IN THE SUPREME COURT OF OHIO

STATE OF OHIO *ex rel.* ELECTRONIC CLASSROOM OF TOMORROW 3700 S. High Street Columbus, Ohio 43207, Relator, v. THE OHIO STATE BOARD OF EDUCATION 25 South Front Street Columbus, Ohio 43215, and THE OHIO DEPARTMENT OF EDUCATION 25 South Front Street Columbus, Ohio 43215, Respondents.	:	Case No._____ ORIGINAL ACTION IN MANDAMUS

APPENDIX OF EXHIBITS IN SUPPORT OF COMPLAINT FOR MANDAMUS RELIEF AND, ALTERNATIVELY, WRIT OF PROHIBITION

VOLUME V

EXHIBITS I, J, K, L, AND M

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Before the Ohio
State Board of Education
25 South Front Street
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In the Matter of:
Electronic Classroom of Tomorrow
Full-Time Equivalency (FTE) Review Appeal

Lawrence D. Pratt
Hearing Officer

RESPONDENT ELECTRONIC CLASSROOM OF TOMORROW'S OBJECTIONS TO THE HEARING OFFICER'S PROPOSED REPORT AND RECOMMENDATION

Pursuant to R.C. 3314.08(K)(2)(c), R.C. 3301.13, and R.C. 119.09, Respondent Electronic Classroom of Tomorrow ("ECOT") hereby submits to the Ohio State Board of Education (the "Board") its Objections to the Hearing Officer's Report and Recommendations.

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INTRODUCTION

Although this proceeding entails a multi-level process, the law contemplates that each level of review in this administrative review process will be conducted fairly and independently. As the Tenth District Court of Appeals explained, "[t]here would be no point in having various tiers of review in administrative cases if the only duty of each reviewing body were to approve without question the decision which came before. … Instead, the system envisions a series of checks and balances in which each reviewing body considers what has gone before ***with an eye for the reasonability of the prior decision*** based upon all the facts presented and in light of the statutory requirements and factors." Collins v. Ohio State Racing Comm'n, 2003 WL 22846110, at *5 (Ohio Ct. App. 10th Dist., Dec. 2, 2003) (emphasis added).

Here, however, it is clear that the Hearing Officer, with limited exceptions, merely approved the misconduct of the Ohio Department of Education ("ODE") administrators, and affirmed the department's challenged actions, without question. He did so by, among other things, precluding ECOT from presenting key exhibits and testimony; asking leading questions clearly designed to rehabilitate and/or redirect ODE's *own* witnesses following (or sometimes, in the middle of) cross examination; ignoring and/or misconstruing key facts; ignoring and/or misapplying pertinent legal authorities; taking/recommending positions that were unnecessary and irrelevant to his decision, and in some instances, by simply denigrating ECOT without a supporting basis in the record. Simply put, the import of the Hearing Officer's decision is that ODE is free to do whatever it wants, whenever it wants, with impunity. One does not need to be a Supreme Court justice to see that ODE's position, endorsed by the Hearing Officer, was without merit.

Faced with such a troubling backdrop; the Board's task is now to ***independently*** consider the Hearing Officer's May 10, 2017, report and recommendation ("R&R"), along with his proposed factual findings and legal conclusions. In doing so, the Board must take steps to ensure that ODE, the agency over which it exercises authority, acts within the bounds of the law – even if the Hearing Officer failed to do so. Otherwise, "there would be no point" in mandating that the Board review the Hearing Officer's recommendations, lest this Board become a mere "rubber stamp[ ]" for ODE's unlawful conduct. Stelzer v. State Bd. of Educ., 72 Ohio App. 3d 529, 532 (3rd Dist. 1991)[1]

The Board's independent role is especially crucial here, given the problems with the R&R, the complexity of the evidence, the sheer amount of funding involved, and the drastic consequences that would occur if the Hearing Officer's recommendations are adopted – essentially the economic death penalty for ECOT, leaving thousands of students and their families without a school and throwing thousands of Ohioans out of work. ECOT, thus, submits these Objections to assist the Board in conducting its independent review.

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[1] As set forth in a May 16, 2017, letter from ECOT's counsel to ODE's counsel, Ms. Lease, ECOT submits that this process is governed by and that it is entitled to the protections afforded by Chapter 119 of the Revised Code. ***First***, the Board's own policies make clear that the instant matter involves a "quasi-judicial" function. [See Board Policies, Reference Material C, at 35 ("When the State Board of Education (SBOE) issues a final 'adjudication' … that determines the rights or duties of adverse parties, and the SBOE has provided notice, a hearing and the opportunity to present evidence, the SBOE has acted in a quasi-judicial capacity."); see also R.C. 119.01(D) (" 'Adjudication' means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.").] ***Second***, R.C. 3301.13 makes clear that ECOT is entitled to the protections afforded by Chapter 119. That statute, which is unique among the various state agencies in Ohio, states that the Board, "[i]n the exercise of ***any of its functions or powers*** … ***shall*** be subject to Chapter 119. of the Revised Code." (Emphasis added.) Obviously, such "functions or powers" include determining whether the Ohio Department of Education may properly claw back tens of millions of dollars from Ohio's largest eschool. Thus, ECOT is submitting these objections within the timeframe provided in, and consistent with its rights under, Chapter 119.

As made clear in these Objections, the Board should review the entire record, particularly the transcript pages and exhibits cited in these Objections. In doing that, it will find the Hearing Officer ignored a vast amount of relevant evidence – including multiple admissions of ODE decision-makers – apparently in an effort to reach a result in favor of the agency. But contrary to the Hearing Officer's apparent conclusion, ODE administrators are not free to engage in whatever conduct they wish, with no regard to the fairness or reasonableness of their approach or the manner and means of its implementation. The law forbids such conduct, and ODE, like all executive branch offices, may not act unreasonably, arbitrarily, or capriciously. For the multiple reasons set forth in these Objections as summarized here, the Board should reject the challenged funding determination and issue its own decision in favor of ECOT:

- **An agency must articulate and set the applicable standards.** ODE proceeded inappropriately by failing to establish the durational standard upon which it bases its attempt to claw back $60 million from ECOT. Indeed, according to ODE, there is "no standard." The FTE Review Handbook, which is the singular document that ODE's witnesses pointed to as setting forth a durational standard, does not, in the words of ODE, "carry the force and effect of law" and contains "merely procedural guidelines for FTE reviewers to follow in conducting FTE reviews." Moreover, ODE's Director of Budget and School Funding, Aaron Rausch, testified that the language of the supposedly applicable Handbook could reasonably be construed as *not requiring eschools* to maintain durational information. Faced with this fundamental conclusion, the Hearing Officer ignored Mr. Rausch's testimony and pointed solely to the language of R.C. 3314.08 as somehow establishing a durational "standard." But, as the Board can readily see from a review of the statute, no such "standard" can be found anywhere therein. Having no binding and enforceable standards, ODE has necessarily proceeded in an unreasonable, arbitrary, and capricious manner.

- **An agency's actions must be supported by a rational and reasoned basis.** Even if there was an enforceable, articulated standard, the record is clear that the durational measurement does not correlate with student engagement. While assuming for the sake of argument that ODE could change the enrollment methodology it has applied for thirteen years, advised the Ohio Auditor to enforce, and even reduced to writing in the form of a Funding Agreement, it is not free to simply manufacture a new standard lacking any correlation with what it is purporting to measure. As all schoolchildren should be taught, two wrongs do not make a right. If ODE believed enrollment was not a valid methodology, replacing it with an equally, if not more, irrational and invalid one is improper. Here, again, ODE has necessarily proceeded in an unreasonable, arbitrary, and

capricious manner, and actually adopted a funding methodology detrimental to the students whom it purports to serve.

- **An agency must provide timely, advance notice of regulatory changes before punishing a regulated entity for non-compliance, must provide sufficient time to allow the regulated entity to prepare and conduct itself with the new regulatory changes, and must be consistent in the notice to the regulated entity.** ODE failed to comply with this settled proposition of law. Incredibly, ODE sought to give notice of its expectation that durational information be provided literally in the middle of the school year, but after giving initial notice, its agents told ECOT the exact opposite. Then, it sought to apply the durational requirement *retroactively* for the entire 2015-2016 school year – *i.e.*, *months before* it made its first "announcement." And, by any measurement, ODE failed to afford ECOT adequate notice. It thus proceeded in an unreasonable, arbitrary, and capricious manner.

- **An agency may not adopt or use a "new" interpretation or approach under a statute to impose punishment if the regulated party acted in reasonable reliance on the agency's "old" interpretation or approach.** Given ODE's historical approach, the undisputed statements it made in March and June 2016, and ECOT's reliance on the same, even if ODE had devised a rational funding methodology, it could not deploy it without providing an adequate and reasonable period to allow for compliance.

- **An agency must articulate the specific criterion that guides its regulatory actions.** An agency may not keep the regulated entity in the dark and left to guess and speculate to the applicable standards. Here, not only did ODE affirmatively state that the FTE Handbook was nonbinding and only a guideline, the document itself offers no information as to the specific requirements and manner of compliance. To the contrary, ODE made those up as it went through the process and didn't even advise ECOT of the items it actually considered as "durational" data until November 2016 in response to a public records request. This smacks of unreasonable, arbitrary, and capricious conduct.

- **An agency must follow its own internal rules and regulations.** Assuming for the sake of argument, contrary to ODE's contention, that the FTE Handbook is enforceable and adequately provided notice of the requirements, the law is clear that ODE was obligated to follow it. The record is replete with examples of ODE's failures to do so. It is obvious ODE failed to do so because the manual is designed to measure enrollment, not duration. But having tried to fit the square peg into a round hole, ODE is stuck with the situation it created. ODE failed to follow its new rules and, thus, has clearly acted unreasonably, arbitrarily, and capriciously.

- **An agency may not act discriminatorily.** But ODE did. It has drawn artificial distinctions in its treatment of eschools under its new policies. In a context where notice is so important, both legally and practically, the arbitrary lines drawn by ODE are clearly unreasonable.

In short, application of basic legal propositions to the evidentiary record in this matter compels a rejection of the Hearing Officer's R&R and ODE's "final determination," and an award to ECOT of its full claimed FTEs.

OBJECTION #1: The Hearing Officer Reached The Wrong Conclusion In Accepting ODE's Sept. 16, 2016, "Final Determination" And Recommending A Funding Clawback In Excess Of $60 Million For The 2015-2016 Academic Year.

At the outset, ECOT objects to the Hearing Officer's ultimate recommendation that ODE take steps to collect an alleged "overpayment" of $60,350,791 – or, for that matter, any amount – for the 2015-2016 academic year. As ODE's area coordinator for ECOT, John Wilhelm, has admitted, *if the FTE review had been conducted the way it should have been conducted*, ECOT would be entitled to full funding:

> Q. What we do know is that based upon the information that was reviewed by you and the other team members as part of the preliminary review, that if you had simply applied the same standard that was utilized as part of the 2011 FTE review, that ECOT would have been entitled to full FTEs claimed?
>
> A. Yes.
>
> [PI Tr. Vol. III at 81-82.][2]

For any of the numerous reasons set forth below, the Board should reject the Hearing Officer's recommendation to accept, with modification, the September 26, 2016, "final determination" in which ODE concluded that ECOT could not justify approximately 51.8

[2] References in these Objections to "Tr." refer to the transcript of the evidentiary hearing in this administrative proceeding. References to "PI Tr." refer to the transcript of the preliminary injunction hearing, which was converted to a final trial on the merits, as part of the Franklin County Court proceedings and which were admitted as part of this proceeding. Similarly, references to "ECOT Exhs" refer to exhibits used by ECOT in this hearing, while references to "Pla. Exhs" (meaning plaintiff's exhibits) refer to exhibits used by ECOT as part of the preliminary injunction proceeding. References to "ODE Exhs" refer to exhibits used by ODE as part of this proceeding and/or the preliminary injunction proceeding.

percent of the FTE funding it had already received from the state for the 2015-2016 school year. [ODE Exh. 1508 (the "Final Determination").] As a result, the Final Determination should be rejected, and ECOT should be awarded its full, claimed FTEs of 15,321.98, for 2015-2016.

OBJECTION #2: The Hearing Officer Is Wrong To Assert And Recommend That The Board Should Find Multiple Issues In This Proceeding Were Litigated And Decided In The Franklin County Action, Thus Precluding The Board From Making Its Own Decision On The Administrative Law Issues Presented. ODE Cannot Hide Behind An Overbroad Application Of The Legal Doctrine *Res Judicata*: *Res Judicata* Applies Only To The Three, Limited Claims And Issues Presented In The Franklin County Action, And The Hearing Officer's Assertion That It Applies To Other Claims/Issues Represents An Incorrect Expansion Of The Doctrine.

Given the extensive emphasis placed thereupon by the Hearing Officer, it is necessary for the Board to understand the impact that the Franklin County Common Pleas Court's decision in The Electronic Classroom of Tomorrow, et al. v. The Ohio Department of Education, Case No. 16CV6402 (the "Franklin County Action") (a decision currently on appeal before the Tenth District Court of Appeals), actually has on the scope of these proceedings, as well as the evidence and issues the Hearing Officer may consider and address by way of a recommended decision. That issue turns on application of the legal doctrine of *res judicata*, which – via its dual prongs of claim and issue preclusion – dictates both the limited claims and issues that the Hearing Officer and, thus, the Board cannot consider, and perhaps more importantly, those that the Board can and should consider.

Because the doctrine of *res judicata* requires significant discussion – it is complex even for lawyers, let alone nonlawyers – for the sake of readability, we will cover it in depth at the end of these Objections.

Two points suffice to illustrate the Hearing Officer's misapplication of the December 14, 2016, Decision by Judge French (the "Franklin County Decision," attached as an Appendix to

the R&R), which ruled on three specific claims brought by ECOT that arose ***before*** ODE administrators announced their "Final Determination."

First, the Hearing Officer wrongly asserts that the Franklin County Decision has conclusively decided many of the issues that are before this Board and that the Court's decision supposedly bars the Hearing Officer (and, by extension, the Board) from considering the propriety of ODE's 2016 FTE review process with respect to ECOT. Amazingly, the Hearing Officer purports that this even includes issues arising from events – including the Final Determination itself – that occurred ***after*** ECOT filed its lawsuit and which were therefore not placed before the Court. Such an assertion, in support of which the Hearing Officer cites only general authorities describing the basic elements of the doctrine, may fairly be described as incorrect.

To the contrary, as discussed in a continuation of this Objection #2 at pages 124-46 below, and based on the numerous, specific authorities cited therein, application of both the claim-preclusion and issue-preclusion prongs of *res judicata* prohibits the parties from relitigating and the Hearing Officer from reconsidering the three ***limited*** claims of issues actually before the Court and actually and necessarily litigated by the parties. Indeed, because those three claims or issues that were decided by the Court are the subject of ECOT's pending appeal in the Tenth District Court of Appeals,[3] ECOT did not raise them in this administrative proceeding. Moreover, ODE's legal counsel even represented to Judge French in a signed court filing that any issues arising from the ODE funding decision must be decided in this administrative

[3] Of course, this entire proceeding will be rendered moot if the Tenth District, in Electronic Classroom of Tomorrow v. Ohio Department of Education, Tenth District Court of Appeals, Franklin County, Ohio, Case No. 16AP000863, ultimately rules that ODE's imposition of a durational funding statute was unlawful, either as inconsistent with the express mandate of R.C. 3314.08; as a violation of R.C. 3310.13 and/or Chapter 119; and/or as a violation of the Funding Agreement between ECOT and ODE.

proceeding, not in her court (see page 126 below; continuation of this Objection #2, Section A.1.a). In short, the Hearing Officer's "recommendation" based on *res judicata* effect of the Franklin County Decision is wrong.

Second, the Hearing Officer further twists and tortures the doctrine of *res judicata* in whichever way is expedient to give the Board the impression it has no choice but to validate the administrators' funding determination. For example, in the Franklin County Decision, with respect to ECOT's claims based on ODE's alleged violation of R.C. 3314.08, Judge French determined only that ODE's imposition of a durational standard ***was not foreclosed by*** the express language of R.C. 3314.08. [Franklin County Decision at 14, 15 ("Under [R.C. 3314.08(H)(2) & (3)], the Court finds that ODE is entitled to consider durational data … . … [T]he Court finds that ECOT does not succeed on its claim that R.C. 3314.08(H)(3) precludes reliance on durational data regarding actual student participation.").] The Court did not rule that ODE must evaluate durational data; it did not rule on how a durational requirement could or should be implemented; and it did not rule on whether the methodology or procedures ODE ultimately employed were reasonable, appropriate, or lawful.

Yet the Hearing Officer asserts that the Franklin County Decision gave the administrators no "discretion" but to impose a durational requirement, and to impose it in the manner they did. [See R&R, at 85-89.] The Hearing Officer also improperly presented multiple recommended conclusions to the Board that the Franklin County Decision compels it to rubber-stamp the administrators' determination. [See, e.g., R&R Recommended Conclusions of Law ¶¶ 7, 15-18, 21-25, 30.] Not so. Such contentions have no basis in law and must be rejected.

In sum, the Board should disregard any recommendations of the Hearing Officer premised on an asserted preclusive or binding effect of the Franklin County Decision. For further explanation, see pages 124-46 below.

OBJECTION #3: The Hearing Officer Reached The Wrong Conclusion By Placing The Burden Of Proof On ECOT As To Why A Funding Clawback Should Not Be Imposed On It.

A. The Hearing Officer Incorrectly Placed The Burden Of Proof On ECOT To Show Why ODE Should Not Take Action Against It.

The Hearing Officer next erred by concluding, first, that ECOT bears the burden of proof in this matter and, second, by giving ODE the benefit of a purported "rebuttable presumption of correctness" that "attaches" to its FTE review and Final Determination. [R&R Conclusions of Law ¶¶ 12-14.]

With respect to the burden of proof, while the Hearing Officer required ODE to present its case first, he now has recommended that the Board find that somehow ECOT otherwise bore the burden of proving why ODE was not entitled to claw back the funding received for the academic year 2015-2016. This is wrong.

Since the seminal case of Goodyear Synthetic Rubber Corp. v. Dep't of Indus. Relations, 122 N.E.2d 503, 76 Ohio Law Abs. 146 (Franklin C.P. 1954), the law of Ohio with regard to administrative proceedings is that "*a party asserting the affirmative of an issue bears the burden of proof*." 122 N.E.2d at 508 (emphasis added). In case after case, Ohio courts have uniformly rejected attempts to shift the burden of proof from the agency to the regulated party. In Goodyear Synthetic Rubber Corp., for example, the court held that a Department of Industrial Relations' order was void because the agency had directed Goodyear, the regulated party, to "show cause" as to why the purportedly applicable statute "should not be enforced against it."

But it was not, the court reasoned, the regulated party's burden to prove a negative. Instead, it was the agency's burden to prove that its action was a proper exercise of agency authority.

As the court explained: "[i]t was clearly the Department of Industrial Relations (not Goodyear Synthetic Rubber Corporation) which was asserting the 'affirmative', i.e. saying its orders requiring changes and adoption of new techniques and construction were necessary and required for 'safety.' " Id. at 508. If the department elected not to present the evidence to support its order, "Goodyear Synthetic Rubber Corporation would have had a correlative right *not* to offer *any* evidence – to 'rest' their case," and the department's order would have to be declared void because "[t]he record then would have contained no evidence" to support it. Id. at 509. In sum, the court declared, placing the burden of proof on the regulated party to prove an agency's order is invalid "is inimical to the 'fair play' doctrine so thoroughly imbedded in American and English law to the effect that no one shall ever be required to prove his innocence; rather, the burden of proving guilt, or wrongdoing, is always upon the party making such accusation." Id. Additionally, the court quoted with approval a provision of the federal Administrative Procedure Act that "the proponent of a rule or order shall have the burden of proof." Id.

Also instructive is Chiero v. Bureau of Motor Vehicles, 55 Ohio Misc. 22, 24 (Franklin C.P. 1977). There the appellant challenged the agency's action transferring his job position as being contrary to law because, among other things, it placed the burden of proof on him. Citing Goodyear Synthetic Rubber Corp., the court declared, "[I]t is a fundamental concept in administrative law and procedure that the party asserting the affirmative of an issue bears the burden of proof. It was clearly the Bureau of Motor Vehicles (not the appellant) which was asserting the 'affirmative,' i.e., that the transfer of appellant was proper and valid under the law.

Thus, the burden of proof should have been on the bureau to establish by reliable, probative and substantial evidence that the action it took was in accordance with law." Id. at 24.

Similarly, in Zingale v. Ohio Casino Control Comm'n, 2014 WL 5765387 (Ohio Ct. App. 8th Dist., Nov. 6, 2014), the court struck down the Casino Control Commission's revocation of the appellant's gaming license, finding the agency "improperly shifted the burden to him to prove … that he was suitable to retain his license, when the initial burden should have been on the Commission to show that he was unsuitable." Id. at *6. The court noted that "although the agency argued that the hearing examiner placed the burden of proof on the administrative agency, it is clear from the report and recommendation that the hearing examiner erroneously placed or shifted the burden of proof to [appellant] to prove by clear and convincing evidence that his casino gaming employee license should not be subject to administrative action." Id. at *7.

Here, even though the proceeding is nominally described as an "appeal," it is through this action that ODE seeks to affirmatively confirm its own Final Determination that ECOT must *repay* tens of millions of dollars in already-received funding. ECOT, on the other hand, merely seeks to maintain the thirteen-plus-year status quo with respect to how funding is determined. As a result, it is ODE that seeks affirmative relief, and consistent with the above-described authorities, it is ODE that bears the burden of proof that its actions reflect a proper exercise of agency authority. Indeed, this is simply akin to a party who asserts a breach of contract claim. Under Ohio law, that party bears the initial burden of establishing its own performance. See Tidewater Fin. Co. v. Cowns, 197 Ohio App. 3d 548, 552 (1st Dist. 2011) ("To prevail on such a claim, a claimant must establish the existence of a contract, *performance on its part*, breach by the other party, and its own damage or loss.") (emphasis added).

Soo too here, ODE bears the burden of demonstrating not only the actual existence of a durational standard (which it failed to do), but also the reasonableness of, among other things, its notice given to ECOT of the purported new durational requirement; its explanation of the steps necessary for ECOT to satisfy the same; its compliance with its own policies/procedures; its fair and equal treatment of affected parties; and the basis/rationale for its imposition of such a requirement. Although all of the above authorities were set forth by ECOT in its briefing to the Hearing Officer, the Hearing Officer's R&R largely ignores them or improperly brushes them aside. The R&R fails to address the Ohio Supreme Court's pronouncement in Goodyear Synthetic Rubber Corp. that it is improper to place the burden on a regulated party to "show cause" why action should not be taken against it – as ODE attempts to do here.

B. The Hearing Officer Wrongly Allowed ODE To Circumvent Its Burden Of Proof By Substituting Inapplicable And/Or Otherwise Rebutted "Presumptions."

1. No "Presumption" Of Correctness Or Regularity Applies To ODE's Actions For Purposes Of This Proceeding.

Instead of requiring ODE to carry its burden, which it failed to do, the Hearing Officer invoked a so-called "presumption of correctness," or "presumption of regularity," as advocated by ODE in its briefing, in order to recommend that this Board decide in favor of ODE. Such "presumption" is inapplicable and the Hearing Officer's reliance upon it is wrong.

To the extent courts have recognized a presumption of regularity with respect to agency conduct, the presumption is reserved for matters of judicial review *following* administrative proceedings where *the regulated party was given a full and fair opportunity to assert and present its position*, and agency action was taken only following such proceedings. Here, the Hearing Officer improperly allowed ODE to put the cart before the horse and gave it the benefit of such a presumption as part of the initial, administrative proceedings. Such an assertion is contrary to

law, and ODE is entitled to no such presumption here. Indeed, were the rule otherwise, the application of such a presumption would necessarily deprive ECOT of the *full and fair* administrative proceeding to which it is entitled.

As the Ohio Supreme Court explained long ago in Bloch v. Glander, 151 Ohio St. 381 (1949), the premise of a presumption favoring the agency upon judicial review of a final agency decision is that that the regulated party *already received a full and fair hearing before the agency*:

> *The general rule* that in the absence of evidence to the contrary, public officers will be presumed to have properly performed their duties and not to have acted illegally, but regularly and in a lawful manner, *is usually applied when regulations, decisions, or orders of administrative officers are challenged in court*, and the burden of proving otherwise is upon the party complaining. *The fact that a full hearing was given is often stressed as a circumstance by which the courts are let to give force to the presumption favoring administrative action*, and some authorities have limited the operation of this presumption to the action of tribunals acting in a judicial or quasi-judicial capacity in which they may fairly be supposed to preserve a judicial attitude.
>
> [151 Ohio St. 381, 385 (1949) (emphasis added).]

Where there was no full and fair opportunity to be heard for the regulated party, there can be no presumption favoring the agency. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the U.S. Supreme Court explained that a "presumption of regularity" is essentially a tool to promote judicial economy: By affording the agency deference under this limited presumption, the court avoids having to reopen factual issues unless the appellant identifies evidence that the proceeding was *irregular* and, thus, that the agency's action is not entitled to the presumption of regularity. See 401 U.S. at 415-16.

It, thus, follows that the same presumption *cannot* apply as part of the underlying agency proceedings that ultimately result in judicial review. As the Tenth District explained, "[t]here

would be no point in having various tiers of review in administrative cases if the only duty of each reviewing body were to approve without question the decision which came before. … Instead, the system envisions a series of checks and balances in which each reviewing body considers what has gone before ***with an eye for the reasonability of the prior decision*** based upon all the facts presented and in light of the statutory requirements and factors." Collins v. Ohio State Racing Comm'n, 2003 WL 22846110, at *5 (Ohio Ct. App. 10th Dist., Dec. 2, 2003) (emphasis added). Accord: Stelzer v. State Bd. of Educ., 72 Ohio App. 3d 529, 532 (3rd Dist. 1991) (holding a hearing officer's recommendations "are not to be merely rubber stamped by the Board").

As a result, no "presumption of regularity" attaches either to ODE's action or to the Hearing Officer's recommendation at this juncture because this is not a judicial appeal or a mandamus action before a court. There obviously has been no "final" administrative action by the Board under R.C. 3314.08(K)(2)(c). Indeed, the only activity that has taken place thus far is a unilateral funding clawback decision by ODE bureaucrats, endorsed in a nonbinding decision from ODE's self-appointed Hearing Officer. If such a presumption is ever to apply, ***this is the proceeding pursuant to which ECOT must receive a "full and fair" hearing in order to give rise thereto***. As a result, in this matter, the Hearing Officer was and the Board is now obligated to provide ECOT with a full and fair hearing, consistent with the burden of proof described above, without providing ODE with the benefit of any type of "presumption."

The court decisions cited by the Hearing Officer at pages 70-72 of his recommendation for the purported "presumption" are unavailing, as they involve presumptions that apply upon ***judicial review*** or are otherwise inapplicable to administrative review of ODE's FTE determination:

- The Hearing Officer cites State *ex rel.* Rock v. Sch. Employees Ret. Bd., 2004 WL 2803446 (Ohio Ct. App. 10th Dist., Sept. 30, 2004), in which the court, upon judicial review, found that the relator was ***not*** entitled to reversal of the board's final determination denying benefits because she failed to present any evidence to "support a finding that the board failed to properly discharge its duties and responsibilities under the law." Id. at *3.

- The Hearing Officer cites a pair of statues pertaining to the Auditor of State that operate to give "prima facie" effect to the Auditor's office's annual or biennial audits of public offices when subjected to judicial review in civil actions provided for in R.C. Chapter 117, and the Hearing Officer also cites a 1933 case, Looker v. State *ex rel.* v. Dillian, 127 Ohio St. 413 (1933), that applied an apparent predecessor statute. The Hearing Officer does not explain how these statutes governing the Auditor's office create any presumption favoring an ODE determination ***in this administrative action***. Indeed, the Hearing Officer cites no such provision contained in Title 33, because there is none.

- The Hearing Officer cites State *ex rel.* Labor Works of Dayton, LLC v. Bureau of Workers' Comp., 2010 WL 5386317 (Ohio Ct. App. 10th Dist., Dec. 21, 2010), which is not on point for at least two key reasons. First, in denying mandamus relief in an employer's challenge to the Bureau of Workers Compensation's audit for purposes of determining its insurance premium, the court noted that the employer inexplicably waited until eighteen months after the agency's deadline to submit ***any*** additional information in support of its position. See id. at *2. By contrast, ODE kept ECOT in the dark and left it to guess and speculate as to the applicable standards, and ECOT did not learn about the actual types of information ODE considered until ***after*** the Final Determination was issued – and, even then, only in ODE's November 3, 2016, response to a public records request served by ECOT. [See Section D.2, under Objection #8.] Second, in the cited case, there was no confusion or dispute over the type of business information the employer was required to maintain and provide, as that was made clear by statute. See id. Here, by contrast, ODE created a moving target: It sought to give notice in the middle of the school year, but after giving initial notice, it backtracked and rescinded the notice. Then, it sought to apply the durational requirement retroactively for the entire 2015-2016 school year – *i.e.*, ***months before*** it made its first "announcement." [See Section C, under Objection #8.]

- The Hearing officer cites several cases involving ***judicial review*** under R.C. 5717.04 from final orders of the Board of Tax Appeals ("BTA") affirming determinations of the State Tax Commissioner, which place the burden of proof on the taxpayer in the judicial proceeding. See, e.g., Satullo v. Wilkins, 111 Ohio St. 3d 399, 402 (2006) ("In reviewing a BTA decision, this court looks to see if that decision was 'reasonable and lawful.' … As for the burden of proof, it rests on the taxpayer 'to show the manner and extent of the error in the Tax Commissioner's final determination.' "); Ross v. Levin, 2010 WL 3353563, at *3 (Ohio Ct. App. 8th Dist., Aug. 26, 2010) ("Pursuant to R.C. 5717.04, if upon consideration of the record and evidence we determine that the BTA's decision is reasonable and lawful, we must affirm … . 'As for the burden of proof, it rests on the

taxpayer "to show the manner and extent of the error in the Tax Commissioner's final determination." ' ") (citing Satullo).

- The Hearing Officer also cites a tax-appeal matter in which the court observed that the Tax Commissioner's assessment is given a "presumption of correctness" if it is not disputed, but if the taxpayer challenges the assessment and offers evidence to support its position, the Tax Commissioner bears the burden of proving the assessment is correct. For example, the Hearing Officer cites Dearwester v. Limbach, 1991 WL 63141 (Ohio Ct. App. 1st Dist., Apr. 24, 1991), but there the court concluded that the presumption of validity of the Tax Commissioner's sales-tax assessment was overcome by the taxpayer's testimony that no sales occurred, and, thus, "the burden is upon the Tax Commissioner to show the occurrence of the sales and upon the board to consider the conflicting evidence and make its own factual determination." Id. at *3. The court found the board's decision in favor of the Tax Commissioner was "unreasonable and unlawful" and remanded for "further proceedings according to this decision and the law." Id. at *5. Similarly, Ross v. Levin, 2010 WL 3353563 (Ohio Ct. App. 8th Dist., Aug. 26, 2010), reversed a Board of Tax Appeals' decision imposing employer withholding tax on an individual. The court found that because the board's decision was not supported by reliable evidence, the appellant's testimony was sufficient to rebut a "presumption of correctness" that might have initially attached to the assessment.

The error of the Hearing Officer's misplaced reliance on the above legal authorities is further compounded by his misguided notion that he can "glean" that the burden of proof is on ECOT because ***he sees something that is not in the statutes***. [See R&R at 72 ("Although the statutory scheme set forth in R.C. 3315.08(K) contains no express allocation of burden, the Hearing Officer gleans from the statutory scheme that a similar presumption of correctness was intended by the legislature.").] No such gloss is warranted or appropriate under the express language of Section 3314.08.

The Hearing Officer also reaches an illogical conclusion that the fact that the time frame for this hearing is "abbreviated" and "there is no right of appeal to the court system," supports a conclusion that ***ECOT*** bears the burden of proof, in addition to having no right to judicial review. In other words, the Hearing Officer suggests that because ECOT, in his view, is entitled to fewer protections than other regulated parties, it must bear the burden of proof. Really? Such conclusion flies in the face of long-settled Ohio Supreme Court authority in Goodyear Synthetic

Rubber Corp., as well as Bloch v. Glander, in which the Court explained that any presumption favoring the agency upon judicial review is based on the appellant having *already received a full and fair hearing before the agency*. See 151 Ohio St. 381, 385. Such reasoning is especially true if, as the Hearing Officer asserts, ECOT is entitled to less process than a normal litigant.

2. Even If Such A Presumption Applied, It Has Been Rebutted By The Existence Of Evidence To The Contrary.

Nevertheless, even assuming for the sake of argument that a presumption of regularity could apply in this proceeding, it does not shield the administrative action "from a thorough, probing, in-depth review" that inquires into such issues as whether the agency acted within the scope of its authority and discretion, whether it followed the necessary procedural requirements, whether the "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," and whether the "actual choice made" was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971). It, thus, follows that the presumption of regularity does not shield the agency where there is "evidence to the contrary," such as the agency's failure to consider probative facts, or the agency's abuse of discretion, or unreasonable, unfair, and/or arbitrary and capricious conduct by the agency. See, e.g., id.; Bloch v. Glander, 151 Ohio St. 381, 388-90 (1949).

In other words, such a presumption, even where it applies, is ***rebuttable*** by evidence suggesting that the agency did not act consistent with its obligations under the law. On point again is Bloch v. Glander, cited above. There, the Ohio Supreme Court granted relief to the relator-taxpayer and reversed the Tax Commissioner and Board of Tax Appeals' decisions ordering payment of back taxes and a penalty, based on the fact that the taxpayer presented evidence that his payments were proper, the Department of Taxation inappropriately

"disregarded" the taxpayer's evidence, and the Department was "arbitrary" in applying the criteria it used to calculate the back taxes allegedly owed. See 151 Ohio St. at 388-90. The Court declared that to the extent any "presumption" arose in favor of the Tax Commissioner's action, which was validated by the Board, it no longer applied. It so held because "the record contains substantial evidence" supporting the taxpayer's position, "*the order of the Tax Commissioner must be supported by something more than a mere presumption in its behalf*." Id. at 390 (emphasis added).

So, too, here. The record is replete with evidence indicating that the Final Determination resulted from an *irregular* process in which, among other things, ODE failed to articulate an actual standard, failed to provide any type of reasonable notice, and failed to follow its own articulated processes and procedures. [See Objection #8 below.] Even in a judicial appeal of a final decision, such evidence would necessarily deprive ODE of the benefit of any presumption of "regularity."

OBJECTION #4: The Hearing Officer Ignored The Legal Principles That Guide Any Analysis Of Agency Conduct, Thus Leading To Wrong Conclusions That Must Be Rejected.

A. The Overarching Standard Of Reasonableness Governs All Agency Conduct.

Having wrongly given ODE the benefit of an inapplicable presumption, the Hearing Officer also apparently conducted the hearing under the misguided premise that the scope of administrative review is somehow confined to ODE identifying its funding methodology and then determining whether ODE correctly made the computations. [See Tr. 209-10 (Hearing Officer commented that Section 3314.08(K) does not set forth "reasonableness" as a standard of review, but instead, "the statute really references to a determination as to whether or not the State's determination that there is money owing is correct").] While the Hearing Officer gives lip

service to ECOT's position that reasonableness is the standard of conduct (and thus, the Recommended Findings of Law contain a number of conclusory statements to the effect that ODE acted reasonably), the Hearing Officer's recommended conclusions ignore vast swaths of the evidence presented, and reflect his exclusion of other evidence proffered by ECOT [see Section B under Objection #7, below], which establishes that ODE failed to proceed in the manner expected of all government agencies. Because space permits us only to touch on the high points in these Objections, we encourage the Board members to see for themselves by reading the hearing transcripts and the parties' briefs.

The overarching principle governing this proceeding is that *ODE, like all executive branch agencies, may not act unreasonably, or arbitrarily or capriciously* in regulating or seeking to act against ECOT or, for that matter, any party before it. See, e.g., Matz v. J.L. Curtis Cartage Co., 132 Ohio St. 271, 286 (1937) (an agency's exercise of enforcement powers must be "reasonable and neither arbitrary nor discriminatory"); Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 120, 125 (1948) (holding an agency's rule is enforceable "unless it is unreasonable"); Citizens Comm. to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61, 70 (10th Dist. 1977) (court noted administrator's action must be reversed if it is "unreasonable," meaning administrator failed to establish a "valid factual foundation" for the action taken); Henley v. City of Youngstown Bd. of Zoning Appeals, 90 Ohio St. 3d 142, 147 (1990) (holding an administrative order must be voided if it is "arbitrary, capricious, [or] unreasonable."); Penobscot Indian Reservation v. U.S. Dep't of Housing & Urban Dev., 539 F. Supp. 2d 40, 47 (D.D.C. 2008) (holding courts must set aside "agency actions, findings, or conclusions when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law").

It is of no matter that the pertinent statutory grant of power or authority does not specifically require the agency to act reasonably or not arbitrarily. Rather, the requirement of reasonable conduct by the agency is inherent in administrative law and implied in ***every*** statute and regulation relating to an agency's conduct. See, e.g., Matz, 132 Ohio St. at 282 (noting that statutes conferring powers upon administrative agencies incorporate a presumption "that the action of the administrative officer" will not be "either arbitrary or unwarranted"); State *ex rel.* Wis. Inspection Bureau v. Whitman, 220 N.W. 929, 942-43 (Wis. 1928) ("While the statute does not in terms provide that the commissioner of insurance shall exercise a sound and reasonable discretion in the disapproval of proposed rules and regulations, that condition is necessarily implied. … The rule of reasonableness inheres in every law, and the action of those charged with its enforcement must in the nature of things be subject to the test of reasonableness."); Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 15 (1911) (holding provisions of the Sherman Antitrust Act inherently incorporated the common law "rule of reason" as "the measure used for the purpose" of enforcing the act). Simply put, agencies and agency officials are duty-bound to conduct themselves reasonably, and whether the agency's actions are ***reasonable*** is part and parcel of arbitrary-and-capricious review. See, e.g., Thomas v. Mills, 117 Ohio St. at 121 (stating an "arbitrary" action is one that, among other things, is "nonrational; not done or acting according to reason or judgment").

It is now the role of this Board to ensure that ODE has complied with that duty. As a result, the fundamental issue to determine here is whether ODE, in arriving at and issuing its Final Determination as to ECOT, acted reasonably and not arbitrarily, consistent with the expectations imposed upon ***all*** government agencies. If the answer is, as ECOT submits, that it did not, then the challenged agency action must be set aside. See, e.g. City of Dayton *ex rel.*

Scandrick v. McGee, 67 Ohio St. 2d 356, 360 (affirming permanent injunction against city's award of contract after bidding process because "due to the lack of announced standards, [the city's] action in this case was arbitrary"); Collins v. Ohio State Racing Comm'n, 2003 WL 22846110, at *5 (Ohio Ct. App. 10th Dist., Dec. 2, 2003) (reversing commission's adoption of hearing officer's recommended decision on grounds the action was unreasonable under the circumstances); Residents of Baldwin Rd. v. State of Ohio, Dep't of Educ., 2002 WL 31303302, at *4 (Ohio Ct. App. 10th Dist., Oct. 15, 2002) (affirming reversal of State Board of Education's order denying transfer of school district territory, finding the Board's decision completely ignored the factors the Board itself promulgated in the Ohio Administrative Code for evaluating transfer requests and "completely ignores the extensive and more persuasive evidence" supporting a transfer in that case).

B. This Standard ***Requires*** Consideration Of The Fairness Of The Agency's Actions (*i.e.*, Equity), And The Board Cannot Ignore The Consequences Of ODE's Actions By Mischaracterizing Applicable Administrative Law As Recommended By The Hearing Officer.

The Hearing Officer proceeded under another incorrect premise by deeming that basic matters of reasonableness and fairness equate to "equity, "equitable claims," or arguments that are "equitable in nature," and then declaring that "equitable" considerations are off limits. [See, e.g. R&R at 84 ("[T]he Hearing Officer observes that arguments raised by ECOT as to why the Hearing Officer and State Board should preclude the consideration of durational based methodology in the Final Determination for ECOT are equitable in nature."); R&R Conclusions of Law ¶ 31 ("As an administrative tribunal and a creature of statute, a proceeding under R.C. 3314.08(K)(2)(b) cannot entertain equitable claims unless that authority has been expressly granted to it by the General Assembly. That has not happened.").]

Wrong again. The Hearing Officer's attempt to hide behind a label ("equitable") must be rejected. Indeed, the above-described, overarching concept that applies to all administrative action specifically includes the concepts of fairness and "equity." At bottom, ***equity*** simply means fairness. Black's Law Dictionary defines equity as "[f]airness; impartiality; evenhanded dealing." Id. at 619 (9th ed. 2009). "In its broadest and most general signification, [equity] denotes the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men – the rule of doing to all others as we desire them to do to us; or, as it is expressed by Justinian, 'to live honestly, to harm nobody, to render to every man his due.' " Malmloff v. Kerr, 879 N .E.2d 870, 874 (Ill. 2007).

The Ohio Supreme Court made clear long ago that an agency's obligation to refrain from arbitrary decision-making includes the duty to act ***fairly*** – and, yes, equitably. In Fratz v. Mueller, 35 Ohio St. 397 (1880), the Court held that if a board of equalization added to the valuation of a taxpayer's personal property "arbitrarily, without any evidence or knowledge of the facts to support the same," then equity would lie to correct the wrong. Id. Syll. ¶ 2. By "equity," the Court meant fairness. The Court noted that "[b]oards of equalization are sworn to ***fairly and impartially*** equalize the value of property for purposes of taxation" and have the power "to add or deduct, upon such evidence as shall be satisfactory to the board. … [B]ut where, as in this case, it appears that [the board] has not only acted without any evidence to support its decision, but directly opposed to evidence in support of the return, we are compelled to hold that such action is contrary to the injunctions of the oath of office, and is an arbitrary and unauthorized exercise of the power to add to or deduct from a return." Id. at 404 (emphasis added).

Indeed, it is long settled that the concept of ***fairness*** is encompassed within arbitrary-and-capricious review and, thus, one aspect of this administrative review of whether ODE's conduct was arbitrary and capricious is necessarily to determine whether ODE acted fairly or unfairly. In Thomas v. Mills, 117 Ohio St. 114 (1927), the Ohio Supreme Court explained that an "arbitrary" action by a public official includes, among other things, actions that are "[w]ithout fair, solid, and substantial cause." Id. at 127.

Moreover, in a case involving a funding clawback, the Tenth District stated that ***fairness is the issue*** if an agency changes its interpretation of a statute or regulation and attempts to apply its new interpretation to conduct that occurred before the regulated party was given notice of the new interpretation. In Omnicare Respiratory Services v. Ohio Dep't of Job & Family Services, 2010 WL 628656 (Ohio Ct. App. 10th Dist., Feb. 23, 2010), which involved an appeal from an audit of Omnicare, a Medicaid provider, the court considered a dispute over whether the agency changed its interpretation of regulations concerning Medicaid reimbursements and whether the agency could use a new interpretation to claw back reimbursements that had been paid by the agency before it imposed its new interpretation. If that were the situation, the court observed, "the real issue" would be whether the agency, without providing notice, "used a different interpretation" of a billing practice set forth in a regulation when it audited the provider and sought return of past payments. Id. at *3. The court added that, "[i]f it did, ***the question is whether such an interpretation was unfair*** to [the provider] who claimed that it relied on that earlier interpretation to its detriment." Id. In short, whether an applicable statute or regulation "was applied correctly" by ODE includes the concept of whether it was applied ***fairly***, as fairness is but one component of arbitrary-and-capricious review.

The Hearing Officer nevertheless asserts that "[b]ecause an administrative remedy is a creature of statute, the courts have held that one challenging an administrative determination cannot raise equitable defenses unless the statute at issue expressly makes equitable defenses available." [R&R at 84.] Let's be clear: ECOT is not bringing a "claim" of equitable estoppel. Additionally, a regulated party's entitlement to fair and reasonable ***advance*** notice of the rules and regulations that will be applied is not an "equitable defense."[4] Rather, it is a basic precept of administrative law that fair notice of regulatory changes is a component of arbitrary-and-capricious analysis.

Indeed, those who are regulated by an agency "have a right to know what government policy and rules are in advance." Provens v. Ohio Real Estate Comm'n, 45 Ohio App. 2d 45, 48 (10th Dist. 1975). As discussed above, whether the concept is called fair notice, "equity," "fairness," "reasonableness," avoidance of arbitrary conduct, or even "estoppel" – it is part and parcel of arbitrary-and-capricious review, which necessarily applies to ***all*** administrative agency conduct. The Hearing Officer's reference to "equitable claims" or "defenses" is simply a red herring.

Here, as set forth in more detail below under Objection #8, ECOT relied upon the 2016 statements of Mr. Wilhelm, its area coordinator, that no durational data would be considered. Of course, Mr. Wilhelm is the individual upon whom both Aaron Rausch, ODE's Director of the

[4] In support of his contention regarding the unavailability of equitable defenses, the Hearing Officer cites Dayspring of Miami Valley v. Shepherd, 2007 WL 1536917 (Ohio Ct. App. 2nd Dist., May 25, 2007). [R&R at 84.] But that case is off point. There, the court held that an Ohio Department of Health hearing officer failed to apply the required statutory factors for determining whether a nursing home could discharge a patient (and which supported discharge in that case) and instead applied additional factors that were not listed in the statute and which the court likened to "equitable defenses." Id. at *4. This case, thus, merely affirms the principle that an agency is bound by its statutory mandate, and has nothing to do with the issue of fair or reasonable notice of a change in regulation or regulatory interpretation that must be afforded to a regulated party.

Office of Budget and School Finance, and Chris Babal, ODE's Community School Payment Administrator, effectively conceded ECOT has a right to rely in matters relating to FTE reviews. [Tr. 366-68 (Babal); Tr. 706-707 (Rausch) (see Objection #8, Section D.1).] Against this backdrop, as well as Mr. Rausch's admission that eschools could reasonably construe the FTE Handbook as not requiring durational data, the concept of estoppel (*i.e.*, fairness) clearly applies, and it additionally bars ODE's attempt to impose a duration-based clawback against ECOT. [Tr. 716-17, 742-43, 1034-35 (Rausch) (see Objection #8, Section D.1).]

Thus, at bottom, the requirement of fair treatment necessarily applies to ***all*** administrative agency conduct. Indeed, questions of the fairness, equity, and reasonableness of ODE's actions are not only within the Hearing Officer's jurisdiction, it was his duty to address them. The Hearing Officer failed to do that and instead merely attempts to rubber-stamp the ODE administrators' misconduct by mischaracterizing ECOT's position as asserting "equitable claims" against the state.

This Board, however, is not a rubber stamp. It is duty-bound to use its authority to correct the mistake and reject the Hearing Officer's conclusion. As the Tenth District explained, "[t]here would be no point in having various tiers of review in administrative cases if the only duty of each reviewing body were to approve without question the decision which came before. … Instead, the system envisions a series of checks and balances in which each reviewing body considers what has gone before ***with an eye for the reasonability of the prior decision*** based upon all the facts presented and in light of the statutory requirements and factors." Collins v. Ohio State Racing Comm'n, 2003 WL 22846110, at *5 (Ohio Ct. App. 10th Dist., Dec. 2, 2003) (emphasis added).

OBJECTION #5: The Hearing Officer Wrongly Concluded That ODE's Final Determination And The Actions Related Thereto Were Reasonable, *i.e.*, Not Arbitrary, Capricious, And Unreasonable.

Because agencies must be barred from "the arbitrary imposition of regulatory requirements[,]" ODE failed to carry its burden of proof to establish that its position in regard to the Final Determination was reasonable. See Fairfield County Bd. of Comm'rs v. Nally, 143 Ohio St. 3d 93, 102 (2015) (holding an agency's failure to undertake "a full and fair analysis of the impact and validity" of any proposed standard before imposing it on regulated parties is the epitome of arbitrary conduct). As referenced above, the R&R is peppered with conclusory statements, based on selected bits of evidence and ignoring the rest, that ODE's conduct was "lawful," "valid," "reasonable" and/or "not unreasonable." [See, e.g., R&R Recommended Findings of Fact ¶ 40-44; Recommended Conclusions of Law ¶¶ 14, 21, 26, 27, 28, 34, 35, 42.]

Quite simply, however, ODE presented no evidence suggesting that the manner or mode by which it arrived at the Final Determination was reasonable or fair to ECOT. For that simple reason, the Board should issue a decision rejecting the Final Determination, in its entirety, and awarding ECOT its full, claimed FTE funding for the 2015-2016 school year. But, lest there be any confusion, as discussed in the following Objections #6 through #11, the application of several specific legal concepts that have developed under the governing arbitrary-and-capricious/reasonableness standard make clear that ODE, through its largely undisputed actions relating to and resulting in the Final Determination, has fallen short of the obligations imposed upon it as an administrative agency.[5]

[5] Although specific applications of the governing concept are discussed below, the general meaning of *arbitrary* as applied to an agency action is well settled in Ohio law. Ninety years ago in Thomas v. Mills, 117 Ohio St. 114 (1927), the Ohio Supreme Court explained that an "arbitrary" action is one that is "[w]ithout fair, solid, and substantial cause and without reason given; … fixed or done capriciously or at pleasure; without adequate determining principle; not

OBJECTION #6: The Complete Lack Of A "Durational" Standard Is Arbitrary And Capricious, And The Hearing Officer Was Wrong To Conclude That A Standard Existed.

A. Accepting ODE's Position At Face Value, No Actual Durational Standard Even Exists.

As a threshold matter, the R&R must be rejected based on ODE's own assertions as to the lack of an actual durational standard upon which such determination could be based – a point conveniently overlooked by the Hearing Officer. Specifically, ODE's own admissions in the Franklin County Court action – discussed in more detail below – indicate that the agency's attempt to impose a clawback based on ECOT's inability to produce minute-by-minute durational data for all of its claimed FTEs suffers from a fundamental flaw: No actual durational standard has been promulgated or articulated by ODE, and thus, there is no standard with which eschools, such as ECOT, could have either complied or not complied.

Specifically, ODE representatives repeatedly testified – as discussed below under Objection #8 – that the ***only*** communication from the department to eschools regarding the so-called durational requirement at issue are periodically updated FTE Handbooks, which have historically been made available on ODE's Web site. Yet in its proposed findings of fact and conclusions of law submitted to and ***adopted in*** the Franklin County Decision, ODE asserted that its FTE review manuals do not "carry the force and effect of law" and "are merely procedural guidelines for FTE reviewers to follow in conducting FTE reviews." [ODE's Proposed Findings

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founded in the nature of things; nonrational; not done or acting according to reason or judgment … ." Id. at 121 (citations omitted). More recently, the Supreme Court affirmed that, " 'Arbitrary' means 'without adequate determining principle; * * * not governed by any fixed rules or standard.' " City of Dayton *ex rel.* Scandrick v. McGee, 67 Ohio St. 2d 356, 359 (1981) (citing Black's Law Dictionary). Also citing Black's, the Court added that " '[u]nreasonable' means 'irrational.' " Id. The term "*arbitrary and capricious*" is essentially two words that mean virtually the same thing. " '[C]aprice' is defined as follows: 'Whim, arbitrary, seemingly unfounded motivation. Disposition to change one's mind impulsively.' " 4D Investments, Inc. v. City of Oxford, 1999 WL 8357, at *2 (Ohio Ct. App. 12th Dist., Jan. 11, 1999).

and Conclusions, at 30 (Franklin County Action).][6] In other words, according to ODE, the only document by which it purportedly communicates its durational expectations/standards to eschools is merely a "guideline" that is ***not binding on anyone***. [Tr. 304 (Babal) (describing FTE Handbook as "the guideline for how the process typically works").]

Further, nothing in R.C. 3314.08 – the FTE funding statute – or the Franklin County Court's interpretation of it suggests that such statute actually sets forth a specific standard with which eschools must (or even can) comply for purposes of collecting and presenting durational information, in the form purportedly sought by ODE. Thus, by necessity, the only possible source of such a binding "standard" is the FTE Handbook. ***Yet, ODE, itself, denies this***.

As a result, taking ODE's assertions at face value, there simply is ***no*** binding durational standard upon which ODE could rely in making the Final Determination. As a result, ODE's "determination" that ECOT cannot justify well over 50 percent of its claimed FTE funding (and ODE's attempt to claw back the same) based solely on the school's failure to satisfy a ***nonexistent*** durational standard must necessarily be rejected, as must the Hearing Officer's recommendation be rejected.

B. The Hearing Officer Fails To Identify Any Actual Durational Standard.

The Hearing Officer tried, but failed, to identify such a standard. Indeed, the R&R offers no specific "finding" of any standard and instead merely concludes that the standard is the funding statute, R.C. 3314.08. [R&R Recommended Conclusions of Law ¶ 22.] Based solely on that, the Hearing Officer concludes that ODE was entitled to claw back funding based on a

[6] Admissions in a party's brief, even if prepared and filed by the party's attorney, are deemed to be party opponent admissions binding on that party. See, e.g., Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998) (noting, under analogous federal evidence rules, "a statement made by an attorney is generally admissible against the client" and "[u]nder Fed.R.Evid. 801(d)(2), an admission offered by a party is not hearsay at all, and is therefore admissible against that party").

purported failure by ECOT to "maintain documentation, including durational data." [See, e.g., R&R Recommended Conclusions of Law ¶¶ 38-40.] Nonsense.

If that were true, then ODE (and this Board as its governing body) has failed to comply with the law for thirteen years, given that the language in Section 3314.08(H)(3) has remained substantially the same since the statute was originally enacted in 2003. We invite the Board to read Section 3314.08(H) and see if it can find a standard that provides concrete guidance to an eschool as to what the durational "standard" is and what type of documentation it should to provide to ODE in order to comply and maintain its funding:

> (H) The department of education shall adjust the amounts subtracted and paid under division (C) of this section to reflect any enrollment of students in community schools for less than the equivalent of a full school year. The state board of education within ninety days after April 8, 2003, shall adopt in accordance with Chapter 119 of the Revised Code rules governing the payments to community schools under this section including initial payments in a school year and adjustments and reductions made in subsequent periodic payments to community schools and corresponding deductions from school district accounts as provided under division (C) of this section. For purposes of this section:
>
> (1) A student shall be considered enrolled in the community school for any portion of the school year the student is participating at a college under Chapter 3365 of the Revised Code.
>
> (2) A student shall be considered to be enrolled in a community school for the period of time beginning on the later of the date on which the school both has received documentation of the student's enrollment from a parent and the student has commenced participation in learning opportunities as defined in the contract with the sponsor, or thirty days prior to the date on which the student is entered into the education management information system established under section 3301.0714 of the Revised Code. For purposes of applying this division and divisions (H)(3) and (4) of this section to a community school student, "learning opportunities" shall be defined in the contract, which shall describe both classroom-based and non-classroom-based learning opportunities and shall be in compliance with criteria and

documentation requirements for student participation which shall be established by the department. Any student's instruction time in non-classroom-based learning opportunities shall be certified by an employee of the community school. A student's enrollment shall be considered to cease on the date on which any of the following occur:

(a) The community school receives documentation from a parent terminating enrollment of the student.

(b) The community school is provided documentation of a student's enrollment in another public or private school.

(c) The community school ceases to offer learning opportunities to the student pursuant to the terms of the contract with the sponsor or the operation of any provision of this chapter.

Except as otherwise specified in this paragraph, beginning in the 2011-2012 school year, any student who completed the prior school year in an internet- or computer-based community school shall be considered to be enrolled in the same school in the subsequent school year until the student's enrollment has ceased as specified in division (H)(2) of this section. The department shall continue subtracting and paying amounts for the student under division (C) of this section without interruption at the start of the subsequent school year. However, if the student without a legitimate excuse fails to participate in the first one hundred five consecutive hours of learning opportunities offered to the student in that subsequent school year, the student shall be considered not to have re-enrolled in the school for that school year and the department shall recalculate the payments to the school for that school year to account for the fact that the student is not enrolled.

(3) The department shall determine each community school student's percentage of full-time equivalency based on the percentage of learning opportunities offered by the community school to that student, reported either as number of hours or number of days, is of the total learning opportunities offered by the community school to a student who attends for the school's entire school year. However, no internet- or computer-based community school shall be credited for any time a student spends participating in learning opportunities beyond ten hours within any period of twenty-four consecutive hours. Whether it reports hours or days of learning opportunities, each community school shall offer not less than nine hundred twenty hours of learning opportunities during the school year.

> (4) With respect to the calculation of full-time equivalency under division (H)(3) of this section, the department shall waive the number of hours or days of learning opportunities not offered to a student because the community school was closed during the school year due to disease epidemic, hazardous weather conditions, law enforcement emergencies, inoperability of school buses or other equipment necessary to the school's operation, damage to a school building, or other temporary circumstances due to utility failure rendering the school building unfit for school use, so long as the school was actually open for instruction with students in attendance during that school year for not less than the minimum number of hours required by this chapter. The department shall treat the school as if it were open for instruction with students in attendance during the hours or days waived under this division.

We cannot discern a standard in the statutory language. The Hearing Officer provides no explanation and also fails to identify what "related provisions" might provide a standard. That is because there are none.

Again, by ODE's binding admission, the FTE manuals also do not provide a "standard." Remarkably, the Hearing Officer advances as a bizarre recommended "finding of fact" that ***ECOT*** took the position and somehow failed to prove that the 2015 FTE Handbook "is only a guideline that is not rule-filed and therefore not binding on either ODE or the schools." [R&R Recommended Findings of Fact ¶ 58(c).] Not so – ***ODE admitted this is its position***. ECOT, on the other hand, contends as part of the court case that the FTE Handbook should have been adopted as a rule under Chapter 119.

The lack of ***any standard***, alone, is fatal to ODE's position. As the Tenth District has long recognized, regulated persons "have a right to know what government policy and rules are in advance [and] if there be no rule, then the result becomes as flexible as the grass in a breeze." Provens v. Ohio Real Estate Comm'n, 45 Ohio App. 2d 45, 48 (10th Dist. 1975). As another court aptly stated, the powers exercised by an administrative agency are lawful "only if the

powers are surrounded *by standards* to guide the agency's actions. The standards must be sufficient to ensure that the agency does not act arbitrarily or capriciously." Distributors Pharm. Inc. v. Ohio State Bd. of Pharm, 41 Ohio App. 3d 116, 118-19 & Syll. ¶ 2 (8th Dist. 1987). Thus, in order to avoid engaging in arbitrary and capricious conduct or decision-making, government agencies must operate within clear, established standards to circumscribe their discretionary powers and ensure that they do not abuse their discretion.[7]

As the Ohio Supreme Court has declared time and again, although government bodies are vested with discretion to act in the public interest, "such discretion is neither unlimited nor unbridled. The presence of standards against which such discretion may be tested is essential; otherwise, the term 'abuse of discretion' would be meaningless." City of Dayton *ex rel.* Scandrick v. McGee, 67 Ohio St. 2d 356, 360 (1981). The absence of such a standard here is fatal to ODE's position.

OBJECTION #7: The Hearing Officer Failed To Consider That ODE's Implementation Of A Durational Requirement Was Arbitrary And Capricious Because ODE Failed To Consider Relevant Factors.

A. The Hearing Officer Ignored The Evidence – Including ODE's Own Admission Through Mr. Rausch – That ODE's "Stopwatch" Approach Has No Correlation To The Supposed Objective Of Fostering Student Engagement In Learning.

On top of its failure to articulate or promulgate an actual standard, ODE acted arbitrarily and capriciously because it failed to undertake a full and fair analysis of what it was actually looking for or seeking to accomplish, based on its "durational" requirement, before seeking to

[7] ECOT, of course, contends as part of its pending Tenth District appeal that R.C. 3314.08 affords ODE with no discretion to apply a durational criterion. Nonetheless, for the reasons described in Objection #2, that issue is not presented in this administrative hearing. We therefore assume for purposes of this administrative proceeding that ODE was permitted by statute to apply a durational criterion. As demonstrated at the hearing and summarized in these Objections, however, ODE acted arbitrarily and unreasonably in its actual application of a purported durational criterion.

apply that requirement to claw back funding from ECOT. But it failed to do so. Although the Hearing Officer acknowledges [see R&R Recommended Findings of Fact ¶ 58(a)] that this point was explored at the hearing – and it would have been explored further but for the Hearing Officer's exclusion of relevant evidence (see Section B below) – the Hearing Officer appears to have made no specific recommended finding on this point other than the blanket conclusion that ODE can effectively do whatever it wants.

By way of background, even if there was an enforceable, articulated "durational" standard, ODE's purely ***time-based*** methodology makes no sense because such a measurement is simply not an indicator of whether students are actually learning and/or whether schools are actually providing students with an education. Aaron Rausch, ODE's Director of the Office of Budget and School Finance, conceded as much, with respect to online time:

> Q. Now, as to terms of what's being considered now, you're not even testing whether or not a student is engaged in a particular activity, you're simply determining whether or not the student had a computer turned on for a particular length of time?
>
> A. I would say that it was more than just having the computer turned on, but it's – but certainly we're measuring the time that is tracked within the various systems that a school uses to engage students in learning opportunities.
>
> Q. Well, I guess what I'm trying to find out is other than looking to see how long a student is accessing electronically, I'm just talking correspondence school online, you've drawn the demarcation between online and offline. So focusing your attention please only on online, what I think you're telling me is that you're simply looking on a – *literally a minute basis as to the amount of time that, for example, a computer may be turned on and turned off, the log-in, log-off, without any real inquiry as to whether the student actually performed or engaged in actual learning during that time period; is that true*?
>
> A. *Yes, that's correct*.

> Q. And so is that true for all the eSchools that were subject to FTE reviews this year, that the Department has confined its review to simply looking at the time records without making any further inquiry as to determine *whether or not the student actually did or didn't do anything*?
>
> A. *For the online time, yes, that would be correct*.
>
> [Tr. 832-33 (emphasis added).]

Thus, as even Mr. Rausch conceded, ODE's myopic focus on online time simply does not correlate with "whether or not the student actually did or didn't do anything[.]" The Auditor's Office, likewise, stated its view of the disutility of such information in a March 2016 letter to ODE, in which the office expressed concern about ODE's drastic change from its prior, enrollment-based approach in conducting FTE Reviews:

> In practice … , *log-in records alone have not proven to be an effective means for online schools to verify whether a student is actually participating in learning opportunities*. A student can log-in for one hour to download assignments and continue working offline to complete those assignments. Likewise, a student can appear to be logged-in for five hours, without actually participating in any learning opportunities.
>
> [Pla. Exh. 52 (emphasis added).]

Equally irrational and unfair is ODE's proposed methodology for recording and demonstrating eschool students' offline time. Specifically, ODE contends that offline time in the eschool context can be properly documented only via a timesheet prepared by a student or parent, but certified by a licensed teacher – a teacher who, in the eschool context, typically does not have physical interaction with the student. Thus, as Chris Babal, ODE's Community School Payment Administrator, testified:

> Q. And so just to make sure we understand the type of data that is now being asked for, to the extent a student reads a chapter from a book, the expectation that is now being

enforced by the Department is that the student would have logged somewhere the – what was read, the amount of the reading time?

Even though the teacher was not physically present to watch the student read the book, the teacher would have to certify that was an accurate amount of time?

A. I would say that's accurate, and would add that the parents could also let a teacher know they are reading at home, depending on the age of the student.

Q. Okay. So you would rely upon the parents to confirm whether or not a student was engaged in learning activity for the requisite time?

A. I would trust the parents to report the student was working on schoolwork.

Q. Okay. But by and large, just so we're clear, the expectation is the teachers ***have to certify the student was engaged in an activity, even though you understand in an online environment the teacher is not physically observing the student engaged in the activity; is that correct***?

A. You're saying the teacher is not seeing the student, but they have to certify it anyway?

Q. Yes, sir.

A. ***Yes***.

[Tr. 323-24 (emphasis added).]

In other words, ODE's inexplicable focus on time is so myopic that the agency believes eschool teachers should be required to risk their licenses by certifying reported time for students whom ***they did not personally observe***. Such a requirement is unfair to eschool teachers, and fails to account for the unique circumstances of the eschool learning environment and the simple fact that different students learn and complete learning-related tasks at different paces. [Tr. 1344 (testimony of ECOT teacher William Schroedl).] As a result, Mr. Babal's testimony only further demonstrates the ridiculousness of ODE's position.

Thus, had ODE actually undertaken a full and fair analysis, of course, it would have concluded that: (1) such methodology could not be squared with the calendar-based ***enrollment*** reporting still utilized by ODE; and (2) the stopwatch methodology being employed is not a rational indicator of whether students are actually being educated and/or actually participating in educational activities – as Mr. Rausch necessarily conceded. Indeed, such methodology not only fails to accomplish ODE's stated goal of determining whether ECOT is actually educating students, and providing funding based on the same, but it is likely to have a negative impact on ECOT's at-risk student population (see Section B below).

An agency's failure to undertake "a full and fair analysis of the impact and validity" of any proposed standard before imposing it on regulated parties is the epitome of arbitrary conduct. Fairfield County Bd. of Comm'rs v. Nally, 143 Ohio St. 3d 93, 102 (2015). The arbitrary-and-capricious doctrine requires the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). An agency's action or decision, or its interpretation of a statute or rule or statute would be arbitrary and capricious, for example, if the agency "entirely failed to consider an important aspect of the ***problem***, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Id. (emphasis added).

The review focuses on whether the agency's action was arbitrary and, therefore, "contrary to law." Darin & Armstrong, Inc. v. U.S. Envtl. Prot. Agency, 431 F. Supp. 456, 460 (N.D. Ohio 1977). This review requires a "thorough[ ] inquir[y] into the factual basis supporting an agency's conclusions in order to insure that the conclusions reached are ***rational***, reasonable

and just." Id. at 461 (emphasis added). An agency cannot simply assert in conclusory fashion that its "ruling is correct." In Home Health, Inc. v. Shalala, 1997 WL 269486, at *1, 5 (D. Minn., Mar. 5, 1997) (finding agency's decision denying reimbursement to Medicare provider was arbitrary and capricious where agency failed to offer any guidance on or analysis of the applicable statute or regulations).

In short, agency action must be supported by a rational and reasoned basis. Delta Airlines Inc. v. Export-Import Bank of the U.S., 718 F.3d 974 (D.C. Cir. 2013), is on point. There, the Export-Import Bank was required to "take into account any serious adverse effect" of a loan or loan guarantee on certain U.S. industries and U.S. jobs. Thus, the agency drafted "procedures [it stated were] designed to identify categories of loans and loan guarantees that do not have an adverse effect" on the relevant portions of the U.S. economy. Id. at 975-76. The court held that the bank failed to follow the directive to restrict benefits to companies "that do not have an adverse effect on the relevant portions of the U.S. economy" and instead acted arbitrarily and capriciously by determining, without explaining its justification, that foreign companies which provide services, as opposed to goods, can never be deemed to cause adverse effects to U.S. industries. Id. at 976-78. The court declared that "[w]e agree with Delta that the Bank, at a minimum, *has not reasonably explained its justification for the categorical conclusion at issue here*." Id. at 978 (emphasis added).

Similarly, in Crickon v. Thomas, 579 F.3d 978, 983 (9th Cir. 2009), the court held that the Bureau of Prisons' interpretation of a rule that operated to categorically deny early release eligibility to prisoners with certain prior convictions was arbitrary and capricious, in part, because it "failed to provide any rationale for the categorical exclusion generally." Id. at 983. As another example, Tanner's Council of Am., Inc. v. Train, 540 F.2d 1188 (4th Cir. 1976),

involved a requirement that the Environmental Protection Agency establish guidelines for controlling water pollution caused by the leather-tanning industry based on standards for identifying "the best practical control technology currently available" for the industry. But instead of considering the factors for evaluating what is "the best" technology for the tanning industry, the agency decided that standards applicable to the meat-packing industry should work. The court found that the agency failed to consider the differences between the two industries, and it held that the agency's "*conclusions are the product of guesswork and not of reasoned decision-making*." See 1191-93 (emphasis added).

Judulang v. Holder, 132 S.Ct. 476 (U.S. 2011), provides yet another example of an agency's failure to consider relevant factors that led to unreasonable regulatory conduct. There the Supreme Court held that the Board of Immigration Appeals' policy for determining whether an alien was eligible for discretionary relief from deportation was arbitrary and capricious because the policy "does not rest on any factors relevant to whether an alien (or any group of aliens) should be deported," and, thus, has "no connection to the goals of the deportation process or the rational operation of the immigration laws." Id. at 487. In short, agency action must be based on non-arbitrary, "relevant factors[.]" Id. at 482.[8]

Here, for the reasons described above, there is no rational or reasoned basis for ODE's imposition of a durational requirement and/or its attempt to claw back tens of millions of dollars from ECOT due to its failure to comply with the same. To the contrary, ODE's imposition of a stopwatch-based approach to online education is ***antithetical*** to the rational goal of ensuring that

[8] See also Penobscot Indian Reservation v. U.S. Dep't of Housing & Urban Dev., 539 F. Supp. 2d 40, 47 (D.D.C. 2008) (court noted that an agency rule or action may be deemed arbitrary and capricious unless "the agency has explained its decision, … the facts on which the agency purports to have relied have some basis in the record, and … the agency considered all relevant factors.").

all Ohio students are provided with the best possible education, suited to their specific needs. The Hearing Officer's R&R offers no basis for concluding otherwise and, indeed, does not even address the issue.

B. The Hearing Officer Improperly Excluded Evidence That ODE's Newly Minted, Time-Focused Methodology Has No Rational Connection To Whether A Student Is Actually Participating In Educational Opportunities.

ECOT also objects to the Hearing Officer's order excluding expert evidence proffered by ECOT that its newly imposed "durational standard" for FTE funding, as applied to ECOT, is arbitrary and capricious. For example, the Hearing Officer excluded the expert report of Dr. Michael Corrigan [Proffered ECOT Exh. B-1] and did not permit Dr. Corrigan to testify.[9] The Hearing Officer's exclusion of this evidence provides ample grounds for rejecting his recommendation, as Dr. Corrigan's testimony would have been particularly significant in this regard.

In his report, Dr. Corrigan, an educational psychologist and statistician, opines that ODE's time-centered methodology not only fails to measure actual educational quality and progress but can actually be detrimental to at-risk students who benefit much more from

[9] The hearing officer also excluded any testimony from two additional experts identified by ECOT. First, Robert Sommers [Proffered ECOT Exh. C-1 (expert report)] would have offered expert testimony regarding the theory and calculations of FTEs for brick-and-mortar schools; ODE's lack of measurement of student engagement in any type of school; the parallels in calculating FTEs between online schools and brick-and-mortar schools; ODE's failure to provide customary and expected notice of changes and standards; ODE's irrational and discriminatory application of new standards to ECOT; the unreasonable, arbitrary, and the punitive application of standards mid-school year to ECOT, Second, Ross McGregor [Proffered ECOT Exh. F-1 (expert report)] would have offered expert testimony and background information as to procedures and functions of JCARR; executive agency participation in the same; considerations made by JCARR as part of the rule-making process; ODE's ongoing efforts to incorporate the FTE handbook as an administrative rule; the substantive (*i.e.*, non-procedural) nature of the FTE handbook, and negative consequences from noncompliance, but not to brick-and-mortar charter schools and/or certain other eschools not subject to audits this year; the difference between "enrollment" and "attendance"; arbitrary restrictions imposed upon instructional methodology; and the relative performance of ECOT.

individualized engagement – as opposed to a stopwatch-style accounting of hours. Indeed, as Dr. Corrigan notes, at-risk students, like those who make up a majority of ECOT's student population, are more likely to fail if they believe that a school's focus is on timekeeping as opposed to individualized engagement and interaction tailored to the student's needs. [Id.]

C. The Hearing Officer's Various Potshots And Editorial Comments About ECOT Do Not Support A Conclusion That ODE's Time-Focused Methodology Has Some Rational Connection To Whether A Student Is Actually Participating In Educational Opportunities.

In an apparent attempt to justify a recommendation that ODE administrators should be allowed to do whatever they want to ECOT, the Hearing Officer cites snippets of testimony and makes various editorial remarks throughout the R&R in an apparent effort to portray ECOT as being ambivalent toward student attendance and participation, or not caring if it teaches to an "empty classroom." Such comments are misplaced and not supported by the evidence.

With regard to participation in learning, given that ECOT serves a largely "at-risk" student population, that its students typically face many challenges, and that its funding has always been based on enrollment, ECOT has put in place numerous mechanisms for engaging and helping its often-struggling students succeed. [PI Tr. Vol. IV 197-98, 203-04, 219-20 (Pierson).] This model, based on positive intervention, starts with ECOT's approximately 900 teachers, many of whom also possess high-demand credentials that allow them to work with special-needs students, are charged not only with teaching students the necessary educational content, but also with specifically monitoring and undertaking efforts to promote student engagement and success. [PI Tr. Vol. IV 194-95, 208-22.] In addition, ECOT provides each new student with the services of an "Orienteer," who assists in acclimating the student to ECOT's systems and programs. [PI Tr. Vol. IV 194-95, 214-15.] When a teacher, principal, or a parent identifies a student as needing additional assistance or intervention in terms of academic

performance, ECOT has a team of "Student Support Specialists," specially trained employees who evaluate students' specific circumstances and work with them and their families for as long as necessary to foster engagement, where necessary, and to take steps to help students achieve academic success. [PI Tr. Vol. IV 215-19; see also Tr. 1425-28; 1448-49 (Pierson).] ECOT also provides counseling services to students who have been identified by their teachers or their families as struggling with emotional issues or other issues. [PI Tr. Vol. IV 217-18.] It also provides social services to homeless students, in an effort to ensure that they have the tools to succeed in ECOT's learning environment, despite their circumstances. [PI Tr. Vol. IV 219-20.]

With regard to attendance and truancy, these subjects have nothing to do with this proceeding. ODE has made clear that only documentation reflecting *actual hours and minutes of log-in time* and offline time will satisfy its new durational requirement. But putting that aside, it is misleading to suggest that ECOT places no emphasis on attendance and truancy issues. As Ms. Pierson testified during the preliminary injunction hearing, ODE has historically received feedback that its truancy filings were seen as "excessive." [PI Tr. Vol. IV 248.] That feedback, coupled with the school's focus on students who have struggled to find success elsewhere, has led ECOT to emphasize efforts to positively engage struggling students over punishing them for continued struggles. As Ms. Pierson testified:

> Q. And why does ECOT base its truancy on the 105-hour rule?
>
> A. Well, the base requirement is that we have to make sure we're not having students stay in our school past 30 days if they haven't logged in. *But we want to have intervention for all of the students to try to keep them engaged. They have already not been successful at another school, so if we kick them out, then where are they going to go*?
>
> So we try to focus on trying to get them engaged as much as possible before we have to withdraw them to some other school or to nowhere, especially the kinds who are over 18, there is not a

> lot they can do if they don't stay with us. *So we try to do everything we can to try to help them through*.
>
> That being said, you don't need to log in every day to be successful at ECOT, it's depending on how you use your time and how quickly you understand and master the contents, you don't have to log in every day. So it is important that we have a human aspect of evaluating why students aren't logging in and making sure that they understand how to stay enrolled in the school and also that they are being successful in their classes.
>
> Q. And you mentioned the focus on intervention, I think you said as soon as three to five days of non-engagement.
>
> A. Yes.
>
> Q. Go ahead.
>
> A. Our teachers are supposed to contact the student every week even if they're a straight A, doing great student, you're supposed to be having some type of communication with them to build that rapport. So if something does go wrong, you have the rapport already with the family.
>
> Most families interact with school faculty when something has gone wrong. So we try as a different form of school to interact with them on positive things so that the first time we call them isn't a negative event. …
>
> [Id. at 243-45 (emphasis added).]

In sum, the suggestion that ECOT fails to devote due attention and resources to student engagement is misleading, is not supported by the evidence, and moreover, has no bearing on the key issue of whether ODE's stopwatch approach has any rational connection student engagement in learning opportunities.

D. The Hearing Officer Ignored The Evidence Establishing ODE Failed To Consider Another Relevant Factor – That Its Purported Methodology Can Be Employed Only To Punish, But Not Benefit, Eschools From A Funding Perspective, Providing A Disincentive To Accelerate Learning.

ODE's stopwatch methodology to funding is also fundamentally flawed and unfair to eschools in that, as ODE admits, it may be used only to ***punish***, but not to reward, eschools from

a funding perspective. In other words, the proffered methodology allows ODE to have its cake and eat it too, while eschools are left holding the crumbs. The Hearing Officer's recommendations distort this issue and somehow attempt to twist ODE's irrational conduct into a factor supporting ODE's position. Again, the Hearing Officer is wrong.

As Mr. Rausch testified, ODE's durational methodology provides for a reduction in funding to eschools that are unable to produce durational/time data for a student equal to the proportion of the full school year in which the student was enrolled at the eschool – based on the school calendar reported in ODE's EMIS data system. [Tr. 984-85.] Thus, an eschool faces funding losses where the durational time produced is ***less*** than the period of the student's enrollment.

But, as Mr. Rausch further testified, no corresponding increase in funding is provided to an eschool where a student actually participates in ***more hours*** than the proportionate period of his or her calendar-based enrollment. [Id.] As an illustration, if a student is enrolled for only 10 percent of a school's specific calendar year, but an eschool can demonstrate that it provided, and the student actually participated in, learning hours equivalent to 20 percent of the same year, the eschool will receive funding for only 10 percent of an FTE, not the 20 percent of learning activities the student actually received and participated in. Yet, at the same time, an eschool is required to continue providing services to, and may not withdraw, a student simply for failing to meet a particular durational milestone. [Tr. 1530-31 (Pierson).] This creates an obvious disincentive for eschools to go above and beyond in educating their students and helping them to learn and progress at a faster pace.

Mr. Rausch attributed this anomaly to the statutory requirement that a single student can only be funded for one FTE per school year, no matter how many schools he or she attends

during that year. [Tr. 1005-06.] In fact, however, such disproportionate treatment of eschools is actually due to ODE's attempt to fit a round peg (*i.e.*, durational data) into a square hole (FTE calculation and funding based on student ***enrollment*** based on a school's calendar reported in EMIS):

> Q. But the calendar we've been told is – was really something used for modeling enrollment as opposed to actual student engagement. But you are now telling us you want to focus on student engagement so why would you look at a model that the Department only wants to follow?
>
> A. I would I guess say there is a nexus between those two things.
>
> Q. But there's not a nexus. You told us that there's not a nexus between a school's calendar and whether or not a student is actually engaged in learning opportunities.
>
> A. There is a nexus when it comes to calculating what the FTE is.
>
> Q. *Well, the only nexus is you placed a cap on the amount of time a school can receive for the student's learning opportunities that is not set forth anywhere in the statute, so provided they don't exceed 10 hours at the end of the day*.
>
> A. *Yes, that's correct*. The use of the calendar would have – would, I guess, be described from an EMIS standpoint.

[Tr. 984 (Rausch).]

The senselessness of ODE's position is reflected in the following example: Assume that a student is enrolled at an eschool for 25 percent of the calendar year but participates in actual learning activity hours equivalent to 75 percent of that same year. The same student then transfers to a brick-and-mortar school for the remaining 75 percent of the calendar year but participates in actual learning opportunity hours equivalent to only 25 percent of that year. Under ODE's eschool-only durational methodology – given that brick-and-mortar schools

remain subject to an enrollment-based funding methodology – the brick-and-mortar school would receive 75 percent of the funding for that student, even though the eschool provided him or her with ***75 percent of the actual education***.

Not only did the Hearing Officer ignore Mr. Rausch's testimony, the R&R also advances ***incorrect statements*** about this subject:

> ODE uniformly applies the actual school calendar filed in EMIS in calculating FTEs documented by the community school. The testimony established that anything less would distort FTEs and lead to absurd consequences. ECOT did not rebut this testimony and it is noteworthy that the Appellant does not further address this issue in it closing briefing. Accordingly the Hearing Officer must find in favor of ODE on this issue.

[R&R at 106.]

The Hearing Officer's assertions quoted above are wrong in every respect. ***First***, Mr. Rausch's testimony established the exact opposite: That ODE's durational methodology provides for a reduction in funding to eschools that leads to the "absurd consequences" – at least as to eschools. ***Second***, ECOT did rebut "this testimony" that the Hearing Officer refers to – in fact the rebuttal came through ***the testimony*** of Mr. Rausch on cross examination quoted above. ***Third***, ECOT, in fact, further addressed this issue in its closing briefing. [ECOT's Post-Hearing Brief, at 45-47.] This Board should reject such mischaracterizations.

Based on this example alone, ODE cannot credibly contend that its proffered durational approach to eschool funding is either fair to eschools or designed to actually incentivize the education of students. To the contrary, such methodology is designed merely as a device for further punishing eschools, which already face a funding disadvantage when compared with their brick-and-mortar counterparts.

OBJECTION #8: The Hearing Officer's Recommendation Should Be Rejected Because The Hearing Officer Ignored ODE's Failure To Provide Adequate And Timely Notice Of Its Imposition Of A Durational Requirement On Which It Would Base A Funding Clawback, Without Providing ECOT A Reasonable Opportunity To Come Into Compliance.

A. ODE's Failure To Give Timely Notice Of The New Durational Requirement Was Arbitrary And Capricious.

Even if an actual standard existed, ODE failed to provide ECOT with timely or adequate advance notice of its imposition of a durational requirement. That failure independently demonstrates the unreasonableness and impropriety of ODE's actions. The Hearing Officer's R&R offers a grab bag of unsupported, *ex post facto* excuses for ODE's failure to provide adequate notice of its significant change in practice, which must be rejected. For example:

- The Hearing Officer contends that ECOT is not even entitled to fair notice (labeled an "equitable claim"), so it "cannot claim to have been unfairly surprised" by ODE's sudden change in how funding would be determined and its indecision on this subject. [R&R Recommended Conclusions of Law ¶¶ 30-34.]

- The Hearing Officer also recommends that the Board find ECOT was somehow in fact provided with fair notice by the FTE Handbook. Yet the Hearing Officer ignored the evidence presented through the admission of Mr. Rausch – ODE's highest-ranking official to testify at the hearing – that the FTE Handbook *could reasonably be construed as not requiring durational information*. [Id. ¶ 26.] See Section D.1 below.

- The Hearing Officer also recommends that the Board find that the language of R.C. 3314.08(H)(3) was sufficient "to place ECOT on notice of its obligation to maintain durational data to support its claimed FTEs for the 2015-2016 academic year." [Id. ¶ 26.] As discussed above in Section A under Objection #6, however, that language has remained substantially unchanged since 2003, and it clearly provides no "notice" that something would change in 2016 or what would be required of ECOT at that time.

- The Hearing Officer also recommends that the Board find that ODE "acted reasonably and lawfully in deferring to the Funding Statute, the FTE Review Handbooks and common sense to place ECOT on notice of the format of durational data needed for the 2015-2016 academic year." [Id. ¶ 27.] As noted above, neither the statute nor the handbooks (as Mr. Rausch admitted) provided sufficient notice. Even more remarkable is the Hearing Officer's suggestion that "common sense" could give an eschool notice of the specific documentation ODE expected it to start generating and providing to the agency – when no such documentation was required or requested during the previous thirteen years.

For the reasons set forth in Section D below, the Hearing Officer's recommended conclusions that ODE proceeded lawfully and reasonably because ECOT received timely and adequate "notice" should be rejected. First, we address the suggestion advanced in the Hearing Officer's R&R that eschools had notice of, or should or would have known or expected, the actions that ODE took in 2016 with regard to its funding methodology. It is, thus, necessary to understand the history of ODE's regulation of eschools, including ECOT, as set forth in the following Sections B and C. The evidence presented at the hearing establishes that ODE imposed drastic changes in funding methodology without providing ECOT with adequate notice and time to come into compliance. The Hearing Officer's R&R ignores the evidence establishing that ODE failed to carry its burden of proof and supporting ECOT's position that ODE acted arbitrarily and unreasonably in this regard.

B. Even If Some Type Of Durational Standard Exists, ODE's Attempt To Impose Such A Standard In 2016 Was A Drastic Departure From Its Past, Enrollment-Based Funding Methodology – Upon Which ECOT And Other Eschools Properly Relied.

Assuming some type of durational standard or requirement had been put in place in 2016 (albeit improperly, as discussed below), it marked a drastic departure from the undisputed historical FTE review and documentation requirements and procedures imposed by ODE upon eschools (and all other schools, for that matter).

During the hearing, Mr. Rausch, ODE's Director of the Office of Budget and School Finance, conceded that – with the limited exception of Provost Academy in 2015[10] – ODE had never imposed a durational requirement on any eschools before 2016:

[10] ODE apparently sought durational data from Provost Academy in 2015, after discovering a year earlier that the school had a unique written policy indicating that one hour of log-in time equaled five hours of attendance. [Tr. 619-20 (Rausch).] Notably, ODE discovered this unique

> Q. Is it fair to say that during – since the course of all this litigation, you have been able to confirm that prior to Provost, no other eSchool or blended school had been asked to provide durational documentations to support the claimed FTEs?
>
> A. To the best of my knowledge, yes, that's correct.
>
> Q. Now, after Mr. Wilhelm brings this – this to your attention, what steps, if any, did you take to ensure that the community schools within Mr. Wilhelm's region were aware that the Department had an expectation of durational documentation being produced to support claimed FTEs?
>
> A. I took no action.
>
> [Tr. 739-740 (Rausch).]

Rather, eschool funding was always evaluated and determined based on student ***enrollment*** and enrollment documentation. [Id. 835-37.]

Yet, at the prompting of the Hearing Officer (who often asked questions structured in such a way as to redirect and/or rehabilitate ODE's witnesses), Mr. Rausch suggested that, despite having never historically sought or reviewed durational information, ODE nonetheless had an "expectation" that eschools would maintain such information. That is nonsense. ODE's own documents and course of conduct for well over a decade plainly demonstrate that ODE never expected or otherwise imposed a durational FTE funding standard on ECOT (or any other eschool apart from Provost) until 2016. To the contrary, ODE expressly implemented and enforced an enrollment-based FTE funding methodology – an approach upon which eschools,

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circumstance a year before it sought the durational information. [Id. 619-20, 701-02.] In other words, Provost was given a full year to comply with ODE's wishes. Further, despite its experience with Provost, ODE did not undertake any efforts to communicate to other eschools that they should be maintaining durational documentation, let alone the impact the lack thereof would have on FTE funding, in the fall of 2015. [Id. 739-40.] In fact, ECOT did not even learn about ODE's actions with respect to Provost until February 2016. [Tr. 1123 (Teeters).]

including ECOT, reasonably relied. In any event, the law is clear that an expectation is not "good enough."

1. ODE Historically Applied An Enrollment-Based Approach To *All* Schools, Including Community Schools.

At the advent of eschools, as a form of community school, in the early 2000s, ODE intended to conduct FTE reviews of eschools just as it had done with traditional brick-and-mortar schools, according to David Varda, then Associate Superintendent with ODE. [PI Tr. Vol. I 309-310, 319, 325-26.] Enrollment at traditional schools was measured by taking a "snapshot" of actual enrollment during one week of October each year—not actual student engagement:

> Q. [T]he way that the Department of Education funded these traditional schools was based upon the school's enrollment?
>
> A. It was based on the average daily membership that was calculated the first full week of October by taking enrollment every day.
>
> Q. Okay. So that's something that we refer to as the ADM?
>
> A. Yes.
>
> Q. For shorthand?
>
> A. Yes, ADM.
>
> Q. And the funding then was based upon the ADM that was measured in the first full week of October each school year?
>
> A. Yes.
>
> Q. And what they would look at at that point in time was to determine what was the student enrollment during the course of that period that was being measured?
>
> A. That is correct.

> Q. So you would basically be taking a snapshot once a year to determine the funding for that school for the balance of that school year?
>
> A. That is correct.
>
> [PI Tr. Vol. I 309 (Varda).]

When charter schools first began operating in Ohio, they had physical, brick-and-mortar locations, and ODE measured their enrollment using substantially the same method. [PI Tr. Vol. I 314-318 (Varda).]

> Q. … The enrollment for brick-and-mortar charter schools was tested on the same approach that would have been done for traditional brick-and-mortar schools with the exception they didn't have multiple locations?
>
> A. Yes, that is correct.
>
> [PI Tr. Vol. I 318 (Varda).]

Then, when eschools began appearing, ODE intended to utilize this same enrollment-based methodology for determining and evaluating their funding. [PI Tr. Vol. I 319-20.]

2. Because Eschools Reflected A New Learning Model, ECOT Initially Debated With ODE The Proper Methodology For Documenting *Enrollment.*

However, given the newness of eschools at the turn of the 21st century, disputes initially arose between ECOT and ODE. [Pla. Exhs. 9, 10; PI Tr. Vol. IV 119-20, 129-31 (former ECOT Superintendent Jeff Forster).] Specifically, disputes arose between ODE and ECOT in the 2001-2002 timeframe as to the type of documentation to be produced by ECOT to support its *enrollment*. [Pla. Exhs. 1-4; PI Tr. Vol. I 326-35; Vol. II 27-28, 31 (Varda); Vol. IV 122-23 (Forster).] The parties also debated the manner by which ECOT would establish that a student had been offered the requisite 920 hours of "learning opportunities," as provided for in the Revised Code. [PI Tr. Vol. I 326-35; Vol. II 27-28, 31 (Varda); Vol. IV 129-35 (Forster).]

ECOT's position, both initially and throughout its discussions with ODE, was twofold: First, ECOT took the position that its funding (*i.e.*, the FTE amount) should be based upon student enrollment, just as in any other school, as opposed to student attendance or engagement. Second, ECOT's position was that the focus should not be on student attendance but, rather, on the learning opportunities offered to the students. [Pla. Exhs. 1, 4; PI Tr. Vol. I 326-35; Vol. II 27-28, 31 (Varda)].

> Q. And the position stated by ECOT at that time was that it viewed that its funding should be just like brick-and-mortar schools based upon student enrollment; is that correct?
>
> A. Yes, that is correct.
>
> Q. And likewise with respect to the learning opportunities, much like your brick-and-mortar school, the position that ECOT communicated to you is that they believed that the learning opportunities should be measured by what they had offered the student as opposed to what specifically the student had engaged in on a particular day?
>
> A. Yes, I remembered it that way.
>
> [PI Tr. Vol. I 326 (Varda).]

After some initial discussions, efforts were undertaken by Mr. Varda and Jeff Forster, the then-Superintendent of ECOT, to negotiate and resolve funding issues and, ultimately, standards to be employed by ODE in measuring and testing the FTEs claimed by ECOT. [PI Tr. Vol. I 335-37; Vol. II 10-77 (Varda).]

3. Ultimately, ECOT And ODE Negotiated And Executed A "Funding Agreement" That Expressly Provided For An Enrollment-Based (Not Durational) Funding Methodology.

ECOT and ODE, from late 2001 through the first and second quarters of 2002, pursued efforts to resolve their differences. Such efforts included a negotiated settlement as to the ***amount*** of certain funds to be repaid by ECOT to ODE over a period of time. [Pla. Exhs. 6, 8-

11, 14-16; PI Tr. Vol. II 19-27, 30, 32-38 (Varda); Vol. IV 129-136 (Forster).] That was one part of the resolution.

The second part of the resolution was the execution, ultimately in January 2003, of a document entitled "Funding Agreement." [ECOT Exh. H-21.] This document was derived from another agreement ODE had previously entered with another eschool known as Alternative Education Academy of Ohio (the "Brennan Agreement"). [Pla. Exhs. 7, 17; PI Tr. Vol. II 34-35-38-39 (Varda).][11]

On its face, the "Funding Agreement" reflected ODE's and ECOT's agreement to set forth the documentation ***requirements*** for measuring student enrollment, learning opportunities and funding standards. [ECOT Exh. H-21 (fifth whereas clause).] No "expectation" or requirement that ECOT maintain or provide ODE with durational documentation was included or otherwise set forth in the Agreement. Specifically, Section 1 of the agreement, entitled "Documentation of Enrollment" provided:

> 1. Documentation of Enrollment. The School shall maintain in its paper and/or electronic files for each student all forms necessary to enroll a student as required by law. State funding for students enrolled in the School is due and shall continue to be paid to the School until the student graduates, withdraws (per the School Board policy) from the School, or is no longer eligible to attend the School pursuant to the provisions of the Community School Contract.
>
> The school shall maintain in its files records of the following:

[11] Although the Common Pleas Court held that the Funding Agreement is no longer enforceable, the negotiation, existence, and terms of such agreement are significant because they reveal the historical practice of ODE, and belie Mr. Rausch's contention that ODE has always "expect[ed]" eschools to maintain durational documentation.

a. Documentation or evidence of delivery and installation of the computer and all necessary related hardware;

b. The successful connection to the School's website, where the student can access electronic curriculum and other electronic resources offered by the School;

c. Delivery, by any means, of the curriculum materials necessary to begin education of the student (For each student, ECOT shall retain documentation of the delivery of curriculum materials and the date and mode of delivery.);

d. The completion of the student's first assignment.

Section 1 was designed to establish the specific documentation ECOT should maintain to document its students' enrollment to support its claimed FTEs. [PI Tr. Vol. II 46-54 (Varda).] Section 1 also established that, assuming documentation existed, a student would be deemed enrolled unless he or she was required to be withdrawn pursuant to the school's board policy or was no longer eligible to attend the school pursuant to the provisions of the community school contract. [Id.]

The last paragraph of Section 1 reads: "A student shall be considered enrolled and ***the funding shall begin*** upon satisfaction of one or more provisions of this section." [ECOT Exh. H-21 (emphasis added).] Thus, upon satisfaction of any of the above-described items, it was agreed that an ECOT student was considered enrolled and funding was to begin. [PI Tr. Vol. II 46-54 (Varda); see also Section 4 of Funding Agreement ("ODE shall fund the School for all students enrolled as set forth in Section 1, pursuant to the Ohio Revised Code section 3314.08.").]

Section 2 of the Funding Agreement, entitled "Documentation of Learning Opportunities," further provided:

> 2. Documentation of Learning Opportunities. State law currently requires that each student must be presented with at least 920 hours of learning opportunities per academic year. These learning opportunities may come from an array of different educational opportunities, such as direct (including computerized) instruction, participation in curriculum related activities, assignments and events, readings, field trips, tutoring, etc.
>
> For the purposes of an enrollment audit, the School ***shall maintain*** in its paper and/or electronic files for each student the following documentation:
>
> a. Learning opportunity hours will be verified by a certificated ECOT employee with appropriate administrative oversight and documentation that each such employee understands the significance and implications of his/her signature;
>
> b. A record of grades earned and proficiency test results while a student is at ECOT;
>
> c. Documentation federally required of Special Needs students for which the School requests additional funding.

On its face, this section was intended by the parties to establish the standards to be applied by ODE in measuring whether ECOT had presented 920 hours of learning opportunities to a student. ***Just as with brick-and-mortar schools, no documentation of actual durations of time spent by students participating in such activities was required***.

This was significant because, as Mr. Varda testified, the Funding Agreement was crafted with a specific eye toward HB 364, which had been passed at the time of the Agreement's execution and which became effective in April 2003. That legislation specifically enacted then-R.C. 3314.08(L)(3), which FTE funding language virtually identical to that found in current R.C. 3314.08(H)(3):

Q. … [I]n the process of negotiating the contract with Mr. Forster, specifically the funding agreement, you had understood that there was something called House Bill 364 that was being considered by the House of Representatives at that time?

A. Yes, that is correct.

Q. And House Bill 364 would have been considered by you and ECOT as part of the negotiation of the funding agreement?

A. Yes, it would have.

Q. And it was expected that the funding agreement that was being negotiated by the parties would comply with House Bill 364?

A. That is correct.

Q. And, quite frankly, you would not have proceeded to negotiate a contract that, from your perspective, did not comply with the provisions of Ohio law, would you?

A. That's correct.

Q. And, in fact, your perspective is that ECOT was, as part of the negotiation of this contract, endeavoring what it could to ensure that contractual provisions complied with Ohio law?

A. That is correct.

[PI Tr. Vol. II 9-10 (Varda).]

4. ODE Actually Utilized The Funding Agreement As A Model In Reviewing Other Eschools And In Preparing Its FTE Handbook.

Contrary to the expectation stated by Mr. Rausch, who joined ODE only in 2014 [Tr. 568], ODE actually utilized the Funding Agreement, and its express enrollment-based methodology, not only as to ECOT, but also in determining and establishing procedures for conducting FTE reviews of ***other*** eschools. ODE's former Area Coordinator, Ronald Heitmeyer,

testified during the preliminary injunction proceeding in the Franklin County Court that ODE circulated the Funding Agreement to all of its area coordinators across its various regions. [PI Tr. Vol. III 204-05 (Heitmeyer).]

Mr. Heitmeyer, a prior member of ODE's FTE task force, also testified that the Funding Agreement was used to prepare ODE's FTE Handbook. [PI Tr. Vol. III 207-08.] That Handbook set forth the methodology by which ***other eschools were reviewed***. In other words, ODE incorporated the provisions of the Funding Agreement into the FTE handbook, and in doing so, ODE adopted an FTE funding approach for all eschools ***moving forward*** that was predicated on ***enrollment***, and the standards set forth in the Funding Agreement.

Consistent with this approach, so long as any eschool, including ECOT, had documentation supporting a student's enrollment and, where applicable, the date of a student's withdrawal (under the 105-hour rule or otherwise),[12] the school's FTE funding for such student was approved. [PI Tr. Vol. III 152 (Wilhelm); Vol. III 211-12, 217-18 (Heitmeyer).]

Thus, ODE reviewed and verified ECOT's FTE funding consistent with an enrollment-based model in each of the reviews conducted until 2016, including those for fiscal years 2003, 2005, 2006, and 2011. [PI Tr. Vol. IV 209-12, 223-24, 232-34 (Heitmeyer), Vol. III 43-48 (Wilhelm); Vol. 1 144-47 (Teeters); Vol. IV 25-54 (Pierson).] ODE neither sought nor reviewed any durational documentation as part of those reviews. [Id.]

Not surprisingly, the same was true for other eschools. For example, no durational documentation was sought in 2011 from Virtual Community School ("VCS"), another eschool based in Central Ohio. [Tr. 398-99 (Jeff Nelson).]

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[12] The 105-hour rule, which is inapposite to this proceeding, provides that a community school student must be automatically withdrawn after failing to participate in 105 consecutive school hours. See, e.g., R.C. 3314.03.

5. The "Expectation" ODE Repeatedly Communicated To The Auditor Of State Was That FTE Funding Is Based On *Enrollment* – Not Duration.

Throughout the same time frame, ODE consistently and specifically advised the Ohio Auditor of State's Office of its position (*i.e.*, expectation) that eschool FTE funding was based on *enrollment* and the amount of learning opportunities *offered* to students – not durational data. This was made clear in the injunction hearing testimony of Marnie Carlisle, Assistant Chief Deputy Auditor. [PI Tr. Vol. IV 20-22, 24-26 (Carlisle).]

> Q. Have you had an opportunity to make inquiries of the Department of Education as part of these communications as to what type of documentation an e-school should maintain in order to support the claimed FTEs?
>
> A. Yes.
>
> Q. And can you tell the Court what the Department of Education has explained to you?
>
> A. Prior to 2016 we had regular meetings with the Department of Education about what was required. What we were consistently informed is that community schools, including e-schools, *are funded based upon annualized enrollment as opposed to attendance*, those two concepts are different, and that the focus of our testing should be upon enrollment and certainly attendance impact of the 105-hour rule for withdrawal from enrollment, and so we should look at documentation supporting enrollment of students, withdrawal of students, as well as whether or not students are complying with the 105-hour rule and are being withdrawn timely by the schools So the type of documentation can vary for those three different aspects.
>
> [PI Tr. Vol. IV 20-21 (emphasis added).]
>
> Q. Now did you also have communications with the Department of Education regarding the subject of learning opportunities being offered to a student?
>
> A. Yes.

Q. And what did the Department of Education tell you about that, please?

A. We talked about the various forms of documentation that a school might have to support learning opportunities and the fact that from school to school that type of documentation would vary greatly. We talked specifically about the learning opportunities being offered versus provided. And prior to 2016 what was communicated to us by the Department is that, for compliance purposes, ***the audit should be focused upon the hours offered as meeting the 920-hour rule***.

Q. And when you say offered, that is the fact that the school offered the certain number of hours of instruction to a student as opposed to measuring that the student had engaged 920 hours of learning opportunities?

A. ***That's correct***.

[PI Tr. Vol. IV 24-26.]

Indeed, in the case of ECOT, ODE specifically advised the Auditor's Office that it should accept teacher certifications of ***offered*** hours as evidence of the hours of learning opportunities presented to its students in a given year. [PI Tr. Vol. IV 26-28 (Carlisle).]

Against this backdrop, it strains credulity to the breaking point for the Hearing Officer to endorse ODE's arguments that ECOT was on notice of a durational requirement prior to 2016, given that ODE repeatedly told the Auditor's office that just the opposite was true. Simply put, no historical "expectation" (let alone requirement) existed that eschools would maintain and/or provide ODE with durational documentation. Rather, consistent with the terms of the Funding Agreement ODE ultimately applied to other schools and ODE's guidance to the Auditor's office, the agency ***expected and specifically communicated*** that eschools would maintain and provide student ***enrollment*** information to support their FTE funding.

Because of that, ECOT has consistently tracked its enrollment, and thus calculated its FTE funding, based on enrollment. [Tr. 1104.] Prior to 2016, no one with ODE ever suggested that the school should do anything different. [Tr. 1139-40 (Rausch).]

6. The Hearing Officer's Citation Of The EMIS Manual Is Improper And A Red Herring.

Finally, the Hearing Officer attempts to support his conclusion that ECOT was on notice of a durational standard by citing a facially ambiguous sentence from the EMIS manual that the "percent of time element" in ODE's EMIS data system is "[t]he average percent of time, for the week, that the student participates in any instruction provided by a certified/licensed employee." [See, e.g., R&R Recommended Findings of Fact ¶ 10; R&R at 18-19, 27-28.] Such reference is problematic and misplaced.

First, on its face, the quoted statement does not support ODE's belated suggestion that eschools are required, as the Hearing Officer asserts, to maintain minute-by-minute accountings of students' online and offline time. To the contrary, it could simply mean that a school should adjust its EMIS reporting to account for time a student spends enrolled/participating in another program, such as a vocational school. [Tr. 485 (Babal).] But no evidence was presented from anyone with specific knowledge of EMIS that may have provided insight into the same. To the contrary, the Hearing Officer precluded ECOT from doing so.

Additionally, the Hearing Officer's endorsement of ODE's *ex post facto* attempt to invoke this, at best, ambiguous provision fails because:

- It is contrary to the testimony of ***every*** ODE witness, who attested that eschools were advised of durational documentation requirements ***only*** via the FTE Handbook. [ECOT's Post-Hearing Brief, at 28-31.]
- ODE failed to present any witnesses with specific familiarity as to EMIS. Both Mr. Babal and Mr. Rausch testified that they lacked specific familiarity with the EMIS system. [Tr. 317, 485 (Babal); 874 (Rausch).]

- In fact, despite introducing the issue, ODE persuaded the Hearing Officer to exclude EMIS-related testimony from Ms. Pierson, and to preclude ECOT from presenting any testimony from Ann Barnes, ECOT's EMIS coordinator. [Tr. 1637-56 (exclusion of Pierson testimony); 1663-81 (exclusion of Barnes).]

- The Hearing Officer's attempt to adopt ODE's *ex post facto* reliance on the EMIS percent-of-time element as somehow relevant to FTE analysis is inconsistent with the statements of ODE's own counsel, who in response to a question from the Hearing Officer, downplayed the significance thereof, stating that the subject came up only in response to a question about how eschools could adjust their FTE reporting to account for durational information:

> HEARING OFFICER: And, Mr. Cole, as I understand your position, the determination of whether or not a school has maintained durational data is independent of what's been reported in EMIS?
>
> MR. COLE: Yes. In looking at the durational data we did not go back and compare it to the percent of time factor that was reported. *The only reason that came up is I think there was some question to Mr. Rausch as to how a school would be able to adjust the funding it was receiving on a monthly basis so it wouldn't be subject to some kind of clawback at the end of the year, and he explained how percent of time factor could be used to accomplish that.*
>
> [Hearing Tr. Vol. VIII, p. 1680.]

Simply put, the EMIS manual has nothing to do with this proceeding, and the Hearing Officer's *ex post facto* attempt to justify ODE's actions based on the same do not make up for the agency's obvious failure to provide fair and appropriate notice of its new durational criterion to ECOT.

C. ODE's Attempt To Impose A New Durational Requirement Via Its 2015 FTE Handbook.

1. ODE's Inconsistent Positions In 2016.

Against this long-standing backdrop, ODE first sought in 2016 to impose upon eschools, including ECOT, a so-called requirement that they specifically document *more than* 920 (*i.e.*, the

statutory minimum) hours of ***actual student log-in or offline time*** in order to support and retain their FTE funding. This new requirement – which ODE has applied only to eschools – was initially set forth in a 2016 FTE Handbook ODE first made available in late January 2016 (*i.e.*, mid-school year). That was approximately the same time ODE first advised ECOT that it would be subject to an FTE review for the 2015-2016 school year. [Tr. 1115 (Teeters), ECOT Exh. K-4; see also ECOT Exh. K-2 (January 2016 power point presentation from Cody Loew to Area Coordinators describing new durational requirements being imposed on eschools via the 2016 Handbook); ECOT Exh. K-1 (Teeters timeline).]

ODE's Office of Budget and School Funding sought to announce/implement these requirements via the 2016 Handbook despite being advised no later than the fall of 2015 that eschools would be unable to provide such durational information ***given that it had not been previously required or reviewed as part of their FTE reviews***. ODE area coordinator John Wilhelm, the area coordinator with responsibility for ECOT in 2016, testified that he told ODE leadership in the fall of 2015 both of the existence of ECOT's Funding Agreement and his belief, based on experience, that eschools, like ECOT, ***would be unable to provide durational documentation given how their FTE funding had historically been calculated and evaluated***. [PI Tr. Vol. III 17-18, 55-60, Pla. Exh. 149.] Further, Mr. Rausch confirmed that that even though ODE intended to impose such a requirement by fall of 2015, and despite Mr. Wilhelm's stated concerns about the availability of such information, no effort was made in that time period to alert eschools as to the need to focus on duration, as opposed to the historical enrollment-based approach to FTE funding.[13] [Tr. 983, 1036.]

[13] Incredibly, the Hearing Officer cites Mr. Wilhelm's testimony in an attempt to rewrite history by making the observation that "Area Coordinators continued to adhere to ***what they incorrectly believed*** to be an ongoing standard to ignore durational data." [R&R at 37 (emphasis

Even after ODE announced its new, durational approach via the 2016 FTE Handbook, certain area coordinators sent mixed messages about the extent of its applicability. For example, in a February 18, 2016, e-mail to Jeff Nelson, superintendent at VCS, area coordinator Don Urban indicated that the new "log" requirement under the 2016 Handbook would need only to cover a "student's learning activities from January- end of school year … ." [ECOT Exh. G-18.]

Subsequently, after various eschools, including ECOT, raised concerns about ODE's mid-year substantive change to its purported FTE funding standard, certain ODE officials, including Mr. Rausch and Jessica Voltolini, attended a meeting at the Ohio statehouse. [Tr. 1121-1130 (Teeters).] During that meeting, ODE – through Ms. Voltolini – committed to postponing all eschool FTE reviews until 2016-2017, and to convene a stakeholder workgroup to consider and work through changes to the FTE Handbook. [Id.]

ODE quickly reneged on this commitment, and stated its intent to proceed with 2015-2016 reviews under its ***2015 FTE Handbook***. [Id. 1128.] Yet, after purportedly withdrawing the 2016 Handbook, ODE provided eschools with no additional communication suggesting that durations would still be reviewed/considered as part of the 2016 FTE review process. [Tr. 717-18 (Rausch).] Thus, ODE left eschools to believe that the same, historical enrollment-based approach would be followed in 2016.

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added).] But Area Coordinators cannot be blamed for maintaining a position or "belief" that was ***consistent*** with ODE's stated position during the pre-2016 time frame. For example, ODE consistently advised the Ohio Auditor of State's Office of its position that eschool FTE funding was based on ***enrollment*** and the amount of learning opportunities ***offered*** to students – not durational data, as was made clear in Ms. Carlisle's testimony at the injunction hearing, [See Section B.5 above.] Further, Mr. Rausch conceded that the only form of notice provided to eschools (*i.e.*, the 2015 FTE Handbook) ***could reasonably be construed as not requiring durational information***. [See Section D.1 below.] The Board should give no credence to the Hearing Officer's attempt to take a potshot at Mr. Wilhelm for a supposed "incorrect belief" that was consistent with the agency's stated position.

In the case of ECOT, such belief was confirmed by Mr. Wilhelm, who specifically told ECOT officials in March 2016 that durational information ***would not be considered*** as part of FTE reviews conducted under the 2015 Handbook. Specifically, at a pre-FTE review meeting with ECOT officials in mid-March 2016, Mr. Wilhelm stated that ECOT would not be required to present durational information as part of the 2016 FTE review process. [Tr. 1132-35 (Teeters); 1605 (Pierson).] This is yet another key point of the evidence that is undisputed or unchallenged by ODE, and where ODE, even though certainly possessing the ability to offer Mr. Wilhelm to testify, not only elected not to do so, but in fact, sought to preclude Mr. Wilhelm from testifying live before the Hearing Officer.

Notably, Mr. Wilhelm was not alone among ODE's area coordinators in communicating such information. Following his initial FTE review of VCS in February 2016, Mr. Urban sent a letter to VCS in which he indicated that the school's documentation was in order, and merely recommended that it "[b]egin to plan how to complete and document any required student computer activities logs and non-computer activity logs for future FTE reviews." [ECOT Exh. G-27.] Indeed, VCS' superintendent, Mr. Nelson, testified that Mr. Urban specifically told him that durational information was not part of ODE's review. [Tr. 413-14.]

ODE conducted its preliminary review of ECOT in March 2016. It did so consistent with Mr. Wilhelm's prior statements. Specifically, ODE did not ask for durational information as part of such review. [Tr. 1148-56 (Teeters).] Moreover, as part of the exit meeting following such review, Mr. Wilhelm did not raise any concerns or issues about durational information, let alone any concerns about the purported lack and/or insufficiency thereof for 2015-2016. [Id. 1148-59.] Indeed, Mr. Wilhelm testified that, based on the historically applied criteria, ECOT's claimed FTE funding would have been ***fully justified*** based on the March 2016 review:

> Q. What we do know is that based upon the information that was reviewed by you and the other team members as part of the preliminary review, that if you had simply applied the same standard that was utilized as part of the 2011 FTE review, that ECOT would have been entitled to full FTEs claimed?
>
> A. Yes.

[PI Tr. Vol. III at 81-82.]

It was only in mid-May 2016, *more than a month and a half after ODE completed the initial FTE review of ECOT*, that ODE advised ECOT it was, again, apparently considering requiring durational information for purposes of ECOT's FY 2016 funding. [PI Tr. Vol. III 80-84 (Wilhelm).] Specifically, in a letter dated April 21, 2016, but not delivered to ECOT until May 17, 2016 – an inexplicable delay of nearly four weeks that the Hearing Officer merely glosses over – Mr. Wilhelm noted that ECOT was not able to document that students actually participated in five hours of learning opportunities per day. [ECOT Exh. K-28 (Wilhelm Letter).] But, even in that letter, Mr. Wilhelm was ambiguous – stating vaguely that "ECOT is encouraged to develop a system of tracking total hours of student participation." [Id.] Of course, ODE's witnesses could not offer an explanation for the significant delay in issuance of the letter other than it was "under review" and no changes were ultimately made. [Tr. 653-54 (Rausch).] That was the longest such delay experienced by any reviewed eschool in 2016. [Tr. 716 (Rausch).]

Following a June 8, 2016, meeting between ECOT and ODE officials, ODE indicated its intent to review and consider ECOT's position. [Tr. 756-58 (Rausch).] Indeed, as late as mid-June 2016, ODE's general counsel indicated to ECOT that ODE was still assessing ECOT's position" as to whether durational data would be required. [Id.; ECOT Exh. K-38.] Ultimately, on July 5, 2016, approximately a week before ECOT's final FTE review was set to begin, ODE

informed ECOT that ODE would, after all, be reviewing and considering durational data as part of its 2016 FTE review. [Id. 757-58.] ODE also stipulated to this, to avoid having to make available its in-house counsel, Diane Lease, as a witness at the hearing. [Tr. 1755-56.]

Thereafter, ODE conducted ECOT's final review as scheduled. Again, Mr. Wilhelm testified that, had the historical criteria been applied, ECOT would have been fully funded based on the documentation made available in July 2016.

> Q. But if we applied, again, the standards that you utilized in 2011, otherwise, the records that were made available by ECOT would have supported the claimed FTEs?
>
> A. Yes.

[PI Tr. Vol. III 86-87.]

Instead, however, ODE ultimately issued a letter to ECOT, dated September 7, 2016, in which it specifically noted ECOT's failure to provide durational documentation as part of the July 2016 review – a requirement Wilhelm described as a "***major***" change from ODE's historical practice. [ECOT Exh. K-54; PI Tr. Vol. III 135 (emphasis added).] Again, ECOT was the *last* of the reviewed eschools to receive such a letter – even though it was the ***first*** to receive a "Final Determination" in which ODE sought the clawback of previously received FTE funding. [ECOT Exhs. K-54; G-67 to G-74.]

2. ODE Has Relied On And Implemented The 2015 FTE Handbook As Setting Forth A Substantive Requirement That Eschools Collect And Provide ODE With Durational Data To Support Their FTE Funding.

In ultimately indicating its intent to require and evaluate ECOT's FTE funding for the entire 2015-2016 school year based on a durational standard, and despite its representations to the Court and adopted by the Hearing Officer, ODE relied upon the 2015 FTE Handbook. Indeed, the only document ODE has cited as setting forth the durational criteria and

documentation requirements eschools have been required to satisfy for 2015-2016 is the 2015 FTE Handbook – the same document ODE has otherwise described as a mere, non-binding "guideline." Moreover, as discussed below, it is a document that, as ODE admits, contains language that was – at minimum – ambiguous as to whether durational information would be required. Yet, ODE has identified no other communications or pertinent documents that were provided to eschools on this subject.

For example, Chris Babal, ODE's Community School Payment Administrator, testified as follows:

> Q. Well, when you talk about the guideline as to how things typically work, is there any other document that you can identify for the Hearing Officer that sets forth the processes that are to be followed by the area coordinators in conducting an FTE review for the 2015/2016 school year other than the handbook that we have marked as Respondent's Exhibit J-7?
>
> A. There is no other document that I am aware of.
>
> Q. Okay. And irrespective of – let me ask you a slightly better question.
>
> Is there any supplemental documentation or additional appendixes or summaries that, from your perspective, supplement this manual, or is this manual the document that we're supposed to look at and try to determine whether or not the Department of Education has conducted the FTE Review Manual in an appropriate fashion?
>
> A. This is the only one that I'm aware of.
>
> Q. Okay. And is it also fair to say, and you can confirm for the Hearing Officer, that this is the only form of document that is shared with the schools being reviewed in a particular cycle, setting forth what the Department's expectations are, save for the letter that's initially sent by the – we saw one from Mr. Wilhelm, announcing that there be a review in a particular year?

A. I lost track. So you're asking is there anything else that for schools they would have regarding what their expectations would be for an FTE review?

Q. Yeah.

A. As far as from ODE, the central office, there is not, that I'm aware of. The area coordinators have their own discretion to hold meetings and share information as they see appropriate. Some do that, some do not, just depends on the area coordinator.

[Tr. 304-06.]

Q. … So we can agree, then, that the only documentation, to your knowledge, that's been promulgated by the Department, consistent with the statutory language I just read, that reflects the identification criterion for conducting or identifying student – if I could go to the prior page, make sure I'm using the precise language – for student participation, would be the 2015 FTE Handbook; is that correct?

A. Yes.

[Id. 558.]

Mr. Rausch agreed:

Q. And so then was the only form of communication other than any additional correspondence that existed between the area coordinators and the schools such as the e-mail that we could look at, is the only other form of documentation that was utilized to communicate the Department's expectations as to how the review would be conducted and what the requirements would be was the 2015 FTE Review Manual?

A. Yes, that would be correct.

[Tr. 717-18.]

Likewise, Mr. Wilhelm testified that the 2015 Handbook—the manual pursuant to which he initially told ECOT that ***no durational data would be considered***—was the sole source pertinent information:

Q. So in terms of understanding the standards that each e-school had to satisfy in order to support their FTE funding, the sole document we should look at is what's set forth in the 2015 FTE review manual?

A. That's the only one I'm aware of.

Q. That is, no one has ever given you instruction to look at any other type of documentation or information in conducting that review?

A. Right.

Q. All right. And so when you conducted the final phase of the second phase of a 2016 FTE review process, your expectation was that ECOT would have to make available the durational records set forth in the 2015 FTE review manual; is that right?

A. Yes.

Q. Now, likewise, after you completed – in any of your communications did you identify any other documents to ECOT that they should reply upon to determine what standards had to be satisfied other than the 2015 FTE manual?

A. No.

[PI Tr. Vol. III 85-86.]

Indeed, even Mr. Rausch's former assistant director, Cody Loew, confirmed that the FTE Handbook is the only place where the documentation standards imposed on eschools are supposedly articulated:

Q. Other than the promulgation of the FTE review manual, are there any other procedures or rules that the Department of Education, through your department or otherwise, have promulgated that set forth manner and means by which an FTE review process is to be completed?

A. No.

> Q. And so for purposes of the analysis, it's the FTE review manual that is in place in any given fiscal year that will set forth what is the standards to be applied in assessing whether that school is entitled to receive the claimed FTE credits?
>
> A. Yes. The manual is the place that sets forth how the FTE review should be conducted and what area coordinators should do.
>
> Q. And there is not any other document that either informs the area coordinators or informs the community school themselves as to what type of requirements must be satisfied in order for the e-school to justify or support the claimed FTEs; is that correct?
>
> A. Yes.
>
> [PI Tr. Vol. III 259-60.]

D. As A Component Of Basic Fairness, ECOT – As A Regulated Party – Was Entitled To Timely, Advance Notice Of Regulatory Changes Before Being Punished For Alleged Noncompliance.

Against this backdrop, ODE's *mid-year* announcement and application of a purported durational criterion was arbitrary and capricious because it failed to provide timely, advance notice of an undisputed change in methodology for calculating eschool FTEs for the *entire* 2015-2015 school year. The Hearing Officer's recommended conclusion to the contrary is simply wrong.

A major problem stems from the notice (or lack thereof) provided by ODE with respect to its implementation of a durational requirement for all of 2015-2016. Such notice was deficient in several respects.

First is the issue of timing. As Mr. Rausch conceded, the only means by which ODE communicated to eschools the department's intent to change its prior practices by imposing a durational requirement for 2015-2016 was via the 2016 FTE Handbook:

> Q. And given that we have not seen – other than the cover e-mail from Mr. Wilhelm we haven't seen any other documents, was the only means by which the Department intended to communicate to charter – the charter schools such as blended schools and eSchools that there was a change in practices and the durational data would be considered was by the publication on the website of the 2016 FTE Review Manual?
>
> A. That is the only communication I'm aware of.
>
> [Tr. 741.]

Mr. Babal agreed:

> Q. Okay. So there was no separate written notice provided by the Department of Education advising ECOT or any other eSchool that the language that had been implied historically not to involve a review of durational records, would now be reviewed or applied in such a way to permit or compel the review of durational records; is that right?
>
> A. To my knowledge, that's correct.
>
> [Tr. 307.]

Yet, as noted above, ODE did not issue the 2016 Handbook until January 2016 – more than halfway through the school year. Putting aside the subsequent switch to the 2015 Handbook and contrary statements by ODE's area coordinators and other deficiencies described below, this initial "notice" was unreasonable and insufficient to afford affected eschools, like ECOT, with an opportunity to comply with the subject durational standard. Obviously, a school that receives notice of a significant change in documentation requirements mid-year cannot be expected to have complied therewith in the months ***before it was even made aware of the change***.

But beyond that, it was unreasonable and impractical for ODE to expect that even prospective compliance was possible for the remainder of the 2015-2016 school year. As ECOT's deputy superintendent, Brittny Pierson, testified, the steps necessary to implement

durational tracking – such as rewriting computer codes, establishing new tracking measures, etc. – all take significant time and cannot be effectively implemented on short, let alone immediate, notice. [Tr. 1586-1604 (Pierson). Indeed, this process easily takes ***12 to 18 months***. [Tr. 1603 (Pierson); 1122-23 (Teeters) (noting that a representative of K12, another large eschool, told ODE, at a February 2016 Statehouse meeting, that it would take 12 to 18 months for the school to put systems in place to comply with the 2016 FTE Handbook).] Indeed, upon learning of the 2016 Handbook, ECOT undertook substantial efforts to gather durational information, but such efforts – given both ODE's and ECOT's long-standing practice – proved unsuccessful. [Id. 1586-1604.][14]

The Hearing Officer recommends that the Board find ECOT had no right to any advance notice of the change in funding methodology – that is, that ECOT should be punished retroactively and forced to return funding previously received for time periods ***even before*** ODE provided notice that there would be any change in the funding methodology and that it should be afforded ***no opportunity*** or lead time to put systems in place in order to comply with the new methodology. The Board should reject such recommendation as patently unfair and unlawful. The Hearing Officer asserts two bases for his recommendation:

- First, the Hearing Officer purports that "[a]s a public school, ECOT 'cannot assert retroactivity concerns as a basis for challenging governmental action.' " For this assertion, the Hearing Officer cites the Franklin County Action. [R&R Recommended

[14] ECOT's understandable inability to immediately and/or retroactively change its internal and external systems, to meet ODE's new durational tracking criteria, is additionally problematic given the contemplated funding consequences associated therewith. That is because, irrespective of the durational documentation ECOT was ultimately able to produce for 2015-2016, its expenses – including teacher/personnel and curriculum costs – had already been fixed and incurred based on the school's enrollment. [Tr. 1108-09; 1280 (Teeters).] Thus, ODE's mid-year attempt to impose a durational criterion, and its associated clawback efforts, would have the effect of forcing ECOT to pay back funds it has already used to pay expenses necessary to provide services to its entire student population – irrespective of any durational data related thereto.

Conclusion of Law ¶ 29; see also R&R at 95-96.] As explained under Objection #2 regarding the doctrines of claim preclusion and issue preclusion, however, the issue of "retroactivity" was not litigated by the Franklin County Court, the judge's comments about retroactivity were made in the context of parroting ODE's proposed findings on an issue that was not before the Court, and those remarks can have no preclusive effect. In short, the Hearing Officer cannot be heard to recommend that this Board put on blinders and refuse to consider the basic issue of administrative fairness by chanting a mantra of "retroactivity."

- Second, the Hearing Officer, again, conflates administrative fairness with "estoppel" or "equity" and asserts that ECOT "cannot claim to have been unfairly surprised" because ODE supposedly has no obligation to treat eschools with fairness. [Id. ¶ 33.]

These recommendations are nonsense. With regard to estoppel, as discussed under Objection #4 above, it is a basic precept of administrative law that fair notice of regulatory changes is a component of arbitrary-and-capricious analysis. ODE cannot escape its obligation by hiding behind the "estoppel" label.

With regard to "retroactivity," let's also be clear: The issue of fair and reasonable ***advance*** notice does not present a question of constitutional "retroactivity." Rather, it is a basic precept of administrative law that fair notice of regulatory changes is a component of arbitrary-and-capricious analysis. Indeed, it is beyond peradventure that those who are regulated by the government "have a right to know what government policy and rules are in advance." Provens v. Ohio Real Estate Comm'n, 45 Ohio App. 2d 45, 48 (10th Dist. 1975).

Directly on point is Khoury v. Bd. of Liquor Control, 52 Ohio Law Abs. 434 (Ohio Ct. App. 10th Dist. 1948). There, just as here, the Tenth District squarely rejected an agency's attempt to punish a regulated party based on a practice the agency had at all previous times expressly countenanced and had induced the regulated party to believe were acceptable.

Specifically, the Khoury court reversed the Department of Liquor Control's revocation of the plaintiff's liquor license because the agency failed over an extended period to communicate to the plaintiff license holder what conduct its regulators expected, even though the plaintiff

sought their guidance. The court noted that that department officials had made numerous inspections of plaintiff's establishment, plaintiff continually communicated a desire to comply with department rules (particularly with respect to the practices the department later objected to), the inspectors were long aware of the practices that formed the basis for the later revocation action, and yet they did not object – that is, not until they took their long-belated action to revoke plaintiff's license. See id. at 437-38. Reversing the department's revocation, the court noted that, under the circumstances, plaintiff "did have the right to expect" that if he was operating contrary to department policy, "that fact would have been made known to him." Id. at 438. It added that even a liquor-license holder, who "has no vested right to retain a permit," is, at the very least, "entitled to a policy from the Liquor Department upon which he can rely and it should at all times be fair to him." Id. at 438.

Under the separate but related concept of "administrative retroactivity," the law construes that administrative regulations have no retroactive effect absent an "express" grant of retroactive rulemaking power from Congress. See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (noting "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). As Justice Scalia explained in Bowen, "[t]he issue here is not constitutionality, but rather whether there is any good reason to doubt that the APA means what it says." Id. at 223 (Scalia, J., concurring).

Of course, the Ohio APA ("Administrative Procedure Act"), like the federal APA (as well as the applicable provisions of Chapter 3314), contains no express grant of retroactive

rulemaking power, and Ohio courts follow the rule against administrative retroactivity with regard to state regulatory action. See, e.g., In re Williams, 1990 WL 63027, at *6 (Ohio Ct. App. 10th Dist., May 15, 1990) (citing Bowen, court commented that if State Medical Board had intended to retroactively apply a particular Ohio Administrative Code rule to the physician's conduct at issue, it could not have done so).

The same is true here. It cannot be credibly disputed that ODE ***first*** announced and sought to retroactively apply a new durational standard in the middle of the 2015-2016 school year. Indeed, despite ODE's half-hearted attempt to point to prior FTE Handbooks as somehow providing notice, even Mr. Rausch was forced to admit that such handbooks could reasonably be interpreted as ***not requiring eschools*** to maintain or provide ODE with durational data. [See Section D.1 below.] As a result, ODE's attempt to apply a mid-year change retroactively violates both basic fairness and the concept of administrative retroactivity. It is, therefore, clearly arbitrary and capricious.

On this point, the Hearing Officer veers astray by attempting to equate apples to oranges. ***First***, the R&R incorrectly conflates constitutional retroactivity with administrative retroactivity. [See, e.g., R&R at 95-96.] The case cited by the Hearing Officer, Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ., 146 Ohio St. 3d 356 (2016), dealt solely with ***constitutional*** retroactivity and has nothing to do with this proceeding. The sole issue considered in that case was "whether ***the General Assembly has the constitutional authority*** to retroactively reduce the amount of state funding allocated to local school districts and to immunize appellant State Board of Education of Ohio ('the department') against legal claims by school districts seeking reimbursement for retroactive reductions in school-foundation funding." Id. at 356 (emphasis

added). ECOT ***is not*** raising an issue of constitutional retroactivity based on legislative action, which is a wholly different doctrine, as Justice Scalia noted in Bowen.

In his attempt to avoid applying this settled doctrine, the Hearing Officer even goes so far as to suggest that the doctrine of administrative retroactivity, which is recognized by no less than the U.S. Supreme Court, is imaginary (see R&R at 96, referring to "ECOT's self-styled 'administrative retroactivity' "). But neither the Hearing Officer nor the Board can ignore the fact that the issue of fair notice presented here is based on principles of basic administrative law.

Second, the Hearing Officer incorrectly conflates the powers of ODE with those of the General Assembly, and purports that because the General Assembly can defund or even abolish an agency, or "political subdivision," of the state, such as a school district, so can ODE. Wrong again. In the Toledo decision, the Ohio Supreme Court held that:

> [T]he Retroactivity Clause, Article II, Section 28 of the Ohio Constitution, does not protect political subdivisions, like school districts, that are created by the state to carry out its governmental functions. Therefore, the legislature was able to authorize the department to adjust local school funding calculations and to retroactively immunize the department from liability for any legal claim of reimbursement by a school district for a reduction of school-foundation funding, without violating the Retroactivity Clause.
>
> [146 Ohio St. 3d at 369.]

On the basis of the Toledo case, the Hearing Officer contends that "any rights [a school district] retains exist only at the will of the legislature," the ***legislature*** may "change policy and release itself from funding obligations to the [school district]" – and on that basis, the Hearing Officer contends that ***ODE*** can exercise the same powers as the General Assembly and simply "release itself" from a funding obligation. [R&R at 70.] If that were true, it would violate the fundamental concept of separation of powers embedded in the Ohio Constitution. See, e.g., McFee v. Nursing Care Mgmt. of Am., Inc., 126 Ohio St. 3d 183, 188 (2010) ("If an

administrative rule exceeds the statutory authority established by the General Assembly, the agency has usurped the legislative function, thereby violating the separation of powers established in the Ohio Constitution. … The General Assembly sets public policy, and administrative agencies, when granted rulemaking power, 'develop and administer' those policies."). Indeed, if that were the case, what would stop ODE administrators from defunding Columbus City Schools on grounds that some of its enrolled students are not being sufficiently educated in ODE's eyes? Or Cincinnati Public Schools? Or school districts in Cleveland, or Toledo, or Ashtabula, Medina, or Marietta?

Fortunately, that is not the law. ODE does not enjoy the powers of the General Assembly, and it is not true that ODE can effectively abolish a school district by changing the rules and cutting off funding with no notice. As discussed throughout these Objections and in greater detail below, ODE is required to provide fair and reasonable notice. Its failure to do so compels a decision in ECOT's favor.

1. ODE Was Required To Provide Appropriate And Reasonable Lead Time For Compliance.

At the outset, even if ODE did not attempt to make the durational criterion retroactive, the notice given was still arbitrary and capricious because it failed to provide appropriate and necessary lead time for compliance. The notice provided to ECOT was insufficient to place the school on notice that durational information would be required to support its claimed FTEs for 2015-2016. Indeed, after ODE elected to rescind the 2016 Handbook in February 2016, and prior to ECOT's receipt of the May 2016 preliminary FTE review letter, the message consistently conveyed by ODE, via its area coordinators, was that *no durational information would be considered under the 2015 Handbook.*

As both Mr. Babal and Mr. Rausch made clear, eschools are entitled to rely upon the guidance of area coordinators – the individuals charged with directly interacting with such schools on, inter alia, funding/FTE matters:

> Q. But as it relates to pre-review or pre-school year, what you're saying is the best we have to try to understand what ODE expects and how ODE will perform this FTE review and what the consequences are is whatever language we can discern from this manual; is that right?
>
> A. Well, and prior practices from area coordinators and any communication they might have made to community schools.
>
> * * *
>
> Q. So in your prior answer you made a reference to the fact that area coordinators, of course, as part of their job functions you described earlier would have communications with area – with the eSchools; is that right?
>
> A. They would.
>
> Q. Okay. And I think in response to what I was asking earlier, and I will restate it, what you're telling me is in terms of understanding the expectations of the language found in this manual *that the schools could rely upon information being provided to you by the area coordinators*?
>
> A. I think the information provided by the area coordinators would be part of the communication and ways that schools would know about this process.
>
> [Tr. 366-68 (Babal) (emphasis added).]
>
> Q. And has that always been the – the intent of the Department, that it would expect to treat each of the charter schools equally?
>
> A. There's certain – yeah. I mean, there's – there is no reason why we wouldn't want to be consistent in our approach.
>
> Q. Okay. That is, consistent in terms of the type of notice you provide to the schools; is that right?

A. Yes.

Q. And consistent in terms of the type of messaging that is being provided by the Department and its agents to the respective schools.

A. Yes.

Q. And in the case of the area coordinators, would it be fair to say that they are one of the principal liaisons between the Department of Education and eSchools with respect to FTE issues?

A. Yes, that's true.

Q. And so in terms of the front line person for the Department in communicating every day as to the Department's expectations as to what the Department is expecting and, in fact, what specifically would look like – look at in terms of records as part of an FTE review, *you were expecting that information would be provided by the area coordinators to your respective schools*?

A. Yes.

[Tr. 706-707 (Rausch) (emphasis added).]

But even after May, ODE continued to send, at best, mixed messages as to whether durational data would be required. The fact that ECOT was not notified of ODE's final intent to impose such a standard until July 2016 – after the school year ended – drives home the point that inadequate notice was given as to whether durational information would be required for the *2015-2016* school year.

The Hearing Officer incorrectly endorses ODE's attempts to shield its own ineptitude by asserting that eschools, like ECOT, were always on notice of the need to maintain durational data and the agency's ability to request the same by certain language found in the 2015 Handbook – and in earlier versions of the handbooks going back to 2010. But, given the present and historic interpretation of such manuals applied by ODE's own area coordinators, Mr. Rausch was forced to concede otherwise:

Q. Now, one of the other issues you identified there was some confusion on – related to durational data and it was the confusion there as to whether or not the Department was, in fact, going to consider durational data in conducting the 2015-2016 FTE reviews?

A. Yes.

Q. And it sounds like there was at least one -- at least one but perhaps there were more area coordinators that were under the impression that at various points in time during this review cycle that durational data would not be reviewed at all.

A. Yes, that's correct.

[Tr. 707-08.]

Q. Now, I do want to go back to that review for a moment – in a second, but before we go there, we were talking about the confusion that was identified and, again, ensuring consistency because at this point in time, we have at least Mr. Urban and perhaps others that are confused as to what the requirements are going to be for this calendar year, are you saying there were no discussions within the Department of Education about providing any form of additional notice to the schools as to what the expectations were?

A. No, I don't recall any conversations.

Q. And so then was the only form of communication other than any additional correspondence that existed between the area coordinators and the schools such as the e-mail that we could look at, is the only other form of documentation that was utilized to communicate the Department's expectations as to how the review would be conducted and what the requirements would be was the 2015 FTE Review Manual?

A. Yes, that would be correct.

[Tr. 716-17.]

Q. What you're telling me is that what had been included in the prior manuals at least had not been sufficiently clear to

inform the area coordinators that durational data would be requested.

A. Yes, that's true.

Q. And if the area coordinators do not read the 2015 FTE Review Manual and its predecessors to require the production of durational data to support the claimed FTEs, *wouldn't it be reasonable to conclude the schools likewise would reach the same conclusion*?

A. ***I suppose that's true, yes*.**

[Tr. 742-43 (emphasis added).]

Q. Now, you also told us, I believe, that the area coordinators are the resource for schools in understanding or seeking clarification with respect to the handbook, for example.

A. Yes. They serve as a resource.

Q. And you told us that the area coordinators for one or more of them were confused or could have been confused by the language contained in the 2015 version of the FTE Review Manual, correct?

A. Yes.

Q. Was the language in the 2011, '12, '13, or '14 manual any clearer than what's found in the 2015 manual about the expectation that there would be a durational requirement that had to be satisfied in supporting claimed FTEs?

A. I don't believe there are any significant differences between what is in the 2010 manual and what ultimately appears in the '15 manual.

[Tr. 1034-35.]

In sum, Mr. Rausch – ODE's highest-ranking official to testify at the hearing – conceded that the only form of notice provided to eschools (*i.e.*, the 2015 FTE Handbook) *could reasonably be construed as not requiring durational information*. That admission, alone,

demonstrates the insufficiency of the supposed "notice" provided by ODE, and compels the rejection of its Final Determination as to ECOT.

Applying the concept of fair notice, courts reject attempts to enforce new regulatory interpretations or changes where the agency fails to provide adequate notice and fails to provide regulated parties sufficient time to come into compliance.

In Nat'l Ass'n of Indep. Television Producers & Distributors v. Fed. Commun. Comm'n, 502 F.2d 249 (2nd Cir. 1974), for example, the court held that an order of the Federal Communications Commission ("FCC") giving only eight months' notice before the effective date for amendments to the agency's "Prime Time Access Rule" was unreasonable to two major groups affected by FCC regulations. First, the proposed amendments would reduce the number of time slots available to independent producers, and the independents attacked the effective date of the rule changes as unreasonably premature because it would not give independents who had produced programs for access time in reliance on the existing rule sufficient opportunity to withdraw from these ventures without unnecessary expense. Id. 253-54.

Second, the networks testified that program planning begins twelve to eighteen months before the start of the season and that a shorter lead time would produce lower-quality network programming. Id. at 254. The court concluded that the eight-month effective date "would be unreasonable because it would cause serious economic harm to independent producers and because it gives networks inadequate time to plan additional programming," and the court remanded to the FCC to set a later date. Id. at 255. In so doing, the court rejected the FCC's claim that its effective date was "unassailable" because the Administrative Procedure Act generally provides that regulations may be made effective thirty days after publication. It

explained that "this provision merely establishes a minimum period of notice. It does not authorize the use of an effective date that is arbitrary or unreasonable." Id. at 254.

Siding & Insulation Co. v. Alco Vending, Inc., 822 F.3d 886 (6th Cir. 2016), is also on point concerning the reasonable time period that should be allowed before a new regulatory interpretation may go into effect – in that case, to punish a party that needed a reasonable period of time to adapt its conduct to the new interpretation. [Tr. 1122-23 (Teeters) (cited above) (noting that a representative of K12, another large school, told ODE in February 2016 that it would take 12 to 18 months for the school to put systems in place to comply with the 2016 FTE Handbook).] There, the FCC had redefined its regulatory definition of "sender" for purposes of enforcing the junk-fax provisions of the Telephone Consumer Protection Act ("TCPA"), such that certain formerly compliant conduct would henceforth constitute a violation. In this case, one company sued another company alleging violations of the TCPA. The Sixth Circuit declared that "considerations of fair notice, reasonable reliance, and settled expectations" compelled its holding that the new definition would not be applied to the defendant's past conduct at issue. Id. at 892. Moreover, the court noted that the FCC itself expressly recognized in the Federal Register that the rule's effective date was delayed beyond the thirty-day minimum because "it is important to provide adequate time for senders to come into compliance" with its new rules. Id.

Here, although ODE purportedly expected and sought to enforce ***immediate*** compliance with its newly announced durational criterion, the undisputed evidence indicated that ECOT and other eschools would need ***a year or more*** simply to develop the systems necessary to begin tracking the durational information apparently sought by ODE. Indeed, the Hearing Officer completely ignored this evidence and incorrectly recommends that the Board join him in

pretending that school districts can stop on a dime and change course – and that no planning or lead time is necessary for systems to be put into place to comply with changes required by ODE.

In these circumstances, the complete lack of any advance notice by ODE, coupled with the agency's effort to punish ECOT for its supposed noncompliance – to the tune of tens of millions of dollars in retroactive funding losses – is arbitrary and capricious.

2. ODE's Inconsistent Statements In 2016 Regarding Durational Requirements Rendered Any Notice Given Unfair, And Thus, Arbitrary And Capricious.

ODE failed to set forth concrete standards with which schools could comply. Thus, even assuming that the 2015 FTE Handbook provided clear notice of ODE's intent to impose a durational requirement in 2015-2016 (which it did not), ODE otherwise failed to timely identify the types of information and documentation eschools needed to maintain and provide in order to satisfy the subject requirement. Simply put, at no point during, or even in the few months after, the 2015-2016 school year in which the final FTE review was completed (including in the May 2016 Wilhelm letter) [see Section C.1 above] did ODE ever specify that its methodology for FTE funding would be contingent upon *minute-by-minute tracking* of the duration of students' online and off-line time. As a result, prior to ECOT initiating the instant proceeding, it had no idea what specific documentation would satisfy ODE's new durational criteria. [Tr. 1463, 1468-69, 1594 (Pierson).] As Ms. Pierson testified:

> Q. Now, you also said that you gathered everything you could because you didn't know exactly what they [ODE] wanted. When did the State tell you how they wanted the information, in what form?
>
> A. I never had a good understanding of what the expectation was, and really this data was provided as part of discovery. It wasn't provided as part of the review. So the manner in which we were required to present it went through the courts … . *But we never had firsthand information from*

> *our area coordinator or the area coordinator team as to what it was they were exactly looking for*. And we had looked at two different manuals, and the information wasn't exactly the same in both. And then Mr. Teeters had been in meetings where he had heard different things.
>
> So going into the July review, we were very confused as to what would be requested, if anything, that day and then when we got the requests from the judge for discovery, we just started pulling any information that we could find from anyone and submitted it in a folder.
>
> [Id. at 1468-69 (emphasis added).]

In fact, ECOT learned about ODE's minute-by-approach, and the documentation it actually considered, only via post-review/litigation correspondence and ODE's response to a public records request, served by ECOT on November 3, 2016. [See, e.g., ECOT Exhs. A-4; A-29.]

Again, ODE suggested that the language of the 2015 FTE handbook advised eschools of the criteria for documenting durations – but, as Mr. Rausch was again forced to concede, such manual did not clearly set forth the minute-by-minute methodology ultimately employed by ODE. In fact, *no* document (apart from the records produced after initiation of this proceeding) ever did.

Simply put, the *sole* piece of information cited and provided by ODE to ECOT – prior to issuance of the Final Determination – failed to advise ECOT of the minute-by-minute durational methodology ODE would ultimately employ in seeking to claw back tens of millions of dollars of the school's funding.

The fact that ODE, and its representatives upon whom ECOT was undisputedly entitled to rely, could not get their stories straight only further demonstrates the arbitrariness and unfairness of ODE's actions. As it pertains to such administrative ping-pong, Williamsburg

Charter High School v. N.Y. City Dep't of Ed., 36 Misc. 3d 810 (N.Y. Sup. Ct. 2012), is on point. There, the regulators' changing positions and concomitant failure to give a charter school adequate notice and opportunity to resolve alleged regulatory issues were key to the court's reversal of the agency's decision to close the school. See id. at 830-32.

Williamsburg involved a charter school ("WCHS") that had been operating for seven years. At the beginning of a school year, on September 16, 2011, the New York City Department of Education issued a "Notice of Probation" stating that the WCHS charter was on probationary status effective immediately and the probationary period was due to expire on August 31, 2012. Id. at 814. The notice included a "remedial action plan which laid out the steps the school would have to take to remedy" a list of identified violations by August of the following year. Id. WCHS officials proceeded to meet with Department of Education officials to discuss steps the school was taking to come into compliance. But four months after serving notice, the department changed its position and unilaterally "concluded that the probation had been ineffective" and on January 9, 2012, it issued a "Notice of Intent to Revoke Charter," purportedly giving the school thirty calendar days to remedy all violations. Id.

Not only was the August deadline torn up, the school was given no guidance in how to meet the new 30-day deadline. The court concluded that "[although the DOE contends that WCHS had ample opportunities to remedy the alleged violations, it appears that they extended no aid in ensuring that [the school] would meet the necessary requirements. In the Court's opinion, it appears that [the school] was set up to fail." Id. at 829. Ultimately the department issued a decision to revoke the school's charter – on the eve of an enrollment lottery to be held for the following school year. Id. at 815.

As the court summed it up, the department acted thoughtlessly in its rush to destroy a charter school – proceeding without regard to the impact its decision would have on students, parents, teachers, administrators, and the entire community:

> The procedure for this revocation process was inconsistent with past practice and was not corroborated by any policy, regulation or protocol established by the DOE. The revocation of a Charter impacts teachers, administrators, students, parents and the community as a whole. As such, decisions for revocation should be made thoughtfully and procedurally. *The Notice of Intent to Revoke in January 2012 was issued well after most students had already completed the high school application process. Moreover, the actual Decision was rendered a day before the WCHS lottery was to be held and well after most non-WCHS students had been seated in a high school, placing WCHS students at a significant disadvantage*.
>
> [36 Misc. 3d at 832 (emphasis added).]

Here, the undisputed evidence demonstrates that ODE could not get its story straight. After initially indicating an intent to impose a durational requirement, ODE – through its area coordinators – then changed course, only to change course again a couple of times up to and including July 2016, after the school year had ended. ODE now seeks to severely punish ECOT for its failure to comply with a requirement that ODE, itself, would not even commit to during the school year in question. That is akin to the type of unfair and arbitrary treatment the charter school faced in Williamsburg, and just as in that case, it should not be countenanced here.

3. Basic Notions Of Agency Fairness Preclude ODE From Imposing A New Interpretation Of FTE Funding And/Or The 2015 FTE Handbook To Force A Clawback Of Funding Previously Disbursed To ECOT.

As a specific corollary to the above-described rule of fair notice, courts also hold – under the rubric of preventing arbitrary and capricious conduct – that administrative agencies may not use a new "interpretation" of a statute or regulation to claw back funding previously received by a regulated party if the party acted in reasonable reliance on the former interpretation. Whether

described as estoppel, reasonable reliance, or simply as a matter of fairness, this concept clearly governs and restrains agency conduct.

On point again is Omnicare Respiratory Services v. Ohio Dep't of Job & Family Services, 2010 WL 628656 (Ohio Ct. App. 10th Dist., Feb. 23, 2010), in which the Tenth District concluded that if an agency attempted to use a new interpretation of a regulation to seek the return of Medicaid reimbursements already received by Omnicare, then "the question is whether such an interpretation was unfair to Omnicare who claimed that it relied on that earlier interpretation to its detriment." Id. The Tenth District answered that question in Khoury v. Bd. of Liquor Control, 52 Ohio Law Abs. 434 (Ohio Ct. App. 10th Dist. 1948), wherein it held that the agency acted improperly by revoking plaintiff's license for conduct the agency clearly had condoned in the past, declaring that the license holder is "entitled to a policy from the Liquor Department upon which he can rely and it should at all times be fair to him." Id. at 438.

For purposes of this analysis, it makes no difference if the new interpretation is a "reasonable" one to apply going forward – because the ***unreasonable*** agency conduct is the attempt to punish parties that acted in reasonable reliance on the former interpretation. For example, in Microcomputer Tech. Inst. v. Riley, 139 F.3d 1044 (5th Cir. 1998), plaintiff MTI, a technical school, sued the U.S. Department of Education to stop the department from recovering $8.1 million in Pell Grant funds that had been received by the school over a period of approximately four years to cover tuition for educating state prisoners. After four years of allowing the Pell Grant funding to be disbursed, and after the funds were used by the students to pay educational costs, the department made an interpretation of the statute and applied it to disallow the funding. The department sought to apply its new interpretation not only going

forward but also reaching back to demand reimbursement of the $8.1 million previously paid. See id. at 1046-47.

Although the court held that the department's interpretation of tuition allowances under the Pell Grant program was reasonable, it rejected the department's attempt to use its new interpretation to claw back funding it had previously provided to the school and disbursed to students. Although the court explained that a retroactive clawback may be permissible in some instances "where an agency makes a change with retroactive effect," it must be determined, using a balancing test, "whether application of the new policy to a party who relied on the old is so unfair as to be arbitrary and capricious." Id. at 1050. The court noted that in this analysis, the agency's position that a rule should be applied retroactively *is entitled to no deference* – because retroactivity "does not call any agency expertise into play; rather, it is a legal concept involving settled principles of law and is no more subject to deference than is an agency's interpretation of, say, a statute of limitations." Id. at 1051.

The court then applied a balancing test to evaluate whether the change should have retroactive effect: "[W]e examine[ ] the extent of the agency's departure from previous interpretation and the reasonableness of the aggrieved party's reliance, on one side of the balance, and the statutory or regulatory interest in retroactivity, on the other." Id. at 1050. Applying the test, the court concluded: "We recognize the Department's interest in ensuring that money be distributed only to those entitled to receive it, but we find this interest outweighed by the detriment that would befall MTI if we applied this interpretation retroactively. Given the Department's previous statements, and MTI's reliance thereon, the Department cannot now require the repayment of the millions of dollars in Pell Grants that MTI disbursed to inmate students … ." Id. at 1051-52.

Similarly, in Lehman v. Burley, 866 F.2d 33 (2nd Cir. 1989), the court considered the State of New York's challenge to the U.S. Department of Transportation's newly announced reinterpretation of one word in the matching-funds provisions of the Recreational Boating Safety Act to prohibit inclusion of any local government expenditures in total "state" expenditures for which matching funds were provided from the federal government to the states. In the middle of a fiscal year, the department informed New York that it was making a new interpretation of the statute and applying its new interpretation to reduce New York's funding for that year by two-thirds. Id. at 35. (Previously, the department interpreted the statute to allow states to use matching funds for local government expenditures.) The problem for New York was that it was the middle of the year, and the state had already disbursed matching funds to local governments, which in turn used the funds to further the purposes of the act.

Using a balancing test similar to the one applied in the case discussed above, the court rejected retroactive application of the new interpretation. It concluded that "New York relied to its detriment" on the department's previous interpretation "by entering into contracts with localities, and the localities had made expenditures in reliance on being reimbursed by the federal government. There was a substantial burden incurred by New York in that it had to withdraw from some programs and cut other proposed programs. It also had to recoup losses it suffered as a result of the departure from previous policy." Id. at 38 (record citation omitted).[15]

Finally, in U.S. v. Cinemark USA, Inc., 348 F.3d 569 (6th Cir. 2003), the court determined that a regulated party that operates hundreds of movie theaters was not expected to tear up and remodel multiple theaters that were constructed in reliance on agency interpretations

[15] Both Lehman v. Burley and Microcomputer Tech. Inst. v. Riley concerned the rule against administrative retroactivity, and neither case dealt with any constitutional issue.

of the Americans with Disabilities Act ("ADA"), which the agency suddenly decided to change. There, the U.S. Department of Justice ("DOJ") sued Cinemark, the corporate owner of a theater chain, for alleged violations of the ADA by its theaters that featured stadium-style seating, based on a new DOJ interpretation of the ADA regulations. Id. at 572. The court found that Cinemark, during a four-year period in which it built a large number of theaters, had conducted itself in reliance on the DOJ's past statements "in numerous publications" that construction approvals given pursuant to certain state and local building codes certified as meeting or exceeding ADA standards "constituted 'rebuttable evidence' that [a theater] building was in compliance with the ADA."[16] Id. at 581-82. Thus, the DOJ's statements implied "that a cinema builder should be able to rely – at least to some degree – on the approval of their building plans by state or local inspectors that were certified by the DOJ." Id. at 582. The court noted that Cinemark described its theory against application of the new interpretation as "equitable estoppel," but it indicated that the issue involves concepts of fairness, reasonable reliance, and the rule against administrative retroactivity. See id. at 581-82.

[16] We note that ECOT operated for thirteen years in reliance on ODE's interpretation of FTE funding requirements before ODE imposed the new durational criterion without adequate notice. The necessity of protecting a regulated party's reliance-based interest increases with the length of time and the amount of resources expended in reliance on the agency's past practice or interpretation of a regulation or statute. See, e.g., St. Otto's Home v. Minn. Dep't of Human Services, 437 N.W.2d 35, 45 (Minn. 1989) (court noted that the plaintiff nursing homes had relied for four years on a Medicare reimbursement rule and it barred the agency from imposing its new interpretation, which was announced without notice, declaring that "[t]o hold otherwise would mean that these homes could rely on the agency application and expend money for operations only to have the rug quickly pulled from under them by a new interpretation of that rule"); Central Ill. Public Service Co. v. Pollution Control Bd., 518 N.E.2d 1354, 1359-62 (Ill. Ct. App. 1988) (court rejected board's new condition on operating permits for existing steam generating plants that ended a "long-standing practice" of the agency for multiple years and was based on a new interpretation of agency regulations, noting that "administrative agencies are bound by their long-standing policies and customs of which affected parties had prior knowledge").

So too here. It is undisputed that ODE did not apply a durational FTE standard to ECOT (or any other eschool aside from Provost) in the thirteen years prior to 2016. Moreover, Mr. Rausch admitted that the 2015 and earlier FTE Handbooks – the only source to which ODE could point in support of the existence of such a requirement – could reasonably be interpreted by eschools *as not requiring durational documentation*. But on top of that, after ODE initially announced its change in 2016, ECOT's area coordinator – Mr. Wilhelm – specifically told the school that *duration would not be considered*. Both Mr. Babal and Mr. Rausch admitted that ECOT was entitled to rely on Mr. Wilhelm's representation.

Thus, whatever the concept is called – call it "fairness," "reasonable reliance," "estoppel," or whatever – as a result of, and consistent with the above-described authorities, basic administrative fairness precludes ODE from clawing back any funds based on its new "interpretation" of FTE funding – even if such interpretation was reasonable (and it is not) – because ECOT reasonably relied upon ODE's past, contrary practice and interpretations (including the one offered by Mr. Wilhelm in March 2016) to its detriment.[17]

[17] Equally absurd is the Hearing Officer's contention that because ECOT's "attendance policies emphasize the need for student participation at an average of five hours per day, twenty-five hours per week," that somehow establishes that "ECOT was aware of durational requirements." [R&R at 91.] Such policies reflect ECOT's estimation that *the average student* should spend approximately that amount of time in order to be successful, but ECOT does not require that amount of time, as some students may need to devote more time, while others may need less time, to become proficient on a subject. The point of an eschool is to provide flexibility, to allow individual students to work at their own pace depending on how long it takes them to understand a subject, not to dictate that they must sit at a desk for a specific number of hours per day or week. In short, the Hearing Officer is wrong to conclude that *ECOT's policy* put ECOT on notice of *ODE's requirement* to provide durational documentation.

OBJECTION #9: The Hearing Officer Ignored The Evidence Establishing That ODE Acted Arbitrarily And Capriciously By Failing To Sufficiently Define The Durational Criterion It Imposed, So As To Place ECOT On Notice Of What Was Actually Expected.

Beyond merely notifying ECOT and other eschools of a newly imposed durational requirement, ODE was additionally required to articulate the specific details and requirements thereof in a manner sufficient to provide the regulated entities with notice of exactly what was expected of them in order to achieve compliance. It was also required to ensure that its own representatives (*i.e.*, area coordinators) were sufficiently versed with respect to such details and requirements so as to properly advise the affected eschools.

Here, as described above, ODE failed to do either. But again, the Hearing Officer ignored relevant evidence and suggests that the Board somehow find that ECOT was placed on sufficient notice by:

(a) R.C. 3314.08(H)(3) (which contains nothing specific about any information required to be furnished to ODE; see Objection #6 above).

(b) The FTE Handbooks (which Mr. Rausch conceded could reasonably be construed as not requiring durational information).

(c) The data provided by ECOT that ODE actually considered in its review but identified to ECOT only via post-review correspondence, and only in response to a public records request, served by ECOT on November 3, 2016; see Section D-2 under Objection #8.

[R&R Recommended Conclusions of Law ¶ 27.] Yet, ECOT has paid the price for ODE's failure to articulate the type of information it was looking for – via the Final Determination. Such actions are the epitome of arbitrary and capricious conduct.

A. The Law Requires Government Agencies To Articulate The Specific Criteria That Guide Their Regulatory Actions And Decision-Making.

Even if an actual standard existed, merely announcing and/or giving notice of a general standard – such as "durational information" – to regulated parties is not enough. Thus, agencies

are deemed to act arbitrarily and capriciously where they purport to apply some criterion or term as a "standard" but fail to sufficiently define what the standard or criterion means, and fail to adequately explain to regulated parties what type of conduct, documentation, or actions are necessary for achieving compliance. This is because the powers exercised by an administrative agency are lawful "only if the powers are surrounded by standards to guide the agency's actions. The standards must be sufficient to ensure that the agency does not act arbitrarily or capriciously." Distributors Pharm. Inc. v. Ohio State Bd. of Pharm, 41 Ohio App. 3d 116, 118-19 & Syll. ¶ 2 (8th Dist. 1987).

This is not a novel idea. Decades ago, the Ohio Supreme Court declared that without such restrictions on an agency's power, "government would be given over to the despotic rule of administrative authorities, and bureaucracy would run wild." Matz v. J.L. Curtis Cartage Co., 132 Ohio St. 271, 281 (1937). Accordingly, the standards that an agency applies must be "reasonable and neither arbitrary nor discriminatory." Id. at Syll. ¶ 4 & 286. The Ohio Supreme Court, in turn, cited Justice Cardozo's declaration in the dissent to Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) – a passage that has since become much-quoted – that the discretion exercised by an agency to "must not be 'unconfined and vagrant' and must be 'canalized within banks that keep it from overflowing.' " Matz, 132 Ohio St. at 280 (citing 293 U.S. at 440 (Cardozo, J., dissenting)).

In short, government officials abuse any discretion they might have when they purport to apply a standard but affected parties are left in the dark and can only guess at or speculate about what the standard is. On point is State *ex rel.* Halak v. Skorepa, 6 Ohio St. 3d 97 (1983), which considered a city charter provision that gave the mayor the power to appoint certain city officials but gave the city council power to disapprove a mayor's appointment if an appointee fails to

meet the requirements for the positon specified in the city charter or an ordinance. See id. at 98. At issue was council's rejection of the mayor's appointee to the position of city law director. The city charter required that an attorney who is appointed to the position of law director shall have "two (2) years experience in the field of municipal law." The Court noted that, at the time the council rejected the appointment, council members "did not specify the experience they believed the appointee was lacking," and the "controversy arises due to the fact that the Charter does not define 'experience in the field of municipal law.' " Id.

The Court concluded that "the various bodies of law which comprise the 'field of municipal law' are so vast that it would probably be easier to cite what is not the 'field of municipal law' than what is," and "[w]ithout further definition in the Charter, we can ascertain no guidelines for its application." Id. As a result, the Court held that council's disapproval of the major's appointment was arbitrary, and, therefore, an abuse of discretion. Id. at 99. The Court granted a writ of mandamus compelling council members to approve the appointment. Id.

Courts have repeatedly addressed the type of specificity that is required to satisfy this standard, and it goes well beyond general statements about the need for "durational" or "log-in/log-out" data – terms that effectively leave the standards upon which ultimate decisions (like the Final Determination) are made open to the whims of agency officials. City of Dayton *ex rel.* Scandrick v, McGee, cited above, is on point. There, the Ohio Supreme Court found that the city acted arbitrarily in undertaking a bidding process for awarding a construction contract without establishing guidelines for the application of a specific bidding criterion that ended up being the dispositive factor, and which itself was not sufficiently disclosed to prospective bidders *in advance*. Additionally, the court found that the city acted arbitrarily in basing its award of a contract on the unannounced criterion – specifically that that the city would give deference to

bidders that were "residents" of the city. Based on the arbitrary actions taken, the court affirmed the trial court's permanent injunction against the city's contract award. See 67 Ohio St. 2d at 361.

Before bids were submitted, bidders were aware of the some of the factors the city would consider in determining which bid was the "lowest and best" bid, as these factors were contained in a city ordinance – but a bidder's place of residency was neither listed in the ordinance nor otherwise announced as a factor that would be considered. See id. at 357-58. Choosing between bids submitted from two companies that both satisfied the disclosed criteria, the city chose the higher of the two bids based on the unannounced criterion of city residency. Id.

In an *ex post facto* attempt to justify its undisclosed standard, city officials argued in the litigation that the city had a general policy of trying to increase its tax base by encouraging businesses to locate within the city, and "in furtherance of this policy, [they] awarded contracts to businesses which did locate within the city." Id. at 358. What made the city's application of its policy arbitrary, the Supreme Court held, was that officials failed to establish any standard that guided this aspect of their decision-making – and, indeed, could not even articulate from the witness stand how their standard applied. The Court noted that the city's witness on this subject stated that contracts were not awarded to companies located within the city in every instance, and the city's application of its residency criterion as a determining factor depended on how "many percentages" the resident company's bid exceeded the lowest bid. The witness, however, could not articulate where any line was drawn. See id. at 360. The Court concluded:

> The evil here is not necessarily that "resident" bidders are preferred but that there are absolutely no guidelines or established standards for deciding by how "many percentages" a bid may exceed the lowest bid and yet still qualify as the "lowest and best" bid. Absent such standards, the bidding process becomes an uncharted desert, without landmarks or

> guideposts, and subject to a city official's shifting definition of what constitutes "many percentages."
>
> [Id.]

The Court concluded that the facts of the case demonstrated that the city officials' actions were "both arbitrary and unreasonable." Id. at 359. It explained that "the record demonstrates no logical nexus between [city officials'] goal of increasing the city's tax base" and their decision to award the contract to the resident company, and "[o]n the state of the record, it is impossible for appellants to have reached any reasonable conclusion that would justify the deference shown" to the chosen bidder. Id. at 359.

Also on point is the Tenth District's decision in Provens v. Ohio Real Estate Comm'n, 45 Ohio App. 2d 45 (10th Dist. 1975), which held that the Real Estate Commission acted arbitrarily and capriciously by applying a criterion to reject an applicant for a state license because the commission made its decision without having set forth any "standards or guidelines" to define or explain the criterion. "Without such standards or guidelines," the court concluded, "the action of the commission must be held to be arbitrary and an abuse of discretion." Id. at 48.

A governing statute stated that the Real Estate Commission "shall issue a broker's license when it is satisfied that the applicant," among other things, "has provided evidence of having met the following qualifications," one of which was that the applicant "has had ***sufficient experience to the satisfaction of the commission***." Id. at 47 (emphasis added). A companion statute provided that the commission "may make reasonable rules and regulations" relating to the issuance of licenses – but the commission never adopted any rules or regulations pertaining to the licensing statue. The court noted that the commission therefore never provided any guidance or gave definition to what types of experience would qualify as "sufficient experience to the satisfaction of the commission":

> Although the above [statutes] refer to rules and regulations of the commission, we find no rules and regulations, and are referred to none which had been adopted by the commission delineating or defining "sufficient experience" as set forth in [the statute]. By failing to define that term a commission may act capriciously and without any standards. Here, the commission has set forth no standards or guidelines to indicate that which will be "sufficient experience" to satisfy the commission. Without such standards or guidelines the action of the commission must be held to be arbitrary and an abuse of discretion.
>
> [Id. at 47-48.]

The same is true here. Apart from general statements contained in an FTE Handbook that even ODE admits could reasonably be construed as *not requiring any durational information*, ODE provided ECOT with no guidance as to what type of documentation was actually required and/or would even be considered until months after the Final Determination was issued. Its failure to do so was arbitrary and capricious. In light of ODE's failure to articulate any methodology until after this appeal was initiated, ODE's actions are arbitrary and capricious.

B. By Failing To Define Or Explain The Durational Standard, ODE Failed To Give Its Own Agents Sufficient Guidance On How To Apply Its Standard To ECOT.

Equally arbitrary and capricious was ODE's demonstrated failure to properly advise and educate its own representatives, including area coordinators, as to the specific requirements eschools needed to satisfy. Indeed, as noted above, at least some area coordinators – including Mr. Wilhelm – believed that no durational requirement was being imposed after ODE rescinded the 2016 manual.

Wagner v. City of Cleveland, 62 Ohio App. 3d 8 (8th Dist. 1988), provides an example of arbitrary action by an agency that failed to give its agents sufficient guidance in their decision-making or review of regulated parties. That case involved a civil service process pertaining to applicants for positions as police officers. Among other things, applicants were subjected to

psychological tests and interviews to determine whether they were qualified to become police officers. This process required ***objective*** evaluations of each applicant by two interviewing psychologists. See id. at 12. The two plaintiffs had passed the civil service examination with high rankings, but they were removed from the eligibility list after the examining psychologists concluded they were "psychologically unacceptable." Id. The court held that the civil service commission's removal of the plaintiffs from the eligibility list was arbitrary under the Ohio Supreme Court's definition of actions taken "without adequate determining principle; not governed by any fixed rules or standard." Id. at 17 (citing City of Dayton *ex rel.* Scandrick v. McGee, 67 Ohio St. 2d 356 (1981)).

The court indicated that the city had failed to instruct its psychological reviewers or provide any guidelines as to what objective criteria they were to evaluate, noting that only one of the two psychologists "exhibited any objective criteria and operative facts in reaching his conclusions that plaintiffs were psychologically unacceptable," while the second psychologist "used personal subjective guidelines to critique the plaintiffs" and his report "contained no objective criteria or reasons on which he based his opinion." Id. at 18. The court found that the commission's reliance on the psychological evaluations in deciding to remove plaintiffs from the eligibility list "was arbitrary and unsupported by a preponderance of reliable evidence due to the subjective and arbitrary nature of one psychologist's report." Id.

As another example, in Bills v. Hardy, 719 S.E.2d 811 (W. Va. 2011), the West Virginia Supreme Court of Appeals reversed the state Department of Health and Human Resources' denial of medical benefits on grounds that the agency's decision was standardless and arbitrary – the court agreed with the petitioner that the agency "failed to adopt any standard or policy for the purpose of making that determination." Id. at 817.

In that case, the department denied the petitioner's application for continued benefits under a cooperative federal-state program funded by Medicaid that is designed to allow persons who would otherwise require institutional care to receive needed services in their own homes or home-like settings. See id. at 813. To qualify for benefits, the applicable Medicaid regulation requires applicants to show they have "substantially limited" functioning in three or more major life areas, one of which is "self-direction"; the department based its denial on a conclusion that the petitioner had failed to demonstrate that he was substantially limited in the life area of "self-direction." Id. at 813-15.

Similar to the situation in Provens v. Ohio Real Estate Comm'n, cited above, this Medicaid regulation does not define or articulate what "self-direction" means, but a companion Medicaid regulation encourages participating states to adopt policies, regulations, or "reasonable standards ... which ... are consistent with the objective of" the Medicaid Act for purposes of making eligibility decisions. Id. at 817. Like the Ohio commission, however, the West Virginia agency never articulated any standards defining what "self-direction" means. Critically, the court stated "we recognize the concerns articulated by Petitioner which stem from the [department's] failure to adopt any policy or regulations for making the self-direction determination at issue." Id. at 816.

Instead, the state applied a process in which the critical eligibility determinations were made by contracting psychologists who were provided essentially no guidelines on how to make a determination consistent with the regulatory requirements. As a result, the court found, the determinations "may in certain instances be subject to the examiner's subjectivity or discretion." Id. at 817. In the petitioner's case, an agency hearing officer reviewed the proposed decision to terminate petitioner's benefits, and even though the agency hearing officer "acknowledged that

'[e]xtensive testimony and documentary evidence clearly show that [the petitioner] is limited with regard to self-direction," the hearing officer concluded without explanation that the petitioner had failed to demonstrate the requisite reduced functionality in the area of "self-direction." Id. at 814.

Just as in the Provens case, the problem identified by the court was that the state agency never adopted any regulation or policies to articulate a standard for evaluating an applicant's "self-direction." The court concluded that the department had followed no standard for making a proper medical determination, that "there is no [department] standard that controls the assessment of the self-direction life area," and "[w]ithout any specified focus for this life area, the inquiry is subject to the discretion of the examiner and necessarily exists in a state of flux from case to case." Id. at 818. In this case, the West Virginia agency's action failed on at least two levels – first, it failed to provide objective standards for the reviewing psychologist to apply, and second, the hearing officer not only failed to apply any objective standards (as none were provided) but ignored all the evidence favoring the petitioner and simply rubber-stamped an arbitrary recommendation.

The court further noted that the petitioner showed that other states, in contrast to West Virginia, have adopted policies or guidelines for purposes of making the determination at issue, and it referenced policies adopted by Alabama and Ohio, adding that "we recognize the concerns articulated by Petitioner which stem from the [West Virginia department's] failure to adopt any policy or regulations for making the self-direction determination at issue." Bills v. Hardy, 719 S.E.2d at 816.

Such authorities are clearly applicable here. ODE not only failed to articulate a concrete and specific methodology to eschools sufficient for them to comply with the new durational

requirement, it failed to provide timely or proper guidance to its own area coordinators. To the contrary, as noted above, at least some of the area coordinators communicated that no durational review would even occur in 2016. ODE's failure to properly advise/educate its own employees was arbitrary and capricious.

OBJECTION #10: The Hearing Officer Wrongly Concluded That ODE Did Not Fail To Follow The Supposedly Uniform Processes Set Forth In The FTE Handbook And/Or That Any Such Failures Were Immaterial.

A. ODE Failed To Follow The Supposedly Uniform Processes Set Forth In The FTE Handbook.

Apart from the improper and insufficient notice provided, ODE also failed, in multiple respects, to follow the processes/steps set forth in its own FTE Handbook – despite ODE's stated desire for consistency in treatment of all community schools. [Tr. 706-07 (Rausch).] The Hearing Officer's response to this evidence, again, is to ignore it: He recommends that ODE's failures should simply be brushed off, contending that there is "no evidence" that the failures had a "material impact." [See R&R at 99-103; Recommended Findings of Fact ¶¶ 39-45; Recommended Conclusions of Law ¶ 35.] We will address the Hearing Officer's inapposite recommendations in Section C below. ECOT, thus, objects with regard to the following five issues:

1. ODE's Failure To Comply With Sampling Provisions Contained In The FTE Handbook.

First, in conducting its final review of ECOT, ODE failed to utilize the 5 percent sample size specifically set forth in the Checklist found at page 22 of the 2015 Handbook. That provision specifically states that ODE is to conduct its FTE reviews based on a sampling of five percent of the total "student records" for the reviewed school. [ECOT Exh. J-7, at 22.] Yet, in reviewing ECOT in 2016, and despite the fact that ECOT had more than 26,000 total student

records for the 2015-2016, ODE management made the decision to base its review on a sample size of only 750 students. [Tr. 452-53, 457-58, 763-64 (Babal, Rausch).] Any such deviation was significant and material given the potentially vast discrepancies in the available durational documentation for particular students under ODE's new durational approach, as compared with the agency's historical approach, which focused merely on the presence of enrollment documentation. [See Tr. 1686-1692 (Pierson) (noting distinctions in expected durational data/information among different grade levels, not accounted for in ODE's sampling). That is why ODE, in its rescinded 2016 Handbook, sought to obtain durational information for *every* student enrolled in the school. [ECOT Exh. J-8, 15-16.] In fact, as described in more detail below, ODE provided an opportunity to other eschools reviewed in 2016, but *not ECOT*, to submit a spreadsheet reflecting durational information for *all* students.

2. ODE's Failure To Comply With Follow-Up Procedures Contained In The FTE Handbook.

Second, ODE failed to follow the Handbook's requirement for promptly identifying any errors/issues following a preliminary FTE review. [ECOT Exh. J-7, at 9 ("At the completion of the review of student records, the coordinator *shall* inform the school of any errors that were discovered.") (emphasis added)]. The obvious purpose of that provision is to ensure that issues are identified and discussed in sufficient time to allow eschools to correct the same by the time of their final review. [Tr. 939 (Rausch).] That, of course, did not happen here.

Mr. Babal attended the first two days of ECOT's preliminary review in March 2016, and notified Mr. Rausch of his concerns about ECOT's lack of durational documentation sufficient to support its claimed FTEs. [Tr. 722-23 (Rausch).] Yet, at the post-review meeting mandated under the Handbook, Mr. Wilhelm raised no concern with a purported lack of durational documentation. [Tr. 1159-60 (Teeters).] Indeed, ECOT did not learn about any supposed

durational issue until it received the May 2016 Wilhelm later (at the virtual end of the school year) – a failure for which Mr. Rausch could offer no explanation:

> Q. So what Mr. Babal had done in the course of three days reviewed the data but not formulated any particular written opinion for you.
>
> A. That's correct.
>
> Q. What he did communicate to you that you thought appropriate to share with the senior leadership at the Department of Education was that based upon what had been seen on a preliminary basis, the data was very adverse for ECOT provided that durational data was considered in calculating the FTE?
>
> A. Yes, that's correct.
>
> Q. And given the magnitude of the potential loss for ECOT, is it fair to say that still at this point in time no effort is being made to communicate to ECOT, at least prior to the delivery of a letter in May, that the Department has any specific concerns?
>
> A. That's correct.
>
> [Tr. 721-22.]
>
> Q. And as part of the process, it's your expectation that to the extent the area coordinator or those who assisted in that review have identified issues, that that information will be communicated to the school at the time of the exit interview.
>
> A. Where a coordinator can communicate to a school the results of their finding, then they are encouraged to do that, yes.
>
> Q. Well, isn't it an expectation under the manual that that information, in fact, is shared as part of the exit interview?
>
> A. Yes, that's true.
>
> Q. Okay. And were there any directions given to Mr. Babal or any of the other folks who reviewed ECOT in March that they should not share as part of this exit interview that there were issues associated with the documentation?

A. No, not that I recall.

Q. And so do you have any explanation as to why those concerns were not shared with ECOT in March 2016 as part of the exit interview?

A. No, I do not.

[Id. 723.]

Q. …. What I'm asking is why someone did not follow up with ECOT and make perfectly clear what the expectations were in terms of durational data and the time frame for which it will be considered given, I guess, what we would characterize the dismissal – dismal review that occurred in March.

A. And I guess I don't have an answer to that question.

[Id. 722.]

3. ODE's Failure To Comply With The FTE Handbook Provision Requiring Review Of Additional Files.

Third, after identifying critical errors – *i.e.*, the lack of durational data – associated with the 750 student files made available by ECOT in July 2016, ODE failed to follow up by reviewing additional files, up to and including the entire ECOT student population. That requirement is set forth on page 24 of the 2015 FTE Handbook. [ECOT Exh. J-7.]

As Mr. Babal testified, ODE expected its area coordinators to follow this requirement – yet they simply failed to do so in the case of ECOT:

Q. And so you've told us on your direct examination that when the FTE review was conducted in July that ECOT had failed to provide durational records based upon the sample to support any of the claimed FTEs; is that right?

A. That's correct.

Q. And that would have been an error that would have been identified in the reports?

A. Yes.

Q. Okay. And you did not at that point in time seek to conduct a sampling of a larger group of ECOT students?

A. At that time, no.

Q. Did you at any point in time seek to conduct a sampling of a larger group of ECOT students beyond that 750 that you described for us?

A. We did not choose any additional records beyond that 750.

[Tr. 478-79.]

Q. So what the manual prescribes is to the extent an error exists and it exceeds up – more than 8 percent of the students reviewed, then there is continuous review of additional samples until either that tolerable error does not exist or the entire school has been reviewed; is that right?

A. That's what it says.

[Id. 480.]

Q. Isn't what the only discretion the area coordinator has is to make sure that they're exercising whatever efforts are necessary to complete the assigned tasks set forth in this handbook?

A. They have to do that, yes.

Q. They don't have an option, for example, of not completing the checklist. They are supposed to complete the checklist.

A. Supposed to complete the checklist.

Q. And so let's focus on that for a moment. At least as to the instructions provided in the checklist that is included in the handbook, it's incumbent upon each of the area coordinators to complete the task and assess the information and finalize that checklist; is that right?

A That's the expectation, yes.

[Id. 484.]

4. ODE's Failure To Comply With The FTE Handbook Provision Requiring It To Work With The Auditor's Office To Jointly Establish A Method For Auditing Community Schools.

Fourth, ODE failed to "jointly establish a method for auditing" community schools, as stated on page 6 of the 2015 FTE Handbook. [Tr. 491-92 (Babal).] Far from jointly establishing anything, ODE took the Auditor's office by surprise in seeking to implement a new durational standard. Such surprise is reflected in a March 2016 letter from the Auditor's Office to ODE, in which the auditor's office expressed concern about ODE's drastic change from its prior, enrollment-based approach in conducting FTE Reviews:

> In practice … , *log-in records alone have not proven to be an effective means for online schools to verify whether a student is actually participating in learning opportunities*. A student can log-in for one hour to download assignments and continue working offline to complete those assignments. Likewise, a student can appear to be logged-in for five hours, without actually participating in any learning opportunities.
>
> [Pla. Exh. 52 (emphasis added).]

Simply put, ODE's 2015-2016 auditing approach, and specifically the durational requirement imposed in connection therewith, was purely *unilateral* – in violation of the Handbook's requirements.

5. ODE's Failure To Comply With The FTE Handbook Provision Prohibiting It From Taking Confidential/Personal Student Information Off Of An FTE Site.

Fifth, ODE violated the specific provision in the Handbook that prohibits ODE officials/employees from leaving an FTE site with confidential/personal student information. [ECOT Exh. J-7, at 27 ("Neither ODE nor any of its staff may leave an FTE review site with personally identifiable information.").] Here, as Mr. Rausch admitted, literally dozens of ODE

employees reviewed documents containing personally identifiable information at ODE's main office – far from the site of any FTE review – in clear violation of the Handbook. [Tr. 988-90.]

B. ODE's Multiple Failures To Follow Its Own FTE Handbook Policies/Procedures Were Arbitrary And Capricious.

Contrary to the Hearing Officer's conclusions – which are discussed in the following section – ODE's above-described failures to comply with numerous procedures set forth in its supposedly uniformly applicable FTE Handbook only further demonstrate the arbitrariness and unreasonableness of the agency's actions. Indeed, separate and apart from the legal issues discussed in Objections set forth above, ODE's failure to follow its own processes tainted the entire ECOT FTE review process as well as the Final Determination resulting therefrom.

It is long established that if an agency creates its own internal rules and regulations – regardless of whether it went through a formal rulemaking process – then it is bound to follow them. Wagner v. City of Cleveland, cited above, is again on point. There, the court noted that the city civil service commission "failed to comply with its own policy "requiring the use of two psychologists to remove plaintiffs from the eligibility list" to become police officers. 62 Ohio App. 3d at 18. Given that only one of the psychologists prepared a valid report based on objective criteria and the second psychologist merely offered "a series of conclusions without factual foundation," the court held that the commission abused its discretion by failing to follow its own rule. Id.

Similarly, in Springwood Associates v. Health Facilities Planning Bd., 646 N.E.2d 1374 (Ill. Ct. App. 1995), the court reversed the state Health Facilities Planning Board's approval of a nursing home's application for a certificate of need to add additional beds, finding "the Board's decision was arbitrary and capricious." Id. at 1374. The decision was arbitrary and capricious because the record showed there were "numerous differences between the documentation

required" under board policy and the documentation upon on which the board's approval was based. Id. at 1377.

In Mass. Fair Share v. Law Enforcement Assistance Admin., 758 F.2d 708 (D.C. Cir 1985), a group called Massachusetts Fair Share ("Fair Share") challenged a decision of the administrator of the federal Law Enforcement Assistance Administration ("LEAA") purporting to deny its application for a grant under the federal Urban Crime Prevention Program, which, as set forth in a "memorandum of agreement" between the LEAA and the Agency for Voluntary Service ("ACTION"), was a program jointly managed by the two agencies, such that grants had be approved by both agencies. See id. at 710. Applicants were referred to the program's "guideline manual," which gave further details on the program, set forth sixteen selection criteria, and prescribed the policies and procedures for processing applications. After Fair Share was found to meet all the requirements contained in the manual, it was approved as a finalist by both agencies. Notwithstanding this determination, the LEAA continued to investigate Fair Share's proposal, and without ACTION's participation it conducted a separate review. Some months later, ACTION asked the LEAA to execute documents formalizing a grant to Fair Share in conformity with their joint decision. Instead, the LEAA sent a notification to Fair Share purporting that its application had been denied on six grounds. See id. at 710.

Fair Share thereupon filed an administrative protest, a hearing was conducted, and the agency hearing officer held that LEAA's action in " 'unilaterally rejecting [Fair Share's] application is contrary to the memorandum of agreement requiring joint action, and is void on its face independent of reasons for rejection offered in the letter of rejection.' " Id. at 711. The hearing officer further held that none of the six reasons proffered in the letter of rejection could withstand either a substantial-evidence test or an arbitrary-or-capricious standard. Id. Affirming

the hearing officer's position, the court explained that "it has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated. This precept is rooted in the concept of fair play and in abhorrence of unjust discrimination, and its ambit is not limited to rules attaining the status of formal regulations." Id. at 711.

Indeed, there are numerous other examples where courts rejected agency actions that violated internal policies. In Service v. Dulles, 354 U.S. 363, 388 (1957), for example, the Supreme Court reversed the Secretary of State's exercise of his statutorily authorized discretion to dismiss employees with questionable loyalty where the Secretary exercised that authority in violation of self-imposed guidelines. See id. at 388. In Wagner v. U.S., 365 F.3d 1358, 1363-64 (Fed. Cir. 2004), the court voided a decision of the Army Board for Correction of Military Records to discharge a reserve officer for the board's failure to adhere to its internal operating procedures. See id. at 1363-64. The court noted that "[w]e begin with the initial premise that an agency is bound by its own regulations." Id. at 1361 (citing Service v. Dulles, 354 U.S. at 388). Similarly, in Wisotsky v. U.S., 69 Fed. Cl. 299, 311 (Fed. Cl. 2006), the court declared it had a duty to "identify and review errors in process and procedure," especially when those procedures have been established by the agency itself. Id. at 304-05.

The same is true here. In conducting the FTE review that led to the Final Determination, ODE admittedly failed to follow its own, established processes and procedures outlined in the FTE Handbook, in numerous respects. And, it did so while purporting to hold ECOT to an, at-best, ambiguous durational requirement purportedly embodied in the same Handbook. Such a galling position taken by ODE only serves as further proof of its arbitrariness and capriciousness.

C. The Board Should Reject The Hearing Officer's Recommended Conclusions That ODE Should Be Excused For Its Misconduct And That Its Failures To Follow Its Own Procedures Had No "Material Impact."

1. ODE's Failure To Comply With Sampling And Follow-up Provisions Contained In The FTE Handbook.

With respect to the first, second, and third issues identified above – (1) ODE's failure to use the 5 percent sample size, (2) failure to promptly identify errors/issues following a preliminary FTE review, and (3) failure to follow up on the identification of critical errors by reviewing additional student files – the Hearing Officer recommends that ODE's failures should be ignored and brushed off, contending that there is "no evidence" that the failures had a "material impact." [See R&R at 99-103; Recommended Findings of Fact ¶¶ 39-45; Recommended Conclusions of Law ¶ 35.]

First, it was not ECOT's burden to prove and quantify the extent to which ODE's failure to follow its own procedures had a "material impact." It is ODE that elected to take action against ECOT based on provisions contained in the Handbook, and it is ODE that must establish that it complied with its own procedures. But putting that aside, as to the second point identified above, it cannot credibly be argued ODE's failure to promptly identify issues following the preliminary FTE review in March 2016 and Mr. Wilhelm's statement in March that durational information *would not be considered* as part of FTE reviews were immaterial. To the contrary, such conduct goes squarely to the heart of the issue – whether ODE may properly claw back ECOT's funding based on a durational standard. Ignoring the evidence, the Hearing Officer makes a glib observation that ODE's unexplained failure to follow its own FTE Handbook procedures was immaterial because "Mr. Teeters was aware of the need to start generating records at least by February 1." [R&R at 101.] But subsequently Mr. Teeters was told *there was no such need*.

As to the first and third points, the Hearing Officer offers this Board nothing but finger-pointing: The Hearing Officer blames ECOT for not being clairvoyant with regard to ODE's failure to communicate its ever-shifting positions, and offers glib excuses for ODE's failures, contending that because ECOT did not conduct its own, independent sampling tests and did not present a statistical expert at the hearing, there is "no evidence" that ODE's failure to follow procedure had a "material impact." [See R&R at 99-103; Recommended Findings of Fact ¶¶ 39-45; Recommended Conclusions of Law ¶ 35.] To the contrary, with regard to issues of sample size, and putting aside the fact that it was ODE's burden to establish ***immateriality***, Ms. Pierson provided substantial testimony demonstrating that ODE's "sampling" was unfair to ECOT – some of it in response to questioning from the Hearing Officer.

> Q. Sure. You testified about this last week, I believe. I believe you testified ECOT objected to a particular sample that ODE selected because the sample count for several grades were over or underrepresented; is that fair?
>
> A. Our belief was based on our review if ODE followed their directions in their manual, then it didn't appear to be a random sample.
>
> Q. Can you explain that?
>
> A. So our understanding from the area coordinator and from the manual is that our random sample is taken of the student population and then applied and used for the review, and if you break down the students in which they looked at, there's a disproportionate number of high or low in some of these grade levels; and, therefore, it doesn't look random. It may or may not have been an issue if you were only looking at enrollment documentation because enrollment documentation is consistent regardless of grade level, but documentation related to duration varies among grade levels. So when you have a disproportionate sample in some of these grade levels, and we're looking for durational documentation, it became apparent that we were – we perceived it as to be an unfair sample based on what the State used.

Q. Now, I know you said you are not a statistician, and neither am I, but you would agree that in any given sample of 706 students, the expected count might not match what was randomly selected in that particular sample; is that fair?

A. I would believe looking at it there would be some variance. You wouldn't – I wouldn't expect that the expected count in the sample would be equal to each other. But we have some that are off by 6. Even the 5 seemed high. So our feeling was that the kindergarten and the 12th grade were disproportionately high and the 5th grade was disproportionately low. The others were kind of in between there and didn't jump out at us as that much off.

Q. So with a variance of 6 or less than 7 students in a sample size of 706, it's your testimony that would be an anomaly beyond what you would expect from typical random sampling?

A. When it – so based on duration, because these grade levels have different data that's required – or different activities that they do that provide different types of data, they used different resources. They used different online/offline activities. That level of variance made a bigger impact for us and, therefore, we didn't think it was fair to be off by that amount. Like I said, had you only been looking at enrollment documentation and that information being consistent across the population in which you are sampling from, that kind of variance maybe wouldn't have been a big deal. I'm not sure from a statistics standpoint, but I do know that based on the review from the math, people who helped with this, they agreed that the high with the 6s was outside that number so.

HEARING OFFICER: What would be the sample size, excuse me, if you removed what you've characterized as the anomaly?

THE WITNESS: Our point was that we believed there should have been more kids in 4th through 8th, specifically in 5th grade and 9th grade, that some of the 12th and kindergartners should have been put into those grade levels if you strictly just looked at the population and the sample they used based on grade level alone.

[Hearing Tr. Vol. VII, p. 1922-27 (Pierson)]

The Hearing Officer went on to note that Ms. Pierson did not do additional testing in an effort to specifically quantify the numerical result of ODE's failure. [Id.] But that is beside the point – ODE failed to comply with its own Handbook, and such failure does not require the party ***negatively affected*** thereby to do the agency's work for it or to fix the agency's problems.

Moreover, as Ms. Pierson's testimony suggested, it was improper for ODE to attempt to use sampling at all, in terms of evaluating and considering durational information for funding purposes. While a sampling of basic enrollment files may provide an accurate picture when extrapolated out over a school's entire student population, common sense dictates that the same cannot be true for durational data, which – particularly in an eschool environment – is necessarily highly dependent on each individual student.

ODE, itself, implicitly recognized this in the 2016 FTE Handbook, under which it would have required eschools to provide a spreadsheet of durational information for ***all*** students. It also implicitly recognized this in providing other eschools, but not ECOT, with an opportunity to provide such a spreadsheet – upon which ODE relied, without checking any underlying, supporting documentation – following unfavorable 2016 FTE reviews. [See ECOT Post-Hearing Brief, at 50-53.][18]

At bottom, it is undisputed that ODE failed to follow its own Handbook in numerous respects. ECOT submits that the materiality thereof is irrelevant, although otherwise readily

[18] This point, of course, reveals the fallacy in ODE's contention – which the Hearing Officer incorrectly attempts to validate (see R&R at 100) – that requiring it to review durational data for all ECOT students would be too cumbersome, given the size of ECOT's enrollment. If ODE simply treated ECOT like other reviewed eschools, it would have provided ECOT with an opportunity to provide its own durational spreadsheet for all students, and simply accepted such information at face value. But, no such opportunity was afforded and ODE repeatedly stated before the Hearing Officer that it would not consider doing so.

apparent.[19] But, in any event, even if materiality is properly in issue, it was incumbent upon *ODE* to establish a lack of materiality – a burden it has failed to carry. ECOT is not required to show everything that ODE did wrong or prove what the result would have been if ODE followed its procedure correctly, just that it failed to follow a proper procedure.[20] As a result, ECOT is entitled to relief in the form of a reversal of ODE's Final Determination.

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[19] The three "sampling" cases cited at pages 100-01 of the R&R are off point for a number of reasons, the primary reason being that none of the cases involved an agency's failure to follow its own procedures. First, the Hearing Officer cites Midwest Transfer Co. v. Porterfield, 13 Ohio St. 2d 138 (1968), for a contention that a party challenging a government audit must "show that the formula used produced an erroneous result." That case did not involve the agency's failure to follow its own formula or procedure, so it does not support the Hearing Officer's contention.

Next, the Hearing officer cites In re Bailey, 64 Ohio App. 3d 291 (10th Dist. 1989), for the same contention that a party challenging a government audit must "show that the formula used produced an erroneous result." This case is irrelevant to the issues here and also does not support the assertion made. Bailey involved sampling by the Department of Human Services for purposes of determining Medicaid reimbursements. There, the court noted that instead of challenging the sampling process before the administrative proceeding was concluded, the Medicaid provider waited until it filed an appeal under R.C. 119.12 seeking judicial review of the department's final order. See id. at 294-95. Not only does Bailey lend no support to the proposition it was cited for, ECOT has timely raised its issues regarding ODE's failure to follow the sampling procedures in this administrative proceeding.

Finally, the Hearing Officer cites Dean Supply Co. v. Tracy, 2000 WL 1754019 (Ohio Ct. App. 8th Dist., Nov. 30, 2000), but offers no explanation for how it excuses ODE's failures. It does not. In that case, a business-tax assessment matter, the taxpayer timely – and successfully – challenged the Tax Commissioner's sampling methodology in the administrative proceeding: The Board of Tax Appeals stated that the taxpayer had shown that the Tax Commissioner had committed error, and the board was able to correct the error before issuing its final order. Id. at *2. The Hearing Officer skipped that portion of the decision and alludes only to a later passage in which the court noted that the taxpayer, at the judicial review stage, had offered no evidence to identify any further issues with the methodology that was used, other than the issue that was corrected in the administrative proceeding. See id. at *3. Dean Supply, thus, supports ECOT's position that errors made by agency officials should be corrected in an administrative proceeding, not ignored and swept under the rug.

[20] For example, the court in Wagner v. U.S., 365 F.3d 1358 (Fed. Cir. 2004), reversed the agency's decision for failure to follow its own procedures and declared that "[w]here the effect of an error on the outcome of a proceeding is unquantifiable, … we will not speculate as to what the outcome might have been had the error not occurred." Id. at 1365. As set forth in

2. ODE's Failure To Comply With The Handbook Provision Requiring That It Jointly Establish A Method For Auditing Community Schools.

With regard to the fourth issue identified above – ODE's failure to work with the State Auditor to "jointly establish a method for auditing" community schools, as called for in the 2015 FTE Handbook – the Hearing Officer asserts there is no issue, citing Mr. Babal's testimony that ODE and the Auditor's office "had conversations" about auditing methodology and quoting a statement made in an Auditor's document dating from 2009. [R&R at 102.] That is hardly proof that ODE satisfied its self-imposed obligation stated in the *2015* FTE Handbook to jointly establish an auditing methodology. Indeed, the *March 2016* letter from the Auditor's Office to ODE taking the position that "log-in records alone have not proven to be an effective means for online schools to verify whether a student is actually participating in learning opportunities," shows that no methodology was ever "jointly established." [Pla. Exh. 52.]

3. ODE's Failure To Comply With The Handbook Provision Prohibiting It From Taking Confidential/Personal Student Information Off Site.

Lastly, on the fifth issue, ODE's conduct of taking records containing confidential student information not only violated the Handbook procedure, such access violated R.C.

Committee for Fairness v. Kemp, 791 F. Supp. 888 (D.D.C. 1992), the proper remedy where an agency makes errors in imposing a new procedure is to reject the results and apply the previous procedure. There, the court held that the plaintiff public housing authorities showed that the Department of Housing and Urban Development's new procedure for calculating subsidies was improper and that the plaintiffs were entitled to recalculation of their subsidies using the Department's *previous procedure* that the plaintiffs asserted was the correct procedure. The Court rejected HUD's argument that it "would be difficult" for plaintiffs to demonstrate what calculations would have been made had it not been for the Department's imposition of the new procedure, and it specified a process for HUD to follow in rectifying its errors. See id. at 897-98. Accord: Mazaleski v. Truesdell, 562 F.2d 701 (D.C. Cir. 1977) (where the agency failed to follow its internal appeal procedure in terminating appellant's employment, the court reversed the decision; the court also rejected the agency's argument that the appellant failed to provide reasons for his appeal, concluding that any default by the appellant was caused by the agency's failure to follow its procedure); Smith v. Resor, 406 F.2d 141 (2nd Cir. 1969) (holding that where the record showed the agency failed to follow its own procedures to the petitioner's detriment, petitioner was entitled to relief in the form of reversal of the improper decision).

3301.0714 – a criminal statute – which prevents ODE from having such access and is incorporated on the cited page of the Handbook. The Hearing Officer acknowledges that the Handbook incorporates R.C. 3301.0714 and states "[a]t no time shall the State Board or the Department have access to information that would enable any data verification code to be matched to personally identifiable student data. (This means that neither ODE nor any of its staff may leave an FTE review site with personally identifiable information.)" [R&R at 103.] Despite this clear command – "at no time …" – the Hearing Officer attempts to excuse the conduct by contending that: (1) no *one else* reviewed the records off site; and (2) "ODE employees themselves have an express right to access [the records] pursuant to R.C. 3314.27. [Id.] These excuses ignore the fact that "ODE employees themselves" are prohibited from taking the information off site. Also, R.C. 3314.27 does not trump R.C. 3301.0714. Rather, R.C. 3314.27 provides that a record containing certain information pertaining to each student "shall be kept in such a manner that the information contained within it can be submitted to the department" for purposes of determining funding, but this statute *does not* provide that ODE may receive confidential/personal student information, only the specific "information contained within" the records.

OBJECTION #11: The Hearing Officer Improperly Ignored Evidence That ODE Engaged In Arbitrary And Unfair Treatment Of ECOT By Retroactively Imposing Its New Funding Methodology Upon ECOT While Giving Other Community Schools Significantly More Favorable Treatment; The Hearing Officer Wrongly Characterized This Issue As A Constitutional Equal Protection Claim Over Which He Lacks Jurisdiction.

A. ODE's Unequal Treatment Of Eschools Reviewed And Not Reviewed In 2016.

Next, ECOT presented evidence that ODE engaged in arbitrary and unfair treatment of ECOT, treating it differently from other eschools for no justifiable reason. The Hearing Officer

simply brushed aside this issue by mischaracterizing it as presenting a constitutional equal protection claim that is outside his jurisdiction. [See Section C, below, for further discussion.] The Hearing Officer is wrong about the nature of this issue and wrong to ignore it.

The basis for this objection is that ODE's arbitrary and unfair treatment of ECOT did not stop with its conduct of retroactively imposing a new funding methodology without sufficient notice or guidance on the new requirements. In addition to that, ODE also chose to impose its new durational requirement only upon approximately half of Ohio's eschool community, even though it could have chosen to subject them all to FTE reviews – and, thus, the retroactive durational standard – in 2016. [Tr. 888-89 (Rausch); ECOT Exh. G-1.]

Specifically, despite knowing by at least no later than the first quarter of 2016 that Ohio eschools were unlikely to have durational data, ODE chose to conduct an FTE review of ***only*** 12 out of 23 eschools in 2016. [Exhs. G-1 to G-4; Tr. 889-90, 892 (Rausch).] Only those 12 selected eschools – including ECOT – face funding losses and/or clawbacks for failing to comply with the new durational standard. The other 11 eschools have been given at least a full year to implement systems to comply with this new purported requirement (*i.e.*, they have been selectively ***exempted*** by ODE):

> Q. Okay. So to the extent there's ambiguity in your mind as to what the area coordinators are communicating, certainly, you know, in the first quarter of 2016, there's a lot of eSchools, that is in fact virtually every eSchool that is being reviewed, doesn't have the type documentation you're looking for?
>
> A. Yes, that's correct.
>
> Q. Okay. And notwithstanding, at that point there's still no effort to conduct any form of FTE review of the other eSchools to test or verify whether they have that type of documentation?

A. That's correct, yes.

[Tr. 892 (Rausch).]

Q. Okay. Now, for the schools that are not subject to an FTE review, can you confirm for us that to the extent they failed to maintain durational documentation that justified their FTE reviews in the 2015/2016 time frame, that the Department's position is it will not be reviewing those schools for that academic year?

A. Yes, that's –

Q. So for each of the schools for which there is the "N" in the second column of Exhibit G-1, to the extent the schools failed to have the requisite documentation to support their hundreds of millions of dollars in funding, collectively, the Department does not intend to go back and try to reclaim those funds through a subsequent FTE review?

A. That's correct. Yes, that's correct.

Q. And that's true even though at least as of the fall of 2015 you had been advised that eSchools had historically not been requested to produce durational documentation to support their claimed FTEs?

A. I had been advised that, yes.

Q. And nevertheless, you elected not to examine these schools to test their compliance with the Department's newly stated position?

A. Correct.

[Tr. 888-89 (Rausch); ECOT Exh. G-1.]

Based on an overall funding estimate of $250 million, that means approximately $125 million of ODE's 2015-2016 eschool funding was untouched, despite ODE's knowledge that those schools could not comply with the new standard

Q. And just so we're clear, the funding in the aggregate basis to eSchools during the 2015/2016 school year was roughly how much money?

A. I don't recall the specific dollar amounts. I don't know.

Q. Okay.

A. I believe you might know and refreshed my recollection the last time.

Q. Is it roughly $250 million?

A. That sounds roughly about an accurate number.

Q. Okay. And so if roughly half these schools were reviewed with half the enrollment, there's apparently $125 million in funding that the Department for no particular reason elected not to review for the 2015/2016 school year?

A. As it relates to eSchools, yes. …

[Tr. 889-90.]

Not only did ODE choose to apply its new durational standard only as to specific eschools, it gave special treatment to others. For example, representatives of Connections Academy and Ohio Virtual Academy, which have a combined enrollment of approximately 13,000, admitted in February 2016 that they could not provide durational data for 2015-2016. [Tr. 1122-23, 1128-29 (Teeters).] Yet, ODE did not schedule those schools for FTE reviews in 2016, and thus, they face no threat of retroactive funding losses. Instead, ODE officials agreed to participate and did participate in informational meetings with both schools to review and "understand" their systems. [Tr. 900-903.] This was a benefit not afforded to eschools – like ECOT – that were forced to undergo the FTE review process, and thus subjected to the new durational requirement, in 2016.

B. <u>ODE's Unequal Treatment Of Eschools Actually Reviewed.</u>

Beyond its decision to subject only certain eschools to a durational standard in 2016, ODE also treated the schools it actually reviewed unequally – without a viable explanation. The

Hearing Officer also brushed off this issue, incorrectly labeling it as a constitutional argument. Specifically, after determining that other reviewed eschools could not justify their claimed FTEs – due to a lack of durational documentation – ODE issued to each eschool a letter requesting that the school submit a spreadsheet listing all students and setting forth the amount of claimed durational time. [Tr. 918-926 (Rausch); Exhs. G-67 to G-74 (letters).] ODE then considered the spreadsheet data that was self-reported by those schools in calculating their FTEs, without requesting or reviewing any underlying supporting data. [Tr. 918-926 (Rausch).]

Of course, the same opportunity – which was consistent with the type of information ODE originally purported to seek under the 2016 FTE Handbook – was not afforded to ECOT. Mr. Rausch could offer no explanation as to why ODE did not look at underlying documentation for other eschools, despite its stated goal of ensuring that all eschools could properly document the actual time students spend on learning opportunities:

> Q. So did the Department of Education test with respect to any of these schools other than ECOT the underlying documentation that supported the summary supplied by the school?
>
> A. No, we did not.
>
> Q. So with respect to each of the schools other than ECOT, the Department of Education has simply accepted at face value the durational summaries provided by the schools?
>
> A. Yes, we did.
>
> Q. And given the importance as you've described it of determining what the actual records reflect in terms of duration, why wasn't the Department of Education simply elected to accept without verification the summaries prepared by the schools other than ECOT?
>
> A. I – I don't know if I have a specific reason or justification for that.

Q. Was that a decision that was made by you and others within your office?

A. Yes, it would have been.

[Tr. 918-19.]

ODE has asserted that it did not afford ECOT a similar opportunity because of the parties' pending litigation. But that makes no sense. The pending litigation did not preclude ODE from sending its Final Determination letter, or from forcing ECOT to initiate the instant appeal process. It follows, then, that the litigation did not prevent ODE from affording ECOT the same opportunities provided to other reviewed eschools.

C. ODE's Unequal/Disparate Treatment Of Reviewed And Non-Reviewed Eschools Was Arbitrary And Capricious.

As discussed above, it is undisputed that ODE engaged in disparate treatment of eschools via, among other things: (1) its decision to conduct FTE reviews of only certain eschools in 2016, thereby allowing non-reviewed schools an additional year to comply with the newly minted durational requirement without facing any funding losses; (2) its decision to allow all reviewed eschools, *except ECOT*, an opportunity to supplement their FTE review findings with a school-wide durational spreadsheet; and (3) consistently providing important correspondence to ECOT significantly later than it was provided to other eschools. Such disparate/unequal treatment, for which ODE has offered no viable explanation, is also arbitrary and capricious as a matter of administrative law and the overarching concept of fairness embodied therein.

The Hearing Officer does not offer a specific recommended finding of fact or conclusion of law regarding the issue of unequal or disparate treatment. Instead, at pages 103-06 of the R&R, the Hearing Officer summarizes some of the parties' arguments and states that "the disparate treatment argument raised by ECOT has the appearance of an 'as applied'

[constitutional] equal protection argument" that is outside his jurisdiction. The Hearing Officer cites a rule in constitutional equal protection jurisprudence that a party asserting a claim "must establish intentional and purposeful discrimination in order to prove a denial of equal protection." R&R at 106 (citing Linden Med. Pharm. v. Ohio St. Bd. of Pharm., 2003 WL 22927252, at *4 (Ohio Ct. App. 10th Dist., Dec. 11, 2003), then makes an incorrect observation that is unsupported by the evidence.[21]

All of this is misdirection on the Hearing Officer's part. ECOT clearly did not assert, and is not asserting, a constitutional equal protection claim. Thus, it is not required to prove disparate treatment was "intentional and purposeful." Rather, it raises the principle that disparate treatment of parties that has no reasonable explanation is prohibited under administrative law.

On point is CliniComp Int'l Inc. v. U.S., 117 Fed. Cl. 722 (Fed. Cl. 2014), where an agency failed to advance a reasonable explanation for a decision to relax its bidding requirements

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[21] At page 106 of the R&R, the Hearing Officer agrees with an assertion made by ODE that "the two groups of eSchools are not even similarly situated." This is based on ignoring the evidence and adopting ODE's tactic of blaming ECOT for its administrative failures:

ODE has suggested that it did not afford ECOT an opportunity to provide a school-wide spreadsheet of durational data (the same opportunity afforded to all other eschools that received a negative review in 2016) because ECOT had suggested that it did not have any additional non-computer durational information (a statement ODE attributes to Ms. Pierson, but which, as ODE concedes, she did not recall making), and because of the parties' lawsuit. [ODE Post-Hearing Brief, at 22-24.] Neither point holds water.

Initially, any suggestion that ODE knew – in the July-through-September 2016 timeframe – that ECOT did not have any additional documentation that could have been relevant to its review is disingenuous, inasmuch as ODE did not provide ECOT with ***specificity*** as to what documentation it actually considered and credited until ***November 2016*** – well after the Final Determination was issued. Further, any reference to the lawsuit is a non-starter. The existence of the lawsuit did not prevent ODE from going forward with its FTE review; from issuing its Final Determination; and from forcing ECOT to pursue this administrative proceeding. It necessarily follows then, that the lawsuit did not prevent ODE from affording ECOT the same opportunity afforded to other eschools. ODE's failure to do so was unreasonable and unfair, and thus, arbitrary and capricious.

for the benefit of one bidder over the other, displaying "unequal treatment [that] is fundamentally arbitrary and capricious." Id. at 742. Similarly, in BayFirst Solutions, LLC v. U.S., 102 Fed. Cl. 677, 690-91 (Fed. Cl. 2012), another bidding case, the court held that the agency's evaluations of the losing bidder's past performance using a different standard from that used to rate the winning bidder "show disparate treatment and were arbitrary and capricious." Id. at 691.

As an example of a different type of disparate treatment, Colonial Fast Freight Lines, Inc. v. U.S., 443 F. Supp. 72 (N.D. Ala. 1977), involved an attempt by Colonial, a trucking company, to secure from the Interstate Commerce Commission an exemption from a particular motor-carrier regulation and the commission's arbitrary and unreasonable adherence to a sixty-day time limit for filing an exemption application under the complex process required by the commission. The court held that Colonial was subjected to disparate treatment, which it deemed arbitrary and capricious, based on the commission's denial of Colonial's application because Colonial missed the sixty-day deadline by a few days. See id. at 76-77.

Critically, the evidence showed the commission had accepted late applications from other applicants, and the court concluded that the commission's treatment of Colonial was similar to that in a previous case in which the commission was found to have engaged in the same type of disparate treatment. Referring to the previous case, the court remarked that: "[I]n some cases late-filed applications were accepted; in others, they were not. In that case, late-filed evidence was rejected; in other cases, such evidence was considered. [In the case at bar] Colonial was subjected to this same sort of uneven treatment." Id. at 76. The court also noted that Colonial's late filing was caused in part by the commission's inexplicable dilatory conduct – for instance, the clock on the sixty-day application process began running upon the commission's mailing out

of a certificate, and the commission stamped its certificate as having been mailed to Colonial on a particular day, yet Colonial did not receive it until eighteen days later. Id. at 74, 77.

Nevertheless, the commission argued that it should be permitted to strictly apply the sixty-day time limit to Colonial even though it did not strictly apply it to others. The court flatly rejected this argument. It concluded that even assuming the time limit was facially reasonable, "any application of a time limit must not be arbitrary and capricious" and "holding Colonial to the 60-day time limit was not reasonable but, rather, arbitrary and capricious." Id. at 75.

Here again, ODE's arbitrary disparate treatment of ECOT is not only fundamentally unfair, it effectively constitutes the disparate meting out of an administrative penalty (likely, a death penalty) upon ECOT while allowing other eschools to live. Again, that is the epitome of arbitrariness and capriciousness.

OBJECTION #2 (CONTINUATION): The Hearing Officer Is Wrong To Assert And Recommend That The Board Should Find Multiple Issues In This Proceeding Were Litigated And Decided In The Franklin County Action, Thus Precluding The Board From Making Its Own Decision On The Administrative Law Issues Presented. ODE Cannot Hide Behind An Overbroad Application Of The Legal Doctrine *Res Judicata*: *Res Judicata* Applies Only To The Three, Limited Claims And Issues Presented In The Franklin County Action, And The Hearing Officer's Assertion That It Applies To Other Claims/Issues Represents An Improper And Unsupported Expansion Of The Doctrine.

A. Application Of The Doctrine Of *Res Judicata* Circumscribes The Claims And Issues The Board Cannot And Can/Should Consider.

As briefly noted above, it is necessary to address in depth here the impact that the Franklin County Action has on the scope of these proceedings, as well as the evidence and issues it was appropriate for the Hearing Officer to consider and address by way of recommended findings to the Board. That issue turns on application of the doctrine of *res judicata*, which – via its dual prongs of claim and issue preclusion – dictates the both the limited claims and issues that

cannot be considered in this proceeding and, perhaps more importantly, those that can and should be considered.

1. Overview Of Claims Actually Asserted And Trial Court's Decision In The Franklin County Action.

a. ECOT's Actual Claims, And What Was Not Asserted Or Litigated In The Franklin County Action.

ECOT filed the Franklin County Action on July 8, 2016. In that case, ECOT asserted only ***three*** claims against ODE, all of which were premised solely on ODE's stated intent to impose ***durational standard*** for purposes of evaluating ECOT's FTE funding for the 2015-2016 school year. [See First Amended Complaint (Franklin County Action).] In Count One, ECOT sought specific performance of the Funding Agreement, which required ODE to utilize an enrollment-based methodology in conducting calculating and reviewing ECOT's FTE funding. In Count Two, ECOT sought declaratory and injunctive relief because ODE's imposition of a durational standard was barred by the language of the FTE funding statute, R.C. 3314.08. In Count Three, ECOT sought declaratory and injunctive relief because ODE's imposition of a durational standard was invalid and unlawful due to the agency's failure to comply with the formal requirement of Chapter 119 of the Revised Code.

Notably, ECOT, aware of controlling Ohio Supreme Court precedent that arguably forecloses such a claim, did not assert a claim for or otherwise argue that ODE's stated intent to impose a durational standard was unconstitutionally retroactive. [See Amended Complaint (Franklin County Action); ECOT's Motion for Preliminary Injunction (Franklin County Action).] Instead, ECOT's challenges were limited to the three, above-described claims and theories.

Further, in the Franklin County Action, ECOT did not challenge ODE's Final Determination, or whether such decision reflected and/or resulted from arbitrary and capricious conduct on the part of ODE. Indeed, ODE could not have done so for multiple reasons. ***First***, the Final Determination was not issued until September 26, 2016 – months after ECOT filed its complaint, and just days before the Court had committed to, and ultimately did, issue its decision on ECOT's motion for preliminary injunction. Thus, ODE's issuance of such determination did not occur until months after ECOT filed the Franklin County Action.

Second, the Final Determination is the very determination expressly subject to appeal under R.C. 3314.08(K) – and is the subject of this proceeding. Indeed, ODE – albeit unsuccessfully – sought to convert ECOT's limited, standard-based challenges in the Franklin County Action into an attack on ODE's not-yet-issued "final determination" in an effort to force ECOT's non-administrative claims into this administrative process. For example, while admitting that no determination had yet been made, ODE argued:

> Here, ECOT has a statutory right to appeal ODE's funding decision (***once it occurs***) to the State Board of Education, an independent political body to which the General Assembly has assigned the responsibility for such funding decisions. In any such appeal, ECOT would be free to mount the very attacks on the funding methodology that it seeks to press here.
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> [ODE's August 5, 2016 Motion to Dismiss Plaintiffs' First Amended Complaint, at 2 (Franklin County Action) (emphasis added).]

Against this backdrop, any assertion by ECOT in the Franklin County Action that ODE's actions purportedly supporting and/or reflected in its not-yet-made Final Determination violated the ***administrative-law*** concept of arbitrariness and capriciousness would, of course, have been met with an objection that such assertion was both premature and subject to administrative exhaustion. [See, e.g., ODE's November 14, 2016 Brief In Support of

Dismissing Appeal For Lack of Final Appealable Order, at 3, filed with Tenth District Court of Appeals) (Franklin County Action) ("[T]o the extent that ECOT has concerns about the ODE funding decision at issue in this case, ECOT has a forum for airing those concerns, and no funding decision will be final unless and until the State Board affirms it.").] Notably, ECOT does not disagree that a specific challenge to ODE's Final determination is subject to appeal under R.C. 3314.08(K) – that is why ECOT filed the instant proceeding.

b. The Franklin County Decision.

In her December 14, 2016 Decision (the "Franklin County Decision"), Judge French specifically ruled upon ECOT's claims based on ODE's alleged violation of R.C. 3314.08; its failure to promulgate the challenged durational standard pursuant to Chapter 119; and its claims for breach and enforcement of the Funding Agreement. [Franklin County Decision.] In so ruling, and even though she largely parroted – in whole cloth – ODE's proposed findings of fact and conclusions of law, Judge French determined only that:

(1) ODE's imposition of a durational standard was not foreclosed by the express language of R.C. 3314.08; [Id. at 14, 15 ("Under [R.C. 3314.08(H)(2) & (3)], the Court finds that ODE is entitled to consider durational data …. … [T]he Court finds that ECOT does not succeed on its claim that R.C. 3314.08(H)(3) precludes reliance on durational data regarding actual student participation.");

(2) ODE had not violated Chapter 119 because the FTE Handbook, via which the imposition of a durational standard was purportedly communicated to eschools, was merely an internal guideline, or alternatively, an "interpretation" that did not "enlarge" the scope of R.C. 3314.08 and which did not have the "force of law" [Id. 16-19]; and

(3) the Funding Agreement expired years ago, and is thus, not enforceable [Id. 8-10]. In the alternative – and, thus, not essential to her conclusion of unenforceability of the Funding Agreement – Judge French also parroted ODE's proposed conclusions that the language of the Funding Agreement, like R.C. 3314.08, did not foreclose the consideration of durational data. She also alternatively found that, to the extent the Funding Agreement could be construed as precluding ODE from determining whether ECOT students were "in fact participating in any

curriculum at ECOT at all" – a position ECOT never advocated – such agreement violated public policy. [Id. at 12-13.]

Separately, and remarkably, Judge French also parroted ODE's straw argument that ECOT had somehow asserted a constitutional retroactivity claim. Having done so, she not surprisingly concluded that no constitutional retroactivity claim was available to ECOT, as a matter law. [Franklin County Decision, at 21.] Further, in support of this unnecessary conclusion, based on an unlitigated claim, Judge French cited the language of prior FTE Handbooks and found that ECOT could not claim "unfair[ ] surprise" as to the basic imposition of a durational standard. [Id.]

Tellingly, however, even in addressing this unasserted and unlitigated claim, Judge French did not purport to address the adequacy of ODE's notice for purposes of guiding eschools' as to what specifically would be required of them in order to satisfy ODE's challenged durational standard. Likewise, Judge French was not presented with and did not address the propriety, under an arbitrary and capricious administrative law standard, of, among other things, ODE's final determination, ODE's changing positions regarding application of a durational standard, lack of guidance as to how such standard could be satisfied, and the agency's refusal to even reveal the basis for/analysis underpinning its final determination as to ECOT until months after such determination was issued.

2. Overview Of Doctrine Of *Res Judicata*: Claim Preclusion And Issue Preclusion.

a. Claim Preclusion.

Against this backdrop, application of the doctrine of *res judicata* to the Franklin County Decision establishes both what the Hearing Officer and, thus, the School Board cannot and can

(indeed, should) consider as part of this proceeding. An overview of the doctrine is, therefore, in order.

Res judicata under Ohio law includes two distinct, but related concepts: claim preclusion and issue preclusion, also known as collateral estoppel. Grava v. Parkman Twp., 73 Ohio St. 3d 379, 381 (1995). Accord: Fort Frye Teachers Assn., OEA/NEA v. State Employment Relations Bd., 81 Ohio St. 3d 392, 395 (1998) ("It has long been held that the legal doctrine of *res judicata* consist of two related concepts – claim preclusion and issue preclusion."). Both concepts are relevant here.

In Grava, the Ohio Supreme Court adopted the "modern approach" to claim preclusion, which holds that "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of ***the transaction or occurrence*** that was the subject matter of the previous action." Id. at 382 (emphasis added). In general, claim preclusion, thus, "bars relitigation of a ***cause of action***." Rizvi v. St. Elizabeth Hosp. Med. Ctr., 146 Ohio App.3d 103, 108 (7th Dist. 2001) (emphasis added). The underlying principle of claim preclusion is that where a litigant has a "full and fair opportunity" to be heard ***on a particular matter***, the litigant is required to "avail [itself] of all ***available*** grounds for relief in [that] first proceeding." Grava, 73 Ohio St. 3d at 383 (emphasis added).

For claim preclusion to apply, four requirements must be met: "(1) there was a prior valid judgment on the merits; (2) the second action involved the same parties as the first action; (3) the present action raises claims that were or ***could have been litigated*** in the prior action; and (4) both actions arise ***out of the same transaction or occurrence***." Reasoner v. City of Columbus, 2005 WL 289574, at *2 (Ohio Ct. App. 10th Dist., Feb. 8, 2005) (emphasis added). Accord: Grava, 73 Ohio St.3d at 381-82.; Sharper v. Tracy, 76 Ohio St. 3d 241, 242 (1996). Claims arise

out of the same transaction and occurrence for purposes of claim preclusion only if they "arise from the same event ***and*** seek to redress the same basic wrong." Astar Abatement, Inc. v. Cincinnati City Sch. Dist. Bd. of Educ., 2012 WL 481799, at *6 (S.D. Ohio, Feb. 14, 2012) (emphasis added).

Consistent with this standard, courts narrowly construe the "transaction and occurrence" element where the ***legal*** relief sought is different. Id. In Astar, a prior state court action between the parties involved a breach of contract claim related to services provided in connection a construction project. The Court refused to apply claim preclusion to a separate federal action between the same parties based on negligence, remarking:

> While both claims involve the same parties and arise from the Sayler Park project, the factual and legal issues appear to be different. Astar's obligation to pay for laboratory services rendered by Pinnacle sound in contract and are defined by the written agreement between Pinnacle and Astar. Pinnacle's duties to Astar, if any, sound in tort and arose from its role as the project designer and engineer retained by CPS for the Sayler Park project. Proof of one claim likely would not prove or refute the other claim. The Court cannot conclude…that the claims asserted therein arise from the same transaction and occurrence.

[Id. at *7.]

Foster v. DBS Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006), also exemplifies how courts limit the scope of "transaction or occurrence" when considering application of claim preclusion under Ohio law. There, the Court rejected the defendants' claim preclusion defense on summary judgment to plaintiffs' Fair Debt Collection Practices Act claims based on alleged misrepresentations defendants made during the debt collection process, finding that the "transaction or occurrence" prong of claim preclusion had not been satisfied. Specifically, the Court noted that though state court debt collection cases involved defendants' attempt to collect plaintiffs' debts, claim preclusion could not apply because the plaintiffs were

not "challenging the amounts they owed," but, rather, were "challeng[ing] the capacity of Defendants to bring debt collection lawsuits against them and the practices Defendants employed when they attempted to collect those debts." Id. at 797. Thus, the Court found the federal matter arose "out of a different set of operative facts than did the underlying state court cases" and refused to bar the plaintiffs' claims. Id.

b. Issue Preclusion.

Issue preclusion or collateral estoppel, on the other hand, provides that "a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." Daniel v. Williams, 2014 WL 309312, at *6 (Ohio Ct. App. 10th Dist., Jan. 28, 2014) (citations omitted). Put differently, "[w]hile claim preclusion precludes relitigation of the same cause of action, issue preclusion precludes relitigation of an issue that has been *actually and necessarily litigated and determined* in a prior action." Id. (emphasis added).

The "actually and necessarily litigated and determined" prong serves as a strict limitation on the use of collateral estoppel where a court decision includes factual findings or remarks that are not essential to or dispositive of the specific issue upon which judgment is rendered. Veleron Holding, B.V. v. Stanley, 2014 WL 1569610, at *12 (S.D.N.Y., Apr. 16, 2014) ("Collateral estoppel is not appropriate when findings of fact are unnecessary to the entry of a valid judgment."). Thus, collateral estoppel does not attach to a court's mere "statements" or "remarks" – even assuming such commentary constitutes a "finding" – because they are *unnecessary* to the judgment. Golden Rain Found. v. Franz, 163 Cal. App. 4th 1141, 1155 (4th Dist. 2008) ("And even if one assumes that [the court's] observation in the statement of decision

was a finding, it was entirely unnecessary to the judgment rendered and should not be given collateral estoppel effect.").

More fundamentally, collateral estoppel does not attach to factual findings where they were not actually and necessarily litigated for purposes of resolving the ***very same issue*** presented in the subsequent proceeding. Where not dispositive of the same issue, factual overlap between the two proceedings is irrelevant. Lupo v. Voinovich, 858 F. Supp. 699, 705 (S.D. Ohio 1994) (quoting Distelzweig v. Hawkes Hosp. of Mt. Carmel, 34 Ohio App. 3d 277, 279 (10th Dist. 1986)) ("the doctrine of collateral estoppel does not apply to a mere overlap of issues").

In Distelzweig, the Tenth District narrowly applied the "actually and necessarily" litigated and determined requirement of collateral estoppel despite the clear factual overlap between the proceedings at issue. There, the plaintiff brought an action for breach of contract arising from her termination for alleged insubordination. Id. at 277-78. According to the defendant, the prior Unemployment Compensation Board of Review proceedings, in which the Board found plaintiff had been terminated for "just cause," collaterally estopped plaintiff from litigating the breach of contract claim in court. The trial court agreed and granted summary judgment. The Tenth Appellate District, however, reversed.

Initially, the Court noted that "a party may not apply the doctrine of collateral estoppel 'without showing that ***precisely*** the same issue was litigated in the prior action.'" Id. at 278 (emphasis added). And, though the Court conceded plaintiff "was represented by counsel at every administrative and judicial proceeding," the Court refused to find that the issues to be tried in the court proceeding were ***identical*** to those litigated before the administrative board:

> Although the board found that plaintiff's continued refusal to wear a cap as required by the written uniform policy constituted insubordination for purposes of R.C. 4141.29(D)(2)(a), the issues which arise concerning whether defendants had "just cause" to discharge plaintiff prior to the

> expiration of plaintiff's employment contract have yet to be fully litigated. *While there will be an overlap of factual questions as well as similarities in the presentation of evidence and testimony, the doctrine of collateral estoppel does not apply to a mere overlap of issues*. … A finding that defendants had just cause to terminate plaintiff must be made considering the written employment contract which clearly does not involve the exact issues regarding whether plaintiff was fired for "just cause" under R.C. 4141.29(D)(2)(a).
>
> [Id. at 279 (emphasis added).]

Also on point is Johnson's Island Property Rental Owners' Assn. v. Nachman, 1999 WL 1048235 (Ohio Ct. App. 6th Dist., Nov. 19, 1999). There, the plaintiff owners' association filed a foreclosure action against defendants for their failure to pay association dues that allegedly were owed. Id. at *3. In support of its foreclosure claim, plaintiff argued the defendants were collaterally estopped from litigating the issue of whether defendants were members of the plaintiff, and thus, owed the dues. Id.

According to plaintiff, prior litigation between the parties in which defendants sued to remove liens placed by plaintiff on their properties and resulted in summary judgment in favor of plaintiff, thus validating the liens, necessarily decided defendants' membership in plaintiff. Id. The Court, however, disagreed, finding that the issue of defendants' members was not "actually and necessarily" litigated and determined in the parties' prior lawsuit:

> [I]t is apparent that *while the court assumed the [defendants] were members of [plaintiff], such membership was not dispositive of the decision. Although discussed by the court, the issue of membership was not litigated*. … In our view, the court's decision…can equally be viewed as finding that were the property owners not required to contribute to the normal operating costs of [plaintiff] they would be unjustly enriched by the benefits [plaintiff] provided to them. Accordingly, [the prior case] is *res judicata* only on the issue of the [defendants'] obligation to contribute their fair share of [plaintiff's] operation costs, which the court…defined as 'dues.' *A lien based on anything other than dues, however, was not actually or necessarily litigated*….
>
> [Id. at *8 (emphasis added).]

Simply put, the fact that certain factual matters were "discussed" or even addressed in a prior action but were not dispositive of the specific issue presented in the subsequent action, does not rise to the level of "actually or necessarily" litigated and determined necessary to support application of collateral estoppel. Id. (emphasis added).[22]

So, too, where the decision of the first tribunal rests on alternative grounds, ***none*** of those grounds is entitled to collateral estoppel effect. "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) of Judgments, § 27, *cmt. i.* See also Stout v. Pearson, 180 Cal. App. 2d 211 (4th Dist. 1960) (refusing to apply collateral estoppel where prior judgment rested on a determination of any one of several alternative grounds). The rationale for this is simple: "when a tribunal decides a case based on alternative grounds, none of them is strictly necessary to the decision…." United Access Technologies, LLC v. Centurytel Broadband Services LLC, 778 F.3d 1327, 1333 (Fed. Cir. 2015). Thus, alternative findings are deemed unnecessary and have no preclusive effect. See, e.g., Vincent v. Thompson, 50 A.D. 2d 211

[22] Indeed, there is no shortage of authorities illustrating the narrow scope of the preclusive effect of collateral estoppel under Ohio law. See also Wead v. Lutz, 161 Ohio App. 3d 580, 589 (12th Dist. 2005) (rejecting application of collateral estoppel to complaint to sell real estate based on prior foreclosure proceedings because even though actions shared many of the same facts "[c]hronologically, the issue of whether GMAC held a valid and secured lien after Huntington assigned the mortgage could not be litigated in the first foreclosure action because the assignment had not yet occurred" and thus "the issue of GMAC's lien was not 'actually and necessarily litigated and determined' in the foreclosure action"); Krahn v. Kinney, 43 Ohio St. 3d 103, 107-08 (1989) (denial of criminal defendant's motion to vacate conviction did not collaterally estop defendant from pursuing legal malpractice claim based upon defendant's counsel's failure to transmit a different plea offer because the motion to vacate was denied on the grounds that the defendant failed to show her guilty plea was not knowingly and voluntarily entered, and thus, "the issues presented in the malpractice action were not 'actually and necessarily litigated and determined' in the denial" of the motion to vacate).

(N.Y. App. Div. 1975) (finding in prior proceeding of inadequate testing of drug was both an alternative finding and unnecessary to the decision, and thus, collateral estoppel did not apply "to alternative theory upon which the recovery was based").

Remarkably, on the issue of collateral estoppel, the Hearing Officer convened a post-briefing telephonic status conference in which he inquired of ECOT whether there is any Ohio authority supporting the proposition that, where a court decides an issue on alternative grounds, neither ground should be given issue preclusive effect. In its original briefing, ECOT cited the Restatement of Judgments and authorities from other jurisdictions that are cited above. The Hearing Officer indicated that he was reluctant to apply that reasoning absent Ohio authority supporting it.

ECOT, therefore, responded to the Hearing Officer's inquiry by citing a number of Ohio authorities, including a decision from the Tenth District Court of Appeals recognizing the same standard.[23] ODE responded to this submission, but cited *only authorities from other jurisdictions* (the very type of authorities upon which the Hearing Officer had previously indicated a

[23] The Tenth District decision is discussed in detail below. The following decisions demonstrate that other Ohio courts, including the Ohio Supreme Court, have repeatedly looked to Restatement Section 27, including the comments thereto, in addressing issues of collateral estoppel/issue preclusion: Goodson v. McDonough Power Equip., Inc., 2 Ohio St. 3d 193, 198 (1983) (citing Restatement Section 27, comment *c*, when discussing whether Ohio recognizes the doctrine of nonmutual collateral estoppel); Kelly v. Georgia-Pacific Corp., 46 Ohio St. 3d 134, 138 (1989) (citing Restatement Section 27, and specifically, comment *j*, for the Court's conclusion that "where a determination in a prior federal action was not essential to the judgment therein, collateral estoppel will not foreclose consideration of the issue in a subsequent state proceeding involving a different claim for relief"); State *ex rel.* Davis v. Public Employees Ret. Bd., 120 Ohio St. 3d 386, 393 (2008) (citing Restatement Section 27, comment *e*, as explaining the "actual-litigation" requirement for the application of collateral estoppel under Ohio law); Grange Mut. Cas. Co. v. Spangler, 1985 WL 4965, at *2 (Ohio Ct. App. 10th Dist., Dec. 31, 1985) (citing Restatement Section 27 for the "actually litigated and determined" requirement of issue preclusion under Ohio law); Howell v. Richardson, 1987 WL 32218, at *2 (Ohio Ct. App. 10th Dist., Dec. 29, 1987) (citing Restatement Section 27 with approval); McCabe Corp. v. Ohio Envtl. Protection Agency, 2012-Ohio-6256, ¶ 19 (Ohio Ct. App. 10th Dist., Dec. 31, 2012) (citing Restatement Section 27 as in agreement with the elements of issue preclusion under Ohio law).

reluctance to rely). Yet the Hearing Officer in his R&R relied upon the ***out-of-state*** authorities cited by ODE, and not the Ohio authorities cited by ECOT. [R&R at 83.] In light of this, one must wonder why the Hearing Officer inquired as to the existence of supporting Ohio law, in the first instance.

Indeed, the Tenth District decision ECOT cited in response to the Hearing Officer's question specifically applied ***comment i*** in recognizing that where a decision is supported by alternative grounds, neither ground is given issue preclusive effect. See Kerr v. Procter & Gamble Co., 1989 WL 11961 (Ohio Ct. App. 10th Dist., Feb. 14, 1989). In Kerr, the plaintiff's workers' compensation claim before the Industrial Commission was denied for two reasons: (1) that plaintiff's injury had not occurred in the course of her employment; and (2) that plaintiff had suffered no physical injury. Id. at *3, n.1. On appeal, however, the parties stipulated that plaintiff's injuries occurred during her employment; thus, the only issue before the appellate court was whether plaintiff suffered a physical injury. Id. at *3. The Court affirmed that plaintiff had not. Id.

In a subsequent action, plaintiff brought tort claims against defendant, which the defendant argued were precluded based on the prior stipulation. Id. at *2-3. The trial court agreed and dismissed plaintiff's claims. Id. The Tenth District, however, held that the parties had not actually and necessarily litigated and determined the issue of whether plaintiff's injury occurred during the course of her employment. Id. Further, the Court explained that because the Industrial Commission's initial decision could be supported under either of its findings noted above, ***neither*** were "essential" to the judgment, and thus, could not form the basis for collateral estoppel pursuant to the Restatement:

> The "essential" requirement means that "[i]f a judgment of a court of first instance is based on determinations of two issues,

> either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." ***Restatement of the Law 2d, Judgments (1982), Section 27, comment i***. In the present case, the Industrial Commission found both that Kerr's injury did not occur in the course of employment and that she suffered no physical injury. Both findings would independently support the commission's denial of Kerr's claim. … As a result, neither finding is conclusive in plaintiffs' common law tort action.
>
> [Id. at *3, n.1 (emphasis added).]

Simply put, the rules set forth in Section 27 of the Restatement and the comments thereto, *including comment i*, unequivocally reflect and are consistent with the law of Ohio. The Hearing Officer was wrong to conclude otherwise.

3. Application Of Claim And Issue Preclusion Here.

a. Claim Preclusion Bars The Hearing Officer From Considering Or Determining ECOT's Statutory Challenges And/Or Enforceability Of The Funding Agreement.

In the first instance, the doctrine of claim preclusion precludes the Hearing Officer, and thus the Board, from reconsidering or otherwise addressing ECOT's claims that: (1) ODE's imposition of a durational standard violated the express language of R.C. 3314.08; (2) such standard, and the FTE Handbook within which it is included, should have been promulgated via Chapter 119; and (3) the Funding Agreement is enforceable. The Trial Court's rulings on those three claims result from "a valid, final judgment rendered upon the merits" of claims actually asserted and litigated between the same parties to this action. Grava, 73 Ohio St. 3d at 382. Further, those arise out of the same, limited transaction or occurrence: ODE's stated intent, prior to issuance of a "final determination" as to ECOT, to employ a durational standard. As a result, these claims are subject to claim preclusion, and they cannot be reconsidered or ruled upon as part of this proceeding. See id.

b. Claim Preclusion Does Not Bar The Hearing Officer From Considering Anything Else – And Particularly The Administrative Law Issues – Presented In This Proceeding.

Beyond those three claims, however, the doctrine of claim preclusion extends *no further*. Specifically, it does not bar ECOT from arguing and the Hearing Officer, and thus the Board, from considering and addressing the propriety of ODE's final determination, and the actions supporting/resulting in it, under basic principles of agency law, for multiple reasons.

i. Claim Preclusion Doesn't Apply To Any Claims Regarding Or Relating To ODE's Final Determination Because No Such Determination Had Been Made At The Time ODE Filed Its Lawsuit.

First, and perhaps most importantly, claim preclusion has no impact on ECOT's challenges related to the Final Determination because – putting aside any authority/jurisdictional issues, described below – such Determination was not issued until months after ECOT initiated the Franklin County Action. Thus, *no claims based on or related to the Final Determination existed at the time ECOT filed its lawsuit*.

Simply put, claim preclusion does not bar claims that had not arisen at the time of the filing of the lawsuit. Indeed, it is hornbook law that the scope of litigation, for *res judicata* purposes, "is framed by the complaint *at the time it is filed*." Computer Associates Intl., Inc. v. Altai, Inc., 126 F.3d 365, 369 (2nd Cir. 1997) (quoting Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731, 749 (9th Cir. 1984) (emphasis added). As one court has explained,

> [A]ll federal appellate courts that have addressed the issue have concluded that because the litigation's scope is framed by the complaint at the time it is filed, claim preclusion generally does not bar a later suit on after-arising claims that were not pled in the earlier action. Most state courts that have considered the issue have reached the same conclusion.

> [Loveland Essential Group, LLC v. Grommon Farms, Inc., 318 P.3d 6, 11 (Colo. Ct. App. 2012).]

Ohio law is no different. For example, in Hall v. Tucker, 161 Ohio App. 3d 245 (4th Dist. 2005), the buyer of a horse obtained a judgment rescinding the sale. Thereafter, the seller brought an action for restitution, conversion, and abuse of process based on the buyer's failure to return the horse upon the seller's satisfaction of the rescission judgment. On appeal, the buyer argued the seller's claims were barred by *res judicata*. The court rejected the buyer's argument, finding that the seller's claims did not arise, and thus could not have been brought, until the buyer wrongfully continued to retain possession of the horse ***after*** the seller hand returned the purchase price. Id. at 261-62.

The Sixth Circuit, likewise, applied this "after-arising" claims rule in Rawe v. Liberty Mut. Fire Ins. Co., 462 F.3d 521 (2006). There, the issue presented was whether the plaintiff's bad faith claims in a second lawsuit were based on the defendant's alleged actions that took place after the plaintiff filed her complaint in the first lawsuit. Initially, the plaintiff filed suit against the defendant to pursue a claim under a UIM policy. Id. at 524. After the parties reached a settlement, a consent judgment was entered against and satisfied by the defendant. Id. at 524-25. Shortly thereafter, the plaintiff filed a second lawsuit against the defendant based on the defendant's actions and conduct during the prior settlement negotiations. The trial court dismissed plaintiff's claims on *res judicata* grounds. Id. at 525.

The Sixth Circuit, however, reversed as to plaintiff's claims that arose after filing of her initial complaint, explaining that:

> The district court's dismissal of these claims on res judicata grounds was erroneous. Simply put, *[plaintiff] could not have asserted a claim that [she] did not have at the time*. … [S]he is correct that *res judicata does not apply to claims that were not ripe at the time of the first suit*. [Plaintiff's] previous suit under the

> UIM policy does not prospectively immunize the defendant from liability for future actionable conduct for bad faith.
>
> [Id. at 529-530 (emphasis added).][24]

So, too, here. For the simple reason that ODE had not issued its "final determination" at the time ECOT filed the Franklin County Action, claim preclusion does not bar any litigation of and/or a ruling upon any claims, arguments, defenses, etc. relating to such determination as part of this proceeding.

ii. Claim Preclusion Doesn't Apply To Claims Or Arguments Relating To Or Based On ODE's Final Determination Because It Lacked Authority/Jurisdiction To Consider The Same.

Second, even if ODE had issued its final determination before ECOT filed its complaint in the Franklin County Action, claim preclusion would not bar any claims/arguments based on or relating to ODE's Final Determination because the court lacked authority/jurisdiction to consider the same. As ODE repeatedly asserted, and as ECOT has recognized, challenges to a final funding determination by ODE are subject to the administrative process set forth in R.C. 3314.08(K). Thus, the court was not authorized to, and thus could not, consider claims/arguments based on the same.

"It is black-letter law that a claim is not barred by res judicata if it could not have been brought." Browning v. Navarro, 887 F.2d 553, 558 (5th Cir. 1989) (citing Restatement (Second) of Judgments, § 26(1)(c)). This recognized exception to claim preclusion is consistent with what is sometimes described as the "jurisdictional competence" exception, which provides that "[i]f

[24] Accord: Computer Associates Intl., Inc. v. Altai, Inc., 126 F.3d 365, 369-70 (2nd Cir. 1997) ("The *res judicata* doctrine does not apply to new rights acquired during the action which might have been, but which were not, litigated. Although a plaintiff may seek leave to file a supplemental pleading to assert a new claim based on actionable conduct which the defendant engaged in after a lawsuit is commenced…he is not required to do so.").

the court rendering judgment lacked subject-matter jurisdiction over a claim," then a litigant's failure to assert that claim will not bar a later action on the unasserted claim. Id. at 558-59. Accord: Kale v. Combined Ins. Co. of Am., 924 F.2d 1161, 1167-68 (1st Cir. 1991) ("This jurisdictional competence exception permits the maintenance in a second suit of a claim stemming from the cause of action previously sued upon 'if a jurisdictional obstacle has precluded raising that issue in the first action.' ").

The court's application of this doctrine in Gatti v. Nat'l Union Fire Ins. Co. of Pittsburgh, 939 F. Supp. 2d 64 (D. Mass. 2013) is instructive. There, the defendant insurer moved to dismiss the plaintiff's complaint on claim preclusion grounds, arguing that plaintiff's failure to bring an ERISA claim in the prior state court proceedings between the same parties arising from the defendant's denial of plaintiff's claim barred her federal claim under ERISA. Even though the court found the ERISA claim "arose out of the same nucleus of facts as the earlier contract-based claim dismissed by the court," and thus, all the elements of claim preclusion had been met, the Court refused to dismiss plaintiff's ERISA claim because the applicable administrative process had not been exhausted with respect thereto. Id. at 66-67.

Again, the same is true here. Because the trial court could not have considered a challenge by ECOT to ODE's Final Determination and the administrative-law issues associated with such decision, it is not barred by claim preclusion from doing so here.

iii. Claim Preclusion Doesn't Apply Because The Franklin County Action And This Proceeding Are Based On Different Transactions And Occurrences.

Third, and perhaps most obviously, claim preclusion does not extend beyond the three matters described above because those matters arise from a different transaction or occurrence than the matters presented in this proceeding. Specifically, the Franklin County Action arose from ODE's stated intent to impose a durational standard in violation of, as ECOT contends, R.C. 3314.08; R.C. Chapter 119; and the Funding Agreement. Consistent with the above-described authorities, the transaction or occurrence at issue was, thus, ODE's alleged violation of those specified legal items – separate and apart from any Final Determination by the agency.

On the other hand, as specifically recognized in R.C. 3314.08(K), *this* proceeding arises directly out of ODE's Final Determination – a different transaction or occurrence. As a result, claim preclusion simply has no application to any argument or challenge asserted by ECOT relating to such Determination; with the limited exception that the Hearing Officer is barred from reconsidering or addressing the Franklin County Court's conclusions that ODE's basic imposition of a durational standard does not violate the express language of R.C. 3314.08; Chapter 119; or the Funding Agreement.

c. Issue Preclusion Bars Only The Relitigation Of Those Limited Issues Actually And Necessarily Tried And Resolved As Part Of The Franklin County Action – It Does Not Apply To Any Unnecessary Remarks Or Alternative Findings.

i. The Same, Three Limited Issues Are Subject To Issue Preclusion.

As with claim preclusion, the Franklin County Decision also has limited issue preclusive effect in this proceeding. Specifically, in light of the above-described authorities, the doctrine of issue preclusion is limited to the same, limited findings to which claim preclusion applies: (1)

R.C. 3314.08 allows for ODE to impose a durational standard; (2) the durational standard, and the FTE Handbook incorporating the same, were not required to be promulgated under Chapter 119; and (3) the Funding Agreement is unenforceable. The Hearing Officer cannot reconsider or reassess the Trial Court's findings in this regard.

ii. <u>The Doctrine Of Issue Preclusion Extends No Further.</u>

Beyond that, however, none of the court's passing remarks, unnecessary findings, and/or alternative conclusions are entitled to issue preclusive effect here. To the contrary, as ODE repeatedly represented to the Court and to the Tenth District, ECOT is free to present (and the Board is free to consider) all of its arguments – with the limited exception of those described above – here:

- "Indeed, in its appeal to the State Board of Education, ECOT is free to make every argument that it seeks to make here." [ODE's August 15, 2016 Reply In Support of its Motion to Dismiss Plaintiffs' First Amended Complaint, at 5 (Franklin County Action)]

- "ECOT has an administrative forum in which it can press all of the substantive arguments regarding funding that it sought to advance in the court below (and that it seeks to make in this appeal)." [ODE's October 24, 2016 Memorandum In Opposition to Appellants' Motion for an Order Expediting Appeal, at 5 (Franklin County Action).]

Thus, by way of summary and for purposes of clarity, issues not necessarily tried and/or litigated in the Franklin County Action, and therefore, which may be appropriately considered and addressed here, include, without limitation, the following:

- **Whether ODE's <u>*final determination*</u> as to ECOT, and the actions/documentation surrounding or purportedly supporting it, were arbitrary and capricious and/or simply incorrect.**

- **Whether, despite the Court's finding as to ODE's statutory ability to do so, ODE established an actual standard of which eschools were aware and with which they could comply.**

- **Whether ODE provided ECOT with proper (advance/actual) notice of its application of the subject durational standard, or whether it failed to do so and, thus, acted arbitrarily and capriciously.**

The Hearing Officer has suggested that the court's statements about language included in prior versions of the FTE Handbook and its findings relating to the lack of a constitutional retroactivity claim are dispositive of any arguments by ECOT about the propriety and/or sufficiency of notice provided by ODE to ECOT. But, such suggestion is wrong. First, as noted above, ECOT ***did not assert*** such a retroactivity claim, and thus, any "facts" or "issues" purportedly related thereto were, as a matter of common sense, neither actually litigated nor necessarily decided by the court. For that reason alone, any findings or conclusions pertaining to retroactivity have no bearing on this proceeding.

Second, the court's references to prior FTE Handbooks, on their face, have nothing to do with its disposition of the three claims actually presented – *i.e.*, whether ODE's stated imposition of the challenged durational standard violated one of multiple statutes or the Funding Agreement. Thus, any "findings" related thereto were unnecessary and have no collateral estoppel effect on this proceeding.

Third, for the reasons discussed in more detail above, even if the Trial Court had properly and necessarily addressed a non-existent constitutional retroactivity claim, it does not preclude the Hearing Officer's consideration of issues of ***administrative*** retroactivity – a doctrine separate from any constitutional claims.

- **Whether ODE provided sufficient guidance/instruction to ECOT – even assuming that its durational standard did not have to be codified as a rule – so that ECOT had a fair and reasonable opportunity to actually comply with the subject criterion and avoid facing the funding clawback at issue in this proceeding.**

Although the court found—albeit not necessarily and/or in the alternative – that the FTE Handbook included information regarding the potential consideration of durational information, it was not asked to and did not address the issue of whether the Handbook provided eschools, like ECOT, with sufficient guidance/instruction to ensure their compliance with any pertinent durational standard. That basic question of administrative law, which is answered by Mr. Rausch's own admission regarding the Handbook's ambiguity, is squarely and properly in issue in this proceeding.

- **Whether ODE arbitrarily and capriciously failed to follow/implement its own supposed "guidelines" in conducting ECOT's FTE review, and thus, in ultimately reaching its final determination.[25]**

- **Even assuming ODE was statutorily permitted to impose a durational standard without complying with Chapter 119, whether the agency's imposition of a purely stopwatch-esque approach was fair and consistent with any administrative/public interest in ensuring that ECOT students are receiving an education and/or that state dollars have been appropriately spent.**

The Hearing Officer has suggested that ECOT is somehow barred from challenging the reasonableness/fairness of ODE's stopwatch-based durational standard by the court's public policy finding in connection with the Funding Agreement. But, such finding has no such impact on this proceeding. First, at no point was the Court asked to address, nor did it address, the propriety of the ***specific methodology*** ODE ultimately chose to employ in implementing a durational standard the court merely held ODE was not legally barred from implementing. Of

[25] Even the court's finding that the FTE Handbooks merely set forth "guidelines" is not entitled to issue-preclusive effect here. That is because such finding was offered in the ***alternative*** to the court's finding that the handbook did not expand the scope of the FTE funding statute, R.C. 3314.08. As noted above, where the decision of the first tribunal rests on alternative grounds, ***none*** of those grounds is entitled to collateral estoppel effect in the second tribunal. See Kerr v. Procter & Gamble Co., 1989 WL 11961, at *3 n.1 (Ohio Ct. App. 10th Dist., Feb. 14, 1989).

course, the Court could not have addressed such methodology inasmuch as ECOT did not learn about it until well after ODE's Final Determination was issued.

Second, in any event, the Court's "public policy" finding was merely an alternative ground for its non-enforcement of the Funding Agreement. For that additional reason, such finding is not entitled to preclusive effect here.

In sum, for all of these reasons, none of the issues/challenges actually asserted by ECOT in this proceeding are barred by *res judicata*.

CONCLUSION

For all of the reasons described above, as well as in ECOT's Post-Hearing Brief and Post-Hearing Response Brief, ODE has failed to carry its burden of proof and the Hearing Officers Report and Recommendation should be rejected in its entirety. To the contrary, the largely undisputed evidentiary record clearly establishes that ODE acted arbitrarily and capriciously, in violation of basic tenets of administrative law. As a result, the Final Determination should be rejected, and ECOT should be awarded its full, claimed FTEs of 15,321.98, for 2015-2016.

Respectfully submitted,

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1036-002:680493

Before the Ohio
State Board of Education
25 South Front Street
Columbus, Ohio 43215

In the Matter of:
Electronic Classroom of Tomorrow
Full-Time Equivalency (FTE) Review Appeal

Lawrence D. Pratt
Hearing Officer

EXECUTIVE SUMMARY OF OBJECTIONS BY THE ELECTRONIC CLASSROOM OF TOMORROW TO REPORT AND RECOMMENDATION OF HEARING OFFICER

The Electronic Classroom of Tomorrow ("ECOT") has already submitted, for the Board's review and consideration, extensive Objections to the Report and Recommendation of the Hearing Officer. Nonetheless, for purposes of convenience and to aid the Board in the lead up to its consideration of the instant matter at its June 12, 2017 meeting, ECOT submits the instant Executive Summary, which summarizes the key objections, concerns, and ultimately, the basic unfairness and unreasonableness of the process culminating with the Hearing Officer's flawed and erroneous Report and Recommendation (the "R and R").

At bottom, let us be clear: If the FTE funding formula historically applied by ODE since at least 2003 (and which, due to ODE's decision to conduct FTE reviews of only approximately ***half*** of Ohio's eschools, was still applied to at least 11 eschools for 2015-2016)[1] had been applied to ECOT for the 2015-2016 school year, ECOT is entitled to ***its full claimed FTE funding***. [See PI Tr. Vol. III at 81-82 (testimony of ECOT's area coordinator John Wilhelm.]

[1] Eschools not subject to FTE reviews in 2016, and thus, whose funding for 2015-2016 continued to be based on reported enrollment figures, included Alternative Education Academy, Auglaize County Educational Academy, Fairborn Digital Academy, Global Digital Academy, Greater Ohio Virtual, Insight School of Ohio, Mahoning Unlimited Classroom, Marion City Digital Academy, Newark Digital, Ohio Connections Academy, Inc., and Ohio Virtual Academy.

But, instead, ODE administrators unilaterally chose to drastically change the FTE funding criteria in the middle of the school year, without any prior warning to ECOT. Now, the department seeks to claw back $60-million in funding ECOT already received based on the school's non-compliance with the previously-unannounced—and still largely undefined—durational criterion. Notably, ODE's imposition of this durational standard not only contradicted its long-standing practice, consistent with R.C. 3314.08—the FTE funding statute—of basing funding solely on enrollment, but it also took the state auditor's office off-guard, inasmuch as ODE officials had consistently advised the Auditor that eschools' FTE funding was to be based on ***enrollment***.

Now, in the middle of a high-profile court case in which ECOT has challenged the legality of the very durational standard upon which ODE's attempted claw back is based, ODE—and its hand-picked hearing officer—are asking this Board to prematurely vote on this issue of great public and educational concern. They do so because ODE administrators apparently do not like ECOT, and want to send the school into a proverbial "death spiral" before: (1) this Board has an opportunity to fully consider the R and R coupled with the extensive record before the Hearing Officer—and thereby realize impropriety thereof; and (2) before the Tenth District Court of Appeals has an opportunity to adjudicate the legality of the very durational criterion at issue.

This Board should not bow to such transparent efforts by ODE bureaucrats and/or its legal counsel. One does not need a legal degree to appreciate the basic notions of fairness that either: (1) support outright rejection of the R and R; and/or (2) support deferring a final vote on the R and R to allow time for actual and proper ***independent*** review of the R and R and the record underlying it by this Board, and for completion of the litigation pending before the Tenth

District. In this regard, the Board members should ask themselves, why would you cast a vote to effectively close Ohio's largest eschool based on faulty factual and legal analysis by the Hearing Officer without taking the time to fully review and consider the same? Why would you cast a vote to effectively close ECOT while the legality of the very standard upon which ODE's proposed claw back is based is still pending before the Court of Appeals? Why is ODE, which has already paid the challenged funding to ECOT and which had never sought to employ a durational test for FTE funding in the ***prior 13 years***, so adamant that final action upon the R and R must be taken immediately?

In answering these questions, the Board should be guided by several basic and common sense propositions:

- Every entity regulated by an administrative agency is entitled to be treated fairly and reasonably by the agency;

- Fairness and reasonableness dictate that an agency must provide ***actual and sufficient advance*** notice of any significant changes in standards or processes, non-compliance with which results in negative consequences for the regulated entity;

- In taking regulatory action, the agency must announce and articulate an ***actual standard*** to which regulated entities, like ECOT, may attempt to conform their actions; and

- An agency's governing board should not act as a mere "rubber stamp" for agency administrators. Instead, to fulfill its obligation as an independent check on the agency's power, the Board must take all reasonable steps to become fully apprised of the issues presented, the parties' respective positions, and the evidence purportedly supporting them. It must also consider the public implications of a vote for or against the agency's position—particularly where, as here, litigation over the very legality of the agency's action remains pending.

Simply put, the "process" to which ECOT has been subjected has been unfair and faulty since day one. ECOT deserves better. The 15,000 students and their families who have selected ECOT as their school of choice deserve better. The citizens of Ohio deserve better. This Board

now has an opportunity to afford the fairness and reasonableness that have been fundamentally lacking, and it should take as much time as is necessary to ensure that it does so.

A. What The Evidence Before The Hearing Officer Really Demonstrated: A Faulty "Process," Lacking An Actual Standard, And An Effort By ODE Officials To Unilaterally Alter The Long-Standing FTE Funding Structure Without Providing Actual Notice To Affected Eschools, Like ECOT.

A basic review of the R and R reveals that the Hearing Officer's consideration of the issues presented was anything but "independent." To the contrary, in all but a few, limited respects, the Hearing Officer acted simply as a "rubber stamp" for ODE, accepting without question the agency's faulty legal propositions and otherwise ignoring key evidence—principally in the form of admissions from ODE's own administrators—that completely undercut the department's positions. While the flawed nature of the R and R is discussed in detail in ECOT's Objections, the following summary demonstrates that the ***actual*** evidentiary record completely undercuts ODE's and the Hearing Officer's positions:

- **ODE's Mid-Year Imposition Of A New "Durational" Requirement, With No Prior Notice.**

  In January 2016, through its issuance of a 2016 FTE Handbook, ODE sought—mid-school-year—to impose a durational (i.e. login time) criterion as a pre-requisite for eschools' FTE funding for the 2015-2016 school year. [Hearing Transcript pp. 1115-1189 (Administrative Hearing testimony of ECOT Superintendent Rick Teeters) ("Tr.").] No prior notice of this change (which reversed 13-years of enrollment-based reviews) was given to eschools, even though ODE area coordinators had raised concerns to ODE central office officials in the fall of 2015 that such data had never been requested and would not be available. [Tr. at 888-89 (Administrative Hearing Testimony of ODE Director of Office of Budget and School Funding Aaron Rausch).]

- **The Lack Of An Actual Durational "Standard."**

  Despite testimony from every ODE witness that the only means by which a requirement to maintain durational data was communicated to eschools, like ECOT, was via the FTE Handbook, ODE has repeatedly asserted that the Handbook is a mere "guideline" that has ***no binding effect on anyone***. Thus, there is no actual "standard" upon which ODE can rely, and nothing in R.C. 3314.08 establishes an actual durational standard with which eschools could

possibly comply—particularly given ODE's 13-year practice of basing FTE funding on enrollment.

- **Inconsistent Statements By ODE Officials After Initial Announcement Of New Requirement, Leading ECOT To Reasonably Believe That Durations Would Not Be Considered.**

Throughout the first half of 2016, ODE repeatedly asserted contradictory positions as to whether durational data would be required for 2015-2016 in conversations with ECOT and other eschool officials. Specifically, after initially announcing in January 2016 that it would proceed with FTE reviews for 2015-2016 under the new, 2016 FTE handbook, ODE backed off and indicated at a February 2016 meeting at the Ohio statehouse that it would not conduct any FTE reviews in 2016, and instead, convene a workgroup to develop a new manual for future years. [Tr. at 1121-1132 (Teeters); Exhs. K-1 (timeline prepared by Mr. Teeters); K-4 (e-mail from ODE to ECOT).] Instead of pushing off all FTE reviews, however, ODE indicated that it would proceed under its 2015 FTE handbook. [Exh. K-10 (February 19, 2016 e-mail from Aaron Rausch, and various responses thereto).] Exhibit K-10 also includes responsive e-mails from Mike Dittoe and Liz Connolly—chiefs of staff with the Ohio House and Senate, respectively—in which both stated to Mr. Rausch their understanding that ODE had committed to postponing all FTE reviews until 2017. Mr. Rausch, however, never responded to these e-mails.

Thereafter, ODE Area Coordinators (the individuals charged with conducting the actual FTE reviews of eschools for ODE) informed ECOT and other eschools in February and March 2016 *that durational data would not be considered as part of the 2016 FTE Reviews*. [Tr. at 1132-1135 (Teeters); 398-414 (testimony of Virtual Community School of Ohio Superintendent Jeff Nelson).] Even during preliminary FTE reviews conducted in February and March 2016, area coordinators continued to tell eschools that durational data *was not required and would not be considered this year*. [Tr. at 1136-1160 (Teeters); 398-414 (Nelson); Exh. K-13 (notes of post-FTE review meeting at ECOT, from March 2016).]

ECOT first learned that ODE was, once again, apparently considering durational data on May 17, 2016, when it received a letter from its Area Coordinator dated April 21, 2016. [Exh. K-27 (letter); Tr. at 1161-64 (Teeters).] However, after that, ODE again indicated at a meeting with ECOT and in a mid-June 2016, e-mail that it still hadn't determined its final position. [Exh. K-38 (email).] It was only on July 5, 2016—less than a week before ECOT's final FTE review was to begin and after the school year was over—that ODE advised ECOT it would be requiring and considering durational information for the *prior school year*. [Tr. at 1184-1189 (Teeters); Exh. K-38.] Then, it was only in November 2016—after the administrative process had already begun—that ECOT only learned about the types of durational data actually considered by ODE; even then, only in response to a public records request.

- **Lack Of Guidance For Compliance With New Requirement.**

Aside from the lack of an actual standard, ODE never provided ECOT with any guidance or notice as to how to satisfy the new durational standard. [Tr. at 1177-78 (Teeters).]

- **Selective Enforcement Of Requirement.**

Despite knowing by at least no later than the first quarter of 2016 that Ohio eschools were unlikely to have durational data, ODE chose to conduct an FTE review of ***only*** 12 out of 23 eschools in 2016. [Exhs. G-1 to G-4; Tr. 889-90, 892 (Rausch).] Only those 12 selected eschools—including ECOT—face funding losses/claw-backs for failing to comply with the new durational standard. The other 11 eschools have been given at least a full year to implement systems to comply with this new purported requirement. [Tr. at 888-89.] Based on an overall funding estimate of $250-million, that means approximately $125-million of ODE's 2015-2016 eschool funding was untouched, despite ODE's knowledge that those schools could not comply with the new standard. [Tr. at 888-89.]

- **Special Treatment For Selected Eschools.**

ODE not only selectively enforced its new durational standard as to specific eschools, but it also gave special treatment to others. For example, representatives of Connections Academy and Ohio Virtual Academy, which have a combined enrollment of approximately 13,000, admitted in February 2016 that they could not provide durational data for 2015-2016. [Tr. at 1122-23, 1128-29 (Teeters).] Yet, ODE did not schedule those schools for FTE reviews in 2016, and thus, they face no threat of retrospective funding losses. Instead, ODE officials agreed to participate and did participate in informational meetings with both schools to review and "understand" their systems. [Tr. at 900-903.] This was a benefit not afforded to eschools—like ECOT—forced to undergo the FTE review process in 2016.

- **ECOT Is Singled Out For A Review Of Underlying Durational Data, While Other Reviewed Eschools Are Allowed To Submit Only Summary Spreadsheets.**

Among the eschools actually reviewed in 2016, ODE only looked at ***underlying durational documentation for ECOT***. [Tr. at 918-19 (Rausch).] One of the requirements set forth in the purportedly-scrapped 2016 FTE handbook was that eschools would be required to provide ODE with summary durational data for each student in an excel spreadsheet format. That requirement, however, was purportedly scrapped when ODE, per Mr. Rausch's February 19, 2016 e-mail [Exh. K-10], reverted back to the 2015 handbook, which contained no such requirement.

Nonetheless, after conducting 2016 FTE reviews of other eschools, such as VCS and Buckeye Online School for Success, and finding that those schools could not justify their claimed FTE funding based on the new "durational" standard, ODE gave them an opportunity to retain their funding by providing a summary spreadsheet sheet of all student durational data. Specifically, via letters sent to other eschools—but not ECOT—in late August 2016, ODE gave such schools an opportunity to submit the very types of summary spreadsheets called for in the 2016 FTE handbook. [Tr. at 918-926 (Rausch); Exhs. G-67 to

G-74 (letters).] In short, as to eschools other than ECOT, ODE simply resorted back to the approach it had previously told high-ranking House and Senate officials it would not use.

Moreover, as to those other schools, and despite their unfavorable FTE review results, ODE accepted the summary spreadsheets provided, for FTE purposes, without requesting or examining underlying supporting documentation. [Tr. at 918-926 (Rausch).] Mr. Rausch could offer no explanation as to why ODE did not look at underlying documentation for other eschools, despite its stated goal of ensuring that all eschools could properly document the actual time students spend on learning opportunities. [Tr. at 918-919 (Rausch).]

B. Mr. Rausch's Own Admissions That Support ECOT's Position/Defeat ODE's Position.

Indeed, although either largely ignored or merely brushed aside by the Hearing Officer, many of the key points summarized above were established by the testimony of Aaron Rausch. For the Board's convenience, key excerpts of Mr. Rausch's hearing testimony are set forth here:

- **ODE's Own Area Coordinators Were Confused As To Whether The 2015 FTE Handbook Required Durational Data, And Mr. Rausch Admits That Eschools Could Reasonably Have Interpreted The Handbook As *Not Requiring* Durational Data**.

> Q. Now, one of the other issues you identified there was some confusion on -- related to durational data and it was the confusion there as to whether or not the Department was, in fact, going to consider durational data in conducting the 2015-2016 FTE reviews?
>
> A. Yes.
>
> Q. And it sounds like there was at least one -- at least one but perhaps there were more area coordinators that were under the impression that at various points in time during this review cycle that durational data would not be reviewed at all.
>
> A. Yes, that's correct.
>
> [Tr. at 707-08]
>
> Q. Now, I do want to go back to that review for a moment -- in a second, but before we go there, we were talking about the confusion that was identified and, again, ensuring consistency because at this point in time, we have at least Mr. Urban and perhaps others that are confused as to what the requirements are

going to be for this calendar year, are you saying there were no discussions within the Department of Education about providing any form of additional notice to the schools as to what the expectations were?

A. No, I don't recall any conversations.

Q. And so then was the only form of communication other than any additional correspondence that existed between the area coordinators and the schools such as the e-mail that we could look at, is the only other form of documentation that was utilized to communicate the Department's expectations as to how the review would be conducted and what the requirements would be was the 2015 FTE Review Manual?

A. Yes, that would be correct.

[Tr. at 716-17]

Q. What you're telling me is that what had been included in the prior manuals at least had not been sufficiently clear to inform the area coordinators that durational data would be requested.

A. Yes, that's true.

Q. And if the area coordinators do not read the 2015 FTE Review Manual and its predecessors to require the production of durational data to support the claimed FTEs, *wouldn't it be reasonable to conclude the schools likewise would reach the same conclusion*?

A. *I suppose that's true, yes*.

[Tr. at 742-43 (emphasis added)]

Q. Now, you also told us, I believe, that the area coordinators are the resource for schools in understanding or seeking clarification with respect to the handbook, for example.

A. Yes. They serve as a resource.

Q. And you told us that the area coordinators for one or more of them were confused or could have been confused by the language contained in the 2015 version of the FTE Review Manual, correct?

A. Yes.

Q. Was the language in the 2011, '12, '13, or '14 manual any clearer than what's found in the 2015 manual about the expectation that there would be a durational requirement that had to be satisfied in supporting claimed FTEs?

A. I don't believe there are any significant differences between what is in the 2010 manual and what ultimately appears in the '15 manual.

Q. Okay. And then as it relates to – so you would agree that those particular manuals aren't any clearer than the 2015 manual.

A. To the extent that we know -- *we know now that area coordinators were confused by the language in the '15 manual, then that would have translated into possible confusion in previous years*.

[Tr. at 1034-35]

Q. Well, I understand that the manual says durational time is going to -- there is actually a yes or no box. It's what we looked at. *I am trying to find out where -- or what document we should look at to find out that durational -- there is going to be actually specific computations of every minute of the student's time in calculating FTEs*. Prior to this was there anything like what we have marked at A-3?

A. I mean, I think -- you know, talked at length about the two -- this two or three sections within the manual that talk about durational time and where that -- and why that matters and how it – how it was used.

Q. But the durational time could also have been in a handbook, I think we've concluded did not necessarily speak clearly, could have also been a way of -- *an alternative way of confirming a student's enrollment and actual participation at the school as opposed to a minute-by-minute digest of what the student did*.

A. *It -- perhaps. Perhaps*.

[Tr. at 994-95 (emphasis added).]

Q. Okay. And so [if] you thought the language of the manual was clear as the day is long as to the expectations you would have expected the area coordinators would have followed that.

A. Yes.

Q. And yet what your understanding is at least as you are representing the language to be today the area coordinators, in fact, did not follow that approach.

A. Yes, that's correct.

* * *

Q. And is there any explanation you can offer the Hearing Officer as to why apparently it's the opinion the area coordinators failed to perform their jobs?

A. I reject the notion that they failed to perform their jobs, but as I've said several times, *I mean, I acknowledge that there has been quite a bit of confusion over this issue as it relates to our -- to our processes*.

Q. But you've tried to qualify that by saying that is related to the withdrawal of the 2016 manual. What about the confusion in '11, '12, '13, and '14 and '15? Were they just not doing their job at that point and if so, why not?

A. I can't really speak to anything before my time here at the Department and but don't have a specific answer to your question.

[Tr. at 1035-36, 1045-46]

- **ODE Provided No Notice To ECOT Of Consideration Of Durational Data, Even After March 2016 Preliminary FTE Review.**

Q. So what Mr. Babal had done in the course of three days reviewed the data but not formulated any particular written opinion for you.

A. That's correct.

Q. What he did communicate to you that you thought appropriate to share with the senior leadership at the Department of Education was that based upon what had been seen on a preliminary basis, the data was very adverse for ECOT provided that durational data was considered in calculating the FTE?

A. Yes, that's correct.

Q. And given the magnitude of the potential loss for ECOT, is it fair to say that still at this point in time no effort is being made to communicate to ECOT, at least prior to the delivery of a letter in May, that the Department has any specific concerns?

A. That's correct.

[Tr. at 721-22.]

- **No Potential Funding Losses For eSchools Not Selected For Review In 2015-2016, Even Though Other Schools Could Not Provide Durational Information.**

Q. Okay. Now, for the schools that are not subject to an FTE review, can you confirm for us that to the extent they failed to maintain durational documentation that justified their FTE reviews in the 2015/2016 time frame, that the Department's position is it will not be reviewing those schools for that academic year?

A. Yes, that's –

Q. So for each of the schools for which there is the "N" in the second column of Exhibit G-1, to the extent the schools failed to have the requisite documentation to support their hundreds of millions of dollars in funding, collectively, the Department does not intend to go back and try to reclaim those funds through a subsequent FTE review?

A. That's correct. Yes, that's correct.

Q. And that's true even though at least as of the fall of 2015 you had been advised that eSchools had historically not been requested to produce durational documentation to support their claimed FTEs?

A. I had been advised that, yes.

Q. And nevertheless, you elected not to examine these schools to test their compliance with the Department's newly stated position?

A. Correct.

[Tr. at 888-89.]

- **ODE Elects To Review Only About Half Of Eschool FTE Funding In 2016, Despite Knowledge That Most—If Not All—Eschools Did Not Have Durational Data.**

> Q. And just so we're clear, the funding in the aggregate basis to eSchools during the 2015/2016 school year was roughly how much money?
>
> A. I don't recall the specific dollar amounts. I don't know.
>
> Q. Okay.
>
> A. I believe you might know and refreshed my recollection the last time.
>
> Q. Is it roughly $250 million?
>
> A. That sounds roughly about an accurate number.
>
> Q. Okay. And so if roughly half these schools were reviewed with half the enrollment, there's apparently $125 million in funding that the Department for no particular reason elected not to review for the 2015/2016 school year?
>
> A. As it relates to eSchools, yes.
>
> [Tr. at 889-90.]
>
> Q. Okay. So to the extent there's ambiguity in your mind as to what the area coordinators are communicating, certainly, you know, in the first quarter of 2016, there's a lot of eSchools, that is in fact virtually every eSchool that is being reviewed, doesn't have the type documentation you're looking for?
>
> A. Yes, that's correct.
>
> Q. Okay. And notwithstanding, at that point there's still no effort to conduct any form of FTE review of the other eSchools to test or verify whether they have that type of documentation?
>
> A. That's correct, yes.
>
> [Tr. at 892]

- **Even Among Those eSchools Actually Reviewed In 2016, ODE Was Inconsistent In The Data Considered.**

Q. So did the Department of Education test with respect to any of these schools other than ECOT the underlying documentation that supported the summary supplied by the school?

A. No, we did not.

Q. So with respect to each of the schools other than ECOT, the Department of Education has simply accepted at face value the durational summaries provided by the schools?

A. Yes, we did.

Q. And given the importance as you've described it of determining what the actual records reflect in terms of duration, why wasn't the Department of Education simply elected to accept without verification the summaries prepared by the schools other than ECOT?

A. I -- I don't know if I have a specific reason or justification for that.

[Tr. at 918-19.]

- ***Irrationality*** **Of What ODE Is Actually Seeking To Test—i.e., Time vs. Actual Education—With New, Durational Standard.**

Q. Now, as to terms of what's being considered now, you're not even testing whether or not a student is engaged in a particular activity, you're simply determining whether or not the student had a computer turned on for a particular length of time?

A. I would say that it was more than just having the computer turned on, but it's – but certainly we're measuring the time that is tracked within the various systems that a school uses to engage students in learning opportunities.

Q. Well, I guess what I'm trying to find out is other than looking to see how long a student is accessing electronically, I'm just talking correspondence school online, you've drawn the demarcation between online and offline. So focusing your attention please only on online, what I think you're telling me is that you're simply looking on a -- *literally a minute basis as to the amount of time that, for example, a computer may be turned on and turned off, the log-in, log-off, without any real inquiry as to*

whether the student actually performed or engaged in actual learning during that time period; is that true?

A. *Yes, that's correct*.

Q. And so is that true for all the eSchools that were subject to FTE reviews this year, that the Department has confined its review to simply looking at the time records without making any further inquiry as to determine whether or not the student actually did or didn't do anything?

A. *For the online time, yes, that would be correct*.

[Tr. at 832-33 (emphasis added).]

C. Blatant Unfairness Exhibited By The Hearing Officer.

The unfairness and unreasonableness did not stop with the actions of ODE's administrators. Rather, the Hearing Officer, himself, repeatedly evinced a pro-ODE position, literally from the outset of the hearing up to and including the R and R.

For example, in the R and R, the Hearing Officer urges this Board to afford ODE the benefit of a "presumption" of regularity/propriety that, based on the very case law cited, applies *only* in the context of *judicial* review of *final* agency decisions. In other words, the Hearing Officer urges the Board to effectively conclude that ECOT is not entitled to any type of independent or even-handed review of ODE's actions at *any stage* of the process. Rather, according to the Hearing Officer, ODE should merely be presumed to have acted appropriately and fairly at all times.

Not only is such a presumption contrary to law, but it is contrary to common sense. If ODE officials were simply presumed to act properly *all the time*, what is the purpose of having a Board of Education? Further, what is the purpose of having a hearing process that entails the presentation of evidence, if at the end of the day, ODE can prevail merely by *asserting* that it acted properly? The Board should reject the Hearing Officer's unwarranted and unsupported

deference to ODE, and subject ODE's actions to the type of independent review and consideration to which ECOT and the public are entitled.

Moreover, beyond his recommended decision, at times during the hearing the Hearing Officer acted more like an attorney for ODE than as a neutral decision-maker. At several points during the hearing, the Hearing Officer asked leading questions of ODE witnesses in an obvious effort to rehabilitate them and/or lead them to specific answers clearly designed to support ODE's position.

For example, in response to evidence demonstrating that ODE failed to follow the provisions of its own FTE Handbook in determining the student sample size utilized as part of the ECOT FTE review process, the Hearing Officer sought to rehabilitate ODE's witness by asking his "opinion" on the impact of such issue. Such questioning prompted a (proper) reluctant objection from ECOT's counsel:

> HEARING OFFICER: Let me restate that. In your opinion, would that in any way skew the information coming from the school if that outcome occurred, hypothetically?
>
> MR. LITTLE: May I object to your questions?
>
> HEARING OFFICER: You may.
>
> MR. LITTLE: Because I'm reluctant to do so, but I think I may need to, because I don't think there's a basis for this witness to offer an opinion into evidence. But subject to my objection, ask your question.
>
> HEARING OFFICER: Very well. And if you don't know the answer to that, you don't have to try –
>
> THE WITNESS: I'm not quite sure. I suppose it would just depend on how much the skew was. It's a random control, it's a random sample, so I suppose. It's hard to say.

> HEARING OFFICER: In the absence of any expert in this proceeding that gives an expert statistical sampling, I'm going to do the best I can. And thank you for your objection, counsel.
>
> MR. LITTLE: Well, there may be a better witness on this, I don't know. But I'm not sure he is the witness. That's the reason for my objection.

[Tr. at 237-38 (Babal).]

Likewise, the Hearing Officer asked questions from lay ODE witnesses about legal issues in a transparent effort to support ODE, even to the extent of leading witnesses toward answers that contradicted prior positions taken by the department:

> By the Hearing Officer:
>
> Q. I would ask you, Mr. Babal, there were a number of questions directed at you by Mr. Little about what documents the FTE reviewed. Would the statutes that underlie the FTE funding process also govern a review conducted by the Department?
>
> A. I would say they would.
>
> MR. LITTLE: I object to foundation for this witness to offer statements as to statutory impact of the statute.
>
> HEARING OFFICER: I'll change the question slightly.
>
> By the Hearing Officer:
>
> Q. Is an understanding of the funding statute part of the preparation that a reviewer would undergo before conducting a review?
>
> A. Yes.
>
> MR. LITTLE: Well, I would object to the foundation, but I'll have some follow-up questions –
>
> HEARING OFFICER: I believe the witness indicated he participated in the review – multiple reviews.
>
> MR. LITTLE: He participated in, I believe, two reviews. I don't think that – I don't want to –

> HEARING OFFICER: But I think it's just as fair to ask if he was asked about the handbook being a basis for review, whether the statutory language was also a basis for the review.
>
> MR. LITTLE: And I believe that the witness had previously testified that the information that is provided for purposes of conducting a review is that set forth in the manual.
>
> I believe this is new territory you're charting on this, so I'll want to cross-examine the witness.
>
> HEARING OFFICER: That's what I took note of, he was never asked about the statute.
>
> MR. LITTLE: Because I believe that the position of the Department has always been – and perhaps we'll hear a different story today – that what is communicated to the schools, as well as what is communicated to the area coordinators in terms of the manner in which the FTE review is being conducted, is simply that set forth in the handbook. There's not a – I'll ask the witness questions.
>
> HEARING OFFICER: The witness actually just indicated to the contrary by the answer he just gave me to my question.
>
> * * *
>
> [Tr. at 533-36.]

Other examples of blatant one-sidedness could be cited. But, it suffices to state that the hearing process afforded by the Hearing Officer, like ODE's actions that precipitated it, was anything but fair and reasonable to ECOT.

D. <u>Conclusion.</u>

For the reasons discussed in detail in ECOT's Objections, and those summarized above, ODE's underlying actions, the administrative hearing process, and now, ODE's apparent effort to urge the Board to prematurely act on a fundamentally flawed and legally unsupported R and R are unfair, unreasonable, and contrary to common sense. If the Board does not simply reject the R and R outright (it should), then it should take its time and delay a final vote to allow for full

and proper consideration of the issues and evidentiary record presented, and to allow for a final judicial resolution of the legality of the very durational requirement at the heart of this matter.

Respectfully submitted,

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1036-002: 681387

IN THE COURT OF APPEALS
FRANKLIN COUNTY, OHIO
TENTH APPELLATE DISTRICT

ELECTRONIC CLASSROOM OF TOMORROW, *et al.*, Plaintiffs/Appellants, v. OHIO DEPARTMENT OF EDUCATION, Defendant/Appellee.	Case Nos. 16AP-863, 16AP-871 (CONSOLIDATED) (REGULAR CALENDAR)

APPELLEE OHIO DEPARTMENT OF EDUCATION'S OPPOSITION TO APPELLANT THE ELECTRONIC CLASSROOM OF TOMORROW'S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

The Electronic Classroom of Tomorrow's ("ECOT's") Motion for Injunctive Relief Pending Appeal is the latest example of ECOT's increasingly acerbic attempts to improperly thwart the Ohio Department of Education's ("ODE") Full-time Equivalency ("FTE") review process. ECOT's most recent Motion fails both procedurally and on the merits, and should be denied.

Procedurally, ECOT's Motion is a transparent attempt both (1) to advance new arguments, not presented (and therefore not preserved) in its merits briefs, and (2) to repeat, at length and after the case was submitted for decision, arguments that were raised in its briefing, apparently in the misguided belief that lengthy recitation of these arguments now that oral argument has occurred will make ECOT's flawed arguments somehow more persuasive to the Panel.

ECOT's improper, eleventh-hour attempt to re-argue its case likewise fails on the merits. In its most recent filing, ECOT faces the heavy burden of showing by clear and convincing evidence that it is entitled to the extraordinary remedy of a preliminary injunction barring ODE and the State Board of Education (the "Board") from finalizing or beginning to implement any determination regarding ECOT's appropriate FTE funding. For reasons described in ODE's appellee brief, ECOT cannot demonstrate any reasonable likelihood of success on the merits of its claims: The plain language of the funding statute makes student participation the basis for eschool FTE funding; nothing in the 2015-16 FTE Review Manual—which the trial court correctly found to

be only "guidelines"—expands the scope of that statutory funding formula; and the so-called Funding Agreement has long since expired and has no bearing on ECOT's funding now.

ECOT thus has virtually no prospect for success on the merits of its appeal. That fact alone warrants this Court denying ECOT's Motion, but the same is true of the balance of harms at stake in ECOT's request. ECOT simply has not shown that the purported harms it faces from allowing the statutorily authorized FTE review process to conclude outweigh the significant harms to ODE and the public interest that would occur if that process suddenly ground to a halt.

Yet still, for nearly a year, ECOT has sought to impede this important government function designed to ensure accountability. Each time that a neutral decision maker has ruled against it, or otherwise had the temerity to suggest that Ohio law requires some accountability from eschools in exchange for the hundreds of millions of dollars in public funding that such schools receive each year, ECOT has responded by personally attacking these decision makers. In ECOT's view, the Common Pleas Court judge who ruled against ECOT simply "parroted"

ODE's position, without giving the matter the consideration required by her oath to "administer justice without respect to persons . . . faithfully and impartially." R.C. 3.23. And ECOT further asserts that the Hearing Officer who recently recommended that the Board adopt ODE's funding determination, with slight modifications, did so simply because he was ODE's "hand-picked Hearing Officer." In other words, ECOT apparently believes that improper personal bias is the ***only*** reason that a judge or administrative officer would rule against it or otherwise question ECOT's position.

There is, of course, a far simpler explanation. The law and facts dictate that ECOT is entitled to receive only that portion of its claimed FTE funding it is able to substantiate on the basis of student participation. Accordingly, as more fully set forth below, ODE respectfully requests that the Court deny ECOT's Motion for Injunctive Relief Pending Appeal.

FACTUAL BACKGROUND

This case involves ECOT's FTE funding for the 2015-16 academic year and, specifically, ECOT's basic claim that it is entitled to receive

more than $100 million in taxpayer funding for "educating" students during the 2015-16 academic year, whether ECOT educated a single student or not. As part of discovery on this claim, the trial court ordered ECOT to produce to ODE (over ECOT's objection) certain materials relating to log-in and log-out times for students selected for review during the second step of ODE's 2015-16 FTE review of ECOT, the so-called "final FTE review." Based on the information that ECOT produced, and after careful review by ODE staff, in September 2016 ODE determined that ECOT could substantiate only about 40 percent of the FTEs that ECOT had claimed during the 2015-16 academic year. (*See* ECOT Mot. Exh. B, May 10, 2017 Decision of the Hearing Officer, at 50-58 (explaining in great detail ODE's tabulation of ECOT's durational information) ("Hearing Officer R&R")). In other words, during the 2015-16 academic year, ECOT's self-reported FTE figures caused it to receive roughly $60 million in public funding that ECOT could not substantiate under the statutory criteria.

Within the statutory time frame for doing so, and at the same time that it was pursuing an interlocutory appeal in this Court from the trial

court's ruling on Plaintiffs' motions for preliminary injunction, ECOT filed an administrative challenge to ODE's funding determination.[1] This administrative appeal followed the statutorily designed process.

After the filing of such an appeal, "[t]he board or its designee shall conduct an informal hearing on the matter within thirty days of receipt of such an appeal and shall issue a decision within fifteen days of the conclusion of the hearing[,]" unless, as here, the parties agree to forego these deadlines. R.C. 3314.08(K)(2)(b); (*see also* Hearing Officer R&R at 3-4). The administrative appeal hearing that followed examined ECOT's 2015-16 FTE review in extensive detail, covering 10 days of argument and testimony between December 5, 2016 and February 1,

[1] ECOT claims, without explanation, that it was "forced" to participate in this process. (Mot. at 7 ("ODE has forced ECOT to participate in an administrative proceeding before a hand-picked Hearing Officer that, not surprisingly, resulted on May 10, 2017 in a favorable report and recommendation for ODE.")). But the statute specifically contemplates that a community school may opt not to challenge ODE's funding determination, in which case that determination becomes final. R.C. 3314.08(K)(2)(a) (stating that a community school "may" appeal an ODE funding determination that finds "the community school owes moneys to the state"). ECOT could have opted not to participate in the administrative appeal process.

2017. ECOT alone introduced more than ***2,000*** exhibits, and proffered an additional ***155*** exhibits.[2] (Hearing Officer R&R at 4-9). And

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[2] ECOT complains that ODE convinced its so-called "self-appointed Hearing Officer to exclude every one of ECOT's proffered witnesses and numerous exhibits" at the hearing, (Mot. at 13), alleging in characteristic fashion that it was treated unfairly by a biased Hearing Officer solely because it did not prevail in those proceedings. This claim is groundless and misleading. The Hearing Officer allowed ECOT to elicit testimony from multiple witnesses during the administrative appeal hearing, with some witnesses literally testifying for days on end. What the Hearing Officer did ***not*** permit, however, was for ECOT to elicit so-called expert testimony on issues entirely irrelevant to the administrative appeal proceedings.

ECOT sought (for example) to introduce the testimony of Dr. Michael Corrigan, who challenged the use of student participation data in school funding. Dr. Corrigan supported his view by noting that "the prefrontal cortex is a work in progress when it comes to K12 students" and that "some research suggests that it is noodle-like in nature when we are young." This "noodle-like nature of the prefrontal cortex," Dr. Corrigan continued, "explains why infants scream at that octave that numbs the adult brain" and "why teenagers cry and sob so miserably after their first lost love and swear to never love again." (Exh. A, ODE's Dec. 1, 2016 Motion in Limine, at 4 (punctuation omitted)). ODE argued that "the Hearing Officer's assessment of the September 26, 2016 final determination w[ould] not be aided by testimony about 'noodle-like cortexes' and the teenage angst that surrounds first love." (*Id.*). The Hearing Officer agreed and excluded Dr. Corrigan's testimony. But that does not mean that the Hearing Officer was biased against ECOT. The Hearing Officer's rulings on ECOT's other proffered expert witnesses are of a piece with his ruling as to Dr. Corrigan's testimony, and each

following that hearing, the parties cross-filed extensive proposed findings of fact and conclusions of law, followed by response briefs. (*Id*. at 9).

As ECOT acknowledged in an earlier filing in this Court, ODE advised the trial court (and ECOT) last September that the administrative appeal process likely would not conclude until "six to nine months" after the trial court hearing occurred, and that no funds would be withheld until the Board's review of the Hearing Officer's decision. (*See* ECOT's Dec. 20, 2016 Motion for an Order Expediting Appeal, at 1 n.1; *see also* Tr. at Vol. I, 98). Consistent with that time line, the Hearing Officer issued his decision on May 10, 2017 (roughly eight months after the trial court hearing occurred), and the Board is scheduled to take up the matter at its regularly scheduled June 2017 meeting (roughly nine months after the trial court proceedings).

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such ruling fell well within the Hearing Officer's discretion to control the presentation of evidence at the informal hearing.

While this administrative process unfolded, proceedings in this Court likewise proceeded apace. In January 2017, this Court denied a request from ECOT to unnecessarily expedite the briefing deadlines in this case, but nonetheless ordered that extensions to file merits briefs would not be granted "absent extraordinary circumstances" and that the case would be "scheduled for oral argument as expeditiously as possible." (Jan. 10, 2017 Entry Denying ECOT's Motion for Expedited Appeal at 2). Consistent with that order, this Court heard argument in this matter on April 13, 2017, less than four months after ECOT filed its notice of appeal—a pace equivalent to (if not more expeditious than) far simpler cases placed on this Court's accelerated calendar. After ECOT unsuccessfully sought to disqualify a member of this panel by petitioning Chief Justice Maureen O'Connor, this appeal was and remains submitted for decision.

As noted above, at its regularly scheduled June 2017 meeting, the Board intends to review the Hearing Officer's decision. Just as with the Hearing Officer's role as the Board's designee, the function that the Board will perform at the June 2017 meeting is prescribed by statute.

"If the [B]oard has enlisted a designee to conduct the hearing, the designee shall certify its decision to the [B]oard. The [B]oard may accept the decision of the designee or may reject the decision of the designee and issue its own decision on the matter." R.C. 3314.08(K)(2)(c). Any decision reached by the Board "is final." *Id*.(K)(2)(d).

In anticipation of such review, ECOT has filed Objections to the Hearing Officer's R&R with the Board. The Objections lead with the hyperbolic (and incorrect) assertion that "the import of the Hearing Officer's decision is that ODE is free to do whatever it wants, whenever it wants, with impunity." (Exh. B, ECOT's Excerpted May 22, 2017 Objection, at 1). Over the course of 146 pages of argument, ECOT accuses the Hearing Officer of (for example) "ignor[ing] a vast amount of evidence . . . apparently in an effort to reach a result in favor of the agency," "twist[ing] and tortur[ing]" legal doctrine for "expedien[ce]," and supposedly ignoring certain legal arguments advanced by ECOT as part of an "attempt[] to rubber-stamp the ODE administrators' misconduct." (*Id*. at 3, 8, 25). ECOT continued this attack in a May 30,

2017 "Executive Summary" submission, where it accuses the Hearing Officer of "ask[ing] leading questions of ODE witnesses in an obvious effort to rehabilitate them and/or lead them to specific answers clearly designed to support ODE's position." (Exh. C, ECOT's Excerpted May 30, 2017 Executive Summary, at 15).

At the June 2017 meeting, the Board can take one of the three actions—it can accept the Hearing Officer's R&R, reject the R&R and render its own decision on the matter, or it can defer action to a subsequent meeting. If the decision reached by the Board is that ECOT is unable to substantiate the FTE figures that it self-reported to ODE during the 2015-16 academic year, ODE will begin the process of recouping the overpayment of public funds that is attributable to such unsubstantiated FTEs.

While the parties have loosely referred to the process as a "claw back," in fact, the recovery of the unsubstantiated FTE-based funding will not require ECOT to repay to ODE a single dollar that ECOT has previously received. In other words, ODE will not order ECOT to cut the state treasury a check equal to the overpayment. Rather, ODE

"recoups" the money by reducing ***future*** payments of public funds ***to*** ECOT. If the Board were to adopt the Hearing Officer's decision at its June 2017 meeting, the earliest that this recoupment process could begin would be as part of ECOT's regularly scheduled July 2017 payment. And even then, the process of recoupment would occur over an extended period of time, concluding long after this Court renders its decision in this appeal.

ARGUMENT

I. ECOT'S Motion Improperly Attempts To Inject New Argument Into An Appeal That Already Has Been Submitted For Decision.

ECOT's request for injunctive relief pending appeal is subject to a familiar standard. ECOT must show that (1) it has a substantial likelihood of success on the merits of its appeal, (2) will suffer irreparable harm if an injunction is entered, and (3) neither third parties nor the public interest will be harmed as a result of the injunction. *Inrex Home Care, L.L.C. v. Ohio Dep't of Dev. Disabilities*, 2016-Ohio–7986, ¶ 5 (10th Dist.). As ECOT recognizes, this standard is "essentially the same as that employed by trial courts under Civil Rule 65," which

governs preliminary injunctions. (Mot. at 17). Consequently, ECOT must make these required showings by clear and convincing evidence. *Cf. Hydrofarm, Inc. v. Orendorff*, 180 Ohio App.3d 339, 2008-Ohio-6819, ¶ 18 (10th Dist.) (cited with approval in *Inrex Home Care, L.L.C.*, 2016-Ohio-7986, at ¶ 5) (reviewing request for preliminary injunction). Courts must be particularly careful in weighing injunctions of the kind sought here, which seek to restrain a government agency's activities in matters of great public concern. *See Danis Clarkco Landfill Co. v. Clark Cty. Sold Waste Mgmt. Dist.*, 73 Ohio St.3d 590, 604 (1995) (explaining that "Courts should take particular caution in granting injunctions, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government" (punctuation omitted)).

Thus, this standard, including its focus on the "merits" of ECOT's appeal, cabins the arguments that ECOT should be permitted to make in this belated request for injunctive relief pending appeal. ECOT, however, disregards this standard and the limitations it imposes by using

its Motion to reargue this appeal, adding new arguments that were not raised in ***either*** its opening brief ***or*** its reply brief.

The first such new argument quite literally forms the epigraph of ECOT's Motion. Citing to a case and to a principle that is entirely absent from either of its briefs filed in this appeal, ECOT now apparently urges this Court to decide this appeal by resolving any doubts the Court might have as to the existence of a "grant of power" to ODE in favor of finding no such grant exists. (*See* Mot. at 4 (quoting *Ohio Fresh Eggs, L.L.C. v. Boggs*, 183 Ohio App.3d 511, 2009-Ohio-3551, ¶ 19 (10th Dist.) (emphasis removed); *see also id*. at 6 ("the *Ohio Fresh Eggs* rule otherwise compels a decision in ECOT's favor"); *id*. at 24 (same)).

The second such new argument spans four pages of ECOT's likelihood-of-success-on-the-merits argument; indeed, this new argument leads off this all-important section of ECOT's Motion. *See O'Toole v. O'Connor*, 2015 U.S. Dist. LEXIS 71850, at *4 (S.D. Ohio June 3, 2015) (applying the federal standard for requests for preliminary injunctive relief, analogous to the standard employed under App.R. 7,

and explaining that "[a] finding that there is simply no likelihood of success on the merits is usually fatal" to a request for such relief (punctuation omitted)). For the first time, ECOT briefs a canon of statutory construction that supposedly requires this Court to give some unique meaning to the language employed in R.C. 3301.13—which generally makes ODE and the Board subject to R.C. chapter 119—because ECOT's review of "***more than 60 examples*** of [similar] statutes" affecting other agencies shows these other statutes use more general language than the language contained in R.C. 3301.13.[3] (*See* Mot. at 19-23 (emphasis in original)).

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[3] Although not included in its brief, ECOT mentioned this statutory survey in passing during oral argument. Specifically, at the April 13 argument, counsel for ECOT stated that his review of the Revised Code showed ***38*** code provisions, including R.C. 3301.13, that are supposedly relevant to the question of statutory interpretation in this case. (*Compare* Affid. of Disqualification at Exh. B, Transcript of April 13, 2017 Oral Argument, at 4, *disqualification denied by Electronic Classroom of Tomorrow v. Ohio Department of Education,* Supreme Court Case No. 17-AP-032 (O'Connor, C.J.) (entered May 8, 2017), *with* Mot. at 20-21, n.2 (listing ***67*** supposedly relevant statutes scattered throughout the Revised Code). But this fact only heightens the inappropriate nature of ECOT's attempt to expand the scope of its briefed arguments here. Even since oral argument and submission of

An appellant is only likely to succeed on arguments that are properly raised and preserved, and an appellant only preserves those arguments that are developed in the appellant's opening brief, including with "reasons in support of the contentions, [and] citations to the authorities, statutes, and parts of the record on which appellant relies." App.R. 16(A)(7). All other such arguments—including ODE's pivot to the *Ohio Fresh Eggs* rule and its reliance on comparisons between different opt-in statutes to divine the meaning of R.C. 3301.13—are waived. No matter how much ECOT may now wish, post oral argument, to change the arguments that it advanced in its briefs, ECOT is stuck with the case that it briefed.

Accordingly, in considering ECOT's Motion, this Court should disregard arguments that ECOT has not preserved for this Court's consideration.

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this case for decision, ECOT has ***continued*** to build an argument that could have been included in its Opening Brief but was not, with the evident design of springing it on the Panel and ODE after ECOT heard the Court's questioning at oral argument.

II. ECOT'S Belated Motion Is A Transparent and Misguided Attempt To Repeat Its Case On The Merits Post Oral Argument.

ECOT is likewise stuck with the tactical decision it made in not pursuing injunctive relief at the outset of this appeal.

In the typical case where a party seeks some provisional relief from this Court during the pendency of its appeal—whether in the form of a stay of a trial court judgment or an injunction pending appeal—the party seeks such relief at the outset of the appeal, ***before*** the filing of principal briefs, oral argument, and submission of the case for decision. This only makes sense. But despite raising the possibility that it would seek injunctive relief pending appeal five months ago, (*see* ECOT's Dec. 20, 2016 Motion for an Order Expediting Appeal at 1, n.1), ECOT has chosen a markedly different path, asking this Court to grant injunctive relief pending appeal only ***after*** ECOT's appeal has been fully briefed, argued, and submitted for decision. Thus, in considering ECOT's unusual Motion, this Court should carefully scrutinize the timing and professed reasons for the Motion.

ECOT's Motion does not withstand such scrutiny. Despite claims to the contrary, (*see* Mot. at 7), ECOT has long known that ODE's funding determination could become "final" during the pendency of this appeal. Nothing about the ***timing*** of the Hearing Officer's decision or the Board's anticipated review of that decision is "news" warranting ECOT's much-belated Motion. Indeed, more than eight months ago, ODE advised the trial court that the FTE review process, including the administrative appeal process, would take "six to nine months" to run its course. (*See* Tr., Vol. I, at 98 (counsel for ODE relaying this predicted timeline during opening argument at the September 2016 preliminary injunction evidentiary hearing)). True to this timeline, the Hearing Officer rendered his decision on May 10, 2017, and the Board is anticipated to consider that decision on June 12, 2017—almost precisely seven and eight months, respectively, from the date that ECOT filed its October 11, 2017 administrative appeal of ODE's September 26, 2016 funding determination. (*But see* Mot. at 14 (feigning surprise that the Hearing Officer's R&R would be considered at the June 2017 Board meeting)).

Likewise, the ***content*** of the Hearing Officer's decision does not explain or excuse ECOT's delay in seeking an injunction. ECOT's appeal challenged a September 26, 2016 funding determination that was expressly based on ECOT's failure to substantiate, on a durational basis, its claimed FTEs. It was readily apparent to ECOT that ODE would defend this funding determination in the administrative appeal process by arguing that ODE is empowered to consider the duration of student participation in learning opportunities in the course of calculating FTE funding—indeed, in late November 2016, weeks ***before*** this appeal was filed, ODE filed a prehearing memorandum with the Hearing Officer, setting forth its position in the administrative appeal. (*See* Exh. D, ODE's Nov. 30, 2016 Prehearing Memo). Two basic possibilities existed at that time. Either the Hearing Officer would agree with ECOT, or he would agree with ODE. The fact that ECOT lost was no less foreseeable than in any other disputed hearing. ECOT thus could have anticipated that the Hearing Officer could approve ODE's determination, and that the Board could adopt that decision, while this appeal was pending.

Despite all of this, ECOT made the tactical decision to wait until after briefing has concluded, after the Panel has heard oral argument, and after submission of this appeal for decision to move for injunctive relief pending appeal. In view of the long-anticipated nature of the administrative appeal process, the reason for this delay is obvious—under the guise of responding to new "developments" in the administrative appeal process, ECOT simply wishes to inject new arguments into this appeal, and to reiterate at length the arguments that it actually preserved, after oral argument. This Court should not allow such gamesmanship.

III. ECOT Has Not Made A Substantial Showing That It Is Likely To Prevail On The Merits Of Its Appeal, Or That The Balance of Harms Favors Entry Of An Injunction.

Stripped of its hyperbole and improper new argument, ECOT's Motion also fails on its merits.

a. ECOT Has Not Made A Strong Showing Of Its Likely Success On The Merits Of Its Appeal.

To begin, ECOT has not shown a substantial likelihood that it will succeed on the merits of any of its claims. ***First***, as ODE has previously

explained, the plain language of R.C. 3314.08, the community school funding statute, permits ODE to consider durational data in the course of substantiating an eschool's claimed FTEs. (*See* ODE's February 23, 2017 Appellee Brief at 44-57). Even if that statute is ambiguous, however, the same result follows, because ODE's interpretation of the funding statute is entitled to deference. (*Id*. at 58 (explaining that "courts should give due deference to statutory interpretations by an administrative agency that has substantial experience and been delegated enforcement responsibility" (punctuation omitted))).

Second, the so-called Funding Agreement entered into between ODE and ECOT in 2002 has no bearing on ECOT's 2015-16 FTE review. The trial court found, as a matter of fact, that the parties only intended the Funding Agreement to apply to the 2002 and 2003 FTE reviews. ECOT has no chance of disturbing that well-supported finding on appeal. (*See id.* at 65-69; *see also id*. at 70-74).

Third, ECOT has not shown any substantial likelihood of success on its claim that the 2015-16 FTE review manual, a kind of "instructional manual" used by ODE's area coordinators in conducting

FTE reviews, is an unlawful "rule" that should have been promulgated under R.C. chapter 119. "The review manual does not enlarge or diminish the scope of the right of community schools to receive money under the statute, but rather just sets forth the procedures that ODE use to assess full-time-equivalency, as it is required to do by statute." (*Id*. at 81 (punctuation omitted)). Consequently, and because the review manual does not carry the force and effect of law, R.C. chapter 119 simply does not apply to its adoption. (*See id*. at 75-88). ECOT's reliance on the general language of R.C. 3301.13 does not change this result, because "[t]he language in R.C. 3301.13 is what makes ODE subject to Chapter 119 in the first instance." (ODE's Appellee Brief at 93). The statute "does ***not*** answer the further question of whether the FTE manual had to undergo the notice-and-comment rulemaking process to which ODE is generally subject." (*Id*. (emphasis in original)).[4]

[4] ECOT itself half-recognizes this fact. (*See* Mot. at 20 (explaining that R.C. chapter 119, by its own terms, makes only certain agencies (not including ODE or the Board) subject to its strictures, while relying on

b. The Balance Of Harms Weighs In Favor Of Denying ECOT's Injunctive Relief Request.

As explained above, when a party a party fails to make a strong showing that it is likely to prevail on the merits of its claim, a request for injunctive relief should ordinarily be denied. *See, e.g.*, *O'Toole*, 2015 U.S. Dist. LEXIS 71850 at *4. This is common sense, because it would serve no purpose to interrupt important functions of government only to later rule that those same functions can proceed as before because the law and facts do not support the position of the party seeking injunctive relief. The same is true here. For the reasons discussed in ODE's Appellee Brief and at oral argument, this Court should affirm the trial court's well-reasoned decision and judgment, and it would serve no purpose to enjoin an FTE review process that, as explained in that

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"separate statutory enactments" in different Code chapters to bring other agencies within the ambit of R.C. chapter 119 at all)). But from this premise, it engages in extreme question-begging, asserting that because ODE is subject to R.C. chapter 119 in some of its functions, that chapter must apply here. This simply does not follow, and it is Ohio case law governing "rules" and "guidelines" that dictates when a document must be promulgated pursuant to notice-and-comment rulemaking, not the general language of "opt-in" statutes such as R.C. 3301.13. (*See* ODE Appellee Brief at 93).

decision and judgment, is authorized by statute. But even were this Court to consider the balance of harms implicated by ECOT's extraordinary request, that balance too supports denying ECOT's requested injunction.

ECOT begins by claiming that "the retroactive loss of $60-million in funding already received—even if clawed back over time—is significant" and will sound the death knell for the school. (Mot. at 15). This grossly misframes the issue properly before this Court.[5] ECOT has sought injunctive relief during the pendency of this appeal—an appeal that (at ECOT's request) has been expedited, briefed, argued, and

[5] While ECOT styles its Motion as also including a request for an injunction "pending a final resolution of the instant case, including any subsequent appeals from this Court's final decision," (Mot. at 2), to the extent ECOT would seek an injunction pending the Ohio Supreme Court's review of any decision entered by this Court, it may ask the Ohio Supreme Court itself to grant such relief. *See, e.g., State ex rel. Kelly v. Cuyahoga Cty. Bd. of Elections*, 69 Ohio St.3d 1433, 631 N.E.2d 1065, 1065 (1994) (motion docket) (denying injunction pending appeal from judgment of the Eighth District Court of Appeals). This Court will decide ECOT's appeal on its merits, and it would make little sense for the Court to at once affirm the trial court's final judgment, while at the same time enjoining the very operation that that judgment permits during the pendency of any further appeals.

submitted for decision. A decision on the merits of ECOT's appeal is presumably impending. Thus, the relevant inquiry is whether ECOT will suffer irreparable harm in the (presumably) short period that separates when it moved for injunctive relief pending appeal (*i.e.*, ***five*** months ***after*** filing this appeal) from when a decision could be expected from this Court.

Assuming such a decision issues by late August, and that the Board adopts the Hearing Officer's well-reasoned R&R, ODE will only have just begun recouping the overpayment (starting in July 2017), and thus only a small fraction of the amount owed to the State will have been recovered, by the time this Court issues its decision. And once again, this small fraction of the total overpayment would be recouped while at the same time ODE ***continues*** to fund ECOT on the basis of its self-reported FTE figures for the 2017-18 academic year.

ECOT is likewise unable to point to specific and significant instances of ongoing, irreparable harm that must be (and will be) prevented by entry of injunctive relief during the pendency of this appeal. Offering the affidavit of ECOT Superintendent Ricky Teeters,

ECOT simply repeats alleged harms that apparently were present eight months ago, when Mr. Teeters testified during the trial court's evidentiary hearing. (*Compare* ECOT Mot. Exh. G, May 23, 2017 Teeters Affidavit, at ¶¶ 4-9, *with* Tr., Vol. I, 216-219).

On the other hand, ECOT pays mere lip service to the myriad harms to third parties and the public interest that weigh heavily on the other side of the scale. ECOT claims that because "the funds at issue have already been paid to ECOT," injunctive relief simply preserves "the status quo" while this Court considers ECOT's appeal. (Mot. at 35(emphasis omitted)). But as explained above, the process of recouping the overpayment to ECOT would ***reduce*** future payments to ECOT, not seize funds ***already*** paid over to ECOT. And in any case, the "status quo" is one in which ODE and the Board are able to exercise their statutory authority in reviewing community schools' self-reported FTEs.

Likewise, ECOT claims that its request for injunctive relief serves the public interest, because an injunction will prevent ECOT from closing. (*Id*.). Once again, however, this assertion is speculative. And

as the trial court found, "there is a public interest in ensuring that our children are receiving the education that our taxpayers are funding . . . . While there is certainly a public interest in school choice, and in the existence of eschools as an option for students, the Court finds that there must still be accountability for the hundreds of millions of dollars in public money that are directed to such schools every year." (R. 188, Decision & Entry Denying Motions for Preliminary Injunction, at 25). Any such notion of accountability to Ohio's taxpayers is wholly absent from ECOT's Motion, just as it has been wholly absent from ECOT's litigation position to date.

In short, ECOT has neither made a strong showing that it is likely to succeed on the merits of its appeal, nor that the balance of harms weighs in favor of granting injunctive relief pending this appeal. Its Motion should be denied.

CONCLUSION

For the reasons set forth above, ODE respectfully urges this Court to deny ECOT's Motion for Injunctive Relief Pending Appeal.

Date: May 31, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served by email upon counsel for the following this 31st day of May, 2017:

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IN THE COURT OF APPEALS
FRANKLIN COUNTY, OHIO
TENTH APPELLATE DISTRICT

ELECTRONIC CLASSROOM OF TOMORROW, *et al.*, Plaintiffs/Appellants, v. OHIO DEPARTMENT OF EDUCATION, Defendant/Appellee.	Case Nos. 16AP-863, 16AP-871 (CONSOLIDATED) (REGULAR CALENDAR)

STATE OF OHIO)
) SS
COUNTY OF FRANKLIN)

AFFIDAVIT OF DOUGLAS R. COLE

PERSONALLY came and appeared before me, the undersigned Notary, the within named Douglas R. Cole, and makes this his statement and Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of his knowledge:

1. I have personal knowledge of the facts set forth below.

2. I am over the age of eighteen (18) years and am fully competent to make this affidavit.

3. I am a partner in the law firm Organ Cole LLP, and I am one of the attorneys representing Defendant Ohio Department of Education ("ODE") in this action as well as in pending administrative proceedings before the Ohio State Board of Education, which is captioned *In the Matter of: Electronic Classroom of Tomorrow Full-Time Equivalency (FTE) Review Appeal* (the "administrative proceedings").

4. Exhibit A is a true and accurate copy of ODE's December 1, 2016 Motion in Limine, which was filed in the administrative proceedings.

5. Exhibit B is a true and accurate copy of excerpts from the May 22, 2017 Respondent Electronic Classroom of Tomorrow's Objections to the Hearing Officer's Proposed Report and Recommendation, which was filed in the administrative proceedings.

6. Exhibit C is a true and accurate copy of excerpts from the May 30, 2017 Executive Summary of Objections by the Electronic

Classroom of Tomorrow to Report and Recommendation of Hearing Officer, which was filed in the administrative proceedings.

7. Exhibit D is a true and accurate copy of ODE's November 30, 2016 Prehearing Memo, exclusive of voluminous exhibits, which was filed in the administrative proceedings.

FURTHER AFFIANT SAYETH NAUGHT.

Douglas R. Cole

Sworn to and subscribed to before me this 31ST day of May, 2017.

NOTARY PUBLIC

CARRIE M. LYMANSTALL
ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

My Commission Expires: N/A

Exhibit A

BEFORE THE OHIO STATE BOARD OF EDUCATION

IN THE MATTER OF: ELECTRONIC CLASSROOM OF TOMORROW FULL-TIME EQUIVALENCY (FTE) REVIEW APPEAL.	Lawrence D. Pratt Hearing Officer

OHIO DEPARTMENT OF EDUCATION'S MOTION IN LIMINE

INTRODUCTION

The Electronic Classroom of Tomorrow ("ECOT") appears intent on making this an administrative hearing without end. ECOT's pre-hearing filings list an astonishing ***190*** witnesses and ***2,545*** exhibits. ECOT intends to offer this monumental volume of evidence to challenge the Ohio Department of Education's ("ODE") 2½-page final determination letter. For perspective, the infamous O.J. Simpson murder trial—the nationally-watched prosecution of a double homicide—lasted nearly a year and included testimony from only 126 witnesses and the presentation of 857 trial exhibits.[1] ECOT has topped those figures by substantial margins, seeking to offer 50% more witnesses and nearly ***three times*** the exhibits.

ECOT has every motivation to delay a determination in this appeal by clogging the administrative process with a mountain of largely irrelevant witnesses and exhibits. ECOT owes the State tens of millions of dollars, and ODE will not begin to claw back that amount until this

[1] *See The O.J. Simpson Murder Trial, By The Numbers*, THE LOS ANGELES TIMES (Apr. 5, 2016), available at http://www.latimes.com/entertainment/la-et-archives-oj-simpson-trial-by-the-numbers-20160405-snap-htmlstory.html (last accessed Nov. 30, 2016).

administrative process is complete. ECOT is treating that as an invitation to turn this administrative process into a never-ending proceeding.

ECOT should not be allowed to drag this hearing out interminably and abuse the administrative process in this fashion. The Hearing Officer should place reasonable limits on the time or number of witnesses each party may use to put on its case. As discussed below, much of the evidence ECOT intends to submit has little to no relevance to the core issue this case presents—whether ODE's September 26, 2016 final determination letter is a reasonable calculation of ECOT's full-time equivalency ("FTE") for the 2015-16 school year—and should be excluded. Moreover, much of the evidence ECOT appears intent on offering is duplicative of evidence already entertained by the trial court in the Franklin County Court of Common Pleas (the "Franklin County Action"). Finally, to the extent that ECOT has new evidence that is even arguably relevant, its filings show that it intends to offer that evidence in an overly burdensome and unnecessarily cumulative fashion (e.g., ***93*** different parents from ECOT students).

For the reasons that follow, ODE requests the Hearing Officer issue an order:
(1) precluding ECOT from offering the testimony and evidence described below; and
(2) providing reasonable limitations on the time or number of exhibits afforded each party to put on its case.

MANY OF ECOT'S WITNESSES SHOULD BE EXCLUDED

The purpose of a motion in limine "is to avoid injection into the trial of matters which are irrelevant, inadmissible and prejudicial." *State v. French*, 72 Ohio St.3d 446, 449 (1995) (punctuation omitted). "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ohio Evid. R. 401. "Evidence which is not relevant is not admissible." Ohio Evid. R. 402.

A. Expert Witnesses.

ECOT's witness and exhibit lists reveal that it intends to offer expert testimony and reports from five so-called expert witnesses. However, none of the witnesses offer opinions relevant to this administrative appeal because none of the opinions have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Oho Evid. R. 401. To be relevant, an expert must possess knowledge in the relevant subject area superior to a layperson. "[T]he 'fit' between an expert's qualifications and the area of inquiry determine whether the expert's opinion is relevant." *Hertzfeld v. Hayward Pool Prods.*, 2007-Ohio-7097 ¶ 19 (6th Dist.) (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 591 (1993) and Ohio Evid. R. 702(B)). "The 'fit' element has been described as encompassing the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case." *State v. Waldock*, 2015-Ohio-1079, ¶ 65 (3d Dist.) (quotation omitted).

None of the five expert witnesses identified by ECOT have evidence that would be helpful to the factfinder. Instead, the experts offer meandering opinions second-guessing educational policy decisions made by the Ohio General Assembly, rendering legal conclusions, and reporting the results of a questionable public opinion "survey" bought and paid for

presumably by using public funds. ECOT should not be permitted to waste ODE and the Hearing Officer's time and resources by eliciting testimony from these purported expert witnesses. Each of the five witnesses are discussed below.

Michael Corrigan. In his expert report (**ECOT Ex. B**), Dr. Corrigan opines that ODE's use of student participation data "is unreasonable, short-sighted, misguided and arbitrary" because such data "not only fails to track an eschool's success in actually engaging/educating students, but it can have the opposite effect by pushing at-risk students toward non-engagement." (*Id.* at 13). In support of these opinions, Dr. Corrigan explains that "[t]he prefrontal cortex is a work in progress when it comes to K12 students" and in fact "[s]ome research suggests that it is noodle-like in nature when we are young." (*Id.* at 9). Dr. Corrigan further explains that the noodle-like nature of the prefrontal cortex explains "why infants scream at that octave that numbs the adult brain" and "why teenagers cry and sob so miserably after their first lost love and swear to never love again." (*Id.*).

The issue in this appeal is whether ODE's September 26, 2016 final determination is a reasonable calculation of ECOT's FTEs. With all due respect, the Hearing Officer's assessment of the September 26, 2016 final determination will not be aided by testimony about "noodle-like cortexes" and the teenage angst that surrounds first love. Separately, that Dr. Corrigan apparently disagrees with the General Assembly's policy determination—reflected in statute—that online community schools like ECOT must substantiate the taxpayer dollars they receive, including by providing documentation of student participation, has no bearing on the reasonableness of ODE's final determination letter. Therefore, Dr. Corrigan's testimony should be excluded.

Ross McGregor. In his expert report (**ECOT Ex. F-1**), Mr. McGregor opines that "I believe that ODE's 'durational' standard should have been adopted as formal rule, subject to Chapter 119 of the Revised Code." (*Id.* at 5). And, "putting that aside," Mr. McGregor also opines that notwithstanding the express terms in the Ohio Revised Code and years of FTE review handbooks requiring student participation data, ODE's request that ECOT substantiate the FTE it claimed for fiscal year 2016 with documentation of student participation was done without "fair notice" and is "arbitrary and unfair." (*Id.* at 5-6).

To start, it is well-settled that legal conclusions are not a proper subject of expert opinions. "[A]n expert's interpretation of the law should not be permitted, as that is within the sole province of the court." *Waste Mgmt. of Ohio, Inc. v. Bd. of Health of the City of Cincinnati*, 159 Ohio App.3d 806, 823 (10th Dist. 2005). Expert testimony about the law is excluded because "the trial judge does not need the judgment of witnesses." *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984). Such testimony about legal conclusions is wholly "superfluous." *Id. See also CFM Commc'ns, LLC v. Mitts Telecasting Co.*, 424 F. Supp.2d 1229, 1236 (E.D. Cal. 2005) (finding expert's opinions about how FCC regulations applied to the facts of the case "based on his interpretations of the law or his experience" to be "utterly unhelpful" to the court because the court "is perfectly able to review FCC decisions and regulations and decide how the law applies to the present facts").

Mr. McGregor's "opinion" is nothing more than a rank legal conclusion. He contends that Chapter 119 required ODE to put the 2015 FTE Handbook through the Chapter 119 rulemaking process. But it is the Hearing Officer's role to determine the law, just as the trial court judge did in the Franklin County Action when it rejected ECOT's "illegal rulemaking"

claim, finding the FTE review manuals "merely interpret funding rules set forth in R.C. 3314.08(H)(3)." (9/30/16 Decision and Entry at 18).

Setting aside the impropriety of Mr. McGregor's legal opinion, Mr. McGregor is not even qualified to offer an opinion as to whether ODE's FTE handbook is guidance or a rule. To be qualified as an expert, a witness must "possess knowledge in the relevant subject area." *Hertzfeld v. Hayward Pool Prods.*, 2007-Ohio-7097 ¶ 19 (6th Dist.) (punctuation omitted).

Mr. McGregor claims to base his expertise in rulemaking on his nine years of experience as a legislator, which included serving on Joint Committee on Agency Rule Review ("JCARR"). But, as Mr. McGregor acknowledges in his report, JCARR only considers the validity of rules that are ***actually proposed***. That is, JCARR never considers ***whether*** an agency must submit a rule (the topic on which he seeks to offer an opinion here), but rather JCARR only considers the validity of a rule that an agency ***has*** proposed.

Indeed, a review of the hearing exhibits corresponding with Mr. McGregor's report (**ECOT Exs. F-2 – F-9**) suggests that Mr. McGregor plans to provide a civics lesson about what JCARR does ***after a rule is proposed*** and under what circumstances JCARR will recommend to the legislature that a proposed rule be invalidated. Interesting enough in its own right, to be sure, but not an issue in this case. Accordingly, Mr. McGregor's testimony on that topic would do nothing to aid the resolution of the matters actually pending before the Hearing Officer, and for this additional reason, Mr. McGregor should be precluded from testifying about his opinion.

Robert Sommers. In his expert report (**ECOT Ex. C-1**), Dr. Sommers offers various opinions about how he believes community schools should be funded and about educational policy generally. He then concludes by stating that "The actions taken by [ODE] regarding E-COT regarding enrollment documentation has [*sic*] been arbitrary and capricious. They have

been contrary to past practice." (*Id.* at 5). He opines that requiring documentation of student participation "would punish the more sophisticated, forward thinking teachers who engage student in non-computer experiments, life experiences, and exploration," and also would punish "students who add arts and music to their curriculum and engage in life experiences to demonstrate learning and mastery." (*Id.* at 4). Dr. Sommers' report also spends much time discussing in detail the so-called "credit flex" legislation that became effective in 2007, as well as other legislation passed by the General Assembly that impacts how revenue is raised and collected.

These discussions are wholly irrelevant to the question of whether the September 26, 2016 final determination letter is reasonable. Instead, like Dr. Corrigan, ECOT offers Dr. Sommers' testimony to second-guess the General Assembly's statutory determination as to how community schools are to be funded and, apparently, to discuss a statute that concerns course ***credit***, not funding and FTE. Accordingly, Dr. Sommers' testimony would do nothing to aid the resolution of the matters actually pending before the Hearing Officer, and he likewise should be precluded from testifying.

Bill LaFayette. In his expert report (**ECOT Ex. D-1**), Dr. LaFayette offers opinions about the economic impact of community schools and ECOT's operations based, in part, on a survey of recent ECOT graduates. Dr. LaFayette discusses at length how ECOT and other community schools employ people and observes that those employees buy goods and pay taxes and thus generate tax revenue. He also offers the opinion that the recently graduated students would not have earned a high school degree but for ECOT.

These matters are wholly irrelevant to the question of whether ODE's September 26, 2016 final determination letter is reasonable. The opinions have no bearing whatsoever on FTEs

or documentation supporting FTEs. Dr. Lafayette's testimony would do nothing to aid the factfinder in this appeal and therefore his testimony should be excluded.

Lowell Julian Baker. ECOT apparently hired Mr. Baker's firm to conduct a public opinion survey of the community's thoughts on the state of America, the state of Ohio, and the state of education. ECOT apparently seeks to offer Mr. Baker's expert report of the results of that "survey." (**ECOT Ex. E-1**). This public opinion survey has absolutely no evidentiary value in this case. In fact, it has no value to this case or in any setting, as a review of the poll quickly reveals the biased nature of the questions. For example:

Q97. Which statement do you agree with more?

	Total	Parents - Public School	Parents - Eschool	Students
Just counting the amount of time a student spends online or in his seat does not match with a guarantee that that student is engaged, learning, and progressing. We need to care foster how students really learn, getting experience outside the classroom and receiving credit for that. Just manually counting the hours a student attends a school, is a step backwards as policy. [LITTLE]	53%	48%	62%	-
Accountability and transparency are key aspects of quality charter schools, and attendance is an important component of student engagement. Ultimately, it is in the best interest of the students to ensure that they are receiving the quality education they deserve in their public charter school. [HOLLIMAN]	47	52	38	-

(*Id.* at 19). This question also suggests ECOT's counsel (the "Little" referred to in the first question above is likely ECOT's counsel, Mr. Little) assisted in the drafting of this public opinion "survey." Mr. Baker and his "survey" have no value to this case and should be excluded.

B. Lay Witnesses.

In addition to excluding the purported expert testimony discussed above, the number of lay witnesses ECOT offers in this administrative appeal should be limited. Categories of witnesses and proposed limitations are discussed below.

ECOT Witnesses 11-23 (Personnel from Other Community Schools). ECOT lists 13 witnesses who are superintendents, directors, or employees of ***other*** community schools. According to ECOT's witness list, each of these witnesses plans to offer testimony addressing "issues regarding ODE's lack of notice, change of standard, and arbitrary conduct." Again, this is ***ECOT's*** appeal of the final determination ODE issued to ***ECOT***. Testimony from personnel from other community schools has no relevance to the core issue before the Hearing Officer—whether the FTE determination set forth in the September 26, 2016 final determination letter to ECOT was reasonable.

In addition to being irrelevant, testimony from these witnesses would undoubtedly be cumulative. Therefore, ECOT should not be permitted to waste the Hearing Officer and ODE's time by calling these witnesses during the hearing. Alternatively, to the extent that the Hearing Officer allows such testimony at all, ECOT should be limited to no more than a few such witnesses.

ECOT Witnesses 30-122 (ECOT Student and Parents of ECOT Students). ECOT lists ***93*** parents of ECOT students as witnesses in this hearing, all of whom are expected to testify about the "extent of students' actual learning experiences at ECOT; time spent as to the same." In addition to listing these 93 individuals, ECOT lists 91 affidavits from parents in its exhibit list. (**ECOT Exs. M-1 – M-91**). The parents' affidavits all use the same template and assert that their children all met or exceeded 25 hours of learning opportunities per week during the 2015-16 school year, and therefore ODE's FTE determination as to that student based on ECOT's documentation is incorrect.

The parents of ECOT students have no information about the durational data that ECOT provided to ODE, nor about ODE's FTE calculation based on that durational data. To the extent

that ECOT is now offering those parents in a last-ditch effort to supplement the durational data, that fails for two reasons. First, as ODE explained in its pre-hearing brief, the time for supplementing durational information has long since passed. The only question at this hearing is whether ODE reviewed and analyzed the durational information in its possession in a reasonable fashion. The ECOT parents have no evidence on that front. Second, even if the Hearing Officer were inclined to allow ECOT to supplement durational records, unsubstantiated testimony from a student's parents—offered long after the fact—would not be a reasonable or reliable basis upon which to perform an FTE funding calculation. As for the affidavits, those are also inadmissible hearsay (that was not subject to cross-examination), which should not be entertained. *See* Ohio Evid. R. 801, 802. On top of all of that, using 93 witnesses and 91 affidavits on these irrelevant issues is unnecessarily cumulative. Therefore, ECOT should not be permitted to call these witnesses nor offer the affidavits as exhibits. Alternatively, ECOT should be limited to no more than five such witnesses.

ECOT Witnesses 124-186 (ECOT Teachers). ECOT lists 63 ECOT teachers as witnesses, all of whom will purportedly testify about "typical student experiences, engagement, and actual time spent on educational opportunities." Like the parents, the teachers have no information about the durational data that ECOT provided to ODE, nor ODE's FTE calculation based on that durational data. And, as described above, ECOT should not be allowed to seek to supplement that durational data now. In any event, offering 63 separate witnesses on the same topic would be unduly burdensome and clearly cumulative. Thus, this testimony should be excluded as well. Alternatively, to the extent such evidence is even remotely relevant (and it is not), ECOT should be limited to no more than five such witnesses.

Diane Lease (ODE Legal Counsel). ECOT lists Diane Lease, ODE's chief legal counsel, as a witness it intends to call to testify about "issues regarding notice; public records responses." Any involvement by Ms. Lease in the review and assessment of ECOT's student files to calculate the FTE set forth in the final determination letter is privileged and therefore cannot be elicited during the hearing.

Perhaps more to the point, the subject matters identified by ECOT are not relevant to the issue in this appeal. ODE's responses to public records requests from ECOT's counsel are not relevant, nor are any so-called "issues regarding notice." And, to the extent these so-called "notice" issues could be deemed relevant and are somehow not privileged, other ODE witnesses are better positioned and available to testify than ODE's general counsel. Therefore, ECOT should not be permitted to call Ms. Lease to testify.

LIMITATION ON TIME OR NUMBER OF WITNESSES

Courts have "reasonable discretion in limiting the number of witnesses that may be called for examination on a given issue." *McCabe v. Ransom*, 2006-Ohio-2926, ¶ 37 (6th Dist.). Ohio Evid. R. 403(B) provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the considerations of undue delay, or needless presentation of cumulative evidence." In addition, Ohio Evid. R. 611(A) grants courts "reasonable control over the mode and order of interrogating witnesses and presenting evidence to as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue burden." *See also Mathewson v. Mathewson*, 2007-Ohio-574, ¶ 28 (2d Dist.) (affirming trial court's use of time limits, in part because appellant consumed time at hearing asking about irrelevant matters).

ODE suggests the Hearing Officer should impose reasonable limits on the time afforded each party to put on its case in this administrative appeal, or limit the number of witnesses each

party may offer. For example, the Hearing Officer may limit each party to three days total of testimony or no more than 15 witnesses per party. Such a limitation would demand that counsel carefully consider how to present their respective party's case in an efficient manner and avoid the needless consumption of time. ODE leaves to the Hearing Officer's discretion what the parameters of those reasonable limits would be, but ODE urges the Hearing Officer to impose such limits in order to thwart ECOT's efforts to make this a case without end.

CONCLUSION

For the above reasons, ODE requests the Hearing Officer issue an order: (1) precluding ECOT from offering the testimony and evidence described above; and (2) providing reasonable limitations on the amount of time or number of exhibits afforded each party to put on its case.

Date: December 1, 2016

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Exhibit B

Before the Ohio
State Board of Education
25 South Front Street
Columbus, Ohio 43215

In the Matter of:
Electronic Classroom of Tomorrow
Full-Time Equivalency (FTE) Review Appeal

Lawrence D. Pratt
Hearing Officer

RESPONDENT ELECTRONIC CLASSROOM OF TOMORROW'S OBJECTIONS TO THE HEARING OFFICER'S PROPOSED REPORT AND RECOMMENDATION

Pursuant to R.C. 3314.08(K)(2)(c), R.C. 3301.13, and R.C. 119.09, Respondent Electronic Classroom of Tomorrow ("ECOT") hereby submits to the Ohio State Board of Education (the "Board") its Objections to the Hearing Officer's Report and Recommendations.

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INTRODUCTION

Although this proceeding entails a multi-level process, the law contemplates that each level of review in this administrative review process will be conducted fairly and independently. As the Tenth District Court of Appeals explained, "[t]here would be no point in having various tiers of review in administrative cases if the only duty of each reviewing body were to approve without question the decision which came before. … Instead, the system envisions a series of checks and balances in which each reviewing body considers what has gone before ***with an eye for the reasonability of the prior decision*** based upon all the facts presented and in light of the statutory requirements and factors." Collins v. Ohio State Racing Comm'n, 2003 WL 22846110, at *5 (Ohio Ct. App. 10th Dist., Dec. 2, 2003) (emphasis added).

Here, however, it is clear that the Hearing Officer, with limited exceptions, merely approved the misconduct of the Ohio Department of Education ("ODE") administrators, and affirmed the department's challenged actions, without question. He did so by, among other things, precluding ECOT from presenting key exhibits and testimony; asking leading questions clearly designed to rehabilitate and/or redirect ODE's *own* witnesses following (or sometimes, in the middle of) cross examination; ignoring and/or misconstruing key facts; ignoring and/or misapplying pertinent legal authorities; taking/recommending positions that were unnecessary and irrelevant to his decision, and in some instances, by simply denigrating ECOT without a supporting basis in the record. Simply put, the import of the Hearing Officer's decision is that ODE is free to do whatever it wants, whenever it wants, with impunity. One does not need to be a Supreme Court justice to see that ODE's position, endorsed by the Hearing Officer, was without merit.

As made clear in these Objections, the Board should review the entire record, particularly the transcript pages and exhibits cited in these Objections. In doing that, it will find the Hearing Officer ignored a vast amount of relevant evidence – including multiple admissions of ODE decision-makers – apparently in an effort to reach a result in favor of the agency. But contrary to the Hearing Officer's apparent conclusion, ODE administrators are not free to engage in whatever conduct they wish, with no regard to the fairness or reasonableness of their approach or the manner and means of its implementation. The law forbids such conduct, and ODE, like all executive branch offices, may not act unreasonably, arbitrarily, or capriciously. For the multiple reasons set forth in these Objections as summarized here, the Board should reject the challenged funding determination and issue its own decision in favor of ECOT:

- **An agency must articulate and set the applicable standards.** ODE proceeded inappropriately by failing to establish the durational standard upon which it bases its attempt to claw back $60 million from ECOT. Indeed, according to ODE, there is "no standard." The FTE Review Handbook, which is the singular document that ODE's witnesses pointed to as setting forth a durational standard, does not, in the words of ODE, "carry the force and effect of law" and contains "merely procedural guidelines for FTE reviewers to follow in conducting FTE reviews." Moreover, ODE's Director of Budget and School Funding, Aaron Rausch, testified that the language of the supposedly applicable Handbook could reasonably be construed as *not requiring eschools* to maintain durational information. Faced with this fundamental conclusion, the Hearing Officer ignored Mr. Rausch's testimony and pointed solely to the language of R.C. 3314.08 as somehow establishing a durational "standard." But, as the Board can readily see from a review of the statute, no such "standard" can be found anywhere therein. Having no binding and enforceable standards, ODE has necessarily proceeded in an unreasonable, arbitrary, and capricious manner.

- **An agency's actions must be supported by a rational and reasoned basis.** Even if there was an enforceable, articulated standard, the record is clear that the durational measurement does not correlate with student engagement. While assuming for the sake of argument that ODE could change the enrollment methodology it has applied for thirteen years, advised the Ohio Auditor to enforce, and even reduced to writing in the form of a Funding Agreement, it is not free to simply manufacture a new standard lacking any correlation with what it is purporting to measure. As all schoolchildren should be taught, two wrongs do not make a right. If ODE believed enrollment was not a valid methodology, replacing it with an equally, if not more, irrational and invalid one is improper. Here, again, ODE has necessarily proceeded in an unreasonable, arbitrary, and

proceeding, not in her court (see page 126 below; continuation of this Objection #2, Section A.1.a). In short, the Hearing Officer's "recommendation" based on *res judicata* effect of the Franklin County Decision is wrong.

Second, the Hearing Officer further twists and tortures the doctrine of *res judicata* in whichever way is expedient to give the Board the impression it has no choice but to validate the administrators' funding determination. For example, in the Franklin County Decision, with respect to ECOT's claims based on ODE's alleged violation of R.C. 3314.08, Judge French determined only that ODE's imposition of a durational standard *was not foreclosed by* the express language of R.C. 3314.08. [Franklin County Decision at 14, 15 ("Under [R.C. 3314.08(H)(2) & (3)], the Court finds that ODE is entitled to consider durational data … . … [T]he Court finds that ECOT does not succeed on its claim that R.C. 3314.08(H)(3) precludes reliance on durational data regarding actual student participation.").] The Court did not rule that ODE must evaluate durational data; it did not rule on how a durational requirement could or should be implemented; and it did not rule on whether the methodology or procedures ODE ultimately employed were reasonable, appropriate, or lawful.

Yet the Hearing Officer asserts that the Franklin County Decision gave the administrators no "discretion" but to impose a durational requirement, and to impose it in the manner they did. [See R&R, at 85-89.] The Hearing Officer also improperly presented multiple recommended conclusions to the Board that the Franklin County Decision compels it to rubber-stamp the administrators' determination. [See, e.g., R&R Recommended Conclusions of Law ¶¶ 7, 15-18, 21-25, 30.] Not so. Such contentions have no basis in law and must be rejected.

Office of Budget and School Finance, and Chris Babal, ODE's Community School Payment Administrator, effectively conceded ECOT has a right to rely in matters relating to FTE reviews. [Tr. 366-68 (Babal); Tr. 706-707 (Rausch) (see Objection #8, Section D.1).] Against this backdrop, as well as Mr. Rausch's admission that eschools could reasonably construe the FTE Handbook as not requiring durational data, the concept of estoppel (*i.e.*, fairness) clearly applies, and it additionally bars ODE's attempt to impose a duration-based clawback against ECOT. [Tr. 716-17, 742-43, 1034-35 (Rausch) (see Objection #8, Section D.1).]

Thus, at bottom, the requirement of fair treatment necessarily applies to ***all*** administrative agency conduct. Indeed, questions of the fairness, equity, and reasonableness of ODE's actions are not only within the Hearing Officer's jurisdiction, it was his duty to address them. The Hearing Officer failed to do that and instead merely attempts to rubber-stamp the ODE administrators' misconduct by mischaracterizing ECOT's position as asserting "equitable claims" against the state.

This Board, however, is not a rubber stamp. It is duty-bound to use its authority to correct the mistake and reject the Hearing Officer's conclusion. As the Tenth District explained, "[t]here would be no point in having various tiers of review in administrative cases if the only duty of each reviewing body were to approve without question the decision which came before. … Instead, the system envisions a series of checks and balances in which each reviewing body considers what has gone before ***with an eye for the reasonability of the prior decision*** based upon all the facts presented and in light of the statutory requirements and factors." Collins v. Ohio State Racing Comm'n, 2003 WL 22846110, at *5 (Ohio Ct. App. 10th Dist., Dec. 2, 2003) (emphasis added).

course, the Court could not have addressed such methodology inasmuch as ECOT did not learn about it until well after ODE's Final Determination was issued.

Second, in any event, the Court's "public policy" finding was merely an alternative ground for its non-enforcement of the Funding Agreement. For that additional reason, such finding is not entitled to preclusive effect here.

In sum, for all of these reasons, none of the issues/challenges actually asserted by ECOT in this proceeding are barred by *res judicata*.

CONCLUSION

For all of the reasons described above, as well as in ECOT's Post-Hearing Brief and Post-Hearing Response Brief, ODE has failed to carry its burden of proof and the Hearing Officers Report and Recommendation should be rejected in its entirety. To the contrary, the largely undisputed evidentiary record clearly establishes that ODE acted arbitrarily and capriciously, in violation of basic tenets of administrative law. As a result, the Final Determination should be rejected, and ECOT should be awarded its full, claimed FTEs of 15,321.98, for 2015-2016.

Respectfully submitted,

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1036-002:680493

Exhibit C

Before the Ohio
State Board of Education
25 South Front Street
Columbus, Ohio 43215

In the Matter of:
Electronic Classroom of Tomorrow
Full-Time Equivalency (FTE) Review Appeal

Lawrence D. Pratt
Hearing Officer

EXECUTIVE SUMMARY OF OBJECTIONS BY THE ELECTRONIC CLASSROOM OF TOMORROW TO REPORT AND RECOMMENDATION OF HEARING OFFICER

The Electronic Classroom of Tomorrow ("ECOT") has already submitted, for the Board's review and consideration, extensive Objections to the Report and Recommendation of the Hearing Officer. Nonetheless, for purposes of convenience and to aid the Board in the lead up to its consideration of the instant matter at its June 12, 2017 meeting, ECOT submits the instant Executive Summary, which summarizes the key objections, concerns, and ultimately, the basic unfairness and unreasonableness of the process culminating with the Hearing Officer's flawed and erroneous Report and Recommendation (the "R and R").

At bottom, let us be clear: If the FTE funding formula historically applied by ODE since at least 2003 (and which, due to ODE's decision to conduct FTE reviews of only approximately ***half*** of Ohio's eschools, was still applied to at least 11 eschools for 2015-2016)[1] had been applied to ECOT for the 2015-2016 school year, ECOT is entitled to ***its full claimed FTE funding***. [See PI Tr. Vol. III at 81-82 (testimony of ECOT's area coordinator John Wilhelm.]

[1] Eschools not subject to FTE reviews in 2016, and thus, whose funding for 2015-2016 continued to be based on reported enrollment figures, included Alternative Education Academy, Auglaize County Educational Academy, Fairborn Digital Academy, Global Digital Academy, Greater Ohio Virtual, Insight School of Ohio, Mahoning Unlimited Classroom, Marion City Digital Academy, Newark Digital, Ohio Connections Academy, Inc., and Ohio Virtual Academy.

> *whether the student actually performed or engaged in actual learning during that time period; is that true*?
>
> A. *Yes, that's correct*.
>
> Q. And so is that true for all the eSchools that were subject to FTE reviews this year, that the Department has confined its review to simply looking at the time records without making any further inquiry as to determine whether or not the student actually did or didn't do anything?
>
> A. *For the online time, yes, that would be correct*.
>
> [Tr. at 832-33 (emphasis added).]

C. Blatant Unfairness Exhibited By The Hearing Officer.

The unfairness and unreasonableness did not stop with the actions of ODE's administrators. Rather, the Hearing Officer, himself, repeatedly evinced a pro-ODE position, literally from the outset of the hearing up to and including the R and R.

For example, in the R and R, the Hearing Officer urges this Board to afford ODE the benefit of a "presumption" of regularity/propriety that, based on the very case law cited, applies *only* in the context of *judicial* review of *final* agency decisions. In other words, the Hearing Officer urges the Board to effectively conclude that ECOT is not entitled to any type of independent or even-handed review of ODE's actions at *any stage* of the process. Rather, according to the Hearing Officer, ODE should merely be presumed to have acted appropriately and fairly at all times.

Not only is such a presumption contrary to law, but it is contrary to common sense. If ODE officials were simply presumed to act properly *all the time*, what is the purpose of having a Board of Education? Further, what is the purpose of having a hearing process that entails the presentation of evidence, if at the end of the day, ODE can prevail merely by *asserting* that it acted properly? The Board should reject the Hearing Officer's unwarranted and unsupported

deference to ODE, and subject ODE's actions to the type of independent review and consideration to which ECOT and the public are entitled.

Moreover, beyond his recommended decision, at times during the hearing the Hearing Officer acted more like an attorney for ODE than as a neutral decision-maker. At several points during the hearing, the Hearing Officer asked leading questions of ODE witnesses in an obvious effort to rehabilitate them and/or lead them to specific answers clearly designed to support ODE's position.

For example, in response to evidence demonstrating that ODE failed to follow the provisions of its own FTE Handbook in determining the student sample size utilized as part of the ECOT FTE review process, the Hearing Officer sought to rehabilitate ODE's witness by asking his "opinion" on the impact of such issue. Such questioning prompted a (proper) reluctant objection from ECOT's counsel:

> HEARING OFFICER: Let me restate that. In your opinion, would that in any way skew the information coming from the school if that outcome occurred, hypothetically?
>
> MR. LITTLE: May I object to your questions?
>
> HEARING OFFICER: You may.
>
> MR. LITTLE: Because I'm reluctant to do so, but I think I may need to, because I don't think there's a basis for this witness to offer an opinion into evidence. But subject to my objection, ask your question.
>
> HEARING OFFICER: Very well. And if you don't know the answer to that, you don't have to try –
>
> THE WITNESS: I'm not quite sure. I suppose it would just depend on how much the skew was. It's a random control, it's a random sample, so I suppose. It's hard to say.

> HEARING OFFICER: In the absence of any expert in this proceeding that gives an expert statistical sampling, I'm going to do the best I can. And thank you for your objection, counsel.
>
> MR. LITTLE: Well, there may be a better witness on this, I don't know. But I'm not sure he is the witness. That's the reason for my objection.

[Tr. at 237-38 (Babal).]

Likewise, the Hearing Officer asked questions from lay ODE witnesses about legal issues in a transparent effort to support ODE, even to the extent of leading witnesses toward answers that contradicted prior positions taken by the department:

> By the Hearing Officer:
>
> Q. I would ask you, Mr. Babal, there were a number of questions directed at you by Mr. Little about what documents the FTE reviewed. Would the statutes that underlie the FTE funding process also govern a review conducted by the Department?
>
> A. I would say they would.
>
> MR. LITTLE: I object to foundation for this witness to offer statements as to statutory impact of the statute.
>
> HEARING OFFICER: I'll change the question slightly.
>
> By the Hearing Officer:
>
> Q. Is an understanding of the funding statute part of the preparation that a reviewer would undergo before conducting a review?
>
> A. Yes.
>
> MR. LITTLE: Well, I would object to the foundation, but I'll have some follow-up questions –
>
> HEARING OFFICER: I believe the witness indicated he participated in the review – multiple reviews.
>
> MR. LITTLE: He participated in, I believe, two reviews. I don't think that – I don't want to –

> HEARING OFFICER: But I think it's just as fair to ask if he was asked about the handbook being a basis for review, whether the statutory language was also a basis for the review.
>
> MR. LITTLE: And I believe that the witness had previously testified that the information that is provided for purposes of conducting a review is that set forth in the manual.
>
> I believe this is new territory you're charting on this, so I'll want to cross-examine the witness.
>
> HEARING OFFICER: That's what I took note of, he was never asked about the statute.
>
> MR. LITTLE: Because I believe that the position of the Department has always been – and perhaps we'll hear a different story today – that what is communicated to the schools, as well as what is communicated to the area coordinators in terms of the manner in which the FTE review is being conducted, is simply that set forth in the handbook. There's not a – I'll ask the witness questions.
>
> HEARING OFFICER: The witness actually just indicated to the contrary by the answer he just gave me to my question.
>
> * * *
>
> [Tr. at 533-36.]

Other examples of blatant one-sidedness could be cited. But, it suffices to state that the hearing process afforded by the Hearing Officer, like ODE's actions that precipitated it, was anything but fair and reasonable to ECOT.

D. <u>Conclusion.</u>

For the reasons discussed in detail in ECOT's Objections, and those summarized above, ODE's underlying actions, the administrative hearing process, and now, ODE's apparent effort to urge the Board to prematurely act on a fundamentally flawed and legally unsupported R and R are unfair, unreasonable, and contrary to common sense. If the Board does not simply reject the R and R outright (it should), then it should take its time and delay a final vote to allow for full

and proper consideration of the issues and evidentiary record presented, and to allow for a final judicial resolution of the legality of the very durational requirement at the heart of this matter.

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1036-002: 681387

Exhibit D

BEFORE THE OHIO STATE BOARD OF EDUCATION

IN THE MATTER OF: ELECTRONIC CLASSROOM OF TOMORROW FULL-TIME EQUIVALENCY (FTE) REVIEW APPEAL.	Lawrence D. Pratt Hearing Officer

OHIO DEPARTMENT OF EDUCATION'S PREHEARING MEMO

I. INTRODUCTION

Ohio pays community schools like Electronic Classroom of Tomorrow ("ECOT") public dollars based on the number of Full-Time Equivalent ("FTE") students that the school educates. This matter is before the Hearing Officer on ECOT's appeal of the September 26, 2016 final determination letter that the Ohio Department of Education ("ODE") issued, which sets forth the number of FTEs for which ODE has determined that ECOT was eligible to receive payment during the 2015-16 school year ("FY 2016"). ECOT disputes that FTE calculation. The hearing in this matter is set to commence December 5, 2016. ODE submits this prehearing brief pursuant to the Supplemental Pre-Hearing Journal Entry entered by the Hearing Officer on November 23, 2016.

ECOT is an online community school. During FY 2016, ECOT received $106 million in public money, funds that otherwise would have gone to other public schools. ECOT received this funding based on FTE figures that it self-reported to ODE during the school year. By statute[1], ODE has the right to require a given community school at the end of the academic year

[1] R.C. 3314.08(H)(3) provides:

> The department shall determine each community school student's percentage of full-time equivalency based on the percentage of learning opportunities offered by the community school to that student, reported either as number of hours or number of days, is of the

to substantiate the FTE figures that the school had reported, and to adjust the school's funding for that year to reflect the FTE figures that the school can successfully substantiate. ODE typically performs such a review for a given community school on a five-year cycle. As ODE had last reviewed ECOT in 2011, ECOT was due for such a review this year. Yet, when ODE asked ECOT to provide documentation showing the hours of education that ECOT actually provided to a sample of its students during the 2015-16 academic year (the "durational information"), ECOT refused, and instead chose to sue ODE in the Franklin County Court of Common Pleas (the "Franklin County Action"), seeking to prevent ODE from getting access to that information. The reason for ECOT's resistance soon became clear, when ODE finally obtained the durational information from ECOT—which it did ***over ECOT's objection and pursuant to a court order***—ODE determined that ECOT was able to document only a little more than 41% of the FTEs it had reported to ODE during FY 2016. ECOT thus owes the State of Ohio reimbursement for roughly 59 percent of the funds that it received during the past school year, which the State will obtain by reducing future payments to ECOT over an extended period of time.

As it has a right to do by statute, ECOT now challenges ODE's FTE determination. At the hearing, ODE will show that it used a reasonable methodology in calculating the amount of public monies to which ECOT was entitled for fiscal year 2016. To do so, ODE will offer the

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> total learning opportunities offered by the community school to a student who attends for the school's entire school year. However, no internet- or computer-based community school shall be credited for any time a student spends participating in learning opportunities beyond ten hours within any period of twenty-four consecutive hours. Whether it reports hours or days of learning opportunities, each community school shall offer not less than nine hundred twenty hours of learning opportunities during the school year.

testimony of two ODE employees and various exhibits related to the way in which ODE accomplished the FTE calculation and the methodology that it employed.

It is worth noting at the outset, though, that ODE could have simply determined that ECOT had failed to substantiate ***any*** of its claimed FTEs. After all, ECOT outright refused to produce during the FTE review the durational information that ODE requested. Instead of taking that path, though, the two ODE witnesses will describe the steps that ODE took to carefully review the mountains of student records that ECOT (unwillingly) provided, so that it could identify ECOT's durational data in those records. They will then also describe the significant efforts undertaken by a team of nearly fifty ODE employees to review and compile the durational data from those records into a useful format, all the while working on an expedited timeframe at ECOT's insistence. Finally, they will discuss the steps that ODE took to validate the data before using it as the basis for the FTE funding determination. All of this was accomplished with ***no*** assistance—indeed, active ***resistance***—from ECOT. Yet, the evidence nonetheless will show that ODE made its determination here in a reasonable, neutral and even-handed fashion.

While it is clear that ECOT is now appealing that funding determination, ODE does not yet know—despite repeated requests—the legal theories or factual issues underlying ECOT's appeal. ODE anticipates, however, that ECOT will make arguments challenging the wisdom of the methodology set by statute for calculating FTE, as well as various other legal arguments that already have been rejected once in the Franklin County Action, a rejection that occurred after a full six-day evidentiary hearing. (*See* **Exhibit 1**, 9/26/16 Decision and Entry Denying Preliminary Injunction). All such arguments, whether previously made and rejected or not, are without merit, and the final determination set forth in the September 26, 2016 letter should stand.

II. BACKGROUND

A. ECOT Is An Online Community School.

ECOT is a so-called "community school." While ECOT is a private, non-profit corporation, community schools (such as ECOT) are, by statute, public schools. R.C. 3314.01. ECOT is not a brick-and-mortar school, but rather an online or "eschool." R.C. 3314.02(A)(7). In such schools, "the enrolled students work primarily from their residence on assignments in nonclassroom-based learning opportunities provided via an internet- or other computer-based instructional method that does not rely on regular classroom based instruction or via comprehensive instructional methods that include internet-based, other computer-based, and noncomputer-based learning opportunities." *Id.* That is, students are not physically present in classrooms, but rather use a computer to log in to the educational programming that ECOT makes available (and also sometimes engage in various offline educational activities such as field trips or library research).

By statute, every community school must have a sponsor (either a traditional public school district or an educational service center) approved and supervised by ODE. R.C. 3314.02(A)(1). The sponsor and community school enter into a contract, which the sponsor files with ODE. R.C. 3314.03. ECOT's sponsor is the Educational Service Center of Lake Erie West ("ESCLEW"). ECOT is the largest community school in Ohio. During the 2015-16 school year, it received more than $106 million in state funding.

B. ECOT's Funding Is Set By Statute, And Is Based On FTE.

The mechanism that provides state funds to community schools is statutory. Under the relevant statute, payments to a given community school are based on the number of FTE students that the community school educates during a given year. Each community school must provide a minimum of 920 hours of "learning opportunities" over the course of a school year to each full-

time student. R.C. 3314.03(A)(11)(a). Each student who receives 920 hours constitutes one "full-time equivalency," or "FTE." The school receives a set amount of per-student funding for each student FTE. Community schools also receive partial payments for partial FTEs, as determined by the number of hours of instruction actually provided to a student during a school year, divided by 920 hours. Thus, the FTE equation is as follows:

FTE = [hours of student education provided] / 920

For example, if full per-student FTE funding for a given academic year was $6,000, but a community school only educated a particular student for 460 hours during that school year, that student's FTE would be 0.5, and the community school would receive only $3,000 in FTE funding for that student.

Each community school is responsible for reporting FTE information to ODE monthly throughout the year using the Education Management Information System ("EMIS"), a computer system that ODE maintains. ODE pays the school monthly based on this self-reported information, but then retains a right to adjust payments at the end of the year based on ODE's review of the school's records. R.C. 3314.08(H)(3).

The community school funding statute is set forth at R.C. 3314.08. This statute provides detailed and exhaustive legislative mandates regarding computation of annual payments to community schools. Of particular importance here, the statute ties community school funding to "full-time equivalency", and, in R.C. 3314.08(H)(3), the General Assembly directs ODE to determine that number:

> The department shall determine each community school student's percentage of full-time equivalency ***based on the percentage of learning opportunities offered by the community school to that student***, reported either as number of hours or number of days, is of the total learning opportunities offered by the community school to a student who attends for the school's entire school year. However**,**

> ***no internet- or computer-based community school shall be credited for any time a student spends participating in learning opportunities beyond ten hours within any period of twenty-four consecutive hours***. Whether it reports hours or days of learning opportunities, each community school shall offer not less than nine hundred twenty hours of learning opportunities during the school year.

(Emphases added). In connection with the statutory command to "determine each community school student's percentage of full-time equivalency based on percentage of learning opportunities," the General Assembly also provided directions as to the meaning of "learning opportunities", expressly requiring such opportunities to be "in compliance with criteria and documentation requirements for student participation which shall be established by the department":

> For purposes of applying … division[] (H)(3) … of this section to a community school student, "learning opportunities" shall be defined in the contract, which shall describe both classroom-based and non-classroom-based learning opportunities and ***shall be in compliance with criteria and documentation requirements for student participation which shall be established by the department***. Any student's instruction time in non-classroom-based learning opportunities shall be certified by an employee of the community school.

R.C. 3314.08(H)(2) (emphasis added). As this language acknowledges, "learning opportunities" can come in many forms—they are defined by the contract between a community school and its sponsor. And, in the same vein, ODE's role is not to set substantive requirements for the form such learning opportunities may take, but rather to address how ODE itself will measure "student participation" in "learning opportunities" that are being "offered by the community school to [each] student" R.C. 3314.08(H)(3). And, given the wide variety of forms that such learning opportunities can take, the General Assembly specifically instructed ODE that it should develop "criteria and documentation requirements," rather than rules, in determining that "student participation."

C. The FTE Review Process.

To investigate whether an FTE funding adjustment is warranted in a given year, ODE periodically conducts an FTE review of a given community school. The purpose of the review is to ascertain whether the school can document the full-time equivalency data (i.e., "student participation" data) that the school reported to ODE through EMIS for the last academic year. ODE typically conducts such reviews on a five-year cycle. During this review process, ODE personnel (called area coordinators) visit the community school and specify records for a sample of students (with the sample size depending on the number of FTEs the school is claiming) that ODE would like to review in order to assess and confirm the community school's reported FTE numbers for the previous academic year.

To assist the area coordinators in performing the FTE reviews, ODE developed an FTE review handbook. The handbook does not create rules for funding decisions, nor does it impose obligations on community schools. Rather, it instructs ODE employees on how to conduct the FTE reviews described above. To that end, the handbook "delineates and describes the procedures and forms that are generally used to conduct FTE reviews" and addresses "what documentation should be collected and maintained by community schools." (**Exhibit 2**, 2015 FTE Handbook at p. 2).

The 2015 FTE Handbook—the operative handbook during the fiscal year 2016 FTE review—includes a section specifically titled "eSchool Review."

> The reviewer should keep in mind that the funding for eSchools is different from the funding of other community schools in some aspects. The funding for eSchools consists only of the formula amount (based on an accurate FTE calculation) and the special education weighted amount calculation. There are no funds for PBA, Parity Aid, gifted aid or CTA funding. This situation puts more pressure on eSchools to have an accurate FTE calculation; therefore, ***the reviewer of eSchools must put a high level of scrutiny on the relationship between the hours/days of instruction and the***

> ***daily/hourly attendance documentation used in calculating the final FTE for each student***.

(*Id.* at p. 15) (emphasis added). That same section of the 2015 FTE Handbook explains what constitutes satisfactory documentation for student participation:

> An eSchool is also required to maintain student attendance records, as specified in the eSchool's written attendance policy. The reviewer will verify that the school has a written attendance policy.
>
> The reviewer will check the attendance record procedure maintained by the eSchool. The eSchool must be ready to display this program on screen for the reviewer to view for each student.
>
> The reviewer will check the individual attendance record for each student being reviewed. ***This attendance record should show when a student has logged on and off while accessing learning opportunities***. A learning opportunity for an eSchool student could be documented computer time for doing homework in any subject, reading resource documents, writing resource papers, taking tests, doing research, conferencing with teachers, etc.

(*Id.* at p. 16) (emphasis added). This log-on-and-off requirement was not new in 2015; it has been included in every manual since the 2010 version of the FTE review manual.

Moreover, the "checklist" included in the 2015 FTE Handbook also specifically delineates that eschools were required to maintain durational information to substantiate FTE, noting that eschools must submit records "match[ing] the amount of time reported in EMIS" and that log-ins alone would not suffice.

Item	Procedure	Comments
	Is this an e-school? YES NO If "Yes," does the following documentation exist: g) Either verification signed by the parent indicating delivery of a computer and setup date, or a signed waiver if the student has a computer. YES NO h) Supporting records indicating when the student's first login was made. YES NO i) An attendance record for the student that matches the amount of time reported in EMIS.[5] YES NO j) If the student has non-computer learning opportunities, were such opportunities documented and approved in writing by a teacher, supervisor or school administrator? YES NO NA k)Was there hourly/daily/weekly accounting of hours in which the student accessed learning opportunities? YES NO.	

[5] A learning opportunity for an e-school student could be computer learning, reading resource documents, writing papers, taking tests, doing research, field trips, and conferencing with teachers, etc. There must be a log-in but that cannot be the only proof of attendance.

(*Id.* at 24). The need for records to substantiate a student's EMIS time also was not new in 2015; it has been included in FTE handbooks since 2010. Moreover, ECOT has had copies of handbooks dating back to at least the 2010 handbook.

D. ODE's Efforts To Conduct An FTE Review Of ECOT For Fiscal Year 2016.

As noted above, ODE typically conducts FTE reviews of community schools once every five years. In January 2016, ECOT learned it would be subject to an FTE review for the 2015-16 academic year. This review was scheduled pursuant to the typical five-year cycle for FTE reviews, as ECOT had last had an FTE review in 2011. ODE area coordinator John Wilhelm sent a letter to ECOT outlining the types of records that he would be requesting from ECOT in connection with the 2016 review. This letter made clear that ODE would be requesting durational records to show how long or how often students had accessed learning opportunities over the course of the academic year.

ODE originally indicated that it would rely on the 2016 FTE review handbook in connection with performing the review. ECOT complained, however, that the 2016 FTE review handbook had not been published until half way through the 2015-16 school year, and thus

constituted an unfair surprise. To address ECOT's concerns, ODE agreed that it would instead use the 2015 FTE review handbook (described above) to conduct all of the community school FTE reviews (including ECOT's) that it performed in FY 2016. That review manual had been published and available on ODE's website since January ***2015***, over a year before the FTE review at ECOT.

On March 28, 2016 through March 30, 2016, ODE conducted its initial, purely advisory, FTE review of ECOT, and requested that ECOT provide durational information. At the initial FTE review, ECOT presented John Wilhelm, ODE employee Chris Babal, and their ODE colleagues with 750 student files, corresponding to the 750 students that ODE had identified in advance of the preliminary review. Each of the 750 student records contained a report showing log-on and log-off times for the specified student. Those records showed that, on average, students were spending approximately one hour per day logged into ECOT's online education platform.

ODE determined that, in connection with the final 2016 year-end FTE review of ECOT, which was scheduled to take place July 11-13, 2016, area coordinators should again review durational information for 750 randomly selected students. However, ECOT refused to provide such data at the year-end review. Instead, on July 8, 2016, just before the FTE review was set to commence, ECOT filed a complaint and motion for a temporary restraining order with the Franklin County Court of Common Pleas. In particular, ECOT sought to enjoin ODE from "including or imposing, as part of any audit of an eschool, including ECOT, a log-in time/duration requirement" in connection with an FTE review. (**Exhibit 3**, 7/8/16 ECOT Motion for TRO at 23). The trial court denied ECOT's motion on the afternoon of July 11, 2016. (**Exhibit 4**, 7/11/16 Entry Denying Motion for TRO).

After the trial court issued its decision, ODE personnel arrived at ECOT to commence the FTE review on the afternoon of July 11. When ODE personnel requested the durational information for the 750 students in the sample, ECOT personnel advised ODE reviewers that ECOT would need to consult legal counsel. That evening, ODE's outside counsel received a letter from ECOT's outside counsel informing ODE that ECOT planned to have an attorney present during the review the following day and that ODE should send counsel as well. (**Exhibit 5**, 7/11/16 Letter). On the morning of July 12, following another request for durational data, ECOT's attorney stated that ECOT would not provide the requested durational data to ODE reviewers, notwithstanding the trial court's denial of its TRO, effectively thwarting ODE's effort to conduct an FTE review. When ODE's counsel asked ECOT to confirm that ECOT would not be providing durational data, ECOT's counsel refused to answer the question directly and instead simply stated that ECOT was "making available documents identified under the Funding Agreement and the Ohio Revised Code", that any other requests constitute "a violation of the Funding Agreement," and that any requests should be made pursuant to a public records request to ECOT. On the third and final day of the review, ECOT again refused to provide ODE reviewers any durational data. ECOT's outside counsel stated that the trial court's denial of its TRO motion did not require it to allow access to the documents requested by ODE reviewers. (**Exhibit 6**, 7/13/16 Letter).

In connection with the Franklin County Action that ECOT had initiated, ODE served ECOT with document requests. These included a request that ECOT "[p]roduce all documents reflecting the Log-in/Log-out Information for the 2015-16 school year for the 750 ECOT students selected by ODE for the July 11-13, 2016 year-end FTE review." (**Exhibit 7**, 7/20/16 ODE Discovery Requests at Doc. Req. No. 9). ECOT refused to produce documents in response

to this request, forcing ODE to file a motion to compel in order to obtain the durational information. (**Exhibit 8**, 7/23/16 Motion to Compel). The trial court granted ODE's motion and ordered ECOT to produce the records requested by ODE. (**Exhibit 9**, 8/1/16 Order Compelling ECOT to Provide Student Participation Records).

ODE worked with ECOT on the timing of the production of the documents, as well as selecting a copy vendor to scan and bates label the subject documents. However, shortly after ECOT produced the documents for copying, ECOT began alleging that ODE's receipt of the documents—which had been accomplished pursuant to a court order—constituted ***criminal*** conduct, as the documents that ECOT provided to ODE for review contained "student identifiable information." (**Exhibit 10**, 8/11/16 Letter). ODE attempted to address ECOT's purported concerns about student-identifiable information by asking ECOT to produce the data in Excel files without student-identifiable information. ECOT refused and instead demanded ODE immediately return the documents that the trial court had compelled ECOT to produce. (*Id.*). In light of ECOT's stated concerns, ODE undertook efforts to complete its review of the voluminous student records as quickly as possible. It completed its review by August 22, 2016, at which time the documents were returned to ECOT or destroyed as ordered by the trial court.

During the time that ODE had access to the records, it completed a comprehensive review of the 706 student records that ECOT had produced pursuant to the court order. More specifically, ODE formed a task force that grew to upwards of 50 employees. These employees were responsible for poring over each student record (some of which had scores of pages) and identifying any records reflecting durational participation by that student. This was an iterative process. Chris Babal, a senior ODE manager, first went through one or two of the student files to ascertain the various types of durational data that the files contained. He then trained others as

to how to identify such data. As new types of durational data were discovered in subsequent files, the training was expanded to include those types of data as well. Each reviewer's output was also subject to review by a supervisor.

Eventually, all of the durational data entries from the 706 students were combined into a single spreadsheet. The durational entries for these students included over 123,000 separate entries. ODE then took steps to make sure that all of the data was in the correct format (e.g., time recorded in hours vs. minutes vs. seconds), and had been properly aggregated. It also performed various other spot checks on the data for data integrity purposes.

Based on the computations conducted through using this spreadsheet, ODE determined that ECOT could substantiate only 170.1 of the 414.35 FTEs that ECOT had reported for these 706 students, or in other words ECOT could substantiate 41.2% of its claimed FTEs. (**Exhibit 11**, 9/26/16 Letter with attachment). Extrapolating this data across all of the ECOT students for which ECOT had claimed FTE funding during the year, ODE issued a final determination concluding that ECOT had over-reported its FTE for the 2015-16 school year by 58.8%. (*Id.*). That is, ECOT reported 15,321.98 FTE, but could only document 6,312.62 FTE. Therefore, ODE stated that it would seek to recover from ECOT the overpayment for the 9,009.36 undocumented FTEs that ECOT had claimed. This proceeding is ECOT's appeal of that determination.

II. LEGAL STANDARD APPLICABLE TO APPEALS OF FTE REVIEWS

ODE conducts its FTE reviews pursuant to express statutory authority. Specifically, "[i]f the department determines that a review of a community school's enrollment is necessary, such review shall be completed and written notice of the findings shall be provided to" the community school. R.C. 3314.08(K)(1). ODE completed its review of ECOT in September 2016, and the "written notice of [ODE's] findings" is the September 26, 2016 final determination letter. (*See*

Exhibit 11). If—as here—"the review results in a finding that the community school owes moneys to the state," the community school "may appeal the department's determination to the state board of education or its designee." R.C. 3314.08(K)(2)(a). "The board or its designee shall conduct an informal hearing on the matter," and if—as here—"the board has enlisted a designee to conduct the hearing, the designee shall certify its decision to the board," and the board may accept or reject that decision. R.C. 3314.08(K)(2)(b), (c).

The statute does not assign burdens of proof to particular parties during the appeal to the board or its designee, nor has ODE adopted any rules in that regard. Therefore, background rules of administrative law apply. As a general matter, "[i]t is fundamental to administrative law and procedure that the party asserting the affirmative issues also bears the burden of proof." *Griffin v. State Med. Bd. of Ohio*, 2011-Ohio-6089, ¶ 18 (10th Dist.); *see also Hicks ex rel. 528 Petitioners v. State Bd. of Educ.*, 2003-Ohio-4134, ¶ 16 (10th Dist.) ("it is generally held that, absent a statutory provision which specifically places the burden of proof, such burden in an administrative action is upon the party asserting the affirmative issue") (punctuation omitted). The question here, of course, is what constitutes the "affirmative issue" in an FTE review. If the affirmative issue is ECOT's claim that it was entitled to funding for the 15,321.98 FTE that it claimed over the course of FY 2016, then ECOT bears the burden of proof. Alternatively, if the affirmative issue is ODE's claim that ECOT was not in fact entitled to all of that funding and that ODE's September 26, 2016 final determination is a reasonable calculation of ECOT's FTEs, then ODE bears the burden of proof. Although, even in the latter case, there is still the separate settled point that "actions of an administrative agency are, absent evidence to the contrary, entitled to a presumption of regularity." *Orth v. State*, 2014-Ohio-5353, ¶ 13 (10th Dist).

Here, the Hearing Officer has indicated that ODE will bear the burden of proof in this proceeding, and that ODE will go first in presenting evidence. For purposes of this hearing, ODE does not object to that assignment of the burden of proof, but ODE reserves the right to challenge that burden in other proceedings. Consistent with the Hearing Officer's decision, ODE will present evidence at the hearing, as more fully set forth below, showing that it complied with the funding statute in making its FTE determination, and that it used a reasonable methodology for calculating ECOT's FTEs given the circumstances surrounding the FTE review.

III. LEGAL ISSUES TO BE PRESENTED BY ODE AT THE HEARING

A. ODE Is Entitled To Rely On Durational Data In Conducting An FTE Review.

FTE funding for community schools is determined by statute. By its plain language, the statute at issue, R.C. 3314.08, allows ODE to consider durational data in connection with a community school's FTE funding decision. At the very least, the statute is ambiguous on that point, and ODE's interpretation that the statute allows reliance on durational data is thus entitled to deference. *See AWL Transp., Inc. v. Ohio Dep't of Job & Family Servs.*, 2016-Ohio-2954, ¶ 11 (10th Dist.) ("Where the question of law involves statutory interpretation, a reviewing court should give due deference to statutory interpretations by an administrative agency that has substantial experience and has been delegated enforcement responsibility."). Indeed, using student participation (i.e., durational data) to determine FTE funding is not only consistent with the plain language of the funding statute for community schools, but also comports with common sense.

The funding statute, by its plain language, directs ODE to consider the time "a student spends participating in learning opportunities" in order to determine the FTEs associated with that student. More specifically, R.C. 3314.08(H)(3) provides:

> The department shall determine each community school student's percentage of full-time equivalency based on the percentage of learning opportunities offered by the community school to that student, reported either as number of hours or number of days, is of the total learning opportunities offered by the community school to a student who attends for the school's entire school year. However, no internet- or computer-based community school shall be credited for any time a student spends participating in learning opportunities beyond ten hours within any period of twenty-four consecutive hours. Whether it reports hours or days of learning opportunities, each community school shall offer not less than nine hundred twenty hours of learning opportunities during the school year.

As the text shows, this section requires consideration of specific hours, telling ODE to drill down to "percentage of full-time equivalency" for each student. *Id*. That language clearly contemplates consideration of actual time spent participating in the offered opportunities. Confirming this, the statute goes on to instruct ODE not to give credit for "any time a student spends participating in learning opportunities beyond ten hours within any period of twenty-four consecutive hours," again showing that the duration of the student's ***actual participation*** matters for statutory counting purposes.

The definition of "learning opportunities" as used in R.C. 3314.08(H)(3) provides yet more confirmation for this result. "Learning opportunities" as used in (H)(3) is defined in the previous section, R.C. 3314.08(H)(2), which states in relevant part:

> For purposes of applying this division and divisions (H)(3) and (4) of this section to a community school student, "learning opportunities" shall be defined in the contract, which shall describe both classroom-based and non-classroom-based learning opportunities and shall be in compliance with criteria and documentation requirements for student participation which shall be established by the department. Any student's instruction time in non-classroom-based learning opportunities shall be certified by an employee of the community school.

As this section shows, the funding statute expressly makes learning opportunities contingent upon "criteria and documentation requirements ***for student participation*** …." R.C.

3314.08(H)(2) (emphasis added). In other words, "learning opportunities," which are the basis for FTE funding, have a durational component that is measured in terms of a given student's actual participation.

ECOT's own contract with its sponsor, ESCLEW, likewise calls for ECOT to monitor students' participation, not merely their log in. Under Section 6.14 of ECOT's agreement with its sponsor, ECOT must comply with the requirements set forth in Attachment 6.14 to that agreement, which appears to track some of the language found in R.C. 3314.27—"[i]f the internet or computer-based community school's ***participation*** is based on days rather than hours, ***participate [sic] must amount to at least five hours per day***." (**Exhibit 12**, cited portions of Sponsor Agreement) (emphasis added). That same section of the sponsor agreement provides that "Attachment 6.14 is statutory and the School shall comply with these provisions as now in effect, or, as the law may hereafter amend." *Id*. Thus, ECOT's own policies require it to measure actual student participation in determining what educational opportunities are offered.

Further, ECOT's stated attendance policy is found in Attachment 6.13 to the agreement. Under a section entitled "Truancy Policy Statement" ECOT states that to avoid the serious consequences of being labeled truant, "it is crucial that the student logs in, checks e-mail and participates in coursework regularly (25 hours per week minimum) each week in order to avoid consequences mentioned above." (Attachment 6.13). And, in the Student-Parent Handbook ECOT issues, ECOT tells parents that it has a system for tracking attendance and engagement and that student attendance is essential for the success of student enrolled in ECOT.

The trial court in the Franklin County Action concluded that "[u]nder these statutes," "ODE is entitled to consider durational data in reaching a funding decision for a community school." (**Exhibit 1**, Decision at 14). In particular, the trial court found that the definition of

"learning opportunities" found in R.C. 3314.08(H)(2) "shows that learning opportunities have a durational component that is measured in terms of actual student participation" and further that the language contained in (H)(3) requires the conclusion that "the duration of participation matters in determining whether a student has been offered (i.e., supplied) 920 hours of learning opportunities to a given student." (*Id.* at 14-15).

Yet, if ECOT continues to push the same failed theories that it advanced in its trial court action, it will argue here that it is entitled to over $100 million of taxpayer money for the 2015-16 school year ***even if not a single student logged into ECOT's online platform for more than 10 minutes per day, and even if the student had not accessed a single learning opportunity during that time***. That is not only inconsistent with statutory plain language, it is absurd.

B. ECOT Cannot Avoid That Result By Noting That ODE Had Not Requested Durational Data In Connection With Previous FTE Reviews.

Separately, ODE anticipates that ECOT will argue that ODE did not ask ECOT for student participation data during FTE reviews in prior years, and that this somehow precludes ODE from considering such data now. ECOT is wrong. To be sure, ODE did not request such data in previous FTE reviews, but, as described above, it certainly had the right to do so. Accordingly, ODE's decision not to do so in connection with the earlier reviews does not preclude it from relying on such data now. To start, as a matter of law, because ECOT is a public school, it cannot assert retroactivity concerns. Separately, even if ECOT could, the FTE review materials at issue here have provided for over six years that ODE reserves the right to seek student participation data.

The Ohio Supreme Court recently confirmed that public school districts cannot assert retroactivity concerns relating to their funding. *See Toledo City School Dist. Bd. of Educ. v. State Bd. of Educ. of Ohio*, 146 Ohio St.3d 356, 2016-Ohio-2806. In that case, three school

districts challenged what they claimed were impermissibly retrospective changes to a school funding formula. After a lengthy historical analysis, the Court concluded that the Retroactivity Clause in Ohio's Constitution "does not protect political subdivisions, like school districts, that are created by the state to carry out its governmental functions," meaning that retrospective adjustments to funding formulas were permissible. *Id*. at ¶ 46.

ECOT is a public school, just like the public schools at issue in *Toledo City School Dist. Bd. of Educ*., and it is carrying out the same "governmental function" of providing a public education. Thus, just like the school districts there, it cannot assert retroactivity concerns as a basis for challenging governmental action.

Even if it could put forward such an argument, that argument would fail. Since at least 2010, the FTE review manuals have supported ODE's ability to request and review durational data in connection with FTE funding reviews. ECOT has been aware of this since at least 2011. Moreover, ODE used the 2015 FTE Handbook for purposes of ECOT's 2015-16 school year review. That handbook was available on ODE's website since January 2015, more than six months before the 2015-16 school year began. Thus, ECOT cannot claim to have been unfairly surprised when ODE requested such data in connection with the 2016 FTE review.

Nor is ODE's decision to rely on such data with regard to FTE reviews unreasonable. ODE became sensitized to the student participation issue beginning in fiscal year 2013 when it reviewed the FTEs claimed by correspondence schools. Because these schools were mailing educational materials to students' homes, ODE personnel became concerned that they had no way of knowing how long a given student actually spent interacting with those materials. Once sensitized to this issue, ODE likewise determined that it should review durational information

from eschools, just to make sure that the students at such schools were actually participating and receiving an education.

In short, ODE had every right to ask for durational data, ODE acted reasonably in doing so, and ECOT cannot reasonably claim surprise as a basis for avoiding that result.

C. ODE Properly Determined That ECOT Can Only Substantiate 6,312.62 Of The 15,321.98 FTEs It Claimed For The 2015-16 School Year.

Consistent with the funding statute (and as instructed in the FTE review manual), as part of ECOT's 2016 FTE review (and the FTE review for other community schools), ODE requested durational data. ECOT, however, refused to provide it, even though ECOT had such documentation available. ODE thus could have determined that ECOT had provided 0.0 FTEs. Instead, ODE went to great lengths to overcome ECOT's refusal to substantiate its FTE with durational information, ultimately obtaining a court order ECOT to provide student participation data. Even then, ECOT continued to try and impede ODE, including making scurrilous accusations that ODE had engaged in criminal conduct and refusing to provide the data with SSIDs instead of student names or internal ECOT identification numbers. Despite these barriers. ODE personnel quickly and effectively analyzed the student participation data in these documents.

In response to the court order compelling production, ODE obtained 706 student files from ECOT reflecting student participation, including log-on and log-out records. ODE witnesses Aaron Rausch and Chris Babal will testify about how the data obtained pursuant to the Court order was analyzed and calculated. More specifically, as described above, ODE personnel created spreadsheets which they used to record and capture the student participation durational data from each of the student records that ECOT provided. After audits and data integrity checks for the individual spreadsheets, ODE then aggregated all of that data into a single spreadsheet

with over 120,000 individual durational entries for the 706 students records. Using this spreadsheet, ODE compared the FTE totals that ECOT's records substantiated to the FTEs that ECOT had claimed. In particular, ECOT had reported 414.35 FTEs for the 706 students for whom it had provided files to ODE. The analysis of the durational data in those records, however, showed that ECOT could only substantiate 170.71 of those 414.35 FTEs—or 41.119% of the claimed FTEs. ODE then applied this same percentage to the overall total FTEs that ECOT claimed for the 2015-16 academic year—i.e., 15,321.98—to reach the final determination that ECOT could substantiate (and thus should receive funding for) only 6,312.62 FTEs.

In sum the hearing will establish ODE's efforts to calculate ECOT's FTEs were reasonable. The calculation is based on data available to ODE which was analyzed using a logical and consistent process.

D. Any Effort By ECOT To Offer "New" Student Participation Data Not Previously Produced Must Be Rejected.

ODE anticipates that ECOT may attempt to provide at the hearing additional student participation data that it refused to provide to ODE during the FTE review process or in response to the motion to compel, and then use this newly provided data to challenge ODE's FTE determination. ECOT should not be permitted to do so. Time and again, ECOT refused to provide the student participation data to ODE personnel during the FTE review process. Even after ODE sent ECOT the final determination letter concluding that more than 9,000 of the FTEs that ECOT reported for the 2015-16 school year cannot be substantiated, ODE still invited ECOT to provide additional documentation. Indeed, even in the weeks leading up to this proceeding, ODE has offered to sit down with ECOT personnel and review any concerns that they may have about durational data. ECOT, however, has refused. Thus, it should not be allowed at this late date to submit additional documentation it could and should have submitted

earlier. Allowing ECOT to do so would condone schools abusing the administrative process, and undermine the FTE review process generally. The time for submitting new data has passed. The only question here is whether ODE acted in a reasonable fashion in reviewing and tabulating that data that ECOT previously provided.

IV. EVIDENCE THAT MAY BE OFFERED BY ODE IN ITS AFFIRMATIVE CASE

The Hearing Officer requested that the parties identify the witnesses and exhibits that they intend to use in establishing their affirmative case. As described above, ODE intends to show that the decision set forth in ODE's September 26, 2016 final determination letter is a reasonable determination based on the information available to ODE. To accomplish that, ODE intends to offer testimony from the following individuals:

Aaron Rausch	Community school funding background; efforts undertaken by ODE to conduct FTE review of ECOT for the 2015-16 school year; documentation of student participation, or lack thereof, provided by ECOT; review and analysis of information gathered from ECOT by court order; and the content of the September 26, 2016 final determination letter to ECOT.
Chris Babal	Efforts undertaken by ODE to conduct FTE review of ECOT for the 2015-16 school year; documentation of student participation, or lack thereof, provided by ECOT; and review and analysis of information gathered from ECOT by court order.

While ODE believes that these witnesses will be sufficient to establish its affirmative case, consistent with the Hearing Officer's instructions, ODE reserves the right to call additional witnesses to respond to any legal argument and evidence presented by ECOT.

Through these two witnesses, ODE may offer the following exhibits to establish the propriety of the determination in its September 26, 2016 final determination letter:

1037	2015 FTE Handbook ECOT_000260-000322
1038	2016 draft FTE Handbook ECOT_000323-000396
1116	ECOT Sponsor Agreement June 3, 2015 ODE_003102-003327

1223	2016-1-27 Wilhelm email to Barnes re FTE review ODE 000080-000083
1231	2016-2-12 Loew Email to Teeters attaching Letter ECOT_007405-007796
1242	2016-2-18 Wilhelm Email to Teeters re FY16 FTE review ODE 000086-000087
1281	2016-5-17 Wilhelm Email to Teeters attaching letter re initial review ECOT_007522-007523
1288	2016-5-24 Rausch Email to Teeters re Questions about initial FTE Review ECOT_007530-007532
1290	2016-5-25 Rausch Email to Teeters ECOT_007536-007538
1301	2016-6-6 Rausch Email to Teeters attaching letter ECOT_007544-007546
1500	2016-7-11 M. Little Ltr. to DR Cole
1501	2016-7-12 DR Cole Email to M. Little
1502	2016-7-13 M. Little Ltr. to DR Cole
1503	2016-7-14 DR Cole Ltr. to M. Little
1504	2016-8-2 DR Cole Ltr. to M. Little
1505	2016-8-10 DR Cole Ltr. to M. Little
1506	2016-8-16 DR Cole Ltr. to M. Little
1507	2016-9-7 J. Wilhelm Ltr. to R. Teeters
1508	2016-9-26 A. Rausch Ltr. to R. Teeters
1509	A. Rausch ECOT Data Entry and Data Quality Process Memo
1510	C. Babal Memo dated Aug. 22, 2016
1511	Full Data Spreadsheet
1512	Data Summary Spreadsheet
1513	Sample Individual Data Spreadsheet
1514	Reviewer Tracker

1515	Reviewer Guidance
1516	IQity vs. Main Spreadsheet

ODE reserves the right to offer additional exhibits respond to any legal argument and evidence presented by ECOT.

Given that this is an informal hearing, ODE does not anticipate that authenticity or admissibility issues are likely to arise with regard to these exhibits. To the extent that ECOT objects to the use of any of the above exhibits, however, ODE reserves the right to call any witnesses necessary to establish authenticity or admissibility (e.g., to establish that a particular exhibit constitutes a "business record").

Date: November 30, 2016

Respectfully submitted,

/s/ Douglas R. Cole
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by email upon counsel for the following this 30th day of November 2016:

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/s/ Douglas R. Cole
One of the Attorneys for the Ohio Department of Education

State Board of Education Meeting

Tess Elshoff, President – Nancy Hollister, Vice President
Paolo DeMaria, Superintendent of Public Instruction

*This time schedule is approximate and subject to change. Board Materials can be located at http://education.ohio.gov/State-Board/State-Board-Meetings

Sunday, June 11, 2017

5:30 p.m. **Dinner** – Double Tree, Capital Club

6:30 p.m. **Introduction to the OSBA Team & Agenda** – Double Tree, Capital Club

- Ice Breaker Exercise
- Departing Thought Question

Monday, June 12, 2017

8:00 a.m. **Chapter 119 Hearing** – Room 102

- OAC 3301-4-01: Notice of Meetings

8:10 a.m. **State Board Business Meeting** – Room 102

- **Call to Order:** President Elshoff – Room 102
- **Roll Call:** Jack Alsop – Room 102
- **Welcome and Pledge of Allegiance:** Joe Farmer – Room 102

Executive Session – Room 102
There will be no public business conducted by the Board at this time. The Board will take roll call and immediately move into Executive Session.

Approval of Minutes of the May 2017 Meeting – Room 102

Review of Written Reports and Items for Vote – Room 102

Report of the Superintendent of Public Instruction – Room 102

Public Participation on Voting Agenda Items – Room 102
(Individuals are not permitted to address the Board on matters that have been or will be the subject of an administrative hearing, including territory transfers or personnel actions.)

Voting on the Report and Recommendations of the Superintendent of Public Instruction – Room 102
(A list of items for vote is included at the end of the time schedule)

Public Participation on Non-Voting Agenda Items – Room 102
(Individuals are not permitted to address the Board on matters that have been or will be the subject of an administrative hearing, including territory transfers or personnel actions.)

Old Business – Room 102

New Business – Room 102

Adjourn

Lunch

State Board of Education Meeting

Tess Elshoff, President – Nancy Hollister, Vice President
Paolo DeMaria, Superintendent of Public Instruction

1:00 p.m. **State Board Strategic Work Session** - Riffe Tower, 31st Floor, East B
- Thought Question Discussion

2:00 p.m. **State Board Strategic Work Session**
- Why are we here and what is our purpose (roles and responsibilities; policy and process)

3:30 p.m. **Break**

3:45 p.m. **State Board Strategic Work Session**
- Maximizing Efforts Before, During and After Legislative Action

5:45 p.m. **Questions/Adjourn**

Tuesday, June 13, 2017

8:30 a.m. **State Board Strategic Work Session** - Riffe Tower, 31st Floor, East B
- Parliamentary Procedure

10:00 a.m. **State Board Strategic Work Session**
- Communication among and between board members

12:00 p.m. **Lunch**

1:00 p.m. **State Board Strategic Work Session**
- ODE's Strategic Plan: A progress report and the board's role in its development

2:30 p.m. **Break**

3:00 p.m. **State Board Strategic Work Session**
- From critical issues to positive action: moving forward

State Board of Education Meeting

Tess Elshoff, President – Nancy Hollister, Vice President
Paolo DeMaria, Superintendent of Public Instruction

Voting Agenda*

*Materials for items referenced below can be located here:
http://education.ohio.gov/State-Board/State-Board-Meetings

CONSENT AGENDA

1.	RESOLUTION TO ACCEPT THE VOLUNTARY SURRENDER AND TO ENTER AN ORDER TO REVOKE PERMANENTLY THE FIVE-YEAR PROFESSIONAL HIGH SCHOOL TEACHING LICENSE OF CHRISTOPHER C. HOLMAN

SCHOOL PERSONNEL

2.	RESOLUTION TO ACCEPT THE REPORT AND RECOMMENDATION OF THE HEARING OFFICER TO TAKE NO ACTION AGAINST THE FIVE-YEAR PROFESSIONAL SUPERVISOR LICENSE AND PERMANENT EDUCATION OF THE HANDICAPPED TEACHING CERTIFICATE OF MARY A. EY

MISCELLANEOUS RESOLUTIONS

3.	RESOLUTION TO RECOMMEND THE MODEL POLICY FOR VIOLENT, DISRUPTIVE, AND INAPPROPRIATE BEHAVIORS THAT STRESSES PREVENTATIVE STRATEGIES AND PARENTAL CONSENT FORM
4.	RESOLUTION TO GRANT *OR* DENY STUDENT'S RIGHT TO PARTICIPATE IN THE COLLEGE CREDIT PLUS PROGRAM PURSUANT TO R.C. 3365.03(A)(1)(A).
5.	RESOLUTION TO ACCEPT THE DECISION OF THE HEARING OFFICER IN ELECTRONIC CLASSROOM OF TOMORROW'S APPEAL PURSUANT TO O.R.C. 3314.08(K)(2). (60 *OR* 64 MILLION)
6.	RESOLUTION TO ACCEPT THE DECISION OF THE HEARING OFFICER IN VIRTUAL COMMUNITY SCHOOL'S APPEAL PURSUANT TO ORC 3314.034.
7.	RESOLUTION TO ACCEPT THE DECISION OF THE HEARING OFFICER IN A+ ARTS ACADEMY'S APPEAL PURSUANT TO ORC 3314.034.

Ohio | Department of Education

John R. Kasich, Governor
Paolo DeMaria, Superintendent of Public Instruction

June 16, 2017

VIA CERTIFIED MAIL (with enclosure) AND
E-MAIL (without enclosure)

Mr. Rick Teeters
Superintendent
Electronic Classroom of Tomorrow
3700 South High Street
Columbus, Ohio 43207

Re: June 2017 State Board of Education Resolution

Dear Mr. Teeters:

Enclosed please find a copy of the State Board of Education's Resolution to Accept the Decision of the Hearing Officer in Electronic Classroom of Tomorrow's Appeal Pursuant to ORC 3314.08(K)(2). At the meeting, the board accepted the Hearing Officer's decision and found that ECOT received an overpayment of $60,350,791 (the "Overpayment") for the 2015-16 academic year. This represents a 44.6 percent reduction of the 15,321.98 FTEs reported by ECOT for that year.

Due to the magnitude of the Overpayment, the Department is willing to agree upon a payment plan. As you know, the Department will recover the Overpayment through deductions from the monthly FTE payments otherwise due to ECOT. The Department proposes recovering the Overpayment through twenty-four (24) equal monthly deductions in the amount of $2,514,616.29. Please advise whether ECOT has a different proposal regarding recovery of the Overpayment. If the parties have not jointly agreed to a different payment plan before June 23, 2017, the Department will begin processing monthly deductions according to the schedule set forth above starting with the FTE payment to ECOT on July 13, 2017. The Department reserves the right to recover the Overpayment in the event that the Department is unable to fully recover the Overpayment through deductions from the monthly FTE payments otherwise due to ECOT.

25 S. Front St., MS 607
Columbus, Ohio 43215
education.ohio.gov

(877) 644-6338
For people who are deaf or hard of hearing, please call Relay Ohio first at 711.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Aaron Rausch
Director, Office of Budget and School Funding

enclosure

cc: Educational Service Center of Lake Erie West

Certified Mail: