court accordingly concludes that parol evidence is inadmissible to alter the terms of a written contract.

{¶ 47} Even assuming Au-Special could prove that it was a party to the contract, the court notes that the contract contains specific provisions for dispute resolution. On page 36 in Exhibit III, the contract contains language which requires CALA and the sponsor to submit "any dispute *** regarding this contract" to an arbitrator and if they are unable to reach an agreement, the arbitrator is to render a decision which "shall be binding upon both parties and such decision shall be final and nonappealable."

{¶ 48} AU also cannot show that either entity was an intended third-party beneficiary to the contract. "A third-party

beneficiary is one for whose benefit a promise is made, but who is not a party to the contract encompassing the promise." *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 303. In *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 40, the Supreme Court of Ohio adopted an "intent to benefit" test to determine whether a party is an intended, or merely an incidental, third-party beneficiary.

{¶ 49} "Under this analysis, if the promisee *** intends that a third party should benefit from the contract, then that third party is an 'intended beneficiary' who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an 'incidental beneficiary,' who has no enforceable rights under the contract." Id. at 40. Here, the contract does not reflect an intent to benefit either plaintiff. The evidence demonstrates that the parties did not enter into the contract to benefit the nonprofit organization, and there is insufficient evidence to convince this court that the contract intended to benefit AU-Inc. ODE maintains that the community school contract is for the benefit of the children who are to be educated. ODE asserts that any consideration given to AU-Inc. was in recognition of its status as the management company. The court finds that the greater weight of the evidence supports such explanation, and that any benefit which accrued to AU-Inc. was merely incidental to the contract. As such, AU has no authority to bring suit under an alleged third-party beneficiary status.

{¶ 50} AU also asserts a claim for unjust enrichment inasmuch as ODE refused to remit payments for students in grades 2, 7, and 8 who were taught during both school years. Unjust enrichment occurs when a party has, and retains, money or benefits which in justice and equity belong to another. *Hummel v. Hummel* (1938), 133 Ohio

St. 520, 528. To prove unjust enrichment, certain factors must be present: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and, (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Hambleton v. R.G. Barry Corp.*(1984), 12 Ohio St.3d 179, 183; *Hughes v. Oberholtzer* (1954), 162 Ohio St. 330.

{¶ 51} AU cannot establish unjust enrichment in this case because the actions of ODE were not unjust. As stated above, ODE's obligations with respect to CALA are set forth in the written agreement. The court finds that ODE did not consent to fund additional grades beyond grades three through six. CALA voluntarily expanded the class offerings and then, after the fact, sought approval from ODE. ODE was well within its rights both by contract and by statute to require documentation that would verify that the school could accommodate any expansion financially as well as practically.

{¶ 52} For the foregoing reasons, the court finds that AU has failed to provide sufficient credible evidence to prove any of its claims. Judgment shall be rendered in favor of defendant.

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	:	
v.		JUDGMENT ENTRY
	:	
OHIO DEPARTMENT OF EDUCATION		
	:	
Defendant		

: : : : : : : : : : : : : : : : :

This case was tried to the court on the issue of liability. For the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
JOSEPH T. CLARK
Judge

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