IN THE SUPREME COURT OF OHIO

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| The Electronic Classroom of Tomorrow, | : | |
| | : | |
| Plaintiff-Appellant, | : | Case No. 2020-0182 |
| | : | |
| v. | : | On appeal from the Franklin County |
| | : | Court of Appeals, Tenth District |
| Ohio State Board of Education, et al. | : | |
| | : | Court of Appeals Case No. 17AP-767 |
| Defendants-Appellees. | : | |
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# MERIT BRIEF OF PLAINTIFF/APPELLANT THE ELECTRONIC CLASSROOM OF TOMORROW

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## INTRODUCTION

This case is before the Court because Defendants/Appellees the Ohio Department of Education ("ODE") and the Ohio State Board of Education ("BOE") convinced the Tenth District (upon reconsideration) to recognize an *exception* to the General Assembly's *uniquely-broad* proclamation that both ODE and the BOE are "subject to Chapter 119. of the Revised Code [including the right to judicial review of 'quasi-judicial' decisions]" in the "exercise of ***any** of [their] functions or powers*." R.C. 3301.13 (emphasis added). Specifically, ODE and the BOE prevailed—after the Tenth District initially ruled in favor of ECOT—on their assertion that a simple reference to the "final[ity]" of the BOE's ***admittedly*** "quasi-judicial" decisions regarding the amount of full-time equivalency ("FTE") funding available to community schools forecloses all appellate review of such decisions under Chapter 119 of the Revised Code.

The practical result is that ODE and the BOE are currently able—through appointment of their own *hand-picked* hearing officers—to serve as prosecutor, judge, jury, and executioner in community school FTE funding disputes, ***unchecked*** by the availability of judicial review. That result is inconsistent with the applicable statutory language and pertinent rules of statutory construction.

"The preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *State ex rel. Lee v. Karnes*, 103 Ohio St. 3d 559, 2004-Ohio-5718, 817 N.E. 2d 76, ¶ 27 (citation omitted). But, the position advocated by ODE and the BOE and adopted (after first being rejected) by the Tenth District is contrary to the plain and unambiguous language of R.C. 3301.13, which subjects these agencies to the substantive and procedural protections afforded by Chapter 119 in the exercise of "***any***"

of their functions or powers. It also runs headlong into key legal propositions (including rules of statutory construction) developed to ensure that administrative agencies—like ODE and the BOE—cannot act with impunity as prosecutor, judge, jury, and executioner in quasi-judicial matters.

First is the long-settled rule that "[s]tatutes providing for appeals"—like R.C. 119.12 and Section 3301.13—"are remedial in nature and should be given a liberal interpretation ***in favor of a right of appeal***." *Van Meter v. Segal-Schadel Co.*, 5 Ohio St. 2d 185, 185, 214 N.E.2d 664, 665, Syll. ¶ 1 (1966) (emphasis added).

Second is the proposition, embodied in Ohio's administrative procedure act (and the analogous federal act) that judicial review of administrative decisions is an important component of separation of powers that serves as a check on potential political and other abuses by the executive branch. *See*, *e.g.*, *First Nat'l Bank of Middletown v. Superintendent of Banks*, 1975 Ohio App. LEXIS 7402, *2 (10th Dist., April 17, 1975) ("One fundamental purpose of the review of administrative decisions is to minimize political influence in that area."); *Burke v. Fought*, 64 Ohio App. 2d 50, 56, 410 N.E.2d 455 (6th Dist. 1978) (both the federal and Ohio administrative procedure acts were designed, at least in part, "[t]o avoid the evil … of commingling in one person the duties of prosecutor and judge …"). Hence, as to agencies legislatively deemed subject to Chapter 119, it is generally presumed that a right to judicial review exists, and exceptions thereto must be ***explicit and unequivocal***. *See First Nat'l Bank*, 1975 Ohio App. LEXIS 7402, at *2 (if a right to judicial review "is thwarted, it should be by unequivocal pronouncement"); *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1268 (9th Cir. 2020) (courts "'police the separation of powers in litigation involving the

executive[.]' For this reason, there is a ***strong presumption*** favoring judicial review of administrative action; non-reviewability is an ***exception that must be clearly evidenced in the statute.***") (emphasis added) (citations omitted).

ODE and the BOE base their entire argument against the availability of Chapter 119 appeal rights on a lone reference to the finality of the BOE's decisions in R.C. 3314.08(K)(2)(d). But, that is ***not*** the type of unequivocal pronouncement necessary to establish an exception to the right to appeal, particularly given the broad language of R.C. 3301.13. As the Court recognized in *Brookwood Presbyterian Church v. Ohio Dep't of Educ.*, 127 Ohio St.3d 469, 2010-Ohio-5710, 940 N.E. 2d 1256, ¶¶ 12-20, the word "final" *does not equal* "non-appealable." To the contrary, "[i]t is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.' … Thus, in our system of law, *'final' can mean* ***the opposite of*** *'not appealable.*' *Id.* ¶ 12(emphasis added) (internal quotation marks omitted).

Indeed, when the General Assembly intends to foreclose appellate rights, it knows how to do so: "by specifying that the [agency's] decision is final ***and not subject to appeal***." *Id.* ¶ 13 (emphasis added). As discussed further below, it has, in fact, done so in many instances. *See*, *e.g.*, R.C. 3318.051(E) ("Any decision by the [Ohio facilities construction] commission to approve or not approve the transfer of money under this section is final ***and not subject to appeal***.") (emphasis added).

It did ***not*** do so in R.C. 3314.08(K). Instead, via Section 3301.13, the General Assembly deemed ODE and the BOE subject to Chapter 119 in *all respects*. Thus, the availability of Chapter 119 appeal rights from the BOE's "final" FTE funding decisions is

*clear*, and such rights should be vindicated by this Court. But, even if some ambiguity exists, it must be resolved in favor of appellate rights under R.C. 119.12; as there is no *clear and unequivocal* statutory pronouncement to the contrary.

For these and the other reasons discussed below, the Tenth District's re-considered decision should be reversed, and the case remanded to the trial court for consideration of ECOT's Chapter 119 appeal on the merits.

## STATEMENT OF FACTS

### A. Overview Of The Administrative Proceeding, And The Predictable Result Attained.

This matter arises from a Chapter 119 appeal filed by ECOT, with the Franklin County Common Pleas Court, on June 27, 2017. Specifically, via its notice of appeal, ECOT sought review by the trial court, under R.C. 119.12(D), of the BOE's June 12, 2017, vote in favor of a resolution approving the May 10, 2017 Report and Recommendation of the Hearing Officer in *In the Matter of: Electronic Classroom of Tomorrow Full-Time Equivalency (FTE) Review Appeal* (the "R & R"). [Exh. QQ in Administrative Record filed with Trial Court on July 25, 2017 ("Admin. R.").]

The R & R, as approved by the BOE via its resolution, authorized ODE to begin clawing back tens of millions of dollars in previous funding provided to ECOT for the 2015-2016 school year, based on ODE's application of a new, durational funding standard purportedly under R.C. 3314.08. [Admin. R. QQ, UU (resolution).][1] Such

[1] To be sure, a majority of this Court previously ruled the pertinent community school funding statute "authorize[d]" ODE and the BOE to impose a durational funding standard. *Elec. Classroom of Tomorrow v. Ohio Dep't of Educ.*, 154 Ohio St.3d 584, 2018-Ohio-3126, 118 N.E.3d 907. But, that is not the issue presented here. Indeed, even though the BOE may have been statutorily authorized to take certain action, the existence of such authority *does not give it carte blanche to implement its authority in a manner that is arbitrary and capricious, or otherwise inconsistent with settled principles*

action followed an administrative hearing held because ECOT "appealed" ODE's "final [funding] determination" for the 2015-2016 school year. ECOT's initial appeal was filed and the subsequent hearing was conducted under R.C. 3314.08(K) before a hearing officer ***hand-picked by ODE*** who regularly made statements and/or asked questions openly advocating for the agency's position. [*See generally* Admin. R. FF (transcript).] ODE, itself, served as *de facto* prosecutor during the administrative hearing in seeking to "claw back" millions of dollars in FTE funding (i.e., the primary source of state funding for community schools) from ECOT—then Ohio's largest online community school.

During the administrative hearing, ECOT identified (and presented significant evidence as to) a host of administrative misconduct that, ECOT submits, may generously be described as arbitrary and capricious. For example, as described in ECOT's post-hearing brief [Admin R. BB], ECOT challenged ODE's failure to:

- Establish actual, concrete, and consistent standards pursuant to which it purportedly sought to hold ECOT liable for tens of millions of dollars as part of the 2016 FTE review process. To the contrary, ODE repeatedly changed its position as to what was required (albeit with minimal specificity), all while providing conflicting statements as to when it would be required. *See, e.g.*, *Distributors Pharm. Inc. v. Ohio State Bd. of Pharm.*, 41 Ohio App. 3d 116, 118-19 & Syll. ¶ 2, 534 N.E.2d 914 (8th Dist. 1987) (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.") (citations omitted); *Provens v. Ohio Real Estate Comm'n*, 45 Ohio App.2d 45, 48 341 N.E.2d 329 (10th Dist. 1975) (regulated parties "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") (internal quotation marks omitted).

- Provide ECOT with reasonable ***advance***, accurate, and detailed notice of the standard to be applied, and the consequences for failure to comply

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***of administrative law***. Recognition of Chapter 119 appeal rights is, thus, necessary to preserve community schools' ability to obtain judicial review of such administrative misconduct.

with the same—particularly where the standard reflected a significant departure from the agency's decade-long practice and guidance to the effect that FTE funding was based on enrollment (not duration of participation). 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.*** *See Khoury v. Bd. of Liquor Control*, 52 Ohio Law Abs. 434, 438, 81 N.E. 2d 634 (10th Dist. 1948) (court held that 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").

- Follow its own articulated processes and procedures in undertaking regulatory action. *See, e.g.*, *Service v. Dulles*, 354 U.S. 363, 388, 77 S.Ct. 1152 (1957) (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).

- Treat similarly-situated regulated parties in the same manner, when engaging in regulatory processes/implementing regulatory standards. Other eschools, who similarly relied on ODE's past practices and guidance in pursuing FTE Funding based on enrollment were given a pass during the same year in which ECOT was subjected to crippling, retroactive liability.[2] *See, e.g., CliniComp Int'l, Inc. v. U.S.*, 117 Fed. Cl.

[2] In his prior role as Auditor of State, Attorney General Dave Yost essentially confirmed these administrative improprieties in recognizing that, prior to 2016, the Ohio Department of Education had ***always*** advised the Auditor's office that community school funding was to be based on *student enrollment*—the methodology that ECOT had historically used. That is made clear in then-Auditor Yost's December 12, 2018, Public Interest Report on E-School Funding and FTE Monitoring. *See* https://ohioauditor.gov/auditsearch/Reports/2018/E-School_Funding_FTE_Monitoring_17-Franklin_PublicInterestAudit.pdf (the "E-school Report"). In the E-School Report, Yost noted, among other things, that: (1) "until recently, the Ohio Department of Education did not verify e-school attendance this way [i.e., based on duration of participation]. Instead, *it essentially allowed e-school funding to be based on the* ***mere fact of enrollment in the e-school****, with teachers certifying that each student had been provided with required learning opportunities*, whether or not the student took advantage of those opportunities"; (2) "[t]his new standard for documentation was introduced *virtually without warning by ODE, and e-schools, which never before had been required to document participation data – also called durational data – were caught flatfooted*. ***In fact, the Education Department did not inform the Auditor of State's office about this change either, and initially asserted that no***

722, 742 (Fed. Cl. 2014) (an agency failed to advance a reasonable explanation for a decision to relax its bidding requirements for the benefit of one bidder over the other, displaying "unequal treatment [that] is fundamentally arbitrary and capricious").

ODE's Hearing Officer, however, predictably found no misconduct and essentially rubber-stamped the agency's position. [Admin. R. QQ.] The BOE then, in turn, did the same in adopting the R & R. [Admin. R. UU.]

### B. ECOT's Pursuit Of Alternative Avenues Of Relief Given ODE's And The BOE's Inconsistent And Continually Evolving Statements Regarding The Nature Of The Administrative Proceedings.

Following these events, ECOT initially pursued alternative avenues of judicial relief—in the form of this Chapter 119 appeal and a separate petition for mandamus relief filed with this Court—due to ***inherently conflicting*** and continually evolving information provided/statements made by ODE and BOE as to the nature of the proceedings conducted under R.C. 3314.08(K). [*See State ex rel. Electronic Classroom of Tomorrow v. The Ohio State Board of Education, et al.,* Case No. 2017-0880 (Ohio Sup. Ct.) (the "Mandamus Action").]

For example, the BOE's then-published policies reflected its official view that adversarial proceedings resulting in an adjudication of parties' rights and/or duties were subject to Chapter 119—specifically including R.C. 119.12's appeal provision. Such policies, then (but no longer) found at http://education.ohio.gov/getattachment/State-Board/State-Board-Reports-and-Policies/Current_May-2017-Policies-Procedures-Manual.pdf.aspx, included the following:

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***change had occurred***."; and (3) "***[a]t present****, neither state law nor Education Department guidelines are entirely clear, and* ***this lack of clarity*** *is evident in the inconsistencies in the online data that has been accepted by the Education Department*, data which in numerous cases is flawed because of overlap and duplication." [Id. at 8-9, 15 (emphasis added).]

Quasi-Judicial Role Generally

> When the State Board of Education (SBOE) issues a ***final "adjudication"*** [citing Chapter 119 definition] 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 Union Title Co. v. State. Bd. of Educ., 51 Ohio St.3d 189 (1990); Rossford Exempted Village School Dist. v. State Bd. of Educ. 45 Ohio St.3d 356 (1989); State, ex rel. Bratenahl Local School Dist. Bd. of Educ. v. State Bd. of Educ., 53 Ohio St.2d 173 (1978). *Pursuant to Ohio Revised Code (ORC) 119.12 and Section 4(B), Article IV of the Ohio Constitution, a party adversely affected by such final decisions of the SBOE **may appeal to the court of common pleas***. See Union Title, 51 Ohio St.3d at 194-195; Rossford, 45 Ohio St.3d at 654-655; State, ex rel. Bratenahl, 53 Ohio St.2d at 176.
>
> [Trial Court R-1681, ECOT's August 23, 2017 Memorandum in Opposition to Defendants' Motion to Dismiss (the "8/23/17 Memo Contra"), at 7 (emphasis added).]

Yet, ODE's hand-picked Hearing Officer and in-house counsel ignored this policy and initially took a contrary position. For example, in his R & R and in direct contravention of the BOE's then-existing policies, the Hearing Officer, without citing any authority, characterized the underlying administrative process as follows:

> R.C. 3314.08(K)(2) provides a limited opportunity for the school to challenge any finding of overpayment through an *informal* hearing process that, *unlike the formal adjudication hearing conducted pursuant to R.C. Chapter 119* that is afforded educator licensees, *is not appealable to the court system*.
>
> [*Id.* at 4; Admin. R. QQ, at 69 (italics in original) (italics and underline added).]

When ECOT subsequently sought an opportunity to be heard by the BOE before it voted to approve the R & R at a regularly-scheduled meeting, ODE's and the BOE's

then in-house counsel, Diane Lease, responded with a similar position. Specifically, in rejecting ECOT's request to speak at the BOE's June 12, 2017 BOE meeting, attorney Lease stated that "R.C. 3314.08(K) specifically provides for a statutory informal hearing process, rather than a formal Chapter 119 hearing, as Hearing Officer Pratt specifically noted." [Exh. C to 8/23/17 Memo Contra, May 19, 2017 Letter, at 1 ("Lease Letter").] Attorney Lease added that "it is not at all clear that Board review of a decision from an 'informal hearing' under R.C. 3314.08(K) constitutes a 'quasi-judicial' determination as that term is used" in Respondents' reference materials. [Lease Letter, at 2.]

### C. Reversing Course From The Lease Letter, The BOE Subsequently Asserts That The R.C. 3314.08(K) Process Is Quasi-Judicial, In Order To Avoid Liability Based On Its Non-Compliance With Ohio's Open Meetings Act.

After the BOE precluded ECOT from specifically speaking before the BOE's vote based on the reasoning set forth in the Lease Letter and without the BOE engaging in any meaningful public deliberations,[3] ECOT on June 14, 2017, filed suit against the BOE for violating Ohio's Open Meetings Act. [*See Electronic Classroom of Tomorrow v. The Ohio State Board of Education*, Case No. 17-cv-005315 (Franklin Cty. Comm. Pls.) (the "ECOT OMA Case").][4] In response to the filing of the ECOT OMA Case, ODE and the BOE once again changed their tune.

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[3] A general and brief public comment period was, of course, held as part of the BOE's normal meeting procedure. However, ECOT was denied an opportunity to formally present information/argument specific to the BOE's deliberations and consideration of the claw back resolution.

[4] This Court may take judicial notice of proceedings that are a matter of public record in other cases. *See*, *e.g.*, *State ex rel. Ford v. Ruehlman*, 149 Ohio St. 3d 34, 2016-Ohio-3529, 73 N.E.3d 396, ¶ 48 ("[W]e take judicial notice of recent judicial proceedings before United States District Court Judge James G. Carr.").

Specifically, as part of the ECOT OMA Case, the BOE asserted and successfully obtained dismissal of ECOT's OMA claims by invoking an exception to the OMA based on the "***quasi-judicial***" nature of the administrative proceeding—in direct contravention of the Lease Letter. Accepting and largely adopting the BOE's arguments, the trial court in the ECOT OMA Case not only held that the BOE's challenged action was "quasi-judicial," but it also specifically recognized that the BOE "***adjudicate[d]***" the issue of ECOT's funding following such "quasi-judicial" proceedings. [Exh. A to 8/23/17 Memo Contra, July 12, 2017 Decision in ECOT OMA Case (the "July 12 OMA Decision").]

In its July 12 OMA Decision, the trial court, in pertinent part, stated that:

> The procedure outlined by R.C. §3314.08(K) ***contemplates a quasi-judicial*** *proceeding* as it addresses the steps to be followed when adjudicating a justiciable conflict that requires evaluation and resolution, after notice and a hearing. The fact that R.C. §3314.08(K) does not expressly state "notice" or "presentation of evidence" does not detract from the quasi-judicial nature of the proceeding as neither side disputes that notice and a hearing were provided. …
>
> * * *
>
> In the case at bar, the requirement of conducting a quasi-judicial hearing is clearly spelled out in R.C. §3314.08(K). The statute expressly provides for a hearing.
>
> * * *
>
> … The fact that the quasi-judicial proceeding began in front of a hearing officer and culminated in front of BOE does not negate the fact that what occurred was quasi-judicial in nature. BOE, after an informal hearing that was held in front of its designee, at which time hearing ECOT presented thousands of pages of exhibits and evidence, exercised its discretion in deciding a justiciable conflict that requires evaluation and resolution. BOE engaged in quasi-judicial conduct when deciding to adopt the hearing officer's decision that ECOT was overpaid by $60 million for the 2015-2016 academic year. Therefore, its deliberations that

> led to the decision were quasi-judicial in nature and not within the purview of R.C. §121.22.
>
> [*Id.* at 14-15 (emphasis added).]

The Tenth District subsequently affirmed the July 12 OMA Decision. In doing so, it held that the R.C. 3314.08(K) hearing and decisionmaking processes constituted "a quasi-judicial proceeding." *Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ.*, 10th Dist. Franklin No. 17AP-510, 2018-Ohio-716, 108 N.E.3d 124, 130, ¶ 25.

In its ***successful*** briefing before the Tenth District in the ECOT OMA Case, the BOE repeatedly asserted that its June 2017 action was part of a quasi-judicial, adjudicative proceeding. For example, in its "Corrected Brief" filed on August 31, 2017 in the OMA Appeal (and available via the Tenth District's online docket), the BOE asserted that:

- Its "ruling" on the R&R at the June 2017 board meeting was a "final adjudication" [Tenth District R-21, Appellant's Brief, at 9-10];
- The administrative proceedings below were "*quasi-judicial*" in nature, "with BOE performing an *adjudicatory* function …" [*id.*];
- "The designee-BOE hearing procedure, established in R.C. 3314.08, is quasi-judicial[,]" and the fact that such hearing is designated as informal "does *not* negate its quasi-judicial nature" [*id.* (emphasis added by BOE)]; and
- "By [here] issuing a ***final adjudication*** determining the rights of adverse parties after providing notice, a hearing, and the opportunity to present evidence, BOE acted *in a* ***quasi-judicial*** *capacity*, as it *typically does* in administrative hearings"—mirroring the language of the BOE's then-existing "policies," quoted above, *which recognized a right to appeal in such circumstances*. [*Id.* (emphasis added).]

**D. The BOE's Conflicting Arguments In The Mandamus Action And The Chapter 119 Appeal.**

Against this backdrop, ODE and the BOE not surprisingly also took conflicting positions in opposing ECOT's efforts to obtain judicial relief via its Chapter 119 appeal and the Mandamus Action. For example, on July 21, 2017, the BOE moved to dismiss the Mandamus Action on multiple grounds. One such argument was the purported availability of an adequate remedy at law *via ECOT's Chapter 119 Appeal* below. [Exh. E to 8/23/17 Memo Contra, BOE's Motion to Dismiss Mandamus Action, *also available at* http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=827941.pdf.]

However, while its motion to dismiss the Mandamus Action was pending, ODE and the BOE remarkably filed a separate motion to dismiss ECOT's Chapter 119 Appeal because, according to them, no Chapter 119 appeal rights exist following an "informal" hearing under Section 3314.08(K). Thus, ODE and the BOE asserted that ECOT *could only seek relief in the form of a writ of mandamus*. [Trial Court R-1179, BOE's August 8, 2017 Motion to Dismiss, at 1.]

On September 13, 2017, this Court issued an entry granting the BOE's motion to dismiss the Mandamus Action, without analysis or discussion. [Trial Court R-1688, Exh. A to Parties' 9/20/17 Joint Status Report.][5]

### E. The Trial Court's Dismissal Order And The Multiple, Inconsistent Decisions From The Tenth District As To The Existence Of Chapter 119 Appeal Rights.

Thereafter, on October 6, 2017, the trial court below (the same court that previously dismissed the ECOT OMA Case) granted the BOE's motion to dismiss

[5] Under Ohio law, if no right to a Chapter 119 appeal exists, mandamus is the vehicle for seeking relief as to agency misconduct. *See, e.g., State ex rel. Keyes v. Ohio Pub. Empl. Ret. Sys.*, 123 Ohio St.3d 29, 2009-Ohio-2052, 913 N.E.2d 932, ¶ 10. Yet, via their successful assertion of inconsistent positions, ODE and the BOE were able to cut off *all* avenues of relief from their challenged actions.

ECOT's Chapter 119 appeal. In so holding, the trial court focused exclusively on language in Section 3314.08(K)(2)(d) providing that the BOE's decision following an appeal is "final." [Trial Court R-1690; APP-21.] In doing so, the trial court determined that such language, standing alone, forecloses a Chapter 119 appeal. [*Id.*]

ECOT timely appealed that decision to the Tenth District. On July 10, 2018, the Tenth District issued an opinion in which a 2-1 majority held that ECOT ***could pursue*** a Chapter 119 appeal of the BOE's "quasi-judicial" funding determination under Section 3314.08(K). *See Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ.*, 10th Dist. Franklin No. 17AP-767, 2018-Ohio-2695, 116 N.E.3d 848 [APP-29]. In so holding, the original majority noted that: (1) the language of R.C. 3301.13 makes the BOE subject to Chapter 119 (including R.C. 119.12) in "any" of its actions; (2) the proceedings before and determination of the BOE were undisputedly "quasi-judicial" in nature; and (3) this Court's prior ruling precluded ECOT from pursuing mandamus relief. *Id.* at ¶¶ 13-25. As to the nature of the BOE's administrative proceedings, the Tenth District specifically noted its prior holding, as urged by the BOE, that Section 3314.08(K) entailed a "***quasi-judicial***" process. *Id.* at ¶ 14.

Thereafter, the BOE filed a motion for reconsideration in which it cited the same facts and authorities set forth in its merit brief. [Tenth District R-29.] On April 25, 2019, the Tenth District issued a new decision granting reconsideration, and reversing the prior ruling in favor of ECOT's Chapter 119 appeal rights. *Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ.*, 10th Dist. Franklin No. 17AP-767, 2019-Ohio-1540 [APP-06].

Via this second decision, a new majority—consisting of the original dissenter and a member of the prior majority—determined that no Chapter 119 appeal rights exist for

the same reasons expressed by the trial court and in the original dissent (i.e., the use of the word "final" in Section 3314.08(K)(2)(d)). *Id.* at ¶¶ 5-9. ECOT then sought re-consideration and/or *en banc* review of the "reconsidered" decision, which was denied. [Tenth District R-39 (motion); 53, 55 (journal entries), APP-11, 16.]

Thus, at bottom, the same panel of the Tenth District ***reversed*** its own prior decision, upon "reconsideration" requested by the BOE, *solely because one judge changed her mind*. No new facts or law were presented. Indeed, the initial and subsequent "majorities" were presented with and considered the ***exact same case law and the exact same facts*** in reaching *opposite* conclusions. The only difference was that one judge from the original majority changed her mind months after the original decision was issued, and decided to agree with the original dissenting opinion.

ECOT timely filed its notice of appeal with this Court on February 3, 2020. [APP-01.]

## ARGUMENT

**FIRST (AND SOLE) PROPOSITION OF LAW: A community school has a right to pursue a Chapter 119 appeal to the common pleas court from an adverse funding determination by the BOE under R.C. 3314.08(K).**

### A. Framework For The Court's Analysis: Basic Rules Of Statutory Construction And Separation Of Powers.

The Court's evaluation and determination of the existence of Chapter 119 appeal rights from decisions under R.C. 3314.08(K) [APP-39] ultimately hinges on basic principles of statutory construction, with any ambiguity resolved in favor of the right to appeal, given the importance of judicial review as a check on the arbitrary and/or unlawful actions of executive agencies.

Since this case, at its core, turns on the meaning and scope of legislative enactments, the Court's overriding objective must be to discern and enforce the legislature's intent. "When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation." *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St. 3d 549, 553, 2000-Ohio-470, 721 N.E.2d 1057, 1061. Stated differently:

> In keeping with Chief Justice Marshall's words, this court has held that "[t]he primary rule in statutory construction is to give effect to the legislature's intention," … by looking at the language of the statute, ... . When there is no ambiguity, we must abide by the words employed by the General Assembly, … and have no cause to apply the rules of statutory construction, …. "We 'do not have the authority' to dig deeper than the plain meaning of an unambiguous statute 'under the guise of either statutory interpretation or liberal construction.'"
>
> [*State ex rel. Clay v. Cuyahoga Cty. Med. Exam'rs Office*, 152 Ohio St. 3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶ 15 (emphasis added) (citations omitted).][6]

In instances of ambiguity, however, statutes providing for and/or relating to appellate rights must be construed in favor of an impacted party's right to seek judicial review. Indeed, this Court has held, as a matter of Syllabus law, that "[s]tatutes providing for appeals and for proceedings with respect to appeals and for limitations on the right of appeal are remedial in nature and should be given a liberal interpretation ***in favor of a right of appeal***." *Van Meter*, 5 Ohio St. 2d at 185 Syll. ¶ 1 (emphasis added). Specifically, "… R.C. 119.12 [the administrative appeal provision] is remedial

[6] *See also Karnes*, 2004-Ohio-5718, at ¶ 27 ("The preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'").

in nature and should, therefore, be given a liberal construction designed to assist the parties in obtaining justice under R.C. 1.11." *Lorms v. State Dep't of Commerce, Div. of Real Estate*, 48 Ohio St.2d 153, 155, 357 N.E.2d 1067, 1068 (1976) (internal quotation marks omitted). As a result, Ohio courts have consistently recognized that appeal-related statutes must be liberally construed in favor of appellate rights. *See*, *e.g.*, *Jackson Cty. Environ. Comm. v. Shank*, 67 Ohio App. 3d 635, 639, 588 N.E.2d 153 (10th Dist. 1990) ("We note that statutory appeal procedures are remedial in nature and are therefore to be … liberally construed in order to promote their object and assist the parties in obtaining justice.") (alteration in original) (internal quotation marks omitted).[7]

It follows that where an executive agency is made expressly subject to the administrative procedure act, any exceptions to the right of appeal from an agency's quasi-judicial decisions must be clear and unequivocal. Indeed, "[o]ne fundamental purpose of the review of administrative decisions is to minimize political influence in that area. If that purpose is thwarted, it should be by ***unequivocal pronouncement[.]***" *First Nat'l Bank*, 1975 Ohio App. LEXIS 7402, at *2 (emphasis added); *see also East Bay Sanctuary Covenant*, 950 F.3d at 1268 (applying analogous federal act, and recognizing that "non-reviewability is an exception that must be clearly evidenced in the statute"). Stated differently, "[j]urisdictional limitations … that shield

[7] *See also InterCity Foods, Inc. v. Porterfield*, 36 Ohio App. 2d 50, 56 at Syllabus, 301 N.E.2d 920 (5th Dist. 1970) ("Statutes providing for appeals and for proceedings with respect to appeals and for limitations on the right of appeal are remedial in nature and should be given a liberal interpretation in favor of a right of appeal.") (quoting *Van Meter*); *Svoboda v. Andrisek*, 33 Ohio App. 3d 165, 166-67, 514 N.E.2d 1140 (8th Dist. 1986) ("As the Ohio Supreme court has consistently stated: '… statutes providing for appeals and for proceedings with respect to appeals and for limitations on the right of appeal are remedial in nature and should be given a liberal interpretation in favor of a right of appeal.'") (quoting *Van Meter*).

agency actions from review are interpreted ***narrowly***: a 'basic presumption of judicial review' is followed absent 'clear and convincing evidence' of congressional intent to the contrary." *Carter v. Cleland*, 643 F.2d 1, 3-4 (D.C. Cir. 1980) (emphasis added).

This ***presumption*** of appellate rights flows from the separation of powers doctrine, and ensures the availability of judicial review as a check on executive impropriety:

> We do not conduct independent policy analyses of executive decisions. But we do "police the separation of powers in litigation involving the executive[.]" …. …. Without such [judicial] review, "statutes would in effect be blank checks drawn to the credit of some administrative officer or board." …
>
> [*East Bay*, 950 F.3d at 1268 (emphasis added).]

Such review, thus, serves to avoid "the evil … of commingling in one person the duties of prosecutor and judge …." *Burke*, 64 Ohio App. 2d at 56. As another Ohio court noted:

> It must not be overlooked … that the continually increasing trend in government is government by administrative device, encompassing more and larger areas of economic and social life, and it has in it the dangers inherent in autocratic attitudes, human judgments, and the insidious possibility of the use of political and financial influence opposed to the public good. *The imminency of such distortions of justice make an 'adjudication,' as some courts put it, 'ripe' for review. An administrative order, 'applied,' not in a vacuum, may be unreasonable and unlawful, or the order resulting from an adjudication may not be supported by reliable, probative, and substantial evidence.* ***Review is essential***."
>
> [*Clermont Nat'l Bank v. Edwards*, 27 Ohio App. 2d 91, 102-03, 273 N.E.2d 783, 790 (10th Dist. 1970) (emphasis added).]

*See also*, *Sang Seup Shin v. Immigration & Naturalization Service*, 750 F.2d 122, 125 (D.C. Cir. 1984) ("Our system of laws requires evenhanded adjudication, not administrative indulgences *unchecked by congressional limits or judicial review*.") (emphasis added).

In short, where an agency is subject to the administrative procedure act, any doubt as the existence of appellate rights thereunder must be resolved in favor of a regulated party's right to pursue an R.C. 119.12 appeal. [APP-47 (copy of R.C. Chapter 119).]

### B. The Plain Statutory Language Makes Clear That ODE And The BOE Are Subject To Chapter 119 In All Respects, And No Exception To Section 119.12 Appellate Rights Exists Under R.C. 3314.08(K).

Ultimately, the Court need not resort to the rule of liberal construction because the plain statutory language, coupled with the BOE's *successful* assertion that the R.C. 3314.08(K) hearing and decisionmaking processes are "*quasi-judicial*," clearly establishes community schools' right to pursue a Chapter 119 appeal from the BOE's FTE funding determinations.

As made clear in the applicable statutory language, the pertinent inquiry turns on a determination of: (1) Whether the administrative decision in question is an "adjudication" issued as part of a "quasi-judicial" process; and if so, (2) Whether the agency is subject to Chapter 119 with respect to the decision at issue. *See* R.C. §§ 119.01, 119.12; *Brookwood*, 2010-Ohio-5710, at ¶¶ 12-20. The answer to both questions is clearly yes. Thus, Section 119.12 appeal rights clearly exist.

#### 1. Step One: The BOE's Challenged Action Was An "Adjudication"—As The BOE *Successfully* Argued In The ECOT OMA Case.

*First*, R.C. 119.12 specifies that an aggrieved party is entitled to file an administrative appeal with a common pleas court following an "agency's" "adjudication" order. It states that: "(B) Any party adversely affected by *any order of an agency issued pursuant to* ***any other adjudication*** may appeal to the court of common pleas of Franklin county … ." (Emphasis added.). There is no ambiguity in this provision. If a covered "agency" issues an "adjudication" order, *a Chapter 119 right to appeal exists*.

The BOE has repeatedly *admitted* that its challenged decision was an adjudication that resulted from a "quasi-judicial" process. The Tenth District *adopted* this reasoning in affirming dismissal of the ECOT OMA Case. *Elec. Classroom of Tomorrow*, 2018-Ohio-716, ¶ 25. As such, this element is readily satisfied.

**2. Step Two: The BOE Is An "Agency" Whose Adjudicative Decisions Are Appealable Under Chapter 119.**

*Second*, the BOE (and ODE, for that matter) is undisputedly an "agency" whose adjudicatory orders are appealable under R.C. 119.12. Again, application of the plain and unambiguous statutory language inevitably leads to this result. In pertinent part, R.C. 119.01(A)(1) defines a covered "agency"—for purposes of Section 119.12—as follows:

> "Agency" means … any official, board, or commission having authority to promulgate rules or make adjudications in … *the* ***functions*** *of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state* ***specifically made subject*** *to sections 119.01 to 119.13 of the Revised Code* … .
>
> [(Emphasis added.)]

The plain and unambiguous language of R.C. 3301.13 establishes the "agency" status—for purposes of Section 119.12—of the BOE in the exercise of ***any*** of its

functions. [APP-38.] Section 3301.13 provides, in pertinent part, that: "The department of education shall consist of the ***state board of education*** …. In the exercise of ***any of its functions or powers*** … the department of education, and any officer or agency therein, ***shall be subject to Chapter 119. of the Revised Code***. …" [*Id.* (emphasis added).]

This language, ***uniquely broad*** among the provisions applicable to state agencies,[8] means what it says: The BOE is "specifically made subject" to Chapter 119 in "***any***" of its functions. *Any* means *any*, and "shall" means "shall." *See Risner v. Ohio Dep't of Natural Res.*, 144 Ohio St. 3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 18 (noting that, when used in a statute, "'Any' means 'all.' *Webster's Third New International Dictionary* 97 (2002)[,]" and holding that when a statute is "phrased in broad, sweeping language, we must accord it broad, sweeping application"); *State v. Martin*, 154 Ohio St. 3d 513, 2018-Ohio-3226, 116 N.E.3d 127, 27 (in considering a statute, courts must construe "the word 'shall' … as *mandatory* unless there appears a

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[8] A review of the Revised Code reveals ***more than sixty*** examples of statutes requiring a commission, agency, or other governmental body to comply with Chapter 119. *See, e.g.,* R.C. 4740.05; 4740.04; 4758.20(B); 4734.10; 4709.05(J); 3773.34(A); 4757.10; 5502.62(B); 4715.031(C); 5123.043(A); 4759.05; 3706.29; 3517.152(G); 173.01; 124.03(A); 5902.02; 3701.04(B); 6109.04; 3772.02(B); 4981.33(C); 4981.30(A); 4925.02(C); 4921.25(B); 5119.21; 5120.422; 5120.70(A); 5120.62; 5120.423; 5120.111; 5120.103(D); 5120.49; 5120.34(A)(2); 5120.031(B)(1);5123.04(E); 5501.77(D); 5501.83; 5703.211(A); 4713.08(A); 1501.01(F); 4701.26; 123.2(B); 121.37(C)(9); 4747.06(B); 3333.374; 175.05(B); 4301.17(2); 4301.61(C); 5503.10; 121.50; 164.05(4); 3701.78(B); 4775.04(A); 4928.543; 4928.56; 4928.53(B)(1); 122.94; 4117.02; 4703.02; 4741.03(C); 5502.25; 4751.04(B) 5502.011(C)(2); 4781.04(A); 3332.031(A); 3901.041; 4717.03(A); 4765.11.

In all but ***one*** instance, these statutes simply state that an agency is to adopt "rules" consistent with Chapter 119, or in a few instances, that the agency is simply "subject" to Chapter 119. The ***lone*** exception is R.C. 3301.13 – the provision specifically applicable to ODE and the BOE and which makes clear that ODE and the BOE are ***broadly*** required to adhere to the Chapter 119 process in exercising any (i.e., all) of their functions and powers.

clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage") (emphasis by Court).

Thus, the statutory right to appeal necessarily includes the BOE's ***function*** and power in issuing "final" funding determinations for community schools, like ECOT, under R.C. 3314.08(K).

### 3. The Reference To A "Final" Decision In R.C. 3314.08(K) Is ***Consistent*** With The Existence Of Chapter 119 Appeal Rights.

The basic statement in R.C. 3314.08(K) that the BOE's decision following a community school's funding appeal is "final" does not change this conclusion. *See* R.C. 3314.08(K)(2)(d).[9] In *Brookwood*, *supra*, the Court rejected an argument that the use

[9] In pertinent part, R.C. 3314.08(K) states:

> (K) (1) If 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 governing authority of the community school and its sponsor within ninety days of the end of the community school's fiscal year. …
>
> (2) If the review results in a finding that … the community school owes moneys to the state, the following procedure shall apply:
>
> (a) Within ten business days of the receipt of the notice of findings, the community school may appeal the department's determination to the state board of education or its designee.
>
> (b) The 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.
>
> (c) If the board has enlisted a designee to conduct the hearing, the designee shall certify its decision to the board. The board may accept the decision of the designee or may

of such term foreclosed a putative community school sponsor from pursuing a Chapter 119 appeal from a specific determination by ODE. *Brookwood*, 2010-Ohio-5710, ¶¶ 6-21. In so holding, the Court rejected the notion that "final" automatically means non-appealable. Instead, citing long-standing jurisprudence, the *Brookwood* Court recognized, in analysis equally applicable here, that:

> [The pertinent provision] merely says that the determination is "final." We can look to our own jurisprudence and the Ohio Constitution to determine the legal significance of the word "final." In *Walburn v. Dunlap*, 121 Ohio St. 3d 373 … this court explained, "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.' …" Section 3(B)(2), Article IV of the Ohio Constitution grants courts of appeals appellate jurisdiction "as may be provided by law to review and affirm, modify, or reverse *final* orders or actions of administrative officers or agencies. (Emphasis by court.) Thus, in our system of law, *"final" can mean* ***the opposite of "not appealable***."
>
> Had the General Assembly intended that the department's determination of whether an entity is education-oriented not be subject to administrative appeal, ***it could have done so by appropriate language***, i.e., by specifying that the department's decision is final and not subject to appeal. … In fact, the General assembly has employed this language carefully to specify when certain actions are not appealable. See R.C. 2712.21 …[,] 3318.051(E) …[,] 5126.0214 … .
>
> [*Id.* ¶¶ 12-13 (emphasis added).]

Rejecting ODE's reliance upon certain lower-court decisions that refused to recognize Chapter 119 appeal rights based on discrete statutory provisions as to

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> reject the decision of the designee and issue its own decision on the matter.
>
> (d) Any decision made by the board under this division is final.

agencies for which there is ***no mandate similar to that contained in Section 3301.13***,[10] the *Brookwood* Court further emphasized the existence of a "specific, statutory grant of jurisdiction to the trial court to review the decisions of the administrative body pursuant to R.C. 119.12." *Id.* ¶ 15. Such a grant exists here, in the form of Section 3301.13—a provision that is uniquely broad within the Revised Code in its mandatory language subjecting the BOE (and ODE) to the formal administrative procedures set forth in Chapter 119.

Of course, as noted in *Brookwood*, had the legislature intended to foreclose Chapter 119 appellate rights from the BOE's FTE funding decisions under Section 3314.08(K), it clearly knew how to do so. Indeed, other provisions contained within Title 33 of the Revised Code make explicitly clear an intended lack of appellate rights. *See*, *e.g.*, R.C. 3311.0510 ("(A) The superintendent's order shall provide that the tax duplicate of each of those school districts shall be bound for and assume the district's equitable share of the outstanding indebtedness of the service center. The superintendent's order is final ***and is not appealable***.") (emphasis added); 3311.81 (as to teacher re-employment decisions involving municipal school districts, "[t]he decision

[10] Tellingly, the decisions cited by the Tenth District in its reconsidered decision are the same ones this Court ***distinguished*** and declined to apply in *Brookwood*. *See Electronic Classroom of Tomorrow*, 2019-Ohio-1540, at ¶ 6. All of the cited cases are additionally distinguishable because they involved provisions relating to "final" decisions made by agencies that—unlike the BOE—***were not made expressly subject to Chapter 119 in all of their functions and powers***. *See*, *e.g.*, *Carney v. Sch. Employees Ret. Sys. Bd.*, 39 Ohio App.3d 71, 528 N.E.2d 1322 (10th Dist. 1987) (no provision similar to 3301.13 as to School Employees Retirement Board under R.C. Chapter 3309); *State ex rel. Shumway v. Ohio State Teachers Ret. Bd.*, 114 Ohio App.3d 280, 683 N.E.2d 70 (10th Dist. 1996) (no similar provision as to State Teachers Retirement Board under R.C. Chapter 3307); *Heartland Jockey Club, Ltd. v. Ohio State Racing Comm'n*, 10th Dist. Franklin No. 98AP-1465, 1999 Ohio App. LEXIS 3530 (Aug. 3, 1999) (no similar provision as to racing commission under R.C. Chapter 3769).

of the board shall be final and ***shall not be subject to further appeal***"); 3317.161(D)(5) (as to approval of career-technical educational programs, "[t]he department's decisions under divisions (D)(1) and (2) of this section shall be final and ***not appealable***"); 3316.03(E) ("A determination by the auditor of state under this section that a fiscal emergency condition does not exist is final and conclusive and ***not appealable***."); 3318.051(E) (regarding certain decisions by the Ohio facilities construction commission, "[a]ny decision by the commission to approve or not approve the transfer of money under this section is final and ***not subject to appeal***").[11]

[11] Similarly ***clear and unequivocal provisions*** can be found throughout the Revised Code. *See, e.g.,* R.C. 109.921 ("(2) The attorney general may decide upon an application for funding out of the rape crisis program trust fund without a hearing. A decision of the attorney general to grant or deny funding is final and ***not appealable under Chapter 119.*** or any other provision of the Revised Code.") (emphasis added); R.C. 118.04 ("(C) A determination by the auditor of state under this section that a fiscal emergency condition does not exist is final and conclusive and *not appealable*.") (emphasis added); R.C. 3345.72 ("(G) A determination by the chancellor of higher education under this section that a fiscal watch exists or does not exist, or that a fiscal watch is terminated or is not terminated, is final and conclusive and not appealable."); R.C. 3345.74 ("(A) … A determination by the chancellor under this division that sufficient fiscal difficulties exist or do not exist to warrant appointing a conservator is final and conclusive ***and not appealable***.") (emphasis added); R.C. 3345.76 ("(A) … A determination by a governance authority under this division that sufficient fiscal stability exists or does not exist to warrant terminating that governance authority is final and conclusive and not appealable."); R.C. 3702.524 ("(C) A certificate of need expires, regardless of whether the director sends a notice under division (B) of this section, if the holder fails to comply with division (A) of this section or to provide information under division (B) of this section as necessary for the director to determine compliance. The determination by the director that a certificate of need has expired is final and ***not appealable under Chapter 119. of the Revised Code***.") (emphasis added); R.C. 3750.14 ("Moneys credited to the fund under section 3750.13 of the Revised Code from the fees paid by the owner or operator of a facility who first submitted an emergency and hazardous chemical inventory form for the facility on or before the first day of March of the current year shall not be considered when making allocations under divisions (B)(1), (2), and (3) of this section, but shall be distributed pursuant to division (E) of this section. The allocated moneys shall be distributed at the start of each fiscal year. The commission's decisions on the distribution of moneys from the fund are not appealable."); R.C. 4117.06 ("(A) The state employment relations board shall decide in

No such language is found here. To the contrary, ODE and the BOE have been broadly made subject to Chapter 119 in the exercise of all of their respective functions and powers. In these circumstances, a reference to the mere "final[ity]" of the BOE's FTE funding decision does not foreclose appellate rights under R.C. 119.12. A contrary conclusion—as urged by ODE and the BOE—would improperly add language (i.e., "not appealable") the General Assembly specifically chose not to include in R.C. 3314.08(K)(2)(d). It would otherwise run afoul of the separation of powers-based presumption ***favoring*** appealability. As a result, the construction proffered by ODE and

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each case the unit appropriate for the purposes of collective bargaining. The determination is final and conclusive and not appealable to the court."); R.C. 5721.31 ("(C) At the public auction, the county treasurer or the treasurer's designee or agent shall begin the bidding at eighteen per cent per year simple interest, and accept lower bids in even increments of one-fourth of one per cent to the rate of zero per cent. The county treasurer, designee, or agent shall award the tax certificate to the person bidding the lowest certificate rate of interest. The county treasurer shall decide which person is the winning bidder in the event of a tie for the lowest bid offered, or if a person contests the lowest bid offered. The county treasurer's decision is ***not appealable***.") (emphasis added); R.C. 718.11 ("(A) … (4) Members of the board of tax review appointed by the legislative authority may be removed by the legislative authority by majority vote for malfeasance, misfeasance, or nonfeasance in office. To remove such a member, the legislative authority must give the member a copy of the charges against the member and afford the member an opportunity to be publicly heard in person or by counsel in the member's own defense upon not less than ten days' notice. The decision by the legislative authority on the charges is final ***and not appealable***.") (emphasis added); R.C. 931.03 ("(E) The approval or disapproval of an application under this section is not a final order, adjudication, or decision under section 2506.01 of the Revised Code and is not appealable under Chapter 2506. of the Revised Code.").

Similarly, when the legislature intends to remove certain administrative functions from the purview of Chapter 119, it does so expressly. *See, e.g.*, R.C. 5104.03 "(G) … (2) ("The following actions by the director ***are not subject to Chapter 119*** …") (emphasis added); R.C. 9.312 ("(B) …"No final award shall be made until the state agency or political subdivision either affirms or reverses its earlier determination. Notwithstanding any other provisions of the Revised Code, the procedure described in this division *is not subject to Chapter 119. of the Revised Code*.") (emphasis added).

the BOE, and adopted by the Tenth District in its reconsidered decision, is wrong and should be rejected.

## CONCLUSION

For all of these reasons, R.C. 3301.13 makes clear that ODE and the BOE are subject to Chapter 119—including appellate rights under R.C. 119.12—in the exercise of any (and all) of their functions. That includes "final" FTE funding determinations under R.C. 3314.08(K). As a result, the Tenth District's reconsidered decision should be reversed, with the case remanded to the trial court for substantive consideration of ECOT's Chapter 119 appeal on the merits.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the Court's electronic filing system on July 10, 2020, and served via email upon the following:

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## APPENDIX

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1036-002:861198

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| The Electronic Classroom of Tomorrow, | : | |
| | : | |
| Plaintiff-Appellant, | : | Case No. _____ |
| | : | |
| v. | : | On appeal from the Franklin County Court of Appeals, Tenth District |
| | : | |
| Ohio State Board of Education, et al. | : | |
| | : | Court of Appeals Case No. 17AP-767 |
| Defendants-Appellees. | : | |
| | : | |

# NOTICE OF APPEAL OF PLAINTIFF/APPELLLANT THE ELECTRONIC CLASSROOM OF TOMORROW

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Counsel for Defendants-Appellees

**NOTICE OF APPEAL OF PLAINTIFF/APPELLANT**
**THE ELCTRONIC CLASSROOM OF TOMORROW**

Plaintiff/Appellant The Electronic Classroom of Tomorrow ("ECOT"), hereby gives notice of appeal to the Supreme Court of Ohio from the decision and judgment of the Tenth District Court of Appeals, granting the motion for reconsideration of Defendants/Appellees the Ohio Department of Education and Ohio State Board of Education, which were entered in Electronic Classroom of Tomorrow v. Ohio State Board of Education, et al., Tenth District Case No. 17AP767, on April 25 and 26, 2019, respectively. On May 6, 2019, ECOT applied for reconsideration and/or *en banc* consideration of that decision and judgment entry. On December 20, 2019, both the original panel and *en banc* court issued separate judgment entries denying ECOT's respective motions. Pursuant to Supreme Court Practice Rules 7(A)(5) and 7(A)(6), this appeal has been filed within 45 days of the decisions denying ECOT's motion for reconsideration and/or *en banc* consideration.

This case is one that involves a substantial constitutional question and is of public or great general interest.

Respectfully submitted,

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1036-002: 847026

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| Electronic Classroom of Tomorrow, | : | |
| Appellant-Appellant, | : | No. 17AP-767<br>(C.P.C. No. 17CV-5773) |
| v. | : | |
| Ohio State Board of Education et al., | : | (ACCELERATED CALENDAR) |
| Appellees-Appellees. | : | |

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered on April 25, 2019, it is the order of this court that the application for reconsideration, filed on July 20, 2018, is granted. This court's July 10, 2018 decision and judgment entry are vacated. Appellant's original assignment of error is overruled, and the October 6, 2017 judgment of the Franklin County Court of Common Pleas is affirmed.

Judge Susan Brown

Judge Betsy Luper Schuster

Court Disposition

Case Number: 17AP000767

Case Style: ELECTRONIC CLASSROOM OF TOMORROW -VS- OHIO STATE BOARD OF EDUCATION ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 17AP0007672018-07-2099980000
   Document Title: 07-20-2018-MOTION TO RECONSIDER - OHIO STATE BOARD OF EDUCATION
   Disposition: 3201

# Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ.

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

April 25, 2019, Rendered

No. 17AP-767

**Reporter**
2019-Ohio-1540 *; 2019 Ohio App. LEXIS 1640 **; 2019 WL 1858225

Electronic Classroom of Tomorrow, Appellant-Appellant, v. Ohio State Board of Education et al., Appellees-Appellees.

**Subsequent History:** Reconsideration denied by, En banc *Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ., 2019-Ohio-5272, 2019 Ohio App. LEXIS 5347 (Ohio Ct. App., Franklin County, Dec. 20, 2019)*

Discretionary appeal allowed by *Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ., 2020 Ohio LEXIS 893 (Ohio, Apr. 14, 2020)*

**Prior History:** **[**1]** (C.P.C. No. 17CV-5773).

*Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ., 2018-Ohio-2695, 2018 Ohio App. LEXIS 2914, 116 N.E.3d 848 (Ohio Ct. App., Franklin County, July 10, 2018)*

**Disposition:** Application for reconsideration granted.

## Core Terms

reconsideration, education-oriented

## Case Summary

**Overview**

HOLDINGS: [1]-The Ohio State Board of Education and the Ohio Department of Education satisfied the grounds for reconsideration under *App.R. 26(A)(1)*, and thus, the trial court did not err in granting their motion to dismiss for lack of jurisdiction, because the majority's conclusion was inconsistent with precedent; [2]-The use of the word "final" in *R.C. 3314.08(K)(2)(d)* precluded an appeal under *R.C. 119.12* because *R.C. 3314.08(K)* specified that the decision was "final" and did not provide a specific grant of statutory jurisdiction to the trial court to review the decision of the administrative body.

**Outcome**
Application for reconsideration granted.

## LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

*HN1*[] **Relief From Judgments, Altering & Amending Judgments**

The test generally applied to an application for reconsideration is whether the application calls to the court's attention an obvious error in its decision or raises an issue for its consideration that was either not

considered at all or was not fully considered by the court when it should have been. However, an application for reconsideration is not designed for use in instances where a party simply disagrees with the logic or conclusions of the court. Furthermore, an application for reconsideration is not a means to raise new arguments or issues.

Education Law > Administration & Operation > Charter Schools

Education Law > Departments of Education > State Departments of Education > State Boards of Education

**HN2[] Administration & Operation, Charter Schools**

R.C. 3314.08 provides that if the Ohio Department of Education (ODE) determines that a review of a community school's enrollment is necessary, it shall complete a review and provide written notice of the findings to the governing authority of the community school. R.C. 3314.08(K)(1). If the review results in a finding that the community school owes money to the State, the statute sets forth the procedure the community school may use to appeal ODE's determination to the Ohio State Board of Education (BOE). R.C. 3314.08(K)(2). Within that framework, the statute then provides any decision made by BOE under this division is final. R.C. 3314.08(K)(2)(d).

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

**HN3[] Reviewability, Reviewable Agency Action**

The legislature's use of the word "final" in the context of decisions of administrative bodies means the decision is not subject to an appeal under R.C. 119.12.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Education Law > Administration & Operation > Charter Schools

Education Law > Departments of Education > State Departments of Education > State Boards of Education

**HN4[] Reviewability, Reviewable Agency Action**

R.C. 3314.08(K) specifies that the decision is "final" and does not provide a specific grant of statutory jurisdiction to the trial court to review the decision of the administrative body. Thus, a statute that provides a decision of an administrative body is "final" and that does not include a separate specific, statutory grant of jurisdiction to the trial court precludes an appeal under R.C. 119.12. Accordingly, the use of the word "final" in R.C. 3314.08(K)(2)(d) precludes an appeal under R.C. 119.12.

**Counsel:** Zeiger, Tigges & Little, LLP, Marion H. Little, Jr., John W. Zeiger, and Christopher J. Hogan, for appellant.

Organ Cole, LLP, Douglas R. Cole, Erik J. Clark, and Carrie M. Lymanstall, for appellees.

**Judges:** BROWN and LUPER SCHUSTER, JJ. BRUNNER, J., dissents.

## Opinion

(ACCELERATED CALENDAR)

DECISION

ON APPLICATION FOR RECONSIDERATION

PER CURIAM.

**[*P1]** On July 20, 2018, appellees-appellees, Ohio State Board of Education ("BOE") and Ohio Department of Education ("ODE"), filed an application seeking reconsideration, pursuant to *App.R. 26(A)(1)*, or, in the alternative, en banc consideration pursuant to *App.R. 26(A)(2)(c)*, of this court's July 10, 2018 decision in *Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ., 10th*

Dist. No. 17AP-767, 2018-Ohio-2695, 116 N.E.3d 848, which reversed the judgment of the Franklin County Court of Common Pleas. Appellant-appellant, Electronic Classroom of Tomorrow ("ECOT"), opposes BOE's and ODE's applications. For the following reasons, we grant the application for reconsideration.

## I. Background

**[*P2]** This court's opinion fully set forth the background of this case, and we will not repeat it here. After BOE issued a decision directing ECOT to repay an overpayment of public funds in excess of $60 million, ECOT sought to appeal the administrative action directly to **[**2]** the Franklin County Court of Common Pleas. The trial court dismissed ECOT's administrative appeal for lack of jurisdiction. On appeal to this court, the majority held the trial court erred in granting BOE's and ODE's motion to dismiss for lack of jurisdiction. More specifically, the majority concluded that the use of the word "final" in R.C. 3314.08(K)(2)(d) did not preclude ECOT from pursuing an appeal under R.C. 119.12(B).

## II. Application for Reconsideration

**[*P3]** HN1[↑] The test generally applied to an application for reconsideration is whether the application calls to the court's attention an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been. *Matthews v. Matthews, 5 Ohio App. 3d 140, 5 Ohio B. 320, 450 N.E.2d 278 (10th Dist.1981).* However, an application for reconsideration "is not designed for use in instances where a party simply disagrees with the logic or conclusions of the court." State v. Burke, 10th Dist. No. 04AP-1234, 2006-Ohio-1026, ¶ 2, citing State v. Owens, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). Furthermore, an application for reconsideration is not a means to raise new arguments or issues. State v. Wellington, 7th Dist. No. 14 MA 115, 2015-Ohio-2095, ¶ 9.

**[*P4]** In their application for reconsideration, BOE and ODE ask this court to reconsider its decision with regard to whether the use of the word "final" in R.C. 3314.08(K)(2)(d) precludes an appeal brought under R.C. 119.12. Upon reconsideration, **[**3]** we conclude this court's prior decision contains an obvious error in the analysis of R.C. 3314.08(K)(2)(d).

**[*P5]** As relevant here, R.C. 3314.08 HN2[↑] provides that if ODE determines that a review of a community school's enrollment is necessary, it shall complete a review and provide written notice of the findings to the governing authority of the community school. R.C. 3314.08(K)(1). If the review results in a finding that the community school owes money to the state, the statute sets forth the procedure the community school may use to appeal ODE's determination to BOE. R.C. 3314.08(K)(2). Within that framework, the statute then provides "[a]ny decision made by [BOE] under this division is final." R.C. 3314.08(K)(2)(d).

**[*P6]** This court has previously construed HN3[↑] the legislature's use of the word "final" in the context of decisions of administrative bodies to mean the decision is not subject to an appeal under R.C. 119.12. Carney v. School Emps. Retirement Sys. Bd., 39 Ohio App.3d 71, 72, 528 N.E.2d 1322 (10th Dist.1987); State ex rel. Shumway v. State Teachers Retirement Bd., 114 Ohio App.3d 280, 286, 683 N.E.2d 70 (10th Dist.1996); Heartland Jockey Club v. Ohio State Racing Comm., 10th Dist. No. 98AP-1465, 1999 Ohio App. LEXIS 3530 (Aug. 3, 1999). Upon reconsideration, we find this precedent and SUPREME COURT OF OHIO's decision in Brookwood Presbyterian Church v. Ohio Dept. of Educ., 127 Ohio St.3d 469, 2010-Ohio-5710, 940 N.E.2d 1256, to be controlling.

**[*P7]** In *Brookwood*, the Supreme Court considered a statute that provided that ODE's decision as to whether an entity was education-oriented was "final." The Supreme Court noted that the same statute also expressly provided a right to appeal under R.C. 119.12. Under those circumstances, **[**4]** the Supreme Court concluded that the use of the word "final" in that statute did not preclude an appeal under R.C. 119.12 where further language, within the same statute, specifically contemplated an appeal. In so deciding, the Supreme Court reviewed our precedent in *Carney*, *Shumway*, and *Heartland Jockey Club* and concluded the statutes in those cases "lacked what is present in [the statute at issue in *Brookwood*] — a specific, statutory grant of jurisdiction to the trial court to review the decisions of the administrative body pursuant to R.C. 119.12. Here, that makes all the difference." Brookwood at ¶ 15.

**[*P8]** Unlike the statute at issue in Brookwood, here R.C. 3314.08(K) HN4[↑] specifies that the decision is "final" and does not provide a specific grant of statutory jurisdiction to the trial court to review the decision of the administrative body. Thus, we conclude on reconsideration that *Brookwood* directs that a statute

that provides a decision of an administrative body is "final" and that does not include a separate specific, statutory grant of jurisdiction to the trial court precludes an appeal under R.C. 119.12. Accordingly, we follow the Supreme Court's precedent in Brookwood and this court's precedent in Carney, Shumway, and Heartland [**5] Jockey Club and find the use of the word "final" in R.C. 3314.08(K)(2)(d) precludes an appeal under R.C. 119.12.

**[*P9]** Thus, because the majority's conclusion was inconsistent with this court's precedent and that of SUPREME COURT OF OHIO, reconsideration is warranted. Accordingly, we grant BOE's and ODE's application for reconsideration and hold that the use of the word "final" in R.C. 3314.08(K)(2)(d) precludes an appeal under R.C. 119.12. Therefore, we conclude the trial court did not err in granting BOE's and ODE's motion to dismiss for lack of jurisdiction.

### III. Disposition

**[*P10]** Based on the foregoing reasons, we find BOE and ODE have satisfied the grounds for reconsideration under *App.R. 26(A)(1)*. Accordingly, we grant BOE's and ODE's application for reconsideration and hold the trial court did not err in granting BOE's and ODE's motion to dismiss for lack of jurisdiction. This court's July 10, 2018 decision and judgment entry are vacated. Appellant's original assignment of error is overruled, and the October 6, 2017 judgment of the Franklin County Court of Common Pleas is affirmed.

*Application for reconsideration granted.*

BROWN and LUPER SCHUSTER, JJ.

BRUNNER, J., dissents.

**Dissent by:** BRUNNER

## Dissent

BRUNNER, J., dissenting.

BRUNNER, J., dissenting.

**[*P11]** Appellees, Ohio State Board of Education **[**6]** ("BOE") and Ohio Department of Education ("ODE"), have requested reconsideration and consideration en banc of our decision in Electronic Classroom of Tomorrow v. Ohio State Bd. of Edn., 116 N.E.3d 848, 2018-Ohio-2695. In that decision, we held that appellant Electronic Classroom of Tomorrow ("ECOT") could appeal under R.C. 119.12 a decision reached by the BOE. Electronic Classroom of Tomorrow, 2018-Ohio-2695, ¶ 1, 116 N.E.3d 848, citing Electronic Classroom of Tomorrow v. Ohio State Bd. of Edn., 108 N.E.3d 124, 2018-Ohio-716, ¶ 28. The BOE and ODE argue that we should reconsider our decision and also consider it en banc as being inconsistent with our decisions in three prior cases decided in 1999, 1996, and 1987, respectively. Heartland Jockey Club v. Ohio State Racing Comm., 10th Dist. No. 98AP-1465, 1999 Ohio App. LEXIS 3530, *2, 1999 WL 566857 (Aug. 3, 1999), State ex rel. Shumway v. State Teachers Retirement Bd., 114 Ohio App.3d 280, 286, 683 N.E.2d 70 (10th Dist.1996), and Carney v. School Emps. Retirement System Bd., 39 Ohio App.3d 71, 72, 528 N.E.2d 1322 (10th Dist.1987). (July 20, 2018 Appellees' Application for Recons. & En Banc at 10-14.) I respectfully dissent from the decision of the now new majority and would deny reconsideration.

### I. RECONSIDERATION

**[*P12]** Our standard of review of BOE's and ODE's motion to reconsider is:

> [W]hether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.

*Matthews v. Matthews, 5 Ohio App. 3d 140, 5 Ohio B. 320, 450 N.E.2d 278 (10th Dist.1981)*, paragraph two of the syllabus (construing *App.R. 26*). BOE and ODE acknowledge that we analyzed *Heartland Jockey*, *Shumway*, and *Carney* at length in our decision, Electronic Classroom of Tomorrow, 2018-Ohio-2695, ¶ 17-21, 116 N.E.3d 848. In our decision, we in fact distinguished them. So did SUPREME COURT OF OHIO in **[**7]** Brookwood Presbyterian Church v. Ohio Dept. of Edn., 127 Ohio St. 3d 469, 2010-Ohio-5710, ¶ 14-15, 940 N.E.2d 1256. ODE's and BOE's argument for reconsideration is that we made an obvious error in our analysis and should have adhered to the holdings in these three prior decisions.

**[*P13]** ODE and BOE argue that we obviously erred

when we distinguished *Heartland Jockey*, *Shumway*, and *Carney* (which concerned statutes governing the Ohio State Racing Commission, the State Teachers Retirement Board, and the School Employees Retirement System Board). They argue that distinguishing them was erroneous insofar as we did so on the basis that each of those decisions found no R.C. 119.12 appeal from a "final" agency decision but noted that there was a remedy in mandamus. Pointing out the notation in our decision that the Supreme Court already, but without explanation, denied mandamus relief to ECOT, ODE and BOE argue that our decision was tantamount to holding that "the ***meaning of a statute*** may ***differ*** based on an aggrieved party's litigation choices (i.e., on whether the party has pursued, and been denied, mandamus relief)." (Emphasis sic.) (Aug. 6, 2018 Appellees' Reply in Support at 2-3.) There is no basis in the record or in the law for this conclusion, in part because the agencies involved in *Carney*, *Shumway*, and *Heartland* **[**8]** *Jockey* were three different agencies, and none of them were BOE or ODE. Also, the legislature has the power to decide via its policymaking function the interests of the various arms of the state according to their functions. *Ohio Constitution, Article II, Section 1* ("The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives."). We have previously stated that "policy-making" is a "balancing of social, political, economic, and privacy concerns which are legislative in nature." (Citation omitted.) Ohio Licensed Beverage Assn. v. Ohio Dept. of Health, 10th Dist. No. 07AP-490, 2007-Ohio-7147, ¶ 39. Thus, what may be statutorily construed to apply for one agency may not be legally fit for another.

**[*P14]** In *Brookwood*, the Supreme Court considered statutes that did involve ODE and BOE. The high court analyzed the tension between statutes governing whether appeal rights from ODE and BOE decisions existed in the context of determining whether a sponsoring organization was "education-oriented," parallel to the situation we examined in our decision. The Supreme Court stated:

> The crux of this case is the interplay between R.C. 3314.015(B)(3) and 3314.015(D). R.C. 3314.015(D) grants a right of appeal to entities disapproved for community-school sponsorship; the question is whether R.C. 3314.015(B)(3) takes it away in certain circumstances. **[**9]** ODE asserts that its determination that Brookwood is not education-oriented is final and therefore not subject to appeal based upon R.C. 3314.015(B)(3).

Brookwood at ¶ 9.

**[*P15]** The Supreme Court recognized that the question of whether Brookwood was "education-oriented" involved four criteria under the education statute, three of which were "black and white." Id. at ¶ 16. But the fourth criteria, whether Brookwood was "education-oriented," required a nuanced approach for which the Supreme Court held that the subjective and substantive judgment of the board was involved; for this reason appellate rights existed so Brookwood would not be consigned to "an administrative abyss." Id. at ¶ 16, 11. The majority at that time thus relied in part on *Brookwood* in applying this rationale to the subjective and substantive issues before ODE and BOE involving ECOT and for the purposes of establishing what the high court in *Brookwood* called "a check on that power." Id. at ¶ 20.

**[*P16]** Also, in *Brookwood*, the high court found that it need not analyze Brookwood's case in light of the Tenth District Court of Appeals' *Carney*, *Shumway*, and *Heartland Jockey* decisions, since specific R.C. 119 appeals language was present. But the Supreme **[**10]** Court did not go on to conclude that such express statutory language was needed for there to exist an R.C. 119.12 right to appeal.

**[*P17]** Because the Supreme Court is a higher court than we, as a precedential matter we were not constrained to follow *Heartland Jockey*, *Shumway*, and *Carney* (even though not overruled in *Brookwood*) when our then majority distinguished them and construed what is meant by the word "final" for litigants' appeals of ODE and BOE decisions. Under the various applications of both statutory and case law, I respectfully disagree with the new majority of the same panel that our decision is not erroneous, let alone obviously so, as the standard for reconsideration requires.

**[*P18]** Thus, I dissent and would deny appellees' application for reconsideration.

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End of Document

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| Electronic Classroom of Tomorrow, | : | |
| Appellant-Appellant, | : | No. 17AP-767<br>(C.P.C. No. 17CV-5773) |
| v. | : | |
| Ohio State Board of Education et al., | : | (ACCELERATED CALENDAR) |
| Appellees-Appellees. | : | |

JOURNAL ENTRY

Appellant's motion for reconsideration, filed May 6, 2019, is denied.

Judge Susan Brown

Judge Betsy Luper Schuster

Dissenting - see attached JB
Judge Jennifer Brunner

BRUNNER, J., dissenting.

{¶ 1} I respectfully dissent from the decision of the majority on both motions submitted to this Court by appellant, Electronic Classroom of Tomorrow ("ECOT"), one for reconsideration of the Court's reconsidered decision of April 25, 2019, and the second for en banc consideration of this matter, for which the majority of this Court has found that no conflict exists pursuant to App.R. 26(A)(2).

{¶ 2} The same panel of this Court that decided ECOT's original appeal granted the Ohio State Board of Education, et al.'s ("Board") reconsideration of it on April 25, 2019. More simply put, a 2-1 decision by the same three-judge panel "flipped" to a different 2-1 decision based on an undefined "obvious error" of law, that to my view was no more than the changing of one panel member's mind. That is not the standard for what is "obvious error" and worse yet, because we have two lines of cases in this district for what obvious error is, the entire court should consider the question.

{¶ 3} I find that we should reconsider as a court en banc our April 25, 2019 reconsidered decision, not only because conflicting decisions of the same panel tend not to promote consistency and reliability of decisions of this Court, but also because I find that the standard of review for App.R. 26 motions for reconsideration has been decided by this Court based on two standards since 2014. And the standard adopted by the majority in denying this most recent motion for reconsideration is precisely why no reconsideration should have taken place. A single judge on the same panel at differing times on the same case has effectively found both decisions as being supportable "under the law." According to our own caselaw since 2014, but not used by this panel, this is not obvious error, and no reconsideration should have taken place on April 25, 2019, nor should it now.

{¶ 4} To elucidate, the new majority in the April 25, 2019 decision granting the Board's motion for reconsideration relied on *Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (10th Dist.1982), in determining what is "obvious error":

> App. R. 26, which provides for the filing of an application for reconsideration in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered and changed. The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been.

{¶ 5} Yet, there exists in this district the following language in a 2014 opinion of this Court, actually *defining* what is "obvious error":

> " 'App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error **or renders an unsupportable decision under the law**.' "

(Emphasis added.) *State v. Harris*, 10th Dist. No. 13AP-1014, 2014-Ohio-672, ¶ 8, quoting *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 10th Dist. No. 03AP-269, 2004-Ohio-2715, ¶ 2, quoting *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist.1996). This phrase, "unsupportable decision under the law," has been used numerous times by our court (*e.g.*, *State v. Stewart*, 10th Dist. No. 11AP-787, 2013-Ohio-78, ¶ 3) and in other districts, especially the 7th, 11th, and 2nd Districts. But since that time, and even now, we have ignored the *Harris* definition of "obvious error" (unsupportable decision under the law) and instead relied on *Matthews*, even in decisions on reconsideration we have issued as recently as this year. *See, e.g., Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 10th Dist. No. 17AP-684, 2019-Ohio-1069, ¶ 2; *State v. Armengau*, 10th Dist. No. 18AP-276, 2019-Ohio-1010, ¶ 16, fn. 4. Since *Harris*, there exist two standards of review in this district for what is meant by "obvious error" concerning App.R. 26 motions for reconsideration, with panels seeming to pick and choose which standard they will observe (one of which is basically no standard, *Matthews*). And while much of this may be unfortunate and inadvertent, by not resolving and clarifying what *is* the standard for reconsideration, we hazard the public view that our decisions appear arbitrary.

{¶ 6} Thus, I find we should grant reconsideration of our reconsidered decision, because the panel chose to rely on the undefined "obvious error" standard of review of *Matthews* when the same panel member found that both decisions at one time or another were supported under the law and thus not amenable to reconsideration under the *Harris* standard of review.

{¶ 7} This also points to why en banc review is appropriate: with en banc consideration we may avoid creating a clear potential for risk of confusion under the rules and cases providing for en banc consideration. Moreover, what is "obvious error" is a

purely legal question that we can and should resolve once and for all for the benefit of the parties to this appeal, the legal community, and for the public.

{¶ 8} Accordingly, we should reconsider our "reconsidered" decision and consider ECOT's appeal en banc. This matter concerns the finality of state administrative appeals from the decisions of the Board and affects not only the matter of the education of the children of this State but also due process afforded all Ohio citizens who seek appellate redress of their grievances against the government. I respectfully dissent from the decisions of the majority in denying ECOT reconsideration of our April 25, 2019 decision and in denying en banc review in this appeal.

Court Disposition

Case Number: 17AP000767

Case Style: ELECTRONIC CLASSROOM OF TOMORROW -VS-
OHIO STATE BOARD OF EDUCATION ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 17AP0007672019-05-0699980000
   Document Title: 05-06-2019-MOTION TO RECONSIDER - ELECTRONIC CLASSROOM OF TOMORROW
   Disposition: 3200

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| Electronic Classroom of Tomorrow, | : | |
| Appellant-Appellant, | : | No. 17AP-767 (C.P.C. No. 17CV-5773) |
| v. | : | (ACCELERATED CALENDAR) |
| Ohio State Board of Education et al., | : | |
| Appellees-Appellees. | : | |

JOURNAL ENTRY

The application of appellant, Electronic Classroom of Tomorrow, for en banc consideration pursuant to App.R. 26(A)(2) is denied for lack of a conflict.

KLATT, P.J., BROWN, DORRIAN,
LUPER SCHUSTER, &
BEATTY BLUNT, JJ., concur.
BRUNNER, J., dissents.
SADLER & NELSON, JJ., not participating.

Presiding Judge William A. Klatt

Judge Susan Brown

Judge Julia L. Dorrian

Judge Betsy Luper Schuster

Judge Laurel Beatty Blunt

BRUNNER, J., dissenting.

{¶ 1} I respectfully dissent from the decision of the majority on both motions submitted to this Court by appellant, Electronic Classroom of Tomorrow ("ECOT"), one for reconsideration of the Court's reconsidered decision of April 25, 2019, and the second for en banc consideration of this matter, for which the majority of this Court has found that no conflict exists pursuant to App.R. 26(A)(2).

{¶ 2} The same panel of this Court that decided ECOT's original appeal granted the Ohio State Board of Education, et al.'s ("Board") reconsideration of it on April 25, 2019. More simply put, a 2-1 decision by the same three-judge panel "flipped" to a different 2-1 decision based on an undefined "obvious error" of law, that to my view was no more than the changing of one panel member's mind. That is not the standard for what is "obvious error" and worse yet, because we have two lines of cases in this district for what obvious error is, the entire court should consider the question.

{¶ 3} I find that we should reconsider as a court en banc our April 25, 2019 reconsidered decision, not only because conflicting decisions of the same panel tend not to promote consistency and reliability of decisions of this Court, but also because I find that the standard of review for App.R. 26 motions for reconsideration has been decided by this Court based on two standards since 2014. And the standard adopted by the majority in denying this most recent motion for reconsideration is precisely why no reconsideration should have taken place. A single judge on the same panel at differing times on the same case has effectively found both decisions as being supportable "under the law." According to our own caselaw since 2014, but not used by this panel, this is not obvious error, and no reconsideration should have taken place on April 25, 2019, nor should it now.

{¶ 4} To elucidate, the new majority in the April 25, 2019 decision granting the Board's motion for reconsideration relied on *Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (10th Dist.1982), in determining what is "obvious error":

> App. R. 26, which provides for the filing of an application for reconsideration in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered and changed. The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been.

**{¶ 5}** Yet, there exists in this district the following language in a 2014 opinion of this Court, actually *defining* what is "obvious error":

> " 'App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error **or renders an unsupportable decision under the law**.' "

(Emphasis added.) *State v. Harris*, 10th Dist. No. 13AP-1014, 2014-Ohio-672, ¶ 8, quoting *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 10th Dist. No. 03AP-269, 2004-Ohio-2715, ¶ 2, quoting *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist.1996). This phrase, "unsupportable decision under the law," has been used numerous times by our court (*e.g.*, *State v. Stewart*, 10th Dist. No. 11AP-787, 2013-Ohio-78, ¶ 3) and in other districts, especially the 7th, 11th, and 2nd Districts. But since that time, and even now, we have ignored the *Harris* definition of "obvious error" (unsupportable decision under the law) and instead relied on *Matthews*, even in decisions on reconsideration we have issued as recently as this year. *See, e.g., Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 10th Dist. No. 17AP-684, 2019-Ohio-1069, ¶ 2; *State v. Armengau*, 10th Dist. No. 18AP-276, 2019-Ohio-1010, ¶ 16, fn. 4. Since *Harris*, there exist two standards of review in this district for what is meant by "obvious error" concerning App.R. 26 motions for reconsideration, with panels seeming to pick and choose which standard they will observe (one of which is basically no standard, *Matthews*). And while much of this may be unfortunate and inadvertent, by not resolving and clarifying what *is* the standard for reconsideration, we hazard the public view that our decisions appear arbitrary.

**{¶ 6}** Thus, I find we should grant reconsideration of our reconsidered decision, because the panel chose to rely on the undefined "obvious error" standard of review of *Matthews* when the same panel member found that both decisions at one time or another were supported under the law and thus not amenable to reconsideration under the *Harris* standard of review.

**{¶ 7}** This also points to why en banc review is appropriate: with en banc consideration we may avoid creating a clear potential for risk of confusion under the rules and cases providing for en banc consideration. Moreover, what is "obvious error" is a

purely legal question that we can and should resolve once and for all for the benefit of the parties to this appeal, the legal community, and for the public.

{¶ 8} Accordingly, we should reconsider our "reconsidered" decision and consider ECOT's appeal en banc. This matter concerns the finality of state administrative appeals from the decisions of the Board and affects not only the matter of the education of the children of this State but also due process afforded all Ohio citizens who seek appellate redress of their grievances against the government. I respectfully dissent from the decisions of the majority in denying ECOT reconsideration of our April 25, 2019 decision and in denying en banc review in this appeal.

Court Disposition

Case Number: 17AP000767

Case Style: ELECTRONIC CLASSROOM OF TOMORROW -VS- OHIO STATE BOARD OF EDUCATION ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 17AP0007672019-05-0699970000
   Document Title: 05-06-2019-MOTION - ELECTRONIC CLASSROOM OF TOMORROW - MOTION FOR EN BANC CONSIDERATION
   Disposition: 3200

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO**
**CIVIL DIVISION**

**ELECTRONIC CLASSROOM OF TOMORROW,**

**Appellant,**

**vs.**

**OHIO DEPARTMENT OF HEALTH,**

**Appellees**.

**CASE NO.: 17CVF-06-5773**

**JUDGE: GUY REECE II**

**DECISION AND ENTRY**
**REMOVING THE STAY AS FILED ON**
**AUGUST 31, 2017**
**AND**
**DECISION AND ENTRY**
**GRANTING APPELLEES' MOTION TO DISMISS**
**AS FILED ON AUGUST 8, 2017**

**REECE, J.**

This action comes before the Court upon an appeal commenced by the Electronic Classroom of Tomorrow (Appellant). On June 27, 2017 the Appellant filed a Notice of Appeal with this Court. Appellant named the Ohio State Board of Education (Board) and the Ohio Department of Education (Department). Appellant was/is contesting the validity of a final determination made by the Board.

On August 14, 2017 the Appellees jointly filed their Motion to Dismiss. The Motion alleged that Appellant's appeal lacked subject matter jurisdiction pursuant to R.C. §119.12 and R.C. §3314.08(K). The matter was stayed by the Court on August 31, 2017 with conditions for reactivating the case. One of those conditions was met on September 13, 2017.

This Court reactivates the case and removes the stay. With the reactivation of the case, the Appellees' Motion to Dismiss is ready for review.

As set forth below, the Motion to Dismiss is well taken and **GRANTED**.

**STATEMENT OF THE CASE**

The Board came to the determination that for the 2015-16 school year the Appellant had received more than $60 million dollars that it should not have. The Board has determined that it will now recoup that money by clawing back the amount owed.

Appellant disagrees and is taking all steps possible to avoid the Board's decision.

## FACTS RELEVANT TO PENDING MOTION

The parties to the current administrative appeal are embroiled in a number of litigations concerning the Board's decision to claw back more than $60 million dollars from the Appellant. The Appellant in this case acknowledged that this appeal was being filed "out of an abundance of caution." (Notice of Appeal page 2) The Appellant went on to state that this appeal was to preserve Appellant's rights "in the event it is determined that such action is, in fact, subject to Chapter 119." (Notice of Appeal page 2) The filing of the Notice of Appeal was triggered – according to the Appellant – by the term 'quasi-judicial' being used by the Board in one of the other pending actions between the parties.

The Appellees claim that the pending R.C. §119.12 appeal should be dismissed because the statute at issue; i.e., R.C. §3314.08(K) clearly gives the final say to the Board on funding decisions. Please note the following language from the relevant section:

> (K) (1) If 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 governing authority of the community school and its sponsor within ninety days of the end of the community school's fiscal year, unless extended for a period not to exceed thirty additional days for one of the following reasons:
>
> (a) The department and the community school mutually agree to the extension.
>
> (b) Delays in data submission caused by either a community school or its sponsor.
>
> (2) If the review results in a finding that additional funding is owed to the school, such payment shall be made within thirty days of the written notice. If the review results in a finding that the community school owes moneys to the state, the following procedure shall apply:
>
> (a) Within ten business days of the receipt of the notice of findings, the community school may appeal the department's determination to the state board of education or its designee.

(b) The 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.

(c) If the board has enlisted a designee to conduct the hearing, the designee shall certify its decision to the board. The board may accept the decision of the designee or may reject the decision of the designee and issue its own decision on the matter.

(d) **Any decision made by the board under this division is final**.

(3) If it is decided that the community school owes moneys to the state, the department shall deduct such amount from the school's future payments in accordance with guidelines issued by the superintendent of public instruction. (Emphasis added)

It is the position of the Appellees that said language in the code eliminates any R.C. §119.12 appeal rights. The Appellees further pointed out that the code did not mention a right to appeal pursuant to Chapter 119.

As noted, the Appellees filed their motion on August 14, 2017. Appellant file its Memorandum Contra on August 23, 2017. Appellees filed their Reply on August 30, 2017. Pursuant to local rules, the Appellee's motion was ready for review at that point in time. However, there was a mandamus case pending before the Ohio Supreme Court in August of 2017. The parties submitted competing entries for the Court to adopt that would stay this case pending the outcome of the Supreme Court case.

This Court reviewed the proposed entries and then filed its own Entry Staying Appeal on August 31, 2017. Said Entry contained the following language:

> For good cause shown, the Court **STAYS** this appeal pending further proceedings in Ohio Supreme Court Case No. 2017-880, Electronic Classroom of Tomorrow v. Ohio State Board of Education ("mandamus action").

On September 13, 2017 the Ohio Supreme Court issued a "Merit Decision Without Opinion" in Case No. 2017-880. Please note the following:

> This cause originated in this court on the filing of a complaint for a writ of mandamus. Upon consideration of respondents' motion to dismiss amended complaint, it is ordered by the court that the motion to dismiss amended complaint is granted. Accordingly, this cause is dismissed.

The Supreme Court did not give any guidance as to which of the four legal arguments raised within the motion to dismiss served as the bases for the dismissal. Hence, this Court cannot assume that the mandamus action was dismissed because there was an adequate remedy at law pursuant to a R.C. §119.12 administrative appeal.

The parties jointly reported the decision in Case No. 2017-880 to this Court with their September 30, 2017 filing. Not surprisingly the parties had differing thoughts on just what could be inferred by the Supreme Court's action. But as to the issue before this Court, the parties agreed that due to the dismissal of Case No. 2017-880 the stay should be lifted and this Court will need to decide the Appellee's Motion to Dismiss as filed on August 8, 2017.



## STANDARD OF REVIEW

Appellee has filed a Civ.R. 12(B)(1) motion to dismiss. Appellee has asserted that this Court does not have subject matter jurisdiction. Please note the following:

> The standard of review for a Civ.R. 12(B)(1) motion to dismiss is "whether any cause of action cognizable by the forum has been raised in the complaint." State ex rel. Bush v. Spurlock (1989), 42 Ohio St.3d 77, 80. When making this determination, the trial court is not confined to the allegations of the complaint, but may consider material pertinent to that inquiry without converting the motion into one for summary judgment. Southgate Development Corp. v. Columbia Gas Transmission Corp. (1976), 48 Ohio St.2d 211, paragraph one of the syllabus. If the trial court only considers the complaint and undisputed facts when ruling on the motion, then appellate review is limited to a determination of whether the facts are indeed undisputed and whether the trial court correctly applied the law. Wilkerson v. Howell Contrs., Inc., 163 Ohio App.3d 38, 43, 2005-Ohio-4418.

This Court will apply said standard to the pending motion.

The issue of subject matter jurisdiction can/may be raised at any time, either by the parties or *sua sponte* by the Court.

## ANALYSIS

The Court has reviewed the case law and statutes in question. Please note the following language from *Heartland Jockey Club, Ltd., v. Ohio State Racing Commission*, No. 98AP-1465 (10th Dist.):

> R.C. 3769.089(E)(3) provides that "the determination of the commission is final." On this appeal, we are asked to determine how final the word "final" is in R.C. 3769.089(E)(3).
>
> * * * * *
>
> The Franklin County Court of Common Pleas erred in dismissing Heartland Jockey Club, Ltd.'s Revised Code Section 119.12 Administrative Appeal for Lack of Subject Matter Jurisdiction.
>
> We believe that the legislature intended to foreclose direct administrative appeals from decisions involving R.C. 3769.089 when the legislature included in the statute the sentence "the determination of the commission is final." Thus, the trial court was correct to dismiss the administrative appeal attempted under the provisions of R.C. 119.12.

The language contained within R.C. §3314.08(K) is quite similar to R.C. §3769.089. As stated in *Heartland*, mandamus is the normal remedy provided to the Appellant because there are no R.C. §119.12 appeal rights.

The Appellees also relied upon *State ex rel. Shumway v. State Teachers Retirement Bd*. (1996), 114 Ohio App.3d 280 (10th Dist.) to make a similar argument. Appellees' argument was supported by a statement in a footnote contained within *Shumway*. *Shumway* dealt with a similarly drafted statute that noted that a decision of the State Teachers Retirement Board was final and as such, was only subject to appeal by way of a mandamus action. A similar result was found within *Carney v. School Emps. Retirement Sys. Bd*. (1987), 39 Ohio App.3d 71 (10th Dist.).

A frank review of the Appellant's argument has led this Court to believe that the Appellant in fact concurs with the Appellees on this issue; i.e., it cannot maintain a R.C. §119.12 appeal. It appears that this administrative appeal was filed to merely cover the bases.

After careful consideration of the law and the arguments, this Court lacks subject matter jurisdiction to address the Appellant's R.C. §119.12 appeal and the Appellees' Motion to Dismiss has merit.

**DECISION**

Accordingly, the Court hereby **GRANTS** the Appellees' Motion to Dismiss as filed on August 8, 2017.

Appellant's case is **DISMISSED**.

**THIS IS A FINAL APPEALABLE ORDER**

Judge Guy Reece II

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Franklin County Court of Common Pleas

**Date:** 10-06-2017

**Case Title:** ELECTRONIC CLASSROOM OF TOMORROW -VS- OHIO STATE BOARD OF EDUCATION ET AL

**Case Number:** 17CV005773

**Type:** DECISION/ENTRY

It Is So Ordered.

/s/ Judge Guy L. Reece, II

Court Disposition

Case Number: 17CV005773

Case Style: ELECTRONIC CLASSROOM OF TOMORROW -VS-
OHIO STATE BOARD OF EDUCATION ET AL

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 17CV0057732017-08-0899920000
   Document Title: 08-08-2017-MOTION TO DISMISS -
DEFENDANT: OHIO STATE BOARD OF EDUCATION
   Disposition: MOTION GRANTED

# Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ.

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

July 10, 2018, Rendered

No. 17AP-767

**Reporter**
2018-Ohio-2695 *; 116 N.E.3d 848 **; 2018 Ohio App. LEXIS 2914 ***; 2018 WL 3414226

Electronic Classroom of Tomorrow, Appellant-Appellant, v. Ohio State Board of Education, et al., Appellees-Appellees.

**Subsequent History:** Vacated by, On reconsideration by Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ., 2019-Ohio-1540, 2019 Ohio App. LEXIS 1640 (Ohio Ct. App., Franklin County, Apr. 25, 2019)

**Prior History:** [***1] APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 17CV-5773).

Elec. Classroom of Tomorrow v. Ohio Dep't of Educ., 2017-Ohio-5607, 2017 Ohio App. LEXIS 2643, 92 N.E.3d 1269 (Ohio Ct. App., Franklin County, June 29, 2017)

**Disposition:** Judgment reversed; cause remanded.

HOLDINGS: [1]-The trial court had subject matter jurisdiction over an online school's challenge to the adverse decision of the Board of Education (BOE) regarding funding because the appellate court interpreted "final," as used in R.C. 3314.08(K)(2)(d), to mean that the decision was the "final" decision of the BOE, not subject to further administrative proceedings, and appealable only to a court under R.C. 119.12; the online school was entitled to the opportunity to dispute not just the substantive and procedural merits of their action but also to appeal the particular findings and decisions of the administrative adjudication, especially as to the "claw back" of funds already appropriated and distributed by the State of Ohio.

**Outcome**
Judgment reversed; matter remanded.

## Core Terms

mandamus, declaratory, Retirement, injunctive, enrolled

## Case Summary

**Overview**

## LexisNexis® Headnotes

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > Appeals > Standards of Review > De Novo Review

**HN1[] Separation of Powers, Jurisdiction**

"Jurisdiction" refers to a court's statutory or constitutional power to adjudicate the case. Courts of common pleas only have such powers of review of proceedings of administrative officers and agencies as may be provided by law. *Ohio Constitution, art. IV, § 4.* Thus, courts of common pleas lack jurisdiction to review actions of administrative agencies unless *R.C. 119.12* or some other specific statutory authority grants it. Whether a court of common pleas possesses subject-matter jurisdiction is a question of law, which appellate courts review de novo.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Education Law > School Funding > Allocation of Funds

Governments > Legislation > Interpretation

**HN2[] Standards of Review, De Novo Review**

The meaning and application of what is "final" under *R.C. 3314.08(K)(2)(d)* is a legal determination for an appellate court's plenary review.

Governments > Legislation > Interpretation

**HN3[] Legislation, Interpretation**

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Governments > Legislation > Interpretation

Education Law > School Funding > Allocation of Funds

**HN4[] Reviewability, Reviewable Agency Action**

One way to reconcile *R.C. 3314.08(K)(2)(d)* and 119.12 would be to say that *§ 3314.08(K)(2)(d)*'s pronouncement that decisions of the Ohio Board of Education (BOE) are "final" means they are not subject to further administrative proceedings before the Ohio Department of Education or the BOE and must be appealed under *§ 119.12(B)*. This would give "effect" to *§ 119.12(B)* in the sense that its grant of an appeal would operate and would reconcile both *§§ 119.12(B)* and *3314.08(K)(2)(d)*. In this way, both statutes would have coherent non-conflicting meanings and effect would be given to both.

**Counsel:** On brief: Zeiger, Tigges & Little, LLP, Marion H. Little, Jr., John W. Zeiger, and Christopher J. Hogan, for appellant.

Argued: Marion H. Little.

On brief: Organ Cole, LLP, Douglas R. Cole, Erik J. Clark, and Carrie M. Lymanstall, for appellees.

Argued: Douglas R. Cole.

**Judges:** BRUNNER, J. BROWN, P.J., concurs. LUPER SCHUSTER, J., dissents.

## Opinion

**[**849]** (ACCELERATED CALENDAR)

DECISION

BRUNNER, J.

**[*P1]** Appellant-appellant, Electronic Classroom of Tomorrow ("ECOT"), appeals a decision of the Franklin

County Court of Common Pleas issued on October 6, 2017 dismissing its administrative appeal from an adverse decision of appellee-appellee, Ohio State Board of Education ("BOE"). Because we have previously held that the decision of the BOE in this case was an adjudication in a "quasi-judicial" proceeding and is therefore appealable under R.C. 119.12, we reverse and remand. *Electronic Classroom of Tomorrow v. Ohio State Bd. of Edn., 10th Dist. No. 17AP-510, 2018-Ohio-716, ¶ 28, 108 N.E.3d 124*.

## I. FACTS AND PROCEDURAL HISTORY

**[*P2]** We have previously stated the facts underlying the conflict between ECOT and the appellees, the BOE and the Ohio Department of Education ("ODE"), as follows:

> ECOT, in operation since 2000, is an online or "e-school" in which **[***2]** students do not attend traditional, brick-and-mortar buildings, but instead attend classes **[**850]** through a computer by logging in to ECOT's online platform to access educational curriculum. Students enrolled in ECOT also have access to other non-computer educational opportunities, including field trips.
>
> Pursuant to R.C. 3314.01(B), ECOT is considered a "community school," which is "a public school, independent of any school district, and is part of the state's program of education." As a public school, a community school such as ECOT receives funding from the state of Ohio based on the number of full-time equivalent ("FTE") students enrolled in the community school. R.C. 3314.08(C). The community schools self-report the number of FTE students to ODE through the education management information system ("EMIS"). [The Ohio Department of Education (ODE)] then has the right to "adjust" the payment to the community school "to reflect any enrollment of students in community schools for less than the equivalent of a full school year." R.C. 3314.08(H).
>
> ODE performs periodic FTE reviews of community schools to investigate whether a funding adjustment is warranted in a given year. Such a review involves ODE personnel visiting the community school **[***3]** and identifying the records ODE would like to view in order to confirm the school's reported FTE numbers for the previous academic year. If, through the review, ODE discovers it owes additional funding to the community school, ODE has 30 days to provide the additional funding. However, if the review results in a finding that the community school cannot substantiate the number of FTE students for which it received funding, ODE can reduce the school's funding amount. The reduction, or "clawback," occurs on a going-forward basis by reducing, over an extended period of time, future state dollars paid to the community school. (Sept. 13, 2016 Tr. Vol. II at 179-80.) A community school that disagrees with ODE's initial determination on funding has a right to an administrative appeal to the State Board of Education. R.C. 3314.08(K)(2). The State Board of Education's decision on the appeal is the agency's final determination on the appropriate funding for the community school for the given academic year. R.C. 3314.08(K)(2)(d).

*Elec. Classroom of Tomorrow v. Ohio Dep't of Educ., 92 N.E.3d 1269, 2017-Ohio-5607, ¶ 2-4*.

**[*P3]** Apparently anticipating an adverse result from a 2016 full-time equivalent ("FTE") review, ECOT sought injunctive and declaratory relief from the Franklin County Court of Common Pleas to prohibit ODE from **[***4]** considering the extent to which students it reported as enrolled were actually spending time on learning opportunities and receiving required educational instruction at public expense through ECOT. *Id. at ¶ 8-14*. The injunctive and declaratory relief case was appealed to this Court where the decision of the trial court was affirmed. *Id.* in passim. The Supreme Court of Ohio has accepted jurisdiction of a further appeal from that ruling and the matter is currently pending before the Supreme Court. *Electronic Classroom of Tomorrow v. Ohio Dept. of Edn.*, Supreme Ct. No. 2017-0913.

**[*P4]** While the declaratory and injunctive relief case was proceeding before the trial court, on September 26, 2016, following completion of the audit of ECOT's FTE data, ODE issued a final determination letter advising ECOT that ODE's review had concluded that ECOT had misreported its FTE numbers resulting in a false report that was approximately 242.7 percent of the actual figures determined **[**851]** from ODE's audit of ECOT.[1]

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[1] The final determination letter said that ECOT's actual FTE was 6,312.62 as compared to the claimed FTE of 15,321.98 reported by ECOT. (Admin. Record A, Sept 26, 2016 Final Determination at 1.) 15,321.98 is approximately 242.7 percent of 6,312.62.

(Admin. Record A, Sept 26, 2016 Final Determination at 1.) Expressed differently, ECOT's actual FTE numbers were just 41.2 percent of what ECOT claimed they were. *Id.* ECOT disputed this finding and appealed to the BOE, which designated **[***5]** a hearing officer to hear the appeal. (Admin. Record B, Oct. 10, 2016 Appeal Letter; Admin. Record C, Oct. 18, 2016 Designation Letter; Admin. Record D, Oct. 26, 2016 Designation Notice.) ODE's designee held a hearing and considered a voluminous body of evidence. (Admin. Record QQ, May 10, 2017 Hearing Officer Decision at 4-9.) In addition, before the hearing officer issued a decision, the Franklin County Court of Common Pleas issued its decision in the injunctive and declaratory relief case settling a number of questions of law that otherwise might have been disputed issues in the administrative appeal before the hearing officer. *Id.* at App'x, enclosing *Electronic Classroom of Tomorrow v. Ohio Dept. of Edn.*, Franklin C.P. No. 16CV-6402 (Dec. 14, 2016). The ODE hearing officer followed the decision of the Court of Common Pleas in writing his decision. (Admin. Record QQ, Hearing Officer Decision at 10-12.) Ultimately, based on exhibits and evidence placed before the hearing officer and the decision of the Franklin County Court of Common Pleas (since affirmed by this Court and now under review by the Supreme Court) the hearing officer concluded that ECOT's actual FTE numbers were 44.6 **[***6]** percent of its reported numbers, entitling ODE to claw back $60,350,791 in overpayment. *Id.* at 133.

**[*P5]** On May 22, 2017, ECOT raised a large number of objections to the hearing officer's report. (Admin. Record RR, May 22, 2017 Objs.) ODE timely responded. (Admin. Record TT, May 31, 2017 Resp. to Objs.) At a meeting on June 12, 2017, BOE adopted the recommendations of the hearing officer's decision and authorized ODE to take necessary measures to obtain repayment of public funds in overpayments to ECOT in the amount of $60,350,791. (Admin. Record UU, June 15, 2017 Resolution at 1.)

**[*P6]** Following this adverse result, ECOT took three actions. It filed suit alleging that the BOE violated the open meetings act. (June 14, 2017 Compl., filed in *Electronic Classroom of Tomorrow v. Ohio Dept. of Edn.*, Franklin C.P. No. 17CV-5315.) It sought, in the case now on review, to appeal the administrative action directly to the Franklin County Court of Common Pleas pursuant to R.C. 119.12. (June 27, 2017 Notice of Appeal.) Finally, it petitioned the Supreme Court for a writ of mandamus or prohibition seeking to have the High Court order the BOE to take a different action. (June 27, 2017 Compl. for Mandamus or Prohibition, filed **[***7]** in *State ex rel. Electronic Classroom of Tomorrow v. State Bd. of Edn.*, Supreme Ct. No. 2017-0880.)

**[*P7]** In the open meetings case, the Franklin County Court of Common Pleas concluded that the BOE did not violate the open meetings act. *Electronic Classroom of Tomorrow v. Ohio State Bd. of Edn.*, Franklin C.P. No. 17CV-5315 (July 12, 2017). On appeal, this Court agreed that the BOE did not violate the open meetings act because the administrative process was "quasi-judicial." *Electronic Classroom of Tomorrow, 2018-Ohio-716, ¶ 28*. ECOT has sought (but not yet been granted) a further appeal from that decision. (Apr. 19, 2018 Memo. in Support of Jurisdiction, filed in *Electronic Classroom* **[**852]** *of Tomorrow v. State Bd. of Edn.*, Supreme Ct. No. 2018-0526.)

**[*P8]** The direct appeal before the common pleas court from the BOE administrative action was stayed while the Supreme Court considered ECOT's complaint for a writ of mandamus or prohibition. (Aug. 31, 2017 Stay Order.) Ultimately, the Supreme Court dismissed ECOT's petition for a writ of mandamus or prohibition without issuing any written opinion explaining the dismissal. *State ex rel. Elec. Classroom of Tomorrow v. State Bd. of Educ., 150 Ohio St. 3d 1426, 2017-Ohio-7567, 81 N.E.3d 1268.*[2]

**[*P9]** Thereafter, the common pleas court reactivated ECOT's administrative appeal and dismissed for lack of jurisdiction. (Oct. 6, 2017 Decision **[***8]** & Entry.) The trial court reasoned that BOE and ODE had presented several arguments as reasons the Supreme Court should dismiss (only one of which was the pendency of this case as an adequate remedy at law) but that the Supreme Court had given no indication why it dismissed the mandamus and prohibition action. *Id.* at 3-4. The common pleas court declined to read the Supreme Court's summary dismissal as an endorsement of ECOT's right to appeal the BOE administrative decision and turned to a strict construction of the statutes possibly authorizing the appeal to the common pleas court. *Id.* The court viewed R.C. 3314.08(K)(2)(d) as requiring that decisions made by the BOE are "final" in the sense that they are unappealable and supported its conclusion with legal findings that in similar circumstances, courts have found that such language is

[2] The exact portion of the case announcement concerning ECOT is available online at ***150 Ohio St. 3d 1426, 2017-Ohio-7567, 2017 Ohio LEXIS 1751, 81 N.E.3d 1268***.

a special or specific provision that precludes the generally applicable appeal under R.C. 119.12. (Oct. 6, 2017 Decision & Entry at 2-5.)

**[*P10]** ECOT has appealed the common pleas court's ruling, seeking review of its decision dismissing its complaint.

## II. ASSIGNMENT OF ERROR

**[*P11]** ECOT presents a single assignment of error for review:

> The Trial Court erred in dismissing the R.C. Chapter 119 Appeal filed by Plaintiff/Appellant **[***9]** The Electronic Classroom of Tomorrow ("ECOT") based on a purported lack of subject matter jurisdiction.

## III. DISCUSSION

### A. Standard of Review

**[*P12]** This Court has previously set forth the standard of review in cases challenging the jurisdiction of a trial court to hear an administrative appeal:

> HN1[] "Jurisdiction" refers to a court's "'statutory or constitutional power to adjudicate the case.'" Pratts v. Hurley, 102 Ohio St. 3d 81, 2004-Ohio-1980, ¶ 11, 806 N.E.2d 992, quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Courts of common pleas only have "such powers of review of proceedings of administrative officers and agencies as may be provided by law." *Ohio Constitution, Article IV, Section 4*; see also Springfield Fireworks, Inc. v. Ohio Dept. of Commerce, 10th Dist. No. 03AP-330, 2003-Ohio-6940, ¶ 17. Thus, courts of common pleas lack jurisdiction to review actions of administrative agencies unless R.C. 119.12 or some other specific statutory authority grants it. Total Office Prods. v. Dep't of Admin. Servs., 10th Dist. No. [**853] 05AP-955, 2006-Ohio-3313, ¶ 12; accord Univ. of Toledo v. Ohio State Empl. Relations Bd., 10th Dist. No. 11AP-834, 2012-Ohio-2364, ¶ 9, 971 N.E.2d 448 ("A court of common pleas has power to review proceedings of administrative agencies and officers only to the extent the law so grants."). Whether a court of common pleas possesses subject-matter jurisdiction is a question of law, which appellate courts review de novo. Courtyard Lounge v. Bur. of Environmental Health, 10th Dist. No. 10AP-182, 190 Ohio App. 3d 25, 2010-Ohio-4442, ¶ 5, 940 N.E.2d 626.

Clifton Care Ctr. v. Ohio Dep't of Job & Family Servs., 994 N.E.2d 879, 2013-Ohio-2742, ¶ 9.

### B. Whether the Trial Court Erred in Dismissing for Want of Jurisdiction

**[*P13]** Ohio Revised Code, Section 119.12(B) provides in relevant part as follows:

> (B) Any party adversely affected by any order of an agency issued pursuant to any [] adjudication [other than **[***10]** those excepted elsewhere in this section] may appeal to the court of common pleas of Franklin county * * *.

"Agency" is defined in pertinent part as "the functions of any * * * board * * * of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code." R.C. 119.01(A)(1). Ohio Revised Code, Section 3301.13 provides that "[t]he department of education shall consist of the state board of education, the superintendent of public instruction, and a staff of such professional, clerical, and other employees as may be necessary to perform the duties and to exercise the required functions of the department" and that "the department of education, and any officer or agency therein, shall be subject to Chapter 119. of the Revised Code." There is no serious dispute that, as a general matter, the BOE and ODE separately and together are deemed subject to R.C. 119.12.

**[*P14]** ECOT argues that it is entitled to appeal the decision of ODE's hearing officer in this particular case and as adopted by BOE, under R.C. 119.12, because the decision was an "adjudication" by an agency in a "quasi-judicial" proceeding. (ECOT's Brief at 13-20.) In our decision on the open meetings act as applied to ODE and BOE, we specifically stated that the action of the BOE in adopting the decision of the hearing officer was an "adjudication" **[***11]** and part of a "quasi-judicial" proceeding. Electronic Classroom of Tomorrow, 2018-Ohio-716, ¶ 20-28.

**[*P15]** That portion of the BOE and ODE

administrative appeal procedural statute contains specific language concerning the review of a school's enrollment data. It also requires that "[a]ny decision made by the board under this division is final." R.C. 3314.08(K)(2)(d). This question of finality is at the heart of this appeal. HN2[↑] The meaning and application of what is final is a legal determination for our plenary review. Does "final" mean the decision is the "final" decision of the agency and appealable only to a court under R.C. 119.12, or is "final" used in the sense that no further appeal is allowed at all, either within the agency or in a court?

**[*P16]** There are some instances in the Ohio Revised Code in which the legislature uses "final" while simultaneously contemplating a right to appeal. *See* R.C. 5709.25(G) (tax commissioner's determination on a pollution control exempt facility certificate); R.C. 3734.05(I)(6) (EPA director's determination on a Class 2 or 3 modification to a hazardous waste facility); R.C. 718.11(E) (local board of tax review **[**854]** decision on a tax administrator's assessment). There are also many instances in which the code uses a variant of the phrase, "final and not appealable." *See* R.C. 4117.06(A) (state employment relations **[***12]** board decision on the unit appropriate for collective bargaining); R.C. 3734.05(I)(6) (EPA director's determination on a Class 2 or 3 modification to a hazardous waste facility); R.C. 718.11(A)(4) (legislative authority's decision to remove a member of the local board of tax review); R.C. 4121.35(B)(5) (industrial commission hearing officers' decision on review of settlement agreements); R.C. 3311.0510(A) (school superintendent's order dividing assets and liabilities of a defunct educational service center); R.C. 109.921(C)(2) (the attorney general's decision upon an application for funding from the rape crisis program trust fund without a hearing); R.C. 3317.161(D)(5) (department of education determination on whether to approve a career-technical education program); R.C. 3702.524(C) (determination by the director of health that a certificate of need has expired in cases where the certificate holder fails to take appropriate actions); R.C. 118.04(C) (determination by the auditor of state whether a fiscal emergency condition exists); R.C. 3316.03(E) (determination by the auditor of state whether a fiscal emergency condition exists); R.C. 3345.72(G) (determination by the chancellor of higher education on the issue of a fiscal watch); R.C. 3345.74(A) (determination by the chancellor of higher education on whether to appoint a conservator); R.C. 3345.76(A) (determination by a governance **[***13]** authority for a state university or college on the issue of whether sufficient fiscal stability exists to warrant terminating that governance authority). There are also statutes within which "final" is used to describe both appealable and non-appealable decisions. R.C. 3734.05(I)(6) (EPA director's determination on a Class 2 or 3 modification to a hazardous waste facility); R.C. 718.11(A)(4) and (E) (legislative authority's decision to remove a member of the local board of tax review and local board of tax review decision on a tax administrator's assessment); R.C. 4121.35(B)(4) and (5) (industrial commission hearing officers' decisions on applications for reconsideration and on review of settlement agreements). What the legislature means when it merely says, "final," in the context of determining whether there is a right to appeal from an administrative adjudication to a court of common pleas, is therefore somewhat ambiguous and subject to judicial determination in the absence of legislation to clarify it. Both this Court and the Supreme Court have addressed situations in which the legislature has merely declared an administrative action to be "final" and these courts have reached varying results.

**[*P17]** In *Heartland Jockey Club v. Ohio State Racing* **[***14]** *Comm'n*, when the Ohio State Racing Commission made a determination about what was "final" in the relevant statute, we were "asked to determine how final the word 'final' [wa]s in R.C. 3769.089(E)(3)." Heartland Jockey Club v. Ohio State Racing Comm'n, 10th Dist. No. 98AP-1465, 1999 Ohio App. LEXIS 3530, *2, 1999 WL 566857 (Aug. 3, 1999). The 1999 panel in that case reached the conclusion that the statute's unadorned use of "final" precluded an appeal under R.C. 119.12 and that mandamus was the proper action through which the plaintiff could seek a remedy. Heartland Jockey Club, 1999 Ohio App. LEXIS 3530 at *2-4. However, in ECOT's case, a remedy in mandamus has been rejected without explanation by the Supreme Court.

**[*P18]** In *State ex rel. Shumway v. State Teachers Retirement Bd.*, this Court determined that a trial court lacked jurisdiction to consider an appeal of a final average salary determination by the State Teachers Retirement Board because former **[**855]** R.C. 3307.013(E) provided that determinations of the board "shall be final." State ex rel. Shumway v. State Teachers Retirement Bd., 114 Ohio App.3d 280, 286, 683 N.E.2d 70 (10th Dist.1996); *see* Am.Sub.S.B. No. 230, 146 Ohio Laws, Part VI, 10257, 10282-83[3]; R.C.

[3] Archived online at 1995 Ohio SB 230.

3307.501(E) (current version of former R.C. 3307.013 containing the same language). The *Shumway* panel also concluded that a declaratory judgment action cannot be substituted for an appeal in such circumstances, leaving a petition for a writ of mandamus as the proper vehicle. Shumway at 284, fn. 1, 286.

**[*P19]** In *Carney v. School Employees Retirement Syst. Bd.*, we held that no appeal lay **[***15]** from a determination by the School Employees Retirement Board because the statute in question, former R.C. 3309.39[4], provided that determinations of the board were "final" and a prior Supreme Court case included this language: "'[t]he determination of whether a member of the School Employees Retirement System is entitled to disability retirement is solely within the province of the School Employees Retirement Board pursuant to R.C. 3309.39.'" Carney v. School Emps. Retirement Syst. Bd., 39 Ohio App.3d 71, 72, 528 N.E.2d 1322 (10th Dist.1987), quoting Fair v. School Emps. Retirement Syst., 53 Ohio St.2d 118, 372 N.E.2d 814 (1978). As in *Shumway*, the *Carney* panel stated that a declaratory judgment action cannot be substituted for an appeal. Like both *Shumway* and *Heartland Jockey Club*, the panel concluded that mandamus was the appropriate course through which to seek a remedy. Carney at 72.

**[*P20]** On the other hand, the Supreme Court has recently decided that an ODE determination that an entity was not "education-oriented" under R.C. 3314.015(B)(3) was appealable pursuant to R.C. 3314.015(D) and in accordance with R.C. 119.12. Brookwood Presbyterian Church v. Ohio Dep't of Educ., 127 Ohio St. 3d 469, 2010-Ohio-5710, ¶ 1, 940 N.E.2d 1256, in passim. The High Court held a right of appeal existed despite the fact that R.C. 3314.015(B)(3) contained language stating that a "determination of the state board is final." In *Brookwood*, the court viewed the "final" language as requiring that, in order to be reviewable upon appeal, decisions must be "final." Brookwood at ¶ 11-12. **[***16]** The High Court then distinguished *Heartland Jockey Club, Shumway*, and *Carney* because, unlike in each of those cases, the relevant statute in *Brookwood*, simultaneously stated that a determination was "final," and, yet, also explicitly provided for an appeal of related matters. Brookwood at ¶ 14-15; R.C. 3314.015(D). That is, R.C. 3314.015(B)(3) provides that a "determination of the state board is final," when rendered on the question of whether a community school contract proposed an education-oriented mission. But a different division of that same statute also provides that "[t]he decision of the department to disapprove an entity for sponsorship of a community school or to revoke approval for such sponsorship under division (C) of this section, may be appealed by the entity in accordance with section 119.12 of the Revised Code." R.C. 3314.015(D). The specific grant of appealability in the statute, said the Supreme Court, "makes all the difference." Brookwood at ¶ 15.

**[*P21]** **[**856]** In this case, there is no stated appeal right that is specific to or set forth in R.C. 3314.08. As such, this case is not on all fours with Brookwood. Yet, neither is it on all fours with Heartland Jockey Club, Shumway, and Carney, because each of those cases opined that mandamus was the proper vehicle to challenge **[***17]** the action at issue and in two of those cases (*Shumway* and *Carney*) this Court opined that a declaratory judgment could not be used instead. Adding to ECOT's unique situation is that ECOT has been permitted to pursue declaratory judgment action (albeit unsuccessfully so far on the merits) but its mandamus action has been dismissed without explanation for why it was inapropos. In short, none of the cases we have cited definitively settles the matter.

**[*P22]** The ODE parties argue that it is, "'[a] well-settled principle of Ohio law [] that when two statutes, one general and one specific, cover the same subject matter, the specific provision is to be construed as an exception to the general statute that might otherwise apply.'" (Jan. 16, 2018 Appellees' Brief at 27, quoting State ex rel. Motor Carrier Serv. v. Rankin, 135 Ohio St.3d 395, 2013-Ohio-1505, ¶ 26, 987 N.E.2d 670.) They, therefore, argue that the specific provision in R.C. 3314.08(K)(2)(d) declaring a decision of the BOE to be "final" prevails over the general grant of an appeal provided in R.C. 119.12(B). (Appellees' Brief at 27-28.) However, this argument becomes hollow without the other principle of law discussed in *Rankin* and codified in R.C. 1.51:

> HN3[↑] "If a general provision conflicts with a special or local provision, **they shall be construed, if possible, so that effect is [***18] given to both**. If the conflict between the provisions is irreconcilable, the special or local provision prevails

[4] Current R.C. 3309.39 contains such language at division (F). The version of R.C. 3309.39 in effect when *Carney* was decided contained no subdivisions but still contained the phrase, "the action of the board shall be final." *See* Am.Sub.H.B. No. 502, 141 Ohio Laws, Part III, 4668, 4714-15.

> as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

(Emphasis added.) *Rankin at ¶ 26*, quoting *R.C. 1.51*. In short, if possible, we must give effect to both *R.C. 3314.08(K)(2)(d)*'s pronouncement that decisions of the BOE are "final" and to *R.C. 119.12(B)*'s provision of an appeal to the court of common pleas from adjudications of administrative agencies.

**[*P23]** *HN4*[↑] One way to reconcile the two statutes would be to say that *R.C. 3314.08(K)(2)(d)* 's pronouncement that decisions of the BOE are "final" means they are not subject to further administrative proceedings before ODE or the BOE and must be appealed under *R.C. 119.12(B)*. This would give "effect" to *R.C. 119.12(B)* in the sense that its grant of an appeal would operate and would reconcile both *R.C. 119.12(B)* and *R.C. 3314.08(K)(2)(d)*. In this way, both statutes would have coherent non-conflicting meanings and effect would be given to both.

**[*P24]** This case has a robust and multi-faceted procedural history. Because of that, as our discussion shows, caselaw and statutes can provide legally persuasive reasoning for allowing this appeal or for dismissing this appeal. **[***19]** ECOT has been permitted to litigate the substantive merits of its case in a declaratory judgment/injunctive relief proceeding that has been appealed to the highest court in Ohio where it currently is pending. ECOT has also been permitted to challenge the manner in which the administrative proceeding occurred (via its open meetings act litigation). However, ECOT has not been permitted to directly dispute the findings of the administrative process and the Supreme Court has dismissed ECOT's mandamus action without explanation. With the law in equipoise, we hold that ECOT is entitled to the opportunity to dispute not just the substantive and procedural merits **[**857]** of their action (which it is already doing in the declaratory/injunctive action and the open meetings act litigation) but also to appeal the particular findings and decisions of the administrative adjudication, especially as to the "claw back" of funds already appropriated and distributed by the State of Ohio. ECOT's sole assignment of error is sustained.

### IV. CONCLUSION

**[*P25]** Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and remand ECOT's *R.C. 119.12* appeal to the trial court for full consideration, utilizing a robust **[***20]** procedure consistent with the law stated in this decision.

*Judgment reversed; cause remanded.*

BROWN, P.J., concurs.

LUPER SCHUSTER, J., dissents.

**Dissent by:** LUPER SCHUSTER

## Dissent

LUPER SCHUSTER, J., dissenting.

**[*P26]** I disagree with the majority and would find the decision of the ODE to be final and not subject to an appeal filed under *R.C. 119.12*. Therefore, I respectfully dissent. As the majority notes, this court has previously construed the legislature's use of the word "final" in the context of decisions of administrative bodies to mean the decision is not subject to an appeal under *R.C. 119.12*. *Carney v. School Emp. Retirement Sys. Bd., 39 Ohio App.3d 71, 72, 528 N.E.2d 1322 (10th Dist.1987)*; *State ex rel. Shumway v. State Teachers Retirement Bd., 114 Ohio App.3d 280, 286, 683 N.E.2d 70 (10th Dist.1996)*; *Heartland Jockey Club v. Ohio State Racing Comm'n, 10th Dist. No. 98AP-1465, 1999 Ohio App. LEXIS 3530 (Aug. 3, 1999)*. I would find this precedent and the Supreme Court of Ohio's decision in *Brookwood Presbyterian Church v. Ohio Dep't of Educ., 127 Ohio St. 3d 469, 2010-Ohio-5710, 940 N.E.2d 1256*, to be controlling.

**[*P27]** In *Brookwood*, the Supreme Court considered a statute that provided that ODE's decision as to whether an entity was education-oriented was "final." The Supreme Court noted that the same statute also expressly provided a right to appeal under *R.C. 119.12*. Under those circumstances, the Supreme Court concluded that the use of the word "final" in that statute did not preclude an appeal under *R.C. 119.12* where further language, within the same statute, specifically contemplated an appeal. In so deciding, the Supreme Court reviewed our precedent in *Carney*, ***[***21]*** *Shumway*, and *Heartland Jockey Club* and concluded the statutes in those cases "lacked what is present in [the statute at issue in *Brookwood*]—a specific, statutory grant of jurisdiction to the trial court to review the

decisions of the administrative body pursuant to R.C. 119.12. Here, that makes all the difference." Brookwood at ¶ 15.

**[*P28]** Unlike the statute at issue in *Brookwood*, here R.C. 3314.08(K) specifies that the decision is "final" and does not provide a specific grant of statutory jurisdiction to the trial court to review the decision of the administrative body. Thus, I would conclude that *Brookwood* directs that a statute that provides a decision of an administrative body is "final" and that does not include a separate specific, statutory grant of jurisdiction to the trial court precludes an appeal under R.C. 119.12. Accordingly, I would follow the Supreme Court's precedent in *Brookwood* and this court's precedent in *Carney*, *Shumway*, and *Heartland Jockey Club* and find the use of the word "final" in R.C. 3314.08(K) precludes an appeal under R.C. 119.12.

**[*P29]** For these reasons, I respectfully dissent.

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End of Document

# 3301.13 Department of education - organization - powers and duties.

The department of education hereby created, shall be the administrative unit and organization through which the policies, directives, and powers of the state board of education and the duties of the superintendent of public instruction are administered by such superintendent as executive officer of the board. The department of education shall consist of the state board of education, the superintendent of public instruction, and a staff of such professional, clerical, and other employees as may be necessary to perform the duties and to exercise the required functions of the department. The department of education shall be organized as provided by law or by order of the state board of education. The superintendent of public instruction shall be the chief administrative officer of such department, and, subject to board policies, rules, and regulations, shall exercise general supervision of the department. The department of education shall be subject to all provisions of law pertaining to departments, offices, or institutions established for the exercise of any function of the state government; excepting that it shall not be one of the departments provided for under division (A) of section 121.01 of the Revised Code. In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards the department of education, and any officer or agency therein, shall be subject to Chapter 119. of the Revised Code. The headquarters of the department of education shall be at the seat of government, where office space suitable and adequate for the work of the department shall be provided by the appropriate state agency. There the state board of education shall meet and transact its business, unless the board chooses to meet elsewhere in Ohio as provided by section 3301.04 of the Revised Code. There the records of the state board of education and the records, papers, and documents belonging to the department shall be kept in charge of the superintendent of public instruction. The superintendent of public instruction shall recommend, for approval by the board, the organization of the department of education, and the assignment of the work within such department. The appointment, number, and salaries of assistant superintendents and division heads shall be determined by the state board of education after recommendation of the superintendent of public instruction. Such assistant superintendents and division heads shall serve at the pleasure of the board. The superintendent of public instruction may appoint, fix the salary, and terminate the employment of such other employees as are engaged in educational or research duties.

Effective Date: 07-22-1994.

# 3314.08 Annual enrollment reports; payments from department.

(A) As used in this section:

(1)

(a) "Category one career-technical education student" means a student who is receiving the career-technical education services described in division (A) of section 3317.014 of the Revised Code.

(b) "Category two career-technical student" means a student who is receiving the career-technical education services described in division (B) of section 3317.014 of the Revised Code.

(c) "Category three career-technical student" means a student who is receiving the career-technical education services described in division (C) of section 3317.014 of the Revised Code.

(d) "Category four career-technical student" means a student who is receiving the career-technical education services described in division (D) of section 3317.014 of the Revised Code.

(e) "Category five career-technical education student" means a student who is receiving the career-technical education services described in division (E) of section 3317.014 of the Revised Code.

(2)

(a) "Category one English learner" means an English learner described in division (A) of section 3317.016 of the Revised Code.

(b) "Category two English learner" means an English learner described in division (B) of section 3317.016 of the Revised Code.

(c) "Category three English learner" means an English learner described in division (C) of section 3317.016 of the Revised Code.

(3)

(a) "Category one special education student" means a student who is receiving special education services for a disability specified in division (A) of section 3317.013 of the Revised Code.

(b) "Category two special education student" means a student who is receiving special education services for a disability specified in division (B) of section 3317.013 of the Revised Code.

(c) "Category three special education student" means a student who is receiving special education services for a disability specified in division (C) of section 3317.013 of the Revised Code.

(d) "Category four special education student" means a student who is receiving special education services for a disability specified in division (D) of section 3317.013 of the Revised Code.

(e) "Category five special education student" means a student who is receiving special education services for a disability specified in division (E) of section 3317.013 of the Revised Code.

(f) "Category six special education student" means a student who is receiving special education services for a disability specified in division (F) of section 3317.013 of the Revised Code.

(4) "Formula amount" has the same meaning as in section 3317.02 of the Revised Code.

(5) "IEP" has the same meaning as in section 3323.01 of the Revised Code.

(6) "Resident district" means the school district in which a student is entitled to attend school under section 3313.64 or 3313.65 of the Revised Code.

(7) "State education aid" has the same meaning as in section 5751.20 of the Revised Code.

(B) The state board of education shall adopt rules requiring both of the following:

(1) The board of education of each city, exempted village, and local school district to annually report the number of students entitled to attend school in the district who are enrolled in each grade kindergarten through twelve in a community school established under this chapter, and for each child, the community school in which the child is enrolled.

(2) The governing authority of each community school established under this chapter to annually report all of the following:

(a) The number of students enrolled in grades one through twelve and the full-time equivalent number of students enrolled in kindergarten in the school who are not receiving special education and related services pursuant to an IEP;

(b) The number of enrolled students in grades one through twelve and the full-time equivalent number of enrolled students in kindergarten, who are receiving special education and related services pursuant to an IEP;

(c) The number of students reported under division (B)(2)(b) of this section receiving special education and related services pursuant to an IEP for a disability described in each of divisions (A) to (F) of section 3317.013 of the Revised Code;

(d) The full-time equivalent number of students reported under divisions (B)(2)(a) and (b) of this section who are enrolled in career-technical education programs or classes described in each of divisions (A) to (E) of section 3317.014 of the Revised Code that are provided by the community school;

(e) The number of students reported under divisions (B)(2)(a) and (b) of this section who are not reported under division (B)(2)(d) of this section but who are enrolled in career-technical education programs or classes described in each of divisions (A) to (E) of section 3317.014 of the Revised Code at a joint vocational school district or another district in the career-technical planning district to which the school is assigned;

(f) The number of students reported under divisions (B)(2)(a) and (b) of this section who are category one to three English learners described in each of divisions (A) to (C) of section 3317.016 of the Revised Code;

(g) The number of students reported under divisions (B)(2)(a) and (b) of this section who are economically disadvantaged, as defined by the department. A student shall not be categorically excluded from the number reported under division (B)(2)(g) of this section based on anything other than family income.

(h) For each student, the city, exempted village, or local school district in which the student is entitled to attend school under section 3313.64 or 3313.65 of the Revised Code.

(i) The number of students enrolled in a preschool program operated by the school that is licensed by the department of education under sections 3301.52 to 3301.59 of the Revised Code who are not receiving special education and related services pursuant to an IEP.

A school district board and a community school governing authority shall include in their respective reports under division (B) of this section any child admitted in accordance with division (A)(2) of section 3321.01 of the Revised Code.

A governing authority of a community school shall not include in its report under divisions (B)(2)(a) to (h) of this section any student for whom tuition is charged under division (F) of this section.

(C)

(1) Except as provided in division (C)(2) of this section, and subject to divisions (C)(3), (4), (5), (6), and (7) of this section, on a full-time equivalency basis, for each student enrolled in a community school established under this chapter, the department of education annually shall deduct from the state education aid of a student's resident district and, if necessary, from the payment made to the district under sections 321.24 and 323.156 of the Revised Code and pay to the community school the sum of the following:

(a) An opportunity grant in an amount equal to the formula amount;

(b) The per pupil amount of targeted assistance funds calculated under division (A) of section 3317.0217 of the Revised Code for the student's resident district, as determined by the department, X 0.25;

(c) Additional state aid for special education and related services provided under Chapter 3323. of the Revised Code as follows:

(i) If the student is a category one special education student, the amount specified in division (A) of section 3317.013 of the Revised Code;

(ii) If the student is a category two special education student, the amount specified in division (B) of section 3317.013 of the Revised Code;

(iii) If the student is a category three special education student, the amount specified in division (C) of section 3317.013 of the Revised Code;

(iv) If the student is a category four special education student, the amount specified in division (D) of section 3317.013 of the Revised Code;

(v) If the student is a category five special education student, the amount specified in division (E) of section 3317.013 of the Revised Code;

(vi) If the student is a category six special education student, the amount specified in division (F) of section 3317.013 of the Revised Code.

(d) If the student is in kindergarten through third grade, an additional amount of $320;

(e) If the student is economically disadvantaged, an additional amount equal to the following:

$272 X the resident district's economically disadvantaged index

(f) English learner funds as follows:

(i) If the student is a category one English learner, the amount specified in division (A) of section 3317.016 of the Revised Code;

(ii) If the student is a category two English learner, the amount specified in division (B) of section 3317.016 of the Revised Code;

(iii) If the student is a category three English learner, the amount specified in division (C) of section 3317.016 of the Revised Code.

(g) If the student is reported under division (B)(2)(d) of this section, career-technical education funds as follows:

(i) If the student is a category one career-technical education student, the amount specified in division (A) of section 3317.014 of the Revised Code;

(ii) If the student is a category two career-technical education student, the amount specified in division (B) of section 3317.014 of the Revised Code;

(iii) If the student is a category three career-technical education student, the amount specified in division (C) of section 3317.014 of the Revised Code;

(iv) If the student is a category four career-technical education student, the amount specified in division (D) of section 3317.014 of the Revised Code;

(v) If the student is a category five career-technical education student, the amount specified in division (E) of section 3317.014 of the Revised Code.

Deduction and payment of funds under division (C)(1)(g) of this section is subject to approval by the lead district of a career-technical planning district or the department of education under section 3317.161 of the Revised Code.

(2) When deducting from the state education aid of a student's resident district for students enrolled in an internet- or computer-based community school and making payments to such school under this section, the department shall make the deductions and payments described in only divisions (C)(1)(a), (c), and (g) of this section.

No deductions or payments shall be made for a student enrolled in such school under division (C)(1)(b), (d), (e), or (f) of this section.

(3)

(a) If a community school's costs for a fiscal year for a student receiving special education and related services pursuant to an IEP for a disability described in divisions (B) to (F) of section 3317.013 of the Revised Code exceed the threshold catastrophic cost for serving the student as specified in division (B) of section 3317.0214 of the Revised Code, the school may submit to the superintendent of public instruction documentation, as prescribed by the superintendent, of all its costs for that student. Upon submission of documentation for a student of the type and in the manner prescribed, the department shall pay to the community school an amount equal to the school's costs for the student in excess of the threshold catastrophic costs.

(b) The community school shall report under division (C)(3)(a) of this section, and the department shall pay for, only the costs of educational expenses and the related services provided to the student in accordance with the student's individualized education program. Any legal fees, court costs, or other costs associated with any cause of action relating to the student may not be included in the amount.

(4) In any fiscal year, a community school receiving funds under division (C)(1)(g) of this section shall spend those funds only for the purposes that the department designates as approved for career-technical education expenses. Career-technical education expenses approved by the department shall include only expenses connected to the delivery of career-technical programming to career-technical students. The department shall require the school to report data annually so that the department may monitor the school's compliance with the requirements regarding the manner in which funding received under division (C)(1)(g) of this section may be spent.

(5) Notwithstanding anything to the contrary in section 3313.90 of the Revised Code, except as provided in division (C)(9) of this section, all funds received under division (C)(1)(g) of this section shall be spent in the following manner:

(a) At least seventy-five per cent of the funds shall be spent on curriculum development, purchase, and implementation; instructional resources and supplies; industry-based program certification; student assessment, credentialing, and placement; curriculum specific equipment purchases and leases; career-technical student organization fees and expenses; home and agency linkages; work-based learning experiences; professional development; and other costs directly associated with career-technical education programs including development of new programs.

(b) Not more than twenty-five per cent of the funds shall be used for personnel expenditures.

(6) A community school shall spend the funds it receives under division (C)(1)(e) of this section in accordance with section 3317.25 of the Revised Code.

(7) If the sum of the payments computed under divisions (C)(1) and (8)(a) of this section for the students entitled to attend school in a particular school district under sections 3313.64 and 3313.65 of the Revised Code exceeds the sum of that district's state education aid and its payment under sections 321.24 and 323.156 of the Revised Code, the department shall calculate and apply a proration factor to the payments to all community schools under that division for the students entitled to attend school in that district.

(8)

(a) Subject to division (C)(7) of this section, the department annually shall pay to each community school, including each internet- or computer-based community school, an amount equal to the following:

(The number of students reported by the community school under division (B)(2)(e) of this section X the formula amount X .20)

(b) For each payment made to a community school under division (C)(8)(a) of this section, the department shall deduct from the state education aid of each city, local, and exempted village school district and, if necessary, from the payment made to the district under sections 321.24 and 323.156 of the Revised Code an amount equal to the following:

(The number of the district's students reported by the community school under division (B)(2)(e) of this section X the formula amount X .20)

(9) The department may waive the requirement in division (C)(5) of this section for any community school that exclusively provides one or more career-technical workforce development programs in arts and communications that are not equipment-intensive, as determined by the department.

(D) A board of education sponsoring a community school may utilize local funds to make enhancement grants to the school or may agree, either as part of the contract or separately, to provide any specific services to the community school at no cost to the school.

(E) A community school may not levy taxes or issue bonds secured by tax revenues.

(F) No community school shall charge tuition for the enrollment of any student who is a resident of this state. A community school may charge tuition for the enrollment of any student who is not a resident of this state.

(G)

(1)

(a) A community school may borrow money to pay any necessary and actual expenses of the school in anticipation of the receipt of any portion of the payments to be received by the school pursuant to division (C) of this section. The school may issue notes to evidence such borrowing. The proceeds of the notes shall be used only for the purposes for which the anticipated receipts may be lawfully expended by the school.

(b) A school may also borrow money for a term not to exceed fifteen years for the purpose of acquiring facilities.

(2) Except for any amount guaranteed under section 3318.50 of the Revised Code, the state is not liable for debt incurred by the governing authority of a community school.

(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 seventy-two 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.

(I) The department of education shall reduce the amounts paid under this section to reflect payments made to colleges under section 3365.07 of the Revised Code.

(J)

(1) No student shall be considered enrolled in any internet- or computer-based community school or, if applicable to the student, in any community school that is required to provide the student with a computer pursuant to division (C) of section 3314.22 of the Revised Code, unless both of the following conditions are satisfied:

(a) The student possesses or has been provided with all required hardware and software materials and all such materials are operational so that the student is capable of fully participating in the learning opportunities specified in the contract between the school and the school's sponsor as required by division (A)(23) of section 3314.03 of the Revised Code;

(b) The school is in compliance with division (A) of section 3314.22 of the Revised Code, relative to such student.

(2) In accordance with policies adopted by the superintendent of public instruction, in consultation with the auditor of state, the department shall reduce the amounts otherwise payable under division (C) of this section to any community school that includes in its program the provision of computer hardware and software materials to any student, if such hardware and software materials have not been delivered, installed, and activated for each such student in a timely manner or other educational materials or services have not been provided according to the contract between the individual community school and its sponsor.

The superintendent of public instruction and the auditor of state shall jointly establish a method for auditing any community school to which this division pertains to ensure compliance with this section.

The superintendent, auditor of state, and the governor shall jointly make recommendations to the general assembly for legislative changes that may be required to assure fiscal and academic accountability for such schools.

(K)

(1) If 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 governing authority of the community school and its sponsor within ninety days of the end of the community school's fiscal year, unless extended for a period not to exceed thirty additional days for one of the following reasons:

(a) The department and the community school mutually agree to the extension.

(b) Delays in data submission caused by either a community school or its sponsor.

(2) If the review results in a finding that additional funding is owed to the school, such payment shall be made within thirty days of the written notice. If the review results in a finding that the community school owes moneys to the state, the following procedure shall apply:

(a) Within ten business days of the receipt of the notice of findings, the community school may appeal the department's determination to the state board of education or its designee.

(b) The 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.

(c) If the board has enlisted a designee to conduct the hearing, the designee shall certify its decision to the board. The board may accept the decision of the designee or may reject the decision of the designee and issue its own decision on the matter.

(d) Any decision made by the board under this division is final.

(3) If it is decided that the community school owes moneys to the state, the department shall deduct such amount from the school's future payments in accordance with guidelines issued by the superintendent of public instruction.

(L) The department shall not subtract from a school district's state aid account and shall not pay to a community school under division (C) of this section any amount for any of the following:

(1) Any student who has graduated from the twelfth grade of a public or nonpublic high school;

(2) Any student who is not a resident of the state;

(3) Any student who was enrolled in the community school during the previous school year when assessments were administered under section 3301.0711 of the Revised Code but did not take one or more of the assessments required by that section and was not excused pursuant to division (C)(1) or (3) of that section, unless the superintendent of public instruction grants the student a waiver from the requirement to take the assessment and a parent is not paying tuition for the student pursuant to section 3314.26 of the Revised Code. The

superintendent may grant a waiver only for good cause in accordance with rules adopted by the state board of education.

(4) Any student who has attained the age of twenty-two years, except for veterans of the armed services whose attendance was interrupted before completing the recognized twelve-year course of the public schools by reason of induction or enlistment in the armed forces and who apply for enrollment in a community school not later than four years after termination of war or their honorable discharge. If, however, any such veteran elects to enroll in special courses organized for veterans for whom tuition is paid under federal law, or otherwise, the department shall not subtract from a school district's state aid account and shall not pay to a community school under division (C) of this section any amount for that veteran.

Amended by 133rd General Assembly File No. TBD, HB 166, §101.01, eff. 10/17/2019.

Amended by 132nd General Assembly File No. TBD, SB 216, §1, eff. 11/2/2018.

Amended by 132nd General Assembly File No. TBD, HB 87, §1, eff. 11/2/2018.

Amended by 132nd General Assembly File No. TBD, HB 49, §101.01, eff. 9/29/2017.

Amended by 131st General Assembly File No. TBD, HB 113, §1, eff. 9/14/2016.

Amended by 131st General Assembly File No. TBD, HB 64, §101.01, eff. 9/29/2015.

Amended by 130th General Assembly File No. TBD, HB 487, §1, eff. 9/17/2014.

Amended by 130th General Assembly File No. TBD, HB 483, §101.01, eff. 9/15/2014.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 129th General AssemblyFile No.128, SB 316, §101.01, eff. 9/24/2012.

Amended by 129th General AssemblyFile No.28, HB 153, §101.01, eff. 6/30/2011.

Amended by 129th General AssemblyFile No.12, HB 36, §1, eff. 4/13/2011.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 7/17/2009.

Effective Date: 06-26-2003; 06-30-2005; 06-30-2006; 03-30-2007; 2007 HB119 06-30-2007.

**Related Legislative Provision:** *See 131st General Assembly File No. TBD, HB 7, §4.*

## Chapter 119: ADMINISTRATIVE PROCEDURE

### 119.01 Administrative procedure definitions.

As used in sections 119.01 to 119.13 of the Revised Code:

(A)

(1) "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the civil service commission, the division of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

Sections 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission. Sections 119.01 to 119.13 of the Revised Code do not apply to the utility radiological safety board; to the controlling board; to actions of the superintendent of financial institutions and the superintendent of insurance in the taking possession of, and rehabilitation or liquidation of, the business and property of banks, savings and loan associations, savings banks, credit unions, insurance companies, associations, reciprocal fraternal benefit societies, and bond investment companies; to any action taken by the division of securities under section 1707.201 of the Revised Code; or to any action that may be taken by the superintendent of financial institutions under section 1113.03, 1121.06, 1121.10, 1125.09, 1125.12, 1125.18, 1349.33, 1733.35, 1733.361, 1733.37, or 1761.03 of the Revised Code.

Sections 119.01 to 119.13 of the Revised Code do not apply to actions of the industrial commission or the bureau of workers' compensation under sections 4123.01 to 4123.94 of the Revised Code with respect to all matters of adjudication, or to the actions of the industrial commission, bureau of workers' compensation board of directors, and bureau of workers' compensation under division (D) of section 4121.32, sections 4123.29, 4123.34, 4123.341, 4123.342, 4123.40, 4123.411, 4123.44, 4123.442, 4127.07, divisions (B), (C), and (E) of section 4131.04, and divisions (B), (C), and (E) of section 4131.14 of the Revised Code with respect to all matters concerning the establishment of premium, contribution, and assessment rates.

(2) "Agency" also means any official or work unit having authority to promulgate rules or make adjudications in the department of job and family services, but only with respect to both of the following:

(a) The adoption, amendment, or rescission of rules that section 5101.09 of the Revised Code requires be adopted in accordance with this chapter;

(b) The issuance, suspension, revocation, or cancellation of licenses.

(B) "License" means any license, permit, certificate, commission, or charter issued by any agency. "License" does not include any arrangement whereby a person or government entity furnishes medicaid services under a provider agreement with the department of medicaid.

(C) "Rule" means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule. "Rule" does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code.

(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.

(E) "Hearing" means a public hearing by any agency in compliance with procedural safeguards afforded by sections 119.01 to 119.13 of the Revised Code.

(F) "Person" means a person, firm, corporation, association, or partnership.

(G) "Party" means the person whose interests are the subject of an adjudication by an agency.

(H) "Appeal" means the procedure by which a person, aggrieved by a finding, decision, order, or adjudication of any agency, invokes the jurisdiction of a court.

(I) "Internal management rule" means any rule, regulation, or standard governing the day-to-day staff procedures and operations within an agency.

Amended by 132nd General Assembly File No. TBD, HB 49, §130.21, eff. 1/1/2018.

Amended by 130th General Assembly File No. TBD, SB 3, §1, eff. 9/17/2014.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 128th General AssemblyFile No.45, HB 292, §1, eff. 9/13/2010.

Effective Date: 06-18-2002; 04-14-2006; 2007 HB100 09-10-2007.

## 119.02 Compliance - validity of rules.

Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in sections 119.01 to 119.13, inclusive, of the Revised Code, for the adoption, amendment, or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule.

Effective Date: 10-01-1953.

## 119.03 Procedure for adoption, amendment, or rescission of rules.

In the adoption, amendment, or rescission of any rule, an agency shall comply with the following procedure:

(A) Reasonable public notice shall be given in the register of Ohio at least thirty days prior to the date set for a hearing, in the form the agency determines. The agency shall file copies of the public notice under division (B) of this section. (The agency gives public notice in the register of Ohio when the public notice is published in the register under that division.)

The public notice shall include:

(1) A statement of the agency's intention to consider adopting, amending, or rescinding a rule;

(2) A synopsis of the proposed rule, amendment, or rule to be rescinded or a general statement of the subject matter to which the proposed rule, amendment, or rescission relates;

(3) A statement of the reason or purpose for adopting, amending, or rescinding the rule;

(4) The date, time, and place of a hearing on the proposed action, which shall be not earlier than the thirty-first nor later than the fortieth day after the proposed rule, amendment, or rescission is filed under division (B) of this section.

In addition to public notice given in the register of Ohio, the agency may give whatever other notice it reasonably considers necessary to ensure notice constructively is given to all persons who are subject to or affected by the proposed rule, amendment, or rescission.

The agency shall provide a copy of the public notice required under division (A) of this section to any person who requests it and pays a reasonable fee, not to exceed the cost of copying and mailing.

(B) The full text of the proposed rule, amendment, or rule to be rescinded, accompanied by the public notice required under division (A) of this section, shall be filed in electronic form with the secretary of state and with the director of the legislative service commission. (If in compliance with this division an agency files more than one proposed rule, amendment, or rescission at the same time, and has prepared a public notice under division (A) of this section that applies to more than one of the proposed rules, amendments, or rescissions, the agency shall file only one notice with the secretary of state and with the director for all of the proposed rules, amendments, or rescissions to which the notice applies.) The proposed rule, amendment, or rescission and public notice shall be filed as required by this division at least sixty-five days prior to the date on which the agency, in accordance with division (E) of this section, issues an order adopting the proposed rule, amendment, or rescission.

If the proposed rule, amendment, or rescission incorporates a text or other material by reference, the agency shall comply with sections 121.71 to 121.75 of the Revised Code.

The proposed rule, amendment, or rescission shall be available for at least thirty days prior to the date of the hearing at the office of the agency in printed or other legible form without charge to any person affected by the proposal. Failure to furnish such text to any person requesting it shall not invalidate any action of the agency in connection therewith.

If the agency files a revision in the text of the proposed rule, amendment, or rescission, it shall also promptly file the full text of the proposed rule, amendment, or rescission in its revised form in electronic form with the secretary of state and with the director of the legislative service commission.

The agency shall file the rule summary and fiscal analysis prepared under section 106.024 of the Revised Code in electronic form along with a proposed rule, amendment, or rescission or proposed rule, amendment, or rescission in revised form that is filed with the secretary of state or the director of the legislative service commission.

The agency shall file the hearing report relating to a proposed rule, amendment, or rescission in electronic form with the secretary of state and the director of the legislative service commission at the same time the agency files the hearing report with the joint committee on agency rule review.

The director of the legislative service commission shall publish in the register of Ohio the full text of the original and each revised version of a proposed rule, amendment, or rescission; the full text of a public notice; the full text of a rule summary and fiscal analysis; and the full text of a hearing report that is filed with the director under this division.

(C) When an agency files a proposed rule, amendment, or rescission under division (B) of this section, it also shall file in electronic form with the joint committee on agency rule review the full text of the proposed rule, amendment, or rule to be rescinded in the same form and the public notice required under division (A) of this section. (If in compliance with this division an agency files more than one proposed rule, amendment, or rescission at the same time, and has given a public notice under division (A) of this section that applies to more than one of the proposed rules, amendments, or rescissions, the agency shall file only one notice with the joint committee for all of the proposed rules, amendments, or rescissions to which the notice applies.) The proposed rule, amendment, or rescission is subject to legislative review and invalidation under sections 106.02, 106.021, and 106.022 of the Revised Code. If the agency makes a revision in a proposed rule, amendment, or rescission after it is filed with the joint committee, the agency promptly shall file the full text of the proposed rule, amendment, or rescission in its revised form in electronic form with the joint committee.

An agency shall file the rule summary and fiscal analysis prepared under section 106.024 of the Revised Code in electronic form along with a proposed rule, amendment, or rescission, and along with a proposed rule, amendment, or rescission in revised form, that is filed under this division.

If a proposed rule, amendment, or rescission has an adverse impact on businesses, the agency also shall file the business impact analysis, any recommendations received from the common sense initiative office, and the agency's memorandum of response, if any, in electronic form along with the proposed rule, amendment, or

rescission, or along with the proposed rule, amendment, or rescission in revised form, that is filed under this division.

The agency shall file the hearing report in electronic form with the joint committee before the joint committee holds its public hearing on the proposed rule, amendment, or rescission. The filing of a hearing report does not constitute a revision of the proposed rule, amendment, or rescission to which the hearing report relates.

If the proposed rule, amendment, or rescission requires liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure, the agency shall conduct a diligent search to determine if the liability insurance, bond, or other financial responsibility instrument is readily available in the amounts required as a condition of licensure, and shall certify to the joint committee that the search was conducted.

A proposed rule, amendment, or rescission that is subject to legislative review under this division may not be adopted under division (E) of this section or filed in final form under section 119.04 of the Revised Code unless the proposed rule, amendment, or rescission has been filed with the joint committee on agency rule review under this division and the time for legislative review of the proposed rule, amendment, or rescission has expired without adoption of a concurrent resolution to invalidate the proposed rule, amendment, or rescission.

This division does not apply to:

(1) An emergency rule, amendment, or rescission;

(2) A proposed rule, amendment, or rescission that must be adopted verbatim by an agency pursuant to federal law or rule, to become effective within sixty days of adoption, in order to continue the operation of a federally reimbursed program in this state, so long as the proposed rule contains both of the following:

(a) A statement that it is proposed for the purpose of complying with a federal law or rule;

(b) A citation to the federal law or rule that requires verbatim compliance.

(3) A proposed rule, amendment, or rescission that, as set forth in section 3719.41 of the Revised Code, must be adopted by the state board of pharmacy pursuant to federal law or rule, to become effective within sixty days of adoption, so long as the proposed rule contains a statement that it is proposed for the purpose of complying with federal law or rule.

If a rule or amendment is exempt from legislative review under division (C)(2) of this section, and if the federal law or rule pursuant to which the rule or amendment was adopted expires, is repealed or rescinded, or otherwise terminates, the rule or amendment, or its rescission, is thereafter subject to legislative review under division (C) of this section.

(D) On the date and at the time and place designated in the notice, the agency shall conduct a public hearing at which any person affected by the proposed action of the agency may appear and be heard in person, by the person's attorney, or both, may present the person's position, arguments, or contentions, orally or in writing, offer and examine witnesses, and present evidence tending to show that the proposed rule, amendment, or rescission, if adopted or effectuated, will be unreasonable or unlawful. An agency may permit persons affected by the proposed rule, amendment, or rescission to present their positions, arguments, or contentions in writing, not only at the hearing, but also for a reasonable period before, after, or both before and after the hearing. A person who presents a position or arguments or contentions in writing before or after the hearing is not required to appear at the hearing.

At the hearing, the testimony shall be recorded. Such record shall be made at the expense of the agency. The agency is required to transcribe a record that is not sight readable only if a person requests transcription of all or part of the record and agrees to reimburse the agency for the costs of the transcription. An agency may require the person to pay in advance all or part of the cost of the transcription.

In any hearing under this section the agency may administer oaths or affirmations.

The agency shall consider the positions, arguments, or contentions presented at, or before or after, the hearing. The agency shall prepare a hearing summary of the positions, arguments, or contentions, and of the issues raised by the positions, arguments, or contentions. The agency then shall prepare a hearing report explaining, with regard to each issue, how it is reflected in the rule, amendment, or rescission. If an issue is not reflected in the rule, amendment, or rescission, the hearing report shall explain why the issue is not reflected. The agency shall include the hearing summary in the hearing report as an appendix thereto. And, in the hearing report, the agency shall identify the proposed rule, amendment, or rescission to which the hearing report relates.

(E) After divisions (A), (B), (C), and (D) of this section have been complied with, and when the time for legislative review under sections 106.02, 106.022, and 106.023 of the Revised Code has expired without adoption of a concurrent resolution to invalidate the proposed rule, amendment, or rescission, the agency may issue an order adopting the proposed rule or the proposed amendment or rescission of the rule, consistent with the synopsis or general statement included in the public notice. At that time the agency shall designate the effective date of the rule, amendment, or rescission, which shall not be earlier than the tenth day after the rule, amendment, or rescission has been filed in its final form as provided in section 119.04 of the Revised Code.

(F) Prior to the effective date of a rule, amendment, or rescission, the agency shall make a reasonable effort to inform those affected by the rule, amendment, or rescission and to have available for distribution to those requesting it the full text of the rule as adopted or as amended.

(G)

(1) If the governor, upon the request of an agency, determines that an emergency requires the immediate adoption, amendment, or rescission of a rule, the governor shall issue an order, the text of which shall be filed in electronic form with the agency, the secretary of state, the director of the legislative service commission, and the joint committee on agency rule review, that the procedure prescribed by this section with respect to the adoption, amendment, or rescission of a specified rule is suspended. The agency may then adopt immediately the emergency rule, amendment, or rescission and it becomes effective on the date the rule, amendment, or rescission, in final form and in compliance with division (A)(2) of section 119.04 of the Revised Code, is filed in electronic form with the secretary of state, the director of the legislative service commission, and the joint committee on agency rule review. The director shall publish the full text of the emergency rule, amendment, or rescission in the register of Ohio.

Except as provided in division (G)(2) of this section, the emergency rule, amendment, or rescission shall become invalid at the end of the one hundred twentieth day it is in effect. Prior to that date the agency may adopt the emergency rule, amendment, or rescission as a nonemergency rule, amendment, or rescission by complying with the procedure prescribed by this section for the adoption, amendment, and rescission of nonemergency rules. The agency shall not use the procedure of division (G)(1) of this section to readopt the emergency rule, amendment, or rescission so that, upon the emergency rule, amendment, or rescission becoming invalid under division (G)(1) of this section, the emergency rule, amendment, or rescission will continue in effect without interruption for another one-hundred-twenty-day period, except when section 106.02 of the Revised Code prevents the agency from adopting the emergency rule, amendment, or rescission as a nonemergency rule, amendment, or rescission within the one-hundred-twenty-day period.

Division (G)(1) of this section does not apply to the adoption of any emergency rule, amendment, or rescission by the tax commissioner under division (C)(2) of section 5117.02 of the Revised Code.

(2) An emergency rule or amendment adding a substance to a controlled substance schedule shall become invalid at the end of the one hundred eightieth day it is in effect. Prior to that date, the state board of pharmacy may adopt the emergency rule or amendment as a nonemergency rule or amendment by complying with the procedure prescribed by this section for adoption and amendment of nonemergency rules. The board shall not use the procedure of division (G)(1) of this section to readopt the emergency rule or amendment so that, upon the emergency rule or amendment becoming invalid under division (G)(2) of this section, the emergency rule or amendment will continue in effect beyond the one-hundred-eighty-day period.

(H) Rules adopted by an authority within the department of job and family services for the administration or enforcement of Chapter 4141. of the Revised Code or of the department of taxation shall be effective without a hearing as provided by this section if the statutes pertaining to such agency specifically give a right of appeal to the board of tax appeals or to a higher authority within the agency or to a court, and also give the appellant a right to a hearing on such appeal. This division does not apply to the adoption of any rule, amendment, or rescission by the tax commissioner under division (C)(1) or (2) of section 5117.02 of the Revised Code, or deny the right to file an action for declaratory judgment as provided in Chapter 2721. of the Revised Code from the decision of the board of tax appeals or of the higher authority within such agency.

Amended by 132nd General Assembly File No. TBD, SB 229, §1, eff. 3/22/2020.

Amended by 132nd General Assembly File No. TBD, SB 221, §1, eff. 8/18/2019.

Amended by 132nd General Assembly File No. TBD, HB 26, §101.01, eff. 6/30/2017.

Amended by 130th General Assembly File No. TBD, HB 10, §1, eff. 3/23/2015.

Amended by 130th General Assembly File No. TBD, SB 3, §1, eff. 9/17/2014.

Amended by 129th General AssemblyFile No.2, SB 2, §1, eff. 1/1/2012.

Effective Date: 09-17-2002 .

## 119.031 [Repealed].

Repealed by 130th General Assembly File No. TBD, SB 3, §3, eff. 9/17/2014.

Effective Date: 04-01-2002 .

## 119.032 [Repealed].

Repealed by 130th General Assembly File No. TBD, SB 3, §3, eff. 9/17/2014.

Amended by 129th General AssemblyFile No.127, HB 487, §101.01, eff. 9/10/2012.

Amended by 129th General AssemblyFile No.28, HB 153, §101.01, eff. 9/29/2011.

Amended by 129th General AssemblyFile No.2, SB 2, §1, eff. 1/1/2012.

Effective Date: 09-17-2002 .

## 119.035 Appointing advisory committee.

An agency may appoint an advisory committee to advise the agency concerning its development of a rule, amendment, or rescission, and may otherwise consult with persons representing interests that would be affected by the rule, amendment, or rescission were it actually to be proposed and adopted. Upon an agency's request, the executive director or another officer or employee of the Ohio commission on dispute resolution and conflict management may serve as a group facilitator for, but not as a member of, such an advisory committee.

Effective Date: 09-15-1999.

## 119.037 Publication in Register of Ohio gives notice of rule.

Unless explicitly provided otherwise by statute, if a document is required by statute to be published in the register of Ohio, its publication in the register is sufficient to give notice of the content of the document to a person who is subject to or affected by the content. Until the document is so published, its content is not valid against a person who does not have actual knowledge of the content.

Effective Date: 04-01-2001.

## 119.038 Electronic publication of the register of Ohio.

An agency shall provide the director of the legislative service commission with assistance that is within the agency's competence and that the director requests with respect to electronic publication of the register of Ohio.

Effective Date: 10-01-1999.

## 119.039 Reimbursement for publishing documents in Register.

An agency by means of an intrastate transfer voucher shall pay to the director of the legislative service commission the amount the director seeks as reimbursement from the agency for the actual costs of publishing the agency's documents in the register of Ohio.

Effective Date: 10-01-1999.

## 119.0311 Guide to public participation in rule-making.

Each agency shall prepare and publish, and as it becomes necessary or advisable, revise and republish, a guide to its rule-making process that functions generally to assist members of the public who participate, or who may wish to participate, in the agency's rule-making. The agency's guide is to include:

(A) A statement of the agency's regulatory mission;

(B) A description of how the agency is organized to achieve its regulatory mission;

(C) An explanation of rule-making the agency is authorized or required to engage in to achieve its regulatory mission;

(D) An explanation of the agency's rule-making process;

(E) An indication of the points in the agency's rule-making process at which members of the public can participate;

(F) An explanation of how members of the public can participate in the agency's rule-making process at each indicated point of participation; and

(G) Other information the agency reasonably concludes will assist members of the public meaningfully to participate in the agency's rule-making.

An agency's guide is not to be adopted as a rule, but rather as a narrative explanation of the matters outlined in this section. An agency's failure to conform its rule-making process to its guide is not cause for invalidating a rule, amendment, or rescission adopted by the agency.

The agency shall publish or republish its guide both in the register of Ohio and as a printed pamphlet.

The agency shall submit a copy of its guide, in electronic form, to the director of the legislative service commission. The director thereupon shall publish the agency's guide in the register of Ohio.

The agency shall provide a copy of its pamphlet guide to any person upon request. The agency may charge the person a fee for this service, but the fee is not to exceed the per copy cost of producing the pamphlet guide and the actual cost of delivering it to the person.

Effective Date: 04-01-2002.

## 119.04 Administrative rule effective dates.

(A)

(1) Any rule adopted by any agency shall be effective on the tenth day after the day on which the rule in final form and in compliance with division (A)(2) of this section is filed as follows:

(a) The rule shall be filed in electronic form with both the secretary of state and the director of the legislative service commission;

(b) The rule shall be filed in electronic form with the joint committee on agency rule review. Division (A)(1)(b) of this section does not apply to any rule to which division (C) of section 119.03 of the Revised Code does not apply.

If an agency in adopting a rule designates an effective date that is later than the effective date provided for by this division, the rule if filed as required by this division shall become effective on the later date designated by the agency.

An agency that adopts or amends a rule that is subject to section 106.03 of the Revised Code shall assign a review date to the rule that is not later than five years after its effective date. If a review date assigned to a rule exceeds the five-year maximum, the review date for the rule is five years after its effective date. A rule with a review date is subject to review under section 106.03 of the Revised Code.

(2) The agency shall file the rule in compliance with the following standards and procedures:

(a) The rule shall be numbered in accordance with the numbering system devised by the director for the Ohio administrative code.

(b) The rule shall be prepared and submitted in compliance with the rules of the legislative service commission.

(c) The rule shall clearly state the date on which it is to be effective and the date on which it will expire, if known.

(d) Each rule that amends or rescinds another rule shall clearly refer to the rule that is amended or rescinded. Each amendment shall fully restate the rule as amended.

If the director of the legislative service commission or the director's designee gives an agency notice pursuant to section 103.05 of the Revised Code that a rule filed by the agency is not in compliance with the rules of the commission, the agency shall within thirty days after receipt of the notice conform the rule to the rules of the commission as directed in the notice.

(3) As used in this section, "rule" includes an amendment or rescission of a rule.

(B) The secretary of state and the director shall preserve the rules filed under division (A)(1)(a) of this section in an accessible manner. Each such rule shall be a public record open to public inspection and may be transmitted to any law publishing company that wishes to reproduce it.

Amended by 131st General Assembly File No. TBD, HB 64, §101.01, eff. 9/29/2015.

Amended by 130th General Assembly File No. TBD, SB 3, §1, eff. 9/17/2014.

Effective Date: 04-01-2002 .

## 119.05 [Repealed].

Effective Date: 09-30-1976.

## 119.06 Adjudication order of agency valid and effective - hearings - periodic registration of licenses.

No adjudication order of an agency shall be valid unless the agency is specifically authorized by law to make such order.

No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

The following adjudication orders shall be effective without a hearing:

(A) Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of a court;

(B) Orders suspending a license where a statute specifically permits the suspension of a license without a hearing;

(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency, to another agency, or to the board of tax appeals, and also give the appellant a right to a hearing on such appeal.

When a statute permits the suspension of a license without a prior hearing, any agency issuing an order pursuant to such statute shall afford the person to whom the order is issued a hearing upon request.

Whenever an agency claims that a person is required by statute to obtain a license, it shall afford a hearing upon the request of a person who claims that the law does not impose such a requirement.

Every agency shall afford a hearing upon the request of any person who has been refused admission to an examination where such examination is a prerequisite to the issuance of a license unless a hearing was held prior to such refusal.

Unless a hearing was held prior to the refusal to issue the license, every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, except that the following are not required to afford a hearing to a person to whom a new license has been refused because the person failed a licensing examination: the state medical board, state chiropractic board, architects board, Ohio landscape architects board, and any section of the Ohio occupational therapy, physical therapy, and athletic trainers board.

When periodic registration of licenses is required by law, the agency shall afford a hearing upon the request of any licensee whose registration has been denied, unless a hearing was held prior to such denial.

When periodic registration of licenses or renewal of licenses is required by law, a licensee who has filed an application for registration or renewal within the time and in the manner provided by statute or rule of the agency shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on the licensee's application. Action of an agency rejecting any such application shall not be effective prior to fifteen days after notice of the rejection is mailed to the licensee.

Amended by 130th General Assembly File No. 48, SB 68, §1, eff. 12/19/2013.

Effective Date: 04-10-2001 .

## 119.061 Power of certain agencies.

Every agency authorized by law to adopt, amend, or rescind rules may suspend the license of any person, over whom such agency has jurisdiction within the purview of sections 119.01 to 119.13 of the Revised Code, for engaging in deceptive trade practice as defined in section 4165.02 of the Revised Code. Except as otherwise expressly provided by law existing as of November 2, 1959, no agency may make rules which would limit or restrict the right of any person to advertise in compliance with law.

Effective Date: 01-01-1974.

## 119.062 Revocation or suspension of driver's license.

(A) Notwithstanding section 119.06 of the Revised Code, the registrar of motor vehicles is not required to hold any hearing in connection with an order canceling or suspending a motor vehicle driver's or commercial driver's license pursuant to section 2903.06, 2903.08, 2907.24, 2921.331, 4549.02, 4549.021, or 5743.99 or any provision of Chapter 2925., 4509., 4510., or 4511. of the Revised Code or in connection with an out-of-service order issued under Chapter 4506. of the Revised Code.

(B) Notwithstanding section 119.07 of the Revised Code, the registrar is not required to use registered mail, return receipt requested, in connection with an order canceling or suspending a motor vehicle driver's or commercial driver's license or a notification to a person to surrender a certificate of registration and registration plates.

Effective Date: 01-01-2004.

## 119.07 Notice of hearing - contents - notice of order of suspension of license - publication of notice - effect of failure to give notice.

Except when a statute prescribes a notice and the persons to whom it shall be given, in all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing the party of the party's right to a hearing. Notice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days of the time of mailing the notice. The notice shall also inform the party that at the hearing the party may appear in person, by the party's attorney, or by such other representative as is permitted to practice before the agency, or may present the party's position, arguments, or contentions in writing and that at the hearing the party may present evidence and examine witnesses appearing for and against the party. A copy of the notice shall be mailed to attorneys or other representatives of record representing the party. This paragraph does not apply to situations in which such section provides for a hearing only when it is requested by the party.

When a statute specifically permits the suspension of a license without a prior hearing, notice of the agency's order shall be sent to the party by registered mail, return receipt requested, not later than the business day next succeeding such order. The notice shall state the reasons for the agency's action, cite the law or rule directly involved, and state that the party will be afforded a hearing if the party requests it within thirty days of the time of mailing the notice. A copy of the notice shall be mailed to attorneys or other representatives of record representing the party.

Whenever a party requests a hearing in accordance with this section and section 119.06 of the Revised Code, the agency shall immediately set the date, time, and place for the hearing and forthwith notify the party thereof. The date set for the hearing shall be within fifteen days, but not earlier than seven days, after the party has requested a hearing, unless otherwise agreed to by both the agency and the party.

When any notice sent by registered mail, as required by sections 119.01 to 119.13 of the Revised Code, is returned because the party fails to claim the notice, the agency shall send the notice by ordinary mail to the party at the party's last known address and shall obtain a certificate of mailing. Service by ordinary mail is complete when the certificate of mailing is obtained unless the notice is returned showing failure of delivery.

If any notice sent by registered or ordinary mail is returned for failure of delivery, the agency either shall make personal delivery of the notice by an employee or agent of the agency or shall cause a summary of the substantive provisions of the notice to be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the last known address of the party is located. When notice is given by publication, a proof of publication affidavit, with the first publication of the notice set forth in the affidavit, shall be mailed by ordinary mail to the party at the party's last known address and the notice shall be deemed received as of the date of the last publication. An employee or agent of the agency may make personal delivery of the notice upon a party at any time.

Refusal of delivery by personal service or by mail is not failure of delivery and service is deemed to be complete. Failure of delivery occurs only when a mailed notice is returned by the postal authorities marked undeliverable, address or addressee unknown, or forwarding address unknown or expired. A party's last known address is the mailing address of the party appearing in the records of the agency.

The failure of an agency to give the notices for any hearing required by sections 119.01 to 119.13 of the Revised Code in the manner provided in this section shall invalidate any order entered pursuant to the hearing.

Effective Date: 03-27-1991; 2007 HB119 09-29-2007 .

## 119.08 Date, time, and place of adjudication hearing.

The date, time, and place of each adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, shall be determined by the agency. If requested by the party in writing, the agency may designate as the place of hearing the county seat of the county wherein such person resides or a place within fifty miles of such person's residence.

Effective Date: 10-01-1953.

## 119.09 Adjudication hearing.

As used in this section "stenographic record" means a record provided by stenographic means or by the use of audio electronic recording devices, as the agency determines.

For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may require the attendance of such witnesses and the production of such books, records, and papers as it desires, and it may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas, and for that purpose the agency may, and upon the request of any party receiving notice of the hearing as required by section 119.07 of the Revised Code shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The sheriff shall be paid the same fees for services as are allowed in the court of common pleas in criminal cases. Witnesses shall be paid the fees and mileage provided for under section 119.094 of the Revised Code. Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid.

An agency may postpone or continue any adjudication hearing upon the application of any party or upon its own motion.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which the witness may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein.

At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. This paragraph does not require a stenographic record at every adjudication hearing. In any situation where an adjudication hearing is required by sections 119.01 to 119.13 of the Revised Code, if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court. The rules of an agency may specify the situations in which a stenographic record will be made only on request of the party; otherwise such a record shall be made at every adjudication hearing from which an appeal to court might be taken.

The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may call any party to testify under oath as upon cross-examination.

The agency, or any one delegated by it to conduct an adjudication hearing, may administer oaths or affirmations.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may appoint a referee or examiner to conduct the hearing. The referee or examiner shall have the same powers and authority in conducting the hearing as is granted to the agency. Such referee or examiner shall have been admitted to the practice of law in the state and be possessed of such additional qualifications as the agency requires. The referee or examiner shall submit to the agency a written report setting forth the referee's or examiner's findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or the party's attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

Effective Date: 07-26-1991; 2008 HB525 07-01-2009 .

## 119.091 Failure of agency to hold adjudication hearing before expiration of license.

The failure of any agency to hold an adjudication hearing before the expiration of a license shall not terminate the request for a hearing and shall not invalidate any order entered by the agency after holding the hearing. If during or after such hearing but before the issuance of an order the existing license shall expire[,] the adjudicatory agency shall in its order in favor of the affected party provide that the licensing authority shall renew the license upon payment of the fee prescribed by law for the renewal of the license.

Effective Date: 10-02-1953.

## 119.092 Attorney fees.

(A) As used in this section:

(1) "Eligible party" means a party to an adjudication hearing other than the following:

(a) The agency;

(b) An individual whose net worth exceeded one million dollars at the time he received notification of the hearing;

(c) A sole owner of an unincorporated business that had, or a partnership, corporation, association, or organization that had, a net worth exceeding five million dollars at the time the party received notification of the hearing, except that an organization that is described in subsection 501(c)(3) and is tax exempt under subsection 501(a) of the Internal Revenue Code, shall not be excluded as an eligible party under this division because of its net worth;

(d) A sole owner of an unincorporated business that employed, or a partnership, corporation, association, or organization that employed, more than five hundred persons at the time the party received notification of the hearing.

(2) "Fees" means reasonable attorney's fees, in an amount not to exceed seventy-five dollars per hour or a higher hourly fee that the agency establishes by rule and that is applicable under the circumstances.

(3) "Internal Revenue Code" means the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. 1, as amended.

(4) "Prevailing eligible party" means an eligible party that prevails after an adjudication hearing, as reflected in an order entered in the journal of the agency.

(B)

(1) Except as provided in divisions (B)(2) and (F) of this section, if an agency conducts an adjudication hearing under this chapter, the prevailing eligible party is entitled, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the hearing. A prevailing eligible party that desires an award of compensation for fees shall file a motion requesting the award with the agency within thirty days after the date that the order of the agency is entered in its journal. The motion shall do all of the following:

(a) Identify the party;

(b) Indicate that the party is the prevailing eligible party and is entitled to receive an award of compensation for fees;

(c) Include a statement that the agency's position in initiating the matter in controversy was not substantially justified;

(d) Indicate the amount sought as an award;

(e) Itemize all fees sought in the requested award. This itemization shall include a statement from any attorney who represented the prevailing eligible party, that indicates the fees charged, the actual time expended, and the

rate at which the fees were calculated.

(2) Upon the filing of a motion under this section, the request for the award shall be reviewed by the referee or examiner who conducted the adjudication hearing or, if none, by the agency involved. In the review, the referee, examiner, or agency shall determine whether the fees incurred by the prevailing eligible party exceeded one hundred dollars, whether the position of the agency in initiating the matter in controversy was substantially justified, whether special circumstances make an award unjust, and whether the prevailing eligible party engaged in conduct during the course of the hearing that unduly and unreasonably protracted the final resolution of the matter in controversy. The referee, examiner, or agency shall issue a determination, in writing, on the motion of the prevailing eligible party, which determination shall include a statement indicating whether an award has been granted, the findings and conclusions underlying it, the reasons or bases for the findings and conclusions, and, if an award has been granted, its amount. The determination shall be entered in the record of the prevailing eligible party's case, and a copy of it mailed to the prevailing eligible party.

With respect to a motion under this section, the agency involved, through any representative it designates, has the burden of proving that its position in initiating the matter in controversy was substantially justified, that special circumstances make an award unjust, or that the prevailing eligible party engaged in conduct during the course of the hearing that unduly and unreasonably protracted the final resolution of the matter in controversy. A referee, examiner, or agency considering a motion under this section may deny an award entirely, or reduce the amount of an award that otherwise would be payable, to a prevailing eligible party only as follows:

(a) If the determination is that the agency has sustained its burden of proof that its position in initiating the matter in controversy was substantially justified or that special circumstances make an award unjust, the motion shall be denied;

(b) If the determination is that the agency has sustained its burden of proof that the prevailing eligible party engaged in conduct during the course of the hearing that unduly and unreasonably protracted the final resolution of the matter in controversy, the referee, examiner, or agency may reduce the amount of an award, or deny an award, to that party to the extent of that conduct;

(c) If the determination is that the fees of the prevailing eligible party were not in excess of one hundred dollars, the referee, agency, or examiner shall deny the motion.

(3) For purposes of this section, decisions by referees or examiners upon motions are final and are not subject to review and approval by an agency. These decisions constitute final determinations of the agency for purposes of appeals under division (C) of this section.

(C) A prevailing eligible party that files a motion for an award of compensation for fees under this section and that is denied an award or receives a reduced award may appeal the determination of the referee, examiner, or agency to the same court, as determined under section 119.12 of the Revised Code, as the party could have appealed the adjudication order of the agency had the party been adversely affected by it. An agency may appeal the grant of an award to this same court if a referee or examiner made the final determination pursuant to division (B)(3) of this section. Notices of appeal shall be filed in the manner and within the period specified in section 119.12 of the Revised Code.

Upon the filing of an appeal under this division, the agency shall prepare and certify to the court involved a complete record of the case, and the court shall conduct a hearing on the appeal. The agency and the court shall do so in accordance with the procedures established in section 119.12 of the Revised Code for appeals pursuant to that section, unless otherwise provided in this division.

The court hearing an appeal under this division may modify the determination of the referee, examiner, or agency with respect to the motion for compensation for fees only if the court finds that the failure to grant an award, or the calculations of the amount of an award, involved an abuse of discretion. The judgment of the court is final and not appealable, and a copy of it shall be certified to the agency involved and the prevailing eligible party.

(D) Compensation for fees awarded to a prevailing eligible party under this section may be paid by an agency from any funds available to it for payment of such compensation. If an agency does not pay compensation from

such funds or no such funds are available, upon the filing of a referee's, examiner's, agency's, or court's determination or judgment in favor of the prevailing eligible party with the clerk of the court of claims, the determination or judgment awarding compensation for fees shall be treated as if it were a judgment under Chapter 2743. of the Revised Code and be payable in accordance with the procedures specified in section 2743.19 of the Revised Code, except that interest shall not be paid in relation to the award.

(E) Each agency that is required to pay compensation for fees to a prevailing eligible party pursuant to this section during any fiscal year shall prepare a report for that year. The report shall be completed no later than the first day of October of the fiscal year following the fiscal year covered by the report, and copies of it shall be filed with the general assembly. It shall contain the following information for the covered fiscal year:

(1) The total amount and total number of the awards of compensation for fees required to be paid by the agency;

(2) The amount and nature of each individual award that the agency was required to pay;

(3) Any other relevant information that may aid the general assembly in evaluating the scope and impact of awards of compensation for fees.

(F) The provisions of this section do not apply when any of the following circumstances are involved:

(1) An adjudication hearing was conducted for the purpose of establishing or fixing a rate;

(2) An adjudication hearing was conducted for the purpose of determining the eligibility or entitlement of any individual to benefits;

(3) A prevailing eligible party was represented in an adjudication hearing by an attorney who was paid pursuant to an appropriation by the federal or state government or a local government;

(4) An adjudication hearing was conducted by the state personnel board of review pursuant to authority conferred by section 124.03 of the Revised Code, or by the state employment relations board pursuant to authority conferred by Chapter 4117. of the Revised Code.

Effective Date: 03-27-1991.

## 119.093 Defining net worth for purpose of attorney fees.

The attorney general shall adopt a rule pursuant to this chapter that defines the term "net worth" for purposes of sections 119.092 and 2335.39 of the Revised Code. The definition shall be designed to permit agencies and courts to apply identical principles in determining whether a party to an adjudication hearing, civil action or appeal of a civil action, or appeal of an adjudication order pursuant to section 119.12 of the Revised Code is an eligible party for purposes of the provisions of sections 119.092 and 2335.39 of the Revised Code.

Effective Date: 04-11-1985.

## 119.094 Adjudication hearing witness fees.

(A) Unless otherwise provided by the Revised Code, each witness subpoenaed to an adjudication hearing shall receive twelve dollars for each full day's attendance and six dollars for each half day's attendance. Each witness also shall receive fifty and one-half cents for each mile necessarily traveled to and from the witness's place of residence to the adjudication hearing.

(B) As used in this section:

(1) "Full day's attendance" means a day on which a witness is required or requested to be present at an adjudication hearing before and after twelve noon, regardless of whether the witness actually testifies.

(2) "Half day's attendance" means a day on which a witness is required or requested to be present at an adjudication hearing either before or after twelve noon, but not both, regardless of whether the witness actually testifies.

Effective Date: 2008 HB525 07-01-2009.

## 119.10 Counsel to represent agency.

At any adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, the record of which may be the basis of an appeal to court, and in all proceedings in the courts of this state or of the United States, the attorney general or any of his assistants or special counsel who have been designated by him shall represent the agency.

Effective Date: 10-01-1953.

## 119.11 [Repealed].

Effective Date: 09-30-1976.

## 119.12 Appeal by party adversely affected - notice - record - hearing - judgment.

(A)

(1) Except as provided in division (A)(2) or (3) of this section, any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license or registration of a licensee, or revoking or suspending a license, or allowing the payment of a forfeiture under section 4301.252 of the Revised Code may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident.

(2) An appeal from an order described in division (A)(1) of this section issued by any of the following agencies shall be made to the court of common pleas of Franklin county:

(a) The liquor control commission;

[b] the Ohio casino control commission,

(b) The state medical board;

(c) The state chiropractic board;

(d) The board of nursing ;

(e) The bureau of workers' compensation regarding participation in the health partnership program created in sections 4121.44 and 4121.441 of the Revised Code.

(3) If any party appealing from an order described in division (A)(1) of this section is not a resident of and has no place of business in this state, the party may appeal to the court of common pleas of Franklin county.

(B) Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin county, except that appeals from orders of the fire marshal issued under Chapter 3737. of the Revised Code may be to the court of common pleas of the county in which the building of the aggrieved person is located and except that appeals under division (B) of section 124.34 of the Revised Code from a decision of the state personnel board of review or a municipal or civil service township civil service

commission shall be taken to the court of common pleas of the county in which the appointing authority is located or, in the case of an appeal by the department of rehabilitation and correction, to the court of common pleas of Franklin county.

(C) This section does not apply to appeals from the department of taxation.

(D) Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court. In filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice. Unless otherwise provided by law relating to a particular agency, notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section. For purposes of this paragraph, an order includes a determination appealed pursuant to division (C) of section 119.092 of the Revised Code. The amendments made to this paragraph by Sub. H.B. 215 of the 128th general assembly are procedural, and this paragraph as amended by those amendments shall be applied retrospectively to all appeals pursuant to this paragraph filed before September 13, 2010, but not earlier than May 7, 2009, which was the date the supreme court of Ohio released its opinion and judgment in *Medcorp, Inc. v. Ohio Dep't. of Job and Family Servs.* (2009), 121 Ohio St.3d 622.

(E) The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. If an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section, the suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of the suspended order during the period of the appeal from the decision of the court of common pleas. In the case of an appeal from the Ohio casino control commission, the state medical board, or the state chiropractic board state chiropractic board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. This provision shall not be construed to limit the factors the court may consider in determining whether to suspend an order of any other agency pending determination of an appeal.

(F) The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal.

(G) Notwithstanding any other provision of this section, any order issued by a court of common pleas or a court of appeals suspending the effect of an order of the liquor control commission issued pursuant to Chapter 4301. or 4303. of the Revised Code that suspends, revokes, or cancels a permit issued under Chapter 4303. of the Revised Code or that allows the payment of a forfeiture under section 4301.252 of the Revised Code shall terminate not more than six months after the date of the filing of the record of the liquor control commission with the clerk of the court of common pleas and shall not be extended. The court of common pleas, or the court of appeals on appeal, shall render a judgment in that matter within six months after the date of the filing of the record of the liquor control commission with the clerk of the court of common pleas. A court of appeals shall not issue an order suspending the effect of an order of the liquor control commission that extends beyond six months after the date on which the record of the liquor control commission is filed with a court of common pleas.

[H] Notwithstanding any other provision of this section, any order issued by a court of common pleas or a court of appeals suspending the effect of an order of the Ohio casino control commission issued under Chapter 3772. of the Revised Code that limits, conditions, restricts, suspends, revokes, denies, not renews, fines, or otherwise penalizes an applicant, licensee, or person excluded or ejected from a casino facility in accordance with section 3772.031 of the Revised Code shall terminate not more than six months after the date of the filing of the record of the Ohio casino control commission with the clerk of the court of common pleas and shall not be extended. The court of common pleas, or the court of appeals on appeal, shall render a judgment in that matter within six

months after the date of the filing of the record of the Ohio casino control commission with the clerk of the court of common pleas. A court of appeals shall not issue an order suspending the effect of an order of the Ohio casino control commission that extends beyond six months after the date on which the record of the Ohio casino control commission is filed with the clerk of a court of common pleas.

(H) Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the state medical board or state chiropractic board that limits, revokes, suspends, places on probation, or refuses to register or reinstate a certificate issued by the board or reprimands the holder of the certificate shall terminate not more than fifteen months after the date of the filing of a notice of appeal in the court of common pleas, or upon the rendering of a final decision or order in the appeal by the court of common pleas, whichever occurs first.

(I) Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. The record shall be prepared and transcribed, and the expense of it shall be taxed as a part of the costs on the appeal. The appellant shall provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

(J) Notwithstanding any other provision of this section, any party desiring to appeal an order or decision of the state personnel board of review shall, at the time of filing a notice of appeal with the board, provide a security deposit in an amount and manner prescribed in rules that the board shall adopt in accordance with this chapter. In addition, the board is not required to prepare or transcribe the record of any of its proceedings unless the appellant has provided the deposit described above. The failure of the board to prepare or transcribe a record for an appellant who has not provided a security deposit shall not cause a court to enter a finding adverse to the board.

(K) Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

(L) The court shall conduct a hearing on the appeal and shall give preference to all proceedings under sections 119.01 to 119.13 of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. An appeal from an order of the state medical board issued pursuant to division (G) of either section 4730.25 or 4731.22 of the Revised Code, the state chiropractic board issued pursuant to section 4734.37 of the Revised Code, the liquor control commission issued pursuant to Chapter 4301. or 4303. of the Revised Code, or the Ohio casino control commission issued pursuant to Chapter 3772. of the Revised Code shall be set down for hearing at the earliest possible time and takes precedence over all other actions. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil action. At the hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence may be introduced if the court has granted a request for the presentation of additional evidence.

(M) The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section.

(N) The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. These appeals may be taken either by the party or the agency, shall proceed as in the case of appeals in civil actions, and shall be pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. An appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and, in the appeal, the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record.

The court shall certify its judgment to the agency or take any other action necessary to give its judgment effect.

Amended by 131st General Assembly File No. TBD, HB 52, §1, eff. 9/29/2015.

Amended by 131st General Assembly File No. TBD, HB 64, §101.01, eff. 9/29/2015.

Amended by 128th General AssemblyFile No.44, HB 215, §1, eff. 9/13/2010.

Effective Date: 04-10-2001; 07-01-2007

## 119.121 Effect of expiration of license on appeal process.

The expiration of the license involved in an appeal filed pursuant to section 119.12 of the Revised Code shall not affect the appeal. If during an appeal the existing license shall expire the court in its order in favor of an aggrieved person shall order the agency to renew the license upon payment of the fee prescribed by law for the license.

Effective Date: 10-02-1953.

## 119.13 Representation of parties.

At any hearing conducted under sections 119.01 to 119.13 of the Revised Code, a party or an affected person may be represented by an attorney or by such other representative as is lawfully permitted to practice before the agency in question, but, except for hearings held before the state personnel board of review under section 124.03 of the Revised Code, only an attorney at law may represent a party or an affected person at a hearing at which a record is taken which may be the basis of an appeal to court.

At any hearing conducted under sections 119.01 to 119.13 of the Revised Code, a witness, if he so requests, shall be permitted to be accompanied, represented, and advised by an attorney, whose participation in the hearing shall be limited to the protection of the rights of the witness, and who may not examine or cross-examine witnesses, and the witness shall be advised of his right to counsel before he is interrogated.

Effective Date: 06-16-1977.

## 119.14 Waiver of penalties for first-time paperwork offenses.

(A) For any small business that engages in a paperwork violation, the state agency or regulatory authority that regulates the field of operation in which the business operates shall waive any and all administrative fines or civil penalties on that small business for the violation, if the paperwork violation is a first-time offense.

(B) When an agency or regulatory authority waives an administrative fine or civil penalty under this section, the state agency or regulatory authority shall require the small business to correct the violation within a reasonable period of time.

(C) Notwithstanding this section, a state agency or regulatory authority may impose administrative fines or civil penalties on a small business for a paperwork violation that is a first-time offense for any of the following reasons:

(1) The violation has the potential to cause serious harm to the public interest as determined by a state agency or regulatory authority director;

(2) The violation involves a small business knowingly or willfully engaging in conduct that may result in a felony conviction;

(3) Failure to impose an administrative fine or civil penalty for the violation would impede or interfere with the detection of criminal activity;

(4) The violation is of a law concerning the assessment or collection of any tax, debt, revenue, or receipt;

(5) The violation presents a direct danger to the public health or safety, results in a financial loss to an employee , or presents the risk of severe environmental harm, as determined by the head of the agency or regulatory authority;

(6) The violation is a failure to comply with a federal requirement for a program that has been delegated from the federal government to a state agency or regulatory authority and where the federal requirement includes a requirement to impose a fine.

(D)

(1) Nothing in this section shall prohibit a state agency or regulatory authority from waiving administrative fines or civil penalties incurred by a small business for a paperwork violation that is not a first-time offense.

(2) Any administrative fine or civil penalty that is waived under this section may be reinstated and imposed in addition to any additional fines or penalties associated with a subsequent violation for noncompliance with the same paperwork requirement.

(E) This section shall not apply to any violation by a small business of a statutory or regulatory requirement mandating the collection of information by a state agency or regulatory body if that small business previously violated any such requirement mandating the collection of information.

(F) Nothing in this section shall be construed to diminish the responsibility for any citizen or business to apply for and obtain a permit, license, or authorizing document that is required to engage in a regulated activity, or otherwise comply with state or federal law.

(G) As used in this section:

(1) "Small business" has the same meaning as defined by the Code of Federal Regulations, Title 13, Chapter 1, Part 121.

(2) "Paperwork violation" means the violation of any statutory or regulatory requirement in the Revised Code mandating the collection of information by a state agency or regulatory body.

(3) "First-time offense" means the first instance of a violation of the particular statutory or regulatory requirement mandating the collection of information by a state agency or regulatory body.

(4) "Employee" means any individual employed by an employer but does not include:

(a) Any individual employed by the United States;

(b) Any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping;

(c) Any individual engaged in the delivery of newspapers to the consumer;

(d) Any individual employed as an outside salesperson compensated by commissions or employed in a bona fide executive, administrative, or professional capacity as such terms are defined by the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 201, as amended;

(e) Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;

(f) A member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of this state;

(g) Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a nonprofit organization or group of organizations described in section 501(c)(3) of the "Internal Revenue Code of 1954," and exempt from income tax under section 501(a) of that code;

(h) Any individual employed directly by the house of representatives or directly by the senate.

Amended by 133rd General Assembly File No. TBD, HB 62, §101.01, eff. 7/3/2019.

Effective Date: 2008 HB285 09-16-2008.