

**IN THE COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO**

State ex rel. :
OHIO ATTORNEY GENERAL, :
30 East Broad Street :
Columbus, Ohio 43215 :

Plaintiff, :

v. :

WILLIAM LAGER :
155 W Main St, Unit 1206 :
Columbus, Ohio 43215 :

AND :

c/o/ 328 Whitehead St :
Key West, Florida 33040 :

AND :

c/o 204 Noble Cottage Lane :
Senecaville, OH :
43780-9600 :

AND :

ALTAIR LEARNING MANAGEMENT I, INC. :
c/o Kelly M. Morgan :
400 S. Fifth St., Suite 102 :
Columbus, OH 43215 :

AND :

IQ INNOVATIONS, LLC :
c/o William L. Lager :
305 W. Nationwide Blvd. :
Columbus, OH 43215 :

AND

RICK TEETERS

2 Arika at Lionspaw

Daytona Beach, FL 32124

AND

MICHELE SMITH

6813 Oakfield North Rd. NW

Bristolville, OH 44402

AND

CHRISTOPHER MEISTER

134 Heischman Ave.

Worthington, OH 43085

AND

ANN BARNES

1335 Great Hunter Ct.

Grove City, OH 43123

AND

REGINA LUKICH

3175 Tremont Rd., Unit 206

Upper Arlington, OH 43221

AND

TRAVELERS CASUALTY AND

SURETY COMPANY OF AMERICA

c/o Ann B. Mulcahy

One Tower Square

Hartford, CT 06183

Defendants.

COMPLAINT FOR RECOVERY OF PUBLIC FUNDS

“It is pretty well settled under the American system of government that a public office is a public trust, and that ... public money ... under the control of such officer or officers constitute a trust fund, for which the official as trustee should be held responsible to the same degree as the trustee of a private trust fund.” *Twp. of Crane v. Secoy*, 103 Ohio St. 258, 259-260 (1921).

ECOT was a public school and hence a public office. It was entrusted with immense amounts of public money, most of which came from other public schools. Those who operated ECOT were subject to the same fiduciary duties as the trustee of a private trust. The most fundamental of those duties is the duty of loyalty—to avoid *any* situation where they would be tempted to profit improperly from their position of trust.

The folks who ran ECOT yielded to that temptation. William Lager, ECOT’s founder and public face, also founded companies that made millions of dollars doing business with that public school. Other ECOT officials stood by, or actively participated, as ECOT overbilled the public on a massive scale to keep the money flowing.

Real harm resulted from that—every dollar of state funding ECOT received from overbilling came from school districts in this State. *See* R.C. 3314.08. The numbers are staggering. The overbilling totaled more than \$79,640,000 since July of 2015 and had real impacts on real districts. That is illustrated here in Franklin County. According to the Ohio Department of Education, Franklin County districts lost \$14,324,653.49 to ECOT’s overbilling between July 1, 2015 and June 30, 2017:

District	Amount of overpayments
Bexley City SD	\$23,459.05
Canal Winchester Local SD	\$191,959.50
Columbus City SD	\$8,533,536.05
Dublin City SD	\$103,324.62
Gahanna-Jefferson City SD	\$36,494.99

Grandview Heights City SD	\$13,423.29
Groveport Madison Local SD	\$870,943.82
Hamilton Local SD	\$360,620.03
Hilliard City SD	\$345,249.16
New Albany-Plain Local SD	\$29,900.68
Reynoldsburg City SD	\$266,712.11
South-Western City SD	\$2,197,420.98
Upper Arlington City SD	\$36,494.99
Westerville City SD	\$551,297.82
Whitehall City SD	\$321,911.05
Worthington City SD	\$256,059.02
Total	\$14,324,653.49

Those are more than numbers on a ledger sheet—they are concrete educational opportunities lost. The amount Groveport Madison lost could have funded 15 teachers at its average salary level during the 2015-2016 school year. South-Western had enough diverted to fund 26 teachers. The amount taken from Columbus could have paid a whopping 130 teachers. Real kids suffered real deprivations.

This case seeks to hold those responsible for those injuries accountable by applying well settled legal principles that exist to address the types of abuse underlying this case. The context may be different, but the principles are the same—those who abuse positions of trust must be held accountable.

The Ohio Attorney General therefore pleads and alleges as follows:

Community Schools Generally

1. A “community school” is a school created by a contract between a “governing authority” and a supervisory entity known as a “sponsor.” They are commonly referred to as charter schools.
2. A community school’s governing authority is a multi-member board. It has roughly the same authority over the community school that a board of education has over a school

district.

3. Although a community school must be structured as a R. C. Chapter 1702 corporation, it is a public body. A community school is a public school, a public office, and a political subdivision.
4. Community schools operate on two types of public monies:
 - a. State operating funds. Those funds are transferred from the traditional school districts where the community schools' students reside.
 - b. Federal grant funds. The Ohio Department of Education ("ODE") receives a finite amount of federal grant funds for distribution to all schools. Portions are allocated to individual community schools based on the individual schools' enrollment and other factors.
5. A community school receives a set amount of state operating funds for each 920 hours of instruction in which its students participate. Each unit of 920 hours is known as a "full time equivalency," or "FTE." A community school obtains those funds by submitting monthly enrollment reports to ODE through an electronic system known at various times as "EMIS," CSADM," and "SOES." Those funds are transferred to the community school on a monthly basis.
6. ODE periodically reviews each community school's records to determine whether they document the school's entitlement to the amount of state operating funds transferred pursuant to the school's requests. That process is commonly referred to as an "FTE Review." If ODE determines that the community school cannot document its entitlement to all the funds it has received, ODE issues a determination of how much the community school is unable to document, calculates how much the school was overpaid, and begins

collecting the overpayment. Community schools may appeal such determinations. Such appeals are commonly referred to as “FTE Appeals.” If an FTE Appeal is pursued:

- a. A hearing officer is appointed to preside over an administrative hearing on the issues raised by the community school.
- b. At that hearing the community school is represented by counsel, may submit witness testimony and documentary evidence, and may cross examine ODE’s witnesses. The community school may also file pre- and post- hearing briefs. A record of proceedings is created.
- c. The hearing officer issues a written report and recommendation to the State Board of Education.
- d. The community school may file written objections to the report and recommendation.
- e. The State Board of Education ultimately decides the appeal, determining the amount of any overpayment. That decision is final.

7. A community school obtains federal grant funds through an electronic system known as “CCIP.” That is a multi-step process:

- a. The school identifies the grants it wishes to pursue and submits electronic applications for those grants. Those applications set out the amounts sought, describe the proposed uses of the grant funds, and propose budgets for the use of grant funds. ODE reviews the applications and, if the grant is approved, establishes the amount of grant funds the school will be awarded.
- b. The school draws down specific amounts of grant funds during the life of the grant by drafting and submitting project cash requests, commonly known as

“PCRs.” A school usually makes multiple PCRs during the life of the grant.

- c. After the school draws down all grant funds, the school prepares and submits a final expenditure report, commonly referred to as an “FER.”
8. Community schools sometimes contract with private companies to manage all or part of their operations. Such companies are referred to as “operators” or “management companies.” Operators/management companies sometimes assist the community schools they contract with in accessing State operating funds and/or federal grant funds, or perform those functions themselves on behalf of those community schools.
 9. Because community schools are public bodies and operate on public funds, they are subject to statutes and common law doctrines protecting public funds:
 - a. Community schools are subject to R.C. Chapters 117 and 149, the chapters of the Revised Code that control the records, finances, and audits of publicly funded entities.
 - b. Members of a community school’s governing authority, its officers, employees, agents, and authorized representatives are public officials for purposes of R.C. 9.39, R.C.102.03, and R.C. 2921.42.
 - c. Officers, employees, agents, and authorized representatives of community schools are fiduciaries of their schools.

Parties and Relevant Persons/Entities

10. The Electronic Classroom of Tomorrow (“ECOT”) is a community school organized under R.C. Chapter 3314.
 - a. As a community school, ECOT is a political subdivision and its property is public property.
 - b. ECOT’s operations were formally suspended on or about January 19, 2018.
 - c. This Court appointed an Interim Special Master to protect ECOT’s assets in Case No. 18 CV 00324. A true, complete, and accurate copy of the order making that

appointment is attached as Exhibit 1.

11. William Lager (“Lager”) was ECOT’s founder and was actively involved in and on behalf of ECOT throughout its entire existence, as discussed more fully below.
12. Altair Learning Management I, Inc. and its predecessor Altair Learning Management LLC (collectively “Altair”) are private, for profit, companies that managed significant portions of ECOT’s operations. Altair served as ECOT’s operator/management company at all times relevant to this case. Lager had a significant ownership interest in Altair and was its chief executive officer at all times relevant to this case.
13. IQ Innovations, LLC Learning Management I, Inc., (“IQ”) is a private, for profit, company that contracted to provide ECOT with curricular materials and related services. Lager had a significant ownership interest in IQ and was its chief executive officer at all times relevant to this case.
14. Rick Teeters (“Teeters”) was ECOT’s superintendent.
15. Michele Smith (“Smith”) was ECOT’s treasurer.
16. Christopher Meister (“Meister”) was ECOT’s vice president of accounting.
17. Ann Barnes (“Barnes”) was ECOT’s EMIS director.
18. Regina Lukich (“Lukich”) was ECOT’s director of federal programs.
19. Travelers Casualty and Surety Company of America (“Travelers”) issued a bond or bonds guaranteeing the faithful performance of Smith’s duties as ECOT’s treasurer, and is sued on those bonds.
20. The Ohio Attorney General (“the State”), brings this case to recover public funds wrongfully paid out by ECOT and wrongfully received by Lager, Altair, and IQ. The Attorney General’s independent, common law, standing to bring those claims is

supplemented here by R.C. 117.42 because the Auditor of State has requested that the Attorney General prosecute the claims asserted here. A true, complete and accurate copy of the Auditor's request is attached as Exhibit 2. To the extent that the claims brought here belonged to ECOT, those claims were assigned to the State for collection pursuant to this Court's order in case No.18CV00324. A true, complete, and accurate copy of that order is attached as Exhibit 3.

ECOT, Lager, Altair and IQ

21. Lager conceived of ECOT and brought it into existence. His actions in that regard included:
 - a. Developing the concept of delivering K-12 educational services throughout the state via the internet.
 - b. Developing ECOT's name.
 - c. Identifying the types of students ECOT would appeal to.
 - d. Formulating the business plan for ECOT, including sources of capitalization.
 - e. Pursuing a charter for ECOT, first with ODE and ultimately receiving a charter with an entity now known as the Educational Service Center of Lake Erie West ("ESCLEW").
 - f. Recruiting the members of ECOT's governing authority.
 - g. Recruiting and supervising ECOT's key staff.
 - h. Selecting and/or developing curricular materials for ECOT.
 - i. Searching for and negotiating with vendors who would provide necessary goods and services to ECOT.
 - j. Representing ECOT in interactions with the press and the general public.
22. ECOT entered into a preliminary agreement with ESCLEW's predecessor to obtain a charter in February of 2000. It received its first charter from ESCLEW's predecessor in April of 2000.

23. Lager continued to be intimately involved in ECOT's operations after it was chartered and operating:
 - a. He was personally involved in many aspects of ECOT's day-to-day operations, including curricular matters, budgeting, and staffing.
 - b. He represented ECOT in its proceedings before ODE, the Auditor of State, ESCLEW and its predecessor, and other state and federal governmental entities regarding such matters as ECOT's public funding.
 - c. He exercised influence on ECOT's staffing.
 - d. He exercised influence over which vendors ECOT did business with and on what terms.
24. Lager regularly represented ECOT in the media, to government officials, and to the general public throughout the time that ECOT operated.
25. Although ECOT had the legal ability to control Lager's actions on its behalf, and was aware of Lager's actions on its behalf, it never objected to those actions. To the contrary, those actions continued, without interruption, for more than 17 years.
26. Lager was also an owner, member, and key officer of Altair. Altair had a series of contracts with ECOT. There were two types of contracts.
27. The first type of contracts between Altair and ECOT were management agreements. There were four such agreements:
 - a. A Management Agreement effective from May 16, 2000 through June 30, 2003.
 - b. An Amended and Restated Management Agreement effective from July 1, 2003 through June 30, 2006.
 - c. An Amended and Restated Management Agreement effective from July 1, 2006 through April 30, 2009.
 - d. A Management Agreement effective from May 1, 2009 through ECOT's closure (collectively "The Management Agreements"). Copies of those contracts are attached as,

collectively, Exhibit 4 hereto.

28. The Management Agreements, among other things:
 - a. Expressly designated Altair's members as agents of ECOT.
 - b. Authorized Altair to take multiple actions on behalf of ECOT including contracting, supervising key educational staff, public relations, managing ECOT's compliance with its charter, and helping manage ECOT's compliance with applicable law.
 - c. Gave Altair responsibility in a number of ECOT's core functions as a public school, including the setting of ECOT's educational program, budgeting, and overall finances.
 - d. Directly involved Altair in ECOT's public funding by, among other things, involving Altair in ECOT's grant funding, budgeting, tracking, and reporting on ECOT's funding. The Management Agreements made Altair "primarily responsible for [ECOT'S] fiscal management and performance[.]"
29. The second type of contracts between Altair and ECOT were licensing agreements. There were two such contracts:
 - a. A License Agreement effective from September 1, 2005 through June 30, 2006.
 - b. A License Agreement effective from July 1, 2006 through June 30, 2009.(The "Altair License Agreements"). True, complete, and accurate copies of those contracts are attached collectively as Exhibit 5 hereto.
30. ECOT's Internal Revenue Service form 990s report that it paid Altair at least \$76,672,930.18 pursuant to the Management Agreements and the Altair License Agreements between July 1, 2000, and June 30, 2017. ECOT likely paid Altair additional funds after June 30, 2017. Further, ECOT likely paid Altair significant funds during fiscal

year 2002, a year for which ECOT did not file a form 990.

31. Lager was also an owner and key officer of IQ. IQ had a series of contracts with ECOT whereby it licensed curricular materials and agreed to provide services to ECOT. Those contracts were:
 - a. A License Agreement entered into on May 1, 2009.
 - b. A First Amendment to License Agreement, entered into June 22, 2010.
 - c. A Second Amendment to License Agreement, entered into on May 22, 2012.
 - d. A Purchased Services Agreement, entered into on January 1, 2014.

Those contracts are collectively referred to as “The IQ Contracts.” True, complete, and accurate copies of those IQ Contracts are attached, collectively, as Exhibit 6.

32. The IQ contracts required ECOT to transfer set percentages of ECOT’s state operating funds to IQ. ECOT’s filings with the Internal Revenue Service report that it paid IQ at least \$122,595,383 pursuant to those contracts between May 1, 2009, and June 30, 2017. ECOT likely paid IQ additional funds after June 30, 2017.

**ECOT’s FTE Reviews and FTE Appeals for the
2015-2016 and 2016-2017 School Years**

33. ODE conducted an FTE Review of ECOT for the 2015-2016 school year. It determined that ECOT could not document any basis for 58.8% of the payments it requested and received from ODE pursuant to R.C. 3314.08. ODE therefore determined that ECOT must return those funds.
34. ECOT took an FTE Appeal from the results of the 2015-2016 FTE Review. The issues raised in that FTE Appeal were exhaustively litigated. The administrative hearing proceeded over the course of 10 days. ECOT produced seven witnesses and had 2,305

exhibits entered into evidence. On May 10, 2017, the hearing officer issued a report and recommendation concluding that ECOT could not document bases for between \$60,054,630 and \$64,054,630 of the funds it received. A true, complete and accurate copy of that report and recommendation is attached as Exhibit 7.

35. ECOT filed written objections to the May 10, 2017, report and recommendation, but the State Board of Education accepted the report and recommendation and found that ECOT must return \$60,350,791 of the State operating funds that it received during the 2015-2016 school year. That was 55.4% of what it received for that year. A true, complete, and accurate copy of the State Board of Education's resolution on this matter is attached as Exhibit 8.

36. ODE conducted an FTE Review of ECOT for the 2016-2017 school year. It determined that ECOT could not document any basis for 18.5% of the payments it requested and received from ODE pursuant to R.C. 3314.08. ODE therefore determined that ECOT must return \$19,295,957.70 of those funds.

37. ECOT took an FTE appeal from the results of the 2016-2017 FTE review. The issues raised in that FTE Appeal were exhaustively litigated. The administrative hearing proceeded over the course of three days. ECOT produced multiple witnesses and had multiple exhibits entered into evidence. ECOT filed post hearing briefs. On January 22, 2018, the hearing officer issued a report and recommendation concluding that ECOT had received \$19,295,957.70 it was not entitled to, an 18.5% overpayment. A true, complete, and accurate copy of that report and recommendation is attached as Exhibit 9.

38. ECOT filed written objections to the January 22, 2018, report and recommendation, but the State Board of Education accepted the report and recommendation and found that

ECOT must return \$19,295,957.70 of the State operating funds it received during the 2016-2017 school year. A true, complete, and accurate copy of the State Board of Education's resolution on this matter is attached as Exhibit 10.

39. The State Board of Education's resolutions of ECOT's 2015-2016 and 2016-2017 FTE Appeals are final under R.C. 3314.08. Although there are purported appeals under R.C. 119.12, the resulting debts are due and payable. The R.C. 119.12 appeals do not automatically stay the operation of the State Board of Education's resolutions and no suspension has been ordered in connection with those appeals. To the contrary, the Ohio Supreme Court rejected ECOT's request that collection of the debt liquidated in the 2015-2016 FTE Appeal be stayed. ODE has therefore collected \$17,588,472.61 of those debts, and a balance of \$61,996,427.39 is due, plus costs and interest. That debt has been referred to the Ohio Attorney General's Office for collection pursuant to R.C. 131.02. See Exhibit 11 hereto.

ECOT's Insolvency and Suspension

40. ODE began enforcing the State Board of Education's findings, described in paragraphs 35, 38, and 39 above, by reducing the State operating funds otherwise due ECOT. ECOT began experiencing financial difficulties.
41. ECOT's sponsor, ESCLEW, therefore suspended ECOT's operations pursuant to R.C. 3314.072, effective January 19, 2018.
42. ECOT's sponsor filed an action to obtain the appointment of a receiver to protect ECOT's assets. That action is pending as Case No. 18CV00324 before this Court. The Court appointed an interim special master to protect ECOT's assets. See Exhibit 1.

43. ODE formally notified the Interim Special Master of the claims resulting from ECOT's 2015-2016 and 2016-2017 FTE Appeals. A copy of that notification is attached as Exhibit 12.
44. The most recent state audit of ECOT, covering the year ending June 30, 2017, reported that ECOT's liabilities far exceeded its assets. The interim special master appointed in Case No. 18CV000324 reported that in February of 2018, ECOT had a total of \$2,268,602 on deposit. ECOT therefore no longer has the funds it received as a result of its unsupported requests for State operating funds, as determined in the FTE Reviews and FTE Appeals described in paragraphs 30, 33, and 34 above.
45. On August 20, 2018, this Court entered an order assigning the claims the State asserts in this case to the State. A true, complete, and accurate copy of that order is attached as Exhibit 3.

Count I

(Public Official Strict Liability against Defendants Lager, Altair, Teeters, Smith, Meister, Barnes, and Lukich)

46. The State hereby restates and realleges all matters set out in paragraphs 1 through 45 above as if they were fully set forth in this paragraph.
47. R.C. 9.39 and Ohio common law make a public official strictly and personally liable for all unauthorized disbursements of a public office's money if the official is directly involved in the receipt or collection of the office's public money or has supervisory authority over those involved in those activities.
48. A community school is a public office.
49. Employees, officers, agents, and authorized representatives of community schools are public officials.

50. All the money involved in the following transactions were either State operating funds transferred pursuant to R.C. 3314.08 or federal grant funds:
- a. The overpayments determined in the 2015-2016 and 2016-2017 FTE Appeal (paragraphs 35, 38, and 39 above).
 - b. The payments made pursuant to the IQ Contracts (paragraphs 31 and 32 above and paragraphs 75-80 below).

Those funds are now gone, having been disbursed without authority of law.

51. Lager was a public official of ECOT, within the meaning of R.C. 9.38(A) and R.C. 117.01(E) in several independently sufficient respects.

52. Lager was an officer of ECOT because:

- a. He was a public officer of ECOT under common law standards because he exercised control over ECOT's public property, over the performance of ECOT's public functions, and over ECOT's exercise of the sovereign authority delegated to it as part of the State's program of education, both directly and through Altair, as summarized in paragraphs 21, 23-25, and 28 above.
- b. He was a de facto officer of ECOT because he repeatedly represented himself as an officer or executive of ECOT in disclosures mandated by R.C. 3517.10(E)(2).

53. Lager was an agent of ECOT because:

- a. He was ECOT's promoter based on the actions summarized in paragraph 21 above, and a promoter is an agent of the entity he promotes.
- b. He was expressly designated as an agent of ECOT through the Altair Management Agreements. The Management Agreements designated members of Altair as agents of ECOT, and Lager was a member of Altair.

- c. Independent of the express designation just discussed, Altair was an agent of ECOT and was a fiduciary of ECOT as its operator. Lager was a subagent of Altair, and as such, he himself was an agent of ECOT.
 - d. He took multiple actions on behalf of ECOT over an extended period of time, as summarized in paragraphs 23-25 and 28 above, ECOT could have prevented that, but did not.
- 54. Lager was an authorized representative of ECOT for the reasons summarized in paragraphs 23-25 above.
- 55. Lager was involved in the receipt and collection of ECOT's public monies in various ways, including:
 - a. Directing ECOT's case in proceedings before ODE and the Auditor of State to determine the enrollment figures driving ECOT's public funding and in negotiating resolutions of disputes about ECOT's enrollment/funding.
 - b. Repeatedly engaging with State officials to encourage the State to continue to fund ECOT.
 - c. Upon information and belief, as Altair's CEO, Lager supervised staff members of Altair and/or ECOT who were directly involved in ECOT receiving and collecting public funds.
 - d. Upon information and belief, Lager actively devised strategies to protect ECOT's continued public funding after ODE began actions that lead to the 2015-2016 and 2016-2017 FTE Reviews and Appeals.
- 56. Altair was an agent and authorized representative of ECOT because it took multiple actions on behalf of ECOT and served as ECOT's operator, some of which are summarized in paragraphs 27, 28, and 30 above.
- 57. Altair was involved in the receipt and collection of ECOT's public monies in multiple ways. Those included assisting ECOT in purportedly complying with the laws and

regulations controlling state operating funds, assisting ECOT in obtaining federal grant funds, and monitoring ECOT's public funding on behalf of ECOT's governing authority, and participating in ECOT's budgeting and spending of those public monies.

58. Rick Teeters was an employee, an officer, and/or an authorized representative of ECOT. He was ECOT's superintendent. He represented ECOT in connection with ECOT's federal grant funding.
59. Teeters was involved in the receipt or collection of ECOT's public money. He was directly involved in ECOT obtaining federal grant funds.
60. Michele Smith was an employee, an officer, and/or an authorized representative of ECOT. She was ECOT's treasurer and was authorized to sign checks on behalf of ECOT. She also represented ECOT in connection with federal grant funds.
61. Smith was involved in the receipt or collection of ECOT's public money. She was directly involved in ECOT obtaining federal grant funds. Upon information and belief, the State alleges that she had authority to and did access the accounts receiving ECOT's public funds by signing checks drawn on those accounts.
62. Ann Barnes was an employee, an officer, and/or an authorized representative of ECOT. She was ECOT's EMIS Director.
63. Barnes was involved in the receipt or collection of ECOT's public money. She participated in and/or supervised the submissions to ODE that resulted in ECOT receiving state operating funding pursuant to R.C. 3314.08.
64. Regina Lukich was an employee, an officer, and/or an authorized representative of ECOT. She was ECOT's Director of Federal Funds.
65. Lukich was involved in the receipt or collection of ECOT's public money. She participated

in and/or supervised ECOT's efforts to draw upon federal grant funds.

66. Christopher Meister was an employee, an officer, and/or an authorized representative of ECOT. He was ECOT's vice president for finance.
67. Meister supervised ECOT staff members/representatives who were involved in the receipt or collection of ECOT's public money. More specifically, he supervised Barnes and Lukich, who, respectively, were involved in ECOT obtaining State operating funds pursuant to R.C. 3314.08 and federal grant funds.
68. Lager, Altair, Teeters, Smith, Meister, Barnes, and Lukich are therefore each strictly liable for all improper disbursements of ECOT's public funds made during the times that they were public officials of ECOT and involved in the receipt or collection of ECOT's public moneys. Those improper disbursements include:
 - a. All funds ECOT improperly received pursuant to R.C. 3314.08, as determined in the 2015-2016 and 2016-2017 FTE Appeals, that have not been preserved.
 - b. All amounts paid pursuant to the IQ Contracts, as discussed in paragraphs 31, 32 above and paragraphs 75-80 below.

Count II

(Breach of Fiduciary Duty by William Lager)

69. The State hereby restates and realleges the matters set out in paragraphs 1 through 6 above as if they were fully set forth in this paragraph.
70. Lager was a fiduciary of ECOT in several independently sufficient ways:
 - a. Lager was ECOT's promoter because of the actions summarized in paragraph 21 above.

- b. Lager was expressly designated as an agent of ECOT through the Management Agreements. The Management Agreements designated members of Altair as agents of ECOT, and Lager was a member of Altair.
- c. Independent of the express designation just discussed, Altair was an agent of ECOT and was a fiduciary of ECOT as its operator. Lager was a subagent of Altair, and as a subagent of Altair, Lager shared Altair's fiduciary duties towards ECOT.
- d. He was a public officer of ECOT under common law standards because he exercised control over ECOT's public property, over the performance of ECOT's public functions, and over the ECOT's exercise of the sovereign authority delegated to it as part of the State's program of education, both directly and through Altair, as summarized in paragraphs 22, 23, 24, and 28 above.
- e. He was a de facto officer of ECOT because he repeatedly represented himself as an officer or executive of ECOT in disclosures mandated by R.C. 3517.10(E)(2).

71. As a fiduciary, Lager had a duty of loyalty to ECOT. That fiduciary duty prohibited him from doing business with ECOT, either directly or through companies he had substantial interests in.

72. Lager violated his fiduciary duty of loyalty by doing business with ECOT through Altair via the Altair License Agreements described in paragraph 29 above.

73. Lager independently violated his fiduciary duty of loyalty by doing business with ECOT through the IQ Contracts described in paragraphs 31 and 32 above and paragraphs 75-80 below.

74. ECOT therefore is entitled to recover from Lager all profits he received from the Altair License Agreements and the IQ Contracts. Further, Lager holds all property purchased with those profits as constructive trustee for ECOT.

Count III

(Recovery of public funds paid IQ on contracts violating R.C. 2921.42)

75. The State hereby restates and realleges the matters set out in paragraphs 1 through 74 above as if they were fully set forth in this paragraph.

76. ECOT was a political subdivision because it was a community school.

77. Lager was a public official of ECOT within the meaning of R.C. 2921.01(A) in several independently sufficient respects:

- a. He was an officer of ECOT for the reasons summarized in paragraph 52 above, ECOT was a political subdivision, and an officer of a political subdivision is a public official pursuant to R.C. 2921.01(A)
- b. He was an agent of ECOT for the reasons summarized in 53 above, ECOT was a political subdivision, and an agent of a political subdivision is a public official pursuant to R.C. 2921.01(A).

78. The IQ Contracts were public contracts within the meaning of R.C. 2921.42(I) because they were for the purchase or acquisition of property and/or services by ECOT and ECOT was a political subdivision.

79. Lager had an interest in the IQ contracts because he was an owner and officer of IQ.

80. All of the IQ Contracts were therefore void under R.C. 2921.42(H), and ECOT is entitled to recover from IQ all funds paid pursuant to such contracts.

Count IV

(Damages from Lager under the Ohio Corrupt Practices Act, R.C. 2923.34)

81. The State hereby restates and realleges all matters set out in paragraphs 1 through 80 above as if they were fully set forth in this paragraph.
82. ECOT was an enterprise within the meaning of R.C. 2923.31(C). That status had at least three independently sufficient bases. First, ECOT was a corporation. Second, as a community school ECOT was a government agency. Third, ECOT was a legal entity.
83. ECOT was also a person within the meaning of R.C. 2923.31(G) and R.C. 1.59(C) because it was a corporation.
84. The IQ Contracts were a pattern of corrupt activity, within the meaning of R.C. 2923.31(E) and (I)(2)(a), in that:
 - a. They each violated R.C. 2921.42 and there were more than two such contracts.
 - b. The IQ Contracts were not isolated actions, but were part of a pattern in that:
 - i. Each had the same purpose (to transfer ECOT's public funds to a private entity controlled by Lager).
 - ii. Each had similar results (ECOT's public funds were diverted to the use of a private entity controlled by Lager).
 - iii. Each had a common participant (Lager).
 - iv. Each had similar victims (ECOT, its students, the school districts whose funds were transferred to ECOT, and those districts' students).

Although the IQ Contracts were similar in the ways just recited, they were not a single event. Instead, they were separate agreements with separate subjects and terms, and upon information and belief, they were approved by separate votes of ECOT's governing authority at separate meetings.

85. The pattern of activity described in the immediately preceding paragraph was conducted in connection with an enterprise: ECOT.
86. ECOT was injured by that pattern of corrupt activity because it paid millions of dollars pursuant to contracts that were void as a matter of law pursuant to R.C. 2921.42(H).
87. Lager is an individual and hence a person within the meaning of R.C. 2923.31(G).
88. Lager was associated with ECOT as an employee, officer, agent, and public officer of ECOT, as summarized in paragraphs 23-25, 28, 52, 53, and 77 above,
89. Lager violated R.C. 2923.32 in at least two independently sufficient ways:
- a. Lager participated in ECOT directly or indirectly through the IQ Contracts that comprised the pattern of corrupt activity.
 - b. Lager received the proceeds of the IQ Contracts, either directly or indirectly, and upon information and belief, invested those proceeds, either directly or indirectly, in various types of property, including interests in multiple companies, real property in Ohio and Florida, multiple automobiles, and multiple boats.
90. R.C. 2923.34(E) therefore makes Lager liable to ECOT for all amounts paid pursuant to the IQ Contracts.

Count V
(Claim on Bond against Travelers)

91. The State hereby restates and realleges all matters set out in paragraphs 1 through 90 above as if they were fully set forth in this paragraph.
92. Travelers issued a bond guaranteeing faithful performance of Michele Smith's duties as ECOT's treasurer. A copy of that bond is attached as Exhibit 13 hereto.

93. Smith did not faithfully perform her duties as ECOT's treasurer because she allowed or participated in the improper dispositions of public funds entrusted to ECOT as summarized in paragraphs 50 and 68 above.
94. Travelers is therefore liable to ECOT for the penal amount of its bond.
95. The State is informed and believes, but has not yet been able to verify, that other bonds and insurance policies may have been issued for ECOT's protection concerning other officials. It reserves the right to assert claims on those bonds and policies as they are discovered.

WHEREFORE the State prays that:

A. As to Count I:

1. That judgment be entered against Lager, Altair, Teeters, Smith, Meister, Barnes, and Lukich, jointly and severally, in amounts equal to:
 - a. Unpaid portions of the amounts ECOT was found liable for in the 2015-2016 and 2016-2017 FTE Appeals, and
 - b. The payments made on the IQ Contracts during their respective times as public officials of ECOT; and

B. As to Count II:

1. An accounting be had establishing all payments and other property Lager received from Altair and IQ while he was in violation of his fiduciary duty of loyalty to ECOT and the disposition of such funds and property; and
2. That Lager be ordered to disgorge all profits he received from the Altair License Agreements and the IQ Contracts; and

3. To the extent that any profits he received from the Altair License Agreements and the IQ Contracts can be traced into any other property owned by Lager, that other property be declared to be held in constructive trust for the benefit of ECOT.

C. As to Count III:

1. Judgment be entered against IQ in an amount equal to all amounts it received from ECOT pursuant to all IQ Contracts.

D. As to Count IV:

1. Judgment be entered against Lager in an amount equal to all amounts ECOT paid pursuant to all IQ Contracts, subject to possible trebling pursuant to R.C. 2923.34(E).

E. As to Count V:

1. Judgment also be entered in favor of ECOT against Travelers for the full penal amount of the bond or bonds it issued to ECOT.

F. As to all counts:

1. That all amounts recovered be distributed pursuant to R.C. 3314.074 under this Court's supervision, either in this case or Case No. 18 CV00324.
2. That it be granted all other relief that is appropriate.

Respectfully submitted,

**MICHAEL DEWINE (0009181)
Ohio Attorney General**

/s/ Todd R. Marti
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REID T. CARYER (0079825)
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Counsel for the Ohio Attorney General

**COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO**

GOVERNING BOARD OF THE	:	
EDUCATIONAL SERVICE CENTER OF	:	
LAKE ERIE WEST,	:	
	:	Case No. 18CV-000324
Plaintiff,	:	
	:	Judge Holbrook
vs.	:	
	:	
ELECTRONIC CLASSROOM OF	:	
TOMORROW,	:	
	:	
Defendant.	:	

**AGREED INTERIM ORDER APPOINTING INTERIM MASTER FOR THE
ELECTRONIC CLASSROOM OF TOMORROW**

Pursuant to the stipulation and agreement of the parties, and for good cause shown, the Court finds and orders as follows:

1. Defendant the Electronic Classroom of Tomorrow (“ECOT”) is an Ohio non-profit corporation formed under Chapter 1702 of the Ohio Revised Code, and has served as an electronic community school (“eschool”) under Chapter 3314 of the Revised Code.

2. Educational Service Center of Lake Erie West (“ESCLEW”) contracted with ECOT to serve as the school’s “sponsor,” a requirement under Chapter 3314 (collectively, ESCLEW and ECOT are described as the “Parties”).

3. Beginning in the middle of the 2015-2016 school year, the Ohio Department of Education (“ODE”) imposed upon ECOT a funding methodology, beginning with that school year, that was dependent upon ECOT’s documentation of the duration of time students spend participating in online and offline learning opportunities.

4. ECOT initiated litigation, originally before the Franklin County Common Pleas Court, in which it challenged, among other things, ODE’s authority to impose a durational funding

standard under R.C. 3314.08—the community school funding statute. ECOT has argued, instead, that eschool funding, under the statute, is to be based on enrollment.

5. The issue of whether ODE was authorized, under Section 3314.08, to impose such a durational funding standard, or whether ODE’s imposition of such standard is unauthorized, and thus, unlawful, is currently before the Ohio Supreme Court and it set for oral argument on February 13, 2018. That case is captioned Electronic Classroom of Tomorrow v. Ohio Department of Education, Case No. 2017-0913 (the “Supreme Court Case”). A decision on the merits is anticipated in the months following oral argument.

6. In the meantime, ODE has proceeded with its implementation of a multi-million dollar monthly “claw back” of ECOT’s funding, based on its determination that ECOT was unable to justify—with durational data—approximately 60-percent of its claimed full-time equivalency funding for the 2015-2016 school year. This claw back, alone, has reduced ECOT’s monthly funding by approximately \$2.5-million per month since July 2017.

7. Based on the same durational methodology at issue in the Supreme Court case, ODE has imposed additional, preemptive funding cuts on top of the \$2.5-million already being withheld from ECOT’s monthly funding.

8. Because of these funding cuts imposed by ODE based on the challenged durational funding standard, ECOT has been forced to deplete its cash reserves in order to continue operations and to provide an education for its more than 12,000 students during the 2017-2018 school year. ECOT’s current fiscal difficulties are due to ODE’s imposition, beginning in 2015-2016, of a durational funding methodology.

9. Because of the magnitude of the funding cuts imposed by ODE, ECOT lacks sufficient reserves to continue operations until a decision is issued by the Ohio Supreme Court in the Supreme Court case.

10. If, however, ECOT succeeds in the Supreme Court Case, ODE's funding claw backs will necessarily have been unlawful, and ECOT will seek to recover all of the funds withheld by ODE beginning in July 2017.

11. Under the sponsorship agreement between ECOT and ESCLEW, as well as R.C. 3314.072, ESCLEW advised ECOT of its intent to "suspend" the school's operations beginning on January 18, 2018.

12. After ECOT submitted proposed remedies to the cited reasons for the intended suspension to ESCLEW's board, the board voted on January 18, 2018, to formally suspend ECOT's operations, which suspension took effect on January 19, 2018.

13. Because of this suspension, ECOT is to perform the tasks set forth in ODE's Community School Guidance Letter No. 2010-4, updated July 2015 (the "Closing Procedures"), including securing and transferring student educational records, staff records, administrative records and financial records and securing and distributing assets of the ECOT pursuant to the priorities required by law. ECOT has already begun undertaking those tasks.

14. On January 11, 2018, ESCLEW filed the instant action in which it seeks appointment of a receiver for ECOT.

15. ECOT's treasurer/fiscal officer, Michele D. Smith, has obtained an extension of her existing public servant bond to and including January 1, 2019. Thus, so long as funds are available, ECOT will retain a bonded, licensed school treasurer (the "Treasurer") during the period of its

suspension, and the Treasurer will be available to the Interim Master. The Interim Master shall make ECOT's retention of a Treasurer a priority.

16. On January 18, 2018, Ohio Auditor of State Dave Yost issued a letter in which he reported the results of his office's analysis of ECOT financial documentation and information to "determine if ECOT accurately and completely represented its fiscal condition to its sponsor, the ESC." A copy of Auditor Yost's letter, without exhibits is attached as Exhibit A to this Order.

17. During a court proceeding on January 19, 2018, outside counsel for the Ohio Department of Education stated that ODE takes no position with respect to the resolution of this matter.

18. Given these circumstances, the Parties agree and specifically consent to the Court's appointment of an interim master who will, among other items and subject to this Entry, oversee, control and supervise (a) all of the tangible and intangible assets of ECOT, real and personal, of whatever kind and description ("Assets"); and (b) performance of the Closing Procedures, including ECOT's employees' efforts in complying with record-related requirements imposed upon a suspended community school, pending a ruling on the merits in the Supreme Court case.

THEREFORE, based on the foregoing findings and the Parties' consent, the Court hereby ORDERS, ADJUDGES, AND DECREES as follows:

1. This Court has subject matter jurisdiction over the Motion and this cause of action.
2. This Court has personal jurisdiction over Defendant, Electronic Classroom of Tomorrow ("ECOT") in this matter pursuant to Ohio Rule of Civil Procedure 4.1, 4.2, and 4.3.
3. Preferred venue properly lies with this Court pursuant to Ohio Rule of Civil Procedure 3(B).

4. The emergency motion of Plaintiff for appointment of a receiver is denied without prejudice.

5. Nonetheless, the Court shall assume responsibility for overseeing and supervising the Assets and the Closing Procedures.

6. In discharge of this responsibility, Myron N. Terlecky, Esq. of Strip, Hoppers, Leithart, McGrath & Terlecky Co., LPA, 575 South Third Street, Columbus, OH 43215 (the “Interim Master”), who is not a party or person having an interest in this action, shall be and hereby is appointed as Interim Master of the suspension process for ECOT. Richard F. Kruse of Gryphon USA, Ltd, who is not a party or person having an interest in this action, shall be and hereby is appointed as Assistant Interim Master for Compliance of the suspension process for ECOT (the “Assistant Master”).

7. The Interim Master’s powers and duties shall be as follows:

a. The Interim Master shall maintain ECOT’s corporate existence as a going concern. ECOT’s Board of Directors may remain comprised and will continue to be the governing body of ECOT; however, any resolution or action of said Board pertaining to the Assets and/or operations of ECOT shall be subject to the approval of the Interim Master. Notwithstanding the prior sentence, and so long as such actions do not impact the Assets and/or implementation of the Closing Procedures, ECOT’s Board of Directors may: (1) engage in basic matters of corporate governance pertaining to the continued existence of ECOT as a non-profit corporation under R.C. Chapter 1702 that are not otherwise inconsistent with this Order; (2) undertake efforts that may allow for resumption of operations as a community school; (3)

craft/make public statements, on behalf of the Board and/or ECOT, in response to media inquiries and/or other matters of public interest regarding or relating to ECOT; and/or (4) direct or control any response to the instant lawsuit, without approval of the Interim Master. The Interim Master may rely upon and direct the services to be provided by the executives, staff, and vendors of ECOT. ECOT will continue as an Ohio non-profit corporation under Chapter 1702 of the Revised Code.

b. The Interim Master shall take immediate control, management and charge of ECOT's accounting books and records of whatever nature and wherever located (whether in the possession of ECOT or any other person or entity), including all information regarding the Assets, liabilities, equity, income and expenses of the ECOT. The Interim Master shall take immediate control, management and charge of: (1) the Assets; and (2) all bank and deposit accounts and certificates of deposit of ECOT and in ECOT's name (the "Bank Accounts").

c. The Interim Master may establish or maintain one or more bank accounts in the Interim Master's name for its operations as the Interim Master in this matter at any federally insured bank with offices in Ohio. The Interim Master shall keep a true and accurate account of any and all receipts and disbursements which the Interim Master shall receive or make as Interim Master in the course of the operation of ECOT's business or operations.

d. The Interim Master shall not have authority to, nor shall he take steps to terminate ECOT's corporate existence. The Interim Master shall take

such steps as necessary to preserve the Assets of ECOT and not proceed to liquidate or sell any Assets except as necessary to fund expenses for or comply with R.C. Chapter 3314 and the Closing Procedures.

e. The Interim Master shall implement the Closing Procedures; provided, however, the Interim Master shall defer elements of the Closing Procedures, to the extent practicable and permissible by law, pending the disposition of the Supreme Court.

f. The Interim Master shall afford reasonable opportunity for creditors to present and prove their claims, and, if deemed appropriate by the Interim Master or the Court, publish in a newspaper of general circulation within the County a deadline or bar date for submitting claims. The Interim Master may defer this process until resolution of the Supreme Court Case.

g. The Interim Master is authorized to determine the validity and priority of creditors' claims subject to court approval in accordance with R.C. 3317.074.

h. The Interim Master is authorized to make recommendations for appropriate distributions of cash or property between the various classes of creditors according to their priority, after such notice as the court deems appropriate and in accordance with R.C. 3317.074.

8. Notwithstanding any other provision of this Entry, the Interim Master shall not seek to terminate, control, or otherwise interfere with ECOT's pursuit, through its current counsel, of any pending litigation and/or administrative proceedings, including but not limited to: The Supreme Court Case; ECOT v. Ohio State Board of Education, et al., Case No. 17AP510 (Tenth

District Court of Appeals); ECOT v. Ohio State Board of Education, Case No. 17AP767 (Tenth District Court of Appeals); and ECOT’s administrative appeal of ODE’s “Final Determination” as to ECOT’s FTE funding for the 2016-2017 school year. ECOT may continue to retain counsel to represent its interest in this lawsuit, including responding to the Interim Master and the Court. The Interim Master shall be responsible for all other litigation, by or against, ECOT, until the Interim Master is discharged by the Court.

9. The Interim Master shall provide the Parties and Court with periodic progress reports as deemed necessary within his reasonable discretion.

10. The Interim Master may: (a) employ counsel or professionals by application as set forth in Local Rule 66.08; (b) without court approval, engage contractors, consultants, and other agents as he deems necessary and reasonable to fulfill his supervisory obligations under this Order; and (c) recommend the termination of ECOT personnel or employees after consultation with senior personnel at ECOT. If, as to subsection (c), the Interim Master and senior personnel at ECOT are not in agreement, the proposed termination of ECOT personnel shall be presented to the Court for resolution.

11. The Assistant Master shall be charged with working with the Interim Master to ensure that the Court is properly and fully informed as to the progress of matters addressed in this Order.

12. The Interim Master shall receive compensation for services rendered at a rate of \$250 per hour expended by the Interim Master in discharge of duties hereunder and agents or employees of the Interim Master shall be compensated at reasonable rates for the services performed by them. To obtain approval for payment of fees and expenses, the Interim Master shall file a fee application as provided for in Local Rule 66.11. The Assistant Master shall receive

compensation for services rendered at a rate of \$150 per hour expended by the Assistant Master in discharge of duties subject to the same terms and conditions as the Interim Master.

13. Pursuant to Ohio law, no action may be commenced or maintained against the Interim Master or the Assistant Master for acts done in their official capacities without leave of this Court being first obtained.

14. ECOT and any persons, firms or entities acting under the direction of ECOT, and any third parties, persons, or firms, shall, upon presentation of a copy of this Order, provide the Interim Master with access to any and all ECOT Assets, including books and records, in the possession or under the control of such parties; and all persons are enjoined and restrained (a) from payment of any amounts owing to ECOT or to anyone other than the Interim Master, and (b) from in any way disturbing or interfering with the collection, management or sale of any of ECOT's Assets.

15. All creditors, claimants, bodies politic, parties in interest, and their respective attorneys, servants, agents, and employees and all other persons, firms, and corporations be, and they hereby are, enjoined and stayed from commencing or continuing any action at law or suit or proceeding in equity to foreclose any lien or enforce any claim against ECOT, its Assets, or against the Interim Master in any court without leave of this Court. The parties are further stayed from executing or issuing or causing the execution or issuance out of any Court of any writ, process, summons, attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with, or enforcing any claim or lien upon ECOT's assets and/or any property owned by or in the possession of ECOT, or the Interim Master, and from doing any act or thing whatsoever to interfere with the Interim Master in the discharge

of his duties in this proceeding or with the exclusive jurisdiction of this Court over ECOT, its assets, including books and records and the Interim Master without leave of this Court.

16. The Interim Master shall have full and unrestricted access to all of the Assets, and ECOT and its managers, employees and agents, and any other party, are directed to take all steps necessary to give the Interim Master access to the business locations, facilities and premises and ECOT's storage facilities for the Assets.

17. The Interim Master and Assistant Master shall be entitled to use sound business judgment in their sole discretion in the execution of their respective duties and shall not be liable for mistake of fact, error of judgment or other acts or omissions unless attributable to willful misconduct. The Interim Master and Assistant Master shall also be authorized to apply to the Court for further instructions.

18. This Order may be amended by further Order of the Court. This Order may also be amended by Order agreed to by the Parties and the Interim Master.

19. Upon a ruling by the Supreme Court in the Supreme Court Case, either party may move for modifications to this Order, including but not limited to termination of the Interim Master and Assistant Master.

20. ECOT shall not be required to file an answer in this case and all defenses to any and all claims asserted in the Amended Complaint are preserved. However, ECOT agrees to waive its defense that ESCLEW failed to comply with a condition precedent to the filing of this lawsuit as asserted in ECOT's Motion for Summary Judgment filed on January 19, 2018.

IT IS SO ORDERED.

AGREED:

/s/ John A. Borell, Jr.

John A Borell, Jr. (0068716)
Margaret J. Lockhart (0039824)
Marshall & Melhorn, LLC
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/s/ Marion H. Little, Jr.

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Facsimile: (614) 365-7900
Email: little@litoio.com
hogan@litoio.com

Counsel for Defendant

1036-002: 739972

Franklin County Court of Common Pleas

Date: 01-24-2018
Case Title: GOVERN BRD EDUCATIONAL SVC CNTR LAKE ER -VS-
ELECTRONIC CLASSROOM TOMORROW
Case Number: 18CV000324
Type: AGREED ORDER

It Is So Ordered.

A handwritten signature in black ink, reading "Michael J. Holbrook", is written over a circular, embossed seal. The seal features a central emblem and text around its perimeter, though the details are somewhat faded.

/s/ Judge Michael J. Holbrook

Electronically signed on 2018-Jan-24 page 12 of 12



Dave Yost • Auditor of State

RECEIVED

JUN 28 2018

Ohio Attorney General
Constitutional Offices Section

June 22, 2018

Michael DeWine
Ohio Attorney General
30 E. Broad Street, 16th Floor
Columbus, OH 43215

Re: R.C. 117.42 Request: Electronic Classroom Of Tomorrow

Dear Attorney General DeWine:

The Office of the Auditor of State ("AOS") has identified a number of troubling issues in its audits and investigations of the Electronic Classroom Of Tomorrow ("ECOT"). I am writing to request that your office bring suit on those matters.

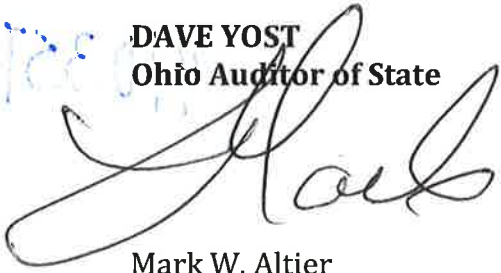
Section 117.42 of the Ohio Revised Code states,

Upon request of the auditor of state, the attorney general may file and prosecute to judgment or decree appropriate actions to prevent the unlawful expenditures of public funds, cancel contracts not made in compliance with law, enforce liabilities arising from false certifications or failure to furnish financial reports, secure compliance with this chapter, secure compliance with fiscal, accounting, or budgeting requirements, opinions, or adjustments made in an audit report, secure compliance with the laws, ordinances, rules, and orders pertaining to any public office, and enforce generally the laws relating to the expenditure of public funds. All sums collected as a result of any action taken under this chapter shall be placed in the treasury of the appropriate public office (emphasis added).

Pursuant to Ohio Revised Code Section 117.42, I respectfully request that the Office of the Attorney General pursue all claims of the type authorized by R.C. 117.42 related to ECOT's operations, including but not limited to claims based on violations of public officials' fiduciary duties, violations of R.C. 2921.42, violations of R.C. 2923.32, and to enforce public officials' strict liability under R.C. 9.39 and Ohio common law.

Sincerely,

DAVE YOST
Ohio Auditor of State

A large, stylized handwritten signature in black ink, appearing to read "Mark W. Altier".

Mark W. Altier
Chief Legal Counsel

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

GOVERNING BOARD OF THE	:	
EDUCATIONAL SERVICE CENTER	:	
OF LAKE ERIE WEST,	:	
	:	
Plaintiff,	:	Case No. 18CV-000324
	:	
vs.	:	Judge Holbrook
	:	
ELECTRONIC CLASSROOM OF	:	
TOMORROW,	:	
	:	
Defendant.	:	

AMENDED ORDER GRANTING THE MOTION OF INTERIM MASTER FOR AN ORDER ASSIGNING CERTAIN CLAIMS AND CAUSES OF ACTION OF THE ELECTRONIC CLASSROOM OF TOMORROW TO THE STATE OF OHIO

This matter is before the Court on The Ohio Attorney General’s request for clarification as to the scope of the claims assigned to the State of Ohio in this Court’s July 25, 2018 Order. Defendant Electronic Classroom of Tomorrow (“ECOT”) and non-parties Altair Leaning Management I, Inc., IQ Innovations Inc., and William Lager filed responses to Ohio Attorney General’s request arguing that the Order is clear, and the Interim Master’s original motion only sought to assign the claims identified in such order.

Having reviewed the original motion and responses, the July 25, 2018 Order, and the present arguments of counsel, the Court finds that further clarification of its Order is warranted. Accordingly, to further clarify the July 25, 2018 Order Assigning Claims, the Court hereby issues this amendment and ORDERS that:

1. The Interim Special Master is authorized to make, and this order hereby effectuates, an assignment to the State of Ohio of any and all claims of ECOT and/or those within the purview of the Interim Master as an asset of ECOT, including, but not limited to, claims against (a) Altair Leaning Management I,

Inc., (b) IQ Innovations Inc., and (c) The Educational Service Center of Lake Erie West, subject to the exceptions listed in Paragraph 2 (collectively, the “Assigned Claims”).

2. For the avoidance of doubt, nothing herein conflicts, nor shall it modify or amend, this Court’s Agreed Interim Order Appointing Interim Master of January 24, 2018 and/or the Protective Order entered on May 14, 2018, and the Assigned Claims shall not include:

- A. Any e-rate claim to recover funds from third-party purchases made by ECOT;
- B. Any refund of funds expended by ECOT subsequent to the entry of the *Agreed Interim Order Approving Interim Master for the Electronic Classroom of Tomorrow* was entered by this Court on January 24, 2018 (the “Agreed Order”);
- C. Any claims arising out of the sale of the real and personal property being sold pursuant to an Order of this Court;
- D. Any funds due ECOT for any overpayment to any public retirement system;
- E. Any funds due ECOT from the Ohio Department of Education, including but not limited to, (i) federal funds for services provided to students; and (ii) repayment of state funds previously clawed-back from ECOT by the Ohio Department of Education; and,
- F. Any claims or lawsuits filed by ECOT against the Ohio Department of Education.

3. The State of Ohio, through the Ohio Attorney General, has full authority and discretion to commence proceedings in any court or other forum, to prosecute, settle, compromise, and/or take any other action he deems appropriate regarding the Assigned Claims. Notwithstanding the forgoing, any decision to the appoint special counsel, and the fee agreement associated therewith, shall be subject to this Court’s approval. Further, any agreements to settle or

compromise Assigned Claims for less than 50% of the amount of the claim are likewise subject to this Court's approval.

4. The State shall turn over all proceeds of the Assigned Claims, less costs of collection, to the Interim Special Master or his successor for distribution as ordered by the Court pursuant to applicable law. Such proceeds shall be turned over within 30 days of their receipt by the State.

IT IS SO ORDERED.

Electronic notification to counsel of record

Copies to:

Todd Marti
Reid Caryer
Office of the Ohio Attorney General
Education Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

Douglas R. Cole
Carrie Lymanstall
Organ Cole LLP
1330 Dublin Road
Columbus, Ohio 43215

Karl H. Schneider
David M. Marcus
McNees Wallace & Nurick LLC
21 East State Street, Suite 1700
Columbus, Ohio 43215

Franklin County Court of Common Pleas

Date: 08-20-2018
Case Title: GOVERN BRD EDUCATIONAL SVC CNTR LAKE ER -VS-
ELECTRONIC CLASSROOM TOMORROW
Case Number: 18CV000324
Type: ORDER

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Michael J. Holbrook". The signature is written over a blue circular seal. The seal contains the text "COMMON PLEAS" at the top, "FRANKLIN COUNTY, OHIO" in the middle, and "ALL THINGS ARE POSSIBLE" at the bottom. The seal also features a central emblem with a scale of justice and a book.

/s/ Judge Michael J. Holbrook

Electronically signed on 2018-Aug-20 page 4 of 4

Court Disposition

Case Number: 18CV000324

Case Style: GOVERNI BRD EDUCATIONAL SVC CNTR LAKE ER -
VS- ELECTRONIC CLASSROOM TOMORROW

Motion Tie Off Information:

1. Motion CMS Document Id: 18CV0003242018-07-2799950000
Document Title: 07-27-2018-MOTION - NON-PARTY: STATE OF
OHIO - REQUEST FOR CLARIFICATION REGARDING ASSI
Disposition: MOTION RELEASED TO CLEAR DOCKET

MANAGEMENT AGREEMENT

by and between the

ELECTRONIC CLASSROOM OF TOMORROW

and

ALTAIR LEARNING MANAGEMENT, LLC

Effective May 16, 2000

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MANAGEMENT AGREEMENT

This Management Agreement (“Agreement”) is entered into as of the 16th day of May, 2000, between Altair Learning Management, LLC (“**Altair**”), a Delaware limited liability company located at 2341 Hardesty Court, Columbus, Ohio 43204, and the Electronic Classroom of Tomorrow (“**ECOT**”), an Ohio non-profit corporation, by and through its Board of Trustees, located at Central Union Plaza, 415 Emerald Avenue, 2nd Floor, Toledo, OH 43602.

RECITALS

ECOT is organized as an Ohio community school under the Ohio Revised Code (“Code”), including but not necessarily limited to Sections 3314 and 1702. Ultimate authority over **ECOT** is vested in the Board of Trustees and Members (the “Board” or “Members”). The School has been granted a Charter Contract (“Contract”) by the Lucas County Educational Service Center (“LCESC”) to operate an Ohio community school, with LCESC as the sponsoring body.

Altair specializes in providing educational institutions, vocational schools, businesses, religious institutions and other organizations with a variety of educational services and products, and human resources administration, including school and business management, curricula, educational programs, contract administration and technology. The products and services of **Altair** are designed to serve the needs of a diverse student population.

ECOT and **Altair** desire to enter into this Agreement, whereby **ECOT** and **Altair** will work together to bring educational excellence and innovation to the State of Ohio, based on a mutual agreed upon school design, comprehensive educational program, and sound school and business principles and management methodologies.

In order to facilitate the commencement of school for the 2000-2001 school year and the continuation of school thereafter, and to implement an innovative educational program at the school, the parties desire to establish this arrangement for the management and operation of certain **ECOT** administrative activities or functions. This will include pre-operational services as well as management functions once **ECOT** is operational.

THEREFORE, it is mutually agreed as follows.

ARTICLE I

TERM

This Agreement shall become effective May 16, 2000, and shall cover the initial organization period plus five (5) academic years, with the entire term to end on June 30, 2005. Notwithstanding the termination of the Contract, this Agreement shall continue to remain in effect provided that **ECOT** has entered into or is continuing to operate under any chartering school contract with an authorizing body (as defined under the Code) or as a private school; and this Agreement has not been terminated pursuant to Article VIII.

ARTICLE II

CONTRACTING RELATIONSHIP

- A. Authority. **ECOT** represents that it is authorized by law to contract with a private entity to provide educational management services. **ECOT** further represents that it has received its charter through LCESC to organize and operate a community school throughout the State of Ohio. **ECOT** is therefore vested with all powers within applicable law for developing and implementing the educational program contemplated in this Agreement.
- B. Agreement. Acting under and in the exercise of its authority, **ECOT** hereby contracts with

Altair, certain specific functions relating to the management and operation of the school in accordance with the terms of this Agreement and **ECOT**'s Contract. **Altair** and **ECOT** acknowledge that each has reviewed this Agreement and all related documents and that they shall comply with the terms and conditions set forth in this Agreement.

C. Relationship and Status of the Parties. **Altair** is a separate Delaware limited liability company, and is not a division or a part of **ECOT**. **ECOT** is an Ohio non-profit corporation and an entity authorized by the Code to be an Ohio public school, and is not a division or part of **Altair**. The relationship between **Altair** and **ECOT** is based solely on the terms of this Agreement, and the terms of any subsequent written agreements between **Altair** and **ECOT**.

D. Designation of Agents. The Board of **ECOT** designates the members of **Altair** as agents of the school having a legitimate educational interest solely for the purpose of entitling such persons access to education records under 20 U.S.C. §1232g, the Family Educational Rights and Privacy Act ("FERPA").

The parties wish to satisfy the requirements of Section 5 of Rev. Proc. 93-19, 1993-1 C.B., 526, so that the provision of **Altair**'s services under this Agreement does not cause the school's facilities to be treated as used in a private business use under Section 141(b) of the Internal Revenue Code of 1986, as amended.

Altair's compensation under this Agreement is reasonable compensation for services rendered. **Altair**'s compensation for services under this Agreement will not be based, in whole or in part, on a share of revenues from the operation of the school.

In general, **Altair** will not have any role or relationship with the school that, in effect, substantially limits **ECOT**'s ability to exercise its rights, including termination rights, under this

Agreement. In furtherance of such a restriction, it is agreed between **ECOT** and **Altair** that none of the voting power of the governing body of the school will be vested in **Altair** or its directors, members, managers, officers and employees, and none of the voting power of the governing body of **Altair** will be vested in the school or its trustees, managers, officers or employees. Further, **ECOT** and **Altair** will not be members of the same controlled group, as defined in Section 1.150-1(f) of the regulations under the Internal Revenue Code of 1986, as amended, or related persons, as defined in Section 144(a)(3) of the Internal Revenue Code of 1986, as amended.

ARTICLE III

FUNCTIONS OF ALTAIR

A. Responsibility. **Altair** shall be responsible and accountable to **ECOT** for the management of the school. **Altair** will meet with **ECOT** at **ECOT**'s regularly scheduled Board meetings to account to **ECOT** for the roles and responsibilities of **Altair** to manage the following areas.

- Personnel and Human Resources Administration
- Program of Instruction
- Purchasing
- Strategic Planning
- Public Relations
- Financial Planning
- Recruiting
- Compliance Issues
- Budgets
- Contracts
- Equipment and Facility
- Such other reasonable responsibilities as **ECOT** and **Altair** deem necessary to carry out the obligations under the Contract.

B. Educational Program. The educational program and the program of instruction shall be recommended by **Altair** and implemented by **ECOT**, through its Superintendent, and

approved by ECOT's Boards of Trustees. **Altair** shall recommend the hiring of the Superintendent to the Board of ECOT, but the Superintendent shall be an employee of ECOT. **Altair** shall manage all administrative services of ECOT, but the education of the students shall be delegated by the Board to the Superintendent. **Altair** shall specifically not be responsible for day-to-day supervision of the teaching staff and the day-to-day supervision of, or implementation of, the educational program of instruction. The Superintendent shall be responsible for the following areas:

1. Educational Staff Recruitment
2. Educational Staff Professional Development
3. Management of day-to-day activities of Educational Staff
4. Performance and Evaluation of Educational Staff
5. Oversee course and curriculum design recommended by **Altair**
6. Develop, maintain and administer all State mandated and other testing
7. Parent education as deemed necessary
8. All other responsibilities assigned by the Board of ECOT

C. Strategic Planning. **Altair** shall design strategic plans for the continuing educational and financial benefits of ECOT. ECOT and **Altair** shall be dedicated to the continuous improvement of the school.

D. Public Relations. **Altair** shall design and manage the public relations strategy for the development of beneficial and harmonious relationships with other organizations, the community and the State of Ohio.

E. Grants and Fund Raising. **Altair** shall locate grants and potential sources for donations and shall recommend consultants or other entities to help with the same.

F. Special Functions. The services **Altair** shall manage for **ECOT** shall include, but not be limited to the following:

Operational Services

1. Financial Management

- Revenue and cash management
- Select benefit packages for **ECOT** staff
- Manage and monitor invoices for LCESC
- Coordinate monthly budgets and financial reports to the Board
- Coordinate yearly audits
- Manage banking relationships

2. Compliance Management

- Student enrollment reports
- Consult with **ECOT** regarding financial transactions for annual report to the State of Ohio
- Budgets/financial plans
- Reports to LCESC
- Policies for the Board and for **ECOT**

3. Management of Equipment/Furniture/Property

- Select phone system, furniture, office machines, computers and other equipment
- Negotiate and arrange for leases or purchase agreements
- Inventory of equipment
- Track and handle surplus property

4. Other

- Administrative services management
- Day-to-day management of non-teaching staff
- Professional development not related to teaching
- Management of all contracts
- Locate and recommend the Superintendent

- Locate and manage the CFO, COO and/or CTO of **ECOT**
- Locate and recommend the Secretary for the Board of Trustees of **ECOT**
- Locate and manage the services of the attorney for **ECOT**

G. Subcontracts. **Altair** may contract with others to provide services or goods for **ECOT**, provided that for all contracts over Ten Thousand Dollars (\$10,000) per year, **Altair** must obtain the prior written approval of **ECOT**'s Board which shall not be unreasonably withheld. **Altair** reserves the right to subcontract or to recommend the subcontract of any and all aspects of all services it agrees to manage for **ECOT** including, but not limited to, payroll, fiscal services and/or any technology related services.

H. Place of Performance. **Altair** shall perform its functions at any location.

I. Student Recruitment. **Altair** in cooperation with **ECOT**, shall be responsible for the recruitment of students subject to general recruitment and admission policies. Application by or for students shall be voluntary, and shall be in writing. On-line enrollment and signatures shall qualify as a valid writing. Students shall be selected in accordance with the procedures set forth in **ECOT**'s Contract, and in compliance with the Code.

J. Legal Requirements. **Altair**, in cooperation with **ECOT**, shall assist **ECOT** in meeting federal, state and local laws and regulations, and the requirements imposed under the Code and the Contract.

K. Rules and Procedures. **Altair** shall recommend policies, rules, regulations and procedures applicable to **ECOT** and is authorized and directed to enforce such rules, regulations and procedures adopted by **ECOT** or by its Contract.

L. Additional Grades and Student Population. **Altair**, in connection with the Superintendent, shall make the recommendation to **ECOT** concerning limiting, increasing or decreasing the number of grades offered and the number of students served per grade or in total.

ARTICLE IV

OBLIGATIONS OF THE BOARD

ECOT, by and through its Board, shall exercise good faith and its best efforts in considering and adopting the recommendations of **Altair** including, but not limited to, recommendations concerning policies, rules, regulations, procedures, curriculum, budgets, fund raising, public relations, hiring of non-teachers and school entrepreneurial affairs.

ARTICLE V

FINANCIAL ARRANGEMENTS

A. Payment of Fee. **ECOT** shall pay **Altair** from May 16, 2000 through June 30, 2005, an annual amount, based on each school year, equal to ten percent (10%) of all funds received by **ECOT**. The fee shall be paid to **Altair** as and when governmental school aid, grants or other funding payments are received, and within thirty (30) days from **ECOT**'s receipt. All fees owed to **Altair** and not paid within thirty (30) days of **ECOT**'s receipt of funds shall incur interest at the rate of one percent (1%) per month, compounded annually. If **ECOT** requests additional services, **Altair** shall receive a separate negotiated fee for such services.

B. Expenses to be Covered by ECOT. **ECOT** shall be responsible for payment of the following costs and expenses incurred under this Agreement:

1. All wages, compensation and expenses including those for the Superintendent, assistants, administrators, clerical staff, teachers and janitorial services;

2. Compensation and expenses for Board liaisons, CFO, COO, CTO and Secretary of the Board and all other compensation;
3. Dues for memberships in any associations;
4. Workers' compensation or other insurance including, but not limited to, any necessary premises liability insurance;
5. Bonds for individuals signing checks or Board, if required;
6. Attorney fees;
7. All fees pursuant to Article V, part A above;
8. All other costs allocated to **ECOT** in this Agreement;
9. Board and **ECOT** office expenses and supplies;
10. Expenses, including compensation, for fund raising, public relations and grant writing or any contract services;
11. The cost of all services of LCESC, including but not limited to those as Fiscal Agent of the School;
12. Leases for equipment and **ECOT** offices or facilities; and
13. Travel, lodging and other expenses incurred pursuant to services rendered for **ECOT**.

C. Expenses to be Covered by Altair. **Altair** shall be responsible for payment of the following costs and expenses incurred under this Agreement:

1. **Altair** staff training and development;
2. Compensation for the staff of **Altair** doing **Altair** work; and
3. The design and protection of all educational and instructional materials.

The above expenses to be covered by **Altair** are, however, subject to the payment provisions of Article V, part A above.

D. Other Schools. ECOT acknowledges that **Altair** may enter into similar management agreements with other public or private schools. **Altair** shall separately account for reimbursable expenses incurred on behalf of ECOT and any other school or schools. No expenses incurred by or on behalf of ECOT for which ECOT has an obligation of payment may be used to benefit any other person or entity.

E. Financial Reporting. **Altair** shall provide ECOT and its Board with:

1. a projected annual budget prior to opening each fiscal year
2. statements of all revenues received, regardless of whatever source, with respect to ECOT, and detailed statements of all direct expenditures for services rendered to or on behalf of ECOT, whether incurred on-site or off-site, upon request.
3. consultation on annual audits in compliance with state law and regulations showing the manner in which funds are spent at ECOT. The cost of all audits will be paid by ECOT.
4. reports on ECOT operations and finances on a quarterly basis and other information on a reasonably requested basis to enable the Board to monitor the performance of ECOT and the efficiency of **Altair's** management of ECOT.
5. a reasonable opportunity to inspect, examine, audit and otherwise review the books, records, accounts, ledgers and other financial documents of **Altair** to the extent that they relate to or otherwise pertain to activities of ECOT and to the duties and obligations of **Altair** hereunder.

ARTICLE VI

PERSONNEL AND TRAINING

A. Personnel Responsibility. Subject to recommendation by **Altair** and the written approval of ECOT through its Board, **Altair** shall have authority to recommend staffing levels and non-teaching staff selections. ECOT shall select all teaching staff and evaluate, assign, discipline and transfer teaching personnel consistent with state and federal law. Either party may request, with

reasonable cause, removal of any staff member, so long as consistent with state and federal law. Should there be a legal impediment to such removal, **ECOT** and **Altair** shall work together for a mutually acceptable resolution.

B. School Superintendent. **ECOT** will, consistent with state law, select the Superintendent and establish employment terms. The Board of **ECOT** shall supervise the Superintendent and hold him or her accountable for the successful education of the students of **ECOT**.

C. Teachers. Prior to the commencement of and during the 2000-2001 school year by **ECOT**, and from time to time thereafter, the Superintendent shall determine the number of teachers, and the applicable grade levels and subjects required for the operation of **ECOT**. The Superintendent will select, as approved by the Board, and hold accountable the teachers of **ECOT**. Teachers may work at **ECOT** on a full- or part-time basis. If assigned to **ECOT** on a part-time basis, such teachers may also work elsewhere as long as such other work is also part-time and does not interfere with their work at **ECOT**, at the sole judgement of the Superintendent. Each teacher assigned to or retained by **ECOT** shall hold a valid teaching certificate issued by the State Board of Education of Ohio under the Code, to the extent required under the Code, or as otherwise necessary to meet Code provisions for non-certified teachers.

D. Support Staff. Prior to the commencement of and during the 2000-2001 school year, **Altair** shall determine the number and functions of support staff required for the operation of **ECOT** and recommend employment terms.

E. Employer of Personnel. The personnel who perform services at ECOT shall be employees or subcontractors or service providers of ECOT and shall be paid for by ECOT. Compensation of employees of Altair shall be paid by Altair. For purposes of this Agreement, compensation shall include salary, fringe benefits, and city, state and federal tax withholdings to the extent required by law, all travel, lodging and other expenses.

ARTICLE VII

ADDITIONAL PROGRAMS

The services provided by Altair to ECOT under this Agreement consist of all management responsibilities not otherwise allocated to ECOT or the Superintendent herein during the school year and school day as set forth in the Contract. Altair, in cooperation with ECOT, may establish additional programs including, but not limited to, adult and community education and pre-kindergarten, on such terms and conditions as Altair and ECOT deem mutually agreeable. ECOT shall be responsible for obtaining the written consent of LCESC whenever required under the Contract when any change requires such consent.

ARTICLE VIII

TERMINATION OF AGREEMENT WITH CAUSE

A. Termination by Altair. Altair may terminate this Agreement with cause, as reasonably determined by Altair, prior to the end of the term specified in Article I in the event that ECOT fails to remedy a material breach of this Agreement within sixty (60) days after written notice from Altair. A material breach may include, but is not limited to, failure to make payments to Altair as required by this Agreement, or failure to adhere to the personnel, curriculum, program or similar material recommendations of Altair. Upon such termination, Altair shall have the option

to reclaim any usable property or equipment (e.g., copy machines, personal computers) provided or installed by **Altair** and not paid for by **ECOT**, or to reclaim the depreciated cost of such equipment. Provided, however, all assets, to the extent fully paid for by **ECOT**, shall remain the property of **ECOT**.

B. Termination by ECOT. **ECOT** may terminate the term of this Agreement after sixty (60) days prior written notice to **Altair**, upon the occurrence of any of the following:

1. If **ECOT** shall cease to be approved by LCESC as an Ohio Community School and **Altair** can not secure another sponsor; or
2. In the event that **Altair** shall be guilty of a felony or fraud, gross negligence, or other act of willful or gross misconduct in the rendering of services under this Agreement; or
3. In the event that **Altair** fails to remedy a material breach of its duties or obligations under this Agreement within ninety (90) days after written notice of the breach is provided to **Altair** by **ECOT**.

Upon such a termination, **Altair** shall have the option to reclaim any usable property or equipment (e.g., copy machines, personal computers) provided or installed by **Altair** and not paid for by **ECOT**, or to reclaim the depreciated cost of such equipment. Provided, however, all assets, to the extent fully paid for by **ECOT**, shall remain the property of **ECOT**.

C. Change in Law. If any federal, state or local law or regulation, or court decision has a material adverse impact on the ability of either party or carry out its obligations under this Agreement, then either party, upon written notice, may request renegotiation of the Agreement and if the parties are unable or unwilling to renegotiate the terms within ninety (90) days after the notice, the party requiring the renegotiation may terminate this Agreement on upon thirty (30) days further written notice.

D. Termination or Expiration. Upon expiration or termination of this Agreement, **Altair** shall have the right to reclaim any usable property or equipment including, but not limited to, copy machines, personal computers, that is provided to **ECOT** or used by **ECOT** or which were installed or provided by **Altair**, or to claim the depreciation cost of such equipment. Fixtures to the extent required by any lease with the building owner, and building alterations shall become the property of the building owner, if required pursuant to any lease. Equipment leased by **Altair** to **ECOT** must be returned to **Altair**.

ARTICLE IX

PROPRIETARY INFORMATION

To the extent that materials, documents or ideas were, or are, owned, designed, developed, formulated, written by or created by **Altair**, **ECOT** agrees that **Altair** shall own all copyright and other proprietary rights to all instructional materials, training materials, curriculum and lesson plans, and any other materials provided by **Altair**, its employees, members, Board of Directors, officers or subcontractors. **ECOT** shall have the right to use such materials during the term of this Agreement. To the extent materials, documents or ideas were formulated by, written by or created by **Altair**, **Altair** shall have the sole and exclusive right to license such materials for use by other schools, districts, public schools, customers or other persons or entities or to modify and/or sell materials. **ECOT** shall treat any proprietary information owned, designed, developed, written or created by **Altair** as though it were a trade secret or protected by copyright, and shall use efforts as may be reasonably requested by **Altair** in writing to refrain from disclosing, publishing, copying, transmitting, modifying, altering or utilizing such proprietary information during the term of this Agreement or at any time after its expiration other than to the extent necessary for implementation

of this Agreement. **ECOT** shall require that no **ECOT** personnel or agent disclose, publish, copy, transmit, modify, alter or utilize the propriety information of **Altair**, to the extent consistent with the education obligations of **ECOT** under this Agreement.

ARTICLE X

INDEMNIFICATION

ECOT covenants and agrees that it will indemnify and hold **Altair**, and all of its officers, Board of Directors, members, agents, and employees harmless for any claims, losses, damages, costs, charges, expenses, liens, settlements of judgments, including interest thereon, whether to any person, including employees of **Altair**, or property of both, by reason of any negligence or omission on the part of **ECOT** arising directly out of or in connection with **ECOT**'s performance under this Agreement, to which **Altair** or any of its officers, Board of Directors, members, agents or employees may be subject or put, including but not limited to those related in any way to **ECOT**'s failure to follow the recommendations of **Altair**. **ECOT** shall not be liable to indemnify **Altair** or any of its officers, Board of Directors, members, agents or employees for damages directly caused by or resulting from the sole negligence of **Altair** or any of its Board of Directors, officers, members, agents or employees.

Altair covenants and agrees that it will indemnify and hold **ECOT** and all of its officers, Board of Trustees, agents and employees harmless for any claim, loss, damage, cost, charge, expense, lien, settlement or judgment, including interest thereon, whether to any person, including employees of **ECOT**, or property or both, by reason of any negligent act or omission on the part of **Altair**, arising directly out of or in connection with **Altair**'s performance, under this Agreement, to which **ECOT** or any of its officers, Board of Trustees, agents or employees may be subject or put.

Altair shall not be liable to indemnify **ECOT** or any of its officers, Board of Trustees, agents or employees for damages directly caused by or resulting from the sole negligence of **ECOT** or any of its officers, Board of Trustees, agents or employees.

ARTICLE XI

WARRANTIES AND REPRESENTATIONS

ECOT and **Altair** each represent that it has the authority under law to execute, deliver and perform this Agreement, and to incur the obligations provided for under this Agreement, that its actions have been duly and validly authorized, and that it will take all steps reasonably required to implement this Agreement. **ECOT** and **Altair** mutually warrant to the other that, to its knowledge, there are no pending actions, claims, suits or proceedings, threatened or reasonably anticipated against or affecting it, which, if adversely determined, would have a material adverse affect on its ability to perform its obligations under this Agreement.

ARTICLE XII

ALTERNATIVE DISPUTE RESOLUTION PROCEDURE

Any and all disputes between the parties concerning any alleged breach of this Agreement, or arising out of or relating to the interpretation of this Agreement or the parties' performance of their respective obligations under this Agreement, shall be submitted to arbitration. Unless the parties agree upon a single arbitrator, the arbitration panel shall consist of three persons, including one person who is selected or recommended by LCESC, one selected by **Altair**, and one selected by the Board. The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association, with such variations as the parties and arbitrator unanimously accept.

ARTICLE XIII

MISCELLANEOUS

A. Sole Agreement. This Agreement supersedes and replaces any and all prior agreements and understandings between ECOT and Altair.

B. Force Majeure. Neither party shall be liable if the performance of any part or all of this Agreement is prevented, delayed, hindered, or otherwise made impracticable or impossible by reason of any strike, flood, riot, fire, explosion, war, or act of God, sabotage, accident, or any other casualty, or similar cause beyond either party's control, and which cannot be overcome by reasonable diligence and without unusual expense.

C. Notices. All notices, demands, requirements and consents under this Agreement shall be in writing, shall be delivered to each party and shall be effective when received by the parties or mailed to the parties at their respective addresses set forth below, or at such other address as may be furnished by a party to the another party:

If to **Altair**: William L. Lager, Chief Executive Officer
Altair Learning Management, LLC
P. O. Box 163068
Columbus, Ohio 43215

If to **ECOT**: Donald F. Wihl, President
Board of Trustees
Electronic Classroom of Tomorrow
P. O. Box 163070
Columbus, OH 43215

D. Severability. The invalidity of any of the covenants, phrases or clauses in this Agreement shall not affect the remaining portions of this Agreement, and this Agreement shall be construed as if such invalid covenant, phrase or clause had not be contained in this Agreement. Such

invalidated covenant, phrase or clause shall be replaced or the remaining provisions construed so as to represent the parties' original intent as nearly as possible.

E. Successors and Assign. This Agreement shall be binding upon, and inure to the benefit of the parties and their respective successors and assigns.

F. Entire Agreement. This Agreement is the entire agreement between the parties relating to the services provided and the compensation for such services.


G. Non-waiver. No failure of a party in exercising any right, power or privilege under this Agreement shall affect such right, power or privilege, nor shall any single or partial exercise thereof preclude any further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies of the parties under this Agreement are cumulative and not exclusive of any rights or remedies which any of them may otherwise have.

H. Assignment. This Agreement shall not be assigned by either party without the prior written consent of the other party, provided, **Altair** may without the consent of the Board delegate the performance for such duties and obligations of **Altair** specifically set forth herein.


I. Survival of Termination. All representations, warranties and indemnities made herein shall survive termination of this Agreement.

J. Governing Law. This Agreement shall be governed by and enforced in accordance with the laws of the State of Ohio.

ALTAIR LEARNING
MANAGEMENT LLC

By: 
William L. Lager, Chief Executive Officer

ELECTRONIC CLASSROOM OF
TOMORROW

By: 
Donald F. Wihl, President of the
Board of Trustees

**AMENDED AND RESTATED
MANAGEMENT AGREEMENT**

by and between the

ELECTRONIC CLASSROOM OF TOMORROW

and

ALTAIR LEARNING MANAGEMENT I, INC.

Effective July 1, 2003

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AMENDED AND RESTATED MANAGEMENT AGREEMENT

This Management Agreement ("Agreement") is effective as of the 1st day of July, 2003, between Altair Learning Management I, Inc. ("Altair"), a Delaware corporation, located at Post Office Box 2886, Columbus, Ohio 43215-2886, and the Electronic Classroom of Tomorrow ("ECOT"), an Ohio non-profit corporation, by and through its Board of Directors, located at 2275 Collingwood Boulevard, Toledo, OH 43620.

RECITALS

ECOT is organized as an Ohio community school under the Ohio Revised Code ("Code"), including but not necessarily limited to Sections 3314 and 1702. Ultimate authority over ECOT is vested in the Board of Directors and Members (the "Board" or "Directors"). The School has been granted a Charter Contract ("Charter Contract"), which is incorporated herein by reference as Exhibit A, by the Lucas County Educational Service Center ("LCES") to operate an Ohio community school, with LCES as the sponsoring body.

Altair specializes in providing education institutions, vocational schools, businesses, religious institutions and other organizations with a variety of educational services and products, and human resources administration, including, but not limited to, school and business management, curricula, educational programs, contract administration and technology. The products and services of Altair are designed to serve the needs of a diverse student population.

ECOT and Altair desire to enter into this Agreement, whereby ECOT and Altair will work together to bring educational excellence and innovation to the State of Ohio, based on a mutual agreed upon school design, comprehensive educational program, and sound school and business principles and management methodologies.

In order to facilitate the continuation of the school, and to continue to implement innovative educational programs at the school, the parties desire to amend and restate the arrangement for the

management and operation of certain ECOT administrative activities or functions first entered into on May 16, 2000, by and between the predecessor in interest to Altair, Altair Learning Management, LLC, and ECOT..

THEREFORE, it is mutually agreed as follows:

ARTICLE I

This Agreement shall become effective July 1, 2003, and shall be coterminous with the Charter Contract, as it may be amended or extended. Notwithstanding the termination of the Contract, this Agreement shall continue to remain in effect provided that ECOT has entered into or is continuing to operate under any chartering school contract with an authorizing body (as defined under the Code) or as a private school; and this Agreement has not been terminated pursuant to Article VIII.

ARTICLE II

CONTRACTING RELATIONSHIP

- A. Authority. ECOT represents that it is authorized by law to contract with a private entity to provide educational management services. ECOT further represents that it has received its charter through LCESC to organize and operate a community school throughout the State of Ohio. ECOT is therefore vested with all powers within applicable law for developing and implementing the educational program contemplated in this Agreement.
- B. Agreement. Acting under and in the exercise of its authority, ECOT hereby contracts with Altair, certain functions as defined hereinafter relating to the management and operation of the school in accordance with the terms of this Agreement and the Charter Contract. Altair and ECOT acknowledge that each has reviewed this Agreement and all related documents and that they shall comply with the terms and conditions set forth in this Agreement.

C. Relationship and Status of the Parties. Altair is a Delaware corporation, and is not a division or a part of ECOT. ECOT is an Ohio non-profit corporation and an entity authorized by the Code to be an Ohio public school, and is not a division or part of Altair. The relationship between Altair and ECOT is that of independent contractors and is based solely on the terms of this Agreement, and the terms of any subsequent written agreements between Altair and ECOT.

D. Designation of Agents. The Board of ECOT designates the members of Altair as agents of the school having a legitimate educational interest solely for the purpose of entitling such persons access to education records under 20 U.S.C. §1232g, the Family Educational Rights and Privacy Act ("FERPA").

E. Other. The provision of Altair's services under this Agreement does not cause the school's facilities to be treated as used in a private business use. The parties agree that Altair's compensation under this Agreement is reasonable compensation for services rendered.

In general, Altair will not have any role or relationship with the school that, in effect, substantially limits ECOT's ability to exercise its rights, including termination rights, under this Agreement. In furtherance of such a restriction, it is agreed between ECOT and Altair that none of the voting power of the governing body of the school will be vested in Altair or its directors, members, managers, officers and employees, and none of the voting power of the governing body of Altair will be vested in the school or its directors, managers, officers or employees, provided, however, that certain Altair employees or shareholders may provide services on a full or part time basis at the offices of ECOT.

ARTICLE III

FUNCTIONS OF ALTAIR

A. Responsibility. Altair shall be responsible and accountable to ECOT for the management of the school. Altair will meet with ECOT at ECOT's regularly scheduled Board meetings to

account to **ECOT** for the roles and responsibilities of **Altair** to manage the school in all areas other than the hiring, termination and suspension of employees, ~~the provision of education directly to~~ students and the maintenance of facilities..

Altair shall provide management services through its employees and/or consultants. Altair employees or consultants may directly manage ECOT employees, subject to the restrictions of Article II(d).

B. Educational Program. The educational program and the program of instruction shall be recommended by **Altair** and implemented by **ECOT**, and approved by **ECOT's** Board of Directors. **Altair** shall recommend the hiring of the Senior Educational Advisor to the Chief Operating Officer (hereinafter the "Senior Educational Advisor") to the Board of **ECOT**. **Altair** shall manage all administrative services of **ECOT**, but the education of the students shall be delegated by the Board to the Senior Education Advisor . **Altair** shall specifically not be responsible for day-to-day supervision of the teaching staff and the day-to-day supervision of, or implementation of, the educational program of instruction. The Senior Educational Advisor shall report to the Chief Operating Officer of the school.

C. Strategic Planning. **Altair** shall design strategic plans for the continuing educational and financial benefits of **ECOT**. Strategic plans shall include, but not be limited to, planning for the vision of the future of the school, the direction and activities necessary to achieve that vision, and the defining of success metrics appropriate to a school which undertakes the burden of educating students who have had great difficulties in achieving success in the public school environment. It shall also include financial planning. All current strategic planning initiatives are noted under the "Knowledge Development Group" subheading on Exhibit A.

- D. Public Relations. Altair shall design and manage the public relations strategy for the development of beneficial and harmonious relationships with other organizations, the community and the State of Ohio.
- E. Grants and Fund Raising. Altair shall locate grants and potential sources for endowments and donations and shall recommend consultants or other entities to help with the same.
- F. Contracts. Altair shall review and approve all contracts for goods and services for ECOT. Contracts which fulfill Board approved and budgeted functions may be executed without the approval of the Board, although practice shall be where possible to obtain the Board President's signature on contracts in excess of Ten Thousand Dollars (\$10,000)
- G. Place of Performance. Altair shall perform its functions at any location.
- H. Student Recruitment. Altair in cooperation with ECOT, shall be responsible for the recruitment of students subject to general recruitment and admission policies. Application by or for students shall be voluntary, and shall be in writing. On-line enrollment and signatures shall qualify as a valid writing. Students shall be selected in accordance with the procedures set forth in ECOT's Contract, and in compliance with the Code.
- I. Legal Requirements. Altair, in cooperation with ECOT, shall assist ECOT in meeting federal, state, and local laws and regulations, and the requirements imposed under the Code, Administrative Code, administrative rules, funding agreements and the Charter Contract.
- J. Rules and Regulations Altair shall recommend policies, rules, regulations, and procedures applicable to ECOT and is authorized and directed to enforce such rules, regulations and procedures adopted by ECOT or by its Charter Contract.
- K. Additional Grades and Student Population. Altair, in connection with the Senior Educational Advisor, shall make the recommendation to ECOT concerning limiting, increasing or decreasing the number of grades offered and the number of students served per grade or in total.

L. Management Tools. Altair shall provide high quality, generally recognized management tools to allow it and the Board of ECOT to properly monitor and control the performance of the school as a business entity. This shall include the establishment of personnel policies and a compliance function within ECOT, which may be staffed by ECOT employees or ECOT consultants.

M. Fiscal Performance. Although Altair cannot guarantee the fiscal success or stability of ECOT, it is primarily responsible for the fiscal management and performance of ECOT. It shall institute profit, loss and cash flow reporting in formats which are appropriate for the unusual nature of the school's funding. It shall assist in, defend, and provide guidance for audits, regular and special.

N. Compliance with Charter Contract. Altair shall manage ECOT to comply with the Charter Contract. It shall monitor and support ECOT's efforts to comply with the Charter Contract. Altair will communicate and report to the Sponsor as necessary to support this effort.

ARTICLES IV

OBLIGATIONS OF THE BOARD

ECOT, by and through its Board, shall exercise good faith and its best efforts in considering and adopting the recommendations of Altair including, but not limited to, recommendations concerning policies, rules, regulations, procedures, curriculum, budget, fund raising, public relations, hiring of non-teachers and school entrepreneurial affairs.

ARTICLE V

FINANCIAL ARRANGEMENTS

A. Payment of Fees. Effective July 1, 2003, ECOT shall pay Altair, an annual amount based on each school year equal to 14% percent of all funds received by ECOT. The fee shall be paid to Altair as and when governmental school aid, grants, or other funding payments are

received, and within thirty (30) days from ECOT's receipts. All fees owed to Altair and not paid within thirty days of ECOT's receipts of funds shall incur interest at the rate of one-half percent (1/2%) per month, compounded annually, after a 180 day grace period. Notwithstanding anything contained in this section to the contrary, Altair's fee shall not be based on any governmental school aid or grants where the payment of the fee based on such governmental aid or grants is prohibited by law or by the terms of the aid or grant.

B. Expenses to be Covered by ECOT. ECOT shall be responsible for payment of the following costs and expenses incurred under this Agreement:

1. All wages, compensation and expenses including those for the Senior Educational Advisor, assistants, administrators, clerical staff, teachers and janitorial services;
2. Compensation and expenses for Board liaisons, Secretary of the Board and all other compensation;
3. Dues for memberships in any associations;
4. Workers' compensation or other insurance including, but not limited to, any necessary premises liability insurance;
5. Bonds for individuals signing checks or Board, if required;
6. Attorney fees for representation of ECOT;
7. All fees pursuant to Article V, part A above;
8. All other costs allocated to ECOT in this Agreement;
9. Board and ECOT office expenses and supplies;
10. Expenses of ECOT employees managed by Altair, including compensation, for fund raising, public relations and grant writing or any contract services;
11. The cost of all services of LCESC, including but not limited to those as Fiscal Agent of the School;
12. Leases for equipment and ECOT offices or facilities; and
13. Travel, lodging and other expenses of ECOT employees managed by Altair which may be incurred pursuant to services rendered for ECOT.

C. Expenses to be Covered by Altair. Altair shall be responsible for payment of the following costs and expenses incurred under this Agreement:

1. Altair staff training and development; and
2. Compensation and expenses for the staff of Altair doing Altair work; and

The above expenses to be covered by Altair are, however, subject to the payment provisions of Article V, part A above.

D. Other Schools. ECOT acknowledges that Altair may enter into similar management agreements with other public or private schools. Altair shall separately account for reimbursable expenses incurred on behalf of ECOT and any other school or schools. No expenses incurred by or on behalf of ECOT for which ECOT has an obligation of payment may be used to benefit any other person or entity.

E. Financial Reporting. Altair shall provide ECOT and its Board with:

1. a projected annual budget prior to opening each fiscal year.
2. statements of all revenues received, regardless of whatever source, with respect to ECOT, and detailed statements of all direct expenditures for services rendered to or on behalf of ECOT, whether incurred on-site or off-site, upon request.
3. consultation on annual audits in compliance with state law and regulations showing the manner in which funds are spent at ECOT. The cost of all audits will be paid by ECOT.
4. reports on ECOT operations and finances on a quarterly basis and other information on a reasonably requested basis to enable the Board to monitor the performance of ECOT and the efficiency of Altair's management of ECOT.
5. a reasonable opportunity to inspect, examine, audit and otherwise review the books, records, accounts, ledgers and other financial documents of Altair to the extent that they relate to or otherwise pertain to activities of ECOT and to the duties and obligations of Altair hereunder.

ARTICLE VI

PERSONNEL AND TRAINING

A. Personnel Responsibility. Subject to recommendation by Altair and the written approval of ECOT through its Board, Altair shall have authority to recommend staffing levels and non-teaching staff selections. ECOT shall select all teaching staff and evaluate, assign, discipline and transfer teaching personnel consistent with state and federal law. Either party may request, with reasonable cause, removal of any staff member, so long as consistent with state and federal law. Should there be a legal impediment to such removal, ECOT and Altair shall work together for a mutually acceptable resolution.

B. Senior Educational Advisor. ECOT will, consistent with state law, select the Senior Educational Advisor and establish employment terms. Altair shall supervise the Senior Educational Advisor and hold him or her accountable for the successful education of the students of ECOT. The Board of ECOT and Altair shall annually review the performance of the Senior Educational Advisor.

C. Teachers. Prior to the commencement of and during the 2000-2001 school year by ECOT, and from time to time thereafter, the Senior Educational Advisor shall determine the number of teachers, and the applicable grade levels and subjects required for the operation of ECOT. The Senior Educational Advisor will select, as approved by the Board, and hold accountable the teachers of ECOT. Teachers may work at ECOT on a full- or part-time basis. If assigned to ECOT on a part-time basis, such teachers may also work elsewhere as long as such other work is also part-time and does not interfere with their work at ECOT, at the sole judgment of the Senior Educational Advisor. Each teacher or aide assigned to or retained by ECOT shall meet the "highly qualified" category as applicable, and teachers shall hold a valid teaching certificate issued by the State Board

of Education of Ohio under the Code, to the extent required under the Code, or as otherwise necessary to meet Code provisions for non-certified teachers.

D. Support Staff. Prior to the commencement of each fiscal year, Altair shall determine the number and functions of support staff required for the operation of ECOT and recommend employment terms.

E. Employer of Personnel. The personnel who perform services at ECOT shall be employees or subcontractors or service providers of ECOT and shall be paid for by ECOT. Compensation of employees of Altair shall be paid by Altair. For purposes of this Agreement, compensation shall include salary, fringe benefits, and city, state and federal tax withholdings to the extent required by law, all travel, lodging and other expenses.

ARTICLE VII

ADDITIONAL PROGRAMS

The services provided by Altair to ECOT under this Agreement consist of all management responsibilities not otherwise allocated to ECOT or the Senior Educational Advisor herein during the school year and school day as set forth in the Charter Contract. Altair, in cooperation with ECOT, may establish additional programs including, but not limited to, adult and community education and pre-kindergarten, on such terms and conditions as Altair and ECOT deem mutually agreeable. ECOT shall be responsible for obtaining the written consent of LCESC whenever required under the Charter Contract when any change requires such consent.

ARTICLE VIII

TERMINATION OF AGREEMENT WITH CAUSE

A. Termination by Altair. Altair may terminate this Agreement with cause, as reasonably determined by Altair, prior to the end of the term specified in Article I in the event that ECOT fails to remedy a material breach of this Agreement within sixty (60) days after written notice from

Altair. A material breach may include, but is not limited to, failure to make payments to **Altair** within 30 days after invoice thereof, or failure to adhere to the personnel, curriculum, program or similar material recommendations of **Altair**. Upon such termination, **Altair** shall have the option to reclaim any usable property or equipment (e.g., copy machines, personal computers) provided or installed by **Altair** and not paid for by **ECOT**, or to reclaim the depreciated cost of such equipment. Provided, however, all assets, to the extent paid for by **ECOT**, shall remain the property of **ECOT**.

B. Termination by ECOT. **ECOT** may terminate the term of this Agreement after sixty (60) days prior written notice to **Altair**, upon the occurrence of any of the following:

1. If **ECOT** shall cease to be approved by LCESC as an Ohio Community School and **Altair** cannot secure another sponsor; or
2. In the event that **Altair** shall be guilty of a felony or fraud, gross negligence, or other act of willful or gross misconduct in the rendering of services under this Agreement; or
3. In the event that **Altair** fails to remedy a material breach of its duties or obligations under this Agreement within ninety (90) days after written notice of the breach is provided to **Altair** by **ECOT**.

Upon such a termination, **Altair** shall have the option to reclaim any usable property or equipment (e.g., copy machines, personal computers) provided or installed by **Altair** and not paid for by **ECOT**, or to reclaim the depreciated cost of such equipment. Provided, however, all assets, to the extent paid for by **ECOT**, shall remain the property of **ECOT**.

C. Change in Law. If any federal, state or local law or regulation, or court decision has a material adverse impact on the ability of either party or carry out its obligations under this Agreement, then either party, upon written notice, may request renegotiation of the Agreement and if the parties are unable or unwilling to renegotiate the terms within ninety (90) days after the notice, the party requiring the renegotiation may terminate this Agreement upon thirty (30) days further written notice.

D. Force Majeure. Any claim of default under this Article is subject to the provisions of Article XIII, subsection (B), "Force Majeure," except that if an incident of force majeure shall result in the failure of ECOT to meet any payment obligation to Altair for more than 60 days, then the provisions of Article XII, subsection (B) shall be of no force and effect, and such failure to pay shall be an event of default under this Article.

ARTICLE IX

PROPRIETARY INFORMATION

To the extent that materials, documents or ideas were, or are, owned, designed, developed, formulated, written by or created by Altair, ECOT agrees that Altair shall own all copyright and other proprietary rights to all instructional materials, training materials, curriculum and lesson plans, and any other materials provided by Altair, its employees, members, Board of Directors, officers or subcontractors. ECOT shall have the right to use such materials during the term of this Agreement. To the extent materials, documents or ideas were formulated by, written by or created by Altair, Altair shall have the sole and exclusive right to license such materials for use by other schools, districts, public schools, customers or other persons or entities or to modify and/or sell materials. ECOT shall treat any proprietary information owned, designed, developed, written or created by Altair as though it were a trade secret or protected by copyright, and shall use efforts as may be reasonably requested by Altair in writing to refrain from disclosing, publishing, copying, transmitting, modifying, altering or utilizing such proprietary information during the term of this Agreement or at any time after its expiration other than to the extent necessary for implementation of this Agreement. ECOT shall require that no ECOT personnel or agent disclose, publish, copy, transmit, modify, alter or utilize the propriety information of Altair, to the extent consistent with the education obligations of ECOT under this Agreement.

Altair acknowledges that ECOT employees may develop inventions, trade secrets, “know-how” and the like (hereinafter “ECOT Proprietary Information”), and that ECOT Proprietary Information is developed by its employees as a “work for hire” for ECOT. Altair has sponsored, at its own expense, educational research which has been conducted, in part, at ECOT, and ECOT agrees to grant a perpetual, non-exclusive, no-cost, license to educational researchers to use information gathered from the study of the operation of ECOT, which may include ECOT Proprietary Information, for the use of scholarly research.

ARTICLE X

INDEMNIFICATION

ECOT covenants and agrees that it will indemnify and hold **Altair**, and all of its officers, Board of Directors, members, agents, and employees harmless for any claims, losses, damages, costs, charges, expenses, liens, settlements of judgments, including interest thereon, whether to any person, including employees of **Altair**, or property of both, by reason of any negligence or omission on the part of ECOT arising directly out of or in connection with ECOT's performance under this Agreement, to which **Altair** or any of its officers, Board of Directors, members, agents or employees may be subject or put, including but not limited to those related in any way to ECOT's failure to follow the recommendations of **Altair**. ECOT shall not be liable to indemnify **Altair** or any of its officers, Board of Directors, members, agents or employees for damages directly caused by or resulting from the sole negligence of **Altair** or any of its Board of Directors, officers, members, agents or employees. ECOT shall provide **Altair** a certificate of insurance showing **Altair** as an additional insured on its comprehensive general liability (or similar) insurance coverage, with the provision that **Altair** shall receive 30 days prior written notice of termination, non-renewal or substantial modification of coverage.

Altair covenants and agrees that it will indemnify and hold ECOT and all of its officers, Board of Directors, agents and employees harmless for any claim, loss, damage, cost, charge, expense, lien, settlement or judgment, including interest thereon, whether to any person, including employees of ECOT, or property or both, by reason of any negligent act or omission on the part of Altair, arising directly out of or in connection with Altair's performance, under this Agreement, to which ECOT or any of its officers, Board of Directors, agents or employees may be subject or put Altair shall not be liable to indemnify ECOT or any of its officers, Board of Directors, agents or employees for damages directly caused by or resulting from the sole negligence of ECOT or any of its officers, Board of Directors, agents or employees.

ARTICLE XI

WARRANTIES AND REPRESENTATIONS

ECOT and Altair each represent that it has the authority under law to execute, deliver and perform this Agreement, and to incur the obligations provided for under this Agreement, that its actions have been duly and validly authorized, and that it will take all steps reasonably required to implement this Agreement. ECOT and Altair mutually warrant to the other that, to its knowledge, there are no pending actions, claims, suits or proceedings, threatened or reasonably anticipated against or affecting it, which, if adversely determined, would have a material adverse affect on its ability to perform its obligations under this Agreement, other than litigation in which the constitutionality of the community school system in Ohio, and the legality of existence of electronic schools, is under challenge..

ARTICLE XII

ALTERNATIVE DISPUTE RESOLUTION PROCEDURE

Any and all disputes between the parties concerning any alleged breach of this Agreement, or arising out of or relating to the interpretation of this Agreement or the parties' performance of

their respective obligations under this Agreement, shall be submitted to arbitration. Unless the parties agree upon a single arbitrator, the arbitration panel shall consist of three persons, including one person who is selected or recommended by LCESC, on selected by Altair, and one selected by the Board. The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association, with such variations as the parties and arbitrator unanimously accept.

ARTICLE XIII

MISCELLANEOUS

- A. Sole Agreement. This Agreement supersedes and replaces any and all prior agreements and understandings between ECOT and Altair.
- B. Force Majeure. Neither party shall be liable if the performance of any part or all of this Agreement is prevented, delayed, hindered, or otherwise made impracticable or impossible by reason of any strike, flood, riot, fire, explosion, war, or act of God, sabotage, accident, or any other casualty, or similar cause beyond either party's control ("Force Majeure Event"), and which cannot be, except for the payment of money, overcome by reasonable diligence and without unusual expense. A Force Majeure Event shall suspend the obligation for the payment of money, subject to the terms of Article VIII(D).
- C. Notices. All notices, demands, requirements and consents under this Agreement shall be in writing, shall be delivered to each party and shall be effective when received by the parties or mailed to the parties at their respective addresses set forth below, or at such other address as may be furnished by a party to the another party:

If to **Altair:** William L. Lager, Chief Executive Officer
 Altair Learning Management I, Inc.
 P. O. Box 2886
 Columbus, Ohio 43216-2886

If to **ECOT:** Electronic Classroom of Tomorrow

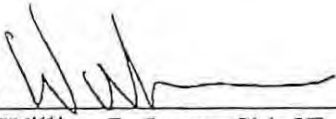
**Attn: Board of Directors
Central Union Plaza
415 Emerald Avenue
2nd Floor
2275 Collingwood Boulevard
Toledo, Ohio 43602**

- D. Severability. The invalidity of any of the covenants, phrases or clauses in this Agreement shall not affect the remaining portions of this Agreement, and this Agreement shall be construed as if such invalid covenant, phrase or clause had not be contained in this Agreement. Such invalidated covenant, phrase or clause shall be replaced or the remaining provisions construed so as to represent the parties, original intent as nearly as possible.
- E. Successors and Assign. This Agreement shall be binding upon, and inure to the benefit of the parties and their respective successors and assigns.
- F. Entire Agreement. This Agreement is the entire agreement between the parties relating to the services provided and the compensation for such services.
- G. Non-waiver. No failure of a party in exercising any right, power or privilege under this Agreement shall affect such right, power or privilege, nor shall any single or partial exercise thereof preclude any further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies of the parties under this Agreement are cumulative and not exclusive of any rights or remedies which any of them may otherwise have.
- H. Assignment. This Agreement shall not be assigned by either party without the prior written consent of the other party, provided, **Altair** may without the consent of the Board delegate the performance for such duties and obligations of **Altair** specifically set forth herein.
- I. Survival of Termination. All representations, warranties and indemnities made herein shall survive termination of this Agreement.
- J. Governing Law. This Agreement shall be governed by and enforced in accordance with the laws of the State of Ohio.

K. Proposed Organization Chart. A proposed organizational chart is attached hereto as Exhibit B. This chart is based on management function and Altair employees and consultants are integrated with ECOT employees. This chart represents the current management structure recommended by Altair which may be changed at any time that Altair recommends to the Board of ECOT that in its discretion, a change is in the best interest of ECOT.

ALTAIR LEARNING
MANAGEMENT I, INC.

ELECTRONIC CLASSROOM OF
TOMORROW

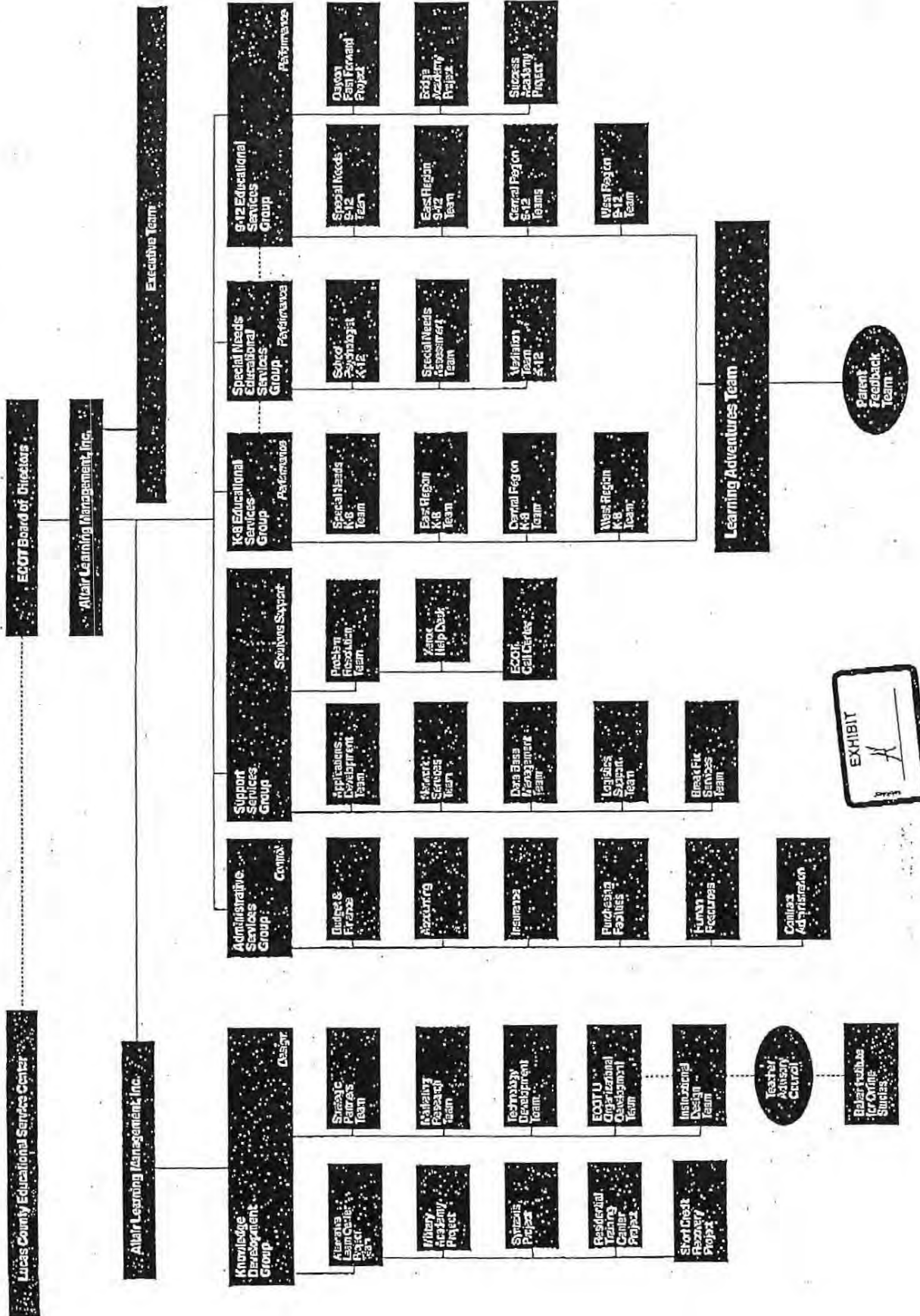
By: 

William L. Lager, Chief Executive Officer

By: 

Sherri A. Dembinski, President of the
Board of Directors

Electronic Classroom of Tomorrow Table of Organization



CONTRACT
For
COMMUNITY SCHOOL
(start-up)
(Sponsor is L.C.E.S.C.)

This contract is entered into by and between the Lucas County Educational Service Center (hereinafter Sponsor) and Electric Classroom of Tomorrow (hereinafter eCOT), the governing authority of the community school called eCOT established as a non-profit corporation under Chapter 1702 of the Ohio Revised Code (hereinafter School Governing Authority).

WHEREAS Ohio law permits community schools in the Lucas County area on a pilot project basis; and

WHEREAS the School Governing Authority and the Sponsor seeks to operate a community school; and

WHEREAS Ohio law requires the School Governing Authority and the Sponsor to enter into a Contract to authorize, create and operate a community school; and

NOW THEREFORE, the School Governing Authority and the Sponsor enter into this Contract with the following terms and conditions:

1. **Creation of Community School.** The School Governing Authority and the Sponsor agree that the School Governing Authority may create and operate a community school (hereinafter sometimes referred to as "the school") as permitted by law, subject to the laws of the State of Ohio and this Contract.
2. **Community School Obligations.** The School Governing Authority, for itself and on behalf of the school, covenants and agrees as follows:
 - a. The school shall be established and operated as a non-profit corporation established under Chapter 1702 of the Ohio Revised Code. The school shall maintain in good standing its status as a non-profit corporation. The school may, but is not required to, qualify a charity under Section (501(c)(3) of the Internal Revenue Code.
 - b. The Governing Authority may employ teachers and non-teaching employees and such employment under §3314.10 of the Ohio Revised Code is subject to either Chapter 3307 or 3309 of the Ohio Revised Code, as applicable. The Governing Authority shall be a "public employer" of any employees hired under §3314.10 of



the Ohio Revised Code for purposes of Chapter 4117 of the Ohio Revised Code, Section 4117.01 of the Ohio Revised Code.

- c. Except as otherwise permitted by this Contract, a collective bargaining agreement, of the Sponsor, contracts entered into with third parties shall provide for a right to cancel or terminate or non-renew effective each June 30th.
- d. The School shall comply with sections 9.90, 9.91, 109.65, 121.22, 149.43, 2151.358, 2151.421, 2313.18, 3301.0710, 3301.0711, 3301.0714, 3313.017, 3313.50, 3313.643, 3313.66, 3313.661, 3313.662, 3313.67, 3313.672, 3313.673, 3313.69, 3313.71, 3313.80, 3313.96, 3319.321, 3321.01, 3327.10, 3365., 4111.17 and 4113.52 and Chapters 117., 1347., 2744., 4112., 4141. and 4167. of the Ohio Revised Code as if it were a school district. The School shall comply with Chapter 102 of the Ohio Revised Code, except that nothing in this Chapter shall prohibit a member of the School's Governing Board from also being an employee of the School and nothing in that Chapter or Section 2921.42 of the Ohio Revised Code shall prohibit a member of the School's Governing Board from having an interest in a contract into which the Governing Board enters.
- e. The school and School Governing Authority may not carry out any act or insure the performance of any function that is not in compliance with the United States Constitution, the Ohio Constitution, Federal law, Ohio law and this Contract.
- f. The school will be located at various locations throughout Ohio with point of Contract in Lucas County. The school facility will be leased from the Lucas County Educational Service Center.
- g. Any facility used for or by the school shall meet all health and safety standards established by law for school buildings.
- h. The school will provide learning opportunities to a minimum of twenty-five (25) students for a minimum of nine hundred and twenty (920) hours per school year.
- i. The school shall be nonsectarian in its programs, admissions policies, employment practices, and all other operations, and will not be operated by a sectarian school or religious institution.
- j. Attached as Attachment 1 are the names, addresses, and home telephone numbers of the current members of the governing authority of the school and a description of the process by which the members of the governing authority of the school shall be selected in the future. The Sponsor shall be promptly notified of any changes in members including notice of new members' names, addresses and phone numbers. All governing board members must pass a criminal background check prior to the opening of the school.

- k. The Chief Administrative Officer of the School will be Altair Learning Management, LLC. Any change in the identity of the Chief Administrative Officer shall be reported immediately to the Sponsor.
- l. The school agrees to begin operation not later than September 1, 2000 by teaching the minimum number of students permitted by this Contract. Time is of the essence in commencing operation. Failure to timely commence operation is grounds for termination of this Contract.
- m. The educational program of the school, including the school's mission, its goals, innovative instructional methods and the focus of the curriculum are attached as Attachment 2 and shall be followed and may not be changed without the written consent of the Sponsor and the Superintendent of the L.C.E.S.C. Attachment 2 is a part of this Contract and incorporated herein by reference.
- n. The performance standards (requirements) and assessments which shall include statewide proficiency tests and any other standards and/or assessments required by law or recommended by the Sponsor, or Superintendent of L.C.E.S.C. must be timely met and completed. Initial performance standards a/k/a requirements are attached as Attachment 3. These standards shall be met by the school and may be changed from time to time by the Sponsor or Superintendent of the L.C.E.S.C. Attachment 3 is part of this Contract and incorporation herein by reference.
- o. The **School Governing Authority** shall submit not later than November 1 to the Sponsor and to the parents of all students enrolled in the school its: financial statement, proposed budget and an annual report of its activities and progress in meeting the goals and standards of this Contract. The financial statement shall be in such form as is prescribed by the State Auditor.
- p. The **School Governing Authority** shall report annually, to Sponsor the following on or before the day set by the Sponsor for reporting:
 - 1. The number of enrolled students in the school who are not receiving special education and related services pursuant to an individualized education program (IEP);
 - 2. The number of enrolled students who are receiving special education and/or related services pursuant to an IEP and the number of such students counted in a unit approved by the State Board of Education and funded under Section 3317.024 of the Ohio Revised Code;
 - 3. The school's base formula amount which is the amount specified as such in the school's financial plan (budget) for a school year;

4. For each student enrolled in the school, the school district that the student is entitled to attend under Sections 3313.64 or 3313.165 of the Ohio Revised Code; and,
 5. The number of student suspensions and expulsions and the number of students suspended and expelled.
- q. Prior to the first day of classes each year, the school shall request in writing the parent, guardian or custodian of each student who is enrolled in the school to register the student's name and address with school.
- r. At least one representative of the Sponsor (appointed by its Superintendent), knowledgeable about special education and related services, shall participate in the development of the individualized education program for any student identified as a handicapped child enrolled in the school. The terms, conditions and compensation for the Sponsor's representative's participation shall be the subject of a separate contract between the School Governing Authority and the Sponsor. Any student needing special education or related services will have those services provided by the staff of the L.C.E.S.C. at a fair and equitable cost agreeable to both parties.
- s. The admission procedures of the school are attached hereto as Attachment 4 and shall be followed and may be changed without the written consent of the Sponsor. Attachment 4 is a part of this Contract and incorporated herein by reference. At a minimum, the admission procedures at all times must:
1. specify that the school will not discriminate in its admission of students to the school on the basis of race, religion, color, national origin, handicap, intellectual ability, athletic ability or measurement of achievement or aptitude;
 2. be open to any individual entitled to attend school in the State of Ohio pursuant to Section 3313.64 or Section 3313.65 of the Ohio Revised Code, except that admission to the school may be limited to (i) students who have obtained a specific grade level or are within a specific age group; (ii) students who meet a definition of "at-risk" that the parties to this Contract agree upon and/or (iii) residents of a specific geographic area that the parties to this Contract agree upon.

If the number of applicants meeting admission criteria exceeds the capacity of the school's programs, classes, grade levels or facilities, students shall be admitted by lot from all eligible applicants, except preference shall be given to eligible siblings of such students. The lottery will be conducted by the L.C.E.S.C.

Upon admission of any handicapped student, the school shall comply with federal and state laws regarding the education of handicapped students.

The school will attempt to achieve racial and ethnic balance reflective of the community it serves by doing each of the items recited in Attachment 5. Attachment 5 is part of this Contract and incorporated herein by reference.

Notwithstanding the admissions procedures of this Contract, in the event that the racial composition of the enrollment of the school is in violation of a federal desegregation order; the school shall take any and all corrective measures to comply with the desegregation order.

- t. Tuition in any form shall not be charged for the enrollment of any student. The school shall not solicit contributions either from any student eligible to enroll or enrolled in the school or from any parent or guardian of a student who is enrolled in the school or from any parent or guardian of a student who is enrolled or intending to enroll in the school. Nothing in this section prevents class fees approved by **Sponsor**, or engaging in voluntary fund-raising activities.
- u. A policy regarding suspension, expulsion, removal and permanent exclusion of a student that specifies among other things the types of misconduct for which a student may be suspended, expelled or removed and the due process related thereto shall be immediately adopted. The school's policy and practices pursuant to the policy shall comply with the requirements of Sections 3313.66, 3313.661 and 3313.662 of the Ohio Revised Code. Those policies and practices shall not infringe upon the rights of handicapped students as provided by state and federal law.
- v. If for any reason the school must close, the school will remain open for students to attend until the end of the school year in which it is determined that the school must close. The programs provided to students in the final year of the school must continue without interruption or reduction unless program changes are approved in writing by the **Sponsor**. The **Sponsor** may at its discretion operate the School in the event the Governing Board fails to continue until the end of the approved school year.
- w. At least one (1) full-time classroom teacher or two (2) part-time classroom teachers each working more than twelve (12) hours per week must be employed by the school. The full-time classroom teachers and part-time classroom teachers teaching twelve (12) hours per week or more shall be certified in accordance with Sections 3319.22 or 3319.31 of the Ohio Revised Code. The school may employ non-certificated persons to teach up to twelve (12) hours per week pursuant to Section 3319.301 of the Ohio Revised Code. The school may also employ necessary non-teaching employees.
- x. Although the **School Governing Authority** may employ teachers and non-teaching employees necessary to carry out its mission and fulfill this Contract, no contract of employment shall extend beyond June 30, 2005.

- y. Teachers and non-teaching employees may organize and collectively bargain pursuant to Chapter 4117 of the Ohio Revised Code. In the event of collective bargaining, no collective bargaining agreement shall extend beyond this five year contract. The **School Governing Authority** shall consider a bargaining unit containing teaching and non-teaching employees to be an appropriate unit notwithstanding Section 4117.06(D)(1) of the Ohio Revised Code.
- aa. Provide to all full-time employees health and other benefits. The current benefits are set out in Attachment 6. Attachment 6 may be amended from time to time with the prior written approval of the **Sponsor**. In the event certain employees have bargained collectively pursuant to Chapter 4117 of the Ohio Revised Code, the collective bargaining agreement supersedes Attachment 6 to the extent that the collective bargaining agreement provided for health and other benefits. The collective bargaining agreement shall not be a part of this Contract. The L.C.E.S.C. has formed a health consortium to provide to all community schools a reduced rate and benefit package. These services are provided at no additional cost. The only cost is for the benefits.
- ab. The school's financial records will be maintained in the same manner as the school district financial records, pursuant to rules of the Auditor of the State of Ohio. Further, during the period commencing upon execution of this Contract and ending June 30 of the second full fiscal Treasurer of the **Sponsor**. The school shall meet the requirements and follow the procedures for program and financial audits established from time to time by the Auditor of the State of Ohio, the Ohio Department and the **Sponsor**. To defray the Treasurer's costs in performing the duties of the Chief Financial Officer of the School, the Treasurer may transfer to the general fund of the **Sponsor** two percent (2%) of all funds in the Treasurer's custody that were paid to the school by the State of Ohio.
- ac. All money received by the school during the period beginning upon execution of this Contract and ending June 30 of the second full fiscal year of the school's operation shall be placed in the custody of the Treasurer of the **Sponsor**, who shall maintain all funds and accounts of the school. After the second full fiscal year of the school's operation, the **School Governing Authority** may elect not to continue to have the Treasurer serve as its Chief Financial Officer and the custodian of its funds. Unless the election is made, the Treasurer of the **Sponsor** shall continue as the Chief Officer of the school.
- ad. The fiscal year of the school shall be July 1 to June 30.
- ae. A financial plan detailing an estimated school budget for each fiscal year of this Contract is attached as Attachment 7. Each year of this Contract on or before June 30, a revised school budget shall be submitted to the **Sponsor**. The budget must detail estimated revenues and expenses. Revenues include the base formula amount that will be used for the purpose of funding calculations under Section

3314.08 of the Ohio Revised Code. The base formula amount for any year shall not exceed the dollar formula amounts specified for the year under Section 3317.022 of the Ohio Revised Code. Other revenue sources must be included in the budget including any projected revenues from the L.C.E.S.C. projected expenses must include the total estimated per pupil expenditure amount for each year.

- af. The school may borrow money only to pay necessary and actual expenses of the school in anticipation of receipt of any portion of the payments to be received by the school pursuant to division (D) of subsection 10 of House Bill 215(1997). The school may issue notes to evidence such a borrowing to mature not later than the end of the fiscal year in which money is borrowed. The proceeds from the notes shall be used only for the purpose for which the anticipated receipts may be lawfully expended by the school. Except as provided in this subparagraph of this Contract, the school may not borrow money.
- ag. General liability insurance at all times will be maintained by the **School Governing Authority** in amounts not less than one million dollars (\$1,000,000) per occurrence and one million two hundred thousand dollars (\$1,200,000) in the aggregate. The insurance coverage shall not be only for the school and **School Governing Authority** and its employees but also for the **Sponsor**; its Board, Superintendent and employees as additional insureds. The insurance coverage must be occurrence coverage rather than claims made coverage. The policy of insurance must be approved by the **Sponsor** in advance of the purchase. The **School Governing Authority**, upon request of **Sponsor**, shall provide evidence of such coverage and shall notify **Sponsor** in writing at least thirty (30) days in advance of any material adverse change to, or cancellation of, such coverage.
- ah. The **School Governing Authority** and school shall indemnify and hold harmless the **Sponsor** and its Board, Superintendent, employees and agents from any and all claims, demands, actions, suits, causes of action, obligations, losses, costs, expenses, attorneys fees, damages, orders and liabilities of whatever kind or nature of law, equity or otherwise, arising from any of the following:
 - 1. A failure of the **School Governing Authority** and/or school or any of its officers, directors, employees, or contractors to perform any duty, responsibility or obligation imposed by law or this Contract; and
 - 2. An action or omission by the **School Governing Authority** and/or school or any of its officers, directors, employees or contractors that result in injury, death or loss to person or property, breach of contract, or violation of statutory law or common law (state and federal).
- ai. If the **Sponsor** provides a leave of absence to a person who is thereafter employed by the school, the **School Governing Authority** and school shall indemnify and hold harmless the **Sponsor** and its board members, Superintendent, employees

and agents from liability arising out of any action or omission of that person while that person is on leave and employed by the **School Governing Authority**.

aj. Timely comply with all reasonable requests of the **Sponsor** and L.C.S.E.C.

ak. This paragraph intentionally omitted.

al. *(If the school high awarding a diploma, add this provision:*

The school shall comply with Section 3313.61 and 3313.611 of the Ohio Revised Code except that, by completing the curriculum adopted by the **School Governing Authority** the student will be deemed to have met the requirement that a person must successfully complete the curriculum specified in Title 33 of the Ohio Revised Code.)

am. A breach of any of the covenants and/or agreements in subparagraphs a. through al. above, shall constitute good cause for termination or non-renewal of this Contract.

3. **Other Obligations.** The parties covenant and agree as follows:

a. In consideration of the **School Governing Authority** entering into a preliminary agreement with **Sponsor** and executing this Contract, the Superintendent of the **Sponsor** has agreed writing to initially pay the **School Governing Authority**. The obligation to pay does not arise unless the Superintendent has received the funds from appropriations made pursuant to the Lucas County community school, and the **School Governing Authority** is in compliance with all of the terms and conditions of this Contract at all times prior to payment. The payment by the Superintendent of the **Sponsor** to the Chief Fiscal Officer of the school shall be considered a grant subject to the repayment obligations of paragraph 6 of this Contract. If any funds were released by the Superintendent of the **Sponsor** to the **School Governing Authority** prior to the execution of this Contract, said funds shall be considered to be a payment toward any amounts to be paid pursuant to this subparagraph.

b. In the first fiscal year of operation of the school, the Superintendent of the **Sponsor** shall make an additional grant to the **School Governing Authority** in an amount to be determined by the Superintendent of the **Sponsor** in his/her sole discretion but in no event more than \$100,000 for the purpose of partially defraying school start-up costs. The payment made by the Superintendent shall be to the Chief Fiscal Officer of the school and shall be considered a grant subject to the repayment obligations of paragraph 6 of this Contract. If any funds have been paid by the Superintendent to the **School Governing Authority**, and are not part of the subparagraph (a) above, said funds may be considered by the **Sponsor** to be payment toward the amount to be paid pursuant to this subparagraph.

- c. The governing board of the **Sponsor** and the **School Governing Authority** may enter into a separate agreement under which the **Sponsor** will provide services to the school. Services provided under such an agreement and the amount and manner in which the **School Governing Authority** will pay for such services shall be mutually agreed to in writing between the **School Governing Authority** and the **Sponsor**. No such agreement may extend beyond June 30, 2005. The agreement will be entered into subsequent to the adoption of identical resolutions by the governing board of the **Sponsor** and the **School Governing Authority** approving such an agreement.
- d. In addition to the fee for service contract recited in subparagraph (c) above, the Superintendent of the **Sponsor** may also provide without cost technical assistance and training to the school and its staff at such times and to the extent that the Superintendent deems appropriate.
- e. One or more **Sponsor** representatives (appointed by the Superintendent of the **Sponsor**) knowledgeable about special education and related services will participate in the development of individualized education program (IEPs) for any student enrolled in the school who is identified as a handicapped child. The nature and scope of the representation and the fee for services rendered may be developed in a separate agreement relating only to IEPs, or in the alternative, if an agreement is entered into as provided in subparagraph (c) above, the agreement also may include IEP participation.
- f. For and in consideration of two percent (2%) of all funds paid to the school by the State of Ohio, the Treasurer of the **Sponsor** shall serve as the Chief Fiscal Officer of the school. Payments to the **Sponsor** shall be monthly by transfer to the general fund of **Sponsor** from the school's accounts that are in the custody of the Chief Fiscal Officer of the school. Payments shall be made based on funds received, not funds expected. In the event that the school elects not to continue to have the Treasurer serve as its Chief Fiscal Officer after the second full fiscal year, but the election is made effective during a subsequent fiscal year, the payment due to the **Sponsor** for the Treasurer's services shall be prorated by first estimating the total of State funds expected during the fiscal year in which the election is made and then determining the percentage of the year that the Treasurer served as Chief Fiscal Officer and then by multiplying expected total funds received by the percentage of the year the Treasurer served as the Chief Fiscal Officer and then multiply that product by two percent (2%). Payment in full is due on the first work day of the month following the Treasurer's last day as Chief Fiscal Officer. In the event total State funds received are more or less than expected, the parties shall at the end of the current fiscal year recalculate the amount to be received by the **Sponsor** for the Treasurer's services based upon actual receipts but otherwise using the formula of this subsection.
- g. The Treasurer of the **Sponsor** shall perform the following functions while serving as the Chief Fiscal Officer of the school.

1. Maintain custody of all funds received by the school;
 2. Maintain all accounts of the school;
 3. Maintain all financial records of the school and follow procedures for receiving and expending funds which procedures shall include that the Treasurer shall disburse money only upon receipt of a voucher signed by the Chief Administrative Officer of the school or that Officer's designee.
 4. Assist the school in meeting all financial reporting requirements established by the Auditor of Ohio; and
 5. Invest funds of the school in the same manner as the funds of the Sponsor are invested, but the Treasurer shall not commingle the funds with any funds of the Sponsor or any other community school.
- h. The Sponsor, upon the request of the school, shall adopt a policy that provides a leave of absence of at least three years to each teacher or non-teaching employee of the Sponsor who is employed by the school. The policy shall provide that any teacher or non-teaching employee may return to employment with the Sponsor if the teacher or employee leaves or is discharged from employment with the school for any reason. Upon termination of the leave of absence and immediate return to the Sponsor's employ, any seniority that is applicable to the person shall be calculated to include all of the following: all employment by the Sponsor prior to the leave of absence; all employment by the school during the leave of absence; all employment by the Sponsor after the leave of absence. The policy also shall provide that if any teacher holding a valid teaching certification returns to employment with the Sponsor upon termination of such a leave of absence, the teacher may be restored to the same or similar position and salary as immediately before the leave. If, as a result of teachers returning to employment upon termination of such leave of absence, the Sponsor reduces the number of teachers it employs, it shall make such reductions in accordance with statutory layoff procedures or a collective bargaining agreement, if applicable. The policy also will provide that personal leave and vacation leave cannot be accrued for use as an employee of the Sponsor while in the employ of the school.
4. **Student Transportation.** The School Governing Authority and the Sponsor will work cooperatively to assure that transportation of students is provided by the school district in which the school is located to the extent that such transportation is required by law.
 5. **Contract Authorization.** Before executing this Contract, the School Governing Authority must pass a resolution authorizing execution of this Contract and authorizing one or more individuals to execute this Contract for and on behalf of the party with full authority to bind the party.

6. Ending the Community School. In the event that this Contract is terminated or not renewed, the operation of the school will cease as a community school. The following requirements and procedures apply regarding the **School Governing Authority** and the school (unless operations continue as a public school of an existing school district):
- a. Regarding employees, if there is a collective bargaining agreement that applies, the collective bargaining agreement shall be followed. In the absence of a collective bargaining agreement, the school may elect to treat employees as laid-off or their positions abolished. Expiring employee contracts may be non-renewed.
 - b. The **School Governing Authority's** rights to any leased equipment first will be offered to the **Sponsor** as assignee of the lease(s), subject to the rights of the lessor. If the **Sponsor** does not accept the assignment, the equipment will be returned to the lessor, or if the lease permits, the **School Governing Authority** may either assign the lease to a third party for fair value or pay lessor the value of the equipment and acquire equipment. Upon such an acquisition of leased equipment by the **School Governing Authority**, and as to all equipment owned by the **School Governing Authority**, the equipment first will be offered to the **Sponsor** with a right to immediate possession, subject to any security interest any third party has in the equipment. If the equipment is accepted by the **Sponsor**, the **School Governing Authority** shall give the **Sponsor** a bill of sale. In no event will the **Sponsor** assume any debt by becoming the owner. If equipment owned by the **School Governing Authority** is not accepted by the **Sponsor**, the **School Governing Authority** promptly shall sell it in a commercially reasonable manner and pay the proceeds of sale to the **Sponsor**, subject to any security interest any third party has in the equipment.
 - c. The **School Governing Authority's** rights to any loaned or leased materials and supplies first will be offered separately to the **Sponsor** as assignee, subject to the rights of the owner or lessor. If the **Sponsor** does not accept an assignment, the materials and/or supplies not assigned to the **Sponsor** will be returned to the owner or lessor, or if any lease permits, the **School Governing Authority** may either assign the lease to a third party for fair value or pay lessor the value of the materials and/or supplies and acquire them. Upon such an acquisition of loaned or leased materials and/or supplies by the **School Governing Authority**, and as to all materials and/or supplies owned by the **School Governing Authority**, the materials and/or supplies first will be offered to the **Sponsor** with a right to immediate possession, subject to any security interest any third party has in the materials and/or supplies. If the materials and/or supplies are accepted by the **Sponsor**, the **School Governing Authority** shall give the **Sponsor** a bill of sale. In no event will the **Sponsor** assume any debt by becoming the owner. If materials and/or supplies owned by the **School Governing Authority** are not accepted by the **Sponsor**, the **School Governing Authority** shall sell it in a commercially reasonable manner and pay the proceeds of sale to the **Sponsor**, subject to any security interest any third party has in the materials and/or supplies.

- d. The **School Governing Authority's** rights to any leased real personal property first will be offered to the **Sponsor** as assignee of the lease(s), subject to the rights of the lessor. If the **Sponsor** does not accept the assignment, the real property will be returned to the lessor, or if the lease permits, the **School Governing Authority** may assign the lease to a third party for fair value. All real property owned by the **School Governing Authority** shall become, at **Sponsor's** option, the property of the **Sponsor**, subject to any lien or mortgage of record in the real property. If the real property is accepted by the **Sponsor**, the **School Governing Authority** shall give the **Sponsor** a warranty deed of conveyance. In no event will the **Sponsor** assume any debt by becoming the owner of the real property. If real property owned by the **School Governing Authority** is not accepted by the **Sponsor**, the **School Governing Authority** shall sell it in a commercially reasonable manner and pay the proceeds of sale to the **Sponsor**, subject to any lien or mortgage of record in the real property.
- e. If monies remain available, the **School Governing Authority**, shall pay all of its other expenses, debts and encumbrances from cash and funds available in school accounts. Thereafter, if monies remain available after all expenses, debts and encumbrances have been paid, the then-remaining funds shall be paid to the **Sponsor** and the **Sponsor** shall use any such funds for public education and/or community school purposes.

If operations at the school continue as a public school of an existing school district immediately after termination of this Contract, then the provisions of paragraphs 6(a) through 6(e) above shall apply, except that the affected school district shall make final decisions regarding whether leases and other contracts will be honored and/or assumed by the School District as successor.

7. **Dispute Resolution.** In the event of a dispute between the **Sponsor** and **School Governing Authority** regarding either any term of this Contract or any community school issue, the parties shall each designate a person to resolve the dispute. In the event the designated persons and any dispute resolution procedure agreed to by the parties cannot resolve the dispute, the matter shall be submitted to the Superintendent of the **Sponsor** or his/her designee for decision. The decision by the Superintendent or his/her designee is final and binding. Any appeal of the decision of the Superintendent or his/her designee shall be to the Lucas County Common Pleas Court as if it were an appeal from a decision of an arbitrator.
8. **Term.** This Contract shall be for an initial term of five (5) years, ending June 30, 2005, and automatically renewable thereafter for one (1) year periods, if allowed by Ohio law, unless either notified the other in writing at least sixty (60) days prior to June 30 that it does not wish to renew the Contract. The **School Governing Authority's** financial obligations under this Contract survive termination, non-renewal, and expiration. The **Sponsor** may choose not to renew a Contract for any of the following reasons:

- a. Failure to meet student performance requirements stated in this Contract;
- b. Failure to meet generally accepted standards of fiscal management;
- c. Violation of any provision of this Contract or applicable state or federal law; and
- d. Other good cause.

A termination shall be effective only at the conclusion of the instructional year.

At least sixty (60) days prior to the termination or non-renewal of this Contract, the Sponsor shall notify the School Governing Authority of the proposed action in writing. Receipt of notice by the Chief Administrative Officer or a member of the governing board of the school shall be conclusively deemed to constitute receipt of notice to the School Governing Authority. The notice shall include the reasons for the proposed action in detail. The School Governing Authority may, within fourteen (14) days of receiving the notice, request an informal hearing before the Sponsor. A decision by the Sponsor to terminate this Contract may be appealed only to the State Board of Education. The decision of the State Board of Education is final.

9. Headings. Headings are for the convenience of the parties only. Headings have no substantive meaning.
10. Assignments. This Contract and its terms shall not be assigned or delegated without the expressed written approval of the other party.
11. Notice. Any notice to one party by the other may be satisfied by personal delivery to, in the case of the Sponsor, the Superintendent; in the case of the School Governing Authority, the Chief Administrative Officer.

Executed this 30th day of April, 2000 in Toledo, Ohio.

Sponsor

SCHOOL GOVERNING AUTHORITY

By: _____
(Name)

By: _____
(Name)

(Title)

(Title)

with full authority to execute this Contract
for and on behalf of Sponsor and with full
authority bind Sponsor

with full authority to execute this Contract
for and on behalf of the School Governing
Authority and with full authority to bind the
School Governing Authority

**AMENDED AND RESTATED
MANAGEMENT AGREEMENT**

**by and between the
ELECTRONIC CLASSROOM OF TOMORROW**

and

ALTAIR LEARNING MANAGEMENT I, INC.

Effective July 1, 2006

AMENDED AND RESTATED MANAGEMENT AGREEMENT

This Management Agreement (“Agreement”) is effective as of the 1st day of July, 2006, between Altair Learning Management I, Inc. (“**Altair**”), a Delaware corporation, located at Post Office Box 2886, Columbus, Ohio 43215-2886, and the Electronic Classroom of Tomorrow (“**ECOT**” or “**School**”), an Ohio non-profit corporation, by and through its Board of Directors, located at 3700 South High Street, Columbus, OH 43207.

RECITALS

ECOT is organized as an Ohio community school under the Ohio Revised Code (“Code”), including but not necessarily limited to Sections 3314 and 1702. Ultimate authority over **ECOT** is vested in the Board of Directors and Members (the “Board” or “Directors”). The School has been granted a Charter Contract (“Charter Contract”), which is incorporated herein by reference, by the Lucas County Educational Service Center (“**LCESC**”) to operate an Ohio community school, with **LCESC** as the sponsoring body.

Altair specializes in providing educational institutions, vocational schools, businesses, and other organizations with a variety of educational services and products, strategic planning and management including; but not limited to, school and business management, curricula, educational programs, contract administration and technology. The products and services of **Altair** are designed to serve the needs of a diverse student population.

ECOT and **Altair** desire to enter into this Agreement, whereby **ECOT** and **Altair** will work together to bring educational excellence and innovation to the State of Ohio, based on a mutual agreed upon school design, comprehensive educational program, and sound school and business principles and management methodologies.

In order to facilitate the continuation of the school, and to continue to implement innovative educational programs at the school, the parties desire to amend and restate the arrangement for the

management and operation of certain **ECOT** administrative activities or functions first entered into on May 16, 2000 and last modified effective July 1, 2003, by and between the predecessor in interest to Altair, Altair Learning Management, I, Inc., and ECOT.

THEREFORE, it is mutually agreed as follows:

ARTICLE I

This Agreement shall become effective July 1, 2006, and shall be coterminous with the Charter Contract, as it may be amended or extended. Notwithstanding the termination of the Contract, this Agreement shall continue to remain in effect provided that **ECOT** has entered into or is continuing to operate under any chartering school contract with an authorizing body (as defined under the Code) or as a private school; and this Agreement has not been terminated pursuant to Article VIII.

ARTICLE II

CONTRACTING RELATIONSHIP

A. Authority. **ECOT** represents that it is authorized by law to contract with a private entity to provide educational management services. **ECOT** further represents that it has received its charter through LCESC to organize and operate a community school throughout the State of Ohio. **ECOT** is therefore vested with all powers within applicable law for developing and implementing the educational program contemplated in this Agreement.

B. Agreement. Acting under and in the exercise of its authority, **ECOT** hereby contracts with **Altair**, certain functions as defined hereinafter relating to the management and operation of the school in accordance with the terms of this Agreement and the Charter Contract. **Altair** and **ECOT** acknowledge that each has reviewed this Agreement and all related documents and that they shall comply with the terms and conditions set forth in this Agreement.

C. Relationship and Status of the Parties. **Altair** is a Delaware corporation, and is not a division or a part of **ECOT**. **ECOT** is an Ohio non-profit corporation and an entity authorized by the Ohio Revised Code to be an Ohio public school, and is not a division or part of **Altair**. The relationship of **Altair to ECOT** is that of an independent contractor and is based solely on the terms of this Agreement, and the terms of any subsequent written agreements between **Altair** and **ECOT**. The personnel who perform services at **ECOT** and are under the direct control and supervision of **ECOT**, or who provide services at the request of **ECOT** (other than services provided by **Altair** hereunder), shall be employees, independent contractors, or service providers of **ECOT** and shall be paid for by **ECOT**. Compensation of employees of **Altair** shall be paid by **Altair**. For purposes of this Agreement, compensation shall include salary, fringe benefits, and city, state and federal tax withholdings to the extent required by law, all travel, lodging and other expenses.

D. Designation of Agents. The Board of **ECOT** designates the members of **Altair** as agents of the school having a legitimate educational interest for the purpose of entitling such persons access to education records under 20 U.S.C. §1232g, the Family Educational Rights and Privacy Act (“FERPA”) and for any other purpose deemed appropriate by **ECOT**.

E. Other. The parties agree that **Altair’s** compensation under this Agreement is reasonable compensation for the services rendered hereunder.

In general, **Altair** will not have any role or relationship with the school that, in effect, substantially limits **ECOT’s** ability to exercise its rights, including termination rights, under this Agreement. In furtherance of such a restriction, it is agreed between **ECOT** and **Altair** that none of the voting power of the governing body of the school will be vested in **Altair** or its directors, members, managers, officers and employees, and none of the voting power of the governing body of **Altair** will be vested in the school or its directors, managers, officers or employees, provided,

however, that certain Altair employees or shareholders may provide services on a full or part time basis at the offices of ECOT.

ARTICLE III

FUNCTIONS OF ALTAIR

A. Responsibility. **Altair** shall be responsible and accountable to **ECOT** for the management of the School as identified within this Contract. **Altair** will meet with **ECOT** at **ECOT's** regularly scheduled Board meetings to account to **ECOT** for the roles and responsibilities of **Altair** to manage the school in the areas identified below which specifically do not include the hiring, termination and suspension of employees of ECOT, the provision of education directly to students, and the maintenance of facilities.

Altair shall provide management services through its own employees and/or consultants. Altair employees or consultants may directly manage and evaluate ECOT employees at the request of ECOT, subject to the restrictions of Article II(d).

B. Educational Program. The educational program and the program of instruction shall be recommended by **Altair** and, if approved, implemented by **ECOT**. **Altair** shall provide **ECOT** with a Senior Educational Advisor. The Senior Educational Advisor shall be an employee of **Altair** and shall act in an advisory capacity to ECOT's Board and Executive Director of Education. **Altair** shall specifically not be responsible for day-to-day supervision of the teaching staff and the day-to-day supervision of, or implementation of, the educational program of instruction. The Senior Educational Advisor shall report to the Board and to **Altair**.

C. Strategic Planning. **Altair** shall design strategic plans for the continuing educational and financial benefits of **ECOT**. Strategic plans shall include, but not be limited to, planning for the vision of the future of the school, the direction and activities necessary to achieve that vision, and the defining of success metrics appropriate to a school which undertakes the burden of educating

students who have had great difficulties in achieving success in the public school environment. It shall also include financial planning.

D. Public Relations. **Altair** shall design and manage the public relations strategy for the development of beneficial and harmonious relationships with other organizations, the community and the State of Ohio.

E. Grants and Fund Raising. **Altair** shall locate grants and potential sources for endowments and donations and shall recommend consultants or other entities to help with the same.

F. Place of Performance. **Altair** shall perform its functions at any location.

G. Legal Requirements. **Altair**, in cooperation with **ECOT**, shall assist **ECOT** in meeting federal, state, and local laws and regulations, and the requirements imposed under the Code, Administrative Code, administrative rules, funding agreements and the Charter Contract.

H. Management Tools. **Altair** shall provide input for the development or acquisition of high quality, generally recognized management tools to allow it and the Board of **ECOT** to properly monitor and control the non-academic performance of the School.

I. Fiscal Performance. Although **Altair** cannot guarantee the fiscal success or stability of **ECOT**, it is primarily responsible for the fiscal management, (except where fees are owed to **Altair**), and performance of **ECOT**. It shall manage profit, loss and cash flow reporting in formats which are appropriate for the unusual nature of the school's funding. It shall provide guidance for audits, regular and special.

ARTICLES IV

OBLIGATIONS OF THE BOARD

ECOT, by and through its Board, shall exercise good faith and its best efforts in considering the recommendations of **Altair** which may include; but are not limited to, recommendations

concerning policies, rules, regulations, procedures, budget, fund raising, public relations, hiring of non-teachers and School entrepreneurial affairs.

ARTICLE V

FINANCIAL ARRANGEMENTS

A. Payment of Fees. Effective July 1, 2006, ECOT shall pay Altair, an annual amount based on each school year equal to 4% percent of all funds received by ECOT. The fee shall be paid to **Altair** as and when governmental school aid, grants, or other funding payments are received, and within thirty (30) days from **ECOT's** receipts. Notwithstanding anything contained in this section to the contrary, **Altair's** fee shall not be based on any governmental school aid or grants where the payment of the fee based on such governmental aid or grants is prohibited by law or by the terms of the aid or grant.

B. Expenses to be Covered by ECOT. **ECOT** shall be responsible for payment of the following costs and expenses incurred under this Agreement:

1. All wages, compensation and expenses, including those for the administrators, assistants, clerical staff, teachers and janitorial services;
2. Compensation and expenses for Board liaisons, Secretary of the Board and all other compensation;
3. Dues for memberships in any associations;
4. Workers' compensation or other insurance including, but not limited to, any necessary premises liability insurance;
5. Bonds for individuals signing checks or Board, if required;
6. Attorney fees for representation of ECOT;
7. All fees pursuant to Article V, part A above;
8. All other costs allocated to **ECOT** in this Agreement;
9. Board and **ECOT** office expenses and supplies;

10. Expenses of ECOT employees managed by Altair, including compensation for fund raising, public relations and grant writing or any contract services
11. The cost of all services of LCESC, including but not limited to those as Fiscal Agent of the School;
12. Leases for equipment and **ECOT** offices or facilities; and
13. Travel, lodging and other expenses of ECOT employees managed by Altair which may be incurred pursuant to services rendered for **ECOT**.

C. Expenses to be Covered by Altair. **Altair** shall be responsible for payment of the following costs and expenses incurred under this Agreement:

1. **Altair** staff training and development; and
2. Compensation and expenses of Altair employees performing their employment duties for Altair

The above expenses to be covered by **Altair** are, however, subject to the payment provisions of Article V, part A above.

D. Other Schools. **ECOT** acknowledges that **Altair** may enter into similar management agreements with other public or private schools. **Altair** shall separately account for reimbursable expenses incurred on behalf of **ECOT** and any other school or schools. No expenses incurred by or on behalf of **ECOT** for which **ECOT** has an obligation of payment may be used to benefit any other person or entity.

E. Financial Reporting. **Altair** shall advise **ECOT** personnel in providing the Board with:

1. a projected annual budget prior to opening each fiscal year.
2. statements of all revenues received, regardless of whatever source, with respect to **ECOT**, and detailed statements of all direct expenditures for services rendered to or on behalf of **ECOT**, whether incurred on-site or off-site, upon request.
3. consultation on annual audits in compliance with state law and regulations showing the manner in which funds are spent at **ECOT**. The cost of all audits will be paid by **ECOT**.
4. reports on **ECOT** operations and finances on a quarterly basis and other information on a reasonably requested basis to enable the Board to monitor the performance of **ECOT** and the effectiveness of **Altair's** management of **ECOT**.

5. a reasonable opportunity to inspect, examine, audit and otherwise review the books, records, accounts, ledgers and other financial documents of **ECOT**

ARTICLE VI

PERSONNEL AND TRAINING

A. Personnel Responsibility. Subject to recommendation by **Altair** and the written approval of **ECOT** through its Board, **Altair** shall have authority to recommend staffing levels and non-teaching staff selections. **ECOT** shall select all staff and evaluate, assign, discipline and transfer teaching personnel consistent with state and federal law. Either party may request, with reasonable cause, removal of any staff member, so long as consistent with state and federal law. Should there be a legal impediment to such removal, **ECOT** and **Altair** shall work together for a mutually acceptable resolution.

B. Executive Director of Education. **ECOT** will, consistent with state law, select the Executive Director of Education, upon the recommendation of **Altair**, and establish employment terms. **ECOT** shall supervise the Executive Director of Education and hold him or her accountable for the successful education of the students of **ECOT**. The Board of **ECOT**, with the assistance of **Altair**, shall annually review the performance of the Executive Director of Education.

C. Teachers. Prior to the commencement of and during the 2000-2001 school year by **ECOT**, and from time to time thereafter, the Board shall determine the number of teachers, and the applicable grade levels and subjects required for the operation of **ECOT**, and shall staff accordingly.

D. Support Staff. Prior to the commencement of each fiscal year, **Altair** shall recommend the number and functions of **ECOT** support staff required for the operation of **ECOT** and further recommend employment terms.

ARTICLE VII

ADDITIONAL PROGRAMS

Altair, in cooperation with **ECOT**, may establish additional programs including, but not limited to, adult and community education and pre-kindergarten, on such terms and conditions as **Altair** and **ECOT** deem mutually agreeable.

ARTICLE VIII

TERMINATION OF AGREEMENT WITH CAUSE

A. Termination by Altair. **Altair** may terminate this Agreement for cause, , prior to the end of the term specified in Article I in the event that **ECOT** fails to remedy a material breach of this Agreement within sixty (60) days after written notice from **Altair**. Upon such termination, **Altair** shall have the option to reclaim any usable property or equipment (e.g., copy machines, personal computers) provided or installed by **Altair** and not paid for by **ECOT**, or to reclaim the depreciated cost of such equipment. Provided, however, all assets, to the extent paid for by **ECOT**, shall remain the property of **ECOT**.

B. Termination by ECOT. **ECOT** may terminate of this Agreement after sixty (60) days prior written notice to **Altair**, upon the occurrence of any of the following:

1. If **ECOT** shall cease to be approved by LCESC as an Ohio Community School and **Altair** cannot secure another sponsor; or
2. In the event that **Altair** shall be guilty of a felony or fraud, gross negligence, or other act of willful or gross misconduct in the rendering of services under this Agreement; or
3. In the event that **Altair** fails to remedy a material breach of its duties or obligations under this Agreement within ninety (60) days after written notice of the breach is provided to **Altair** by **ECOT**.

Upon such a termination, **Altair** shall have the option to reclaim any usable property or equipment (e.g., copy machines, personal computers) provided or installed by **Altair** and not paid

for by **ECOT**, or to reclaim the depreciated cost of such equipment. Provided, however, all assets, to the extent paid for by **ECOT**, shall remain the property of **ECOT**.

C. Change in Law. If any federal, state or local law or regulation, or court decision has a material adverse impact on the ability of either party or carry out its obligations under this Agreement, then either party, upon written notice, may request renegotiation of the Agreement and if the parties are unable or unwilling to renegotiate the terms within ninety (90) days after the notice, the party requiring the renegotiation may terminate this Agreement upon thirty (30) days further written notice.

D. Force Majeure. Any claim of default under this Article is subject to the provisions of Article XIII, subsection (B), "Force Majeure," except that if an incident of force majeure shall result in the failure of **ECOT** to meet any payment obligation to **Altair** for more than 60 days, then the provisions of Article XIII, subsection (B) shall be of no force and effect, and such failure to pay shall be an event of default under this Article.

ARTICLE IX

PROPRIETARY INFORMATION

Proprietary Information shall mean and include any and all software, firmware, content, materials, documents, designs, strategies, ideas, concepts, inventions, trade secrets, "know-how" and the like, whether provided by **Altair**, or otherwise developed by **Altair**, **ECOT**, or others in the course of the provision of services and any license between **ECOT** and **Altair**, and whether embodied in or through written material, software, firmware, courseware, content, or any other form. The rights of **ECOT** and **Altair** pertaining to Proprietary Information, and any restrictions on the use thereof, shall be governed by the terms of one or more specific license agreements between the parties.

ECOT shall and does hereby grant to Altair a perpetual, non-exclusive, no-cost, license to use for Altair's business purposes in the field of education any and all proprietary information (as that term is generally defined herein) that may be developed by ECOT, together with information gathered from the study of the operation of ECOT during the term of use by ECOT of any Altair Proprietary Information. ECOT shall take all reasonable efforts to ensure that its officers, staff and employees who have access to Altair Proprietary Information comply with the terms hereof.

Except as may be further provided in any license agreement between the parties, nothing herein shall in any way preclude **Altair** from providing similar services or rights to others, or from granting to other persons or entities rights in the Altair Proprietary Information.

ARTICLE X

INDEMNIFICATION

ECOT covenants and agrees that it will indemnify and hold **Altair**, and all of its officers, Board of Directors, members, agents, and employees harmless for any claims, losses, damages, costs, charges, expenses, liens, settlements of judgments, including interest thereon, whether to any person, including employees of **Altair**, or property of both, by reason of any negligence or omission on the part of **ECOT** arising directly out of or in connection with **ECOT's** performance under this Agreement, to which **Altair** or any of its officers, Board of Directors, members, agents or employees may be subject or put, including but not limited to those related in any way to **ECOT's** failure to follow the recommendations of **Altair**. **ECOT** shall not be liable to indemnify **Altair** or any of its officers, Board of Directors, members, agents or employees for damages directly caused by or resulting from the sole negligence of **Altair** or any of its Board of Directors, officers, members, agents or employees. ECOT shall provide Altair a certificate of insurance showing Altair as an additional insured on its comprehensive general liability (or similar) insurance coverage, with

the provision that Altair shall receive 30 days prior written notice of termination, non-renewal or substantial modification of coverage.

Altair covenants and agrees that it will indemnify and hold **ECOT** and all of its officers, Board of Directors, agents and employees harmless for any claim, loss, damage, cost, charge, expense, lien, settlement or judgment, including interest thereon, whether to any person, including employees of **ECOT**, or property or both, by reason of any negligent act or omission on the part of **Altair**, arising directly out of or in connection with **Altair's** performance, under this Agreement, to which **ECOT** or any of its officers, Board of Directors, agents or employees may be subject or put **Altair** shall not be liable to indemnify **ECOT** or any of its officers, Board of Directors, agents or employees for damages directly caused by or resulting from the sole negligence of **ECOT** or any of its officers, Board of Directors, agents or employees.

ARTICLE XI

WARRANTIES AND REPRESENTATIONS

ECOT and **Altair** each represent that it has the authority under law to execute, deliver and perform this Agreement, and to incur the obligations provided for under this Agreement, that its actions have been duly and validly authorized, and that it will take all steps reasonably required to implement this Agreement. **ECOT** and **Altair** mutually warrant to the other that, to its knowledge, there are no pending actions, claims, suits or proceedings, threatened or reasonably anticipated against or affecting it, which, if adversely determined, would have a material adverse affect on its ability to perform its obligations under this Agreement, other than litigation in which the constitutionality of the community school system in Ohio, and the legality of existence of electronic schools, is under challenge.

ARTICLE XII

ALTERNATIVE DISPUTE RESOLUTION PROCEDURE

Any and all disputes between the parties concerning any alleged breach of this Agreement, or arising out of or relating to the interpretation of this Agreement or the parties' performance of their respective obligations under this Agreement, shall be submitted to arbitration. Unless the parties agree upon a single arbitrator, the arbitration panel shall consist of three persons, including one person who is selected or recommended by a disinterested third party, one person selected by **Altair**, and one person selected by the Board. The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association, with such variations as the parties and the arbitrator unanimously accept.

ARTICLE XIII

MISCELLANEOUS

- A. Sole Agreement. This Agreement supersedes and replaces any and all prior agreements and understandings between **ECOT** and **Altair** relating to the management of **ECOT**.
- B. Force Majeure. Neither party shall be liable if the performance of any part or all of this Agreement is prevented, delayed, hindered, or otherwise made impracticable or impossible by reason of any strike, flood, riot, fire, explosion, war, or act of God, sabotage, accident, or any other casualty, or similar cause beyond either party's control ("Force Majeure Event"), and which cannot be, except for the payment of money, overcome by reasonable diligence and without unusual expense. A Force Majeure Event shall suspend the obligation for the payment of money, subject to the terms of Article VIII(D).
- C. Notices. All notices, demands, requirements and consents under this Agreement shall be in writing, shall be delivered to each party and shall be effective when received by the parties or

mailed to the parties at their respective addresses set forth below, or at such other address as may be furnished by a party to the another party:

If to **Altair**: William L. Lager, Chief Executive Officer
Altair Learning Management I, Inc.
P. O. Box 2886
Columbus, Ohio 43215-2886

If to **ECOT**: Electronic Classroom of Tomorrow
Attn: President, Board of Directors
3700 S. High Street
Columbus, OH 43207

D. Severability. The invalidity of any of the covenants, phrases or clauses in this Agreement shall not affect the remaining portions of this Agreement, and this Agreement shall be construed as if such invalid covenant, phrase or clause had not be contained in this Agreement. Such invalidated covenant, phrase or clause shall be replaced or the remaining provisions construed so as to represent the parties, original intent as nearly as possible.

E. Successors and Assign. This Agreement shall be binding upon, and inure to the benefit of the parties and their respective successors and assigns.

F. Entire Agreement. This Agreement is the entire agreement between the parties relating to the management services provided and the compensation for such services.

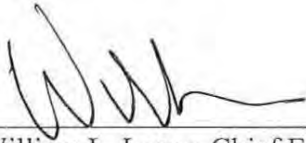
G. Non-waiver. No failure of a party in exercising any right, power or privilege under this Agreement shall affect such right, power or privilege, nor shall any single or partial exercise thereof preclude any further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies of the parties under this Agreement are cumulative and not exclusive of any rights or remedies which any of them may otherwise have.

H. Assignment. This Agreement shall not be assigned by either party without the prior written consent of the other party, provided, **Altair** may without the consent of the Board delegate the performance for such duties and obligations of **Altair** specifically set forth herein.

I. Survival of Termination. All representations, warranties and indemnities made herein shall survive termination of this Agreement.

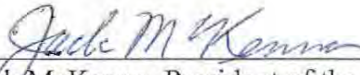
J. Governing Law. This Agreement shall be governed by and enforced in accordance with the laws of the State of Ohio.

**ALTAIR LEARNING MANAGEMENT I,
INC.**

By: 

William L. Lager, Chief Executive Officer

**ELECTRONIC CLASSROOM OF
TOMORROW**

By: 

Jack McKenna, President of the Board of
Directors

LICENSE AGREEMENT

This Agreement (“Agreement”) is made and entered into as of this 1st day of July, 2006 (“Effective Date”), by and between **Altair Learning Management I, Inc.**, having an address of P.O. Box 2886, Columbus, OH 43216-2886 (“Altair”) and **ECOT**, having an address of 3700 S. High Street, Columbus, OH 43207.

In consideration of the following mutual covenants and agreements, the parties agree as follows:

I. DEFINITIONS

1.1 **“Authorized User”** means an individual student of Electronic Classroom of Tomorrow (“ECOT”) or an ECOT faculty or staff member authorized by Altair to access the Courseware.

1.2 **“Assessment Item Collection”** means the assessment items relating to the Courseware normally provided in connection with Content.

1.3 **“Confidential Information”** means any non-public information about a party, including, without limitation, the party’s business, customers, product information, trade secrets, finances and financial condition, or other information that the disclosing party desires to protect against unrestricted disclosure by the receiving party.

1.4 **“Courseware”** means the kindergarten through twelfth grade internet-accessible and/or multi-media educational array of courses embodied in the learning management system (the “Altair LMS”) sufficiently comprehensive to satisfy ECOT’s core curriculum needs and any and all related software, graphics and instructions, and all Content provided therein and thereafter.

1.5 **“Content”** means, from whatever source, subject to the restrictions set forth herein, the cumulative substantive information, data, graphics, and other material provided in the context of the various course subjects, whatever the source, as well as any and all information from any related website, whether or not linked to the System, and any and all intellectual property associated therewith, including all registered or common-law trademarks, service marks, copyrights, trade secrets (as that term is defined in the Uniform Trade Secrets Act), and patented or patentable subject matter.

1.6 **“FTE Student Enrollments”** means the number of full time equivalent (FTE) K-12 school students reported by ECOT to the state of Ohio for state funding purposes, and FTE K-12 school students who utilize the Courseware.

1.7 **“System”** means software and interfaces capable of delivering Courseware and Content over the Internet with all modifications, enhancements and improvements thereof.

1.8 **“Services”** means any consulting, educational, operational, training, maintenance and support services provided by Altair, whether or not provided directly from Altair or through Altair from any other person or entity.

1.9 **“Proprietary Information”** means any and all software, firmware, content, materials, documents, designs, strategies, ideas, concepts, inventions, trade secrets, “know-how” and the like, and “Altair Proprietary Information” means all Proprietary Information provided hereunder by Altair, whether or not owned by Altair, or owned by others and provided by Altair, and whether embodied in

or through the Courseware, System, Content, Services, or through written material, software, firmware, courseware, content, or any other form

1.10 **“Management Agreement”** means the agreement governing the provision of management services by Altair to ECOT. This Agreement is entered into between the parties subject to the terms of the Management Agreement between them, entered into contemporaneously herewith. Except as otherwise specifically stated herein, the definitions set forth in the Management Agreement shall be applicable in the context of this License Agreement.

2. LICENSE GRANT

2.1 **Limited License.** Subject to the terms and conditions of this Agreement, and as set forth in the Schedule (Exhibit A), Altair grants ECOT a limited non-exclusive, non-transferable license to access and use the Courseware and to permit its Authorized Users to access and use the Courseware.

2.2 **Rights of Altair in Altair Proprietary Information.** Altair Proprietary Information is and shall remain the under the exclusive control of Altair for purposes hereof, and nothing herein shall in any way alter any rights of ownership therein. Except for the specific rights of use granted in this License Agreement, ECOT shall have no right of ownership whatsoever in Altair Proprietary Information, and shall have no other rights of use for any other purpose except as provided herein, and no rights to alter, publish, copy, transmit or otherwise disclose Altair Proprietary Information, except to the extent of its use in implementation of this Agreement.

In addition to the other restrictions explicitly or impliedly identified herein, ECOT shall not remove, modify or destroy any Courseware, or any copyright, trade secret, proprietary, confidentiality or other legends or markings placed upon or contained or embedded within the Courseware, System or Content. ECOT agrees to maintain in confidence all materials and documentation relating to Altair Proprietary Information and any modifications thereto other than as required by federal or state disclosure laws and corporate reporting requirements. ECOT shall use reasonable efforts to prevent the infringement any intellectual property rights in Altair Proprietary Information. ECOT is strictly prohibited from selling or otherwise transferring Altair Proprietary Information and from using Courseware, Content or the System in a manner that is libelous, defamatory, obscene, infringing, abusive or illegal.

2.3 **Rights of ECOT related to Courseware.** ECOT shall have access during the term of this Agreement to certain features of the System enabling ECOT to add data or other content in framesets outside the Courseware shell. ECOT, in consideration of accepting said features of the System, agrees that such additional data or subject matter shall be added only after ECOT shall have obtained all necessary and appropriate copyright permissions, authorizations and licenses for publication and that any such additional data or subject matter be clearly labeled as a creation or work of ECOT and not of Altair or any other entity providing Courseware, Content or Services on behalf of Altair hereunder. ECOT shall be solely responsible for any and all such additional data or subject matter created or developed by ECOT as contemplated herein.

2.4 **Restrictions Related to Courseware.** To the extent that ECOT is granted rights to the Courseware in conjunction with this Agreement, ECOT shall not, except as provided herein, (i) copy the Courseware in whole or in part, except (a) as required within the Learning Management System, to set up course sections in a teacher's sub-Learning Center or to make Courseware accessible to ECOT students; (ii) adapt, alter, create derivative works based on, modify, or translate the Courseware in whole or in part; (iii) sell, assign, distribute, lease, market, rent, sublicense, transfer, make available, or otherwise grant rights to the Courseware in whole or in part to any third party in any form; (iv) electronically transfer the Courseware in whole or in part from one computer to

another over a network or enable any timesharing or service bureau use of the Courseware; (v) obscure, remove or alter any of the trademarks, trade names, logos, patent or copyright notices or markings to the Courseware; (vi) add any other notices or markings to the Courseware or any portion thereof; (vii) reverse engineer, decompile, or disassemble any component of the Courseware or otherwise obtain or attempt to obtain the source code for the Courseware.

3. MAINTENANCE AND SUPPORT

3.1 Maintenance Services. At ECOT's request, any Content revisions or corrections made by or on behalf of Altair ("Updates") will be provided by or on behalf of Altair for use pursuant to the terms of this Agreement and uploaded annually via FTP at such times as Altair may direct. Altair shall be responsible for converting Updates for use on the Altair LMS and for creating course sections, providing student access, and all systems administration of the Courseware on the Altair LMS, including primary academic and technical support thereof, and for integrating any content, assessments or modifications which it may develop or create with any Updates provided by or on behalf of Altair to prevent such Updates from over-writing any Altair customized content developed by Altair.

3.2 Sources of Content. Altair shall provide Content from class.com, and such other source as may be deemed appropriate for compatibility with the Altair LMS and the Courseware, and which is at least equivalent to class.com in terms of conformity with the State of Ohio curriculum requirements. Altair may augment or replace Content based on any changes in commercial availability of class.com or other Content in use, or as may be deemed appropriate by Altair to meet the quality standards of ECOT. In any case, any additional or replacement of Content is permissible hereunder only with the advance acceptance and approval of ECOT so as to confirm its quality and compliance with the standards of the State of Ohio.

3.3 Support Services and Consulting. Altair itself or through others on its behalf will arrange to provide ECOT with second-level academic and technical support of the Courseware through its Customer Care Desk during the hours of 8:00 a.m. to 5:00 p.m. CST, Monday through Friday.

The academic support contacts identified below are the only individuals who may contact any entity providing such support on behalf of Altair regarding academic support services. ECOT may change its academic support contact as long as Altair or the entity providing support on its behalf is informed in writing and the list does not exceed one contact person.

Name: Thomas Fletcher
Phone: 614-492-8884
Fax: 614-492-8894
E-mail: Thomas.fletcher@ecotoh.net

Name: Vernell Bristow
Phone: 614-492-8884
Fax: 614-492-8894
Email: vernell.Bristow@ecotoh.net

4. FEES; PAYMENT

4.1 Fees During the Term. In consideration of the rights granted to ECOT hereunder, ECOT shall pay Altair an license fee based on each school year, the fee being equal to 16% percent of all funds received by ECOT, subject to the limitation set forth below. The fee shall be paid to Altair as and when governmental school aid, grants, or other funding payments are received, and within thirty (30) days from ECOT's receipts. Notwithstanding anything contained in this section to the contrary, Altair's fee shall not be based on any governmental school aid or grants where such payment is or would be prohibited by law or by the specific terms of the

aid or grant. Altair's fee shall be reduced by whatever amount is appropriate to ensure that the total combined fees paid to Altair by ECOT under this license and the Management Agreement in any fiscal year do not exceed 20% of all non-restricted funds received by ECOT.

5. RECORD KEEPING AND AUDIT

5.1 ECOT Responsibility. It is ECOT's responsibility to keep accurate records regarding the number of enrollments and the usage of the Courseware for purposes of compliance with this Agreement.

5.2 Audit. For the sole purpose of ensuring compliance with this Agreement and any Agreement between Altair and any other entity providing Content or any other material, support or services hereunder, Altair shall have the right, at its expense, to audit ECOT's use of the Courseware and student enrollment records upon at least seven (7) days advance notice. In connection therewith, except as may be prohibited by FERPA, ECOT shall provide Altair, who may then provide any other entity providing Content or any other material, support or services hereunder, with such enrollment information as Altair and/or its designee may request. In the event of any underpayment of the fees payable hereunder, ECOT shall pay within 14 days of notice the difference to Altair.

6. TERM; TERMINATION

6.1 Term. This Agreement shall commence as of the Effective Date and shall continue until June 30, 2009. (the "Initial Term").

6.2 Default. Either party may, at its option, terminate this Agreement if a material default by the other party is not corrected within sixty (60) days after receipt of a written notice of the default.

(a) **Default by ECOT-** If the agreement is terminated due to a material breach by ECOT, then ECOT shall not contract with any other entity providing the specific Content that is the subject of this agreement, or any other material, support or services hereunder for two (2) years after the date of cancellation.

(b) **Default by Altair -** A cancellation of a contract due to a material breach by Altair between Altair and any other entity providing Courseware, Content, Services or any other material, support or services hereunder, which cancellation cannot be mitigated and thereby results in the inability of Altair to deliver Courseware or Content hereunder will be considered a material breach with respect to the contract with ECOT. If this occurs, ECOT, at its option, and as its sole remedy, may contract directly with the canceling entity or any other entity to allow for continued access by ECOT to such Courseware, Content, Services or other material. Altair shall pay the difference between the new contracted price and the price of the original contract between ECOT and Altair.

6.3 Effect of Expiration or Termination. Upon expiration or termination of this Agreement, ECOT shall have no further right to exercise the rights licensed hereunder and shall (i) immediately discontinue all use of the Courseware; (ii) remove the Courseware from its server; (iii) destroy all copies of the Courseware; and (iv) certify in writing to Altair, within thirty (30) days of the expiration or termination of this Agreement, that ECOT has complied with the foregoing. The expiration or termination of the Agreement shall not relieve either party of any obligation or liability accrued hereunder prior to such expiration or termination, nor affect or impair the rights of either party arising under this Agreement prior to such expiration or termination, except as expressly provided herein.

7. WARRANTIES

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7.1 **Warranty.** Altair warrants to ECOT that Altair has all rights necessary to provide the Courseware and Content to ECOT during the Term of this Agreement consistent with the limited license granted under this agreement with respect thereto; and that the Courseware, Content and Services will substantially conform in all material respects to the descriptions of those things contained in, or referred to, in this Agreement.

9. MUTUAL INDEMNIFICATION

Each party agrees to defend, indemnify and hold the other party harmless from and against any and all claims, proceedings, demands, losses, liability costs and expenses (including but not limited to attorneys' fees, expert witness costs) arising from their acts or omissions relating to (i) any unauthorized use or dissemination of Courseware or the System, or Content, and (ii) any violation of this Agreement or of any third-party's rights, including but not limited to infringement of any patent, copyright, violation or any proprietary right, trade secret misappropriation or invasion of any privacy rights including, but not limited to, the Children's Online Privacy Protection Act or FERPA. This obligation will survive the termination of this Agreement.

10. GENERAL

- 10.1 **Governing Law.** The rights and duties of the parties will be governed by the law of the State of Ohio, excluding any choice-of-law rules that would require the application of the laws of any other jurisdiction.
- 10.2 **Assignment.** Neither party shall assign this Agreement or any of its rights or obligations hereunder without the written consent of the other, and any attempt to do so shall be void. If any such assignment is approved, this agreement shall survive as to all terms. Further, no such assignment shall relieve either party of any of its obligations hereunder.
- 10.3 **Headings.** The descriptive headings of this Agreement are intended for reference only and shall not affect the construction or interpretation of this Agreement.
- 10.4 **Waiver of Rights.** The failure of either party to insist, in any one or more instances, upon the performance of any of the terms, covenants, or conditions of this Agreement or to exercise any right hereunder, shall not be construed as a waiver or relinquishment of the future performance of any rights. No modification of this Agreement shall be binding unless executed in writing by the party to be bound thereby.
- 10.5 **Entire Agreement; Conflict.** This Agreement, together with any exhibits and schedules hereto, constitutes the complete, final and exclusive statement of the terms of the Agreement among the parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions of the parties.
- 10.6 **Confidentiality.** The receiving party of Confidential Information agrees to exercise reasonable care to protect Confidential Information from unauthorized disclosure, which care shall in no event be less than the receiving party gives to protect its own trade secrets. The receiving party may disclose Confidential Information only to its employees or agents who need to know such information and shall inform such employees, by way of policy and agreement that they are bound by obligations of confidentiality. Notwithstanding the foregoing, each party may disclose Confidential Information to the extent necessary pursuant to applicable federal, state or local law, regulation, court order or other legal process.

10.7 **Notices.** All notices, requests, demands and other communications that are required or may be given under this Agreement shall be in writing and shall be deemed to have been duly given (i) when received if personally delivered, (ii) upon electronic confirmation of receipt, if transmitted by telecopy, (iii) the day after it is sent, if sent for next day delivery to a domestic address by a nationally recognized overnight delivery service (i.e., Federal Express), and (iv) three days from the date of deposit in the U.S. mails, if sent by certified or registered U.S. mail, return receipt requested; and (v) at 9:00 a.m. local time on the next business day after sending e-mail. In each case such notice shall be addressed as follows:

ECOT
3700 S. High St.
Columbus, OH 43207
Attn: Scott Kern, Sr. V.P.
Fax: (614)

Altair Learning Management I, Inc.
P. O. Box 2886
Columbus, Ohio 43216-2886
Attn: William Lager, CEO
Fax: (614) 445-6180

10.8 **Survivorship.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed by duly authorized officers or representatives as of the date first above written.

ECOT

By: Jack McKenna
Name: JACK MCKENNA
Title: PRES BO OF DIR

Altair Learning Management I, Inc.

By: William Lager
Name: WILLIAM L. LAGER
Title: CEO

Exhibit A
LEARNING MANAGEMENT SYSTEM

Overview - the product is:	
Modular	Functions of the system are made available to each customer through a selection interface. Each feature may be globally enabled or disabled, on an individual customer basis. Disabled features do not appear in the environment, and therefore do not hamper usability. Example - a client may or may not wish to allow sending messages between users.
Customizable	Each module (if it is enabled for use by the customer) is further controlled at the "Role" level (students may have different permissions within any given function than teachers or staff). These may also be enabled or disabled by the individual customer at any time, as they see fit or as their needs change. Example - should messaging be enabled, perhaps only teachers are permitted to use it; not students.
Hierarchical	Schools may report data up to parent districts, which may report up to an ESC or a County. Districts may be permitted to manage the schools under them, or merely run reports. A school, district, or other entity may be added into or deleted from the hierarchy at any time.
Course Delivery Tools	
Course Management	Instructors may use the supplied content, create their own content or import content from other sources, and edit, delete or reorder content items within a class.
Online Grading Tools	Grade items feed directly into the Online Gradebook - including quizzes, class participation, etc. Non-graded items are also available. Students can view their gradebook in real-time. Teachers can provide different grading items to different students (within a single class) to customize the learning process for each. Instructors can manually edit or override all grades. Instructors can export the gradebook to a comma-delimited file, or in PDF format.
Flexible instructor tools	Each instructor can individually select their personal default search criteria, as well as the data content and format of the results set, and can choose the fields (and their order) as displayed in their class rosters. One click changes the view from Demographics to Grades to Activity Log to Student Journal.
Student Tracking	Instructors can view reports of student session tracking, login/logout dates and times, dropbox submissions, and discussion participation.
Assessments	Instructors can create assessments that use the following types of questions: Multiple Choice, Multiple Answer, Essay, Short Answer, True/False, or Matching. Test item banks and Assessment Banks can be created, each based on defined standards. Items and assessments may be reused by multiple teachers.
Customized Look and Feel	The system can support multiple schools or other organizational divisions on an individual server setup. Each unit can be separately branded.
Data Migration	Ability to import/export user data, grade information, activity logs, results of all reports, etc., to a printer, a PDF document, or a CSV file.
Ad-Hoc Reports	In addition to the standard reporting capabilities available within each module, staff members can easily create simple reports through a point-and-

	click interface, to produce tabular listings and summaries of collected data. Example - number of students in Mrs. Smith's Algebra class who have a grade of B or higher.
Content Sharing/Reuse	The system provides a central content repository where course content files can be stored and accessed by other instructors.

Communication Tools	
Discussion Forums	Forums may be created for an entire class, a group of students (in a project), or one-on-one with any student. Attachments may be included with posts. All forums may be moderated.
Bulletin Board	There is a school bulletin board for global announcements, and a separate bulletin board for each class taught in the system.
Calendar	Calendar system accepts global (school) postings, class (teacher) postings, and personal (student) postings, and follows the user throughout the system.
File Exchange	Users deliver assignments to teachers via the dropbox - a special kind of forum. The dropbox contains comments and attachments for review.
Internal Email	Internal only (no Internet) messaging system allows e-mail-like communication between teachers, staff and students. Internet e-mail is optionally available. Students may email individual students, instructors or groups, depending on administration-supplied rules. Students use a dynamic address book to email individuals and groups.
Online Journal	A journal is available for teachers and staff to enter comments concerning students. The students may or may not be permitted to view these comments.
Real-time Chat	There is a Java-based chat tool. Instructors can moderate chats, monitor chats, suspend students from the chat rooms and view chat logs. The system creates archive logs for all chat rooms.
Whiteboard	The software supports a whiteboard. The whiteboard supports image uploading and annotation.

Student Involvement Tools	
Orientation/Help	An interactive training system is available online to all users, along with a more traditional manual-style "Users' Guide".
User Homepage	All users have a personal home page that lists new email, all courses in which the user is either enrolled or teaching, all course and system-wide events by date from their personal calendar, as well as school announcements.
<u>Groupwork</u>	Instructors can assign students to group projects through a specialized discussion forum.

Administration Tools	
Course Authorization	Each school may create custom user roles, and assign separate permissions to each. Example - a school could create a "Truancy Officer" role, and allow them access to only contact information and activity records (seat time), but not grade information.
Registration	Administrators can batch add students to an organization, and to one or more courses, using a delimited text file. The software also supports

	optional customized integration with other SIS or portal systems. Administrators can transfer student information bi-directionally between the system and an SIS.
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Hardware/Software	
Client Browser Required	The LMS core learning system is Internet-based and is delivered via a Web Browser (Internet Explorer or Mozilla/Firefox) and “standard” plug-ins (Flash, Shockwave, etc). The e-learning system does not require any special software to be loaded onto a user’s computer. Note: certain content (Ex.- foreign language classes) or optional offerings (Whiteboard, etc.) may require client software to be installed (Java, or a movie player).
Hosted Services	The product provider offers a hosted system that includes 24x7x365 monitoring, intrusion detection, nightly backups, and service level agreements on a network of high-performance, fault-tolerant servers with fail-over capability utilizing redundant Tier 1 network connections.
Server/Database Requirements	The product and all content is housed on the product provider’s servers, and no server investment or database requirements are required on the part of the customer.

LICENSE AGREEMENT

This Agreement ("Agreement") is made and entered into as of this 1st day of September, 2005 ("Effective Date"), by and between **Altair Learning Management I, Inc.**, having an address of P.O. Box 2886, Columbus, OH 43216-2886 ("Altair") and **ECOT**, having an address of 3700 S. High Street, Columbus, OH 43207.

In consideration of the following mutual covenants and agreements, the parties agree as follows:

1. DEFINITIONS

1.1 "**Authorized User**" means an individual student of Electronic Classroom of Tomorrow ("ECOT") or an ECOT faculty or staff member authorized by Altair to access the Courseware.

1.2 "**Assessment Item Collection**" means the assessment items relating to the Courseware normally provided by Class.com to its licensees.

1.3 "**Confidential Information**" means any non-public information about a party, including, without limitation, the party's business, customers, product information, trade secrets, finances and financial condition, or other information that the disclosing party desires to protect against unrestricted disclosure by the receiving party.

1.4 "**Courseware**" means the Class.com Internet-accessible and/or multi-media educational courses or curriculum listed in Exhibit A hereto and any and all related graphics and instructions.

1.5 "**Class.com IP**" means the Courseware, the Class.com website at www.class.com, the System, and all other intellectual property directly related to the foregoing, including all registered or common-law trademarks, service marks, copyrights, trade secrets (as that term is defined in the Uniform Trade Secrets Act), patents, and patent applications.

1.6 "**FTE Student Enrollments**" means the number of full time equivalent (FTE) high school students reported by ECOT to the state of Ohio for state funding purposes, and FTE middle school students who utilize the Courseware.

1.7 "**System**" means Class.com software and interfaces capable of delivering Courseware over the Internet with all modifications, enhancements and improvements thereof.

1.8 "**Services**" means any consulting, educational, operational, training, maintenance and support services provided by Class.com to Altair as set forth herein.

2. LICENSE GRANT

2.1 **Limited License.** Subject to the terms and conditions of this Agreement, and as set forth in the Schedule (Exhibit A), Altair grants ECOT a limited non-exclusive, non-transferable license to access and use the Courseware and to permit its Authorized Users to access and use the Courseware.

2.2 **Rights of Class.com and Altair.** Class.com and its third party licensors retain exclusive ownership, right, title and interest in any and all Class.com Intellectual Property ("IP"), Courseware, and the System. The rights of Class.com and its third party licensors cover all reproductions, corrections, modifications, enhancements and improvements of Class.com IP, Courseware, and the System. ECOT shall not remove, modify or destroy any Courseware, copyright, trade secret, proprietary or confidential legends or markings placed upon or contained or embedded within the

Courseware. ECOT agrees to maintain in confidence all materials and documentation relating to Class.com IP, Courseware and the System and any modifications thereto other than as required by federal or state disclosure laws and corporate reporting requirements. ECOT shall use reasonable efforts to prevent the infringement of Class.com and its third party licensors' Class.com IP, Courseware and the System. ECOT is strictly prohibited from selling or otherwise transferring Courseware or content of any kind related thereto and from using Courseware or the System in a manner that is libelous, defamatory, obscene, infringing, abusive or illegal.

2.3 Rights of ECOT related to Courseware. ECOT shall have access during the term of this Agreement to certain features of the System enabling ECOT to add data or other content in framesets outside the Courseware shell. ECOT, in consideration of accepting said features of the System, agrees that such additional data or subject matter shall be added only after ECOT shall have obtained all necessary and appropriate copyright permissions, authorizations and licenses for publication and that any such additional data or subject matter be clearly labeled as a creation or work of ECOT and not of Class.com or its licensors. ECOT shall be solely responsible for any and all such additional data or subject matter created or developed by ECOT as contemplated herein.

2.4 Restrictions Related to Courseware. To the extent that ECOT is granted rights to the Courseware in conjunction with this Agreement, ECOT shall not except as provided herein (i) copy the Courseware in whole or in part, except (a) as required within the Learn.com Learning Management System to set up course sections in a teacher's sub-Learning Center or to make Courseware accessible to ECOT students; (ii) adapt, alter, create derivative works based on, modify, or translate the Courseware in whole or in part; (iii) sell, assign, distribute, lease, market, rent, sublicense, transfer, make available, or otherwise grant rights to the Courseware in whole or in part to any third party in any form; (iv) electronically transfer the Courseware in whole or in part from one computer to another over a network or enable any timesharing or service bureau use of the Courseware; (v) obscure, remove or alter any of the trademarks, trade names, logos, patent or copyright notices or markings to the Courseware; (vi) add any other notices or markings to the Courseware or any portion thereof; (vii) reverse engineer, decompile, or disassemble any component of the Courseware or otherwise obtain or attempt to obtain the source code for the Courseware.

3. MAINTENANCE AND SUPPORT

3.1 Maintenance Services. At ECOT's request, any Class.com Content revisions or corrections made by Class.com ("Updates") will be provided to Altair by Class.com for use pursuant to the terms of this Agreement and uploaded annually via FTP at such times as Altair may request. Altair shall be responsible for converting Updates for use on the Altair LMS and for creating course sections, providing student access, and all systems administration of the Courseware on the Altair LMS, including primary academic and technical support thereof, and for integrating any content, assessments or modifications which it may develop or create with any Updates provided by Class.com to prevent such Updates from over-writing any Altair customized content developed by Altair.

3.2 Support Services and Consulting. Altair will arrange for Class.com to provide ECOT with second-level academic and technical support of the Courseware through its Customer Care Desk during the hours of 8:00 a.m. to 5:00 p.m. CST, Monday through Friday.

The academic support contacts identified below are the only individuals who may contact Class.com regarding academic support services. ECOT may change its academic support contact as long as Class.com is informed in writing and the list does not exceed one contact person.

Name: Thomas Fletcher
Phone: 614-492-8884
Fax: 614-492-8894
E-mail: Thomas.fletcher@ecotoh.net

Name: Vernell Bristow
Phone: 614-492-8884
Fax: 614-492-8894
Email: vernell.Bristow@ecotoh.net

4. FEES; PAYMENT

4.1 **Fees During the Initial Term.** In consideration of the rights granted to ECOT hereunder, ECOT shall pay to Altair a fee of \$25 per high school student per month based on ECOT's high school student count at the end of each prior month. Payments must be made within 30 days of receipt of an invoice.

5. RECORD KEEPING AND AUDIT

5.1 **ECOT Responsibility.** It is ECOT's responsibility to keep accurate records regarding the number of enrollments and the usage of the Courseware for purposes of compliance with this Agreement.

5.2 **Audit.** For the sole purpose of ensuring compliance with this Agreement and the Agreement between Altair and Class.com, Altair shall have the right, at its expense, to audit ECOT's use of the Courseware and student enrollment records upon at least seven (7) days advance notice. In connection therewith, except as may be prohibited by FERPA, ECOT shall provide Altair, who may then provide Class.com, with such enrollment information as Altair and/or Class.com may request. In the event of any underpayment of the fees payable hereunder, ECOT shall pay within 14 days of notice the difference to Altair.

6. TERM; TERMINATION

6.1 **Term.** This Agreement shall commence as of the Effective Date and shall continue until June 30, 2006 (the "Initial Term").

6.2 **Default.** Either party may, at its option, terminate this Agreement if a material default by the other party is not corrected within sixty (60) days after receipt of a written notice of the default.

(a) **Default by ECOT-** If the agreement is terminated due to a material breach by ECOT, then ECOT shall not contract with Class.com or any of its third-party licensors for two (2) years after the date of cancellation.

(b) **Default by Altair with Class.com-** A cancellation of the contract between Altair and Class.com due to a material breach by Altair, will also be considered a material breach with respect to the contract with ECOT. If this occurs, ECOT, at its option, may contract with Class.com or a third-party licensor for continued use of Class.com. Altair shall pay the difference between the new contracted price and the price of the original contract between ECOT and Altair.

6.3 **Effect of Expiration or Termination.** Upon expiration or termination of this Agreement, ECOT shall have no further right to exercise the rights licensed hereunder and shall (i) immediately discontinue all use of the Courseware; (ii) remove the Courseware from its server; (iii) destroy all copies of the Courseware; and (iv) certify in writing to Altair, within thirty (30) days of the expiration or termination of this Agreement, that ECOT has complied with the foregoing. The expiration or termination of the Agreement shall not relieve either party of any obligation or liability accrued hereunder prior to such expiration or termination, nor affect or impair the rights of either party arising under this Agreement prior to such expiration or termination, except as expressly provided herein.

7. WARRANTIES

7.1 **Warranty.** Altair warrants to ECOT that Altair, through its license with Class.com, and/or that Class.com: (i) has all rights necessary to provide the Class.com IP to ECOT during the Initial Term of this Agreement consistent with the limited license granted under this agreement with respect thereto; (ii) has sufficient rights to use the trademarks and trade names “CLASS” and “Class.com”; and (iii) Class.com IP and Services will substantially conform in all material respects to the descriptions of those things contained in, or referred to, in this Agreement.

9. MUTUAL INDEMNIFICATION

Each party agrees to defend, indemnify and hold the other party harmless from and against any and all claims, proceedings, demands, losses, liability costs and expenses (including but not limited to attorneys’ fees, expert witness costs) arising from their acts or omissions relating to (i) any unauthorized use or dissemination of the Class.com IP, Courseware or the System, and (ii) any violation of this Agreement or of any third-party’s rights, including but not limited to infringement of any patent, copyright, violation or any proprietary right, trade secret misappropriation or invasion of any privacy rights including, but not limited to, the Children’s Online Privacy Protection Act or FERPA. This obligation will survive the termination of this Agreement.

10. GENERAL

- 10.1 **Governing Law.** The rights and duties of the parties will be governed by the law of the State of Ohio, excluding any choice-of-law rules that would require the application of the laws of any other jurisdiction.
- 10.2 **Assignment.** Neither party shall assign this Agreement or any of its rights or obligations hereunder without the written consent of the other, and any attempt to do so shall be void. If any such assignment is approved, this agreement shall survive as to all terms. Further, no such assignment shall relieve either party of any of its obligations hereunder.
- 10.3 **Headings.** The descriptive headings of this Agreement are intended for reference only and shall not affect the construction or interpretation of this Agreement.
- 10.4 **Waiver of Rights.** The failure of either party to insist, in any one or more instances, upon the performance of any of the terms, covenants, or conditions of this Agreement or to exercise any right hereunder, shall not be construed as a waiver or relinquishment of the future performance of any rights. No modification of this Agreement shall be binding unless executed in writing by the party to be bound thereby.
- 10.5 **Entire Agreement; Conflict.** This Agreement, together with any exhibits and schedules hereto, constitutes the complete, final and exclusive statement of the terms of the Agreement among the parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions of the parties.
- 10.6 **Confidentiality.** The receiving party of Confidential Information agrees to exercise reasonable care to protect Confidential Information from unauthorized disclosure, which care shall in no event be less than the receiving party gives to protect its own trade secrets. The receiving party may disclose Confidential Information only to its employees or agents who need to know such information and shall inform such employees, by way of policy and agreement that they

are bound by obligations of confidentiality. Notwithstanding the foregoing, each party may disclose Confidential Information to the extent necessary pursuant to applicable federal, state or local law, regulation, court order or other legal process.

10.7 **Notices.** All notices, requests, demands and other communications that are required or may be given under this Agreement shall be in writing and shall be deemed to have been duly given (i) when received if personally delivered, (ii) upon electronic confirmation of receipt, if transmitted by telecopy, (iii) the day after it is sent, if sent for next day delivery to a domestic address by a nationally recognized overnight delivery service (i.e., Federal Express), and (iv) three days from the date of deposit in the U.S. mails, if sent by certified or registered U.S. mail, return receipt requested; and (v) at 9:00 a.m. local time on the next business day after sending e-mail. In each case such notice shall be addressed as follows:

ECOT
3700 S. High St.
Columbus, OH 43207
Attn: Scott Kern, Sr. V.P.
Fax: (614)

Altair Learning Management I, Inc.
P. O. Box 2886
Columbus, Ohio 43216-2886
Attn: William Lager, CEO
Fax: (614) 445-6180

10.8 **Survivorship.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed by duly authorized officers or representatives as of the date first above written.

ECOT

By: Jack M. Kern
Name: JACK MCKENNA
Title: PRES BO of DIR

Altair Learning Management I, Inc.

By: William Lager
Name: WILLIAM L. LAGER
Title: CEO

Exhibit A

Mathematics

- Algebra 1A
- Algebra 1B
- Algebra 2A
- Algebra 2B
- Pre-algebra 1A
- Pre-algebra 1B
- Geometry 1A
- Geometry 1B
- Precalculus 1A
- Precalculus 1B

Science

- Biology 1A
- Biology 1B
- Chemistry 1A
- Chemistry 1B
- Health Science 1A
- Health Science 1B
- Physics 1A
- Physics 1B
- Life Science — Oceanography

Language Arts

- Advanced Composition
- American Literature 1A
- American Literature 1B
- Beginning Composition
- World Literature

Language Learning

- Spanish 1A
- Spanish 1B
- Spanish 2A
- Spanish 2B
- Conversational English: Everyday English
- Conversational English: Explore Your World

Business and Technology

- Macroeconomics
- Introduction to Technology
- Business Communication
- Business and Personal Protocol
- Business and Consumer Math

Social Studies

- American Government

- American History 1A
- American History 1B
- World Civilizations 1A
- World Civilizations 1B
- Anthropology
- Civics
- Psychology

Skills Development

- Career Planning
- Study Skills
- Personal Economics and Finance
- Reading Comprehension
- Math Skills Review
- Essential Math

LICENSE AGREEMENT

This Agreement (“Agreement”) is made and entered into as of this 1st day of July, 2006 (“Effective Date”), by and between **Altair Learning Management I, Inc.**, having an address of P.O. Box 2886, Columbus, OH 43216-2886 (“Altair”) and **ECOT**, having an address of 3700 S. High Street, Columbus, OH 43207.

In consideration of the following mutual covenants and agreements, the parties agree as follows:

I. DEFINITIONS

1.1 **“Authorized User”** means an individual student of Electronic Classroom of Tomorrow (“ECOT”) or an ECOT faculty or staff member authorized by Altair to access the Courseware.

1.2 **“Assessment Item Collection”** means the assessment items relating to the Courseware normally provided in connection with Content.

1.3 **“Confidential Information”** means any non-public information about a party, including, without limitation, the party’s business, customers, product information, trade secrets, finances and financial condition, or other information that the disclosing party desires to protect against unrestricted disclosure by the receiving party.

1.4 **“Courseware”** means the kindergarten through twelfth grade internet-accessible and/or multi-media educational array of courses embodied in the learning management system (the “Altair LMS”) sufficiently comprehensive to satisfy ECOT’s core curriculum needs and any and all related software, graphics and instructions, and all Content provided therein and thereafter.

1.5 **“Content”** means, from whatever source, subject to the restrictions set forth herein, the cumulative substantive information, data, graphics, and other material provided in the context of the various course subjects, whatever the source, as well as any and all information from any related website, whether or not linked to the System, and any and all intellectual property associated therewith, including all registered or common-law trademarks, service marks, copyrights, trade secrets (as that term is defined in the Uniform Trade Secrets Act), and patented or patentable subject matter.

1.6 **“FTE Student Enrollments”** means the number of full time equivalent (FTE) K-12 school students reported by ECOT to the state of Ohio for state funding purposes, and FTE K-12 school students who utilize the Courseware.

1.7 **“System”** means software and interfaces capable of delivering Courseware and Content over the Internet with all modifications, enhancements and improvements thereof.

1.8 **“Services”** means any consulting, educational, operational, training, maintenance and support services provided by Altair, whether or not provided directly from Altair or through Altair from any other person or entity.

1.9 **“Proprietary Information”** means any and all software, firmware, content, materials, documents, designs, strategies, ideas, concepts, inventions, trade secrets, “know-how” and the like, and “Altair Proprietary Information” means all Proprietary Information provided hereunder by Altair, whether or not owned by Altair, or owned by others and provided by Altair, and whether embodied in

or through the Courseware, System, Content, Services, or through written material, software, firmware, courseware, content, or any other form

1.10 **“Management Agreement”** means the agreement governing the provision of management services by Altair to ECOT. This Agreement is entered into between the parties subject to the terms of the Management Agreement between them, entered into contemporaneously herewith. Except as otherwise specifically stated herein, the definitions set forth in the Management Agreement shall be applicable in the context of this License Agreement.

2. LICENSE GRANT

2.1 **Limited License.** Subject to the terms and conditions of this Agreement, and as set forth in the Schedule (Exhibit A), Altair grants ECOT a limited non-exclusive, non-transferable license to access and use the Courseware and to permit its Authorized Users to access and use the Courseware.

2.2 **Rights of Altair in Altair Proprietary Information.** Altair Proprietary Information is and shall remain the under the exclusive control of Altair for purposes hereof, and nothing herein shall in any way alter any rights of ownership therein. Except for the specific rights of use granted in this License Agreement, ECOT shall have no right of ownership whatsoever in Altair Proprietary Information, and shall have no other rights of use for any other purpose except as provided herein, and no rights to alter, publish, copy, transmit or otherwise disclose Altair Proprietary Information, except to the extent of its use in implementation of this Agreement.

In addition to the other restrictions explicitly or impliedly identified herein, ECOT shall not remove, modify or destroy any Courseware, or any copyright, trade secret, proprietary, confidentiality or other legends or markings placed upon or contained or embedded within the Courseware, System or Content. ECOT agrees to maintain in confidence all materials and documentation relating to Altair Proprietary Information and any modifications thereto other than as required by federal or state disclosure laws and corporate reporting requirements. ECOT shall use reasonable efforts to prevent the infringement any intellectual property rights in Altair Proprietary Information. ECOT is strictly prohibited from selling or otherwise transferring Altair Proprietary Information and from using Courseware, Content or the System in a manner that is libelous, defamatory, obscene, infringing, abusive or illegal.

2.3 **Rights of ECOT related to Courseware.** ECOT shall have access during the term of this Agreement to certain features of the System enabling ECOT to add data or other content in framesets outside the Courseware shell. ECOT, in consideration of accepting said features of the System, agrees that such additional data or subject matter shall be added only after ECOT shall have obtained all necessary and appropriate copyright permissions, authorizations and licenses for publication and that any such additional data or subject matter be clearly labeled as a creation or work of ECOT and not of Altair or any other entity providing Courseware, Content or Services on behalf of Altair hereunder. ECOT shall be solely responsible for any and all such additional data or subject matter created or developed by ECOT as contemplated herein.

2.4 **Restrictions Related to Courseware.** To the extent that ECOT is granted rights to the Courseware in conjunction with this Agreement, ECOT shall not, except as provided herein, (i) copy the Courseware in whole or in part, except (a) as required within the Learning Management System, to set up course sections in a teacher's sub-Learning Center or to make Courseware accessible to ECOT students; (ii) adapt, alter, create derivative works based on, modify, or translate the Courseware in whole or in part; (iii) sell, assign, distribute, lease, market, rent, sublicense, transfer, make available, or otherwise grant rights to the Courseware in whole or in part to any third party in any form; (iv) electronically transfer the Courseware in whole or in part from one computer to

another over a network or enable any timesharing or service bureau use of the Courseware; (v) obscure, remove or alter any of the trademarks, trade names, logos, patent or copyright notices or markings to the Courseware; (vi) add any other notices or markings to the Courseware or any portion thereof; (vii) reverse engineer, decompile, or disassemble any component of the Courseware or otherwise obtain or attempt to obtain the source code for the Courseware.

3. MAINTENANCE AND SUPPORT

3.1 Maintenance Services. At ECOT's request, any Content revisions or corrections made by or on behalf of Altair ("Updates") will be provided by or on behalf of Altair for use pursuant to the terms of this Agreement and uploaded annually via FTP at such times as Altair may direct. Altair shall be responsible for converting Updates for use on the Altair LMS and for creating course sections, providing student access, and all systems administration of the Courseware on the Altair LMS, including primary academic and technical support thereof, and for integrating any content, assessments or modifications which it may develop or create with any Updates provided by or on behalf of Altair to prevent such Updates from over-writing any Altair customized content developed by Altair.

3.2 Sources of Content. Altair shall provide Content from class.com, and such other source as may be deemed appropriate for compatibility with the Altair LMS and the Courseware, and which is at least equivalent to class.com in terms of conformity with the State of Ohio curriculum requirements. Altair may augment or replace Content based on any changes in commercial availability of class.com or other Content in use, or as may be deemed appropriate by Altair to meet the quality standards of ECOT. In any case, any additional or replacement of Content is permissible hereunder only with the advance acceptance and approval of ECOT so as to confirm its quality and compliance with the standards of the State of Ohio.

3.3 Support Services and Consulting. Altair itself or through others on its behalf will arrange to provide ECOT with second-level academic and technical support of the Courseware through its Customer Care Desk during the hours of 8:00 a.m. to 5:00 p.m. CST, Monday through Friday.

The academic support contacts identified below are the only individuals who may contact any entity providing such support on behalf of Altair regarding academic support services. ECOT may change its academic support contact as long as Altair or the entity providing support on its behalf is informed in writing and the list does not exceed one contact person.

Name: Thomas Fletcher
Phone: 614-492-8884
Fax: 614-492-8894
E-mail: Thomas.fletcher@ecotoh.net

Name: Vernell Bristow
Phone: 614-492-8884
Fax: 614-492-8894
Email: vernell.Bristow@ecotoh.net

4. FEES; PAYMENT

4.1 Fees During the Term. In consideration of the rights granted to ECOT hereunder, ECOT shall pay Altair an license fee based on each school year, the fee being equal to 16% percent of all funds received by ECOT, subject to the limitation set forth below. The fee shall be paid to Altair as and when governmental school aid, grants, or other funding payments are received, and within thirty (30) days from ECOT's receipts. Notwithstanding anything contained in this section to the contrary, Altair's fee shall not be based on any governmental school aid or grants where such payment is or would be prohibited by law or by the specific terms of the

aid or grant. Altair's fee shall be reduced by whatever amount is appropriate to ensure that the total combined fees paid to Altair by ECOT under this license and the Management Agreement in any fiscal year do not exceed 20% of all non-restricted funds received by ECOT.

5. RECORD KEEPING AND AUDIT

5.1 ECOT Responsibility. It is ECOT's responsibility to keep accurate records regarding the number of enrollments and the usage of the Courseware for purposes of compliance with this Agreement.

5.2 Audit. For the sole purpose of ensuring compliance with this Agreement and any Agreement between Altair and any other entity providing Content or any other material, support or services hereunder, Altair shall have the right, at its expense, to audit ECOT's use of the Courseware and student enrollment records upon at least seven (7) days advance notice. In connection therewith, except as may be prohibited by FERPA, ECOT shall provide Altair, who may then provide any other entity providing Content or any other material, support or services hereunder, with such enrollment information as Altair and/or its designee may request. In the event of any underpayment of the fees payable hereunder, ECOT shall pay within 14 days of notice the difference to Altair.

6. TERM; TERMINATION

6.1 Term. This Agreement shall commence as of the Effective Date and shall continue until June 30, 2009. (the "Initial Term").

6.2 Default. Either party may, at its option, terminate this Agreement if a material default by the other party is not corrected within sixty (60) days after receipt of a written notice of the default.

(a) **Default by ECOT-** If the agreement is terminated due to a material breach by ECOT, then ECOT shall not contract with any other entity providing the specific Content that is the subject of this agreement, or any other material, support or services hereunder for two (2) years after the date of cancellation.

(b) **Default by Altair -** A cancellation of a contract due to a material breach by Altair between Altair and any other entity providing Courseware, Content, Services or any other material, support or services hereunder, which cancellation cannot be mitigated and thereby results in the inability of Altair to deliver Courseware or Content hereunder will be considered a material breach with respect to the contract with ECOT. If this occurs, ECOT, at its option, and as its sole remedy, may contract directly with the canceling entity or any other entity to allow for continued access by ECOT to such Courseware, Content, Services or other material. Altair shall pay the difference between the new contracted price and the price of the original contract between ECOT and Altair.

6.3 Effect of Expiration or Termination. Upon expiration or termination of this Agreement, ECOT shall have no further right to exercise the rights licensed hereunder and shall (i) immediately discontinue all use of the Courseware; (ii) remove the Courseware from its server; (iii) destroy all copies of the Courseware; and (iv) certify in writing to Altair, within thirty (30) days of the expiration or termination of this Agreement, that ECOT has complied with the foregoing. The expiration or termination of the Agreement shall not relieve either party of any obligation or liability accrued hereunder prior to such expiration or termination, nor affect or impair the rights of either party arising under this Agreement prior to such expiration or termination, except as expressly provided herein.

7. WARRANTIES

{DHD3285.DOC;1}

Page 4

7.1 **Warranty.** Altair warrants to ECOT that Altair has all rights necessary to provide the Courseware and Content to ECOT during the Term of this Agreement consistent with the limited license granted under this agreement with respect thereto; and that the Courseware, Content and Services will substantially conform in all material respects to the descriptions of those things contained in, or referred to, in this Agreement.

9. MUTUAL INDEMNIFICATION

Each party agrees to defend, indemnify and hold the other party harmless from and against any and all claims, proceedings, demands, losses, liability costs and expenses (including but not limited to attorneys' fees, expert witness costs) arising from their acts or omissions relating to (i) any unauthorized use or dissemination of Courseware or the System, or Content, and (ii) any violation of this Agreement or of any third-party's rights, including but not limited to infringement of any patent, copyright, violation or any proprietary right, trade secret misappropriation or invasion of any privacy rights including, but not limited to, the Children's Online Privacy Protection Act or FERPA. This obligation will survive the termination of this Agreement.

10. GENERAL

- 10.1 **Governing Law.** The rights and duties of the parties will be governed by the law of the State of Ohio, excluding any choice-of-law rules that would require the application of the laws of any other jurisdiction.
- 10.2 **Assignment.** Neither party shall assign this Agreement or any of its rights or obligations hereunder without the written consent of the other, and any attempt to do so shall be void. If any such assignment is approved, this agreement shall survive as to all terms. Further, no such assignment shall relieve either party of any of its obligations hereunder.
- 10.3 **Headings.** The descriptive headings of this Agreement are intended for reference only and shall not affect the construction or interpretation of this Agreement.
- 10.4 **Waiver of Rights.** The failure of either party to insist, in any one or more instances, upon the performance of any of the terms, covenants, or conditions of this Agreement or to exercise any right hereunder, shall not be construed as a waiver or relinquishment of the future performance of any rights. No modification of this Agreement shall be binding unless executed in writing by the party to be bound thereby.
- 10.5 **Entire Agreement; Conflict.** This Agreement, together with any exhibits and schedules hereto, constitutes the complete, final and exclusive statement of the terms of the Agreement among the parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions of the parties.
- 10.6 **Confidentiality.** The receiving party of Confidential Information agrees to exercise reasonable care to protect Confidential Information from unauthorized disclosure, which care shall in no event be less than the receiving party gives to protect its own trade secrets. The receiving party may disclose Confidential Information only to its employees or agents who need to know such information and shall inform such employees, by way of policy and agreement that they are bound by obligations of confidentiality. Notwithstanding the foregoing, each party may disclose Confidential Information to the extent necessary pursuant to applicable federal, state or local law, regulation, court order or other legal process.

10.7 **Notices.** All notices, requests, demands and other communications that are required or may be given under this Agreement shall be in writing and shall be deemed to have been duly given (i) when received if personally delivered, (ii) upon electronic confirmation of receipt, if transmitted by telecopy, (iii) the day after it is sent, if sent for next day delivery to a domestic address by a nationally recognized overnight delivery service (i.e., Federal Express), and (iv) three days from the date of deposit in the U.S. mails, if sent by certified or registered U.S. mail, return receipt requested; and (v) at 9:00 a.m. local time on the next business day after sending e-mail. In each case such notice shall be addressed as follows:

ECOT
3700 S. High St.
Columbus, OH 43207
Attn: Scott Kern, Sr. V.P.
Fax: (614)

Altair Learning Management I, Inc.
P. O. Box 2886
Columbus, Ohio 43216-2886
Attn: William Lager, CEO
Fax: (614) 445-6180

10.8 **Survivorship.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed by duly authorized officers or representatives as of the date first above written.

ECOT

By: Jack McKenna
Name: JACK MCKENNA
Title: PRES BO OF DIR

Altair Learning Management I, Inc.

By: William Lager
Name: WILLIAM L. LAGER
Title: CEO

Exhibit A
LEARNING MANAGEMENT SYSTEM

Overview - the product is:

Modular	Functions of the system are made available to each customer through a selection interface. Each feature may be globally enabled or disabled, on an individual customer basis. Disabled features do not appear in the environment, and therefore do not hamper usability. Example - a client may or may not wish to allow sending messages between users.
Customizable	Each module (if it is enabled for use by the customer) is further controlled at the "Role" level (students may have different permissions within any given function than teachers or staff). These may also be enabled or disabled by the individual customer at any time, as they see fit or as their needs change. Example - should messaging be enabled, perhaps only teachers are permitted to use it; not students.
Hierarchical	Schools may report data up to parent districts, which may report up to an ESC or a County. Districts may be permitted to manage the schools under them, or merely run reports. A school, district, or other entity may be added into or deleted from the hierarchy at any time.

Course Delivery Tools

Course Management	Instructors may use the supplied content, create their own content or import content from other sources, and edit, delete or reorder content items within a class.
Online Grading Tools	Grade items feed directly into the Online Gradebook - including quizzes, class participation, etc. Non-graded items are also available. Students can view their gradebook in real-time. Teachers can provide different grading items to different students (within a single class) to customize the learning process for each. Instructors can manually edit or override all grades. Instructors can export the gradebook to a comma-delimited file, or in PDF format.
Flexible instructor tools	Each instructor can individually select their personal default search criteria, as well as the data content and format of the results set, and can choose the fields (and their order) as displayed in their class rosters. One click changes the view from Demographics to Grades to Activity Log to Student Journal.
Student Tracking	Instructors can view reports of student session tracking, login/logout dates and times, dropbox submissions, and discussion participation.
Assessments	Instructors can create assessments that use the following types of questions: Multiple Choice, Multiple Answer, Essay, Short Answer, True/False, or Matching. Test item banks and Assessment Banks can be created, each based on defined standards. Items and assessments may be reused by multiple teachers.
Customized Look and Feel	The system can support multiple schools or other organizational divisions on an individual server setup. Each unit can be separately branded.
Data Migration	Ability to import/export user data, grade information, activity logs, results of all reports, etc., to a printer, a PDF document, or a CSV file.
Ad-Hoc Reports	In addition to the standard reporting capabilities available within each module, staff members can easily create simple reports through a point-and-

	click interface, to produce tabular listings and summaries of collected data. Example - number of students in Mrs. Smith's Algebra class who have a grade of B or higher.
Content Sharing/Reuse	The system provides a central content repository where course content files can be stored and accessed by other instructors.

Communication Tools	
Discussion Forums	Forums may be created for an entire class, a group of students (in a project), or one-on-one with any student. Attachments may be included with posts. All forums may be moderated.
Bulletin Board	There is a school bulletin board for global announcements, and a separate bulletin board for each class taught in the system.
Calendar	Calendar system accepts global (school) postings, class (teacher) postings, and personal (student) postings, and follows the user throughout the system.
File Exchange	Users deliver assignments to teachers via the dropbox - a special kind of forum. The dropbox contains comments and attachments for review.
Internal Email	Internal only (no Internet) messaging system allows e-mail-like communication between teachers, staff and students. Internet e-mail is optionally available. Students may email individual students, instructors or groups, depending on administration-supplied rules. Students use a dynamic address book to email individuals and groups.
Online Journal	A journal is available for teachers and staff to enter comments concerning students. The students may or may not be permitted to view these comments.
Real-time Chat	There is a Java-based chat tool. Instructors can moderate chats, monitor chats, suspend students from the chat rooms and view chat logs. The system creates archive logs for all chat rooms.
Whiteboard	The software supports a whiteboard. The whiteboard supports image uploading and annotation.

Student Involvement Tools	
Orientation/Help	An interactive training system is available online to all users, along with a more traditional manual-style "Users' Guide".
User Homepage	All users have a personal home page that lists new email, all courses in which the user is either enrolled or teaching, all course and system-wide events by date from their personal calendar, as well as school announcements.
<u>Groupwork</u>	Instructors can assign students to group projects through a specialized discussion forum.

Administration Tools	
Course Authorization	Each school may create custom user roles, and assign separate permissions to each. Example - a school could create a "Truancy Officer" role, and allow them access to only contact information and activity records (seat time), but not grade information.
Registration	Administrators can batch add students to an organization, and to one or more courses, using a delimited text file. The software also supports

	optional customized integration with other SIS or portal systems. Administrators can transfer student information bi-directionally between the system and an SIS.
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Hardware/Software	
Client Browser Required	The LMS core learning system is Internet-based and is delivered via a Web Browser (Internet Explorer or Mozilla/Firefox) and “standard” plug-ins (Flash, Shockwave, etc). The e-learning system does not require any special software to be loaded onto a user’s computer. Note: certain content (Ex.- foreign language classes) or optional offerings (Whiteboard, etc.) may require client software to be installed (Java, or a movie player).
Hosted Services	The product provider offers a hosted system that includes 24x7x365 monitoring, intrusion detection, nightly backups, and service level agreements on a network of high-performance, fault-tolerant servers with fail-over capability utilizing redundant Tier 1 network connections.
Server/Database Requirements	The product and all content is housed on the product provider’s servers, and no server investment or database requirements are required on the part of the customer.

LICENSE AGREEMENT

This Agreement ("Agreement") is made and entered into as of this 1st day of May, 2009 ("Effective Date"), by and between **IQ Innovations, LLC Learning Management I, Inc.**, having an address of P.O. Box 2886, Columbus, OH 43216-2886 ("IQ Innovations, LLC") and **ECOT**, having an address of 3700 S. High Street, Columbus, OH 43207.

In consideration of the following mutual covenants and agreements, the parties agree as follows:

1. DEFINITIONS

1.1 **"Authorized User"** means an individual student of Electronic Classroom of Tomorrow ("ECOT") or an ECOT faculty or staff member authorized by IQ Innovations, LLC to access the Courseware.

1.2 **"Assessment Item Collection"** means the assessment items relating to the Courseware normally provided in connection with Content.

1.3 **"Confidential Information"** means any non-public information about a party, including, without limitation, the party's business, customers, product information, trade secrets, finances and financial condition, or other information that the disclosing party desires to protect against unrestricted disclosure by the receiving party.

1.4 **"IQ-ity"** is the learning management system (or LMS) that administers instructor-led and e-learning courses and keeps track of student progress. IQ-ity includes features such as those included in Exhibit "A."

1.5 **"Content"** means the kindergarten through twelfth grade internet-accessible and/or multi-media educational array of courses, whatever the source, embodied in IQ-ity sufficiently comprehensive to satisfy ECOT's core curriculum needs. This includes the cumulative substantive information, data, graphics, and other material provided in the context of the various course subjects, whatever the source, as well as any and all information from any related website, whether or not linked to the System, and any and all intellectual property associated therewith, including all registered or common-law trademarks, service marks, copyrights, trade secrets (as that term is defined in the Uniform Trade Secrets Act), and patented or patentable subject matter.

1.6 **"Services"** means any, operational, training, maintenance and support services provided by IQ Innovations, LLC, whether or not provided directly from IQ Innovations, LLC or through IQ Innovations, LLC from any other person or entity.

1.7 **"Proprietary Information"** means any and all software, firmware, content, materials, documents, designs, strategies, ideas, concepts, inventions, trade secrets, "know-how" and the like, and "IQ Innovations, LLC Proprietary Information" means all Proprietary Information provided hereunder by IQ Innovations, LLC, whether or not owned by IQ Innovations, LLC, or owned by others and provided by IQ Innovations, LLC, and whether embodied in or through the Courseware, System, Content, Services, or through written material, software, firmware, courseware, content, or any other form.

2. LICENSE GRANT

2.1 **Limited License.** Subject to the terms and conditions of this Agreement, IQ Innovations, LLC grants ECOT a limited non-exclusive, license to access and use the Courseware and to permit its

Authorized Users to access and use the Courseware. The license may be transferable with written permission from IQ Innovations.

2.2 Rights of IQ Innovations, LLC in its Proprietary Information. IQ Innovations, LLC Proprietary Information is and shall remain the under the exclusive control of IQ Innovations, LLC for purposes hereof, and nothing herein shall in any way alter any rights of ownership therein. Except for the specific rights of use granted in this License Agreement, or as otherwise stated herein, ECOT shall have no right of ownership whatsoever in IQ Innovations, LLC Proprietary Information, and shall have no other rights of use for any other purpose except as provided herein, and no rights to alter, publish, copy, transmit or otherwise disclose IQ Innovations, LLC Proprietary Information, except to the extent of its use in implementation of this Agreement. ECOT may request customization of the IQ-ity system to fit ECOT's unique needs, including, but not limited to added features. If such customization is approved by IQ Innovations, LLC, ECOT shall contract with IQ Innovations, LLC's vendor of choice to create and implement the customizations/features. The proprietary rights of any customization that cannot be used independently of the IQ-ity system shall be owned by IQ Innovations, LLC.; however, the proprietary rights of any customization that can be used independently of the IQ-ity system shall be owned by ECOT. In addition to the other restrictions explicitly or impliedly identified herein, ECOT shall not remove, modify or destroy any Content, or any copyright, trade secret, proprietary, confidentiality or other legends or markings placed upon or contained or embedded within the System or Content unless otherwise permitted by IQ Innovations. ECOT agrees to maintain in confidence all materials and documentation relating to IQ Innovations, LLC Proprietary Information and any modifications thereto other than as required by federal or state disclosure laws and corporate reporting requirements. ECOT shall use reasonable efforts to prevent the infringement any intellectual property rights in IQ Innovations, LLC Proprietary Information. ECOT is strictly prohibited from selling or otherwise transferring IQ Innovations, LLC Proprietary Information and from using the Content or the System in a manner that is libelous, defamatory, obscene, infringing, abusive or illegal.

2.3 Rights of ECOT related to Content. ECOT shall have access during the term of this Agreement to certain features of IQ-ity enabling ECOT to add data or other content into the Classroom. ECOT, in consideration of accepting said features of the System, agrees any such additional data or subject matter be clearly labeled as a creation or work of ECOT and not of IQ Innovations, LLC or any other entity providing Content or Services on behalf of IQ Innovations, LLC hereunder. ECOT shall be solely responsible for any and all such additional data or subject matter created or developed by ECOT as contemplated herein.

ECOT shall have the right to sell any content it creates through IQ-ity's Digital Rights Management System (DRM). ECOT shall be paid the end-customer's purchase price of the content through IQ Innovations, LLC, less the sixteen percent (16%) fees under this agreement.

2.4 Restrictions Related to Content. To the extent that ECOT is granted rights to the Content in conjunction with this Agreement, ECOT shall not, except as otherwise provided for herein and/or authorized by IQ Innovations, (i) copy the Courseware in whole or in part, except (a) as required within IQ-ity, to set up course sections in a teacher's IQ-ity homepage or to make Content accessible to ECOT students; (ii) adapt, alter, create derivative works based on, modify, or translate the Content in whole or in part; (iii) sell, assign, distribute, lease, market, rent, sublicense, transfer, make available, or otherwise grant rights to the Content in whole or in part to any third party in any form; (iv) electronically transfer the Content in whole or in part from one computer to another over a network or enable any timesharing or service bureau use of the Content; (v) obscure, remove or alter any of the trademarks, trade names, logos, patent or copyright notices or markings to the Content; (vi) add any other notices or markings to the Content or any portion thereof; (vii) reverse engineer,

decompile, or disassemble any component of the Content or otherwise obtain or attempt to obtain the source code for the Content.

3. MAINTENANCE AND SUPPORT

3.1 Maintenance Services. At ECOT's request, any Content revisions or corrections made available by or on behalf of IQ Innovations, LLC ("Updates") will be provided by or on behalf of IQ Innovations, LLC for use pursuant to the terms of this Agreement and uploaded by such means and times as IQ Innovations, LLC may direct. IQ Innovations, LLC shall be responsible for converting Updates for use on IQ-ity and for creating course sections, providing student access, and all systems administration of the Content on IQ-ity, including primary academic and technical support thereof, and for integrating any content, assessments or modifications which it may develop or create with any Updates provided by or on behalf of IQ Innovations, LLC to prevent such Updates from over-writing any IQ Innovations, LLC customized content developed by IQ Innovations, LLC.

3.2 Hosting. IQ Innovations, LLC is responsible for hosting services under this Agreement. ECOT, at its discretion, may elect to provide for its own hosting subject to IQ Innovations systems, structure, and specifications. If ECOT chooses to host the System, IQ Innovations is responsible for providing a backup hosting environment should ECOT's system fail; whereby creating additional system security. ECOT is responsible for the backup of its data under a self-hosted system.

3.3 Sources of Content. IQ Innovations, LLC shall provide Content from class.com, and/or any such other sources as may be deemed appropriate for compatibility with IQ-ity and the Content, and which is at least equivalent to class.com in terms of conformity with the State of Ohio curriculum requirements. IQ Innovations, LLC may augment or replace Content based on any changes in commercial availability of class.com or other Content in use, or as may be deemed appropriate by IQ Innovations, LLC to meet the quality standards of ECOT. In any case, any additional or replacement of Content is permissible hereunder only with the advance acceptance and approval of ECOT Executive Management so as to confirm its quality and compliance with the standards of the State of Ohio.

3.4 Support Services and Consulting. IQ Innovations, LLC itself or through others on its behalf will arrange to provide ECOT with second-level academic and technical support of IQ-ity and the Content during the hours of 9:00 a.m. to 8:00 p.m. EST, Monday through Friday.

The support contacts identified below are the only individuals who may contact any entity providing such support on behalf of IQ Innovations, LLC regarding support services. ECOT may change its support contact as long as IQ Innovations, LLC or the entity providing support on its behalf is informed in writing and the list does not exceed one contact person.

For ECOT:

Name:	Sarah George	Name:	Brittney Pierson
Phone:	614-492-8884	Phone:	614-492-8884
Fax:	614-492-8894	Fax:	614-492-8894
E-mail:	Sarah.George@ecotoh.net	Email:	Brittney.Pierson@ecotoh.net

For IQ Innovations:

Name:	Jason Gary
Phone:	815-274-1590
E-mail:	Jason.Gary@iq-ity.com

4. FEES; PAYMENT

4.1 **Fees During the Term.** In consideration of the rights granted to ECOT hereunder, ECOT shall pay IQ Innovations, LLC an annual license fee based on each school year, the fee being equal to 16% percent of all funds received by ECOT, subject to the limitations set forth below. The fee shall be paid to IQ Innovations, LLC as and when governmental school aid, grants, or other funding payments are received, and within thirty (30) days from ECOT's receipts. Notwithstanding anything contained in this section to the contrary, IQ Innovations, LLC's fee shall not be based on: (1) Expense Reimbursement including E-rate Reimbursements; (2) Sale of Assets; (3) Employee Payroll Deductions or Payments for Benefits; (4) Fundraising Sales and Activities (i.e., School store, bake sale, etc.); (5) Payment of miscellaneous fees (excluding instructional related revenue including tuition) by or on the behalf of students (i.e. Prom); or (6) any other governmental school aid or grants where such payment is or would be prohibited by law including Federal Title Funds or by the specific terms of the aid or grant. IQ Innovations, LLC's fee shall be reduced by audit by the amount necessary to ensure that the total fees paid to IQ Innovations, LLC by ECOT under this license or any other agreement with IQ Innovations in any ECOT fiscal year does not exceed 16% of all funds received by ECOT during that fiscal year.

5. RECORD KEEPING AND AUDIT

5.1 **ECOT Responsibility.** It is ECOT's responsibility to keep accurate records regarding the number of enrollments and the usage of the Content for purposes of compliance with this Agreement.

5.2 **Audit.** For the sole purpose of ensuring compliance with this Agreement, IQ Innovations, LLC shall have the right, at its expense, to audit ECOT's use of the Content and student enrollment records upon at least seven (7) days advance notice. In connection therewith, except as may be prohibited by FERPA, ECOT shall provide IQ Innovations, LLC, who may then provide any other entity providing Content or any other material, support or services hereunder, with such enrollment information as IQ Innovations, LLC and/or its designee may request. In the event of any underpayment of the fees payable hereunder, ECOT shall pay within 14 days of notice the difference to IQ Innovations, LLC.

6. TERM; TERMINATION

6.1 **Term.** This Agreement shall commence as of the Effective Date and shall continue until May 30, 2012. (the "Initial Term"). This contract shall supersede the prior License Agreement and Addenda originally in effect until June 30, 2009.

6.2 **Default.** Either party may, at its option, terminate this Agreement if a material default by the other party is not corrected within sixty (60) days after receipt of a written notice of the default.

(a) **Default by ECOT-** If the agreement is terminated due to a material breach by ECOT, then ECOT shall not contract with any other entity providing the specific Content that is the subject of this agreement, or any other material, support or services, unless such Content, material, support or services has been purchased or utilized by ECOT prior to this or prior related license agreements hereunder for two (2) years after the date of cancellation.

(b) **Default by IQ Innovations, LLC -** A cancellation of a contract due to a material breach by IQ Innovations, LLC between IQ Innovations, LLC and any other entity providing Content, Services or any other material, support or services hereunder, which cancellation cannot be mitigated and thereby results in the inability of IQ Innovations,

LLC to deliver Content hereunder will be considered a material breach with respect to the contract with ECOT. If this occurs, ECOT, at its option, and as its sole remedy, may contract directly with the canceling entity or any other entity to allow for continued access by ECOT to such Content, Services or other material. IQ Innovations, LLC shall pay the difference between the new contracted price and the price of the original contract between ECOT and IQ Innovations, LLC.

6.3 Effect of Expiration or Termination. Upon expiration or termination of this Agreement, ECOT shall have no further right to exercise the rights licensed hereunder and shall (i) immediately discontinue all use of the Content; (ii) remove the Content from its server; (iii) destroy all copies of the Content to the extent permissible by Ohio public records law; and (iv) certify in writing to IQ Innovations, LLC, within thirty (30) days of the expiration or termination of this Agreement, that ECOT has complied with the foregoing. The expiration or termination of the Agreement shall not relieve either party of any obligation or liability accrued hereunder prior to such expiration or termination, nor affect or impair the rights of either party arising under this Agreement prior to such expiration or termination, except as expressly provided herein.

7. WARRANTIES

7.1 Warranty. IQ Innovations, LLC warrants to ECOT that IQ Innovations, LLC has all rights necessary to provide the Content and Content to ECOT during the Term of this Agreement consistent with the limited license granted under this agreement with respect thereto; and that the Content, Content and Services will substantially conform in all material respects to the descriptions of those things contained in, or referred to, in this Agreement.

IQ Innovations warrants that it shall use commercially reasonable efforts to make accessible IQ-ity and Content 7 days a week, 24 hours a day, excluding scheduled maintenance, and force majeure events during the traditional school year.

8. MUTUAL INDEMNIFICATION

Each party agrees to defend, indemnify and hold the other party harmless from and against any and all claims, proceedings, demands, losses, liability costs and expenses (including but not limited to attorneys' fees, expert witness costs) arising from their acts or omissions relating to (i) any unauthorized use or dissemination of the System or Content, and (ii) any violation of this Agreement or of any third-party's rights, including but not limited to infringement of any patent, copyright, violation or any proprietary right, trade secret misappropriation or invasion of any privacy rights including, but not limited to, the Children's Online Privacy Protection Act or FERPA. This obligation will survive the termination of this Agreement.

9. GENERAL

9.1 Governing Law. The rights and duties of the parties will be governed by the law of the State of Ohio, excluding any choice-of-law rules that would require the application of the laws of any other jurisdiction.

9.2 Assignment. Neither party shall assign this Agreement or any of its rights or obligations hereunder without the written consent of the other, and any attempt to do so shall be void. If any such assignment is approved, this agreement shall survive as to all terms. Further, no such assignment shall relieve either party of any of its obligations hereunder.

9.3 Headings. The descriptive headings of this Agreement are intended for reference only and shall not affect the construction or interpretation of this Agreement.

9.4 Waiver of Rights. The failure of either party to insist, in any one or more instances, upon the performance of any of the terms, covenants, or conditions of this Agreement or to exercise any right hereunder, shall not be construed as a waiver or relinquishment of the future performance of any rights. No modification of this Agreement shall be binding unless executed in writing by the party to be bound thereby.

9.5 Entire Agreement; Conflict. This Agreement, together with any exhibits and schedules hereto, constitutes the complete, final and exclusive statement of the terms of the Agreement among the parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions of the parties.

9.6 Confidentiality. The receiving party of Confidential Information agrees to exercise reasonable care to protect Confidential Information from unauthorized disclosure, which care shall in no event be less than the receiving party gives to protect its own trade secrets. The receiving party may disclose Confidential Information only to its employees or agents who need to know such information and shall inform such employees, by way of policy and agreement that they are bound by obligations of confidentiality. Notwithstanding the foregoing, each party may disclose Confidential Information to the extent necessary pursuant to applicable federal, state or local law, regulation, court order or other legal process.

9.7 Notices. All notices, requests, demands and other communications that are required or may be given under this Agreement shall be in writing and shall be deemed to have been duly given (i) when received if personally delivered, (ii) upon electronic confirmation of receipt, if transmitted by telecopy, (iii) the day after it is sent, if sent for next day delivery to a domestic address by a nationally recognized overnight delivery service (i.e., Federal Express), and (iv) three days from the date of deposit in the U.S. mails, if sent by certified or registered U.S. mail, return receipt requested; and (v) at 9:00 a.m. local time on the next business day after sending e-mail. In each case such notice shall be addressed as follows:

ECOT
3700 S. High St.
Columbus, OH 43207
Attn: Board President
Fax: (614) 492-8894

IQ Innovations, LLC Learning Management I, Inc.
P. O. Box 2886
Columbus, Ohio 43216-2886
Attn: William Lager, CEO
Fax: (614) 445-6180

10.8 **Survivorship.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed by duly authorized officers or representatives as of the date first above written.

ECOT

By: W. Scott Burke

Name: W. Scott Burke

Title: President, Board of Directors

IQ Innovations, LLC

By: William Laker

Name: WILLIAM LAKE

Title: CEO

Exhibit A
LEARNING MANAGEMENT SYSTEM

Overview - the product is:

Modular	Functions of the system are made available to each customer through a selection interface. Each feature may be globally enabled or disabled, on an individual customer basis. Disabled features do not appear in the environment, and therefore do not hamper usability. Example - a client may or may not wish to allow sending messages between users.
Customizable	Each module (if it is enabled for use by the customer) is further controlled at the "Role" level (students may have different permissions within any given function than teachers or staff). These may also be enabled or disabled by the individual customer at any time, as they see fit or as their needs change. Example - should messaging be enabled, perhaps only teachers are permitted to use it; not students.
Hierarchical	Schools may report data up to parent districts, which may report up to an ESC or a County. Districts may be permitted to manage the schools under them, or merely run reports. A school, district, or other entity may be added into or deleted from the hierarchy at any time.

Course Delivery Tools

Course Management	Instructors may use the supplied content, create their own content or import content from other sources, and edit, delete or reorder content items within a class.
Online Grading Tools	Grade items feed directly into the Online Gradebook - including quizzes, class participation, etc. Non-graded items are also available. Students can view their gradebook in real-time. Teachers can provide different grading items to different students (within a single class) to customize the learning process for each. Instructors can manually edit or override all grades. Instructors can export the gradebook to an Excel spreadsheet.
Flexible instructor tools	Each instructor can individually select their personal default search criteria, as well as the data content and format of the results set, and can choose the fields (and their order) as displayed in their class rosters. One click changes the view from Demographics to Grades to Activity Log to Student Journal.
Student Tracking	Instructors can view reports of student session tracking, login/logout dates and times, dropbox submissions, and discussion participation.
Assessments	Instructors can create assessments that use the following types of questions: Multiple Choice, Multiple Answer, Essay, Short Answer, True/False, or Matching. Test item banks and Assessment Banks can be created, each based on defined standards. Items and assessments may be reused by multiple teachers.
Customized Look and Feel	The system can support multiple schools or other organizational divisions on an individual server setup. Each unit can be separately branded.
Data Migration	Ability to import/export user data, grade information, activity logs, results of all reports, etc., to a printer, or in certain cases to an Excel spreadsheet.
Content Sharing/Reuse	The system provides a central content repository where course content files can be stored and accessed by other instructors.

Communication Tools

Discussion Forums	Forums may be created for an entire class, a group of students (in a project), or one-on-one with any student. Attachments may be included with posts. All forums may be moderated.
Bulletin Board	There is a school bulletin board for global announcements, and a separate bulletin board for each class taught in the system.
Calendar	Calendar system accepts global (school) postings, class (teacher) postings, and personal (student) postings, and follows the user throughout the system.
File Exchange	Users deliver assignments to teachers via the dropbox - a special kind of forum. The dropbox contains comments and attachments for review.
Internal Email	Internal only (no Internet) messaging system allows e-mail-like communication between teachers, staff and students. Internet e-mail is optionally available. Students may email individual students, instructors or groups, depending on administration-supplied rules. Students use a dynamic address book to email individuals and groups.
Online Journal	A journal is available for teachers and staff to enter comments concerning students. The students may or may not be permitted to view these comments.
Real-time Chat	As a component of LiveBoard Instructors can moderate chats, monitor chats, suspend students from the chat rooms and view chat logs. The system creates archive logs for all chat rooms.
LiveBoard	The software supports a whiteboard named Liveboard.

Student Involvement Tools

Orientation/Help	There is an IQ-ity course in "IQityU" that informs students how to use IQ-ity. Teacher and Admin user manual are available.
User Homepage	All users have a tab that lists new email, all course and system-wide events by date from their personal calendar, as well as school announcements.
Groupwork	Instructors can assign students to group projects through a specialized discussion forum.

Administration Tools

Course Authorization	Each school may create custom user roles, and assign separate permissions to each. Example - a school could create a "Truancy Officer" role, and allow them access to only contact information and activity records (seat time), but not grade information.
Registration	Administrators can batch add students to an organization, and to one or more courses, using a delimited text file. The software also supports optional customized integration with other SIS or portal systems. Administrators can transfer student information bi-directionally between the system and an SIS.

Hardware/Software

Client Browser Required	IQ-ity core learning system is Internet-based and is delivered via a Web Browser (Internet Explorer or Mozilla/Firefox) and "standard" plug-ins (Flash, Shockwave, etc). The e-learning system does not require any special
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	software to be loaded onto a user's computer. Note: certain content (Ex. foreign language classes) or optional offerings (Whiteboard, etc.) may require client software to be installed (Java, or a movie player).
Hosted Services	The product provider offers a hosted system that includes 24x7x365 monitoring, intrusion detection, nightly backups, and service level agreements on a network of high-performance, fault-tolerant servers with fail-over capability utilizing redundant Tier 1 network connections.
Server/Database Requirements	The product and all content is housed on the product provider's servers, and no server investment or database requirements are required on the part of the customer.

FIRST AMENDMENT TO LICENSE AGREEMENT

This Amendment (“Amendment”) entered into as of this 22nd day of June, 2010 (“Effective Date”), modifies the License Agreement made and entered into on May 1, 2009 by and between IQ Innovations, LLC Learning Management I, Inc. (“IQ Innovations, LLC”) and ECOT (the “License Agreement”).

WHEREAS, IQ Innovations LLC and ECOT entered into the License Agreement;

WHEREAS, the compensation formula for IQ Innovations LLC set forth in the License Agreement did not contemplate that certain shortfalls in state funding for education would be made up for by federal State Fiscal Stabilization Funds distributed to community schools by the State of Ohio under the American Recovery and Reinvestment Act; and

WHEREAS, it was and is the parties intent that IQ Innovations LLC’s compensation under the License Agreement be based upon the total funding for education provided to ECOT by the State of Ohio, including federal State Fiscal Stabilization Funds to the extent those funds are intended to replace shortfalls in funding which would otherwise be provided by the State of Ohio;

NOW THEREFORE, the License Agreement is hereby modified as follows:

1. Section 4.1 of the License Agreement is hereby modified and replaced in its entirety to read as follows:

4.1 Fees During the Term. In consideration of the rights granted to ECOT hereunder, ECOT shall pay IQ Innovations, LLC an annual license fee based on each school year, the fee being equal to 16% percent of all funds received by ECOT, including State Fiscal Stabilization Funds distributed to community schools by the State of Ohio under the American Recovery and Reinvestment Act, subject to the limitations set forth below. The fee shall be paid to IQ Innovations, LLC as and when governmental school aid, grants, or other funding payments are received, and within thirty (30) days from ECOT’s receipts. Notwithstanding anything contained in this section to the contrary, IQ Innovations, LLC’s fee shall not be based on: (1) Expense Reimbursement including E-rate Reimbursements; (2) Sale of Assets; (3) Employee Payroll Deductions or Payments for Benefits; (4) Fundraising Sales and Activities (i.e., School store, bake sale, etc.); or (5) Payment of miscellaneous fees (excluding instructional related revenue including tuition) by or on the behalf of students (i.e. Prom). Notwithstanding anything else contained in this section to the contrary, IQ Innovations, LLC’s fee shall not be paid using governmental school aid or grants where the payment of such fee from such aid or grants is or would be prohibited by law or by the specific terms of the aid or grant. IQ Innovations, LLC’s fee shall be reduced by audit by the amount necessary to ensure that the total fees paid to IQ Innovations, LLC by ECOT under this license or any other agreement with IQ Innovations in any ECOT fiscal year does not exceed 16% of all funds received by ECOT during that fiscal year.

2. All other provisions of the License Agreement not inconsistent with the foregoing remain in full force and effect.

ECOT



By: KEVIN MILLER

Title: PRESIDENT, BOARD OF DIR.

IQ Innovations, LLC Learning Management I,
Inc.



By: WILLIAM H. LAKER

Title CEO

SECOND AMENDMENT TO LICENSE AGREEMENT

This Amendment ("Amendment") entered into as of this 22nd Day of May, 2012 ("Effective Date") modifies the License Agreement made and entered into on May 1, 2009 and Amended on June 22, 2010, by and between IQ Innovations, LLC Learning Management I, Inc. ("IQ Innovations, LLC") and Electronic Classroom of Tomorrow ("ECOT").

WHEREAS, IQ Innovations LLC and ECOT entered into the License Agreement;

WHEREAS, both parties desire to continue their partnership through the License Agreement beyond the Initial Term.

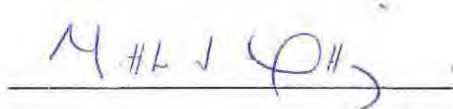
NOW THEREFORE, the License Agreement is hereby modified as follows:

1. Section 6.1 is hereby modified and replaced in its entirety to read as follows:

6.1 **Term.** This License Agreement shall commence as of the Effective Date and shall be coterminous with the Charter Contract, as it may be amended or extended. Notwithstanding the termination of the Contract, this Agreement shall continue to remain in effect provided that ECOT has entered into or is continuing to operate under any chartering school contract with an authorizing body (as defined under the Code) or as a private school; and this License Agreement has not been terminated pursuant to other sections of the License Agreement.

2. All other provisions of the License Agreement not inconsistent with the foregoing remain in full force and effect.

ECOT



By: Matthew Ottiger

Title: Chairman, Board of Directors

IQ Innovations, LLC Learning Management I, Inc.



By: WILLIAM LAGER

Title: CEO

**ELECTRONIC CLASSROOM OF TOMORROW
PURCHASED SERVICES AGREEMENT**

THIS PURCHASED SERVICES AGREEMENT ("Agreement"), is entered into and made effective as of the 1st day of January 2014, by and between the **Electronic Classroom of Tomorrow (ECOT)**, a nonprofit educational organization and community school with an address of 3700 S. High St., Suite 95, Columbus, OH 43207 (hereinafter "Customer") and IQ Innovations, LLC (hereinafter "Service Provider" or "IQ") with an address of 580 N. Fourth St., Suite 560, Columbus, OH 43215. Each of Service Provider and Customer is a "Party," and collectively, Service Provider and Customer may be referred to as the "Parties."

WHEREAS, Service Provider and Customer are parties to a License Agreement with an initial effective date of May 1, 2009, as subsequently amended ("Existing License"), which is currently in effect; and

WHEREAS, Customer wishes to engage Service Provider to provide additional services as described herein;

NOW, THEREFORE, the Parties hereby agree as follows:

Section 1

SCOPE OF SERVICES

1.1 Services. Service Provider agrees to provide, and Customer agrees to accept, services to reach deliverables and outcomes of this project. A summary of the scope and phases of anticipated work is set forth in Exhibit A, attached hereto.

1.2 Conduct of Services. All work shall be performed in a workmanlike and professional manner, *provided that*; Service Provider shall not be liable to Customer for any failure or delay in performing any work or providing any services under this Agreement that results in whole or in part from Customer's failure to fulfill its obligations hereunder or to provide any information, cooperation, access to resources or other assistance needed or requested by Service Provider.

1.3 Method of Performing Services. Service Provider shall have the right to determine the method, details, and means of performing the work to be performed for Customer, as provided in Exhibit A. Customer shall, however, be entitled to exercise general power of supervision and control over the results of work performed by Service Provider to assure performance as provided in Exhibit A, including the right to inspect, the right to stop work, the right to make suggestions or recommendations as to the details of the work, and the right to propose modifications to the work.

1.4 Scheduling. The services provided by Service Provider are expected to require a substantial part of Service Provider's available business time and availability. Subject to the other

provisions of this Agreement, Service Provider will use commercially reasonable efforts to accommodate Customer's work schedule requests.

1.5 Reporting. Customer and Service Provider shall agree to regular project meetings and to develop appropriate administrative procedures for coordinating with each other. Customer shall periodically provide Service Provider with evaluations of Service Provider's performance and progress towards defined milestones, if any.

1.6 Place of Work. Service Provider will perform its work for Customer primarily at Service Provider's premises, except when select projects or tasks require Service Provider to travel off-site or as otherwise requested by Customer.

Section 2

TERM AND TERMINATION

2.1 Term. The term of this Agreement shall commence on the date set forth above and shall continue until the earlier of September 30th, 2014 and completion of the work described in Exhibit A, unless otherwise terminated as set forth in paragraph 2.2.

2.2 Termination. This Agreement may be terminated by either Party upon thirty (30) days written notice in the event that the other Party has breached a material term of this Agreement and failed to cure such breach within thirty (30) days following written notice thereof.

2.3 Remaining Payments. Within thirty (30) days after termination of this Agreement, Service Provider shall submit to Customer an itemized invoice sufficient to satisfy the requirements of the Straight A grant for any fees or expenses that have accrued and remain due and owing under the terms of this Agreement.

Section 3

FEEES AND PAYMENT

3.1 Fees. Service Provider shall be paid a monthly fee of \$226,707.25 by Customer for the period of January 2014 through August 2014. The total contract amount payable to Service Provider is \$1,813,658 00. Service Provider shall submit itemized monthly invoices based on Exhibit A. Service Provider shall be paid within 30 days of Customer's receipt of an itemized monthly invoice for services rendered.

Section 4

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RESPONSIBILITIES OF SERVICE PROVIDER FOR TAXES AND OTHER MATTERS

4.1 Taxes and Other Financial Obligations. Service Provider will comply with all federal, state, municipal, and/or other local tax laws. As an independent contractor, Service Provider shall pay and report, as required by law, all federal, state, municipal, and/or other local income tax withholding, FICA, social security, Medicare, pension or retirement plan contributions, if applicable (including Ohio State Employee Retirement System Contributions), and unemployment and workers' compensation insurance applicable to Service Provider and any employees of Service Provider .

Service Provider will provide—its provide its employer identification number from the Internal Revenue Service to Customer and Customer shall provide Form 1099 amounts paid to Service Provider for services provided during the tax year.

Service Provider and employees of Service Provider shall not be entitled to participate in health or disability insurance, retirement benefits, or other welfare or pension benefits (if any) to which employees of Customer may be entitled unless otherwise required by law.

4.2 Insurance. Service Provider will have and maintain insurance coverage appropriate for its activities under this Agreement and will deliver to Customer, upon request, copies of all certificates of insurance applicable to this Agreement.

Section 5

CONFIDENTIALITY

5.1. Confidential Information. "Confidential Information" shall mean information that is designated as confidential or proprietary to a Party and is disclosed by such Party ("Discloser") to the other Party ("Recipient") in connection with this Agreement, and includes the whole or any portion or phase of Discloser's trade secrets, educational materials, Educational Records, scientific or technical information, including formulas, patterns, compilations, programs, devices, methods, techniques, designs, procedures, inventions, improvements, discoveries, processes, know-how, plans, or any business information or plans, financial information, customer lists or other similar listings of names, addresses, or telephone numbers. For the avoidance of doubt, all of Service Provider's computer software, code (in source or object format), designs, algorithms, configurations, platform architecture, data structures, databases, libraries, content, information, documentation, manuals and help files, whether now existing or created under this Agreement, constitute Service Provider's Confidential Information. Customer Confidential Information includes all information received by Service Provider from the Customer with express written instructions that such information is not to be disclosed; potentially including, but not limited to, training, training manuals, or other such information provided by the Customer in relation to the services provided by the Customer. Customer may not disclose, disseminate or use any Confidential Information of Service Provider or this Agreement in a manner which could unnecessarily or avoidably result in same becoming a public record without having previously received Service Provider's express, written consent thereto.

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5.2. Ideas and Inventions. "Ideas and Inventions" shall mean and include any and all ideas, processes, inventions, designs, technologies, computer hardware or software, trademarks, service marks, original works of authorship, formulas, discoveries, patents, copyrights, copyrightable works, products, marketing and business ideas, and all improvements, know-how, data, rights, and claims related to the foregoing that, whether or not patentable, are conceived, developed or created by Customer which (i) relate to the Customer's current or contemplated business or activities; (ii) relate to the Customer's actual or demonstrably anticipated research or development; (iii) result from any work performed by Service Provider for the Customer; (iv) involve the use of the Customer's equipment, supplies, facilities, trade secrets or Confidential Information; (v) result from or are suggested by any work done by the Customer or at the Customer's request, or any projects specifically assigned to Service Provider; or (vi) result from the Service Provider's access to any of the Customer's memoranda, Confidential Information, notes, records, drawings, sketches, models, maps, customer lists, Educational Records, research results, data, formulae, specifications, inventions, processes, equipment or other materials (collectively, "Customer Materials"). Customer grants to Service Provider the right to use, copy, modify, adapt and distribute copies and derivatives of Ideas and Inventions during this Agreement and thereafter. Except as otherwise provided in this Agreement, Customer shall retain its rights in Ideas and Inventions.

5.3 Recipient agrees not to disclose (directly or indirectly) Confidential Information to any unauthorized person without Discloser's prior written permission, at any time during the term of this Agreement or the Existing License or for a period of five (5) years after the latter to expire or terminate.

5.4 Recipient agrees not to make use of Confidential Information except as contemplated under this Agreement.

5.5 Recipient agrees to safeguard the Confidential Information that he or she obtains or learns from Discloser by taking reasonable steps, including by abiding by all of the policies and procedures regarding storage, copying and handling of documents and information marked or designated as "confidential and/or proprietary" that Recipient employs for its own confidential or proprietary information.

Section 6

RETURN OF MATERIALS

6.1 Service Provider agrees to deliver promptly to the Customer, upon Customer's request following the termination of this Agreement, all Customer materials or other property of the Customer then in Service Provider's possession or custody; including, but not limited to, all written, graphic, and electronic materials in Service Provider's possession or control obtained from or on behalf of the Customer in connection with its duties as Service Provider. This

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obligation includes, but is not limited to, copies or reproductions or correspondence, memoranda, reports, notebooks, drawings, photographs or other documents, or any other information, whether in print or electronic form, or in any other medium, relating in any way to the affairs of the Customer or to the affairs of its affiliated companies and which are entrusted to Service Provider at any time during the term of this Agreement, and also including, but not limited to, information related to the Customer's customers.

Section 7

MISCELLANEOUS

7.1 Privacy Rights and Educational Records To the extent the work to be performed under this Agreement requires that Service Provider be given access to "Educational Records," Service Provider agrees to keep said Educational Records confidential and to refrain from disclosing said Educational Records to any third parties. For the purposes of this Agreement, "Educational Records" shall include students' family information, personal information, academic information, testing information, special education records, disciplinary records, medical and health records, transcripts, videotaped recordings, prior school records, grades, evaluations, and all other correspondence or other documents incorporating such information, records or materials.

7.2 Force Majeure. Service Provider shall not be liable to Customer for any failure or delay caused by events beyond Service Provider's reasonable control, including, without limitation, acts of God, war or civil unrest, failures or delay in transportation or communication, strikes or labor disputes, interruption or disruption of network services including the Internet, extreme weather events, or the like.

7.3 Governing Law. This Agreement shall be governed and construed in all respects in accordance with the laws of the State of Ohio.

7.4 Equipment. Except as otherwise contemplated hereunder, including in Exhibit A, Service Provider shall supply, at Service Provider's sole expense, all equipment, tools, materials, and/or supplies in order to perform the services under this Agreement.

7.5 Independent Contractors. The Parties are and shall be independent contractors to one another, and nothing herein shall be deemed to cause this Agreement to create an agency, partnership, or joint venture between the parties. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between Customer and either Service Provider or any employee or agent of Service Provider.

7.6 Notices. All notices required or permitted hereunder shall be in writing addressed to the respective Parties as set forth herein, unless another address shall have been designated, and shall be delivered by hand or by registered or certified mail, postage prepaid. Notice may also be given by electronic mail (e-mail).

7.7 Subcontracting. Service Provider shall not assign or subcontract any of its

obligations hereunder without notifying the Customer.

7.8 Entire Agreement. This Agreement constitutes the entire agreement of the Parties hereto regarding the subject matter hereof and supersedes all prior representations, proposals, discussions, and communications, whether oral or in writing, regarding same. This Agreement may be modified only in writing and shall be enforceable in accordance with its terms when signed by both Parties. If any provision of this Agreement has been rendered unenforceable by a court of law, it shall not serve as a waiver of any other provision of the Agreement.

7.9 Indemnification. Customer shall defend, indemnify and hold harmless Service Provider and its employees, officers, directors and agents from and against all claims, liability, losses, damages and expenses (including attorneys' fees and court costs) arising from or in connection with any unlawful or ~~negligent~~ negligent act or omission of Customer or the use or application of Service Provider's services, work or work product by Customer or any customer, user or direct or indirect purchaser or licensee of Customer.

Service Provider agrees to defend, indemnify and hold harmless Customer and its employees, officers, directors and agents from and against all claims, liability, losses, damages and expenses (including attorneys' fees and court costs) resulting from Service Provider's unlawful conduct that is outside the scope of the services provided by Service Provider under this Agreement, or Service Provider's infringement of a U.S. patent or registered copyright

In the event either Party seeks indemnification hereunder, it must give written notice to the other Party promptly after the claim for which it seeks indemnification has arisen and provide all relevant information and reasonable cooperation to the latter in defending or settling such claim.

7.10 Compliance with Law. Service Provider declares that it is solely responsible for compliance with all laws, regulations, rules, and other requirements of the United States, the State of Ohio, and any other applicable state, city or county government, and that Service Provider agrees to obtain all necessary licenses for the conduct of Service Provider's business and in all other ways to fully comply with all State and Federal laws.

7.11. IQ Intellectual Property. Service Provider shall own and retain all right, title and interest in and to all inventions, patent rights, copyrights, trademarks, trade secrets, mask works and other proprietary rights in and to the computer software, code (in source or object format), designs, algorithms, configurations, platform architecture, data structures, databases, libraries, content, information, documentation, manuals, help files and training materials provided or created by Service Provider under this Agreement, specifically including learning objects, Knowledge Precedence Mapping, Personalized Learning Platform ("PLP"), assessments, system design and the like (collectively, "IQ IP"). For the duration of the Existing License but not less than five (5) years from the date of this Agreement, Service Provider grants to Customer a non-exclusive, limited right and license to access and use such IQ IP as is delivered, provided or made accessible by Service Provider to Customer under this Agreement, in the same manner as Customer may access and use, and permit its Authorized Users to access and use, Courseware

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under the Existing License (as the terms "Authorized Users" and "Courseware" are used in the Existing License).

7.12 **iLearnOhio.** The Parties acknowledge that iLearnOhio is a comprehensive e-learning platform provided by IQ and funded by the Ohio General Assembly to ensure that Ohio students have access to high-quality online courses. For the avoidance of doubt, the Parties further acknowledge that after certain software customizations for the PLP are completed for Customer, IQ intends to make the base PLP available to all Ohio K-12 schools and districts using iLearnOhio.

WHEREFORE, the parties have caused this 10 page Agreement to be executed by their duly authorized representatives, on the date and year first above written.

CUSTOMER

Christopher Meister
Electronic Classroom of Tomorrow

Date: 1-2-14

SERVICE PROVIDER

[Signature]
IQ Innovations, LLC

Date: 1-2-14

All correspondence relating to parties shall be sent to:

Customer:
Electronic Classroom of Tomorrow
Attn:
3700 S. High St.
Columbus, OH 43207
(888) 326-8395

Service Provider:
IQ Innovations, LLC
580 N. Fourth St., Suite 560
Columbus, OH 43215
(614) 564-1050

Exhibit A

Along with the itemized invoice, the Service Provider will include a brief description of progress each month on the following high level grant benchmarks:

Phase 1: January through April:

1. Secure license to NWEA item bank featuring 70,000 rigorously developed items aligned to the Common Core designed to measure student knowledge and learning through June 30, 2015.
2. Develop communications plan. Inform all stakeholders of the grant award with methods outlined in communication plan. The communication of PLP will be a continuous effort throughout the project.
3. Begin development of Knowledge Precedence Maps (KPM) with completed outline of the learning precedence of mathematics and learning dependencies.
4. Begin content learning objects review/creation/alignment to CCSS to provide up to 5 pieces of content per standard meeting every student's needs in a manner consistent with iNACOL standards.
5. Begin LMS customizations to adjust some LMS features to accommodate the PLP functionality as envisioned. Areas with customization development work include:
 - a. User Interface adjustments.
 - b. Gap list reporting developed
 - c. Standards-based report cards
 - d. Content search.
 - e. Assessment engine upgrades.
6. Assessments created based on KPMs using NWEA item bank to identify a student's academic level and measure learning.
7. Content learning objects uploaded into LMS reactor repository by the IQ Innovations Development team.

Phase 2: May through September:

May:

1. PLP system is ready for user acceptance testing and for pilot use of HS Algebra at ECOT for summer school.

June, July August, and September:

1. Teacher, administrator, and help desk PLP user training.

2. PLP piloting of HS Algebra during ECOT summer schools (begins June 23).
3. Begin evaluation of system effectiveness and usability through surveys of staff and students, observations, and achievement outcomes.
4. School begins August 22, 2014 and PLP System goes live at ECOT.
5. During the school year PLP adjustments executed as needed.
6. Complete final evaluation of system and student outcomes based on summer school comparison from 2013 to 2014.

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

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

Lawrence D. Pratt
Hearing Officer

May 10, 2017

Decision of the Hearing Officer

Appearances:

For the Ohio Department of Education: Douglas R. Cole, Esq., Erik J. Clark, Esq., Carrie M. Lymanstall, Esq., Organ Cole, LLP, Special Counsel to Michael DeWine, OHIO ATTORNEY GENERAL, 1330 Dublin Road, Columbus, Ohio, 43215. Telephone: 614-481-0902; 614-519-3985; Fax.: 614-481-0904; E-mail: drcole@organcole.com, ejclark@organcole.com, cmlymanstall@organcole.com.

For ECOT: Marion H. Little, Jr., Esq., John W. Zeiger, Esq., Christopher J. Hogan, Esq., Zeiger, Tigges & Little LLP, 3500 Huntington Center, 41 South High Street, Columbus, Ohio 43215. Telephone: (614) 365-9900; Fax: 614-365-7900; E-mail: little@litohio.com, zeiger@litohio.com, hogan@litohio.com.

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I. Nature of the Proceedings

This is an administrative proceeding under R.C. 3314.08(K). It arises from an October 11, 2016 request for hearing made by the Electronic Classroom of Tomorrow (“ECOT”) from a September 26, 2016 Final Determination of the Ohio Department of Education (“ODE” or the “the State”) with respect to a Full-time Equivalency (“FTE”) Review of the School for the 2015-2016 school year. Under R.C. 3314.08(K), the hearing is designated as an informal hearing. It is therefore not an adjudication hearing under R.C. Chapter 119. Nevertheless, per ODE prerogative, both parties were given ample opportunity to present evidence, testimony and arguments in support of their respective positions and a transcribed record was taken. The Hearing Officer used the Ohio Rules of Evidence as a guide in resolving any evidentiary disputes.

II. Procedural History

A. The Administrative Proceeding

On September 26, 2016, ODE, through Aaron Rausch, Director, Office of Budget and School Financing issued a letter to ECOT notifying the school of ODE’s statutorily required Final Full-Time Equivalency (FTE) Determination (“Final Determination”) for the 2015-2016 academic year. The letter informed ECOT that: “[b]ased upon the information provided by ECOT to the department for the 2015-2016 school year and in accordance with Ohio Revised Code Section 3314.08(H), the department has made a Final Determination that ECOT’s FTE is 6,312.62, which is a 58.8 percent less than the 15,321.98 FTE reported by ECOT.” The reasons for the determination were set out in the letter as follows:

Pursuant to ORC 3314.08(H), the department attempted to conduct a final FTE review for ECOT beginning on July 11, 2016, which would include a review of log-in and log-out records and non-classroom documentation. The department’s three-day review concluded without the department having an opportunity to

review the log-in and log-out records.

When department staff requested the log-in and log-out records on July 11-13, 2016, ECOT refused to provide that data despite having provided it to the department during the preliminary review on March 28-30, 2016. As a result, the department sought relief in the pending lawsuit filed by ECOT against the department and was successful in securing a Court Order that compelled the delivery of this information to the department. The Court granted this relief on Aug. 1, 2016.

As required by the Court, ECOT was ordered to provide a sample of 750 randomly selected student records, including the log-in and log-out records. The department was able to match 706 records provided by ECOT. The department reviewed those records and created the enclosed spreadsheet, which reflects the log-in and log-out times provided by ECOT.

From the 706 records verified by the department from ECOT's sample, ECOT reported 414.35 FTEs. After analyzing the log-in and log-out records and other records provided by ECOT, the department determined that this only amounted to 170.71 FTEs. The department then extrapolated the final HE number to determine the overall reduction in FTEs.

The FTE review was conducted in accordance with:

- 1) ORC 3314.08(H)(3), which includes a statutory requirement that the department determine each student's percentage of "full-time equivalency" based on "learning opportunities" offered to the students;
- 2) ORC 3314.08(H)(2), which provides that for purposes of that section and (H)(3) and (H)(4) of that section, learning opportunities shall be defined in the contract with the sponsor, which describes both classroom and non-classroom-based learning opportunities and shall be in compliance with criteria and documentation requirements for student participation established by the department;
- 3) ORC Section 3314.03(A)(11), which requires schools to provide learning opportunities to a minimum of 25 students for a minimum of 920 hours per year; and
- 4) ORC Section 3314.27, which prohibits a student from participating in more than 10 hours per day.

Since learning opportunities can come in many forms, the January 2015 FTE Handbook serves as a set of instructions for staff on how to conduct the reviews. As noted on page 16 of the handbook, it requires the FTE reviewers to verify that an eSchool has maintained student attendance records, as specified in the school's written policy. Page 16 of the handbook further instructs reviewers to check the individual attendance record for each student whose record was pulled for the review. Specifically, the January 2015 FTE Handbook states:

The reviewer will check the individual attendance record for each student being reviewed, This attendance record should show when a student has logged on and off while accessing learning opportunities. A learning opportunity for an eschool student could be documented computer time for doing homework in any subject, reading resource documents, writing resource papers, taking tests, doing research, conferencing with teachers, etc.

Non-classroom activities other than correspondence courses or non-classroom online instruction for a student that constitutes less than one-half of the student's instructional day must be documented and approved in writing by a teacher, supervisor or school administrator and must include an hourly/daily/weekly accounting that the hours documented were hours in which the student accessed a learning opportunity.

This final determination was based on the records provided by ECOT to the department that documented durational time for internet- and/or computer-based learning opportunities as well as non-classroom, non-computer-based learning opportunities.

(Emphasis included.) (ODE Exh. 1508.)

The letter further notified the School of its opportunity to request an informal hearing before the State Board of Education or its designee pursuant to R.C. 3314.08(K). On October 11, 2016, the School timely requested a hearing within the 10 days allotted in R.C. 3314.08(K). The undersigned was appointed by the Superintendent of Public Instruction by letter of October 18, 2016 to serve as Hearing Officer in this matter.

On October 26, 2016, the Hearing Officer issued a *Pre-Hearing Journal Entry with Notice of Hearing*, setting a hearing date to commence on November 7, 2016, along with a pre-hearing timetable, as required to meet the thirty day period for commencement of a hearing set forth in R.C. 3314.08(K)(2)(b). Following the issuance of the initial Pre-Hearing Entry, the parties participated in a telephonic pre-hearing conference in which they requested that the hearing be continued to a later date and, in order to do so, agreed to waive statutory deadlines. Upon agreement of the parties, the matter was rescheduled

to commence on December 5, 2016. See October 28, 2016 *Amended Pre-Hearing Journal Entry with Notice of Hearing* and October 31, 2016 *Stipulated Waiver* of the parties. Pre-hearing deadlines were subsequently modified and supplemented by a November 23, 2016 *Supplemental Pre-Hearing Journal Entry*.

In compliance with the pre-hearing journal entries, ODE filed a Witness List indicating its intent to call 13 named witnesses in the proceeding. In contrast, ECOT filed a Witness List indicating an intent to call, in addition to key personnel, over 190 witnesses including five experts, personnel from other community schools, ECOT students and their parents, ECOT teachers and ODE Chief Legal Counsel Diane Lease. In addition, ECOT disclosed an Exhibit List of 2,545 exhibits. On December 1, 2016, ODE filed a *Motion In Limine* seeking the exclusion of, and/or limitation on the number of witnesses and exhibits. ECOT responded on the first day of hearing, December 5, 2016, and after extensive oral argument, the Hearing Officer granted the Motion, concluding that the presentation of expert testimony, as proffered in the expert reports of the five witnesses, would not be helpful to the trier of fact and therefore would not be permitted. The Hearing Officer concluded that much of what ECOT intended with respect to the majority of remaining witnesses would be unnecessarily cumulative. With respect to Ms. Lease, the Hearing Officer reserved judgment but indicated that ECOT would have a high threshold to demonstrate why her testimony was necessary and/or not privileged.

The hearing proceeded over the course of ten days on December 5-9, 13, and 23, 2016, and January 12, January 19, and February 1, 2017. The following witnesses were called on behalf of ODE:

- a) Christopher Babal (Tr. Vol. II at 217-388, 440-527; Vol. III at 533-567; Vol. X at 2117-2141.) Mr. Babal is Community School Payment Administrator at ODE, a position he has held since July of 2015 when he joined the Department. In his position, he is responsible for ensuring accurate payments to community schools in compliance with the Ohio Revised Code. His duties include overseeing the FTE review process, providing answers and assistance to community schools when they have questions about their payments or the funding formula, participating in team meetings, and acting as a go-between with the Office of Data Quality and ODE's IT, and Fiscal Department. Mr. Babal has a B.S. in Education from Bowling Green State University (2008). His specialty is integrated social studies and was certified to teach 7th through 12th grade. He taught for four years at St. Thomas School in Fort Thomas, Kentucky, before enrolling at University of Wisconsin at Madison and obtaining a Master's of Public Affairs in 2015. Mr. Babal testified about ODE policy regarding durational data and his involvement in the 2016 FTE review of ECOT.
- b) Aaron Rausch, (Tr. Vol. III at 567-784; Vol. IV at 824-1046; Vol. X at 2141-2193.) Mr. Rausch has been Director of the Office of Budget and School Funding at ODE since January, 2015. Prior to that, Mr. Rausch was Assistant Director commencing with his joining the Department in March of 2014. Before that Mr. Rausch was Budgeting Analyst at the Office of Budgeting Management for about three years prior to joining ODE. In that capacity his primary assignment was education where he served as a liaison between the Department and the Office of Budgeting Management. Mr. Rausch has a Bachelor's Degree from Capital

University in Economics and Public Administration. In his current position he is responsible for two of ODE's functions: a) the development and implementation of the Department's budget as a whole, and b) the implementation of the school funding formula. Mr. Rausch's staff work closely with ODE's School Finance Office, and with the Area Coordinators in overseeing the FTE review process and manages the development of the FTE Review Handbook. Mr. Rausch testified about ODE history and policy regarding durational data and his involvement in the 2016 FTE review of ECOT.

The following witnesses were called on behalf of ECOT:

- a) Ricky A. Teeters (Tr. Vol. V at 1095-1140; Vol. VI at 1146-1329.) Mr. Teeters has been Superintendent of ECOT since October of 2013 and before that was Assistant Superintendent from July of 2012. Before that Mr. Teeters was Director of Special Programs at another eSchool, Virtual Community School of Ohio, and before that, Mr. Teeters spent twenty years with the Waverly, Ohio school district first as a teacher and then as an administrator. He has a Bachelor's in Elementary Education from Ohio University and a Master's in Educational Administration from Ashland University. Mr. Teeters testified about ECOT, durational data and his interaction with ODE administrators regarding the 2016 FTE review.
- b) Brittny Pierson (Tr. Vol. VII at 1405-1656; Vol. VIII at 1682-1837; Vol. IX at 1842-2085.) Ms. Pierson has been with ECOT since 2002, first as a school counselor, then worked with the Title 1 program, then became Director of the counseling department, then middle school principal, then liaison between the educational technology department and the teaching and administrative staff, then

Vice President of Operations, and now is the Deputy Superintendent and Chief of Staff. In her current position, all positions at ECOT roll up to her except for anyone in the finance, legal, and career tech areas. Ms. Pierson has a Bachelor's from Ball State in Psychology and Sociology and a Master's degree from Ohio State University in Counseling. She holds a license for school counseling, community counseling, and distance counseling from the Ohio Social Work and Counseling Board and is licensed as a principal and superintendent by the State Board. Ms. Pierson testified about operations at ECOT, durational data and her involvement with the 2016 FTE review.

- c) William Schroedl. (Tr. Vol. VI at 1329-1357.) Mr. Schroedl is a high school teacher of physical science and physics at ECOT. He has been with ECOT for five years. He has a Bachelor's in Physics and a teaching certification in mathematics and science teaching from the University of Wisconsin, Milwaukee. Mr. Schroedl described his classes and efforts made at engaging students.
- d) Elizabeth Daron. (Tr. Vol. VI at 1358-1393.) Ms. Daron has been a high school math teacher at ECOT for three years. Prior to that she taught math at the junior high and high school level with Reynoldsburg City Schools. Ms. Daron works in the credit recovery department where she teaches Algebra One to students who have previously taken the course and failed it at least once, whether through ECOT or their previous schools, and are essentially recovering the credit so they can earn that credit towards graduation requirements.. She has a Bachelor's degree from Ohio Dominican University and an online Master's degree through

Walden University. Ms. Daron also testified about her classes and efforts to monitor engagement of her students.

- e) Jeff Nelson (Tr. Vol. II at 389-439.) Mr. Nelson is Superintendent of the Virtual Community School of Ohio (“VCS), an eSchool, and has been that position for four years. Altogether he has been with VCS for thirteen years both as a teacher and administrator. Before that he worked as a teacher, a dean, and an assistant principal for six at the Lake County Boys Ranch in Florida. Mr. Nelson has a J.D. from Capital Law School (2009), a Bachelor’s in Education from Ohio University and a Master’s in Educational Leadership from Barry University in Florida (1999). Mr. Nelson testified regarding the similar experience to ECOT that VCS experienced with its 2016 FTE review.
- f) John Wilhelm (via August 29, 2016 deposition in *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C.P. No. 16CV006402.) Mr. Wilhelm has been a part-time Area Coordinator for ODE since 2008 and is assigned to northwestern Ohio. Prior to that he was a school administrator. Mr. Wilhelm testified regarding his past experience in conducting FTE reviews for ODE and his specific experience in conducting the 2011 and 2016 FTE reviews for ECOT.
- g) Ronald Heitmeyer (via September 9, 2016 deposition in *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C.P. No. 16CV006402.) Mr. Heitmeyer was an Area Coordinator for northwestern Ohio from 2001 until retiring in 2016. He was responsible for FTE reviews of ECOT

for the 2002/2003 and 2005/2006 academic years and provided testimony regarding his understanding of the FTE review process.

In addition to the testimony, 33 exhibits were introduced on behalf of the State (identified at Vol. X of the Transcript at 2204). 2305 exhibits were introduced on behalf of ECOT (identified at Vol. X of the Transcript at 2206 and 2208). An additional 155 ECOT exhibits were not admitted and were proffered (identified at Vol. X of Transcript at 2206-2209). (See also 4/19/17 Joint Appendix of the parties, Vol. 4.)

On March 8, 2017, the parties submitted post-hearing briefs along with proposed Findings of Fact and Conclusions of Law followed by reply briefs on April 4, 2017. On April 19, 2017, the parties filed a Joint Appendix in which they included miscellaneous filings, exhibits and testimony introduced in the collateral proceeding in the Franklin County Court of Common Pleas, *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin County C.P. Case No. 16 CV 006402. On the same date the parties filed Joint Exhibit 1 containing the entire transcript of the September 2016 evidentiary hearing in the above-referenced common pleas action. On May 2, 2017, in response to questions regarding the briefing raised by the Hearing Officer during a May 1, 2017 status teleconference, ECOT submitted a letter containing additional authority. On May 5, 2017, ODE filed a response. At this point the matter was deemed submitted.

All testimony and exhibits, together with post-hearing written arguments, whether or not specifically referred to in this Decision, were thoroughly reviewed and considered by this Hearing Officer prior to reaching a decision.

B. The Collateral Common Pleas Action

As the parties have acknowledged throughout, these proceedings are also governed by the outcome of a civil action filed on July 8, 2016 by ECOT in the Franklin County Court of Common Pleas while the underlying FTE review that is the subject of this proceeding was in progress. See *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin County Case No. 16 CV 006402. In an Amended Complaint filed by ECOT on August 1, 2016, and/or during the course of the proceedings, ECOT requested specific performance, declaratory and injunctive relief from the Court premised on the allegations that: 1) a Funding Agreement executed in January, 2003 between ECOT and ODE precluded ODE from imposing a durational requirement as part of the FTE audit/funding process; 2) the imposition of a durational requirement is unlawful and inconsistent with the statutory mandate under R.C. 3314.08; 3) the use of the 2015 and 2016 FTE Review Handbooks, and any language contained therein related to durational requirements, in the course of an FTE review is unlawful as the Handbooks were not promulgated as rules in accordance with R.C. Chapter 119; and 4) reducing ECOT's FTE funding for the 2015-2016 academic year based on durational data would violate retroactivity principles as ODE did not inform ECOT until part-way through the academic year that it intended to rely on such data. See *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin County Case No. 16 CV 006402 (December 14, 2016.)¹

Extensive testimony and evidence was received by the Court of Common Pleas during the course of the proceeding. After initially denying a temporary restraining order and then a preliminary injunction seeking to preclude ODE from going forward with a review of durational

¹ A companion complaint was filed by individual families of ECOT students ("the ECOT families") in which they asserted that the imposition of a durational requirement is a violation of their equal protection rights in that other eSchools were not reviewed in 2016. See *Electronic Classroom of Tomorrow v. Ohio Department of Education*, *supra* at 21-23.

data in the underlying FTE review, the Court, after also denying a motion to dismiss filed by ODE based in part on the existence of the instant administrative remedy, ultimately issued its Final Decision on December 14, 2016 rejecting ECOT's arguments on each of the claims and rendering judgment in favor of ODE. *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*.

In the Decision, the Court makes the following findings and conclusions as to why ECOT failed in its request for relief: a) the Funding Agreement was no longer in effect (Id. at 8-11); b) even if it is still in effect, the Funding Agreement cannot be fairly construed to preclude the consideration of durational data (Id. at 10-12); c) interpretation and implementation of the Agreement to exclude durational data from the funding process would be against public policy and therefore render the Agreement null and void (Id. at 12-13); d) review of durational data does not violate R.C. 3314.08, and in fact, "the duration of participation [by a student] matters in determining whether a student has been offered (i.e. supplied) 920 hours of learning opportunities to a given student" [under the statutory requirements for funding of an FTE]; e) since at least 2010, the FTE Review Handbooks have contained language instructing the FTE reviewer to place a high level of scrutiny on durational data (Id. at 17-18); f) the FTE Review Handbook does not unlawfully expand the scope of the underlying funding statute as that provision already permits the consideration of durational data (Id. at 18); g) the FTE Review Handbook is an interpretive guideline of the funding statute for reviewers to follow in conducting an FTE review, not a rule required to be promulgated under R.C. Chapter 119 (Id. at 16-20); h) as a public school, ECOT cannot assert retroactivity concerns, citing *Toledo City School Dist. Bd. of Educ. v. State Bd. Of Educ. of Ohio*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950 (Id. at 20-21); i) even if it was not precluded from asserting retroactivity, the facts

prevent ECOT from prevailing on such a claim as the FTE Review Handbooks have placed ECOT on notice for over six years that “ODE reserves the right to seek durational data.” (Id. at 20, 21); and j) the ECOT Families’ equal protection claims fail under a rational basis test as the facts show that it was not singled out for review in 2016 but was merely on schedule for a review under a five year cycle (Id. at 21-23.)

The Decision is on appeal to the Tenth District Court of Appeals where oral arguments were heard on April 13, 2017. (*Electronic Classroom of Tomorrow v. Ohio Department of Education*, 10th Dist. Case Nos. 16AP 000863 and 16 AP 000871.) Because of the overlap of issues with the current proceeding, the Decision brings up legal issues of claims and/or issue preclusion as to whether the parties are precluded from relitigating any of the factual findings and/or legal conclusions rendered in the collateral action. As will be addressed later, ECOT advocates a narrow reading of claims and issue preclusion and therefore a limited impact of the Common Pleas decision on the present action. ODE argues the opposite.

III. Summary of the Evidence

A. Background of the Electronic Classroom of Tomorrow

The Electronic Classroom of Tomorrow (“ECOT”) is a form of community school (common referred to as “charter schools”) designated an “eSchool.” The definition of an eSchool is found in R.C. 3314.02(A)(7) as follows:

“Internet-or computer-based community school” means a community school established under this chapter in which the enrolled students work primarily from their residences on assignments in non-classroom-based learning opportunities provided via an Internet- or other computer-based instructional method that does not rely on regular classroom instruction or via comprehensive instructional methods that include Internet-based, other computer-based and non-computer-based learning opportunities.

(See also ODE Exh. 1037 at 15.) As a community school, ECOT is “a public school, independent of any school district, [that] is part of the state’s program of education.” R.C. 3314.01(B)

Incorporated under R.C. Chapter 1702 (ODE Exh. 1116 at 3181-3182) and opening in 2000, ECOT is a kindergarten through 12th grade community school that functions fully online as an eSchool. Unlike a traditional school, ECOT students access the eSchool’s educational offering largely via computer supplemented by non-computer-based learning opportunities such as field trips to places like the zoo or research at the library. All of its students work from home. 80% are issued computers and the rest utilize their own. All receive tablets and headphones. K-8 students receive webcams which is optional with high school students. All of its teachers teach from home. The school has nine principals. The school has students in all 88 counties concentrated in the major urban areas of Cleveland, Columbus and Dayton and Cincinnati. Its 900 member teaching staff resides in about 63 of the 88 counties. The school’s main operations are at 3700 South High Street in Columbus, Ohio with branch locations in Cleveland, Columbus and Dayton. (Teeters at 1100, 1316; Pierson at 1414-1415, 1419, 1423-1425, 1428-1432, 1446-1447, 1488-1489; Franklin County Common Pleas Transcript, “C.P. Tr.”, Vol. IV at 194-195.)

At the main location are 350 employees who handle various areas including a) technical support help desk that assist students and parents with any issues with equipment or software; b) a call team designated a “student information center” that handles calls regarding admission and enrollment and helps navigate students to where they can find assistance; c) an ed. tech department which interfaces between the software developers and infrastructure, educators and operations; d) a software solutions department that maintains ECOT’s student home page, parent portal, and other software; e) a project management team which performs business analysis; f)

“operation development” that assists the curriculum staff interface with new technologies; g) an infrastructure department in charge of hardware for the divisions including maintaining phones, computers the network and a collocation where 23 servers are housed; and h) a testing department in charge of all the State testing and logistical coordination of sites around the state where all the students will take their tests. (Pierson at 1414-1420, 1446.)

ECOT also holds regional accreditation through Advanced and North Central Accrediting. Its students must meet all state standards in order to graduate from high school. (Teeters at 1100, 1316.) ECOT's sponsor is the Educational Service Center of Lake Erie West. (Teeters at 1169.) ECOT has a seven member non-profit board. (Teeters at 1210-1211.) Its web page states that, “like all public school students in Ohio, ECOT students are expected to complete school of 25 hours per week during the school year. However, unlike traditional school classrooms, students may attend ECOT online at their convenience or on their own schedule.” (Teeters at 1317.) As Ms. Pierson explained:

[A]ll students who are coming to ECOT found they did not have flexibility in their previous school that they needed so that sometimes is based on time. That could be just location. It could be... special needs. We have students who need access to a variety of interventions from ...therapists...the majority of our students are in the high school and a lot of them have jobs, also have their own kids, and.. are trying to do homework ...when they are not having to take care of their kids. We want to be able to accommodate them as much as possible, so we try to make information accessible for when they have the time and the means to be engaging with it.

(Pierson at 1523-1524.)

Online content is available twenty-four hours a day, seven days a week unless ECOT is having a maintenance window. Teachers also do live sessions during the day, either with an entire class or with a pull-out group, and record content for students or provide alternate video content to fill the gap for students who can't attend live sessions. ECOT also has a variety of

flexible office hours that teachers provide, checking e-mail, making phone calls in off-hours to accommodate students' schedules. (Pierson at 1428, 1433; Schroedl at 1332-1357.)

The teaching staff is divided into general teachers, special ed. teachers, Title 1 teachers and intervention specialists. The general education teacher is responsible for all of the grading, accountability for the student on State tests and on the report card, live sessions, and office hours. They create some content within their classroom but are not responsible for the curriculum of the classroom which is done by an ECOT department and through resources purchased by ECOT from outside vendors. (Pierson at 1429-1430; Schroedl at 1334-1335.) The teachers are expected to work a seven and one-half hour day with six hours of instruction and the remaining hours spent in grading, feedback and preparation for the following day. (Pierson at 1433.) The teachers are supplemented in their teaching by a) an “orienteer” who follows a student for their first six weeks of enrollment, provides live sessions and is available by phone and e-mail to interact with the students and the parents to assist them in any technical or navigational issues they may have; b) student support specialists that also interface with the students who have engagement issues and are not meeting the requirements that the teachers have set forth in a class; and c) various categories of counselors and a parent liaison who is available as a frontline for general questions of being a parent of a student at ECOT. (Pierson at 1448-1451.)

To create its curriculum, ECOT utilizes around 50 paid on-line curriculum providers supplemented by free on-line resources. (Pierson at 1439, 1441, 1452-1455; ECOT Exhs. P-9 & P-10.) It also uses around 20 content developing staff who help write content to fill gaps that are not able to be filled by ECOT’s providers. Because it is a classroom in which the students enter through a portal, pages are created to frame the content of the home pages that the students will

be looking at when accessing the other providers or to obtaining assignments. [IQity is the name of ECOT's Learning Management System where the classrooms are housed. (Pierson at 1545-1546.)]

Depending on where the student was in their coursework, the student has a choice of three areas in which to select once logged-on: a) the classroom where the content is, b) the library where the student may be accessing a book that they are reading for a course, or c) going to a live session. (Pierson at 1485-1486.) To access the other providers' Learning Management Systems from ECOT's home system, the student clicks on a link and enters log-on information to enter the new platform. (Pierson at 1439, 1482, 1543.) ECOT also provides over 100 field trips per year. (Pierson at 1488-1489.)² Typically each live session would involve one hour out of a five hour school day. (Pierson at 1538-1539.)

At its peak, ECOT has had over 17,000 students enrolled at one time and over 28,000 students enrolled at one time or the other during a school year. (Teeters at 1102.) During the 2015-2016 academic year, the school had 26,000 students that were enrolled at one time or the other and had reported approximately 15,300 FTEs. (Teeters at 1191-1193; Pierson at 1420, 1684-1685; ECOT Exh. A-2.) ECOT is the largest community school in the State. (Rausch at 719.)

ECOT serves a largely "at-risk" student population, with nearly 90 percent of its students falling into that category. (Teeters at 1100-01.) At-risk students are those who face special challenges and heightened risks of academic failure/drop-out due to various socio-economic issues and other challenges. (Id. at 1103.) Students and families typically choose ECOT's online educational format for a variety of reasons, including bullying, social and developmental

² A more detailed tour of the school in the context of both a 3rd grader and a high schooler is in the record. (Pierson at 1485-1520, 1534-1585.)

issues, less-than-ideal familial circumstances, and in some instances, homelessness. (Pierson, C.P Tr. Vol. IV at 197-98, 203-04, 219-20.)

ECOT's demographics include a racial make-up that is 72% white, 72% of the students come from low-income families, 20% are special education students, 44% fall into a risk category such as socio-economic or special ed. and 5% are older than the typical student at their grade level. (Teeters at 1101; Pierson at 1426-1427.) As indicated by the difference between FTEs and students enrolled, ECOT's student body is highly mobile. Only 8.9% of the students that enter high school at ECOT are there at graduation. Of those that do, 63.5% graduate in four years. (Teeters at 1292-1293.)

B. ESchool Funding

ESchools, like all community schools, receive public funding from the state. Funding is established by R.C. 3314.08(H) and is based on per-pupil Full-Time Equivalency ("FTE"), the "portion of the school year a student was educated, as determined by the number of either days or hours of instruction provided to a student during a school year divided by its annual membership units (the total number of either days or hours of instruction which a community school must provide during a school year in accordance with its contract with the sponsor, as listed in the community school's entity profile." *FTE Review and Community School Enrollment Handbook*, revised January 5, 2015, ("the FTE Review Handbook") (ODE Exh. 1037 at 44.) A child who is educated for an entire school year is counted as 1 FTE. A child educated for less than a school year is a fraction of 1 FTE (ex.75 FTE). (Babal at 219.) An FTE is the equivalent of at least 920 hours. (Babal at 343,550.) (ODE Exh. 1037 at 44.) A standard school week is

five days. A standard school day is five hours. (Rausch at 946.)³ (See also Teeters at 1204-1205.) Any portion of an FTE is calculated by the number of hours of participation by the student divided by the total number of hours in the eSchool's calendar.

Funding is implemented in two parts, an interim payment followed by a periodic post payment "true-up" called an FTE Review that occurs at least once every five years for the preceding academic year. The interim payment is triggered by the self-reporting of information from the community school of information from which the FTE's accrued to date are calculated. Locally community schools as well as traditional districts, have what are called student information systems. Those systems, which vary from school to school, allow a local school to interface with what's called an information technology center. These are intermediaries between the Department of Education and the local school. Through the affiliation with an ITC, the school is able to upload data to a system that is then processed and sent to the Department in what is called the Statewide Education Management Information System ("EMIS"). (Rausch at 572-573.) EMIS is the primary way by which the schools communicate with ODE. (Id.)

The data transmitted covers many areas such as accountability, staffing and course information and also includes the information needed for funding. (Rausch at 573.) It includes the school's calendar, the student's name, their contact information such as where they live, the start date and end dates of their enrollment, grade level and, if applicable, additional coding items such as special-ed. coding, limiting proficiency coding, career tech funding, and economic disadvantage funding. (Babal at 220-222, 327; Rausch at 574.)⁴ Schools also report the "percent

³ In the case of an eSchool it is recognized that hours may vary from the standard so long as they do not exceed ten hours in a twenty-four hour day and accumulate to at least 920 hours over the year. (Rausch at 947-948.)

⁴ The school enters a code for each of these special categories and once EMIS recognizes the code, funding is generated for that code. (Babal at 327.)

of time factor” defined in the EMIS Manual as “the average percent of time, for the week, that a student participates in any instruction provided by a certified/licensed employee.” (ECOT Exh. J-10 at 24.) Data is reported throughout the year but ODE encourages schools to report data regularly, twice a week if possible. (Babal at 222.)⁵

From this data, ODE calculates each interim payment by use of a fraction consisting of numerator which is the dates of enrollment for each student during that period and a denominator which is the school’s calendar. The fraction is then adjusted by the “percent of time factor.” If a school’s calendar is for 920 hours, the student is enrolled for the entire year, and the “percent of time factor” is 100%, the student is treated as enrolled for 920 hours of learning opportunities and a full FTE. (Rausch at 575-582; Babal at 253, 326, 343.) “[I]f they are enrolled, they get payment.” (Babal at 325.)⁶ To this base amount additional increments of calculated funding for such factors as special-education, limited proficiency, career tech and economic disadvantage are

⁵ Although the calculation of an FTE is ultimately tied to the hours of engagement of a student in a learning opportunity, schools do not report to EMIS the specific hours that a student is engaged in learning activity during the course of a particular day, month, or year as a condition of receiving the interim funding. (Babal at 321, 357; Rausch at 576.)

⁶ Historically the “percent of time factor” has been used in situations where a student splits time between two schools such as a career tech center and a community school. Through the “percent of time factor,” the latter is to report the actual percentage of time spent at the community school. (ECOT Exh. J-10 at 24-28.) However, per Mr. Rausch, the “percent of time factor” can also be used where the student remains 100% at the community school but is progressing through the course material at a rate that constitutes only a fraction of a 920 hour annual rate. In such cases, the school can report an estimate of this percentage as well under the “percent of time factor.” Thus if the school reported only a 50% “percent of time factor,” it would be paid only half of the \$5900 per full FTE funding for that student. (Rausch at 576-581.) At the end of the year, the school is expected to adjust the “percent of time factor” to reflect the ultimate percentage of time expended on learning activities for each student. (Rausch at 607-609, 959, 969-983.) (See also description of this type of use in the 2015 FTE Handbook in the context of correspondence schools. (ODE Exh. 1037 at 47; Rausch at 874-878; EMIS Manual J-10 at 24-25.) ECOT did not report any information under the percent of time factor during the 2015-2016 academic year. (Babal at 253-254.)

added.⁷ ESchools do not receive all of the calculated funding that bricks and mortar community schools receive but do receive special needs and career tech funding. (Babal at 354-356.)

Community schools are paid monthly by the tenth business day each month. Payments run a month behind. ODE pulls the data submitted to date by the community school on the 23rd of each month, and that data is used to fund the next month's payments. (Babal at 221-222, 320; Rausch at 574.) During the 2015-2016 school year, eSchools such as ECOT received a base amount figure of \$5900 for each full FTE reported by the school. (Babal at 539.)

From ODE's perspective, this payment methodology, where the calculation of FTEs and corresponding interim payment is based primarily on enrollment regardless of actual student participation, makes follow-up accountability of participation critical. (Babal at 325-326.) As such, all payments made to a school throughout the school year are subject to periodic adjustments and then subject to the afore-stated periodic final post funding FTE review to verify, along with enrollment and other factors, that the actual hours of engagement in a learning activity match the calendar hours (at least 920 hours for 1FTE, less for partial FTEs) that were funded and adjustments made up or down. (Babal at 324-327; Rausch at 570-572, 581-584, 828, 830, 948-949.)

During school year 2015-2016, ECOT was paid \$109,276,126. Of that amount, \$108,936,445.79 was directly tied to reported FTEs and the remainder tied to the school's report card and academic performance during the prior year. (Rausch at 2150-2153; Pierson at 1953; ECOT Exh. A-11.)

⁷ Commencing in FY 2016, a funding factor for student achievement was also added. (Rausch at 829.)

C. FTE Reviews

ODE conducts the FTE reviews through its Area Coordinators,⁸ (Babal at 223; Rausch at 569-570, 583-584, and 595.) Typically the Area Coordinator assigned to the region in which the community school is located is tasked with taking the lead on the FTE review. (Babal at 295-296.)

Generally, as noted above, FTE reviews occur every five years for each school unless factors are present that would trigger a more frequent review such as an issue with a prior year FTE review or where there are recommendations to conduct one from the Auditor of State or another department of ODE. (Babal at 225; Rausch at 585-586, 886-887.)⁹ The scope of the review extends only to the immediately preceding academic year. ODE does not reach back to previous academic years. (Rausch, C.P. Vol. II at 222; Teeters at 1205.) If ODE determines through the FTE review that a given community school is not able to substantiate all of the FTE funding that it received for the previous academic year, ODE requires the school to return any overpayment on a going-forward basis out of new monthly payments of public money that the school receives. ODE deducts the overpayment on a monthly basis for an extended period of time. (Rausch at 621.)

In conducting the reviews, the Area Coordinators are subject to the funding provisions set forth in R.C. 3314.08. (Babal at 533.) They are also guided by an FTE Review Handbook that

⁸ Area Coordinators are retired school administrators who have extensive education experience. They are organized by 10 regions in Ohio. In addition to performing FTE reviews, they have a multitude of other duties including acting as an intermediary between ODE and the schools in forwarding information from ODE answering questions from the schools, serving as monitors for grants, conducting Straight A-funded audits, mediating disputes between schools, and resolving disputes between two public districts regarding student placement. (Babal at 240; Rausch at 596-597, 878-881.)

⁹ More frequent FTE reviews are limited by the sheer number of community schools – 360. (Rausch at 585-587.) ODE performed 184 FTE reviews in FY '15, 100 in FY '16, and has about 100 being reviewed in FY '17. (Rausch at 890.)

informs them as to what documentation to look for and what procedures to follow in conducting the review. (Babal at 224, 226-227; Rausch at 587, 598-599, 859; Heitmeyer C.P. Dep. at 48-53; ODE Exh. 1037.)¹⁰ Typically the Handbook has been updated annually. (Rausch at 587-588.) The Handbook is posted on ODE’s website and “we view the primary purpose of the manual...to be for the use of the area coordinator, we certainly understand that because it is on our website and placed publicly, that schools read it, seek to understand it, and to be prepared to provide the information that ultimately our reviewers are ultimately going to ask for.” (Rausch at 588, 600, 637, 728; Heitmeyer C.P. Dep. at 51, 73-75.)

The 2015 FTE Review Handbook was drafted by a committee of Area Coordinators including Jack Narris, Jim Lambert, Fred Ross and Don Urban. (Babal at 294-295.) Recognizing that eSchools are different in operation from bricks and mortar community schools, the Handbook has a section and checklist specifically discussing FTE reviews of eSchools such as ECOT. (ODE Exh. 1037 at 15, 23-24; Babal at 226, 228; Rausch at 600-601.) The reviewers check many areas that are applicable to all community schools such as source documentation, birth certificates, proof of residence, and the special-ed file (verifying that what is reported is justified by the student IEP), if there is one. They would also look at it the 105 hour withdrawal rule¹¹ and check to verify enrollment and original source attendance data, including start dates, end dates, and withdrawals. They also check some areas unique to eSchools such as the delivery

¹⁰ “The job in the FTE review is to make sure that state law is being complied with. The FTE Handbook provides guidelines on how to do those procedures and what documents to look for. So yeah, I guess the statutes certainly are something that we look at. The statutes don't provide a step-by-step guideline on how to conduct an FTE review, but the ORC is the ORC, we have to enforce what's there.” (Babal at 555.) (See also Rausch at 600.)

¹¹ The 105 hour withdrawal rule is a provision that requires a school to withdraw a student if they have 21 consecutive school days of unexcused absences in the case of a bricks and mortar school; or 30 days in the case of an eSchool that is open seven days a week. (Babal at 321-322; Teeters at 1270; Pierson at 1842-1844.)

of a computer or a waiver that the student or family did not need a computer, and durational data, whether the attendance hours for each student reported in EMIS match the actual documentation the school has in its possession. (Babal at 228-231, 328-330, 343-345; ODE Exh. 1037 at 9, 15-16.) While ODE expects a level of uniformity in applying the Handbook, the Handbook itself recognizes that discretion is allotted with respect to individual situations in conducting each review. (Rausch at 599-600; ODE. Exh. 1037 at 2.) The 2015 FTE Review Handbook has been available on ODE's website since January of 2015. (Rausch at 589.)

The review process consists of two stages, an initial and a final review. The purpose of the initial review is to act as a trial run to let the school know what ODE will be looking for in the final review and to walk through any issues. It is conducted procedurally in the same format as the final but no final findings are made and it has no funding consequences. (Babal at 234-235; Rausch at 592-593.) The Area Coordinator will typically e-mail the community school in the fall or early winter of the school year to advise school administrators of the upcoming initial review and provide a list of documents to produce. (Babal Vol. II at 232-234.) Documents are selected as a random sampling based on a number tied to the size of the school set forth in the checklist in the FTE Handbook and for larger schools, are pulled using a function in Excel. (Babal at 235-237, 2126; ODE Exh. 1037 at 22, Item 8.) The time for the initial review is mutually arranged and then conducted on site followed by an initial FTE letter outlining any issues detected. (Babal at 234.)

The final review is then conducted at the end of the school year anywhere from May through July with the same format repeated except final determinations are made. (Babal at 235-236.) The final review may focus on issues identified during the initial review or it may be a comprehensive second review, depending on the circumstances. (Rausch at 593-594.) Once

completed the review findings are sent to Mr. Rausch's office where a final determination of over or underpayment is made. (Rausch at 595.) As noted above, the results of the review could result in an upward or a downward adjustment to the school's funding (Babal at 223), with any finding of overpayment returned on a going-forward basis out of new monthly payments of public money that the school receives. (Rausch at. 621.)

D. Durational Data is Part of eSchool Funding and FTE Reviews.

The source of ODE's reliance on durational data rather than mere enrollment data in doing its FTE review "true-ups" of eSchools lies in R.C. 3314.08(H). The "Funding Statute" for community schools is R.C. 3314.08(H)(3) which provides that:

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.

(Emphasis added). The term "learning opportunities," as used in the funding statute, is addressed in R.C. 3314.08(H)(2), which states in relevant part:

For purposes of applying this division and divisions (H)(3) and (4) of this section to a community school student, "learning opportunities" shall be defined in the contract, which shall describe both classroom-based and non-classroom-based learning opportunities and shall be in compliance with criteria and documentation requirements for student *participation* which shall be established by the department. Any student's instruction time in non-classroom-based learning opportunities shall be certified by an employee of the community school.
(Emphasis added).¹²

¹² It is further described in the 2015 FTE Review Handbook at page 24, footnote, as: "[l]earning opportunity for eSchool could be computer learning, reading, resource documents, writing papers, taking tests, doing research, field trips, and conferencing with teachers."

Construing these provisions, the Franklin County Court of Common Pleas has declared that “[u]nder these statutes, the Court finds that ODE is entitled to consider durational data in reaching a funding decision for a community school.” The Court has further found that, “the duration of participation matters in determining whether a student has been offered (i.e., supplied) 920 hours of learning opportunities to a given student.” The Court has reasoned that, “the statute expressly makes learning opportunities contingent upon “criteria and documentation requirements *for student participation*” R.C. 3314.08(H)(2). The Court finds that this section shows that learning opportunities have a durational component that is measured in terms of actual student participation.” (Emphasis included.) *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, at 13-16.

The Court construed the durational component as so engrained in the statutory scheme that the Court found untenable ECOT’s argument that the Court should enforce an old 2003 Funding Agreement between ODE and ECOT that purportedly did not contain a durational component. In so doing the Court opined that to “require the State to continue paying hundreds of millions of dollars per year for an indefinite time period, without any ability to determine whether students are in fact participating in any curriculum at ECOT at all...would render the Funding Agreement void as *against public policy*.” *Id.* at 12. (Emphasis added.)

As the Franklin County Court of Common Pleas further concluded, the statutory scheme is reflected in the *FTE Review and Community School Enrollment Handbooks* issued by ODE. Since at least 2010 the annual versions of these handbooks have included a dedicated section for eSchools that incorporated the requirement of eSchools to maintain durational data in the school’s records. *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, at 17-18. See also C.P. testimony of ECOT Superintendent Ricky Teeters acknowledging that

durational data has been referenced in the Handbooks since 2010. (Teeters C. P. Vol. I at 265-270.)

The FTE handbook utilized in the review for ECOT's 2015-2016 academic year, revised January 5, 2015, (ODE Exh. 1037), provides in a dedicated section on eSchools that:

When reviewing an eSchool, coordinators shall follow the review procedures in the FTE Review manual for all community schools; however, some procedures will vary in intensity and will be different because of the legal obligations and unique situations of the eSchool.

The reviewer should keep in mind that the funding for eSchools is different from the funding of other community schools in some aspects. The funding for eSchools consists only of the formula amount (based on an accurate FTE calculation) and the special education weighted amount calculation. There are no funds for PBA, Parity Aid, gifted aid or CTA funding. *This situation puts more pressure on eSchools to have an accurate FTE calculation; therefore, the reviewer of eSchools must put a high level of scrutiny on the relationship between the hours/days of instruction and the daily/hourly attendance documentation used in calculating the final FTE for each student.*

When reviewing an eSchool, the reviewer shall follow all the review procedures/letters in the FTE Review Checklist, incorporating these specific eSchool additions/suggestions:

- 1.....
2. *An eSchool is also required to maintain student attendance records, as specified in the eSchool's written attendance policy. The reviewer will verify that the school has a written attendance policy.*

The reviewer will check the attendance record procedure maintained by the eSchool. The eSchool must be ready to display this program or screen for the reviewer to view for each student.

The reviewer will check the individual attendance record for each student being reviewed. *This attendance record should show when a student has logged on and off while accessing learning opportunities.* A learning opportunity for an eSchool student could be documented computer time for doing homework in any subject, reading resource documents, writing resource papers, taking tests, doing research, conferencing with teachers, etc.

Non-classroom activities other than correspondence courses or non-classroom online instruction for a student that constitutes less than one-half of the student's

instructional day must be documented and approved in writing by a teacher, supervisor or school administrator and *must include an hourly/daily/weekly accounting that the hours documented were hours in which the student accessed a learning opportunity.*

(Id. at 15-16.) (See also Rausch at 603-604, 726)

Further reference to durational data is included in the reviewer checklist for eSchools appearing in Item Eleven in the Handbook. (Id. at 24, 30):

- i) An attendance record for the student that matches the amount of time reported in EMIS? YES NO
- j) If the student has non-computer learning opportunities, were such opportunities documented and approved in writing by a teacher, supervisor or school administrator? YES NO NA
- k) Was there hourly/daily/weekly accounting of hours in which the student accessed learning opportunities? YES NO.

See also Babel at 360-366; Rausch at 604-606, 726.)

Additional language in the FTE Review Handbook that demonstrates the relationship between durational data and Funding is found at pages 46-47, which, as both Mr. Babel and Mr. Rausch noted, is specifically directed at blended/correspondence schools but nevertheless includes general language that is applicable to the treatment of eSchools as well both for computer-based and non-computer-based/non-classroom learning opportunities:

The expectation is that all non-classroom based learning hours be certified by an employee and documented. For traditional correspondence courses, the following requirements and procedures apply. These procedures may also be used as a framework for documenting hours spent on other non-classroom, non-computer activities. (If the non-classroom activities are computer-based, then some sort of computer log should be the basis of the hours.)

1. There must be a written plan, specific to each student and each course, which details the subject matter to be mastered and tasks to be completed by the student to obtain a specified number of credits toward graduation. That plan must be signed by a representative of the school and the student's parent/guardian or the student if the student is 18 years old or older. That plan must be finalized and signed before the student's work towards completing the plan begins. A school can count as "learning opportunities" student hours spent with school staff on

evaluation and assessment for the purpose of creating the plan, *if the hours are documented.*

2. *The actual number of hours the student spends working towards completing his or her plan must be tracked and recorded in a written or electronic student participation log that indicates the dates and times the work was done. That student participation log is separate from the original source documents, and may be compiled by either the student or school staff, but its accuracy must be certified on a monthly basis by a teacher who is licensed by the Ohio Department of Education and hence is subject to The Licensure Code of Professional Conduct for Ohio Educators. The student participation log shall total each time entry to the nearest quarter hour.*

The school will be considered to have provided one hour of learning opportunity for each hour of student work documented in the student participation log described in paragraph 2 above. The school will be given credit for providing partial hours of learning opportunity for each partial hour of student work that are documented in the student participation log described in paragraph 2 above. *Non-classroom learning opportunities are only credited for actual documented hours; missed days or assignments do not count as hours.*

A student may combine hours from different learning modes. For instance, a student with 460 hours of non-classroom logged hours, 460 hours of classroom-based instruction would have 920 total hours. Documentation, such as attendance logs, of classroom-based learning must be compiled and kept by the teacher of the classroom.

The school will report, for funding purposes, each student's FTE based upon hours documented in the student participation log described in paragraph 2 above, as a percentage of 920 hours of learning opportunities. For example, if the school can document 920 hours of student work in the student participation log required by paragraph 2, the student will be reported as 1FTE, *but if it can only document 690 hours of student work in that way the student will be reported as .75 FTE.* Any student with documented hours in excess of 920 hours will be reported as 1.0 FTE.

For determination of the "percent of time" element reported in EMIS, SOES, or successor systems, used to determine a partial FTE for a student, the school should estimate the student's percent of time upon enrollment, and document and follow a procedure to update the student's percent of time element periodically based on documented hours in comparison with hours needed at that point of the year to be on track for full-time status. At the end of the school year, the school will adjust the percent of time element to precisely reflect the student's documented hours.

(ODE Exh. 1037 at 46-47; Babel at 369-371; Rausch at 607-608, 726-727.)

As ODE administrators charged with the implementation of the Funding Statute, Mr. Babel construes R.C. 3314.08(H)(3) as containing a durational element as does Mr. Rausch. (ODE Exh. 1325; Babal at 536-538, 547; Rausch at 611-612, 996.) When Mr. Babel began work at ODE in 2015, “[t]he expectation was that schools were tracking this information already. That was my understanding when I came in. That is what I was told by multiple directors in different offices throughout the Department,” including the office of Community Schools. (Babel at 473-475.) Mr. Rausch expected that correspondence schools, blended learning schools and eSchools would all be maintaining durational data by the 2015-2016 school year. (Rausch at 718-719, 1024-1025.)

The reason why ODE relies on durational data in doing its FTE review “true-ups” of eSchools rather than enrollment data as it does it for its final funding determination for “bricks and mortar” community schools or the “bricks and mortar” portion of a “blended” community school, was explained by Mr. Babal and Mr. Rausch. In a bricks and mortar setting, the student is presumed to be in the classroom receiving instruction where they are in front of a teacher who is observing the student engaging in learning opportunities. In the case of a blended school, the reviewer would give credit to the school’s calendar and the student’s attendance record for the time spent in the bricks and mortar portion of the student’s education and look for durational data for the extra time spent online outside the school. (Babal at 333-335.)

In contrast, the eSchool student is often not in front of a teacher but instead working from their home. In such a setting the only way of judging whether they are engaged in a learning opportunity is by log-in, log-out times. (Babal at 333-334.) ECOT Superintendent Teeters himself acknowledged this dynamic. (Teeters at 1217. Mr. Rausch added that,

in a brick and mortar community school the learning opportunities are offered at a set time; math is offered at this time, the building is open for operation from 8:00

a.m. to 3:00 p.m. That's when the learning opportunities are provided to students. That is the measure. The nature of...of what we found with these correspondence schools initially, and then with eSchools, is that there is considerable flexibility in terms of when the instruction is provided, when the course work can be accessed. In fact, it can be accessed 24 hours a day, the law just says a school can't claim more than ten hours in a given day in learning opportunities. And so it's that distinction and kind of that difference in the model that causes us to look at durational time in the eSchool environment.

(Rausch at 826-827.) Durational data is therefore an integral part of the FTE reviews for the 2015-2016 school year and is the central issue in this appeal. (Rausch at 828, 830, 832-833.)

E. ECOT's Written Policies Mirror the Durational Component of the Funding Statute.

ECOT's own written policies mirror the durational component of the funding statute. Superintendent Teeters acknowledged that ECOT's stated policy is that, "[s]tudent attendance is essential for the success of students enrolled in ECOT." (Teeters at 1228.) Mr. Teeters acknowledged that ECOT's 2013/2014 enrollment application provides that, "[i]t is crucial that the student logs in, checks e-mail and participates in course work regularly (25 hours per week minimum) in order to avoid... consequences." (Teeters at 1226-1227; Pierson at 1858-1862; ODE Exh. 1062.) Mr. Teeters acknowledged that ECOT's 2011/2012 Truancy and Student Engagement policy provides that students are to log-in five days a week, five hours a day. (Teeters at 1218-1220, ODE Exh. 1048.)

Mr. Teeters and Ms. Pierson acknowledged that ECOT has an attendance policy, articulated in its 2012/2013 admissions guide, that states that "[s]tudents are expected to do schoolwork at least 25 hours per week," and ECOT's current website states that "[l]ike all public school students in Ohio, ECOT students are expected to complete school of 25 hours per week during the school year." (Teeters at 1224-1225, 1317); Pierson at 1857-1858; ODE Exh. 1061 at 10523.) Similarly the 2014-15 ECOT Parent/Student Handbook at 8 states that ECOT has "a

system for tracking attendance/engagement.” (ODE Exh. 1058.)¹³ Ms. Pierson acknowledged that these articulated representations did not materially change for the 2015-2016 school year. (Pierson at 1850, 1862.)

F. Historically, With Some Exceptions, ECOT Did Not Create or Maintain Durational Data.

ECOT’s practices contrast sharply to ECOT’s own articulated policy. Although it created and maintained some durational data, historically ECOT had simply not been maintaining durational data as a general practice. (Pierson at 1865.) Instead it was keeping records in accordance with what it believed was required under the 2003 Funding Agreement between ECOT and ODE (Pierson at 1863)[an Agreement that, as noted above, the Franklin County Court of Common Pleas subsequently found to be both limited to one school year and to be void as against public policy if interpreted to preclude the consideration of durational data, *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, at 12.]) “We always maintain the student log, and we can provide student log-ins. What we haven’t ever maintained are durational records.” (Teeters at 1109-1110.) Nor was ECOT requesting the on-line curriculum providers with which it contracted to maintain durational data of ECOT students logging in to those sites. (Pierson at 1447-1448, 1457-1458.)

ECOT did not even record the attendance of students in its live sessions. While the software allowed the teacher to track who was present while the session was live, that data was not preserved after the session had ended. (Pierson at 1434-1436, 1521-1522.)¹⁴ Teachers

¹³ Per Ms. Pierson, the term “engagement” was used interchangeably by ECOT to describe a system for tracking “attendance.” (Pierson at 1845-1847.)

¹⁴ Ms. Pierson indicated that ECOT also had no system in place for tracking the amount of time students spent reading book assignments retrieved from the library. However she noted that subsequent to the FTE Review, ECOT discovered some reading logs where students were tracking time spent reading. (Pierson at 1546-1548.)

could look at an access log in the Learning Management System to determine whether a student accessed a page of content within the ECOT classroom and/or a couple of the outside platforms purchased by ECOT such as Study Island and STAR, but not access information on how long the student had remained on any page. (Pierson at 1480-1481; 1544-1545.) A student could literally log-on to a computer and then leave for the day without any record of that event. (Pierson at 1478.)

Outside of on-line study, ECOT also did not track durational data for its field trips. Although teacher certification that a student was present for the duration of the trip would have been acceptable to ODE, ECOT did not maintain such detail. It knew the duration of the trip but could not verify that each student who signed up for the trip either showed up or was present throughout. (Pierson at 1555-1560.)

Mr. Teeters acknowledged that ECOT did nothing to monitor and enforce ECOT's Truancy and Student Engagement policy which provides that students are to log-in five days a week, five hours a day. (Teeters at 1218-1220, ODE Exh. 1048.) Mr. Teeters and Ms. Pierson acknowledged that other than teacher reports, ECOT had nothing in place to monitor whether students were actually engaged in schoolwork for a period of 25 hours per week as required by its attendance policy. (Teeters at 1224-1225, 1317; Pierson at 1857-1858; ODE Exh. 1061 at 10523.) ECOT's attendance officer, Patrick Tingler, testified that the only tracking of attendance that ECOT does for funding purposes is to ensure that students log in for some brief period of time at least once every thirty days. (Tingler, C.P. Vol. V at 27). Mr. Teeters and Ms. Pierson testified that instead of maintaining durational data for funding purposes, ECOT merely had its

teachers for each student certify at the end of the school year that they have provided a specified number of FTEs of instruction. (Pierson at 1560-1571; ECOT Exh. H-41.)¹⁵

Asked why ECOT didn't maintain durational data, Mr. Teeters responded that "we didn't know how to keep it." (Teeters at 1112.)¹⁶ He added that prior to the 2016 FTE Review, ODE had never asked ECOT to maintain durational data nor had ECOT asked the vendors, from whom it purchased educational log-in software resources, to maintain durational data. (Teeters at 1110-1111; Pierson at 1592.) He acknowledged that while he was Director of Special Programs at Virtual Community School, the school had maintained a form of durational data by having the student log in the previous day's hours on an attendance screen before they could access an educational platform. VCS had, in fact, made the durational data available to ODE reviewers during its 2011 FTE review. (Teeters at 1208-1209.) He testified that when he started employment with ECOT, he "wondered why ECOT didn't do that," and suggested this format to Scott Kerns, Chief Policy Officer of ECOT's management company, Altair Learning

¹⁵ Per Ms. Pierson, the certification is based on the calendar enrollment of 920 hours or a subset of that full calendar year and not on any calculation of time. She indicated that the form originated in the 2003 Funding Agreement with ODE. (Pierson at 1564-1566; 1563.)

¹⁶ ECOT is now implementing a system to track durational time. (Pierson at 1471-1478, 1502-1503, 1519-1520; 1552-1553; 1592-1604.) Per ECOT representatives, the process will take 12 to 18 months. (Pierson at 1603; Teeters at 1122-1123.) Ms. Pierson testified that planning began for implementing durational data when the since withdrawn 2016 FTE Handbook was published online by ODE. ECOT ultimately implemented a system called Active Track in the spring of 2016 that can capture the online durational data. With respect to offline student activity, ECOT tried a pilot version to track the data during the summer of 2016 but it did not work out. This has subsequently been refined and has been working since the fall of 2016. (Pierson at 1623-1634.) However Ms. Pierson believes that no system can accurately track durational data with 100% confidence. (Pierson at 1550.)(See also Roger Nelson at 427.) She pointed out that students had ways of by-passing ECOT software and going directly to the sites of paid vendors without logging on to ECOT. (Pierson at 1548-1552.) She believes this has been addressed with Active Track but there are still loopholes such as a student using multiple screens at the same time where the software can only capture one at a time. (Pierson at 1631-1632.) Problems also exist with the students' tablets which, because of technological limitations require the students to self-report. (Id. at 1634-1636.)

Management Company. He was told that durational data was unnecessary due to the 2003 Funding Agreement. (Teeters at 1209.)

While initially advancing the idea of maintaining durational data when he began his work with ECOT, Mr. Teeters nonetheless believes it is unnecessary. He acknowledges that it is generally the expectation of educators that students attend and participate in an average of five hours per day, five times a week of school. (Teeters at 1214-1215.) He acknowledges that in general increasing participation increases the likelihood of success of a student. (Teeters at 1220.)¹⁷ However under ECOT's model of each student proceeding at his own pace, he believes that it is perfectly acceptable for a student to attend school significantly fewer times than that model. He believes that the proper way of determining a student's mastery of a subject is how they are doing in turning in assignments and how they are doing on test scores. He believes that how long a student is actually spending time on the computer really doesn't matter as long as he

¹⁷ Mr. Teeters and Ms. Pierson testified that ECOT places primary responsibility on the teachers through such indicators as pop quizzes, grade books, e-mails, calls, participation in live sessions, classroom access logs and the dates that a student turns in work, to monitor the engagement of the students. If they see a problem, they are supposed to contact the student and parent to get the student engaged. They may also utilize ECOT's student support specialist group that is assigned to each principal or its attendance department or its orientation group to help get the student on track. (Teeters at 1278-1279; Pierson at 1448-1449, 1479, 1502-1503, 1515, 1521-1522, 1526-1528.)

ECOT teacher William Schroedl testified that he monitors student engagement through assignments, quizzes, labs, phone conversations and monitoring what sites the student logs into through IQity. (Schroedl at 1334-1343, 1346.) He acknowledges that he makes no attempt to measure actual time engaged and believes that such an effort would be meaningless as he believes that end product is the true measure of engagement. (Schroedl at 1343-1344.) As to those students who are borderline, Mr. Schroedl testified that, "I would say a large portion of my day is specifically towards those students that are struggling." (Id. at 1345.) Mr. Schroedl believes that one student for which ODE gave 75% credit for documented FTE's actually spent larger time engaged. (Schroedl at 1347-1353.) ECOT teacher Elizabeth Daron gave similar testimony regarding her work with credit recovery students, asserting that even a student that averages Cs and Ds is an acceptable outcome even though they might have the potential to perform at a higher level with more engagement. (Daron at 1362-1381.)

or she passes. If a student gets a “D,” that is acceptable even if higher amounts of engagement in learning opportunities may have produced a higher grade. (Teeters at 1215-1217.)¹⁸

Nor does Mr. Teeters believe that engagement in learning activities should have any bearing on funding.¹⁹ He believes that it is acceptable under the Funding Statute for a student to log-in just a few moments once every 30 days in order to avoid withdrawing the student under the 105 day rule and the school would nonetheless be entitled to be paid 100% of an FTE for that minimal amount of student participation. (Teeters at 1270-1272.)²⁰ Asked about ECOT Exhibit H-41, where ECOT’s teachers are certifying for funding purposes that they provided educational opportunities to the students during the period of their enrollment, Ms. Pierson acknowledged that a teacher could lecture to an empty classroom and sign the form in good faith. To her, ECOT’s role was simply to provide the instruction and whether the student actually attended was up to the student and their parents. (Pierson at 1870-1873.)

Mr. Teeters asserts that he never viewed any of the annual versions of the FTE Review Handbook prior to 2016 nor did he task anyone at ECOT with reviewing it. (Teeters at 1233-1234.) Nevertheless, Mr. Teeters acknowledged in his testimony that he was tracking House Bill 2 throughout 2015 and was aware in October 2015 that ECOT would have to be creating

¹⁸ The graduation rate at ECOT on the most recent grade card was 38.8 percent. (Teeters at 1251.)

¹⁹ Mr. Teeters testified that ECOT has overhead costs regardless of how many students it has enrolled and that it is not fair to base funding solely on student engagement. (Teeters at 1108-1109.) Mr. Babal acknowledged that by tying funding to durational data, it does not directly take into consideration the school’s cost of operation. (Babel at 501.)

²⁰ ECOT argues that it should not be penalized for its student’s lack of engagement because there are no codes in the EMIS manual that would allow the school to withdraw them for failure to engage. Per Ms. Pierson, both the Area Coordinator and the Auditor of State confirmed this. (Pierson at 1530-1531.)

durational data no later than the legislation's February 1, 2016 effective date.²¹ (Teeters at 1263-1266.) Mr. Teeters further acknowledged that by January 27, 2016, when ODE posted its new 2016 FTE Review Handbook online, he was aware that ODE would be looking for durational data in its upcoming reviews for 2016 and "knew we didn't have anything in place to pull, which was a problem." (Teeters at 1214, 1234.)²²

G. Historically ODE, While Incorporating the Requirement of eSchools to Maintain Durational Data in the FTE Review Handbooks, Was Nevertheless Ignoring It in Conducting Its FTE Reviews.

Prior to 2015, despite the language in ODE's own FTE Review Handbooks, ODE's Area Coordinators were not looking at the durational data in doing an FTE review of an eSchool. (Babal at 475; Rausch at 613-614, 701-703, 730-731, 831-832; Teeters at 1116-1117; Nelson at 397-399; Wilhelm C.P. Dep. at 75-76, 86.) This included a 2011 FTE review of ECOT. (Rausch

²¹ Mr. Teeters disputes whether this requirement is applicable to funding but admits that, at a minimum, it is applicable to ECOT's attendance records. (Teeters at 1263-1266.) Later in his testimony Mr. Teeters essentially retracted this testimony and denied that the statutory language required ECOT to maintain a record of the duration of student participation. Instead he maintained that ECOT could get under the statute by producing a grade book for the day. (Teeters at 1325-1326.)

²² Mr. Teeters apparently also doesn't believe that maintaining adequate attendance data is appropriate to allow ECOT to comply with state truancy requirements. ECOT's attendance policy states that a child can become a "chronic truant" or a "habitual truant" based on cumulative absences within some set period of time (e.g., 10 days in a month or 15 days in a year). (Tingler, C.P. Vol. V at 25). ECOT's attendance policy mirrors state law in this regard, as state truancy law likewise includes those categories. ECOT, however, makes no effort to track non-consecutive absences, so ECOT would have no record of students who have 10 absences in a month, or 15 absences in a year. ECOT tracks only consecutive absences. (Tingler, C.P. Vol. V, 22, 26-27.) As a result, a student who "misses five days and then logs in and then misses another five days and logs in and keeps doing that throughout the year" will never trigger any action from ECOT's attendance office. (Id. at 29.) Given ECOT's failure to track anything other than consecutive absences, ECOT's attendance officer, Patrick Tingler suggested to Mr. Teeters, that it would be a good idea for ECOT to also track non-consecutive absence days. Mr. Tingler said such tracking would allow him to better perform his job as ECOT's attendance officer. Mr. Teeters responded by saying that he would take up the issue with other members of ECOT's senior management. Mr. Teeters then got back to Mr. Tingler and told him that ECOT was electing not to undertake such tracking. (Id. at 19-22.)

at 614; Wilhelm C.P. Dep. at 74.) The practice apparently began in the early 2000s and was cemented with the 2003 Funding Agreement executed between ODE and ECOT after a period of contention between the two entities over what information should be the focus of funding and maintained by the eSchool. (David Varda, former ODE Associate Superintendent, C.P. Tr., Vol. I at 309-337, Vol. II at 19-54.) Although, as the Franklin County Court of Common Pleas has held, the Agreement was for only one year, Area Coordinators continued to adhere to what they incorrectly believed to be an ongoing standard to ignore durational data. As stated by Area Coordinator John Wilhelm, “I don’t know if we were obligated to do it, but we did not do it.” (Wilhelm C.P. Dep. at 80.) The same information was communicated by ODE to the Auditor of State for purposes of school audits conducted by that official. (Marnie Carlisle, Assistant Chief Deputy Auditor, C.P. Tr. Vol. IV at 20-28.)

The Area Coordinators might look at a calendar to make sure it's a legitimate calendar, but they did not look at daily accounting of hours. (Babal at 330-331, 373-374.)²³ The reviewers would check to verify that the calendar conformed with the version submitted to EMIS and that the student was enrolled for the period for which funding was sought and other essentials such as whether the student had a computer, and then end the inquiry regarding learning opportunities. (Rausch at 949-950.) In the case of computer-based learning opportunities, all a school would need to show for on-line activity was a log-in time and evidence that the next log-in was not in excess of the 105 hour rule and it would receive full credit for the hours on its calendar without ever have to establish how much time the student was actually logged on. (Rausch at 952-964, 1001-1010; Pierson at 1531-1532.) Absent other issues that would result in an adjustment, the

²³ Mr. Babal testified that it was not the responsibility of the Area Coordinators to construe the funding statute. That responsibility occurred at higher levels. (Babal at 541-542.)

FTE reviewer would essentially leave the original interim funding calculation untouched. (Id.; Teeters at 1104-1105)

Nor was ODE checking actual hours for purposes of enforcing the ten hour rule [capping ten hours of learning opportunities within a 24 hour period per R.C. 3314.08(H)(3)] . Instead the Department was merely checking to see whether a school’s calendar included more than ten hours in a day, seeing that the hours were spread out over a particular series of months, and then matching that up with the student's enrollment. (Rausch at 835-837.)

H. ODE’s Practice of Ignoring Durational Data in Its FTE Reviews of Non “Bricks and Mortar” Community Schools Ended in 2015.

This practice was subsequently changed with respect to eSchools and other non-bricks and mortar schools. (Babal at 331.) Mr. Rausch explained that the first round of examining durational data occurred with four correspondence schools – Townsend Community School, London Academy, Beacon Hill Academy sand Hamilton Alternative Academy – during FTE reviews conducted for the 2013-2014 school year. Because of lack of evidence of the time students were participating, findings were issued, the schools appealed and settlements were executed in which the schools agreed to the repayment of certain sums and to maintain durational data going forward. (Rausch at 615-619; ODE Exhs. 1006-1008.)

Review of durational data for eSchools began with the discovery by an Area Coordinator that an eSchool, Provost Academy, was taking such liberty with the lack of scrutiny over durational data, that it was counting a log-in as the equivalent of a five hour complete day, regardless of actual time spent in learning activity. Durational data was requested, supplied and reviewed in August 2015. The data could only support 25% of the FTE levels reported and funded, and findings were made. Again Provost settled for a specified amount. (Babel at 476; Rausch at 619-625, 733-736.)

Sometime in the fall of 2015, Mr. Rausch was discussing Provost with Area Coordinator John Wilhelm and the latter advised him that he personally had not been requesting durational data in any of the reviews of community schools, including ECOT, that he had conducted in the past. (Rausch at 736-738, 889.) Mr. Rausch was able to then verify that this practice was systemic by all ODE Area Coordinators. (Id.) This prompted ODE officials to change this practice and begin including the review of durational data in all future FTE reviews commencing with those conducted in 2016. (Babal at 517-518; Rausch at 625-626, 740.)

In implementing this new practice, Mr. Rausch was both aware that this would be a significant change from past practice and that Mr. Wilhelm and other Area Coordinators had advised him that they had concerns about the ability of eSchools to produce durational data in order to support their claimed FTEs. (Rausch at 891, Wilhelm Dep. at 111-115, 118-121, 127-128.) Nevertheless he did not perceive that eSchools would not have the data, partly because Provost Academy was able to produce durational data within a few days of the request and partly because the course of House Bill 2, as it made its way through the General Assembly throughout 2015, placed eSchools on additional notice that the creation of durational data would be necessary by at least February of the 2015-2016 school year. (Rausch at 630-633, 861-862, 866.)²⁴ Consequently ODE did not provide any additional notice to the eSchools prior to January 2016 that it was changing its practices and now integrating the review of durational data in its

²⁴ The legislation, signed into law on November 1, 2015 and incorporated into R.C. 3314.27 with an effective date of 2-1-16, provides that: each Internet or computer-based community school shall keep an accurate record of each individual student's participation in learning opportunities each year, kept in a manner that can easily be submitted to the Department at the request of either ODE or the Auditor of State's office. (Rausch at 631-633.)

FTE reviews. (Nelson at 401-403; ECOT Exh. G-18; Wilhelm Dep. at 150-151.) This lack of clarification resulted in confusion among both Area Coordinators and eSchools.²⁵

I. The 2016 FTE Review of ECOT

1. The Initial FTE Review

In 2016, having last been reviewed in 2011, ECOT was on cycle for its next FTE review. (Rausch at 586.)²⁶ Accordingly, the decision was reached to conduct a review of the funding for the 2015-2016 academic year. (Id.) The initial plan at ODE was to conduct its 2016 reviews under a new 2016 version of the FTE Review Handbook, posted online on January 27, 2016, that contained even stronger durational data language than that in the prior versions of the Handbook. (Rausch at 589, 740-744.) Due to negative feedback from eSchools regarding implementing the Handbook in mid-school year, the review was ultimately conducted under the guidelines of the 2015 FTE Review Handbook, a Handbook that had been made available on ODE's website in January, 2015 and also contained provisions related to durational data. (Rausch at 589, 747-750.)²⁷

²⁵ Mr. Wilhelm verified that he was aware during the fall of 2015 of a decision-making process to incorporate the review of durational data in FTE reviews and that this decision was formally communicated to the Area Coordinators through a power point presentation by Cody Lowe in January 2016. (Wilhelm at 83-87, 99.) After this decision was communicated to the Area Coordinators, there continued to be confusion among them well into 2016 as to whether and when durational data would be considered in the reviews. (Babel at 502-527; Rausch at 694-696, 701-709.)

²⁶ A number of other eSchools were in cycle to be reviewed in 2016 and have received FTE reviews. Many similarly lacked durational data to support their funding. Others had durational data. Others not in the cycle are not being reviewed even if it's possible that they cannot support their FTEs with durational data as the Department has elected not to deviate from the cycle. (Rausch at 886-892, 904-938; ECOT Exhs. G-1 and G-2.) As a result of what the reviewers have found, ODE has stepped up its educational efforts to notify eSchools of its expectations for record-keeping. (Rausch at 893-903.)

²⁷ The posting of the 2016 Handbook and then its withdrawal at the end of February, 2016, served to add to the Coordinator's confusion on whether they were to look for durational data. Per Mr. Nelson, Area Coordinator Don Urban actually sent his eSchool an e-mail on February

On January 27, 2016, Area Coordinator John Wilhelm sent Ann Barnes, ECOT Director of EMIS, a letter notifying ECOT of an upcoming FTE review for the 2015-2016 school year and outlining the documents to be produced at review. As highlighted below, the list included a request for both online and offline durational data documenting the time the student was engaged in a learning activity:

This is to confirm that I will be conducting an FTE Review of your school's student enrollment and attendance policies and records for the 2015-2016 school year and will examine the school's procedures for maintaining enrollment and attendance documents that substantiate the full-time equivalency reported for funding. I will arrive at your school on Monday, February 22 at 9:30 AM. As part of the review, I will be comparing the school's enrollment and attendance data with the school's SOES data and will try to resolve challenges identified by any error flags. Please prepare the following items in advance and have them available for the reviewer's use during the visit:

1. The FTE Detail or SOES Excel report described in the "Obtaining a List of Students from SOES" which is attached.
2. Copy of the contract with the sponsor.
3. The community school's written enrollment and attendance procedures.
4. For each child:
 - a) Birth certificate;
 - b) Proof of residency;
 - c) Enrollment form;
 - d) Withdrawal form, if applicable;
 - e) Proof of attendance by way of an original source document;
 - f) For any special education child, the ETR and the current IEP.
 - g) Verification signed by the parent indicating the delivery date of a computer and set up date, or a signed waiver stating the student has a computer.

18, 2016 indicating that durational data would only be required for the second half of the academic year and, in fact, conducted the initial FTE review of VCS that month without focusing on durational data. (Nelson at 406-420; ECOT Exh. G-20.) This prompted a session during the Area Coordinator's regular staff meeting at the end of April, 2016, in which it was confirmed to the Area Coordinators that the FTE reviews would be going forward in 2016 with a durational data component. (ODE Exh. 1038 at 15, Item 2; Rausch at 628-630, 638, 703, 710.) However no communication was made directly with the eSchools to clarify any confusion that they might have as a result of any inconsistent statement made to them by Area Coordinators. (Rausch at 712-713, 717-718.)

- h) Supporting records indicating when the student's first login was made.
 - i) *An attendance record for the student that matches the amount of time reported in ODDEX.*²⁸
 - j) *Computer log in records for each student that shows verified time the student was logged into the on line system.*
 - k) *For any non-computer learning opportunities, hourly accounting of time in which the student accessed learning opportunities as verified by the teacher.*
5. The reviewer or the area coordinator has the authority, in consultation with the Director of School Finance Programs, to request such documentation as necessary to complete the review from any necessary personnel of the community school or of the traditional public district. Nothing shall be construed as limiting the area coordinator or other charged personnel in obtaining such documentation or information as necessary to complete the review mandated under ORC 3313.08.

A post-review conference will be held at the conclusion of the review.

In a cover e-mail, Mr. Wilhelm alerted ECOT that the data listed in items (i)-(k) had not been requested during the 2011 FTE Review. He further notified the school that the random list of student files to be pulled would be forthcoming closer to the review date. (ODE Exh. 1223; Babal at 241-242.) (Emphasis added.)

Mr. Babal testified that items i j and k were included in the checklist in the 2015 FTE Review Handbook. (Babal at 315.) Mr. Babal explained that with respect to item j, the reviewers expected, “some sort of system printout or something that tells how long a student was engaged in learning activities on a computer, engaged in the learning system.”²⁹ With respect to item k, the reviewers were looking for documentation that evidenced the time spent in activities such as homework, reading, book reports and other areas where the student would be writing things offline. Mr. Babal noted that a sample log-in sheet certified by a teacher, an example of

²⁸ Mr. Babal explained that ODDEX is another ODE data system that used to be the repository for community schools to submit student data used for funding but it was switched to EMIS in fiscal year 2015 and some of the Area Coordinators were slow to pick up on this change in terminology in their FTE letters. (Babal at 315-320.)

²⁹ Mr. Babal also indicated that this data could also be used by the reviewers to verify compliance with the 105 hour withdrawal rule. (Babal at 321-322.)

which is contained in the Handbook, would be sufficient to document the durational time spent in off-line learning. (Babal at 243-246, 312-316, 321-324.)³⁰

The actual initial review was conducted in March, 2016 and took place over a three day period. (Babal at 246.)³¹ The reviewers consisted of Area Coordinators John Wilhelm and John Lambert, along with Alice Dewar and John Babal.³² (Babal at 248.) (Mr. Babal was only present during the first two days. Babal at 246.) Using the 2015 FTE Handbook as the guideline for the review, 600 randomly selected student files were requested in advance (by student ID number – “SSID”) with another 150 identified for production on the first day of the review. The sample size was based on 5% of the 15,321.98 FTEs reported by the school and applied to the

³⁰ Per Mr. Teeters, when ECOT received the letter, the school became alarmed as it knew it could not provide durational data as requested. The school contacted Area Coordinator John Wilhelm who told Mr. Teeters to contact Mr. Loew and Mr. Babal for a meeting. That meeting never materialized but Mr. Teeters did attend a meeting in mid-February at the General Assembly involving representatives of that body along with representatives of the eSchool community and representatives from ODE. During the meeting ODE representatives indicated that they would withdraw the recently posted 2016 FTE Review Handbook. At the same time ODE’s legislative liaison, Jessica Voltilini, represented that ODE would delay going forward with reliance on durational data in the 2016 reviews. The following day, Mr. Rausch issued a letter to the President of the Senate and the Speaker of the House, copied to others at the meeting, indicating a reversal in that position and informing eSchools that ODE would proceed with review of durational data based on the 2015 FTE Review Handbook. Mr. Teeters acknowledges that ECOT did nothing in reliance on the statements made during the meeting and that the school continued to be “fearful” that ODE would apply the 2015 FTE Review Handbook to hold the school accountable for any lack of durational data just as it had done with Provost Academy. (Teeters at 1117-1128, 1240-1247; ECOT Exh. A-10; ODE Exh. 1251.)

³¹ Both Mr. Teeters and Ms. Pierson testified that prior to the commencement of the review, they met with Mr. Wilhelm on March 18th. They state that Mr. Wilhelm told them that a durational data review would not be conducted during the initial review. They state that an iQuity spreadsheet that contained log-in and log-out data was discussed but it contained information for only an ECOT based learning platform and not other learning platforms purchased from outside vendors. Moreover they indicate that the discussion only focused on whether it was adequate to document compliance with the 105 day rule and that a student had logged-on for enrollment purposes. (Teeters at 1133-1136, 1147-1148; Pierson at 1604-1613.) Mr. Teeters acknowledges that Mr. Wilhelm disputed this recollection of the meeting during a subsequent telephone call in May, 2016. (Teeters at 1166.)

³² Both reviews were conducted pursuant to the checklist set forth in the FTE Review Handbook. (ODE Exh. 1037 at 21-25; Babal at 440-441.)

entire enrollment of 26,000 representing students who had attended the school at one time or the other during the school year. (Babal at 248-249,451-460; Rausch at 639-642; Pierson at 1943.)³³ The student files produced by ECOT were, in Mr. Babal's words, "very big folders." Each file contained a birth certificate, a proof of address, testing information, IEPs where applicable, records related to teacher meetings; a folder with proof of attendance information for log-ins, field trips, other learning engagements and excuses for a student's non-participation; and another folder with durational data consisting of log-in, log-out and total time for each session. (Babal at 250-251; Wilhelm C.P. Dep. at 190.)(See also Teeters at 1147-1152, 1206.)³⁴

In reviewing the durational data, Mr. Babal observed that:

Generally speaking, it was about an hour a day each kid was engaged in learning opportunities. There are some that were more, some that were less. Some kids would often go weeks between engagements, some were engaged every day. So it was all over the map. I would say about an hour a day on average.

(Babal at 251.) As an initial review, no specific tabulations were made by the reviewers but the results of the initial review and Mr. Babal's concerns were reported to Mr. Rausch and discussed

³³ Mr. Babal indicated that this is standard procedure to help prevent any manipulation. (Id. at 249.) He further indicated that the student files were selected from an FTE Detail Report, a spreadsheet generated by ODE's Office of Data Quality in January, 2016 that contained all of the EMIS data. (Babal at 341-343.)

³⁴ Mr. Teeters acknowledges that log-in and log-out data was produced by ECOT but states that it was an incomplete and inaccurate student record. (Teeters at 1206.) Ms. Pierson testified that the data that was produced came from the IQity Learning Management System that did have some durational data. (Pierson at 1483-1484, 1765-1767.) "All we did was export the student's access log information out of the Learning Management System," and place it in an Excel spreadsheet for the reviewer's convenience. She stated that the data did not contain log-in and log-out data but instead a start and an end time for a session. She stated that system was designed to allow ECOT to see what pages the students were looking at and what they were doing in the system, not to constitute a cumulative summary of student time. (Pierson at 1615-1621.) She indicates that this limitation was communicated to Mr. Wilhelm and Ms. Dewar at the pre-review meeting (See also Wilhelm Dep. at 189-192) but was not subsequently communicated by ECOT to Mr. Babel and Mr. Lambert during the actual initial review. (Pierson at 1618-1619.)

with ODE senior leadership. (Rausch at 645, 720-722.)³⁵ A draft of the initial review letter was sent by Mr. Wilhelm to ODE legal counsel for review on April 15, 2016. There were no material revisions. (Wilhelm C.P. Dep. at 204-206, 213-214.)

On May 17, 2016, Mr. Wilhelm sent the initial FTE review letter, dated April 20, 2016, to ECOT Superintendent Rick Teeters along with some available dates for the final review and notification of the need to pull an additional 750 student files for the final review.³⁶ The letter identified the following issues, including the absence of durational data demonstrating that students engaged in 5 hours a day of learning opportunities:

Reviewers identified 13 student records with withdraw code 41 where a fraction of fte was reported but no login data was recorded. This occurred when student was enrolled prior to Labor Day holiday in most instances. ECOT staff adjusted these students to 0 fte and was going to review all similar cases to make adjustments as needed. Each file contained the appropriate documentation for proof of residency, birth certificate and delivery of a computer or evidence that the student had access to a computer to begin logins. Each file reviewed contained student engagement logins that were accurate for beginning and ending days for

³⁵ Per Mr. Babal, Mr. Lambert communicated ODE's concerns to ECOT regarding the lack of durational data at the exit conference. (Babal at 444.) ECOT explained the lack of documented hours for its students in relation to reported FTEs as caused by two factors: a) the use of management systems by ECOT that didn't track durational data; and b) the resulting additional time that would be necessary to capture durational data from other sources. (Babal at 255-256, 559-560.) Mr. Teeters disputes that there was any discussion or review of durational data by the four reviewers. He testified that any discussion with Mr. Lambert of documenting hours of engagement was only with respect to future reviews, not the 2016 final review. (Teeters at 1151-1159, 1165.) Ms. Pierson concurs. She states Mr. Lambert began asking questions about the data (that could have been in a durational context) and was interrupted by Mr. Wilhelm who repeated that there would not be a review of durational data and that the data was only being considered in the context of the 105 rule. She states that Mr. Babal remained silent. (Pierson at 1618-1622.) Mr. Wilhelm testified in a deposition given in the common pleas matter that, while "several of my colleagues" inquired about durational data at some point during the review," the exit conference only focused on other more minor issues, that ECOT was complemented on its record-keeping and that he commented during the conference that he hoped that, "we didn't have to review 750 files the second time." (Wilhelm Dep. at 190-199.)

³⁶ Mr. Rausch did not know with certainty but explained that the difference in time was probably due to the review of Mr. Wilhelm's draft by senior officials and the legal staff. In the end no edits were made to the draft and it was released. (Rausch at 653, 714-716.) See further discussion at Rausch at 881-885.)

enrollment purposes. Logins from ECOT's learning management system that identified the length of time the student was logged into the learning management system was also available for each student in the file. *Most login times from these files did not substantiate 5 hours per day of login time for the students reviewed.*

³⁷ECOT staff reported that the learning management system was only one of many ways for the student time to be demonstrated, but other documents were not in a form that would have been available in the amount of time the reviewers had to do the initial review.

Recommendations are as follows: Final fte review is recommended to occur after June 13, 2016. Please consider June 14-June 16 as possible dates for this final review. *Using the FY15 FTE Review and Community School Handbook, our initial review was not able to substantiate the following: i) An attendance record for the student that matches the amount of time reported in EMIS (A learning opportunity for an e-school student could be computer learning, reading resource documents, writing papers, taking tests, doing research, field trips, and conferencing with teachers, etc. There must be a log-in but that cannot be the only proof of attendance.) ECOT is encouraged to develop a system of tracking total hours of student participation.*

(Emphasis added.) (ODE Exh. 1281; Babal at 252-256, 441-443; Rausch at 647-650, 653; Teeters at 1257; ODE Exh. 1037 at 9; ECOT Exh. K-47).³⁸

2. The Final FTE Review

Mr. Teeters described a series of verbal and e-mail exchanges with Mr. Rausch and/or Mr. Loew in which ODE reiterated its intent to review durational data in the 2016 final review. Mr. Teeters states that he found these responses unhelpful in clarifying the exact nature of the records to be produced (and asserts that he still doesn't understand.) (Teeters at 1177-1182, 1195, 1203; ECOT Exhs. K-30, 31, 32 & 35.) Eventually ODE scheduled the final review for June 12-14, 2016. (Teeters at 1182-1183.) On June 8, 2016, in response to a request by ECOT, ODE administrators and legal staff met with ECOT Superintendent Teeters and ECOT's counsel to discuss ODE's intent to continue to use durational data in its review. ECOT expressed its

³⁷ Mr. Teeters again insists that this was not discussed at the exit conference. (Teeters at 1163.)

³⁸ Asked why the lack of durational data was not discussed at the exit conference when it became a material part of the initial review letter drafted by him the following month, Mr. Wilhelm could not offer an explanation. (Wilhelm C.P. Dep. at 210-211.)

view that ODE was precluded to rely on such information based on its reading of the statute and and the 2003 Funding Agreement between ODE and ECOT. ODE responded that it would take ECOT's arguments under consideration and agreed to postpone the final review to a later date.

By agreement, the final review was ultimately scheduled to commence on July, 11 2016. (Teeters at 1188; ECOT Exh. K-42.) On June 29, 2016, Mr. Wilhelm requested the student data from ECOT from which the sample would be selected and was provided a list of 26,000 SSIDs. (Pierson at 1683-1684; ECOT Exh. A-2.) On July 5, 2016, ODE communicated to ECOT that it had determined to proceed with a review of durational data (Rausch at 656-657, 754-758, 861; Teeters at 1182-1189; Stipulation at 1755-1756; ECOT Exh. K-38.) On July 6, 2016, ODE provided ECOT with a new list of 600 randomly selected student SSID numbers whose files were to be produced at the review. (Teeters at 1191-1194; Pierson at 1686; Wilhelm Dep. at 243-244; ECOT Exh. K-46.)³⁹

On July 8, 2016, ECOT filed the previously referenced lawsuit in the Franklin County Court of Common Pleas seeking to enjoin the commencement of a review in which ODE would access and/or rely on durational information. (Rausch at 658-659; Teeters at 1194.) When a temporary restraining order was denied by the Court, [*Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C.P No. CV 006402, *Entry Denying Plaintiff's Motion for Temporary Restraining Order* (July 11, 2016)], the review proceeded with most of the same review team. (Rausch at 659.)

On July 11, 2016, the first day of the review, ECOT produced the student files on the list of 600 along with 150 more identified at the outset of the review. The files produced were

³⁹ Mr. Teeters states that although he had requested that Mr. Wilhelm provide the list of students with more advance notice to ECOT to allow them adequate time to pull the files, the list wasn't sent until five days prior to the commencement of the review. (Teeters at 1191-1194.)

different in format from those produced during the initial review in that the log-in and log-out data reviewed during the March review had been excluded and replaced by a single sheet showing only log-in times. When Mr. Wilhelm requested the durational data, he was referred to ECOT's attorneys. (Babal at 256-259.) When Mr. Wilhelm asked for data for non-computer based, non-classroom based learning opportunities, the reviewers were told by ECOT representative Brittany Pierson that ECOT had none. When he asked it a second time, the response was the same. (Babal at 261, 2120-2122.) No such documentation was produced. (Babal at 2123.)⁴⁰

On the second day of the review, the reviewers were read a statement by an ECOT attorney to the effect that ECOT would require a public records request before producing the records, a demand that was unprecedented for FTE reviews. (Rausch at 2180-2181.) Consequently no durational records were produced on either the second or third day of the review. (Babal at 259-262; Pierson at 1760-1761.) The only records regarding time that ECOT provided were "teacher certifications" of student hours. These certifications did not purport to represent time that students spent actually participating in educational opportunities. Rather, the teacher was verifying "only that the student had the ability to access educational materials if the student chose to do so." (Pierson at 1871.) As Ms. Pierson acknowledged, a teacher could be lecturing to a blank wall and could in good faith sign the form. (Pierson at 1872-1873).

On September 7, 2016, Mr. Wilhelm issued a letter to ECOT Superintendent Teeters memorializing ODE's findings. Initially he identified several positive findings in ECOT's favor:

⁴⁰ Ms. Pierson testified regarding this conversation that "I do not recall communications with ODE regarding non-computer-based documentation in July," but stated that, had the question been posed to her, "I think I would have remembered" being asked the question. (Pierson at 1895-1899.)

Each file contained the appropriate documentation for proof of residency, birth certificate and delivery of a computer or evidence that the student had access to a computer to begin logins. Each file reviewed contained student engagement logins that were accurate for beginning and ending days for enrollment purposes.

However he then identified the total lack of durational data:

Logins from ECOT's learning management system that identified the length of time the student was logged into the learning management system were not available for any student in any files. That document had been available for the first review. There was a sheet/sheets for each student that indicated the dates in which the student logged in to the ECOT home page per Brittany Pierson, the vice president of student services. This sheet(s) served as an attendance record for each student. There was no documentation of log-outs nor was there evidence of learning opportunities for an e-school student including computer learning, reading resource documents, writing papers, taking tests, doing research field trips, and conferencing with teachers, etc. (Ohio Department of Education FTE Review Checklist, pg. 24, 01/05/2015) There was no hourly/daily/weekly accounting of hours in which the student accessed learning opportunities.

An ECOT teacher or teachers signed a single form with the fte for each individual student to verify that the fte reported is an accurate account of learning opportunities offered for each student. There was no hourly/daily/weekly accounting of hours in which the student accessed specific learning content in any files that were reviewed.

Recommendations are as follows: Our final review was not able to substantiate the following: An attendance record for the student that matches the amount of time reported in EMIS (A learning opportunity for an e-school student could be computer learning, reading resource documents, writing papers, taking tests, doing research, field trips, and conferencing with teachers, etc.

(ODE Exh. 1507; Babal at 262-264; Rausch at 659-661, 2154.)

At this point, the state of the records made available to ODE justified a 100% finding against ECOT. (Babal at 262-264.) (See also Wilhelm C.P. Dep. at 254-257.) Nevertheless, Mr. Wilhelm recommended giving ECOT another opportunity to produce the durational data:

At least one more fte review is recommended in the 2016-17 school year. The specific purpose is to check for both log-ins and log-outs of randomly selected students as well as verify a running record of hours and minutes of individual student participation of both computer and non-computer learning that correlates with the stated fte.

(ODE Exh. 1507; Babal at 263.)

3. The Court-Ordered Production

This recommendation, in fact, had already been implemented by ODE in the pending Franklin County Court of Common Pleas matter via a July 23, 2016 Motion to Compel Discovery. Based on ECOT's representation that it had no durational information for non-computer-based learning opportunities, coupled with ODE's knowledge that ECOT did have such information for computer-based learning opportunities, ODE moved the an order compelling production of the durational information relating to computer-based learning opportunities. [*Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C.P No. CV 006402, *Motion to Compel Discovery* (July 23, 2016); *see also id.* Exh. B at Request Nos. 6 & 9.]

In a decision issued on August 1, 2016, the Court ordered, in pertinent part, the following relief:

The Court **GRANTS** Defendant's motion and **ORDERS** Plaintiff ECOT to provide, no later than 5:00 p.m. on Tuesday, August 2, 2016, all documents responsive to Document Request Nos. 6 and 9 within ODE's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission to ECOT. *These documents shall include, but are not limited to, spreadsheets showing the log-in and log-out data of the ECOT students randomly identified by ODE in advance of and during ODE's preliminary review of ECOT in March 2016, as well as spreadsheets, formatted in the same manner, showing the log-in and log-out data of the ECOT students randomly identified by ODE in advance of and during ODE's year-end review of ECOT in July 2016.*

In the event that the production of these documents cannot be accomplished by the specified date due to the voluminous nature of the documents, the parties are ordered to confer with each other regarding a reasonable timeframe for the production.

(Emphasis added.) See *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C.P No. CV 006402, *Order Compelling Plaintiff Electronic Classroom of*

Tomorrow (“ECOT”) to Provide Student Participation Records (August 1, 2016). (Rausch at 662.) ODE was given until August 22, 2016 to review and return the records. {Rausch at 942.)

In response to the Court Order, ECOT started contacting vendors it used to provide learning platforms to try and obtain durational data that the school itself did not maintain. (Teeters at 1112-1113.)⁴¹ ECOT was able to retrieve durational data from 20-27 of its on-line vendors. (Pierson at 1458-1460, 1462-1466.) In the case of others, it was discovered that from the late timing of the request, many vendors had already dumped data as the school year had come to an end. (Pierson at 1466-1468.) ECOT was also able to retrieve durational call data from Software Solutions, its internal development team that maintains its data bases. (Pierson at 1460-1461.)

Eventually ECOT sent boxes of records to ODE for its review. (ECOT Exh. R, “the Red Folder;” Pierson at 1608, 1762.)⁴² Some of the information consisted of entire student files, others more specifically on-line documentation of learning opportunities. The files, themselves, appeared to be printed off of spreadsheets. They included a student ID number, the students' names, and the names of different on-line learning management systems in which the student participated. Some provided dates, log-in, log-out information, and duration time. Some of the printouts only had portions of that information. As was the case with the March review, the durational information was located within a colored folder within the student file. (Babal at 264-267, 274.) ODE instructed a copy vendor to scan every page of the colored files for each of the students in the sample. (Babal at 265-67.) The vendor provided the scanned information to ODE as a series of PDF files—sometimes with a single PDF file containing information for two

⁴¹ Mr. Teeters testified that the log-in and log-out data produced during the March initial review was only a fraction of the hours of engagement by ECOT students. (Teeters at 112-1115.)

⁴² ECOT asserted on the record that because it was produced pursuant to a Court Order, the school does not consider the review of this material part of the final review. (1756-1758.)

different students—which were then stored on ODE’s computer server system. (Rausch at 2185.)

A significant difference from the March review was that, while the March production only included durational data from one learning management system, the August production included data from multiple systems, as many as ten different learning management systems for each student that had documented learning opportunities. (Babal at 267-268.) Per an instructional e-mail drafted by Mr. Rausch (ODE Exh. 1515; Rausch at 665-667,989-990), the information was entered into a spreadsheet by the reviewers with the rule of thumb being that if there was durational time recorded or a way to ascertain durational time, ECOT was given credit. [ODE Exh. 1513 (sample of one student); Babal at 272-273, 289-291; Rausch at 662-671; 696-697.] If there was no durational data such as log-out or a total time in the documentation presented, it was not documented. (Babal at 350-351.)⁴³

Up to 50 ODE employees were ultimately retained to go through the boxes.⁴⁴ Each prepared an individual spreadsheet which was submitted to a data quality process team to thrice go back over and check for errors. (Rausch at 670-676.) Of the 750 records originally requested in the sample, ODE was able to analyze 706. (Pierson at 1693.) At the end, ODE data managers integrated 100 individual spreadsheets recording 700 plus records into a single Excel spreadsheet that enabled ODE to identify the durational time associated with each record and compare that to the amount of time that had been claimed by ECOT for those same records. (Rausch at 675,680-682; ODE Exh. 1511.) Durational data was identified that represented the entire school year. (Rausch at 680.)

⁴⁴ This review was in still progress when the September 7, 2016 letter relating to the July review was issued by Mr. Wilhelm. (Rausch at 942-943.)

Mr. Babal created a memo summarizing the various learning management systems encountered during the document review and what was counted or not towards substantiating FTEs. (ODE 1510; Babal at 273; Rausch at 663-664.) It included the following categories:

- a. A category designated as “Main” by the reviewers where most of the durational data was found and then recorded. It included the student's ID number, student's name, the dates that the engagement occurred, the log-in, the log-out time, and duration in hour/minute formats. (ODE Exh. 1510; Babal at 273-274; Pierson at 1481-1482.) Per Ms. Pierson, this file was produced by IQity, the ECOT Learning Management System source in format slightly different than that produced in March. (Pierson at 1611-1612, 1764-1765.)
- b. “IQity”, a file produced internally by ECOT for the IQity data that was essentially duplicative of the “Main” data source and therefore not counted after a test side-by-side comparison between the two sources for one student was made and found to be virtually identical. (ODE Exhs. 1510, 1516; Babal at 278-280; Pierson at 1481-1482; 1886.) Per Ms. Pierson, as a data source coming directly from the vendor, the Main file would be more inclusive than the IQity file produced from ECOT’s internal sources for the same function. (Pierson at 1886-1887.)
- c. “SEP engagements,” the Student Electronic Portfolio data from student log-ins into the system that takes the students to their course work where they can access the student home page, the learning management system, their resource center, and their schedule. (Pierson at 1725-1726.) The data included the student's ID number, the name, grade, start dates, and a start time, but did not include an end time or durational time. It was therefore not recorded in the spreadsheet. (ODE Exh. 1510; Babal at 280; Pierson at 1768.) *ECOT later discovered that it had left out durational data by doing such things as printing in portrait versus landscape.* (Pierson at 1713, 1725-1726, 1768-1769, 1773-1774.)
- d. “Call Data,” a call log for each student that would include the time of day, how long the call was and a phone extension number. The reviewers captured all of this data as durational time and recorded it in the spreadsheet. (ODE Exh. 1510; Babal at 280-281; Pierson at 1727.)
- e. “Certified,” certified engagements from teachers that are entered into SEP documenting something that a student did with a teacher that was outside of the classroom. It would predominantly be packet work where a student, primarily an older credit recovery student or a student who has a break/fix issue with their computer, has to be temporarily working offline and is provided credit for participation in those activities they did offline. (Pierson at 1729.) The file consisted of information that appeared to be cut off from some other source. While it contained a start date and an end date, it contained nothing more specific and no link to a specific learning opportunity. It therefore could not be included. (ODE Exh. 1510;

Babal at 281.) Again *ECOT* later discovered that it had left out durational data by printing in portrait versus landscape. (Pierson at 1728.)

- f. “Magna High Course,” an online, supplemental game-based practice with data and built-in opportunities for ongoing, standards-based formative assessment for common core math. The file consisted of data in a format that usually had a subject identified on top such as “geometry” or “algebra.” While it did not provide start times or end times or even dates, it did include a durational time in minutes and the reviewers elected to include those minutes in the spreadsheet on face value. (ODE Exh. 1510; Babal at 282.)
- g. “Communication Log,” consisting of twenty to thirty pages of what appeared to be teacher notes for each student on a number of communications that they had with the student. However there was no durational time included and therefore nothing was captured. (ODE Exh. 1510; Babal at 282-283; Pierson at 1762-1764.)
- h. “Achieve,” a learning management system from one of ECOT’s vendors that is typically used in middle school. It is a supplemental common core literacy program used for monitoring progress and formative assessment/data analysis, providing cross curricular opportunities across content areas for nonfiction reading and writing skills practice at the student's "just right" reading level. (Pierson at 1787; ECOT Exh. P-9.) It consisted of data that was similar to the Magna High Course in that there was not a start time or end time but simply duration. Just as was the case with the Magan High Course, the time was accepted as provided. (ODE Exh. 1510; Babal at 283; Pierson at 1787.)
- i. “RTI,” consisting of Response to Intervention reports. This file was pretty sizable for the students that had it and included a date of start time and duration. It included notes from the teacher regarding how the student was doing and was divided into three separate areas: sessions, assessments, and interventions. Mr. Babal characterized it as “a pretty intensive document of learning opportunities” and “we instructed our staff to include any duration time within those three sections.” (ODE Exh. 1510; Babal at 283-284.)
- j. “Lift,” interventions that take place in reading and math with specialized reading and math intervention teachers outside of the course content but related to improving deficits in student's reading and math areas. (Pierson at 1785.) The file consisted of data that contained the name, grade, duration of time in 15 minute and/or 30 minute and/or hour blocks, a start date and a start time but not an end time. The reviewers recorded all the duration time for this category. (ODE Exh. 1510; Babal at 285.)
- k. “Collaborate,” a data file reflecting live sessions software where students can go to interactive lessons with their teachers. (Pierson at 1782.) Data in the file appeared to be cut off from a source document. It contained a student ID, the student's name and grade, and a start date and end date for the session but nothing else regarding

durational data. It was therefore not included on the spreadsheet. (ODE Exh. 1510; Babal at 285; Pierson at 1783, 1884-1885.)

- l. "Pearson," a data file from one of ECOT's providers of standards-based online core content, containing lessons and assessments. The file contained the student's name, ID, a log-in time and duration time recorded in minutes. The reviewers captured the duration time despite there being no other time information regarding it. (ODE Exh. 1510; Babal at 285-286; Pierson at 1717; ECOT Exh. P-9.)
- m. "Headsprout," a file from the younger grade reading program containing the student's ID and name, and a log-in time recorded in minutes. Although there was no other start time, end time, or log-in and log-out time, the reviewers captured the duration provided at face value. (ODE Exh. 1510; Babal at 286; Pierson at 1717.)
- n. "STAR Renaissance," a reading and math diagnostic assessment and progress monitoring tool. Students use this product for short assessments several times a year in general education for formative assessment. The file produced contained only a few students' ID numbers that contained an identified school subject, the number of tests that a student took and a description of how long each test should take. The reviewers did not record this estimated time as durational data because there was no documentation that showed log-in, log-out dates or any other documentation of actual minutes taken to complete the test. (ODE Exh. 1510; Babal at 286; ECOT Exh. P-9.)
- o. "Follett," a data file recording when students access and read their library books. It would have the duration of any book where they used the online library. (Pierson at 1785.) This was another file with only a few students in it. The file contained the student name, ID number, grade, a duration figure, a start date and a start time but no end time. Nevertheless the reviewers captured the duration figure at face value. (ODE Exh. 1510; Babal at 286-287; ECOT Exh. P-9.)
- p. "Study Islands," one of the resources that is used for test prep intervention and as a primary resource in some of ECOT's grades in reading, math, and social studies. (Pierson at 1785.) The file was small and contained the student name, grade, date and a start time and end time, but no total duration time. From this information, Aaron Rausch and ODE's data manager were able to capture a durational figure. (ODE Exh. 1510; Babal at 287-288; Pierson at 1543-1544; ECOT Exh. P-9.)
- q. "Compass Learning," a supplemental resource containing research, videos, non-fiction reading materials, and classroom tools. The file only contained the student's ID number and a duration figure provided in minutes and seconds but no start time, end time, or date. Again the durational time was recorded at face value. (ODE Exh. 1510; Babal at 288; ECOT Exh. P-9.); and
- r. "iReady," another resource of diagnostic and instructional materials designed specifically for a student's individual learning needs. The file contained the student

ID number, a subject and a duration time in minutes, but no start time, end date, or end time. Again the duration figure was nonetheless captured by the reviewers in the tally of documented FTEs. (ODE Exh. 1510; Babal at 288; ECOT Exh. P-9 .)

See also Rausch at 677-680.)

Mr. Rausch's observation was that while the final review showed an increase in durational documentation from that presented by ECOT in the initial review, it still represented a significant lack of documentation to support the funding. At one extreme was a handful of students that had documentation for the entire FTE that was being claimed while at the other extreme there were cases where "very, very little durational data existed for that student and then everything in between." (Rausch at 699-700.)

Mr. Babal indicated that while the majority of students logged on multiple times per week, it was not uncommon for the reviewers to come across a student who went a longer time before logging on. While the reviewers found no violations of the 105 hour rule where the student wasn't withdrawn, they did find several cases where a student would only be logged on for a couple times a month. (Babal at 2124-2125.)

4. The Final Determination

Once the spreadsheet was completed, Mr. Rausch and his staff made the final calculations. (Babal at 289-290; Rausch at 662.)⁴⁵ ODE determined the FTE for each of the 706 unique SSIDs that ODE reviewers located in the data ECOT provided in August. For each student, ODE divided the documented durational time for that student by 921.29 (i.e., ECOT's stated academic calendar hours). That showed the amount of FTE that ECOT had substantiated for that particular student. By performing that calculation for each of the students in the sample,

⁴⁵ Per the Court Order, ODE lost immediate access to the original copies before the review was completed. (Rausch at 664-665.)

and then aggregating the results, ODE was able to calculate the total FTEs that ECOT had substantiated for the 706 students for whom ODE had harvested durational information during the review in August. (See ODE Ex. 1512). ODE Exh. 1512 is the summary of all of the records ODE was able to review by student and compares the reported FTE versus what the reviewers had determined the FTE to be and then the difference both as an FTE as well as hours. (Rausch at 682-691.)

Using this approach, review of the grand total of the 706 records examined for the sample versus what ECOT reported shows that ECOT was claiming 414.35 FTEs for its student body based on enrollment but that the durational records only substantiated 170.71 FTEs or 41.2% of the amount for which ECOT was funded for the sample.⁴⁶ (Rausch at 688-689; Pierson at 1691-1692.)⁴⁷ Utilizing a sampling tool obtained from the Auditor of State, ODE verified that it could apply the sampling results to the whole population within an acceptable degree of 95 percent certainty and that using the sample size wouldn't be misstating the true calculation of overpayment by more or less than \$500,000 out of the total amount of FTE funding for the year of \$108.9 million. (Rausch at 691.) To determine the appropriate FTE funding for ECOT for the 2015-2016 academic year, ODE then applied that same substantiation rate of 41.2% to all of the FTEs that ECOT had claimed for the year through EMIS (15,321.98 FTEs) to arrive at a figure of 6312.62 substantiated FTEs (i.e., 41.2% x 15,321.98 = 6312.62). (Rausch at 692- 693; Pierson at 1943; ODE Ex. 1508).

⁴⁶ $41.2\% = \frac{170.71 \text{ in substantiated FTEs}}{414.35 \text{ in claimed FTEs}}$

⁴⁷ ODE found a few instances where there was durational data in excess of the full or partial year claimed by ECOT as a full or partial FTE. In those instances ODE did not credit ECOT for additional time as to do so would result in funding in excess of the full or partial FTE capped in by statute. (Rausch at 943-946, 985.)

With the Superintendent's approval, Mr. Rausch prepared the afore-stated Final Determination letter, incorporating ODE's finding that ECOT had overstated its FTE's by 58.8 % of the 15,321.98 FTEs reported, and issued it on September 26, 2016. (Rausch at 693-694; ODE Exh. 1508.) Applying the 58.8% to the figure of \$108,936,445.79 results in an overpayment figure of \$64,054,630.20. (Rausch at 2154-2157.) ODE delivered a letter to ECOT on September 27, 2016, outlining the results of ODE's review, and informing ECOT of the substantiation rate that ODE had determined, and its impact on ECOT's claimed FTEs. (ODE Ex. 1508; Rausch at 692.) ODE followed that up with additional information regarding the methodology that ODE had undertaken in performing the review.

J. Challenges by ECOT to the Manner in Which ODE Selected the FTE Review Sample

At hearing, ECOT elected to challenge the sampling methodology utilized by ODE on three bases. The first argument addresses the size of the sample selected. The 2015 FTE Review Handbook Checklist in Item 8 at 22 (ODE Exh. 1037 at 000281) provides the following guideline for Area Coordinators and staff to select a random sample of student files to review:

From the listing obtained in Item 7 [a listing of all enrollees who have been enrolled in the school in the present school year with their names and SSID numbers], select students for review, by SSID if there are more than 1000 names, using the following:

- a)...
- b)....
- c)....
- d) For schools with greater than 5,000 records, select 5% of the student records with a minimum of 400 records selected. 80% of the SSID's selected may be given to the school two business days prior to the FTE review visit.

The Handbook provides in Item 14 at 24 (ODE Exh. 1037 at 000283) that:

If the review is a final FTE review, then additional students should be selected when the amount of errors noted in the initial group selected for review equals or

exceeds 8 percent for any single attribute tested in Item 11a through 11j.[fn6]⁴⁸
The number of additional students selected should be equal to the number of students selected in Item 8, based on the school enrollment.

Footnote 6 states that: “[t]his process should continue until the tolerable error does not exceed 8% of all the students reviewed up to this point or the entire school has been reviewed.”

The 2015 FTE Review Handbook further provides in its Introduction (ODE Exh. 1037 at 000261) that:

This handbook delineates and describes the procedures and forms that are generally used to conduct FTE reviews. It indicates what documentation should be collected and maintained by community schools and addresses issues involved in conducting FTE reviews. **The FTE reviewer or team may exercise discretion in implementing the various aspects of the review to assure that the review is conducted properly. Unique aspects or programs of a school may require the area coordinator to modify or skip certain steps in the review process and accept alternative supporting documents.**

(Emphasis included.)

ECOT asserts that regardless of any discretion afforded reviewers in the Handbook, ODE should have stuck to the guideline and taken a sample based on 5% of the 26,000 students enrolled during the academic year and therefore had 1300 files pulled rather than 700 plus. (Pierson at 1934; Little at 1929.) Moreover, based on ECOT’s refusal to produce durational data for the 700 plus files at the July review, ECOT asserts that the literal interpretation of Item 14 and footnote six of the Handbook means that ODE was obligated to perform a 100% review of all 26,000 student files since each contained the error of absent durational data. (Pierson at 1934; Little at 1930.) However ECOT presented no evidence establishing that increasing the size of the sample would result in crediting it with a higher number of FTEs. (Pierson at 1935-1937.)

⁴⁸ It is noted that the text excludes Item 11k which addresses whether there was “hourly/daily/weekly accounting of hours in which the student accessed learning opportunities.”

. In response, Mr. Babal acknowledged that ODE exercised its discretion to sample 750 student files (ultimately 706 files) based on 5% of the FTE figure of approximately 15,000 rather than 5% of the total student enrollment figure of 26,000 suggested in the Handbook which would have resulted in the selection of 1300 files rather than 750. In Mr. Babal's opinion the difference was immaterial. The sample size was still drawn from the total enrollment of 26,000, not just the 15,000 FTEs and, given the amount of error found just within the 706 files actually reviewed, would not have produced results more favorable to ECOT even if 1300 files had been reviewed. (Babal at 448-456, 457-458.)

Mr. Babel further testified that the proposed 2016 FTE Review Handbook and the new 2016-2017 Handbook provide for a 100% review of durational data and that the 100% standard has been applied to other eSchools reviewed for the 2015-2016 school year. (Babel at 465-473.) He also agreed that the 2015 Handbook gives the option to reviewers to expand the sample size where the error discovered exceeds 8% and continue to expand as long as the error persists until ultimately a 100% review is completed. Once again Mr. Babal explained that the review ratios are not set in stone, that the Handbook gives discretion to the reviewers on a case by case basis. In the situation with ECOT, the reviewers were informed that no further durational data would be forthcoming and when they ultimately were given access it was subject to a Court Order limiting that access. (ODE Exh. 1037 at 24 fn. 6; Babal at 478-484.)

Mr. Rausch confirmed that he had discussed the sample size with his assistant, Cody Loew, at the time of the review and reached the conclusion that a) the FTE Review Handbook allowed discretion in selecting the sample size, and b) given the already large size of the selected sample, adding still more files would be immaterial. (Rausch at 641, 759-773.) He pointed out that the State Auditor's Office indicated to him that it utilizes even smaller sample sizes in their

audits and that community school representatives participating in a work group with ODE had actually expressed concern that the sample sizes being utilized in the ongoing reviews were too large. (Rausch at 655-656, 775-781.) Mr. Rausch further noted that by the time that ODE received the sample records, it was subject to a Court Order and any attempt to expand the size would have been subject to another contested motion in Court. (Rausch at 1039.) Finally Mr. Rausch indicated that an expansion of the sample to 100% would have been “nearly impossible for the staff capacity at ODE in a reasonable amount of time to pull all of that information together...” and would have taken months to perform. (Rausch at 2190-2191)

Mr. Teeters acknowledged that at the time, ECOT did not challenge the sample size as too small and actually characterized pulling more files than those pulled in March as “excessive.” (Teeters at 1260-1261.)

Second, ECOT asserts that the sample was not randomly selected. To support its argument, ECOT produced an exhibit that allegedly shows that an inordinate number of Kindergarten and 12th grade students were included in the sample in relationship to the other grades.⁴⁹ ECOT submits that this disparity is critical as the curriculum of both grades relies on more off-line content than on-line. Ms. Pierson explained that in the case of Kindergarten, while there is some interaction with teachers online, the majority of what's provided online is resources for the students to do outside of the classroom, including reading, writing, letters, and letter sounds. To track this form of learning engagement would require self-reporting, something ECOT did not have in place at the time. (ECOT Exh. A-6.)

⁴⁹ The exhibit indicates that six grade levels - Kindergarten and grades 1, 3, 4, 7 and 12 - are overrepresented to varying degrees while seven grade levels - 2, 5, 6, 8, 9, 10, and 11 - are underrepresented. (ECOT Exh. A-6.) The exhibit also indicates that the total overrepresentation in the two grades highlighted by ECOT involves 13 students out of a total of 748 (1.7%). (Id.)

At the other end of the spectrum, many 12th graders have jobs and rely more on non-classroom learning, again requiring self-reporting that didn't exist during the 2015-2016 school year. The opposite is true with grades 4 through 8, the grades where students are independent from their parents, but also are at home during traditional time periods. The incidents of live sessions are higher, the ability of the student to read their content online is better, the ability to participate in online resources is better, and the ability to present information online is easily manageable for students, teachers and the parents. Thus most of the evidence of learning engagement would be from on-line systems. Since ECOT was able to produce more of this on-line durational data than non-classroom durational data, ECOT submits that the smaller size of students from grades 4-8 represented in the sample unfairly includes fewer FTEs from those grades than it otherwise should. (Pierson at 1686-1691, 1922-1939; ECOT Exh. A-6.)⁵⁰

In response to this argument, Mr. Babal testified that he used an Excel function that randomized numbers and picked the first 750 that came down. In so doing, ODE did not target grades, ages or any other identifying factor other than student ID number. He acknowledged that it is possible for the methodology to have skewed a grade level even in randomly selecting files. (Babal at 2126-2130.) ECOT, however, presented no evidence purporting to quantify the alleged impact of that alleged over-or under-representation on the results of the FTE review, nor did ECOT present any statistical expert testimony regarding whether it is necessary or appropriate in selecting a random sample to normalize the distribution of the sample population to match the entire population. Likewise, ECOT did not present any statistical expert evidence suggesting

⁵⁰ ECOT also produced a document looking at the demographics of the students in the sample breaking them down by age, grade level, whether the student was in special education or not, their ethnicity, and whether they were eligible for free or reduced lunch. (Pierson at 1685-1686; ECOT Exh. A-5.)

that the alleged over- or under-representation of certain grades that purportedly occurred here was inconsistent with the sample being selected in a random fashion. (Pierson at 1925-1927.)⁵¹

Finally ECOT criticizes the absence of the 38 student files⁵² out of the original 750 for which some level of FTE was claimed by ECOT but where not reviewed in the sample. In explanation as to why the files may have been left out of the sample, Mr. Rausch indicated that ODE only learned of the missing 38 files after it lost access to the files pursuant to the Court Order. (Rausch at 2185.) He suggested that one reason for the oversight could have been due to the record not being scanned from the original paper copy by the copy vendor that produced copies for the reviewers. He suggested a second reason could be the fact that some records produced by ECOT were included twice, or that other files contained two student records and still others situations where one student spanned two different pdf documents. Finally he acknowledged that a file may simply not have been recorded. (Rausch at 2185-2187.)

As noted above, ODE had found 170.1 FTEs in the sample of 706 and had divided that figure by 414.35, the total number of FTEs claimed for the sample of 706, to reach a substantiation rate of 41.2%. Ms. Pierson indicated in her testimony that ECOT's original concern was that these 38 files had actually been included by ODE in calculating the total number of FTEs in the denominator but had not been included in the numerator even though ECOT found durational data in each one. (Pierson at 1715-1753, 1942-1944; ECOT A-7, Red files R-576, R-563 and remaining files at 1749-1752.) She acknowledged that she now is aware

⁵¹ Nor has ECOT presented any exhibit comparing the contents of the red files that are from grades 1-11 to those from Kindergarten and 12th grade.

⁵² Although ECOT originally claimed error in the exclusion of 44 files from the 706 reviewed, it subsequently acknowledged that six were properly excluded because ECOT had not presented ODE with any FTE claim for them. (Pierson at 1720-1721, 1940; ECOT Exh. A-29.)

that concern did not happen. (Pierson at 1942-1944.) Nor has ECOT redone the fraction to see if the durational data from the 38 files is added to the numerator and if the FTEs claimed from the 38 files is added to the denominator, the adjustment changes the 41.2% substantiation rate in its favor. (Pierson at 1944-1947.)

K. ECOT's Challenge to ODE's Use of a School Calendar Consisting of 921.29 Hours In its Calculations Versus 920 Hours

ECOT presented testimony that when its designated calendar was inputted into EMIS, the school inadvertently assigned 921.29 hours to the calendar rather than 920 hours as it alleges it intended. In determining the amount of overpayment, ODE used 921.29 hours in the denominator thus decreasing the substantiation rate from 41.6% to 41.2% and increasing the overpayment by \$437,104.50 than if 920 hours were used in the denominator. (Adding 1.8 FTE to 170.71 to get 172.511 divided by 414.35 raises substantiation rate to 41.6% or \$437,104.50 subtracted from overpayment.) (Pierson at 1804-1820, 1947-1955; ECOT Exhs. A-3, A-11, A-12.) ECOT believes that its alleged error should be recognized and adjusted accordingly.

In response, ODE presented testimony demonstrating why it cannot deviate from the hours submitted by the school for its calendar. By statute, an eSchool's academic calendar must have at least 920 hours, but can be greater if the school desires. [Babal at 494; R.C. 3314.08(H)(3) ("each community school shall offer not less than nine hundred twenty hours of learning opportunities during the school year")]. Some eSchools have a calendar year that provides for 1,200 to 1,300 hours. (Rausch at 836.) In undertaking FTE calculations, ODE uses a school's stated calendar hours, rather than the statutory minimum of 920 hours. (Babal at 494; Rausch at 685.) See R.C. 3314.08(H)(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.*") (Emphasis added)].

As Mr. Rausch explained, if ODE used the 920 hour figure in its calculations for funding, a student could generate more than 1 FTE in a year. (Rausch at 945). He presented an example where a student had documented time of 1200 hours in a school for which 1200 hours comprised a full academic year. If ODE used the documented time for that student (i.e., 1200 hours), but then divided by 920 hours (i.e., the statutory minimum) in determining FTEs, the student would generate more than 1 FTE for the school (i.e., $1200/920 > 1$). Similarly, if a student were on a 1200-hour pace for the year, but stopped attending that school halfway through the year, that student would presumably have 600 documented hours of participation. Using the school's calendar year amount (i.e., 1200 hours), that student would have generated .5 FTE during the one-half year he attended the school. That would leave another .5 FTE in funding available for whatever school the student attended for the second half of the year. If, however, ODE instead used 920 in calculating the FTE, the student would generate $600/920$ of an FTE, which is greater than .5 FTE. That would leave less than one-half of an FTE worth of funding available for whatever school the student attended during the second half of the year. (Rausch at 1031.)

L. ECOT's Proffered Pro-Rated Adjustment of the Final Determination For the Period August, 2016 Through January 31, 2016, "The Blue File"

One of ECOT's arguments addressed more fully below is that ODE is estopped under retroactivity concerns from imposing a condition on ECOT to maintain durational documentation until after the School was formally notified of the requirement through the receipt of the notice of the initial FTE review in January of 2016. Towards this end, ECOT prepared an exhibit purporting to adjust the Final Determination in a fashion that gives credit to ECOT for the period from August 2015 through January 31, 2016. The calculation, designated as the "Blue File" is

based on three assumptions: 1) giving 100% credit to ECOT for the period August 2015 through January 31, 2016 regardless of whether durational data was produced, 2) giving credit for the period from February 1, 2016 through June 3, 2016 based on durational data produced in August, 2016 (the “Red File”) and durational data produced at hearing (the “White File”), and 3) adjusting the calendar utilized in the calculation from the school’s filed annual calendar of 921.29 to 920 hours. Per the calculation, the FTEs for which ECOT should be credited rises from 41.6% to 73.7% or 73.53% using slightly different methodology. (Pierson at 1763-1782; 1795-1801; 1802-1803; ECOT Exhs. A-8, A-9, A-10.)

M. Additional Durational Documentation Presented by ECOT During the Hearing, the “White File”

Based on the summary from ODE in the September 26, 2016 letter and another document sent by ODE later, (ODE Exh. 1508; ECOT Exh. A-3; Pierson at 1704-1708) identifying what data was approved in the final review, ECOT went back and reviewed the 750 files that were presented to the State and looked for data that was not provided as part of the Court Order, but met the definition of duration. ECOT also found that it had produced documents that were not accepted because ECOT had printed in portrait instead of landscape, accidentally cropping off the log-off data (Pierson at 1713-1714, 1725-1726, 1773-1774).⁵³

Included in this “White file” is the following data that ECOT requests be considered by ODE/the State Board:

- a) SEP Engagement files that ECOT’s developers were able reformat in landscape to add the missing end time (Pierson at 1769-1770, 1774); ECOT developers were able to

⁵³ ECOT teacher William Schroedl believes, based on his work with one student, that the 75% for which ODE gave credit for documented FTE’s for the student, is grossly understated. (Schroedl at 1347-1353.) Similarly, teacher Elizabeth Daron challenges the 75% FTE finding made by ODE with respect to another student who got a mixture of Cs and Ds but turned his work in. (Daron at 1372-1376.)

determine that a log-in took 2 minutes and add that information as durational data. (Pierson at 1891-1893; ECOT Exh. T-615 at 11978);

- b) “Proctoring” files that recorded an unscheduled event where teachers have to talk to students by phone, either face to face or in live session, and discuss course work with them to verify the students are doing their own work. The file doesn’t actually record a beginning and ending time but, per Ms. Pierson, proctoring sessions have a minimum time of 15 minutes and this time was used for the duration calculation (Pierson at 1772-1773, 1887-1891; ECOT. Exh. T-615 at 11976);
- c) “Testing” data, documentation recording tests the students take during the school year. ECOT originally did not have durational information for this area but subsequently retrieved the dates that the students took the test, and multiplied by the exact length of the standardized and mandatory test to obtain the duration (Pierson at 1773, 1785-1787);
- d) “Physical Activity Log,” where the student records the date, the activity, the location and the time engaged in various physical activities. Ms. Pierson acknowledged that this information was available at the time of the review but wasn’t produced because ECOT was refusing to produce any durational data. It further wasn’t produced after the Court Order because ECOT did not think of it. (Pierson at 1774-1775, 1893-1900; ECOT Exh. T-615 at 11984);⁵⁴
- e) “Field trips,” where durational data was not initially available but, after some digging and coding, ECOT’s data warehouse was able to produce that for some students. (Pierson at 1787-1788.)

The school created 22 new folders (“T files” or “White files”), added up the additional data, and found 14.88 FTEs that would meet ODE’s requirements. (Pierson at 1616, 1694-1696; ECOT Exh. A-1.) ECOT added this number to the 170.71 FTEs credited by ODE and arrived at 185.59. This was then subtracted by the total number of 414.35 FTEs found by ODE to be the amount upon which ECOT was reimbursed for the sample students and arrived at a difference of 228.76 FTEs not documented. Multiplied by \$5900 per full FTE, ECOT found that ECOT was

⁵⁴ The example shown by ECOT (ECOT Exh. T- 615 at 11984; Pierson at 1774-1777), contains an entry that is suspect in that it shows a student expending eight hours in a single day in walking back and forth to the store. ECOT insists that, based on what ODE is accepting as adequate in its review, this data would have to be accepted on face value no matter how unreasonable it appears. (Pierson at 1776-1777; 1919-1922.) Regardless, it appears that the eight hours represented by the record has an immaterial impact on the proposed adjustment.

overpaid by \$1,349,684.00 for the sample. (Pierson at 1695-1699.) However it was later established that ECOT's calculation included new data from all 750 files versus the 706 that ODE had sampled but had retained the lower 414.35 FTE figure from the universe of 706, thus skewing the calculation. (Pierson at 1703, 1713-1729; 1955-1956.)

ECOT has not done any calculation to adjust this figure to just the 706 files but agrees it's overstated. (Pierson at 1956.) In lieu of such a calculation, ODE provided an estimated figure based on multiplying 706/750 times the 14.88 to arrive at 14 additional FTEs in the sample. (Tr. at 1955-1961, 2170-2177.) (The Hearing Officer notes that using this figure increases the original 170.71 FTEs substantiated by ODE to 184.71. Dividing that by 414.35, the total FTEs funded, would give a new substantiation rate of 44.6% and would lower the overpayment by \$3,703,838.90.)

IV. Analysis

A. Funding Under R.C. 3314.08(H)(3) Is Based on ECOT's Ability to Substantiate that Its Claim to FTEs is Supported by Documentation Demonstrating Student Participation in Learning Opportunities.

Analysis of the issues raised in this proceeding must start with the fact that ECOT, like all community schools, is a *public* school, legislatively created as part of Ohio's constitutionally required system of common schools with "the expressed legislative intent...to provide a chance of educational success for students who may be better served in their educational needs in alternative settings." R.C. 3314.01(B); *Cordray v. International Preparatory School et al.*, 128 Ohio St.3d 50, 2010-Ohio-6136, 941 N.E.2d 1170, at ¶¶ 22-24, citing *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 32. As a public school, the funds held by its administrators are public trust funds

and community schools must account for and disburse monies that have come into their hands according to the law. *Cordray v. International Preparatory School et al*, at ¶¶12-16, 30.

The funding provisions for eSchools such as ECOT, as set forth in R. C. 3314.08(H)(3) and as construed by the Franklin County Court of Common Pleas, is that the legislature has determined to fund such schools based on the time that the schools actually engaged students in learning opportunities that the school offers, and not merely on opening its doors and/or enrolling a student. *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*. Any interim payments received by the school throughout the school year are based on self-reported information by the school and are ultimately subject to documenting the hours of participation of its students. *Id.* The legislature has provided a mechanism to ODE in R.C.3314.08(K) for reviewing whether the school has in fact engaged students in learning opportunities at the level for which it received interim funding and to issue findings of whether additional funds are owing or whether the school has been overpaid. That evidence demonstrates that this is the duty that ODE has exercised in the instant matter by conducting an FTE review and issuing its September 26, 2016 Final Determination letter.

B. The Appeal Process From a Final Determination Places the Burden of Demonstrating Error in the Final Determination on the Appellant.

As a general rule, both parties agree that, “[I]t is fundamental to administrative law and procedure that the party asserting the affirmative issues also bears the burden of proof.” *Nucklos v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 09AP-406, 2010-Ohio-2973, ¶17. Within this context, 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. Further, unlike an educator disciplinary proceeding under R.C.

Chapter 119, where the imposition of sanctions requires an adjudication order issued by the State Board even if a hearing is not requested by the licensee, a Final Determination under R.C.3314.08 remains final, without the need for ratification by the State Board, unless an appeal is filed under R.C. 3314.08(K)(2). The purpose of the proceeding is therefore to provide a forum for the Appellant to establish any error in the FTE Review findings that would result in an adjustment, not for the State to “vindicate” its Final Determination as ECOT suggests.

There are reasons why the legislature may have deemed such a hearing process appropriate. As a political subdivision of the state, a community school does not have vested rights. *Toledo City School Dist. Bd. of Educ. v. State Bd. of Educ. of Ohio, supra*, at ¶¶ 26, 45. Accordingly it does not enjoy the same protections as individuals and private corporations. *Id.* at ¶25, citing *Maryland v. Baltimore & Ohio RR. Co.*, 44 U.S. 534, 549-50. 11 L.Ed. 714 (1845.) Any rights it retains exist only at the will of the legislature. *Id.* at ¶24, citing *Sloan v. State*, 8 Blackf. 361, 364 (Ind. 1847.) This includes even the ability of the legislature at any point to change policy and release itself from funding obligations to the political subdivision. *Id.* at ¶25, quoting *Maryland v. Baltimore & Ohio RR. Co., supra*.

It is further observed that the courts have often recognized a presumption of regularity and lawfulness in administrative determinations. As the Tenth District has explained in assigning the burden of persuasion to rebut the presumption attached to a determination of the State Employees Retirement Board denying disability retirement benefits to a school bus driver for the Parma City School District:

The rule is generally accepted that, in the absence of evidence to the contrary, public officers, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully. All legal intendments are in favor of the regularity of administrative action.

State ex rel. Rock v. Sch. Emples. Ret. Bd., 10th Dist. Franklin No. 99AP 1474, 2004-Ohio-5268, ¶¶ 13-14, quoting *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 186, 126 N.E.2d 449 (1955).

It is further observed that this proceeding involves the equivalent of a challenge to audit findings made by a governmental body. In such scenarios, a rebuttable presumption of correctness typically attaches to the audit findings that places the burden on the party challenging them to establish the manner and extent of claimed error. For example when the State Auditor makes an inquiry into the “methods, accuracy and legality of the accounts, financial reports, records, files and reports of” a public office pursuant to R.C. 117.11(A), a “certified copy of any portion of the report containing factual information is prima-facie evidence in determining the truth of the allegations” made in a case based on an audit finding. R.C. 117.36. His findings constitute “presumably valid legal claims” that justify government action based upon them, *Looker v. State*, 127 Ohio St. 413, 418, 188 N.E. 753 (1933).

Similarly in appeals filed to the Ohio Board of Tax Appeals from final determinations made by the State Tax Commissioner, “the burden of proof...rests on the taxpayer to show the manner and extent of the error in the Tax Commissioner’s final determination.” *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954 at ¶15, citing *Stds. Testing Laboratories, Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278 at ¶30., The Tax Commissioner’s findings “are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.” *Id.* at ¶15, quoting *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855, 784 N.E.2d 93, ¶10. , “If rebutted by testimony by the taxpayer, the burden shifts back to the Tax Commissioner to justify its findings, with any conflicts in the evidence being resolved by the BTA’s own factual determinations.” *Ross v. Levin*, 2010-Ohio-4009, 8th Dist. Cuyahoga Co. No. 93760 at ¶14, quoting *Dearwester v. Limbach*, 1st Dist.

Hamilton No. C-900051, 91-LW-3145 (Apr. 24 1991), citing *Bloch v. Glander*, 151 Ohio St. 381, 388, 86 N.E.2d 318, 321 (1949).

See also *State ex rel. Labor Works of Dayton LLC v. Ohio Bur. Of Worker's Compensation*, 10th Dist. Franklin No. 10AP-22, 2010-Ohio-6299, holding that, pursuant to R.C. 4123.24 and Ohio Adm. Code 4123-17-17, findings made by the Bureau to determine premiums owed be an employer during an audit, based on incomplete information made available to it by the employer, were entitled to prima facie weight that required the employer to rebut the Bureau's good faith efforts to determine the premiums in order to prevail.

Although the statutory scheme set forth in R.C. 3314.08(K) contains no express allocation of burden, the Hearing Officer gleans from the statutory scheme that a similar presumption of correctness was intended by the legislature. As noted above, any funding received by ECOT is interim, based solely on representations made by the school and not finalized until the FTE Final Determination. As with tax determinations, the burden is on the community school to maintain the necessary documentation to support its claim to funding. The process for challenging the determination is styled an appeal. The hearing is informal and there is no right of appeal to the court system. The time frame for the hearing is extremely abbreviated.

The posture of the parties also indicates that ECOT had the burden. Although pre-hearing briefing was provided, it was still unclear to ODE at the commencement of the hearing as to what specific errors that ECOT would be raising. [See for example Mr. Cole at 127 ("I am not entirely sure what their argument is going to be, so it's hard for me to give too much of a response to it up front.")] As such, for ODE to be assigned the burden of proof with respect to the issues ECOT has raised in this proceeding would have placed ODE unreasonably in the

position of rebutting a negative. All of this suggests that presumptive weight is to be afforded the determination and that the burden of rebutting the reasonableness and lawfulness of the Final Determination is on the community school. ECOT, as “the party asserting the affirmative issues,” therefore bears the burden of proof.

The Hearing Officer also notes, however, in the context of one agency that relies on presumptions, the Ohio Department of Medicaid (formerly under the Ohio Department of Job and Family Services), the courts have held that the presumption of validity that attaches to an audit of a Medicaid provider is inapplicable where the Department’s witness testifies with respect to discernable audit factors. *Cotterman v. Ohio Dept. of Pub. Welfare*, 28 Ohio St.3d 256, 503 N.E.2d 757 (1986); *Meadowood Nursing Facility v. Ohio Dept. of Job and Family Services*, 10th Dist. Franklin No. 4AP-732, 2005-Ohio-1263 at ¶¶11-16. The Hearing Officer notes that these cases are distinguishable in that the decision of ODE to assume the burden of going forward and introducing evidence regarding its FTE review was involuntary as the Hearing Officer directed ODE, over its objection, to assume the burden of going forward in order to lay a groundwork for the FTE review. The Hearing Officer also notes that Medicaid providers, unlike community schools, are private entities and that Medicaid audit proceedings, unlike the present case, are formal adjudications.

Nevertheless, to the extent that the presumption of correctness would be construed as inapplicable due to ODE’s presentation of evidence regarding “discernable audit factors,” the Hearing Officer finds that ODE successfully presented a prima facie case for the reasonableness and lawfulness of its FTE review and findings that was not successfully rebutted by ECOT. Indeed, as noted above, the refusal of ECOT to present any durational data during the July FTE

review justified ODE in making a 100% finding against ECOT.⁵⁵ It has therefore exercised discretion in favor of the school it was not mandated to afford by considering documentation presented at a later time in August.

With this backdrop, the Hearing Officer will address the issues ECOT has raised in its appeal.

C. ECOT’s Arguments That ODE is Precluded from Relying on Durational Data in its 2016 FTE Review Fail for Multiple Reasons.

The primary group of issues raised by ECOT relate to ODE’s decision to include the review of durational data in its FTE review as requisite of calculating FTEs, and therefore determining the amount of funding for the school. ECOT’s arguments can be summarized as follows:

1. Duration should not be included in the funding methodology because it is not an effective measure of a student’s engagement in learning opportunities;
2. Durational requirements cannot be implemented without the promulgation of standards set forth by rule;
3. The 2015 FTE Handbook does not substitute for these standards as it, a) does not clearly articulate durational standards, b) is only a guideline that is not rule-filed and therefore not binding on either ODE or the schools;
4. Durational methodology cannot be implemented without advance notice to the schools, particularly to allow them to put in place the recordkeeping that will be required;
5. ODE cannot summarily implement a new methodology after schools have relied on the past practices of ODE Area Coordinators that have utilized an enrollment based methodology of conducting FTE reviews;
6. ODE cannot summarily implement a new methodology after schools have relied on inconsistent statements regarding the use of durational methodology made by ODE Area Coordinators and officials during 2016; and
7. Durational methodology cannot be implemented in mid academic year as that would violate “administrative retroactivity.”

⁵⁵ The Hearing Officer does not accept ECOT’s contention that it did not refuse to produce the documents but merely required their production through a public records request. The Hearing Officer is not aware of any legislative scheme where an agency that is entitled by law to inspect a regulated entity’s records in order to reconcile funding/reimbursement must first file such a request. This was clearly a legal tactic to avoid and/or delay the consequences of a production that ECOT intended to fight in court.

Under these arguments, ECOT contends that the Hearing Officer should find that ODE must conduct its 2016 FTE review relying solely on enrollment data as a basis for funding and that any findings (100%) based on the absence of durational data to support claimed FTEs should be voided. For the following reasons, these arguments must fail.

1. ECOT Has Raised Arguments that are Barred Under the Doctrines of Res Judicata and/or Collateral Estoppel.

As noted above, a major factor in the disposition of this proceeding is the fact that ECOT pre-emptively elected to challenge the FTE Review process via a collateral suit in the Franklin County Court of Common Pleas that has been adjudicated at the trial level in ODE's favor. It thereby raised issues of whether the doctrines of res judicata and/or collateral estoppel bar ECOT from raising certain arguments in this proceeding.

“Under the doctrine of res judicata, ‘a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.’” *Karras v. Karras*, 2nd Dist. Montgomery No. C.A. 27094, 2016-Ohio-8511, ¶ 20, quoting *Kelm v. Kelm*, 92 Ohio St.3d 223, 227, 749 N.E.2d 249, 2001-Ohio-168, in turn quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 syllabus (1995). “Furthermore, res judicata bars the litigation of ‘all claims which were or might have been litigated in a first lawsuit.’” *Karras*, 2016-Ohio-8511, ¶ 20, quoting *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990). The doctrine bars both the relitigation of factual and well as legal points decided by the first tribunal. *See Thryoff v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 15AP-1043, 2016-Ohio-4634, ¶ 21, citing *Meyer v. Chieffo*, 193 Ohio App.3d 51, 59, 2011-Ohio-1670, ¶ 13 (10th Dist.).

As the Ohio Supreme Court explained in *Natl. Amusement.*:

It has long been the law of Ohio that “an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.” *Rogers v. Whitehall* (1986), 25 Ohio St. 3d 67, 69. “Where a party is called upon to make good his cause of action . . . he must do so by all the proper means within his control, and if he fails in that respect . . . he will not afterward be permitted to deny the correctness of the determination, nor to relitigate the same matters between the same parties.” *Covington & Cincinnati Bridge Co. v. Sargent* (1875), 27 Ohio St. 233, paragraph one of the syllabus. The doctrine of res judicata “encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes.” *Brown v. Felsen* (1979), 442 U.S. 127, 131. “Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals” *Southern Pacific Rd. Co. v. United States* (1897), 168 U.S. 1, 49.

Nat’l Amusements v. Springdale, *supra*, at 62 (emphasis omitted).

In addition to claim preclusion, the doctrine of res judicata under Ohio law also includes the related concept of issue preclusion, sometimes called collateral estoppel. *See Grava v. Parkman Township*, *supra*, at 380. “[I]ssue preclusion, [or] collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.” *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998). See also *State ex rel. Schachter v. Ohio Pub. Emples. Ret. Bd.*, 121 Ohio St. 3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶ 28 (per curiam). The Ohio Supreme Court has held that “[r]es judicata, whether claim preclusion or issues preclusion, applies to quasi-judicial administrative proceedings.” *Schachter* at ¶ 29. See also *Grava* at 381.

“The party asserting res judicata must show the following four elements: (1) there was a prior valid judgment on the merits; (2) the second action involved the same parties as the first action; (3) the present action raises claims that were or could have been litigated in the prior

action; and (4) both actions arise out of the same transaction or occurrence.” *Thyroff v. Nationwide Mut. Ins. Co.*, *supra*, at ¶ 22. In its written closing arguments, ODE submits that all four of these elements are met in the instant proceeding. The December 12, 2016 final judgment in the Common Pleas Court is a “valid judgment on the merits.” The Common Pleas Court action “involved the same parties” - ODE and ECOT. This action raises claims - e.g., the Department’s ability to rely on durational data in connection with the 2015-2016 FTE review - that “were or could have been litigated in the prior action.” And, both this action and the Common Pleas Court action “arise out of the same transaction or occurrence” - i.e., the 2015-2016 FTE review at ECOT. ODE concludes that the prior action therefore prevents ECOT from seeking to relitigate legal or factual issues, or indeed raising *any* claim based on the 2015-2016 FTE review that could have been litigated in that prior action.

In its own closing briefing, ECOT agrees that *res judicata* applies to the Common Pleas final judgment but argues that the doctrine is to be narrowly construed. Accordingly, it acknowledges that it cannot relitigate whether ODE is barred from relying on durational data in its 2016 FTE review based on these three claims raised in the Common Pleas action: a) ODE is barred by the terms of the 2003 Funding Agreement from implementing duration based FTE reviews; b) ODE is barred by the provisions in the Funding Statute, R.C. 3314.08(H)(3), from implementing duration based FTE reviews; and c) ODE is barred from relying on language in the 2015 FTE Review Handbook to implement duration based FTE reviews because the latter is not rule-filed. (See *ECOT Post-Hearing Brief* at 67.) However ECOT argues nevertheless that the Common Pleas decision does not preclude it from raising a number of other legal theories in the immediate proceeding to bar ODE from implementing a duration based FTE review: retroactivity in implementing a duration-based standard in mid-academic year; lack of notice that a duration

based standard would be used for the 2015-2016 academic year; lack of a rule-filed standard for implementing duration based funding and identifying the form and type of durational records to be maintained; abuse of discretion by implementing a durational standard that allegedly bears no relationship to student performance; and equitable estoppel because of prior inconsistent conduct by ODE. ECOT argues res judicata is inapplicable because these theories were both allegedly not raised in the Common Pleas matter and were not ripe for review (allegedly “administrative remedies” tied directly to the Final Determination in this matter rather than a prior event.) (See *ECOT Post-Hearing Brief* at 67-75.)

For the following reasons, the Hearing Officer concludes that ECOT is in error in seeking to exempt its current claims regarding the inclusion of durational data in the 2016 ECOT FTE review, from the operation of res judicata. First of all, with respect to retroactivity, ODE has demonstrated from the Common Pleas record that ECOT did, in fact, raise retroactivity arguments in that forum that the Court considered and rejected in its Decision. This argument was raised throughout the course of the proceeding. In its Amended Complaint at ¶ 55, ECOT alleges that, “ODE seeks to impose this requirement retroactively for the 2015-2016 school year, even though ECOT, which was last subject to an FTE audit in 2011, received no advance notice prior to the school year that it was even required to collect, let alone maintain, the subject data/information.” In her testimony in the Common Pleas action, Ms. Pierson states that she was “concerned that [ODE] shouldn’t be able to [impose a durational requirement] retroactively.” (Pierson, C.P. Vol. IV at 319.) In his closing arguments, Counsel Little argued that “it is not within the Department’s discretion to “rewrite” the statute “in the middle of the school year” (C.P. Vol. VI at 50-51); “And when a bunch of bureaucrats sit around a table and try to game the system and come up with new rules in the middle of a school year after the school year started,

then that's when the [C]ourt steps in.") (Id. at 51); "We're here today because the Department decided to change the rules in January 2016." (Id. at 139); and "What that [purported lack of notice] means, though, is, Your Honor, they can't change the rules in the middle of the game." (Id.)

Second, ECOT's arguments regarding the absence of sound rationale for the implementation of durational methodology, the absence of rule-filed standards for durational methodology and ODE's past practice of basing funding on enrollment, sound much like repositioned versions of the three arguments that ECOT acknowledges were litigated and cannot be raised again.

Third, even if none of the arguments now raised were adjudicated in the Common Pleas action, they would nonetheless be barred under principles of res judicata because they could have been adjudicated in the Common Pleas action. Contrary to ECOT's position, since the issuance of the Supreme Court's decision in *Grava v. Parkman, supra*, the courts in Ohio have actually adopted an "expansive view of claim preclusion" that bars the litigation in a second action of any legal theory for relief that may arise out of a transaction or occurrence or series of transactions or occurrences that were the focus of the first action. See *Johns 3301 Toledo Cafe, Inc. v. Liquor Control Commission*, 10th Dist. Franklin No. 07AP-632, 2008-Ohio-394 at ¶¶ 20, 22, (emphasis added) quoting *Holzemer v. Urbanski*, 86 Ohio St.3d 129, 133, 1999-Ohio-91, 712 N.E.2d 713, construing *Grava*. As stated in *Johns*,

In *Grava*, the Supreme Court of Ohio explained that "[i]n recent years, this court has not limited the doctrine of res judicata to bar only those subsequent actions involving the same legal theory of recovery as a previous action. * * * It has long been the law of Ohio that "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been litigated* in a first lawsuit." ' ' " *Grava*, at 382, quoting *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, certiorari denied (1991), 498 U.S. 1120, 111 S. Ct. 1075, quoting *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69.

(Emphasis sic.) See, also, *Grava*, at 382 (remarking that "[w]e also declared that '[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it' "). (Citations omitted.) Cf. Black's Law Dictionary (8 Ed. 2004) 1337 (defining "res judicata" as, among other things, "[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not - raised in the first suit").

As stated in *Grava*,

The present trend is to see the claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff * * *; regardless of the variations in the evidence needed to support the theories or rights."

Id. at 383, quoting 1 Restatement of the Law 2d, Judgments (1982), Sections 24, Comment a at 196-197.

The instant matter clearly involves the same occurrence or series of occurrences as that litigated in *Electronic Classroom of Tomorrow v. Ohio Department of Education*, *supra*. In both cases ECOT sought to bar the imposition of durational methodology to an ODE 2016 FTE determination of whether or not the school received an overpayment of funding for academic year 2015-2016. In the Common Pleas action ECOT raised several theories as to why the relief should be granted. In the immediate action, ECOT raises several theories as to why the relief should be granted.

Contrary to ECOT's arguments, there is nothing unique to its durational based claims that prevented them from ripening until after the issuance of a Final Determination. On July 8, 2016 when the Common Pleas action was filed, the final FTE review that is the subject of this proceeding was already in progress; the same statutory language was in place; the same 2015 FTE Review Handbook upon which the review was based was in place, the same intent to rely on durational data was in place, the same notification or lack thereof to ECOT as to ODE's

reliance on durational data was in place; the same conduct by ODE of ignoring durational data in past years had already occurred; and the same timing of imposing the durational standard on ECOT after the commencement of the academic year had already occurred. In sum, all of the facts upon which ODE relies to argue that durational data should not be a part of the 2016 FTE Review findings in the instant matter are the same facts upon which ECOT would have and could have relied in the Common Pleas matter to raise the very same arguments opposing the use of durational data.

These are not exclusively “administrative claims” as ECOT argues. In fact much of the very case law upon which ECOT relies in support of each argument arose out of an original action in court, not an appeal from an administrative action. While some of the issues raised by ECOT related to the propriety of utilizing durational data in an FTE review could have been originally raised as part of this administrative proceeding, and while courts have often dismissed collateral actions in favor of administrative proceedings under the doctrine of “exhaustion of administrative remedies” in situations where constitutional challenges are not raised, see e.g. *Fairview General Hospital, Appellant, v. Fletcher*, 63 Ohio St. 3d 146; 586 N.E.2d 80 (1992) and *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 530 N.E.2d 928 (10th Dist. 1987), ECOT’s decision to first pursue this issue in Common Pleas, and the Court’s subsequent denial of ODE’s Motion to Dismiss, locked ECOT into that forum for raising all claims and all theories of law related to its requested relief. Accordingly the Hearing Officer finds that ECOT is precluded in this matter from raising claims/issues, regardless of theory, that findings in ODE’s Final Determination should be disallowed because they are based on durational data.

It is further noted that the Court of Common Pleas made many factual/legal findings throughout its Decision that underscore its conclusions that durational data is properly part of

ODE's FTE review. These would otherwise independently be subject to issue preclusion (collateral estoppel). ECOT singles out certain of these findings as not subject to the doctrine, arguing that specific findings made by the Court that, a) the language of the FTE Review Handbooks provided ECOT with adequate notice of a durational standard, and b) a non-durational standard would be contrary to public policy, should be ignored under issue preclusion because they either appear, as in the case of the first finding, in a section of the Decision not raised by ECOT (retroactivity) or appear, as in the case of both findings, as one of multiple alternative reasons for finding against a claim (the two reasons stated by the Court for finding against retroactivity and the three reasons given by the Court for finding the Funding Agreement inapplicable.) (See *ECOT Post-Hearing Brief* at 73-75.)

ECOT's first argument is addressed above in discussing res judicata. As the Hearing Officer concluded, the record reflects that ECOT *did* raise retroactivity as an issue to be considered by the Court in assessing whether the application of durational data was to be enjoined. With respect to the second argument, it is clear that ECOT is correct that the Court cited three reasons for rejecting ECOT's argument that the Funding Agreement precluded ODE from relying on durational data: a) the Funding Agreement had expired, b) the Funding Agreement on its face did not preclude reliance on durational data, and c) an interpretation of the Funding Agreement that precluded reliance on durational data would be void as contrary to public policy. *Electronic Classroom of Tomorrow v. Ohio Department of Education*, *supra*, at 8-13. Similarly the Court cites two reasons for finding retroactivity inapplicable: a) as a matter of law the principle doesn't apply to public bodies such as ECOT and b) factually it is inapplicable because ECOT was on notice of the requirement to maintain durational data. *Id* at 20-21.

Citing to the Restatement of Judgments 2d, Section 27, comment i, the case law of other jurisdictions, *Stout v. Pearson*, 180 Cal. App. 2d 211 (4th Dist. 1960); *Vincent v. Thompson*, 50 A.D. 2d 211 (N.Y. App. 1975), and a footnote in one non-reported Ohio 10th District decision, *Kerr v. Proctor & Gamble Co.*, 10th Dist. No. 88AP-629, 1989 WL 11961 (Feb. 14, 1989), ECOT argues that in situations where a court has cited alternative bases for its conclusions, issue preclusion does not apply to any of the reasons cited by the Court. In response, ODE cites to the case law of other jurisdictions that have rejected the application of comment i where a) the original court had “rigorously considered” the alternative grounds, “carefully reviewing each contention,” *Eagle Props., Ltd. v. Scabauer* 807 S.W.2d 714, 722 (Tex. 1990); or b) the litigant was able to anticipate the potential issue-preclusive effect of the prior judgment on the second action, *Winters v. Lavine*, 574 F.2d 46, 68 (2d Cir. 1978).

In analyzing the arguments, the Hearing Officer notes that each of the reasons cited by the Court appear to be “rigorously considered” reasons for the Court’s ultimate conclusions, even if stated in the alternative, and not mere dicta. The Court’s conclusions regarding public policy is not even limited to its discussion of the Funding Agreement but also reflects on its construction of the Funding Statute, as more fully addressed below, and the Court even states that the first issue is tied to its resolution of the second. (“Thus, the Court finds that ECOT cannot prevail based on the Funding Agreement unless it can prevail on its argument regarding the Funding Statute...”) *Electronic Classroom of Tomorrow v. Ohio Department of Education*, *supra*, at 12. Finally, it can hardly be contended that ECOT wasn’t aware at the time that it filed the collateral lawsuit, let alone at the time of the Common Pleas decision in December, that it would have a significant impact on the administrative action.

There are therefore persuasive reasons for invoking collateral estoppel to the findings in question despite the footnote in *Kerr v. Proctor & Gamble Co, supra*. In the end, however, the resolution of this legal question does not bear materially on the outcome of the conclusions herein for two reasons. First, the arguments regarding issue preclusion become moot since each finding of the Court at issue under this principle relates to an issue that the Hearing Officer has already found to be barred from relitigation under the principle of res judicata, specifically the argument that durational data should not be considered in the 2016 ECOT FTE review and findings. Second, the Hearing Officer finds that, even if preclusive weight is not given to specific findings in the Common Pleas Decision, the Decision constitutes persuasive authority from a higher tribunal within the same appellate district involving the same parties, the same FTE review and the same overall question of whether durational data should be incorporated into the 2016 FTE review of ECOT as has been raised by ECOT in the present matter. The Decision will therefore be given significant weight in addressing the arguments raised by the Appellant and the evidence in the record.

2. Equitable Arguments Raised by ECOT Are Outside the Jurisdiction of an FTE Review Appeal.

Even if not precluded under principles of claim/issue preclusion, the Hearing Officer observes that arguments raised by ECOT as to why the Hearing Officer and State Board should preclude the consideration of durational based methodology in the Final Determination for ECOT are equitable in nature. But R.C. 3314.08(K) does not expressly confer equitable powers on the Hearing Officer and State Board. Because an administrative remedy is a creature of statute, the courts have held that one challenging an administrative determination cannot raise equitable defenses unless the statute at issue expressly makes equitable defenses available. See *Dayspring of Miami Valley v. Shepherd*, 2nd Dist. Clark No. 06-CA-113, 2007-Ohio-2589 at ¶ 29

(holding that a hearing officer erred in considering equitable defenses where “the statute [did] not refer to any equitable defenses nor . . . cite any factors to be considered in determining whether discharge is appropriate”).

Moreover, the Hearing Officer finds that even if he and the State Board have jurisdiction to consider ECOT’s arguments against the consideration of durational data, the school does not prevail on the merits, as the Hearing Officer will address next. .

3. As Indicated in the Court of Common Pleas Decision, R.C. 3314.08(H)(3) Does Not Afford ODE Discretion to Ignore Durational Data in Substantiating Funding to ECOT.

As noted above, the relief requested by ECOT with respect to each of its durational arguments is that ODE be precluded from relying on durational data in computing the school’s funding for the 2015-2016 academic year. However to even consider such relief, absent claims preclusion, the Hearing Officer would first have to conclude that ODE has such discretion. Based on the holdings of Judge French, the Hearing Officer is constrained to conclude that the statute authorizes funding without accountability for student participation.

The Court clearly concludes that durational data is a key component of the funding provisions. Examining the language of the funding statute, the Court first observes that certain rules of construction govern its resolution of the issue:

"It is a cardinal rule of statutory interpretation that we look to the language of the statute itself in determining legislative intent. If statutes relate to one another they should be read together with the differences in language carefully compared." *Sims v. Nissan N. Am., Inc.*, 2013-Ohio-2662, ¶ 32 (10th Dist.) (citations omitted). Another "cardinal rule of statutory interpretation is that words shall be given their plain and ordinary meaning. Where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Frisch's Rests., Inc. v. Conrad*, 2007-Ohio-545, ¶ 20 (10th Dist.) (citations omitted).

Applying the rules of construction to R.C. 3314.08(H)(3) and (H)(2), the Court notes in pertinent part that the term “learning opportunities,” as used in R.C. 3314.08(H)(3) is defined in R.C. 3314.08(H)(2) to require “compliance with criteria and documentation requirements for student **participation** which shall be established by the department.” (Emphasis included.) (Id. at 13-14.) The Court finds that, “this section shows that learning opportunities have a durational component that is *measured in terms of actual student participation.*” (Id. at 15.) (Emphasis added.)

The Court further notes that R.C. 3314.08(H)(3) also states that, “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.” (Emphasis included.) (Id. at 14.) The Court concludes that,

this sentence makes no sense if, as ECOT claims, “learning opportunities” do not have a durational component. Stating that the community school will not be credited for participation that exceeds ten hours per day means that a community school will be credited for participation of less than ten hours per day. But that also means that the duration of a student’s participation is something that needs to be “credited” to a community school. In other words, the Court finds that *the duration of participation matters in determining whether a student has been offered (i.e., supplied) 920 hours of learning opportunities to a given student.*

(Emphasis added.) (Id. at 14.)

The Court points to further language supporting its conclusion in R.C. 3314.27 which provides that:

No student enrolled in an internet- or computer-based community school may **participate** in more than ten hours of learning opportunities in any period of twenty-four consecutive hours. Any time such a student **participates** in learning opportunities beyond the limit prescribed in this section shall not count toward the annual minimum number of hours required to be provided to that student as prescribed in division (A)(II)(a) of section 3314.03 of the Revised Code. If any internet- or computer-based community school requires its students to **participate** in learning

opportunities on the basis of days rather than hours, one day shall consist of a minimum of five hours of such *participation*.

Each internet- or computer-based community school shall keep an accurate record of each individual student's *participation* in learning opportunities each day. The record shall be kept in such a manner that the information contained within it easily can be submitted to the department of education, upon request by the department or the auditor of state.

(Emphasis included by Court). Noting the frequent references to participation, the Court concludes that, “[a]lthough R.C. 3314.27 is not a funding statute, the Court finds that it shows that in assessing whether a school has met the requirement for 920 hours of learning opportunities, which is a statutory requirement on which funding is based (*see* R.C. 3314.08(H)(3)), *participation matters*.” (Id. at 15.) (Emphasis added.)

Still further findings supporting the Court’s construction can be found in other sections of the Decision. Responding to ECOT’s arguments that the FTE Review Handbooks unlawfully impose a durational standard because they were never rule-filed in compliance with R.C. Chapter 119, “[t]he Court finds that this language [referencing language in the 2010 FTE Review Handbook that addresses the need to maintain durational data] does not enlarge the scope of the statutes *because the statutes permit the consideration of participation*.” (Id. at 17-18.) (Emphasis added.) The Court continues,

As applied to the facts here, the Court finds that both the FTE review manual and the Ohio Compliance Supplement are merely interpreting, rather than "enlarging," the community school funding statute. As both manuals agree, that statute allows reviewers to consider durational information in connection with conducting a review as to whether an eschool can justify the FTEs that it has claimed. *The manuals merely set forth the steps that reviewers will take in assessing whether that statutory mandate has been met.*

(Id. at 19.) (Emphasis added.)

To the extent that one might argue that the Court’s use of the stronger term “statutory

mandate” is tempered by the less restrictive permissive terms “permit” and “allows” in the portion of the decision just discussed, and implies that the Court concluded that the statute should be read in a fashion that the inclusion of durational data in the funding formula is discretionary, the Court’s treatment, in part, of ECOT’s argument that its 2003 Funding Agreement with ODE overrides the use of durational data, is telling:

Lastly, the Court finds that interpreting the Funding Agreement in the manner ECOT suggests, and enforcing an outdated 2003 agreement, *would be in violation of public policy*. “[I]t is well-settled that a valid contract cannot be made if its purpose or performance is contrary to statute. Similarly, a contract may be void if it violates public policy, the legal principle which declares that one may not lawfully do that which has the tendency to injure the public welfare.” *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309, ¶ 22 (9th Dist.) (finding contract unenforceable as against public policy) (citations and quotations omitted). “Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. Actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy.” *Belmont Hills Country Club v. Beck Energy Corp.*, No. 11-CV-290, 2013 Ohio Misc. LEXIS 224, at *9 (Ohio Ct. Com. Pl. July 8, 2013) (citations and quotations omitted).

In the case at hand, the Court finds that if the Funding Agreement were interpreted in the manner that ECOT suggests, to require the State to continue paying hundreds of millions of dollars per year for an indefinite time period, without any ability to determine whether students are in fact participating in any curriculum at ECOT at all, that construction would render the Funding Agreement void as against public policy. Accordingly, the Court finds that even if the Funding Agreement were still in effect, and even if ECOT's interpretation of the Funding Agreement were correct, ECOT still does not succeed on its claim that the Funding Agreement prevents ODE or the State Board from reviewing or considering durational data in connection with the funding decision.

Similarly, the Hearing Officer finds that if he were to find that ECOT is entitled to full funding without the need to substantiate that it expended the requisite 920 hours of FTE, or appropriate fraction of that number, in actually engaging the student in educational opportunities, the finding would be contrary to a fair reading of Judge French’s Decision, the statute and public policy.

Accordingly, to the extent it was permitted discretion by the statute, ODE certainly did not abuse that discretion in conducting its 2016 review using durational data.⁵⁶

4. Both R.C. 3314.08(H) and at Least Six Years of the Publication of the FTE Review Handbook Placed ECOT on Notice that the School is Accountable for Durational Data as Support for Funding.

For many of the same reasons articulated by Judge French in her decision, ECOT's arguments that durational data could not be required as an element of funding until such time as it was rule-filed and/or communicated to ECOT in a form other than the FTE Review Handbooks, well in advance of the 2016 FTE review, must also fail. As the Court stated, holding ECOT and other community schools accountable to the hours of participation of its students did not require a rule in order to be implemented. Duration is an inherent part of the statute itself, unchanged since its enactment. "[T]he Court finds that the FTE review manuals merely interpret the funding rules set forth in R.C. 3314.08(H)(3)." (Id. at 18-19.)

In so doing the FTE Review Handbooks further clarified the "statutory mandate" that documentation of student participation was expected of eSchools reviewed by ODE Area Coordinators. Between the statute and the FTE Review Handbooks, ECOT's administrators

⁵⁶ And even if the Court reserved discretion to ODE in its interpretation of the funding statute, the fact that ODE altered that interpretation after a decade of a contrary interpretation, does not diminish the validity of the interpretation it now follows. The U.S. Supreme Court "has rejected the argument that an agency's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the statute in question." *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (punctuation omitted). "[A]n initial agency interpretation is not instantly carved in stone," nor is it "required to establish rules of conduct to last forever." *Id.* (punctuation omitted). Rather, an agency "must be given ample latitude to adapt its rules and policies to the demands of changing circumstances." *Id.* at 187 (punctuation omitted). See also *Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.") (citations and punctuation omitted.)

should have been on notice that durational data was a component of funding. As the Franklin County Court of Common Pleas observed:

the Court finds that in every ODE FTE review manual since at least 2010, there has been a special section of the manual that is directed toward FTE reviews conducted at eschools. See, Rausch testimony. In the 2010 manual that was sent to Ms. Bentahir, for example, there is a section listed in the table of contents for "eSchool Review." See, ODE Exhibit 1031. The material in that section provides, inter alia, that "the reviewer of eschools must put a high level of scrutiny on the relationship between the hours/days of instruction and the daily/hourly attendance documentation used in calculating the final FTE review for each student." *Id.* at 32. The manual also provides that:

The reviewer will check the individual attendance record for each student being reviewed. This attendance record should show when a student has logged on and off while accessing learning opportunities. A learning opportunity for an eSchool student could be documented computer time for doing homework in any subject, reading resource documents, writing resource papers, taking tests, doing research, conferencing with teachers, etc.

Id. As to non-computer learning opportunities, such as field trips, the manual provides that:

Non-computer learning opportunities for a student also must be documented and approved in writing by a teacher, supervisor or school administrator and must include an hourly/daily/weekly accounting that the hours documented were hours in which the student accessed a learning opportunity.

Id. at 33.

The Court finds that this language does not enlarge the scope of the statutes because the statutes permit the consideration of participation. The Court further finds that the FTE review checklist in the 2010 manual likewise provides that, as to eschools, the reviewer should "[e]xamine the attendance record for the student and determine if the attendance record for the student matches the amount of time reported in SOES," and "[i]f the student has non-computer learning opportunities, determine [that] the hourly/daily/weekly accounting of hours were hours in which the student accessed a learning opportunity." *Id.* at 43. The Court finds that the same language appeared in the FTE review manuals that ODE published in 2011, 2012, and 2014. See, ODE Exhs. 1032, 1034, and 1035, and Rausch testimony.

In addition, the 2015 manual, which was published on ODE's website in January 2015, includes the same language, but also adds more description of durational

records that area coordinators should request and review in connection with FTE reviews of eschools. See, ODE Ex. 1037.

Electronic Classroom of Tomorrow v. Ohio Department of Education, supra, at at 17-18.)

(Emphasis added.)

The Hearing Officer finds that the evidence presented in the instant matter confirms the same findings. In addition to the evidence summarized by the Court, the evidence also shows that ECOT's own attendance policies emphasize the need for student participation at an average of five hours per day, twenty-five hours per week. Its superintendent had even raised it after beginning employment. There is therefore ample evidence in the record that ECOT was aware of durational requirements.

In response, ECOT points to the expired 2003 Funding Agreement, its own erroneous interpretation of the Funding Statute, the uncontested evidence that ODE Area Coordinators were for a number of years, as a matter of practice, ignoring durational data during FTE reviews, and the confusing inconsistent statements made by Area Coordinators even after the 2016 reviews had commenced, as support for its argument that it had inadequate notice that durational data was a condition of funding. While there is no question that ODE could have provided better notice to ECOT both, prior to, and during its 2016 FTE reviews, that it was implementing a new approach to FTE reviews, the Court of Common Pleas has rejected both ECOT's interpretation of the Funding Agreement and its interpretation of the statute, and the Hearing Officer does not find that ODE's inconsistent practice is sufficient cause to justify a good faith belief on the part of ECOT that it could ignore the statutory mandate, the FTE Review Handbooks and ECOT's own attendance policies. This is particularly true given the improbability that ECOT could in good faith genuinely believe that ODE, even after a decade of ignoring durational data during its FTE reviews, would continue indefinitely to pay in full for each of ECOT's 15,000 plus FTEs so

long as the school made sure it's students logged on to a computer once every thirty days. As the Court of Common Pleas similarly found, "the Court finds that ECOT cannot claim to have been unfairly surprised when ODE requested such data in connection with the 2016 FTE review." (Id. at 21.)

5. ODE is not Estopped from Exercising an Interpretation of the Funding Statute that is Inconsistent with Past Practice.

ECOT also argues that regardless of the language in the statute and the FTE Review Handbooks, the actions and words of ODE for over a dozen years in interpreting and applying the Funding Statute during the FTE reviews as a funding formula based on enrollment and not on student participation, equitably estops the Department from implementing a durational standard in 2016. But ECOT's argument of estoppel has been considered and rejected by the courts on multiple occasions. As stated by the Supreme Court in *Ohio St. Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 555 N. E.2d 631 (1990), "[i]t is well-settled that, as a general rule, the principle of estoppel⁵⁷ does not apply against a state or its agencies in the exercise of a governmental

⁵⁷ The two types of estoppel, equitable and promissory, are described in *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 852 N.E.2d 716, 2006-Ohio-4251 at ¶20, 23. Citing 4 R. Lord Williston on Contracts (4th Ed. 1992) 28-31, Section 8.3, the Court described equitable estoppel as follows:

It is generally held that a representation of past or existing fact made to a party who relies upon it reasonably may not thereafter be denied by the party making the representation if permitting the denial would result in injury or damage to the party who so relies. The party making the representation is denied, by virtue of equitable estoppel, the right to plead or prove the existence of facts contrary to his representations. As the United States Supreme Court has pointed out, one 'who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.' [*Dickerson v. Colgrove* (1879), 100 U.S. 578, 25 L.Ed. 618.]

Id. at ¶ 20. Promissory estoppel, in contrast, is described by the Court as follows:

function. (citing *Sekerak v. Fairhill Mental Health Ctr.* 25 Ohio St.3d 38, 39, 495 N.E.2d 14, 15 (1986), and *Besl Corp. v. Pub. Util. Comm.* 45 Ohio St.2d 146, 150, 341 N.E.2d 835, 838 (1976) (finding the Pharmacy Board was not estopped from enforcing the law because the regulated pharmacist had relied upon the status quo to invest large sums in building up his business when the Board failed to investigate him in an expeditious manner.) The Court observed, “[i]f a government agency is not permitted to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of all citizens in obedience to the rule of law is undermined.” (citing *Heckler v. Community Health Services*, 467 U.S. 51, 60, 104 S. Ct. 2218, 2224, 81 L.Ed.2d 42 (1984). In *Hortman v. City of Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, syllabus, the Ohio Supreme Court expanded the exemption of government from estoppel claims by holding that, “[t]he doctrines of equitable estoppel *and* promissory estoppel are inapplicable against a political subdivision when the political subdivision is engaged in a governmental function.” (Emphasis added.)

In *Cook v. Ohio Dept. of Job and Family Services*, 10th Dist. Franklin Nos. 14AP-852, 14AP-853, 2015-Ohio-4966, the court declined to apply estoppel against ODJFS when the latter changed its position with respect to a trust it had reviewed and approved a number of years earlier and subsequently found to be an available resource thus rendering the appellant ineligible

Promissory estoppel has been defined by the Restatement of Contracts, 2d as "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement of the Law 2d, Contracts (1981) 242, Section 90.

Id. at ¶ 23.

for Medicaid benefits. Citing to *Hortman* and *Frantz*, the court found that since ODJFS was a political subdivision engaged in a governmental function the doctrine was inapplicable.

In *Forest Hills Local School District Bd. of Ed. V. Noe*, 144 Ohio Misc.2d1, 2007-Ohio-6082, 877 N.E.2d 756 (Clermont C.P.), the court considered the application of estoppel to a situation where a student had attended a school district tuition free when he actually was a resident of another school district. When the school district sued for recoupment of the tuition, the court noted that the liability “appears to stem primarily, from unintended misinformation passed from” one of the two school districts to the parents of the student. *Id* at ¶23.

Considering the possibility of estoppel based on the parents’ reliance on the error, the court observed that due to general language in *Frantz*, some courts had carved out exceptions to the rule against the applicability of estoppel to political subdivisions. Further noting that the Supreme Court in *Hortman* “took great pains to restrict the scope of *Frantz*, flatly rejecting the linguistic interpretation necessary to permit the exceptions contemplated by Ohio’s lower courts,” the court concluded that, “*Hortman* clarifies earlier case law by stating, without exception, that the doctrines of equitable estoppel and promissory estoppel *are inapplicable against a political subdivision* when the subdivision is engaged in a governmental function.” (Emphasis included.) Accordingly the court declined to apply the doctrine.

The same conclusion applies to the present matter. In carrying out its FTE reviews, ODE was and is a political subdivision carrying out a governmental function. It cannot be estopped from incorporating durational data into that function.

6. Principles of Retroactivity Do Not Apply to ODE in its Interaction with a Public School Such as ECOT.

ECOT argues that at a minimum, ODE should not be able to implement durational based funding for the portion of the 2015-2016 academic year prior to issuing ECOT the first written

notice in January to schedule the initial FTE review. ECOT argues that to apply durational data to the first half of the academic year would be to impermissibly apply ODE's new methodology retroactively. Although ECOT acknowledges that Judge French addressed and rejected retroactivity in her decision, the school argues that her analysis is inapplicable to the instant matter for a couple of reasons. One, it argues that, despite Judge French's finding at page eight of her decision that ECOT raised the issue, the school nonetheless did not and therefore the Court's ruling could not constitute *res judicata* barring it from raising the issue herein. Two, ECOT argues that the decision is nonetheless distinguishable because it only addresses "constitutional" retroactivity, not "administrative" retroactivity, the version ECOT seeks to raise in the instant matter.

The argument fails for several reasons. One, *res judicata* applies because it's an argument that could and should have been raised by ECOT in the common pleas action even if it didn't actually do so. Two, ECOT incorrectly seeks to narrow the Court's ruling to a consideration of the Retroactivity Clause in Ohio's Constitution whereas the decision is broader to encompass retroactivity in general.

The Court relies on *Toledo City School Dist. Ed. of Educ. v. State Bd. of Educ. of Ohio*, *supra*, as the basis for its conclusion that retroactivity principles do not preclude ODE from implementing the inclusion of durational data for the entire academic year. In that decision the Ohio Supreme Court found that General Assembly has the constitutional authority to retroactively reduce the amount of state funding allocated to local school districts and is not implicated by the Retroactivity Clause because funding of school districts is a matter of public concern and interfered with no private right since school districts, as political subdivisions, have no vested rights. In so finding, the Court, as Judge French noted, engaged in "a lengthy

historical analysis” in which the Court observed that the state’s exemption from retroactivity concerns preceded the incorporation of retroactivity into the Ohio Constitution in 1851 and that there was no indication that there was any intent to change that exemption with the constitutional language. The Court therefore made it clear that the exemption is not tied specifically to a constitutional provision but instead generally to the lack of a vested right by the school because it is a public school carrying out a government function. *Id.* This exemption from retroactivity concerns would be just a applicable to ECOT’s self-styled “administrative retroactivity” as it would to “constitutional retroactivity.”

Judge French recognized this in finding generally that school districts cannot assert retroactivity concerns:

ECOT is a public school, just like the public schools at issue in *Toledo City School Dist. Ed. of Educ.*, and it is carrying out the same "governmental function" of providing a public education. Thus, the Court finds that just like the school districts there, it cannot assert retroactivity concerns as a basis for challenging governmental action.

Id. at 21.

D. ECOT’s Remaining Arguments Also Fail.

Although they are not the thrust of ECOT’s arguments, the Appellant also seeks to nullify the Findings in the Final Determination based on several other arguments that aren’t necessarily tied to whether durational data can implemented as part of the funding formula for the 2015-2016 academic year. Because they were not or could not have been raised in the collateral action, they are therefore not precluded by *res judicata*.. They are addressed as follows:

1. ECOT Has Not Demonstrated that the School Received Insufficient Notice as to the Type of Durational Data Record It Had To Maintain During the 2015-2016 Academic Year.

ECOT argues that durational based funding should not be implemented until ODE provides notification as to the types of records it would consider as documenting the time spent by the student participating in learning opportunities. While this argument could be grouped with the other arguments proffered by ECOT as bases to void any portion of the Final Determination based on durational data, it is distinguishable from the others in that it could not be raised until after the review was completed, the Final Determination issued and ECOT advised as to which records were accepted by the reviewers and which were not. As such, the argument could not have been raised in ECOT's common pleas complaint in the same manner as other durational based arguments and principles of res judicata are inapplicable to its consideration.

That being said, the Hearing Officer nonetheless finds the argument without merit. While the Hearing Officer agrees with ECOT that some notice of the types of records expected for documenting funding is necessary, sufficient notice that FTE reviewers were to look for records recording the time spent in a learning activity was provided in six years of publishing FTE Review Handbooks. Page two of the 2015 FTE Review Handbook, for example, clearly states that attendance records are part of the documentation upon which funding is based and that the Area Coordinators are expected to review attendance documentation during the FTE reviews:

Community schools enter data concerning the enrollment attendance of their students into EMIS, and the EMIS data populates the School Options Enrollment System (SOES) which is used by the Ohio Department of Education (ODE) to make payments to community schools. Area coordinators conduct full-time equivalency (FTE) reviews to verify the accuracy of the enrollment and attendance data entered by community schools into EMIS.

An ODE FTE review team examines enrollment and attendance policies, student enrollment data and the school's procedure for maintaining enrollment and attendance documentation that substantiates whether the data reported in the SOES for funding is accurate. *The review team compares the source enrollment and attendance data with the EMIS/SOES data submitted by the community school for funding and checks the validity of the IEP's being implemented in the school.*

(Emphasis added.)

Page 16 of the 2015 FTE Review Handbook describes that nature of the attendance data expected from eSchools:

The reviewer will check the individual attendance record for each student being reviewed. This *attendance record should show when a student has logged on and off while accessing learning opportunities*. A learning opportunity for an eSchool student could be documented computer time for doing homework in any subject, reading resource documents, writing resource papers, taking tests, doing research, conferencing with teachers, etc.

Non-classroom activities other than correspondence courses or non-classroom online instruction for a student that constitutes less than one-half of the student's instructional day *must be documented and approved in writing by a teacher, supervisor or school administrator and must include an hourly/daily/weekly accounting that the hours documented were hours in which the student accessed a learning opportunity*.

(Emphasis added.) Any reasonable interpretation of this language would put the reader on notice that an eSchool should be recording log-off as well as log-on times for students accessing learning activities online and should be documenting the "hours in which the student accessed a learning activity" in "non-classroom activities."

To the extent that anything more specific was expected by ODE, it is immaterial to this particular FTE review. The evidence shows that ODE exercised great latitude in counting any documentation that arguably showed increments of time and ECOT has not pointed to any such documentation that was not included. The record reflects that the issue was more that no durational data was created and/or retained at all then with the adequacy of such data. Where

data was rejected, it was readily apparent that it did not measure duration in any manner. As such the Hearing Officer concludes that the ODE findings are not deficient because of any lack of notice to ECOT as to what should have been maintained for the 2016 review.

2. ECOT Has Not Demonstrated that ODE Arbitrarily and Capriciously Deviated From the Discretionary Guidelines Set Forth in the 2015 FTE Handbook in Conducting its 2016 FTE Review.

As its next argument, ECOT asserts that ODE acted arbitrarily and capriciously because of “multiple failures to follow its own FTE Handbook Policies/Procedures,” (ECOT Br. at 110-12). Again the Hearing Officer finds the argument neither supported by the record or by the applicable law. It is first noted that each of the arguments raised ignore the fact that, as the Common Pleas Court held in its decision, the FTE Review Handbooks are guidelines, not mandatory rules. These guidelines are therefore subject to discretion in their application as the 2015 FTE Review Handbook plainly states. (ODE Exh. 1037 at 2.) Thus, unlike the rules at issue in the cases cited by ECOT, any choice by an Area Coordinator to take a different approach does not create reversible error unless it both constitutes an abuse of discretion and causes a definitive harm to the school. ECOT has failed to establish either.

ECOT’s chief argument under this topic is that the sampling methodology employed by ODE is flawed under the Handbook. (ECOT Br. at 40, 42-44.) As noted above, ECOT raises three issues: 1) whether ODE should have drawn roughly double the number of files it reviewed, from 750 files to 1,300 files, because the Handbook arguably required ODE to base its sample size on the roughly 26,000 students who attended ECOT for all or part of the 2015-16 academic year, rather than on the roughly 15,000 FTE that ECOT claimed during the academic year; 2) whether the sample should have been collected on a grade by grade basis based on an exhibit that showed the sample had uneven distributions of various grades and testimony from Ms. Pierson

that this could potentially skew the sample due to the uneven use of the computers versus off-line educational opportunities among the various grades and the inability of ECOT to produce off-line durational data in the FTE review; and 3) the sample size should have been expanded to 100% based on the degree of errors found in the sample and language in the Handbook that discussed expanding the sample in such situations.

But there are multiple problems with ECOT's argument. One, as a general rule, it is noted that sampling and extrapolating a finding to a larger universe is a commonly accepted methodology for governmental auditing that makes it, "incumbent upon the complainant "to show that the formula used produced an erroneous result." *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138, 142, 235 N.E.2d 511 (1968) (Tax Commissioner audit). See also *In re Bailey*, 64 Ohio App.3d 291, 293-295, 581 N.E.2d 577 (10th Dist. 1989)(Medicaid provider audit). In so doing, the courts have recognized that findings can be made based on a relatively small sample size. In upholding a sample size of 71 out of a universe of 13,880 claims, the Tenth District opined that, "[s]tatistical sampling methods used to extrapolate a total disallowance figure have been consistently upheld provided there exists an opportunity to rebut the initial determination of overpayment." *In re Bailey* at 293-294. The court continued that notwithstanding the private interest of the challenger in an accurate result, the "burden on the state of a case-by-case audit of each claim made by every provider far outweighs [those] private interests," and concluded that a sampling method is "conclusive," so long as the challenger is "provided an opportunity to rebut [the] findings." *Id.* at 295.

Two, even outside the presumption of regularity that attaches to such findings, ODE presented testimony that demonstrated a reasonable basis for the sample size given the enormous size of the school, the relatively large sample that was extracted just using the FTEs as a basis for

the selection of the size and the fact that the State Auditor had made findings in various audits based on even smaller sample sizes. Three, ECOT presented no evidence from an individual with background in sampling to rebut the presumption and/or ODE's testimony. Finally ECOT presented no evidence to demonstrate whether following its suggested methodology would have made a material difference in the findings let alone establish what that difference would be. There is simply no persuasive evidence to discredit the sample. See *Dean Supply Co. v. Tracy*, 8th Dist. Cuyahoga No. 77834, 00-LW-5499, 2000 Ohio App. Lexis 5602 (November 30, 2000) at 8-9 (rejecting challenge to tax audit determination based on sampling where the challenger "has offered no evidence other than conclusory assertions that the outcome of the audit would have been different had a longer time period sample been used").

ECOT next asserts that ODE "failed to follow the Handbook's requirement for promptly identifying any errors/issues following a preliminary FTE review." (ECOT Br. at 40-42). But, as ECOT also acknowledges, the Handbook only states that ODE shall inform the school of errors found following completion of the review and provides an "April/May" timeline for doing so. (2015 FTE Review Handbook at 5.) While the evidence certainly indicates that ODE policy was to communicate errors at the exit conference or as soon as possible thereafter, and while the evidence is mixed as to whether Mr. Lambert raised durational data during the exit conference, it is clear that it was discussed during the course of the review and that the absence of durational data was communicated to ECOT no later than May 17, 2016, a month and a half before the final review and precisely within the timeline specified in the Handbook. Finally ECOT has again failed to establish how and to what degree being formally notified in May versus March had on its ability to produce (or desire to produce) records in July, particularly given a) testimony from Mr. Teeters that he was aware of the need to start generating such records at least by February 1,

2016 from his tracking of H.B. 2 the prior year and yet had not implemented anything, and b) the actual course ECOT took in July not to produce what durational data it had. The argument is therefore not well taken.

Third, ECOT asserts that ODE did not “jointly establish a method for auditing” community schools with the Ohio Auditor of State referencing language in former R.C. 3314.08(N)(2) that is repeated on page 6 of the 2015 FTE Review Handbook. (ECOT Br. at 44). Again ECOT has not demonstrated any issue with this language that would mandate voiding the FTE review findings. ECOT references testimony from Mr. Babal in which the witness actually testified that ODE and the State Auditor have held conversations in which ODE’s methodology has been discussed. (Babal Tr. at 490-491.) ODE further points out that the Auditor’s own Compliance Supplement, as far back as 2009, has specifically provided, consistent with the FTE Review Handbooks, that “the community school should be able to produce a report of the total hours the student claimed as learning time during the year.” (Carlisle C.P. Tr. Vol IV at 98.) Thus, regardless of practice, the written guidelines for auditing eSchools expected that the schools would be maintaining durational data.

Fourth, ECOT asserts that ODE did not comply with the FTE Review Handbook when it “[left] an FTE site with confidential/personal student information.” (ECOT Br. at 44). ECOT addresses the argument again as a separate topic later in its closing brief. (See ECOT Br. At 114-116.) ECOT is referencing page 27 of the 2015 FTE Review Handbook which interprets the underlying statute, R.C. 3301.0714(D)(2), as follows:

Prohibition for leaving with Individual Student Names and SSID Numbers
RC 3301.0714(D)(2) – Individual student data shall be reported to ODE through the information technology centers utilizing the code but, except as provided (for EdChoice, Autism Scholarship, Cleveland Scholarship and DD students), at no time shall the State Board or the Department have access to information that would enable any data verification code to be matched to personally identifiable

student data. (This means that neither ODE nor any of its staff may leave an FTE review site with personally identifiable information.)

ECOT argues that ODE violated the provision when it had ODE employees review student files at ODE offices as part of the FTE review. It argues that ODE's alleged illegal conduct should bar it from imposing any adverse findings on ECOT.

In response ODE does not deny that its employees reviewed student files away from ECOT premises but then points out the irrationality of ECOT's argument in that ECOT was the cause of the records being reviewed at another location, first refusing to produce them when reviewers were on site; then providing them pursuant to Court Order, without expressing any objection to confidentiality, at the site of a document production contractor, watermarked from top to bottom with student names, knowing that they would be reviewed off-site; and finally benefiting from the production when, as a result, ODE lowered the finding from 100% to 58.8%. ODE continues that there is no evidence that anyone other than the ODE employees involved in the review accessed the records and that ODE employees themselves have an express right to access them pursuant to R.C. R.C. 3314.27. (ODE Reply Br. at 35-36, 38.)

In reviewing the arguments, the Hearing Officer duly notes the circumstances articulated by ODE and the lack of any applicable and/or persuasive authority supporting ECOT's position and concludes that ECOT's argument is without merit as a basis to void FTE findings.

3. To the Extent that ECOT is not Raising an Equal Protection Claim that is Outside the Jurisdiction of an Administrative Hearing, It Has Not Demonstrated that the School was Subjected to Unreasonable and/or Unlawful Disparate Treatment by ODE In the Conduct of its 2016 FTE Review.

ECOT next asserts that:

it is undisputed that ODE engaged in disparate treatment of eschools via, among other things: (1) its decision to conduct FTE reviews of only certain eschools in 2016, thereby allowing non-reviewed schools an additional year to comply with

the newly minted durational requirement without facing any funding losses; (2) its decision to allow all reviewed eschools, except ECOT, an opportunity to supplement their FTE review findings with a school-wide durational spreadsheet; and (3) consistently providing important correspondence to ECOT significantly later than it was provided to other eschools. Such disparate/unequal treatment, for which ODE has offered no viable explanation, is also arbitrary and capricious as a matter of administrative law and the overarching concept of fairness embodied therein.

(ECOT Br. at 50-54; 113-114). The argument is based on testimony in the record that ODE, consistent with its normal five year scheduling, only conducted FTE reviews of 12 of the 23 eSchools in 2016, even though at least two of the schools not reviewed were not maintaining durational data (ECOT Exhs. G-1 thru G-4; Rausch Tr. at 889-890, 892; Teeters Tr. at 1122-1123, 1128-1129.); that ODE, unlike the protocol it followed with ECOT, issued a letter to other eSchools reviewed in 2016 to provide a spreadsheet listing students and claimed durational time for each (Rausch Tr. at 918-926; ECOT Exhs. G-67 to G-74); and that ODE considered the spreadsheet as evidence of durational data without reviewing supporting documentation (Rausch Tr. at 918-926.)

In response, ODE submits that the circumstances were quite different between ECOT and the other eSchools as ECOT elected to litigate rather than produce durational data in any form; that when John Wilhelm asked Brittny Pierson for documentation of non-computer-based participation, Ms. Pierson responded that no such data existed (Babal Tr. at 261, 2121-2122); and that the only data that ECOT provided at all was material that the Common Pleas Court ordered it to provide, over ECOT's objection. (ODE Reply Br. at 36.)

ODE then submits that ECOT incorrectly characterizes the letters that ODE sent to other eSchools selected for an FTE review in 2016 as merely seeking the amount of "*claimed*" durational time for each eSchool student. ODE points out that, much to the contrary, the letter specifically stated that "[i]f [a] student is being reported as receiving the full FTE for his/her

enrollment period, then there must be documentation . . . that the student participated in the corresponding amount of learning opportunities to justify the FTE being claimed.” (E.g., ECOT G-67 at 1). The letter added: “Students can only be given credit for *documented* learning opportunities in which he/she was completing work/receiving instruction.” (Id. at 2). The letter therefore requested from each eSchool a spreadsheet that required each eSchool to provide, for each student, “the total amount of *documented* computer-based learning opportunities that the student participated in” and “the total amount of *documented* non-computer, non-classroom based learning opportunities that the student participated in.” (Id.) ODE points out that it, in fact, rejected “summary sheets” that were submitted in response to these letters. (Rausch Tr. at 2162-2163.)

In addressing this argument, the Hearing Officer initially notes that the disparate treatment argument raised by ECOT has the appearance of an “as applied” equal protection argument that it is beyond the jurisdiction of an administrative hearing officer. As creatures of statute, administrative agencies themselves are without jurisdiction to rule on the constitutionality of a statute. Such determinations are reserved to the courts alone. *Herrick v. Kosydar*, 44 Ohio St.2d 128, 130, 339 N.E.2d 626 (1975). This is true even where the challenge is that a provision is being applied unconstitutionally, *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195, 197-99, 625 N.E.2d 597 (1994). Constitutional issues cannot be determined administratively, *Bouquet v. Ohio St. Medical Bd.*, 123 Ohio App.3d 466, 474, 704 N.E.2d 583 (10th Dist. 1997), citing *Grant v. Ohio Dept. Of Liquor Control*, 86 Ohio App.3d 76, 83, 619 N.E.2d 1165, 1171 (1993), citing *Mobil Oil Corp. v. Rocky River*, 38 Ohio St.2d 23, 26, 309 NE.2d 900, 902 (1974).

Moreover even if the Hearing Officer has jurisdiction over the claim, it is noted that, “when a party alleges that a law that is fair on its face was applied unequally to those who are similarly situated, that party must establish intentional and purposeful discrimination in order to prove a denial of equal protection.” *Linden Medical Pharmacy, Inc., v. Ohio St. Bd. of Pharmacy*, 2003-Ohio-6650 (10th Dist. 2003.), citing *Cahill v. Lewisburg*, 79 Ohio App.3d 109, 116 (1992). There is no intentional and purposeful discrimination documented in the record. In fact, as ODE points out, the two groups of eSchools are not even similarly situated. The schools that submitted spreadsheets did so representing that they detailed underlying durational documentation. ECOT, in contrast, admitted it didn’t have the durational data to document in a spreadsheet. The other schools voluntarily submitted information. ECOT did so only under the confines of a Court Order. The record simply doesn’t support the claim.

4. ECOT Has Not Demonstrated that ODE Acted Unlawfully and/or Unreasonably in Relying on the Number of Hours in the Calendar Submitted by the eSchool Rather than the 920 Hour Minimum for all Community Schools in Calculating Documented FTEs.

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

E. The State Board Should Exercise Its Discretion to Consider Durational Data Submitted By ECOT Subsequent to the Issuance of the Final Determination.

As noted above, ECOT presented additional durational data for the sample group of students during the course of the hearing that was not presented at either the July FTE review or the August follow-up. ODE suggested at hearing that the data, if considered, would represent

approximately 14 additional FTEs. Once extrapolated these 14 FTEs would reduce the finding of overpayment by \$3,703,838.90. In its closing briefing, ODE correctly argues that it is not *required* to allow an eSchool to supplement or correct durational data once the administrative hearing process has begun, as doing so would create finality problems for the administrative hearing process, while also rendering the final FTE review meaningless. ODE cites in support, *State ex rel. Labor Works of Dayton LLC v. Ohio Bur. Of Worker's Compensation, supra*, at ¶ 59 (holding that a party was not entitled to a “new audit simply because [the audited party] has now (18 months later) finally provided the information [it] was required to provide in March 2008”). ODE further correctly notes that if an eSchool refuses to provide durational data to substantiate its claimed FTEs in response to a request from ODE, ODE has the authority to determine that the eSchool has not substantiated any of its FTEs. See R.C. 3314.08(H)(3) & (K); See *State ex rel. Labor Works of Dayton LLC v. Ohio Bureau of Workers' Comp., supra*, at ¶45 (upholding BWC audit determination where party had “failed to provide the BWC with all the necessary payroll information” in connection with the BWC’s audit) (magistrate’s decision, adopted by the Court “as our own, including the findings of fact and conclusions of law contained in it”). See also *Bay Mechanical & Electrical Corporation v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882 at ¶¶ 28- (holding that the Tax Commissioner “acted reasonably and lawfully” when he denied a sales tax exemption because of the taxpayer’s “failure to produce the requested pertinent documentation.”)

But there is a difference between not being required to consider data and being obligated to disregard it. ODE could have correctly found in July, 2017, that ECOT received a 100% overpayment because it produced no durational data to support its funding. [Indeed, surprisingly, ECOT even took the position during the hearing that the August production should

not be considered part of the FTE review as it was produced pursuant to Court Order. (Tr. at 1756-1758.)] But ODE exercised discretion to consider the durational data produced pursuant to the Court Order. The State Board has now been presented with another round of such data and asked to consider it as well. For the following reasons, the Hearing Officer concludes that, despite the untimeliness of the production, it also would be an appropriate exercise of discretion to do so.

It is first noted that the data in question, although not always produced in the same format in which it was originally maintained, nevertheless appears to come from information maintained by ECOT contemporaneous with the dates it professes to record. It is data that, as explained by ECOT, was originally produced in an incomplete format or was not produced during the August production either because it was outside the scope of the Court Order or was otherwise overlooked. It is also noted that the documentation is in the same durational format accepted by ODE during its prior review. It is noted that, unlike the 18 month period addressed in *State ex rel. Labor Works of Dayton LLC v. Ohio Bureau of Workers' Comp., supra*, the documentation was produced to ODE, pursuant to the October 28, 2019 *Amended Pre-Hearing Journal Entry with Notice of Hearing*, no later than November 21, 2016, less than five months after the original date for production and less than three months after the Court ordered production. It is noted that this production occurred while the appeal process was still ongoing. Finally, while ODE is correct that ECOT could have voluntarily turned these records over earlier, it also is noted that the circumstances surrounding this FTE review have been one of confusion and judicial intervention.

The Hearing Officer also again finds that *Bay Mechanical & Electrical Corporation v. Testa, supra*, at ¶¶ 33-39 instructive. At the administrative hearing before the Board of Tax

Appeals, the taxpayer submitted spreadsheets in part summarizing information from invoices that the taxpayer had refused to provide the Tax Commissioner during the audit. Although the underlying invoices were provided to the Tax Department as part of discovery prior to the hearing, they were not introduced at the hearing. The BTA admitted the spreadsheets but declined to give them weight.

On appeal to the Ohio Supreme Court, the Court affirmed the BTA, distinguishing its earlier decision in *HealthSouth Corp. v. Testa*, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, on the basis that:

HealthSouth was a case in which the record contained not only the taxpayer's summary exhibits presented at the BTA, but other documentation to support the taxpayer's claim that had been submitted contemporaneously with the original tax returns on which the commissioner had predicated his assessment. *HealthSouth*, ¶ 23, 25-26. By contrast, the underlying facts-and-circumstances evidence in the present case was neither shown to the tax agent during the audit, nor presented in support of Bay's petition for reassessment, nor offered as an exhibit at the BTA hearing. Accordingly, the record in this case was devoid of documentation that would corroborate the summary exhibits on which Bay chose to rely.

Id. at ¶ 36. Although, like *Bay Mechanical*, ECOT did not supply its documentation during the review/audit, like *HealthSouth*, ECOT has introduced at hearing corroborating underlying records in addition to summary documents detailing durational data for the review period sample. With the sole exception of the deminimus one day off-line activity record of one student which was highlighted by the Hearing Officer during the hearing, ODE has not elected to specifically challenge the accuracy of those records

As such, *under the unique circumstances of this particular FTE review*, the Hearing Officer would recommend the consideration of the late-filed documentation and resulting adjustment to the Final Determination.

V. Findings of Fact

Having heard the testimony of the witnesses and considered the arguments of counsel and having examined the exhibits admitted into evidence, I make the following findings of fact and conclusions of law. To the extent that any findings of fact constitute conclusions of law, they are offered as such. To the extent any conclusions of law constitute findings of fact they are offered as such.

1. Electronic Classroom of Tomorrow (“ECOT”) is an “eSchool,” defined under R.C. 3314.02(A)(7) as “a community school established under this chapter [R.C. Chapter 3314] in which the enrolled students work primarily from their residences on assignments in non-classroom-based learning opportunities provided via an Internet- or other computer-based instructional method that does not rely on regular classroom instruction or via comprehensive instructional methods that include Internet-based, other computer-based and non-computer-based learning opportunities.”
2. ECOT is a public school, licensed and accredited. It opened in 2000 and provides education to students in grades kindergarten through twelve.
3. ECOT’s principal location is at 3700 South High Street in Columbus, Ohio with branch locations in Cleveland, Columbus and Dayton.
4. ECOT is the largest community school in the state with students in all 88 counties. During the 2015-2016 academic year, it had over 26,000 students that were enrolled at one time or the other.
5. ECOT students and teachers work primarily from their respective homes with students accessing instruction online through either an ECOT issued computer or

- their own personal computer. Curriculum, depending on grade, is a combination of such areas as both in-house and vendor-purchased online learning management systems, live online sessions with teachers, field trips, and personal reading in an online library. Online content is available 24 hours a day, 7 days a week unless ECOT is having a maintenance window.
6. Community schools such as ECOT receive funding through the Ohio Department of Education (“ODE”).
 7. Funding for ECOT and other community schools is established by the provisions of R.C. 3314.08 and is based on per-pupil Full-Time Equivalency (FTE), described in the 2015 *FTE Review and Community School Enrollment Handbook* at 44 as “[t]hat portion of the school year a student was educated, as determined by the number of either days or hours of instruction provided to a student during a school year divided by its annual membership units (the total number of either days or hours of instruction which a community school must provide during a school year in accordance with its contract with the sponsor, as listed in the community school’s entity profile).” An FTE is the equivalent of 920 hours. A standard school week is five days. A standard school day is five hours.
 8. As interpreted and applied by ODE, funding is implemented in two parts - an initial payment on a monthly basis triggered by the self-reporting by the eSchool of information from which the FTE’s accrued to date are calculated; followed by a potential post payment “true-up” called an FTE Review which occurs at least once every five years and is focused on verifying whether the FTEs initially reported by the school for the preceding academic year are supported by its documentation.

9. When an FTE review is conducted, it typically only applies to the preceding academic year, leaving the funding for all prior years for which a review has not been conducted untouched from the original calculation used to determine the initial interim payment.
10. As interpreted and applied by ODE, the interim funding base calculation for each student consists of the fraction with enrollment days in the numerator and the school calendar days in the denominator multiplied by 1FTE and can be further adjusted by the eSchool through submission of a “percentage of time” factor, defined in ODE’s EMIS Manual as “the average percent of time, for the week, that a student participates in any instruction provided by a certified/licensed employee.”
11. As interpreted and applied by ODE, the final “true-up” calculation of accrued FTEs for purposes of funding for ECOT and other eSchools is based primarily on a fraction consisting of the documented hours of student engagement in learning opportunities (“durational data”) in the numerator and the school calendar days in the denominator, multiplied by 1FTE.
12. As interpreted and applied by ODE for the 2015-2016 school year for ECOT and other eSchools, the FTE review is focused on ascertaining whether the school has documentation verifying hours of engagement by the student in learning opportunities to support the funded FTE or portion thereof (durational data).
13. In conducting the FTE reviews, ODE Area Coordinators rely on the guidelines in the *FTE Review and Community School Enrollment Handbook*, (“the FTE Review Handbook”) that is issued annually and posted on ODE’s website for schools to review.

14. Since at least 2010, the annual FTE Review Handbooks have contained passages that direct the Area Coordinators to review durational data in their FTE reviews of eSchools for purposes of adjusting funding.
15. ODE Area Coordinators were guided by the 2015 FTE Review Handbook for purposes of conducting FTE reviews in 2016 for the 2015-2016 academic year. The Handbook also directed the Area Coordinators to review durational data in their FTE reviews and the Area Coordinators carried out their reviews for the school year by including a review of such data.
16. With the exception of the 2015 FTE review of Provost Academy, ODE Area Coordinators did not review durational data during any of the FTE reviews of eSchools conducted in years prior to 2016.
17. ODE Area Coordinators did review durational data during FTE reviews of four “correspondence” community schools in 2014.
18. ODE does not review durational data during FTE reviews for traditional “bricks and mortar” community schools.
19. The reason for ODE’s distinction between “bricks and mortar” community schools and other community schools for purposes of documenting funding is based on the increased ability by teachers to monitor student engagement in the “bricks and mortar” setting versus the on-line setting.
20. As a matter of course, ECOT was not creating and/or maintaining durational data to substantiate all of its claimed FTE despite the fact that ECOT’s current superintendent raised the option of creating and maintaining durational data when he first began employment with ECOT in 2012 and despite the fact that ECOT’s

- written attendance policy for years has emphasized the need for student participation in learning opportunities five hours a day, twenty-five hours a week.
21. In 2016, ECOT was in the five year cycle for an FTE review.
 22. On January 27, 2016, Area Coordinator John Wilhelm sent ECOT a letter notifying ECOT of an upcoming FTE review for the 2015-2016 school year and outlining the documents to be produced at review. The list included a request for both online and offline durational data documenting the time the student was engaged in a learning activity.
 23. The initial review was conducted in March, 2016 and took place over a three day period.
 24. Using the 2015 FTE Review Handbook as the guideline for the review, 600 randomly selected student files were requested in advance (by student ID number – “SSID”) with another 150 identified for production on the first day of the review.
 25. Each file contained a birth certificate, a proof of address, testing information, IEPs where applicable, records related to teacher meetings; a folder with proof of attendance information for log-ins, field trips, other learning engagements and excuses for a student’s non-participation; and another folder with durational data consisting of log-in, log-out and total time for each session.
 26. The durational data only included documentation from one of ECOT’s several online learning management systems and substantiated only about one hour per day of learning engagement for each student file reviewed.
 27. On May 17, 2016 Mr. Wilhelm sent the initial FTE review letter, dated April 20, 2016, to ECOT in which it was noted that durational data was present in each of the

- files examined but that the data did not substantiate five hours per day of login time for the students reviewed.
28. Receipt of the letter was followed by a series of communications in which ECOT attempted to persuade ODE not to continue its pursuit of reviewing durational data in its final review. ODE ultimately made the decision to continue and communicated that decision to ECOT on July 5, 2016 and the review was scheduled to commence on July 11, 2016.
 29. As was the case with the initial review, ODE provided ECOT with a list of 600 randomly selected student files in advance of the review followed by 150 more identified student files at the commencement of the review.
 30. On July 8, 2016, ECOT filed a lawsuit in the Franklin County Court of Common Pleas seeking, in part, a declaratory judgment that holding schools accountable to durational data would violate the funding provisions in R.C. 3314.08; and an injunction prohibiting ODE from reviewing durational data as part of its FTE reviews. When a temporary restraining order was denied by the Court, [*Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C.P No. CV 006402, *Entry Denying Plaintiff's Motion for Temporary Restraining Order* (July 11, 2016)], the review proceeded on the scheduled date.
 31. Although the 750 files were produced, none contained any durational data, not even the data produced at the initial review.
 32. On August 1, 2016, the Franklin County Court of Common Pleas, in the pending lawsuit, issued a discovery order in which ECOT was ordered to produce, “spreadsheets showing the log-in and log-out data of the ECOT students randomly

- identified by ODE in advance of and during ODE's preliminary review of ECOT in March 2016, as well as spreadsheets, formatted in the same manner, showing the log-in and log-out data of the ECOT students randomly identified by ODE in advance of and during ODE's year-end review of ECOT in July 2016.” See *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C.P. No. CV 006402, *Order Compelling Plaintiff Electronic Classroom of Tomorrow (“ECOT”) to Provide Student Participation Records* (August 1, 2016). ODE was given until August 22, 2016 to review and return the records.
33. In response to the Court Order, ECOT started contacting vendors it used to provide learning platforms to try and obtain durational data that the school itself did not maintain. ECOT was able to retrieve durational data from 20-27 of its on-line vendors. In the case of others, it was discovered that from the late timing of the request by ECOT, many vendors had already dumped data as the school year had come to an end.
34. Eventually ECOT sent boxes of records to ODE for its review. Some of the information consisted of entire student files, others more specifically on-line documentation of learning opportunities. Files appeared to be printed off of spreadsheets. They included a student ID number, the students' names, and the names of different on-line learning management systems in which the student participated. Some provided dates, log-in, log-out information, and duration time. Some of the printouts only had portions of that information.
35. The records were copied by a copy vendor and entered into a computer database. A team of ODE personnel that at one point numbered fifty individuals reviewed the

- material and entered the results on a spreadsheet with the instruction that if there was durational time recorded or a way to ascertain durational time, ECOT was to be given credit. If there was no durational data such as log-out or a total time in the documentation presented, it was not documented. Of the 750 records originally requested in the sample, ODE was able to analyze 706 in the time period allotted.
36. The grand total of the 706 records examined for the sample versus what ECOT reported to ODE showed that ECOT was claiming 414.35 FTEs for its student body but the records only substantiated 170.71 FTEs or 41.2% of the amount for which ECOT was funded for the sample. Applied to the universe of 15,321.98 FTEs for which ECOT was funded for the 2015-2016 school year, this translates to only 6312.62 FTEs that could be substantiated. The converse, or 58.8%, constitutes the overstatement of FTEs and applied to the portion of the total funding figure received by ECOT that is driven by FTEs, \$108,936,445.79, results in an overpayment figure of \$64,054,630.20.
37. The calculation of overpayment is premised on the calendar submitted by ECOT of 921.29 hours for a school year, not 920, the minimum number of hours required annually by the funding statute.
38. The 2015 FTE Review Handbook provides that “[t]he FTE reviewer or team may exercise discretion in implementing the various aspects of the review to assure that the review is conducted properly. Unique aspects or programs of a school may require the area coordinator to modify or skip certain steps in the review process and accept alternative supporting documents.”

39. Although the 2015 FTE Review Handbook recommended that 5% of the enrolled students be selected for the sample reviewed by the Area Coordinators, the reviewers determined that such a sample size (1300 files) was unnecessary given the large sample size that would nonetheless be created in applying a smaller percentage. They therefore exercised discretion permitted by Handbook to modify the selection process and based the sample size on 5% of the 15,321.98 FTEs reported by the school (750) rather than the entire enrollment. However they made sure that the entire enrollment would be represented in the sample by selecting the 750 files from an Excel randomized reorder of the 26,000 student files who had attended the school at one time or the other during the school year.
40. There is no evidence in the record that a selection of 750 files rather than 1300 files was unreasonable or had have a material impact on the calculation of overpayment. There is no evidence of the amount of any such claimed adjustment.
41. There is no evidence in the record that the actual review of 706 files rather than 750 files was unreasonable or had a material impact on the calculation of overpayment. There is no evidence of the amount of any such claimed adjustment.
42. Evidence in the record indicates that the 750 student sample included a larger portion of students in certain grades over the proportional number of students enrolled in those grades and included a smaller portion of students in other grades over the proportional number of students in those grades. Testimony was elicited that a disproportionately smaller percentage of student files were included where the curriculum in the student's grade relied more on online activities than a higher percentage of student files from other grades included in the sample thus arguably

- skewing the results due to ECOT's ability to produce more durational data from on-line educational activities than offline educational activities.
43. There is no evidence in the record that doing a single sample was unreasonable or that conducting a sampling on a grade by grade basis would have a material impact on the calculation of overpayment. There is no evidence establishing the specific amount of any such claimed adjustment.
 44. Although the 2015 FTE Review Handbook recommended in a footnote that the sample size be continually expanded as long as each additional increment had an error rate in excess of 8% until the sample eventually equaled the universe, to do so with respect to the ECOT FTE review, despite the degree of error manifested in the sample size, would have been unrealistic and unreasonable given the sheer volume of 26,000 student files and the court-restricted access to ECOT's files.
 45. There is no evidence in the record that conducting a review of 26,000 files would have a material impact on the calculation of overpayment. There is no evidence of what any claimed adjustment amount would be.
 46. On September 27, 2016, ODE delivered a letter to ECOT outlining the results of ODE's review, and informing ECOT of the substantiation rate that ODE had determined, and its impact on ECOT's claimed FTEs. This was followed with additional information regarding the methodology that ODE had undertaken in performing the review.
 47. The letter further notified ECOT of its opportunity to request an informal hearing before the State Board of Education or its designee pursuant to R.C. 3314.08(K).

48. On October 11, 2016, the ECOT timely requested a hearing within the 10 days allotted in R.C. 3314.08(K). The undersigned was appointed by the Superintendent of Public Instruction by letter of October 18, 2016 to serve as Hearing Officer in this matter.
49. The informal hearing was originally scheduled to commence on November 7, 2016, as required to meet the thirty day period for commencement of a hearing set forth in R.C. 3314.08(K)(2)(b).
50. By agreement, the parties subsequently agreed to waive and/or extend the statutory deadlines for commencement of the hearing and for issuance of a decision following the conclusion of the hearing.
51. The hearing was scheduled to commence on December 5, 2016 and took place on that date and on nine subsequent dates through February 1, 2017 during which the parties made their arguments and presented evidence supplemented by portions of the record in *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C. P. No. 16CVH07-6402, after which they filed three rounds of closing briefing and/or findings of fact and conclusions of law.
52. ECOT's lawsuit against ODE remained pending during the course of these proceedings. A preliminary injunction hearing was conducted on September 12, 2016 through September 14, 2016 and September 19, 2016 through September 21, 2016 during which extensive testimonial and documentary evidence was presented.
53. On September 30, 2016, the Common Pleas Court issued a Decision denying ECOT's request for a preliminary injunction to prevent ODE from relying on durational participation information in determining appropriate FTE funding.

Electronic Classroom of Tomorrow v. Ohio Department of Education, Franklin Co. C. P. No. 16CVH07-6402, (9/30/16 *Decision and Entry Denying Plaintiff Electronic Classroom of Tomorrow's Motion for Preliminary Injunction Filed July 8, 2016 and Decision and Entry Denying Plaintiffs, ECOT Families' Motion for Preliminary Injunction, Filed August 22, 2016*, "Decision" at 7). In the Decision, the Court found that ECOT had no substantial likelihood of success on its claims that: (1) the Funding Statute precluded ODE from relying on durational information in connection with making its FTE funding decision, (2) that a Funding Agreement that ODE and ECOT had entered in 2003 precluded ODE from relying on durational participation information in connection with ECOT's FTE funding determination, (3) that the FTE review manual that ODE used to guide its FTE review process amounted to an invalid administrative rule not adopted through a Chapter 119 process, and (4) that the use of durational data to determine FTE funding violated anti-retroactivity principles as ODE allegedly had changed its approach during the middle of the 2015-16 academic year without notice. (9/30/2016 Decision at 8-21).

54. On October 3, 2016, ECOT filed a notice of appeal to the Tenth District Court of Appeals of the Common Pleas Court's Decision denying the preliminary injunction. On November 22, 2016, the Tenth District dismissed ECOT's appeal of the Common Pleas Court Decision for lack of a final, appealable order.

55. Upon remand, the parties petitioned the Common Pleas Court under Ohio Rule of Civil Procedure 65 to treat the recently-completed preliminary injunction hearing as the final hearing on the merits, and thus to enter final judgment on ECOT's claims in its lawsuit. *Electronic Classroom of Tomorrow v. Ohio Department of Education*,

Franklin Co. C. P. No. 16CVH07-6402, (December 14, 2016) at 7-8, attached hereto and incorporated herein by reference.

56. On December 14, 2016, the Common Pleas Court entered its Final Decision and Judgment, *Electronic Classroom of Tomorrow v. Ohio Department of Education*, *supra*, entering judgment in favor of ODE for each of ECOT's claims. (Id. at 23.)

In that judgment, the Court made several findings and holdings that are binding upon and/or materially relevant to the instant matter. More specifically, the Court held that:

- Under the community school Funding Statute, the language of R.C. 3314.08(H)(3) read in conjunction with the term “learning opportunities” as discussed in R.C. 3314.08(H)(2), means that “ODE is entitled to consider durational data in reaching a funding decision for a community school.” (Id. at 14.)
- The limitation in R.C. 3314.08(H) that an eschool cannot be “credited for any time a student spending participating in learning opportunities beyond ten hours within any period of twenty-four consecutive hours” would make no sense if, as ECOT claims, “learning opportunities” do not have a durational component. (Id. at 14.)
- “[L]earning opportunities have a durational component that is measured in terms of actual student participation.” (Id. at 15.)
- If the 2003 Funding Agreement between ODE and ECOT [which ECOT argued precludes ODE from considering durational data in its 2016 FTE reviews] “were interpreted to require the State to continue paying hundreds of millions of dollars per year for an indefinite time period, without any ability to determine whether students are in fact participating in any curriculum at ECOT at all, the construction would render the Funding Agreement void as against public policy.” (Id. at 12.)
- “FTE review manuals do not ‘enlarge the scope of the rule or statute from which they derive,’ nor do they carry the force and effect of law.” Rather, they are merely “procedural guidelines for FTE reviewers to follow in conducting FTE reviews.” (Id. at 17). “[I]n every ODE FTE review manual since at least 2010, there has been a special section of the manual that is directed toward FTE reviews conducted at eschools.” (Id.). “ODE’s FTE review materials have provided for over six years that ODE reserves the right to seek durational data.” (Id. at 20.)
- The 2015-16 FTE review at ECOT was scheduled “pursuant to the typical five-year review cycle for FTE reviews.” (Id. at 4.)

- In January 2016, ODE advised ECOT that it would be subject to an FTE review, and that ODE “would be requesting durational records to show how long or how often students had accessed learning opportunities over the course of the academic year.” (Id.)
- At the time that ODE informed ECOT that ECOT would be subject to an FTE review, ODE intended to use the 2016 FTE Review Handbook in connection with that review. At the request of ECOT and other eschools, ODE agreed to instead use the 2015 FTE Review Handbook. (Id.)
- “[T]he 2015 manual, which was published on ODE’s website in January 2015, includes the same language [as earlier FTE review manuals that address durational data] but also adds more description of durational records that area coordinators should request and review in connection with FTE reviews of eschools.” (Id. at 18).
- As a public school, ECOT “cannot assert retroactivity concerns as a basis for challenging governmental action.” (Id. at 21).
- Even if ECOT had the ability to assert retroactivity concerns, “it has not established the viability of any such concerns” with regard to the 2015-2016 FTE review, “given that ODE’s FTE review materials have provided for over six years that ODE reserves the right to seek durational data.” (Id. at 20). Moreover, the FTE Review Handbook that ODE used in connection with ECOT’s 2015-2016 FTE Review “was available on ODE’s website since January 2015, more than six months before the 2015-16 school year began.” (Id. at 21). Accordingly, “ECOT cannot claim to have been unfairly surprised when ODE requested such data in connection with the 2016 FTE review.” (Id.).
- At the initial FTE review at ECOT in March, ODE requested, and ECOT provided, durational data for the students in the sample. (Id. at 4-5.)

57. The final decision of the Franklin County Court of Common Pleas is currently on appeal by ECOT to the Tenth District Court of Appeals.

58. Although it acknowledges that ODE’s right to include durational data in its Final Determination of funding for an eSchool was determined by the Franklin County Court of Common Pleas and is binding on this proceeding, ECOT nonetheless seeks to exclude findings based on durational data from the Final Determination premised on several arguments that ODE improperly implemented durational data in its 2016 FTE reviews, summarized as follows:

- a) Duration should not be included in the funding methodology because it is not an effective measure of a student’s engagement in learning opportunities;
- b) Durational requirements cannot be implemented without the promulgation of standards set forth by rule;
- c) The 2015 FTE Handbook does not substitute for these standards as it, a) does not clearly articulate durational standards, b) is only a guideline that is not rule-filed and therefore not binding on either ODE or the schools;
- d) Durational methodology cannot be implemented without advance notice to the schools, particularly to allow them to put in place the recordkeeping that will be required;
- e) ODE cannot summarily implement a new methodology after schools have relied on the past practices of ODE Area Coordinators that have utilized an enrollment based methodology of conducting FTE reviews;
- f) ODE cannot summarily implement a new methodology after schools have relied on inconsistent statements regarding the use of durational methodology made by ODE Area Coordinators and officials during 2016; and
- g) Durational methodology cannot be implemented in mid academic year as that would violate “administrative retroactivity.”

59. ECOT presented evidence of what it contended would be the recalculated overpayment if ECOT were given credit for all funding prior to January 27, 2016, the date of ODE’s written notice to ECOT that it would examine durational data in its 2016 FTE review.

60. ECOT presented additional durational documentation at hearing substantiating approximately 14 additional FTEs for the 706 student files examined by ODE in the sample. If added to the 170.1 FTEs given credit by ODE during its review, the 184.71 FTEs represent 44.6% of the 414.35 FTEs in the sample claimed by ECOT for the school year and once extrapolated, would lower the calculation of overpayment by \$3,703,838.90, resulting in an adjusted calculated overpayment of \$60,350,791.30 for all students for the school year.

61. Although the additional durational documentation was not presented at the actual FTE review or during the August 2016 Court ordered production, given the extraordinary circumstances regarding the change in policy by ODE in considering

durational data for ECOT for the first time during the 2016 FTE review, it is reasonable and appropriate for ODE to make this \$3,703,838.90 adjustment.

VI. Conclusions of Law

1. The State Board has jurisdiction in this matter and has complied with all procedural requirements of R.C. 3314.08(K), Title 33 and applicable rules.
2. ECOT is a community school subject to the provisions of R.C. Chapter 3314 and applicable rules. ECOT operates as an eSchool as defined in R.C. 3314.02(A)(7).
3. ECOT is part of the public school system. R.C. 3314.01(B).
4. The funding of community schools by the state under R.C. Chapter 3314 is subject to the conditions set forth therein.
5. The funding provisions for community schools are set forth in R.C. 3314.08(H).
6. The methodology for payment to community schools is set forth in the “Funding Statute,” R.C. 3314.08(H)(3), which provides that “[t]he department shall determine each community school’s percentage of full-time equivalency [per pupil FTE] 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.”
7. Within the context of the statutory scheme set forth in R.C. 3314.08(H), it is clear that offering a learning opportunity includes the concept of student participation in that learning opportunity. It is not a reasonable construction of the statute to conclude that its purpose and intent is to authorize the payment of

public dollars to schools to teach to what could be the equivalent of an “empty classroom.” See *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*.

8. It is incumbent on eSchools to maintain the records necessary to document the propriety of the per-pupil FTE payments they have received, including durational data that would demonstrate that all of the FTEs for which they were paid represent the participation of students in learning opportunities.
9. ODE is authorized to conduct an FTE review at community schools to ascertain whether the amount of FTE funding the community school has claimed is accurate and memorialize that finding in a Final Determination letter. R.C. 3314.08(K)(1). ODE has exercised that legal authority in conducting an FTE review of ECOT for the 2015-2016 academic year.
10. Adjustments to the funding may result from full-time equivalency reviews. R.C. 3314.08(K)(2).
11. If the Final Determination letter indicates that an overpayment has been made, the community school may appeal the determination to the State Board or its designee which shall conduct an informal hearing to address the appeal. If conducted by a designee such as a Hearing Officer, the Hearing Officer shall certify his decision to the State Board which can accept or reject the decision or issue its own decision. Any decision of the State Board is final. R.C. 3314.08(K)(2).
12. In a proceeding under R.C. 3314.08(K)(2)(b), a rebuttable presumption of correctness attaches to an FTE review Final Determination that places the

burden on the appealing community school to establish the manner and extent of any claimed error committed by ODE in conducting its FTE review and issuing its findings.

13. Based on the evidence in the record and applicable authority, ECOT has not sustained its burden.
14. In this case ODE has also independently established, by a preponderance of evidence, the lawfulness and reasonableness of its Final Determination.
15. In the instant matter, instead of waiting for a Final Determination and then requesting the afore-stated informal hearing, ECOT filed a preemptive Complaint in the Franklin County Court of Common Pleas, *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C. P. No. 16CVH07-6402, seeking declaratory and injunctive relief to preclude ODE from considering durational data in its ongoing FTE review.
16. The action filed in the Franklin County Court of Common Pleas in *Electronic Classroom of Tomorrow v. Ohio Department of Education*, *supra*, involves the same parties, the same FTE review and the same core issue that is being litigated in the instant informal hearing, specifically whether ODE should be precluded from including a review of durational data as the basis for making any finding of overpayment of funding against ECOT for the 2015-2016 academic year.
17. The *Final Decision and Judgment* of the Franklin County Court of Common Pleas in *Electronic Classroom of Tomorrow v. Ohio Department of Education*, *supra*, is binding on this tribunal under principles of res judicata with respect to any claim that ECOT raised *or could have raised* relative to ECOT's obligation

to maintain durational data in order to substantiate funding received by it for educating its students during the 2015-2016 academic year.

18. The *Final Decision and Judgment* of the Franklin County Court of Common Pleas in *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, bars ECOT under principles of res judicata and/or collateral estoppel, from litigating in this tribunal, each of the arguments, issues and/or claims it has proffered in support of its position that ODE is precluded from relying on the absence of durational data, as a basis for making findings that ECOT has not substantiated claimed FTE's and/or funding for the 2015-2016 academic year.
19. To the extent that res judicata and/or collateral estoppel is inapplicable, the *Final Decision and Judgment* of the Franklin County Court of Common Pleas in *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, nonetheless constitutes compelling persuasive authority with respect to ODE's duty and right to rely on durational data as a means to substantiate whether ECOT has provided the FTE's of learning opportunity for which it was preliminarily funded.
20. To the extent that res judicata and/or collateral estoppel is inapplicable, the Appellant nonetheless fails in its arguments as to why ODE is precluded from relying on the absence of durational data as a basis for making findings that ECOT has not substantiated claimed FTE's and/or funding for the 2015-2016 academic year.
21. ODE acted lawfully and reasonably in applying durational data to the funding formula for the 2015-2016 academic year.

22. The “standard” for the inclusion of durational data in the funding formula is created by the Funding Statute, R.C. 3314.08(H)(3), and related provisions and requires no independent rule-filed standard.
23. As used in the Funding Statute, “learning opportunities have a durational component that is measured in terms of actual student participation.” *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, at 15.
24. “ODE is entitled to consider durational data in reaching a funding decision for a community school.” *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, at 14.
25. Any interpretation or application of the funding formula that would “require the State to continue paying hundreds of millions of dollars per year for an indefinite time period, without any ability to determine whether students are in fact participating in any curriculum at ECOT at all,would [be]....against public policy.” *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, at 12.
26. ODE acted reasonably and lawfully in deferring to the Funding Statute and the FTE Review Handbooks to place ECOT on notice of its obligation to maintain durational data to support its claimed FTEs for the 2015-2016 academic year.
27. Given ODE’s liberal acceptance of the format of durational data submitted by ECOT, ODE acted reasonably and lawfully in deferring to the Funding Statute, the FTE Review Handbooks and common sense to place ECOT on notice of the format of durational data needed for the 2015-2016 academic year.

28. ODE acted reasonably and lawfully in requiring ECOT to maintain durational data to support its claimed FTEs for the entire 2015-2016 academic year.
29. As a public school, ECOT “cannot assert retroactivity concerns as a basis for challenging governmental action.” *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, at 21.
30. Even if ECOT had the ability to assert retroactivity concerns, “it has not established the viability of any such concerns” with regard to the 2015-2016 FTE review, because, “ECOT cannot claim to have been unfairly surprised when ODE requested such data in connection with the 2016 FTE review.” *Electronic Classroom of Tomorrow v. Ohio Department of Education, supra*, at 20-21.
31. As an administrative tribunal and a creature of statute, a proceeding under R.C. 3314.08(K)(2)(b) cannot entertain equitable claims unless that authority has been expressly granted to it by the General Assembly. That has not happened.
32. Even if equitable claims could be considered in this proceeding, ECOT has not established a claim for relief under said theories.
33. ECOT has not established a claim for relief under the theory of estoppel as, a) the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function; b) the evidence in this proceeding demonstrates that, ECOT cannot claim to have been unfairly surprised when ODE requested such data in connection with the 2016 FTE review.
34. Although other arguments raised by ECOT that don’t directly challenge the use of durational data in the 2016 FTE Review are not barred by res judicata or

collateral estoppel in this proceeding, ECOT has nonetheless failed to establish that ODE acted unreasonably or unlawfully with respect to the conduct of its FTE review and resulting findings.

35. ODE did not abuse its discretion in using a random sample to conduct its FTE review, did not abuse its discretion in selecting the size of its sample, did not abuse its discretion in selecting the sample from the entire student enrollment and not by individual grade and did not abuse its discretion in not expanding the sample to 100% of the student enrollment.
36. ECOT has failed to demonstrate that ODE is barred under R.C. 3301.0714(D)(2) from making findings in its Final Determination regarding undocumented FTEs.
37. ODE did not err in using the hours in ECOT's school calendar (921.29) rather than the minimum FTE annual hours of 920, in the denominator of the fraction utilized to calculate the fraction of an FTE substantiated by ECOT's documentation.
38. Because it is incumbent on an eSchool to maintain documentation, including durational data, supporting its funding, ODE is authorized to conclude that funding is not supported where the school fails to produce requested documentation during the course of an FTE review.
39. Accordingly ODE was authorized to make a 100% finding of overpayment against ECOT when the school failed to produce durational data during the July, 2016 FTE review.
40. ODE nonetheless exercised sound discretion to consider documentation subsequently produced by ECOT in August, 2016, pursuant to a discovery order

of the Franklin County Court of Common Pleas in *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin Co. C. P. No. 16CVH07-6402, which raised the finding of FTE substantiation from 0% to 41.2% of the FTEs claimed by ECOT for the academic year.

41. Although it would not rise to the level of abuse of discretion for ODE to refuse to consider additional durational documentation produced by ECOT during the course of this hearing, given its untimely production, it would nonetheless, given the issues generated from the pending collateral lawsuit and given the confusion that ODE's implementation of a durational data review in 2016 has caused, be reasonable and appropriate *in this unique case*, to consider durational data that existed during the 2015-2016 academic year and was overlooked by ECOT during the August production or produced in an incomplete fashion so as to be denied credit. The evidence in the record establishes that this additional documentation would credit ECOT with approximately 14 additional FTEs in the sample.
42. The record establishes that ODE acted in a valid and lawful manner, consistent with R.C. 3314.08 and the guidelines contained in the 2015 FTE Review Handbook, in conducting the 2016 FTE review of ECOT for the 2015-2016 academic year.
43. Based on the durational documentation reviewed prior to the issuance of the Final Determination, ODE correctly found that ECOT substantiated 41.2%, or \$44,881,816, of the \$108,936,446 paid to ECOT during the 2015-2016 academic year based on its claimed FTEs.

44. Based on the durational documentation reviewed prior to the issuance of the Final Determination, ODE would be entitled to “claw back” the remaining 58.8% of the payments, or \$64,054,630, the FTE funding by which ECOT was overpaid.
45. Based on additional durational data produced during the course of the hearing, ECOT has documented an additional 14 FTEs of funding for students included in the FTE review sample which, when added to prior substantiated FTEs and extrapolated, would result in substantiating 44.6%, or \$48,585,655, of the \$108,936,446 paid to ECOT during the 2015-2016 academic year.
46. If adjusted by the additional durational documentation produced during the course of the hearing, ODE would be entitled to “claw back” the remaining 55.4% or \$60,350,791, of the FTE funding by which ECOT was overpaid.

VII. Conclusion and Recommendation

Upon sufficient evidence that ECOT has not documented FTEs for which it reported and was funded during the 2015-2016 academic year, constituting an overpayment of \$64,054,630, based on documentation submitted by ECOT prior to the issuance of the Final Determination, and/or \$60,350,791, based on additional documentation submitted by ECOT through the conclusion of the administrative appeal hearing, it is the decision and recommendation of this Hearing Officer that the State Board of Education exercise its discretion to adopt the latter of these two alternative findings of overpayment and direct ODE to take such measures as are necessary to collect the overpayment from the School and/or correspondingly deduct the overpayment from any future outstanding payments due to the School.

This is not a final order. Only the State Board has the authority to enter a final order in this administrative action. The State Board has the authority to approve, modify, or disapprove this decision, and this decision shall not be effective until and unless approved by the State Board in the manner provided by R.C. 3314.08(K), Title 33 and any applicable rules promulgated thereunder. In accordance with R.C. 3314.08(K)(2)(d), any decision made by the Board is final.

Date

Lawrence D. Pratt,
Hearing Officer

CERTIFICATE OF SERVICE

I certify that the original of this document was served upon the State Board of Education/Ohio Department of Education at its offices in Columbus, Ohio, by regular mail, postage prepaid and by e-mail delivery on May 10, 2017, with instructions that copies be served upon the parties at the addresses noted above.

Lawrence D. Pratt,
Hearing Officer

IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

ELECTRONIC CLASSROOM OF TOMORROW, et al.,	:	
	:	
Plaintiffs,	:	Case No. 16CVH07-6402
	:	
vs.	:	JUDGE FRENCH
	:	
OHIO DEPARTMENT OF EDUCATION,	:	
	:	
Defendant.	:	

FINAL DECISION AND JUDGMENT

This matter is before the Court upon the Stipulation Regarding the Court’s Consideration of Preliminary Injunction Evidence for Purposes of Entering Final Judgment, filed by Plaintiffs, The Electronic Classroom of Tomorrow (hereinafter “ECOT”), Jeremy Aker, individually, and as custodial parent of current ECOT student and minor child CA, Darrell DeBerry, individually, and as custodial parent of current ECOT student and minor child JD (hereinafter “the ECOT Families”), and Defendant, the Ohio Department of Education (hereinafter “ODE”), on October 12, 2016. Per this stipulation, the parties agreed that the Preliminary Injunction Hearing conducted on September 12, 2016 through September 14, 2016, and September 19, 2016 through September 21, 2016, is converted into a final injunction hearing and trial on the merits on all claims in this case. The parties further agreed that the Court may issue a final decision and judgment on Plaintiffs’ claims on the basis of all the evidence and arguments received in connection with Plaintiffs’ Motions for Preliminary Injunction, as well as the parties’ respective Motions for Summary Judgment.

I. Findings of Fact

The following Findings of Fact are based on the evidence presented at the hearing on Plaintiffs' Motions for Preliminary Injunction, as well as the evidence submitted in support of and opposing the parties' Motions for Summary Judgment.

ECOT is an online or "eschool" which has been in operation since 2000. ECOT's students do not attend a typical "brick-and-mortar" building for their classes, but rather have a computer, typically in their homes, where they have the ability to log-in to ECOT's online platform and access educational curricula. ECOT also provides various other types of non-computer-based learning opportunities, such as field trips or other educational events.

ECOT is also considered a "community school", which is "a public school, independent of any school district, and is part of the state's program of education." R.C. 3314.01(B). Because they are public schools, community schools receive funding from the State of Ohio. Community schools are paid state funds based on the number of Full-Time Equivalent ("FTE") students that the community school reports to ODE through the Education Management Information System ("EMIS"). ODE then has a right to adjust that payment "to reflect any enrollment of students in community schools for less than the equivalent of a full school year." R.C. 3314.08(H). To investigate whether an adjustment is warranted in a given year, ODE from time-to-time conducts an FTE review of a given community school. During this review, ODE personnel visit the community school and specify various records that they would like to review in order to assess and confirm the community school's reported FTE numbers for the previous academic year.

The results of FTE reviews can have financial consequences for a community school. If a community school is unable to substantiate the FTE numbers that it reported to ODE for the year under review, ODE can reduce the school's FTE dollars that were paid to that community school. Once ODE personnel determine the financial consequences that they believe are appropriate based on the FTE review, ODE reports that funding determination to the community school at issue. If the community school disagrees with ODE's initial determination, the community school then 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 in connection with any such appeal is the agency's final determination as to the appropriate FTE funding for the community school for that academic year. *Id.*

In 2001, ODE conducted an FTE review at ECOT. As a result of issues that arose during this review, ECOT and ODE began to discuss how student attendance and participation should be documented for the 2002-2003 FTE review, which was in its initial stages, and began negotiations for an April 2002 Funding Agreement. Although the parties went back and forth as to whether the Funding Agreement was to apply for the 2002-2003 school year only, or whether the Funding Agreement was to apply for the 2002-2003 school year and thereafter, the final Funding Agreement entered between the parties in January 2003 is silent as to its duration.

ODE typically conducts FTE reviews of community schools, or eschools, once every five years. In 2005, ODE conducted an FTE review of ECOT. In 2011, ODE again conducted an FTE review of ECOT.

In January 2016, ECOT learned that it would be subject to an FTE review for the 2015-2016 academic year. This review was scheduled pursuant to the typical five-year cycle for FTE reviews discussed above. ODE area coordinator, John Wilhelm, sent a letter to ECOT outlining the types of records that he would be requesting from ECOT in connection with the 2016 review. This letter made it clear that ODE would be requesting durational records to show how long or how often students had accessed learning opportunities over the course of the academic year.

In January 2016, ODE published the new 2016 FTE Review Manual on its website. At the time, ODE was intending to use the new 2016 FTE review manual in connection with its 2016 FTE reviews. The 2016 FTE review manual had additional information regarding durational data in the eschool FTE review context above and beyond what is set forth in the 2015 FTE review manual. In particular, the 2016 FTE review manual specifies the format that such data and records should take. However, because ECOT and other eschools expressed concerns that it would not be appropriate to use an FTE review manual that had first been published mid-year, ODE agreed that it would instead use the 2015 FTE review manual for its 2016 FTE reviews.

On March 28, 2016 through March 30, 2016, ODE conducted its initial FTE review of ECOT, and requested that ECOT provide durational data. At that initial FTE review, ECOT presented John Wilhelm and his colleagues with 750 student files, corresponding to the 750 students that ODE had identified in advance of the preliminary review. Each of the 750 student records contained a report that showed log-on and log-off times for the specified student. Those log-on/log-off records showed that, on average,

students were spending about one hour per day logged on to ECOT's online educational platform.

ECOT still disputes that such durational information was appropriate in connection with its FTE review, and contends that the information provided was only a *sample* printout from its IQity learning management system, which Ms. Pierson described as an example of the *type* of form that ECOT might be able to prepare in the future, if ODE were to require durational information. Although the sample document included columns for durational information, Ms. Pierson testified that she made clear to Mr. Wilhelm that it *did not present* an accurate picture of students' participation time, but that it, instead, merely provided a potential *format* for future consideration.

ODE determined that, in connection with the final 2016 year-end FTE review of ECOT, which took place in July 2016, the area coordinators should again review durational data. However, ECOT did not provide such data at the year-end review, indicating it did not keep this type of data, as it had never before been requested.

On July 8, 2016, ECOT filed a Verified Complaint for Specific Performance and Declaratory and Injunctive Relief against ODE. On August 1, 2016, ECOT filed its First Amended Complaint for Specific Performance and Declaratory and Injunctive Relief, adding two ECOT families as additional plaintiffs.

Plaintiffs allege that ODE has breached the Funding Agreement between ECOT and ODE by utilizing the log-in time/duration criteria in its FTE audit of ECOT. ECOT contends that it is entitled to specific performance of the Funding Agreement, including an Order requiring ODE, as part of any FTE audit, to evaluate ECOT's FTE funding consistent with the express terms of the Funding Agreement (Count I). Plaintiffs further

allege that ODE violated R.C. 3314.08(H)(3) by stating its intent under the 2015 FTE handbook or otherwise, to evaluate and determine ECOT's FTE funding based on the amount of time a student is logged in, and contend that ECOT is entitled to declaratory and injunctive relief preventing ODE from proceeding unlawfully and in violation of legislative mandate, and specifically from evaluating and/or calculating eschool FTE funding based on anything other than "offered" learning opportunities (Count II). Plaintiffs also request declaratory judgment that (1) the Funding Agreement is valid and enforceable, and that it precludes ODE from imposing a log-in time/duration requirement as part of the FTE audit/funding process; (2) ODE's imposition, via the Handbooks or otherwise, of such a log-in time/duration requirement as part of the FTE review/funding process is unlawful, inconsistent with its statutory mandate under R.C. 3314.08, and constitutes a violation of the ECOT families' equal protection rights; and (3) the 2015 and 2016 Handbooks, and specifically any log-in time/duration requirements contained therein and/or purportedly derived by ODE therefrom, are facially unlawful and cannot be utilized by ODE as part of any FTE audit because they were not promulgated in accordance with Chapter 119 of the Revised Code (Count III). Lastly, Plaintiffs allege that ODE's unlawful actions reflect a purposeful effort to single out the ECOT Families, among the larger classes of similarly situated community school and eschool families, for disparate treatment in terms of deprivation of their legislatively-recognized right to public school choice, and seek declaratory and injunctive relief that ODE has violated the ECOT Families' equal protection rights (Count IV).

On September 12, 2016 through September 14, 2016, and September 19, 2016 through September 22, 2016, the Court held an evidentiary hearing regarding ECOT and the ECOT Families' Motions for Preliminary Injunction.

On September 30, 2016, this Court issued a Decision and Entry denying Plaintiffs' Motions for Preliminary Injunction.

On October 3, 2016, ECOT filed a Notice of Appeal of the Court's September 30, 2016 Decision and Entry denying Plaintiffs' Motions for Preliminary Injunction, and on October 4, 2016, the ECOT Families filed their Notice of Appeal of the Court's September 30, 2016 Decision and Entry denying Plaintiffs' Motions for Preliminary Injunction.

On October 12, 2016, the parties filed a Stipulation Regarding the Court's Consideration of Preliminary Injunction Evidence for Purposes of Entering Final Judgment. As stated above, per this stipulation, the parties agreed that the Preliminary Injunction Hearing conducted on September 12, 2016 through September 14, 2016, and September 19, 2016 through September 21, 2016, is to be converted into a final injunction hearing and trial on the merits of this case. The parties further agreed that the Court may issue a final decision and judgment on Plaintiffs' claims on the basis of all the evidence and arguments received in connection with Plaintiffs' Motions for Preliminary Injunction, as well as the parties' respective Motions for Summary Judgment. However, because the matter had already been appealed to the Tenth District Court of Appeals, this Court did not have jurisdiction at that time to issue a final decision and judgment on Plaintiffs' claims.

However, on November 22, 2016, the Tenth District Court of Appeals issued a Judgment Entry stating that this Court’s order denying temporary injunctive relief did not meet the requirements of R.C. 2505.02(B)(4)(b) and did not constitute a final, appealable order, and dismissed Plaintiffs’ appeal for lack of jurisdiction. Therefore, this Court may now issue its final decision and judgment in accordance with the parties’ October 12, 2016 Stipulation.

II. Conclusions of Law

ECOT proffers four bases on which it contends that ODE cannot consider durational data in connection with making ODE’s initial determination as to ECOT’s FTE funding: (1) doing so would breach the 2003 Funding Agreement between ODE and ECOT; (2) doing so would violate the funding statute, R.C. 3314.08(H)(3); (3) relying on the FTE Review Manual for ODE’s initial determination is invalid, as the FTE Review Manual is a rule that was required to be (and was not) promulgated through Chapter 119 procedures; and (4) reducing ECOT’s FTE funding for the 2015-2016 academic year based on durational data would violate retroactivity principles, as ODE did not inform ECOT until part-way through the academic year that ODE intended to rely on such data. The Court finds that ECOT does not succeed on any of these four claims.

A. ECOT’s Contract Claim based on the Funding Agreement fails.

Generally, if a term stating the duration of a written contract is omitted, then the contract is only partially integrated and extrinsic evidence is admissible so that a court may determine the missing term. *Miller v. Lindsay-Green, Inc.*, 2005-Ohio-6366, ¶ 40 (10th Dist.) (citing *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 15 Ohio St.3d 321, 323-324 (1984)).

Here, the Funding Agreement (the contract) did not provide the duration for the agreement, so the Court must look to extrinsic evidence, or evidence outside the contract, to determine its duration. The Court finds that the extrinsic evidence shows that the parties intended the Funding Agreement to apply only to the 2002 and 2003 FTE reviews. In the letters that the parties exchanged during negotiations, ECOT proposed that the agreement being negotiated (the Funding Agreement) would apply to FTE reviews in “2002 and 2003, *and thereafter*.” See, ODE Exhibit 1377 (Emphasis added). ODE responded by counter-proposing that the Funding Agreement would apply to FTE reviews in 2002 and 2003 (dropping the “and thereafter” language that ECOT proposed). The parties exchanged multiple communications re-stating their positions. *Id.* Ultimately, however, ECOT acquiesced in its last letter to ODE on the subject, dropping the “and thereafter” language that it had proposed. *Id.*

In addition, the Court finds that the parties’ course of performance further indicates that the Funding Agreement was limited to the 2002 and 2003 FTE reviews. When ODE conducted the 2005 FTE review of ECOT in the summer of 2005, the 2002 and 2003 FTE reviews were still open. Ron Heitmeyer, the ODE area coordinator who led the FTE review at ECOT in 2005 sent a letter to ECOT in September 2005 stating the results of the 2002 FTE review, the 2003 FTE review, and the 2005 FTE review. See, ODE Exhibit 1368. In that letter, he states that the 2005 FTE review was conducted pursuant to “the normal course of FTE reviews of community schools.” *Id.* By contrast, he states in that same letter that the 2002 and 2003 FTE reviews were “initiated pursuant to the Funding Agreement.” *Id.* No one at ECOT disputed that characterization of the

difference between the manner in which these FTE reviews were conducted. See, Heitmeyer testimony.

Likewise, when ODE conducted its 2011 FTE review of ECOT, ECOT personnel asked John Wilhelm, the area coordinator who acted as the lead FTE reviewer for ECOT that year, whether he was familiar with the Funding Agreement. He responded that he was “unfamiliar” with such a document. See, ODE Ex. 1171. Although ECOT sent him the Funding Agreement, Wilhelm does not recall reviewing or relying upon it, and instead conducted the 2011 FTE review at ECOT pursuant to the then-applicable FTE Review Manual. See, Wilhelm testimony.

The Court further finds that ODE’s failure to request durational documentation, and its continued acceptance of teacher certifications, do not constitute an affirmative agreement to an extension of the Funding Agreement. The Court also finds that the Funding Agreement, when in effect, as well as the Funding Statute, did not preclude ODE from requesting such information.

Based on the foregoing, the Court finds that this extrinsic evidence, taken together, prevents ECOT from establishing its claim that the Funding Agreement was still in effect for the 2015-2016 academic year. To the contrary, the Court finds that the evidence shows that the Funding Agreement was directed solely to the 2002 and 2003 FTE reviews.

Furthermore, the Court finds that even if the Funding Agreement were still in effect, ECOT does not prevail on its claim under that agreement because the Funding Agreement provides that it will be construed consistent with the Funding Statute and all applicable laws and rules of the State of Ohio.

Paragraph 2 of the Funding Agreement specifically references the requirements of State law, and states in pertinent part as follows:

2. Documentation of Learning Opportunities. *State law currently requires that each student must be presented with at least 920 hours of learning opportunities per academic year. These learning opportunities may come from an array of different educational opportunities, such as direct (including computerized) instruction, participation in curriculum related activities, assignments and events, reading, field trips, tutoring, etc.*

For the purposes of an enrollment audit, the School shall maintain in its paper and/or electronic files for each student the following documentation:

a. *Learning opportunity hours will be verified by a certificated ECOT employee with appropriate administrative oversight and documentation that each such employee understands the significance and implications of his/her signature . . .*

In addition, Paragraph 4 of the Funding Agreement expressly requires compliance with the Funding Statute as follows:

4. Funding. *ODE shall fund the School for all students enrolled as set forth in Section 1, pursuant to the Ohio Revised Code section 3314.08 . . .*

Paragraph 5 of the Funding Agreement further provides:

5. Governing Law and Rules; Severability. *The terms and conditions of this contract shall be construed in accordance with applicable laws and rules of the State of Ohio . . .*

Lastly, Paragraph 6 of the Funding Agreement contemplates compliance with ODE's auditing procedures, as follows:

6. *ODE will provide the school a copy of FTE auditing procedures within thirty (30) days of the execution of this agreement and shall include in such procedures the auditing of students reported but for whom no funding has been received.*

See, Plaintiff's Ex. 20 at Sec. 2-6 (Emphasis added). Thus, the Court finds that ECOT cannot prevail based on the Funding Agreement unless it can prevail on its argument regarding the Funding Statute, which will be discussed below.

Lastly, the Court finds that interpreting the Funding Agreement in the manner ECOT suggests, and enforcing an outdated 2003 agreement, would be in violation of public policy. "[I]t is well-settled that a valid contract cannot be made if its purpose or performance is contrary to statute. Similarly, a contract may be void if it violates public policy, the legal principle which declares that one may not lawfully do that which has the tendency to injure the public welfare." *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309, ¶ 22 (9th Dist.) (finding contract unenforceable as against public policy) (citations and quotations omitted). "Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. Actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy." *Belmont Hills Country Club v. Beck Energy Corp.*, No. 11-CV-290, 2013 Ohio Misc. LEXIS 224, at *9 (Ohio Ct. Com. Pl. July 8, 2013) (citations and quotations omitted).

In the case at hand, the Court finds that if the Funding Agreement were interpreted in the manner that ECOT suggests, to require the State to continue paying hundreds of millions of dollars per year for an indefinite time period, without any ability to determine whether students are in fact participating in any curriculum at ECOT at all, that construction would render the Funding Agreement void as against public policy.

Accordingly, the Court finds that even if the Funding Agreement were still in effect, and even if ECOT’s interpretation of the Funding Agreement were correct, ECOT still does not succeed on its claim that the Funding Agreement prevents ODE or the State Board from reviewing or considering durational data in connection with the funding decision.

B. ECOT does not establish that reviewing durational data violates the Funding Statute.

The community school funding statute is R.C. 3314.08(H)(3) (the “Funding Statute”). “It is a cardinal rule of statutory interpretation that we look to the language of the statute itself in determining legislative intent. If statutes relate to one another they should be read together with the differences in language carefully compared.” *Sims v. Nissan N. Am., Inc.*, 2013-Ohio-2662, ¶ 32 (10th Dist.) (citations omitted). Another “cardinal rule of statutory interpretation is that words shall be given their plain and ordinary meaning. Where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.” *Frisch’s Rests., Inc. v. Conrad*, 2007-Ohio-545, ¶ 20 (10th Dist.) (citations omitted).

Here, the Funding Statute, R.C. 3314.08(H)(3), provides that:

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.

R.C. 3314.08(H)(3) (Emphasis added).

The term “learning opportunities” as used in the Funding Statute is discussed in the previous section, R.C. 3314.08(H)(2), which states in relevant part:

For purposes of applying this division and divisions (H)(3) and (4) of this section to a community school student, “learning opportunities” shall be defined in the contract, which shall describe both classroom-based and non-classroom-based learning opportunities and shall be in compliance with criteria and documentation requirements for student *participation* which shall be established by the department. Any student’s instruction time in non-classroom-based learning opportunities shall be certified by an employee of the community school.

R.C. 3314.08(H)(2) (Emphasis added).

Under these statutes, the Court finds that ODE is entitled to consider durational data in reaching a funding decision for a community school.

Moreover, the Court notes that the very next sentence of R.C. 3314.08(H)(3) states that “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.” The Court finds that this sentence makes no sense if, as ECOT claims, “learning opportunities” do not have a durational component. Stating that the community school will not be credited for participation that exceeds ten hours per day means that a community school will be credited for participation of less than ten hours per day. But that also means that the duration of a student’s participation is something that needs to be “credited” to a community school. In other words, the Court finds that the duration of participation matters in determining whether a student has been offered (i.e., supplied) 920 hours of learning opportunities to a given student.

The Court notes that the parties have not cited any relevant definition in the contract. However, the statute expressly makes learning opportunities contingent upon “criteria and documentation requirements *for student participation*” R.C. 3314.08(H)(2). The Court finds that this section shows that learning opportunities have a durational component that is measured in terms of actual student participation.

The Court also finds that other related statutory provisions similarly show that student participation matters in terms of meeting the 920 hour requirement for learning opportunities. For example, R.C. 3314.27 provides that:

No student enrolled in an internet- or computer-based community school may *participate* in more than ten hours of learning opportunities in any period of twenty-four consecutive hours. Any time such a student *participates* in learning opportunities beyond the limit prescribed in this section shall not count toward the annual minimum number of hours required to be provided to that student as prescribed in division (A)(1)(a) of section 3314.03 of the Revised Code. If any internet- or computer-based community school requires its students to *participate* in learning opportunities on the basis of days rather than hours, one day shall consist of a minimum of five hours of such *participation*.

Each internet- or computer-based community school shall keep an accurate record of each individual student’s *participation* in learning opportunities each day. The record shall be kept in such a manner that the information contained within it easily can be submitted to the department of education, upon request by the department or the auditor of state.

R.C. 3314.27 (Emphasis added).

Although R.C. 3314.27 is not a funding statute, the Court finds that it shows that in assessing whether a school has met the requirement for 920 hours of learning opportunities, which is a statutory requirement on which funding is based (*see* R.C. 3314.08(H)(3)), participation matters.

Accordingly, the Court finds that ECOT does not succeed on its claim that R.C. 3314.08(H)(3) precludes reliance on durational data regarding actual student participation.

C. ECOT does not succeed on its claim that the FTE Review Manual is an invalid Administrative Rule.

ECOT argues that the FTE Review Manual is a substantive rule or requirement that was not properly promulgated by the Chapter 119 rulemaking process. However, ODE claims that the FTE Review Manual is not subject to the Chapter 119 rulemaking process because it is a mere guideline for the FTE Review Audits, and does not create a substantive rule or requirement.

Ohio Revised Code §119.01(C), defines a “Rule” subject to the mandatory rulemaking process as:

“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.

“The pivotal issue in determining the effect of a document is whether it enlarges the scope of the rule or statute from which it derives rather than simply interprets it.” *State ex rel. Saunders v. Indus. Comm’n.*, 101 Ohio St. 3d 125, 129 (2004). “Documents that explain rather than expand fall outside R.C. Chapter 119.” *Id.* See also, *Textileather Corp. v. Korleski*, 2007-Ohio-4129, ¶ 46 (10th Dist.) (explaining that documents that “translat[e] the general [provisions of a rule] to the specific” are not themselves rules). Guidelines that “merely control the procedure by which the duties in the statute and rule

must be performed” are “distinct from” a rule. *Princeton City Sch. Dist., Bd. of Educ. v. Ohio State Bd. of Educ.*, 96 Ohio App.3d 558, 563 (1st Dist. 1994). Moreover, administrative “rules” refer to things that carry the force and effect of law. See, e.g., *Burroughs v. Ohio Dep’t. of Admin. Servs.*, 2013-Ohio-3261 (10th Dist.) (“An administrative rule, issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment.”).

Here, the Court finds that the FTE review manuals do not “enlarge the scope of the rule or statute from which they derive,” nor do they carry the force and effect of law. The Court finds that the FTE review manuals are merely procedural guidelines for FTE reviewers to follow in conducting FTE reviews.

More specifically, the Court finds that in every ODE FTE review manual since at least 2010, there has been a special section of the manual that is directed toward FTE reviews conducted at eschools. See, Rausch testimony. In the 2010 manual that was sent to Ms. Bentahir, for example, there is a section listed in the table of contents for “eSchool Review.” See, ODE Exhibit 1031. The material in that section provides, inter alia, that “the reviewer of eschools must put a high level of scrutiny on the relationship between the hours/days of instruction and the daily/hourly attendance documentation used in calculating the final FTE review for each student.” *Id.* at 32. The manual also provides that:

The reviewer will check the individual attendance record for each student being reviewed. This attendance record should show when a student has logged on and off while accessing learning opportunities. A learning opportunity for an eSchool student could be documented computer time for doing homework in any subject, reading resource documents, writing resource papers, taking tests, doing research, conferencing with teachers, etc.

Id. As to non-computer learning opportunities, such as field trips, the manual provides that:

Non-computer learning opportunities for a student also must be documented and approved in writing by a teacher, supervisor or school administrator and must include an hourly/daily/weekly accounting that the hours documented were hours in which the student accessed a learning opportunity.

Id. at 33.

The Court finds that this language does not enlarge the scope of the statutes because the statutes permit the consideration of participation. The Court further finds that the FTE review checklist in the 2010 manual likewise provides that, as to eschools, the reviewer should “[e]xamine the attendance record for the student and determine if the attendance record for the student matches the amount of time reported in SOES,” and “[i]f the student has non-computer learning opportunities, determine [that] the hourly/daily/weekly accounting of hours were hours in which the student accessed a learning opportunity.” *Id.* at 43. The Court finds that the same language appeared in the FTE review manuals that ODE published in 2011, 2012, and 2014. See, ODE Exs. 1032, 1034, and 1035, and Rausch testimony.

In addition, the 2015 manual, which was published on ODE’s website in January 2015, includes the same language, but also adds more description of durational records that area coordinators should request and review in connection with FTE reviews of eschools. See, ODE Ex. 1037. The 2016 manual, which was published in January 2016, addresses durational information in even greater detail. See, ODE Ex. 1038. In particular, the 2016 FTE manual specifies the format in which area coordinators should expect to see durational data presented during the FTE review. *Id.* at 15.

Based on the foregoing, the Court finds that the FTE review manuals merely interpret the funding rules set forth in R.C. 3314.08(H)(3). They “explain” how FTE reviewers should conduct a review consistent with that statute, rather than “expand” the review that the statute allows.

In this regard, the Court finds that they are much like the Auditor’s Ohio Compliance Supplements, which likewise are manuals that instruct government employees (audit staff) on how to conduct a review consistent with a statutory funding scheme. The Auditor’s Ohio Compliance Supplements, like FTE review manuals, are not adopted as administrative rules.

As applied to the facts here, the Court finds that both the FTE review manual and the Ohio Compliance Supplement are merely interpreting, rather than “enlarging,” the community school funding statute. As both manuals agree, that statute allows reviewers to consider durational information in connection with conducting a review as to whether an eschool can justify the FTEs that it has claimed. The manuals merely set forth the steps that reviewers will take in assessing whether that statutory mandate has been met.

Similarly, the Court finds that the FTE review manuals do not prescribe rules that carry the force of law. The FTE review manuals do not prescribe funding rules. As the area coordinators testified, to the extent that there was a substantial shortfall in FTEs at a particular school, the FTE review manual does not set forth the funding consequences that will follow. See, Rausch and Loew testimony. To the contrary, the area coordinators agreed that the funding impact would be a matter for review and determination among senior management at ODE. *Id.*

Moreover, even if ODE were to conclude based on its FTE review that a clawback is appropriate, that would not be a “final decision” by the agency. Under law, only the State Board can make a “final decision” as to funding for community schools. See, R.C. 3314.08(K)(2)(d) (providing community schools the right to seek review before the State Board of Education as to any initial determination by ODE, and providing that “any decision by the board under this division is final”).

Here, the Court finds that the FTE review manual does not have the force or effect of law, but just provides the “techniques” and “practices” that area coordinators use in conducting FTE reviews. Although, the results of such reviews may ultimately trigger financial consequences, the Court finds that the review manuals themselves do not carry the force of law, nor do area coordinators make funding decisions (even initial decisions) in cases involving substantial FTE reductions.

Accordingly, the Court finds that ECOT fails to establish its claim that the FTE review manuals are “rules” for purposes of Chapter 119.

D. ECOT does not succeed on its claim that retroactivity concerns preclude ODE from relying on durational data.

As a matter of law, the Court finds that because ECOT is a public school, it cannot assert retroactivity concerns. Moreover, even if it could, it has not established the viability of such concerns here, given that ODE’s FTE review materials have provided for over six years that ODE reserves the right to seek durational data.

The Ohio Supreme Court just recently confirmed that public school districts cannot assert retroactivity concerns relating to their funding. See, *Toledo City School Dist. Bd. of Educ. v. State Bd. of Educ. of Ohio*, 2016-Ohio-2806. In that case, three school districts challenged what they claimed were impermissibly retrospective changes

to the school funding formula. After a lengthy historical analysis, the Court concluded that the Retroactivity Clause in Ohio's Constitution "does not protect political subdivisions, like school districts, that are created by the state to carry out its governmental functions," meaning that retrospective adjustments to funding formulas were permissible. *Id.* at ¶ 46.

Here, the Court finds that ECOT is a public school, just like the public schools at issue in *Toledo City School Dist. Bd. of Educ.*, and it is carrying out the same "governmental function" of providing a public education. Thus, the Court finds that just like the school districts there, it cannot assert retroactivity concerns as a basis for challenging governmental action.

Furthermore, the Court finds that even if ECOT could assert such an argument, it cannot prove that the governmental action at issue here is impermissibly retroactive. The Court finds that since at least 2010, the FTE review manuals have supported ODE's ability to request and review durational data in connection with FTE funding reviews. ODE used the 2015 FTE review manual for purposes of ECOT's 2016 FTE review. That manual was available on ODE's website since January 2015, more than six months before the 2015-2016 school year began. Thus, the Court finds that ECOT cannot claim to have been unfairly surprised when ODE requested such data in connection with the 2016 FTE review.

E. The ECOT Families' Equal Protection Claim fails.

"The Equal Protection Clauses of both the United States and the Ohio Constitution guarantee that no one will be denied the same protection of the laws enjoyed by others in like circumstances. ... The standards for assessing equal-protection claims

are essentially the same under the state and federal constitutions.” *State v. Klembus*, 146 Ohio St. 3d 84, 85 (2016). “Courts apply varying levels of scrutiny to equal-protection challenges depending on the rights at issue and the purportedly discriminatory classifications created by the law.” *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, ¶ 18. Where an equal protection “challenge does not involve a suspect classification or a fundamental interest,” courts “apply rational-basis review.” *Klembus*, 146 Ohio St. 3d at 85.

To “survive rational-basis review,” the government conduct at issue need only “bear a rational relationship to a legitimate government objective.” *Id.* This “involves a two-step analysis. [The Court] must first identify a valid state interest. Second, [the Court] must determine whether the method or means by which the state has chosen to advance that interest is rational.” *Pickaway Cty. Skilled Gaming, L.L.C.* at ¶ 19 (punctuation omitted). It does not matter whether the state interest is the actual interest that motivates the statute or not. The only question is whether any rational basis can be imagined. *See Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 91 (explaining that an Equal Protection Claim evaluated under rational-basis review requires the plaintiff to “negate every conceivable basis that might support the legislation”)

Here, the ECOT Families claim that ODE inappropriately singled out thirteen eschools for FTE review this year, but did not apply the durational data requirement to other eschools. However, the Court finds that the testimony showed that the eschools subjected to FTE reviews this year were selected because they were up for five-year reviews. The Court further finds that having a standard review cycle constitutes a

rational basis. As such, the Court finds that the ECOT Families do not succeed on their Equal Protection Claim.

III. Conclusion

Therefore, based on the foregoing, the Court finds that because Plaintiffs fail to prove the elements for each of their claims, ODE is entitled to judgment in its favor as a matter of law. Costs to Plaintiffs. This is a final appealable order and there is no just cause for delay. The Clerk shall serve a copy of this decision on all parties in accordance with Civ.R. 58(B).

IT IS SO ORDERED.

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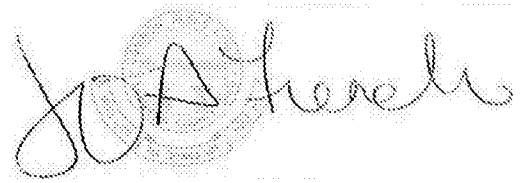
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Franklin County Court of Common Pleas

Date: 12-14-2016
Case Title: ELECTRONIC CLASSROOM OF TOMORROW -VS- OHIO STATE
DEPARTMENT EDUCATION
Case Number: 16CV006402
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, appearing to read "J.A. French", is written over a faint, circular, textured background.

/s/ Judge Jenifer A. French

Court Disposition

Case Number: 16CV006402

Case Style: ELECTRONIC CLASSROOM OF TOMORROW -VS-
OHIO STATE DEPARTMENT EDUCATION

Case Terminated: 18 - Other Terminations

NOW, THEREFORE, BE IT RESOLVED that the State Board of Education hereby denies the student's right to participate in the program as a result of the student's failure to notify the district of her intention to participate by April 3, 2017, finding that the delay should prevent the student from participating, and that questions concerning the student's prospective participation in college credit plus program based upon failure to comply with the April 3, 2017 deadline should be resolved in favor of the school district; and Be It

FURTHER RESOLVED that the Superintendent of Public Instruction be, and he hereby is, directed to notify the principal of North Royalton High School, and the student of this action.

It was Moved by Ms. Fowler and Seconded by Mrs. McGuire that the above recommendation (Item 4) be approved.

President Elshoff called for a roll call vote.

YES VOTES

Pat Bruns	Stephanie Dodd
Joe Farmer	Cathye Flory
Sarah Fowler	Linda Haycock
Nancy Hollister	Meryl Johnson
Laura Kohler	Martha Manchester
Charlotte McGuire	Antoinette Miranda
Kara Morgan	Eric Poklar
Lisa Woods	

NO VOTES

Nick Owens	Tess Elshoff
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ABSTAIN

Rebecca Vazquez-Skillings

Motion carried.

President Elshoff presented the following recommendation (Item 5):

- 5. RESOLUTION TO ACCEPT THE DECISION OF THE HEARING OFFICER IN ELECTRONIC CLASSROOM OF TOMORROW'S APPEAL PURSUANT TO O.R.C. 3314.08(K)(2).**

I **RECOMMEND** that the State Board of Education **ADOPT** the following Resolution:

WHEREAS, Section 3314.08(H) of the Ohio Revised Code sets forth a process for the Department to review the full-time equivalent (FTE) student funding that a community school has claimed and received for a given academic year; and

Section 3314.08(K) provides that the Department shall complete such an FTE review of a community school and issue its findings within ninety days of the end of the community school's fiscal year; and

Section 3314.08(K)(2) provides that if the Department determined that an overpayment was made to the community school, the community school may appeal the Department's FTE determination; and

On September 26, 2016, the Department issued its FTE determination to Electronic Classroom of Tomorrow ("ECOT") finding that overpayment was made to ECOT for the 2015-2016 school year; and

Electronic Classroom of Tomorrow (ECOT) timely appealed the Department's FTE determination on October 11, 2016; and

The matter was referred to a hearing officer on October 18, 2016 for an informal hearing; and

The informal hearing occurred on December 5, 6, 7, 8, 9, 13 and 23, 2016 and January 12 and 19, 2017 and February 1, 2017; and

The hearing officer heard testimony and received exhibits introduced during the hearing; and

The hearing officer issued his decision on May 10, 2017 based on the testimony and exhibits introduced at the hearing; and

ECOT timely submitted objections to the hearing officer's decision on May 22, 2017; and

ECOT timely submitted an executive summary of its objections on May 30, 2017; and

The Department timely responded to ECOT's objections on May 30, 2017; and

The State Board of Education has reviewed the hearing officer's decision, the objections submitted by ECOT, and the Department's response to ECOT's objections.

NOW, THEREFORE, BE IT RESOLVED that the State Board of Education, based on its review of the hearing officer's decision and ECOT's objections thereto, hereby accepts the hearing officer's decision and finds that ECOT received an overpayment of \$64,054,630 and directs the Department to take such measures as are necessary to collect the overpayment from ECOT; and Be It

FURTHER RESOLVED that the Superintendent of Public Instruction be, and he hereby is, directed to notify ECOT and its sponsor the Educational Service Center of Lake Erie West of this resolution.

It was Moved by Mrs. Flory and Seconded by Mrs. Kohler that the above recommendation (Item 5) be approved.

Representative Brenner asked why the higher of the two amounts was brought forth. Mrs. Flory responded that she felt the children and taxpayers were cheated and ECOT should pay the amount back.

Ms. Johnson stated that she was under the impression the lesser amount was given after additional information was presented.

Dr. Morgan called the question.

Ms. Fowler Moved to amend the resolution by Substitution. She Moved to change the overpayment amount to 60,350,791. Mrs. Haycock Seconded the motion. Ms. Fowler stated this is the recommendation of the Hearing Officer that she read and supported.

President Elshoff called for a roll call vote on the proposed amendment.

YES VOTES

Joe Farmer	Sarah Fowler
Linda Haycock	Meryl Johnson
Laura Kohler	Martha Manchester
Charlotte McGuire	Antoinette Miranda
Kara Morgan	Nick Owens
Eric Poklar	Rebecca Vazquez-Skillings
Lisa Woods	Tess Elshoff

NO VOTES

Pat Bruns	Stephanie Dodd
Cathye Flory	Nancy Hollister

Motion carried.

President Elshoff called for a roll call vote on the resolution as amended.

YES VOTES

Stephanie Dodd	Joe Farmer
Cathye Flory	Sarah Fowler
Linda Haycock	Nancy Hollister
Meryl Johnson	Laura Kohler
Martha Manchester	Charlotte McGuire
Antoinette Miranda	Kara Morgan
Nick Owens	Eric Poklar
Rebecca Vazquez-Skillings	Tess Elshoff

NO VOTES

Pat Bruns

ABSTAIN

Lisa Woods

Motion carried.

Before the Ohio State Board of Education

25 S. Front Street, Columbus, Ohio

In re: :

Electronic Classroom of Tomorrow's :

Appeal of the 2016-17 FTE Determination : January 22, 2018

: Karl W. Schedler, Hearing Officer

:

DECISION OF THE HEARING OFFICER

Appearances:

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Counsel for the Ohio Department of Education

I. Nature of the Proceeding

This proceeding is undertaken pursuant to R.C. 3314.08(K). That statute permits the Ohio Department of Education (“ODE”) to conduct a review of the payments made to community schools under R.C. 3314.08(C) based on the number of full-time equivalent (“FTE”) students served by the school during the academic year. ODE made monthly payments to community schools over the course of the 2016/2017 school year based on self-reported data. The review process is a statutory mechanism under which ODE can verify that the monthly payments made to each community school are properly supported by the school’s records. Under R.C. 3314.08(K)(2),

If the review results in a finding that additional funding is owed to the school, such payment shall be made within thirty days. If the review results in a finding that the community school owes money 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 the 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.

The Electronic Classroom of Tomorrow (“ECOT”) is a community school and is subject to review under this section. On September 26, 2016, ODE put ECOT on notice that it would conduct an FTE review for the 2016/2017 academic year. *ODE Ex. 2*, p. 3. On September 28, 2017, ODE completed a review of the payments made to ECOT during the year. It determined that ECOT’s FTEs for the year were 11,575.47 rather than the 14,203.03 FTEs that ECOT had reported. As a result, ODE notified ECOT that it would “claw back” 18.5% of the monies

advanced to ECOT during the 2016/2017 academic year. Within ten business days, on October 12, 2017, ECOT submitted a written notice to the Ohio State Board of Education that it “hereby appeals to the State Board of Education from the September 28, 2017 ‘Final Determination’ letter issued to ECOT by the Ohio Department of Education.”

On October 18, 2017, this Hearing Officer was designated to hear this appeal under R.C. 3314.08(K). A telephone status conference was held with attorneys for ECOT and ODE, at which time the parties agreed to waive the thirty (30) day statutory time limit to conduct an informal hearing. The parties agreed to conduct the evidentiary portion of the informal hearing on December 4, 5, and 8, 2017 but that schedule was subsequently amended, also by agreement, to December 4, 5, and 11. The evidentiary portion of the informal hearing was completed in three days. After the submission of the evidence the attorneys for both sides agreed to submit written briefs in lieu of oral closing arguments. Initial briefs were due December 29, 2017, with reply briefs due January 5, 2018. Both ECOT and ODE filed briefs on December 29, 2017. On January 5, 2018, ODE submitted a reply brief. ECOT elected not to submit a reply brief. On December 11, 2017, both sides agreed that for purposes of R.C. 3314.08(K)(2)(b), the “conclusion” of the informal hearing would be on January 5, 2018, when the reply briefs were to be submitted. Fifteen days from January 5, 2018, fell on Saturday January 20, 2018. Accordingly, this decision is submitted on the next following business day, Monday January 22, 2018.

II. Procedural Context

This appeal falls into the context of a broader dispute between ECOT and ODE. In 2016, ODE conducted an FTE review of ECOT covering the 2015/2016 academic year. In preparation for that review, ODE notified ECOT that it planned to base its determination of ECOT’s FTEs upon how

much time ECOT's students were logged into its electronic educational platform and participating in learning opportunities. ECOT claimed that this information, labeled "durational data," was never used previously by ODE to measure FTEs. ODE's demand for durational data to conduct its review ignited litigation. Specifically, ECOT and several families of its students, brought an injunction action against ODE in the Franklin County Court of Common Pleas to prevent the FTE review based on durational data. That case was heard by Judge Jennifer French, and resulted in the denial of the injunction and dismissal. *Electronic Classroom of Tomorrow v. Ohio Department of Education*, Franklin County Court of Common Pleas, Case No. 16CVH07-6402. Judge French's decision was issued on December 14, 2016.

Without an injunction in place, an informal hearing was conducted under R.C. 3314.08(K) before a hearing officer. The hearing officer rendered a decision on May 10, 2017, upholding ODE's review findings. The Ohio Board of Education adopted that decision on June 12, 2017. ECOT attempted to appeal that decision to court even though the statute expressly provides that the Board's decision "is final." The purported "administrative appeal" was dismissed by the Franklin County Court of Common Pleas. *Electronic Classroom of Tomorrow v. Ohio Dept. of Edn.*, Franklin County Court of Common Pleas, Case No. 17CV-5773, October 6, 2017. That decision has been appealed by ECOT to the Tenth District Court of Appeals, and is pending there. *Electronic Classroom of Tomorrow v. Ohio Dept. of Edn.*, Tenth Dist. Case No. 17AP-767. Separately, ECOT filed an action seeking writs of mandamus and prohibition against ODE and the Board in the Ohio Supreme Court on June 27, 2017, to prevent the claw-back of funds under the 2015/2016 findings. That action was dismissed by the Supreme Court without an opinion on July 21, 2017. *State ex rel. Electronic Classroom of Tomorrow v. Ohio Brd. of Edn.*, 2017-Ohio-7567.

Meanwhile, ECOT appealed Judge French's decision denying ECOT's action for an injunction to the Tenth District Court of Appeals. On June 29, 2017, the Court of Appeals affirmed her decision. *Electronic Classroom of Tomorrow v. Ohio Dept. of Edn.*, 2017-Ohio-5607. ECOT appealed that decision, and the Ohio Supreme Court accepted it for review. That case is presently pending before the Ohio Supreme Court and it is scheduled for oral argument on February 13, 2018. Ohio Supreme Court Case No. 2017-913.

III. Summary of the Evidence

The evidentiary portion of the hearing in this matter commenced as scheduled on December 4, 2017. The parties were represented by counsel. Both ECOT and ODE had the opportunity to call and examine witnesses, and to present exhibits. Prior to the commencement of the hearing, the parties were instructed to provide a written synopsis of their respective legal positions. In its prehearing synopsis, ECOT advanced ten separate arguments supporting its position. Those ten arguments fall under five general categories. First, ECOT claimed that ODE failed to apply a consistent standard to its review of the school's "durational data" documenting the individual student's participation in learning opportunities. Second, ECOT argued that ODE improperly used the period of a student's enrollment as a predicate to limit the available time that each student could be credited with participation in learning opportunities. Third, ECOT contended that ODE treated it differently than other similarly situated eschools. Fourth, ECOT claimed that ODE failed to conduct a required "pre-review" conference in the fall of 2016, and this caused prolonged confusion and difficulty for ECOT, preventing it from gathering the data that ODE wanted in the review process. Fifth, ECOT argued that ODE should include student participation in learning opportunities for time that students participated in "504 and Related Services," and time that ECOT gleaned from its "Collaborate" software, after ODE's review process was completed.

One week after ECOT submitted its pre-hearing synopsis, ODE filed its response. In that pleading it addressed each of the points raised by ECOT and summarized what it believed would be shown through the evidence. It agreed that it had repeatedly instructed ECOT to redo its calculations, but insisted that the recalculations were needed to eliminate duplicative data or to have ECOT rid its data of calculation assumptions that ODE believed to be unwarranted under the funding statute. Once the data was properly assembled in accordance with ODE's parameters, the review was completed using ECOT's figures. ODE asserts that in the final analysis, it "relied on the data in ECOT's August 30, 2017 spreadsheets to make the funding determination reflected in the September 28, 2017 letter. Based on those spreadsheets, ODE found that ECOT could substantiate only 11,575.47 of the 14,203.03 FTEs that ECOT had claimed during the 2016-17 school year, and thus that ECOT was entitled to only 81.5% of the FTE-based funding that it had received in that period." *ODE's Pre-Hearing Synopsis*, p. 12.

Testimony of Aaron Rausch

At the hearing ODE presented the testimony of Aaron Rausch, Director of ODE's Office of Budget and School Funding. Rausch signed the September 28, 2017, letter making the findings against ECOT. *ODE Ex. 2*. His testimony included an overview of community school funding. The primary source of state funding for public education in Ohio is the opportunity grant of \$6,000.00 per year per student. If the student remains in a traditional district school, the grant money is paid to the district. If the student enrolls in a community school, the grant payment is deducted from the payments made to the resident district and paid over to the community school. According to Rausch, community schools, like ECOT, make monthly reports to ODE regarding enrollment and district of origin data, and ODE then makes monthly payments to the community school based on that unverified data. Only if ODE elects to perform a review under R.C. 3314.08

does it inspect the school's data and verify its accuracy. Rausch identified *ODE Ex. 1* as ECOT's Final payment report for 2016/17. It shows that ECOT reported 14,209.04 FTE and was paid \$104,302,474.05 for the 2016/2017 school year.

Rausch testified that ODE measures FTEs for eschools based on two data points. The first is the length of the student's enrollment in the school. The second is the durational information showing that the student participated in sufficient learning opportunities so that his time engaged in learning was at least equivalent to the period of his enrollment. Specifically, Rausch testified that "to represent a full FTE, the student would have been enrolled during the entirety of the reported calendar or the reported academic year, but then they would have also participated or have documented learning opportunities that were equal to that full calendar year." Tr., v. 1, p. 79. He added: "[S]o if a school says 920 hours is what our academic year is, or what our calendar is, we would expect to see at least 920 hours of documented learning opportunities to substantiate the one full FTE for that student in that school." *Ibid.* He also clarified that a school cannot generate more than one FTE per student per academic year because if that were so "the state would be paying each student more than one FTE." *Ibid.*

Rausch explained that the reporting forms used by community school to report FTEs over the course of the year include a space to record data regarding "percentage of time." That term compares the percent of time of an academic year that a student is enrolled in the community school to the actual participation in learning, based on durational data. As an example, if the student was enrolled for half of the school year (in ECOT's case a full year is 920 hours, so half is 460 hours), but his documented durational participation was only half of the enrolled time (in ECOT's case he was enrolled for 460 hours but only documented 230 hours of learning opportunities), then his "percentage of time" would be 25% (.50 FTE enrolled time x .50 of

potential hours participating in learning). Tr., v.1, p. 87. Rausch summarized that “under a durational based approach we would only fund for the duration or amount of the time during that enrollment period that a ... school was able to substantiate student participation.” Tr., v. 1, p. 94

Rausch testified that ODE notified ECOT on September 26, 2016, that it would be under review for the 2016/2017 academic year. *ODE Ex. 2*. He testified that because ODE was thoroughly acquainted with ECOT’s accounting methods as a result of the 2015/2016 review, a November “pre-review” conference was not scheduled. In February 2017 ODE contacted ECOT’s superintendent, Richard Teeters, to set up a conference. One was scheduled in March, but then cancelled by Teeters. The meeting was rescheduled for April, but was also cancelled by Teeters. *ODE Ex. 3, 4*. The meeting ultimately took place on May 11, 2017. At that meeting, according to Rausch, ECOT had not updated the percentage of time data in its spreadsheets to limit the student’s time by percentage of documented participation multiplied by the period of enrollment, capped at one FTE per student per year. Tr., v.1, pp. 111-112. An on-site review was scheduled for July 18-20, 2017, and, according to Rausch, ECOT promised to adjust the percentage of time data to conform with ODE’s parameters by the date of the on-site review. In addition, ECOT was asked to provide a summary of durational data for all its students, and to be prepared to provide specific “granular” data about a random sample of fifty students so that ODE could verify the sources used for the summaries.

At the on-site review ODE’s reviewers determined that ECOT had not updated the percentage of time data in the manner it understood was promised at the May conference. In addition, the granular data was prepared in a method that ODE felt it could not use. Moreover, ODE found that the durational data was unreliable in that it revealed multiple days of 10 hours per day of learning activity, or that multiple sources of time tracking overlapped so that the same time

slots were being counted two or more times. Finally, closer review also showed that there was “time borrowing” meaning that time claimed as being engaged in learning by a student who had surpassed the daily ten-hour maximum allotment was being spread to other students whose own time was under the ten-hour limit. ECOT expressed frustration with the ODE process in general based on what it felt were “moving targets.” Ultimately, ECOT’s deputy superintendent, Brittny Pierson¹, halted the on-site review and demanded to meet with Rausch.

Over the following weeks ECOT and ODE continued to exchange data, but as the review moved from July to August there was a potential difficulty looming. One source of ECOT’s data was the state’s electronic data system known as EMIS. The EMIS system for the 2016/17 year was scheduled to freeze on August 14. According to Rausch, he reached an oral agreement with ECOT allowing the review to proceed beyond August 14 with EMIS data from August 12. In August ECOT submitted a series of spreadsheets to Rausch’s office that addressed most of ODE’s objections to the earlier versions. On one of the spreadsheets, the “percentage of time” was adjusted to meet ODE’s instructions. Durational time was “de-duplicated,” meaning that each block of time spent in learning opportunities was limited to the actual time spent and counted just once per student. The issue of long time blocks was addressed by cutting off “system” time at midnight, and resuming once the student’s computer recorded activity. The total number of FTEs was limited to one per student per year and was tied to the period of enrollment. On behalf of ECOT, Brittny Pierson submitted a written document to ODE that she titled “Narrative Summary” that presented ECOT’s view of the events leading up to the submission of the spreadsheets. The Narrative Summary includes what purports to be an “appeal,” by which ECOT intended to preserve

¹ Ms. Pierson was ultimately promoted to superintendent in August 2017 after her predecessor, Richard Teeters, left ECOT.

its rights to object to the process used by ODE while still complying with ODE's demands for specific data. *ECOT Ex. B-21*.²

ECOT dubbed the spreadsheet that met ODE's durational criteria "1A." *ODE Ex. 13-4*. The spreadsheet was delivered to ODE on August 30, 2017. It was the final spreadsheet submitted by ECOT, and it was the spreadsheet that ODE used to calculate ECOT's FTEs for 2016/17. Using ECOT's spreadsheet 1A, ODE determined that the school had data to support 11,574.98 FTEs of the 14,197.64 FTEs it self-reported during the year. ($11,574.98 \div 14,197.64 = 0.815$). Accordingly, ODE seeks to recover 18.5% of the monies it paid to ECOT during 2016/2017.

On cross-examination, Rausch admitted that the durational data approach that ODE used was only applied to eschools and correspondence schools, and not applied to "bricks and mortar" community schools or traditional district schools. He continued to insist, however, that each student can generate just one FTE per year. His testimony was that ODE ensures "that no student in the State, regardless of how many different school districts or community schools are educating them, generates more than one FTE." *Tr., v. 2, p. 243*. He listed ten eschools that underwent review for the 2016/2017 school year, and testified that all but three of them "made some adjustments in order to substantiate durational data." *Tr., v. 2, pp. 248-251*.

Regarding the Jack Pierson spreadsheet, *ODE Ex. 5-2*, Rausch agreed that it was provided to ECOT in May, shortly before the pre-conference meeting. When ECOT used it, the data was rife with errors. That is why he asked ECOT to refine its data. Rausch testified that ECOT never complained to him that it had wanted to meet earlier with ODE, or that it would have taken a

² There is no statutory provision for a community school to "appeal" its FTE review during the review process and prior to ODE making a final determination under R.C. 3314.08(K). For purposes of this proceeding, the Hearing Officer considers this "appeal" a "reservation of rights" on ECOT's behalf to argue that ODE's methodology is incorrect while nonetheless submitting the requested data. The hearing conducted on December 4, 5, and 11, gave ECOT a full opportunity to contest ODE's methodology on that basis.

different course of action had the meeting taken place earlier. He also testified that he never received any indication from ECOT that the numbers in spreadsheet 1A it provided ODE, and that ODE ultimately used to calculate its findings, were inaccurate.

Testimony of Brittany Pierson

Brittany Pierson has been the superintendent of ECOT since August 2017. She has been employed by ECOT since 2002. Immediately prior to becoming superintendent she served as deputy superintendent, and, in that role, was involved in state funding and information technology. She explained that following the 2015/2016 findings against ECOT, the school intensified its “data warehouse” operation. By 2017 the data warehouse employed five people who devoted most of their time to gathering durational material for the ODE review. Following ODE’s 2015/2016 findings against ECOT she submitted a public record request to obtain information about the review process that ODE had used. She used ODE’s response, *ODE Ex. 17*, to prepare for the 2016/2017 review. She testified that it would have been “helpful” for ECOT to have ODE’s “specific expectations” to prepare for the review. As it was, she testified, “we were guessing.” Tr., v. 2, p. 352.

Pierson testified that prior to the start of the 2016/2017 school year ECOT asked its vendors to find ways to capture and document durational data about its students. At the start of the year ECOT installed software called “ActivTrak” to capture every keystroke and mouse click in the student’s computers. Then, on May 10, 2017, she received the Jack Pierson spreadsheet. Her understanding was that it was to serve as a template for ECOT’s submission to ODE.

Following the May 11, 2017, pre-review meeting, and in anticipation of the on-site review to be held in July, Brittany Pierson helped to develop a breakdown of student durational data that she believed Jack Pierson wanted. *ECOT Ex. B-9*. She testified that when she shared this with

him in June he told her it was not what he wanted, and that he needed “click-by-click” data. Later, on July 13, she had a telephone conversation with Jack Pierson. She testified that he told her that the new format she had assembled was not what he wanted, and when she asked him if he wanted “what I gave you in May?” He answered, “Yeah can you do that?” She told him that they had abandoned that approach because he had told her he wanted click-by-click data. He answered, “That’s unfortunate.” She was thus extremely frustrated by what she felt were mixed signals from ODE that left her “guessing.” Tr., v. 2, pp. 383-85. As a result, she testified, ECOT had to pay many employees for overtime to run the numbers at the last minute to supply the “granular” data for the on-site review.

Brittney Pierson testified that on the morning of the on-site review ECOT received the “final” 20% of the names that were to be reviewed for ODE’s enrollment check. This resulted in her people scrambling through data to comply, and she felt it was unfair. She demanded to meet with Aaron Rausch before proceeding further, but he was not in town. She wrote him a letter that was emailed on July 24. *ECOT Ex. B-18*. He replied in kind on July 31. *ECOT Ex. B-19*. After reading Rausch’s letter she acknowledged that she better understood the nature of what ODE was seeking. Yet, she disagreed that ODE’s methodology was fair because it “constrained” students by their enrollment period. Following this exchange, ECOT prepared several spreadsheets that made various assumptions. *ECOT Ex. B-22*, a spreadsheet labeled 2A by ECOT, is “de-duplicated” and included off-line learning time as well as documented durational data, but it capped the FTE at 920 hours regardless of the actual length of a student’s enrollment. She testified that “if we had to pick one, 2A is the one we wanted to go with.” In contrast, spreadsheet 1A, *ECOT Ex. B-23*, is “constrained by the enrollment period of the individual student.” Tr., v. 2, p. 445.

When Brittany Pierson met with ODE personnel in August it became clear to her that ODE was comparing learning participation time, the so-called “durational data,” to the period of enrollment and not a full academic year. As a result, spreadsheets “3 and 4 came off the table.” Tr., v. 3., p. 467. At that time, ODE raised the issue of students who were reporting ten hours per day of “system time” for many days in a row. This was the result of long blocks of time that continued through midnight, sometimes for multiple days in a row, that was uninterrupted by any mouse-click or keystroke data. During those periods of time the student’s computer was idle, but opened to ECOT programing. ECOT counted it as durational data for the allowed maximum of hours per day. It did so day after day. Once this problem was identified, ECOT’s data warehouse developed coding logic to cut off the times at midnight. Doing so eliminated apparently idle computers from registering system time under ActivTrak software. After further adjustments and refinements, ECOT resubmitted spreadsheets 1A and 2A. *ECOT Ex. B-48*. Brittany Pierson testified that “we felt like 2A was the one they should be using, but because we wanted them to be able to add up everything the way that they hoped it would work, we provided a detailed 1A.” Tr., v.3, p. 478. The durational data captured on 1A “includes a cap at the actual enrollment period hours.” Tr., v.3, p. 479. As is reflected in *ECOT Ex. B-44*, Pierson provided spreadsheet 1A, and its revisions, to ODE with the reservation that it did not reflect the calculation of FTEs in a manner that ECOT felt should be used.

Pierson testified that ECOT subsequently created additional spreadsheets, including *ECOT Ex. B-54*. These spreadsheets were not presented to ODE until December 4, 2017, the first day of the informal hearing. The totals of various calculations are shown on page 599 of 603 of the exhibit. Column K is 82.49% which is the percentage of FTEs that ECOT calculated had been demonstrated based upon the yearly total of durational data, with crossovers and overlaps removed,

tied to the actual period of enrollment, with the long blocks of time adjusted³, and durational time capped at 10 hours per day. Column L of the exhibit reflects ECOT's calculation of total time for all students using the Jack Pierson spreadsheet, without de-duplicating overlapping data and without tying the FTEs to the period of enrollment. Column L has a ten hour per day cap on durational data. That result was 180% of the paid FTEs. Column O is ECOT's calculation of FTE based on filtered and de-duplicated data, capped at 920 hours per year, regardless of the actual enrollment period. That result was 99.2% of ECOT's reported and paid FTEs. Ultimately, Pierson testified that based on her review of the data, ECOT had demonstrated that it was entitled to at least 100% of the FTE payments that had been made during the 2016/2017 school year.

Brittney Pierson underwent a lengthy cross-examination. She agreed that ECOT was aware at the start of the 2016/2017 school year that ODE would conduct an FTE review, and that it would base the review on durational data. She testified that ECOT originally took the position that "durational time" begins when a student logs in for the day, and ends when he logs out, regardless of activity in the interim. She agreed that if a student logged in at 8 a.m., logged out at 11:00 a.m., logged back in at 6 p.m., and logged out at 9:00 p.m., ECOT counted that as durational time from 8:00 a.m. to 9:00 p.m., capped at ten hours per day. Tr., v. 3, pp. 545-546. After the on-site review in July, she testified that ECOT's filtering of durational data "changed dramatically." Tr. v.3, p. 554. The spreadsheets submitted in early August, *ECOT Ex. B-29*, were ECOT's "best accounting ... for actual participation capped at ten hours per day." Tr., v.3, p. 572. However, it was not until August 30 that ECOT updated the spreadsheets to address the "big blocks of time" problem.

³ According to the testimony of ECOT data warehouse manager, Michael Kubacki, in Column K the long blocks of time were adjusted by ECOT so that idle computer time that stretched over midnight could accumulate until either (1) there was a keystroke or mouse click in the new day, or (2) ten hours accumulated on the new day. Tr., v.3, pp. 728-730.

Pierson testified that *ECOT Ex. B-48* was the August 30 version of spreadsheet 1A, and that in it ECOT had “taken out the big blocks of data” by capping them at midnight. Using that version of ECOT’s 1A spreadsheet, ODE calculated that the allowable percentage of FTE was 81.5%. Prior to removal of the “big blocks of time” ECOT calculated the FTE percentage at 82.49%. Tr., v.3, pp. 590-592.

Superintendent Pierson also testified about additional time that ECOT had not previously counted including “504 and Related Time.” According to her testimony, the data totaled 267 hours as reflected in *ECOT Ex. D-1*. That 267 hours represents a tiny fraction of the total durational time of 13,058,057 hours. Tr., v.3, p. 601. She also identified time discovered through ECOT’s Collaborate software program that was not discovered or submitted until after ODE’s written findings were signed by Aaron Rausch in September.

Superintendent Pierson testified on cross-examination that her frustration with ODE’s area coordinator, Jack Pierson, grew because of what she felt were mixed signals about his spreadsheet tool and what she was told about ODE’s request for granular data. This confusion, that she placed at the feet of ODE and Jack Pierson, cost ECOT considerable time and money. Finally, by late July she had had enough. She emailed Aaron Rausch a letter on July 24 because she knew that Pierson “didn’t speak for the Department and Aaron Rausch,” so she wanted to get “the actual answer from the Department.” Tr., v. 3, p. 548. Once that happened, communication improved.

Regarding spreadsheet 1A taken from *ECOT Ex. B-48*, Pierson agreed that all the data used was accurate “according to the standards provided by Mr. Rausch.” Tr., v.3, pp. 619-20. But, she testified, ODE used “negative aspects” of the data in *B-48* to calculate ECOT’s FTE percentage. When asked to identify those “negative aspects,” she testified that *B-48* stopped all continuous

blocks of time at midnight. Other than that, her remaining objection to using *B-48* was that it capped each student's time by the period of enrollment. Tr., v.3, pp. 621-22.

Testimony of Michael Kubacki

Michael Kubacki has been employed by ECOT for five years as the manager of its data warehouse operation. In that capacity he oversees ECOT's electronic data collection and reporting functions. He testified that once his team completed the 2015/2016 FTE review they spent "most" of their time working with vendors to develop ways to capture durational data to satisfy ODE. He claims that this effort brought his team's education related services "to a halt." Tr., v.3., pp. 627-630.

Most of the testimony offered by Kubacki related to specific spreadsheets that he and his team had prepared in various iterations. He testified that *ECOT Ex. B-54*, that was prepared after the FTE review and not shown to ODE until the first day of the informal hearing on December 4, 2017, found an FTE percentage of 82.49% in Column K. That data has overlaps removed, days capped at ten hours, and FTEs capped by the period of student enrollment. Tr., v.3, p. 677.⁴ However, in Column O, the same data with the FTE capped at 920 hours rather than the period of enrollment, yielded an FTE percentage of 99.268%.

Kubacki testified that he inspected the submissions made by other eschools for their FTE review for the 2016/2017 school year, *ECOT Ex. C-1 through C-21*, and he concluded that "it

⁴ There is an inconsistency between the 82.49% in this calculation and the 81.5% that ODE calculated. That one percent amounts to about \$1 million. Brittny Pierson explained that 82.49%, reflected on p. 599 of 603 on *ECOT Ex. B-54* is the same as is shown on an earlier version of spreadsheet 1A in *ECOT Ex. B-43*. That spreadsheet still reflects "big blocks of time." Tr., v. 3, p. 593. This minor inconsistency was not explained any other way, and since ECOT never questioned Aaron Rausch's calculation of 81.5%, the Hearing Officer concludes that 81.5% represents the percentage of documented FTEs based on *ECOT Ex. B-48* with the long blocks of time removed after *ECOT Ex. B-43* was submitted, in the manner described by Michael Kubacki. Tr., v. 3, pp. 728-730.

looked like” they did not submit filtered data in the same manner as ECOT did. Tr., v. 3, p. 680, 687. He also testified about a software program called “Collaborate.” ECOT had started using a program called “ActivTrak” in the beginning of the 2016/2017 school year that captured and reported every keystroke and mouse movement in a student’s computer. The Collaborate software was intended to capture time spent viewing faculty presentations, but the vendor was not able to provide reliable data, and Kubacki found that “large amounts” of data from Collaborate were missing. After the FTE review was completed, and after ODE issued written findings, Kubacki found additional data from Collaborate that he used to assemble *ECOT Ex. B-54*. That data raised the FTE percentage in spreadsheet 1A to 82.67%, up from the on the earlier submission. Tr., v. 3, p. 696.

On cross-examination Kubacki was asked about scheduling the pre-review conference. He testified that in November 2016 he asked ECOT superintendent Rick Teeters about when it was going to be scheduled, and Teeters told him “we’ll just wait for them to contact us.” He had a similar conversation with Brittny Pierson. Tr. v. 3, p. 703. He also clarified how the long blocks of time were treated in *B-48*. His testimony was that his team developed coding logic in August that used ActivTrak to count all time in one block going through midnight, but stopping on the new day when that continuous time block reached ten hours in the new day, or there was a keystroke or mouse click, which ever occurred first. Tr. v.3, pp. 727-728. He confirmed that the data in spreadsheet 1A was filtered for duplication, capped at ten hours per day, and capped by the period of enrollment to calculate the FTE. Tr., v.3, pp. 727-731. In the final version, the long blocks of time were cutoff after ten hours in the new day, or on a keystroke or mouse click. Aaron Rausch testified that using that version of the 1A spreadsheet, ODE calculated the FTE percentage as 81.5%. Tr. v. 1, p. 201; *see*, n. 4, *supra*.

Exhibits

At the conclusion of the testimonial evidence the parties moved for the admission of exhibits. *ODE Exhibits 1-17*, including sub-parts, were admitted without objection. Similarly, ECOT moved most of its marked exhibits into evidence. *ECOT Exhibits A-3 through A-5, Exhibits B-1 through B-3, Exhibits B-6 through B-54, Exhibits C-1 through C-2, Exhibits C-4 through C-21, Exhibit D-1, Exhibit D-2, Exhibit D-4, Exhibit D-6, Exhibit D-7, and Exhibits E-4 through E-17* were admitted without objection. *ECOT Exhibits A-5, B-4, and B-5* were withdrawn.

IV. Analysis

A. Burden of Proof

In their post-hearing briefs, both sides devote a portion of their argument to the issue of who bears the burden of proof. In his comprehensive analysis of the application of R.C. 3314.08 last year, Hearing Officer Pratt concluded that ODE must present a *prima facie* case that the underlying determination was “reasonable” and “lawful.” In making that case, ODE enjoys a “presumption of regularity and lawfulness in [making] administrative determinations.” *In the Matter of: Electronic Classroom of Tomorrow’s Appeal of the 2015-2016 FTE Determination*, Hearing Officer’s Decision, May 10, 2017, pp. 69-74. He concluded that if ODE successfully presents such a case, the burden shifts to ECOT to rebut that ODE’s findings are reasonable and lawful. *Ibid.* Following the procedure that was established in the hearing following the 2015/2016 FTE finding, ODE presented its evidence first, and then ECOT presented evidence that was clearly intended to show that the findings were neither lawful nor reasonable. While the conclusions reached in the 2015/2016 decision regarding this legal issue are convincing, in this case, as is discussed below, the burden of proof is not a material issue. While there is some dispute regarding certain details about how the review was conducted, there is not any significant dispute as to the

factual basis underlying the determinative issues. Rather, this dispute centers on the application of the law to an essentially agreed upon presentation of ECOT's durational and enrollment data.

B. The Application of the Enrollment Period

Under the decision handed down by the Tenth District Court of Appeals in June 2017, it is settled that ODE is obligated to review durational data for eschools when making a review under R.C. 3314.08. The Court stated clearly "we agree with ODE that a plain reading of the statute compels the conclusion that although enrollment is a necessary predicate to funding, the amount of funding per student is dependent on a measure of student participation. Thus, we agree ... that ODE did not violate R.C. 3314.08(H)(3) when it requested and reviewed durational data of ECOT students." 2017-Ohio-5607, ¶ 25. The pivotal issue in this case boils down to whether the determination of an FTE is limited by the period of a student's enrollment, as ODE says it measured the FTEs here, or whether it is limited by a different measure, as argued by ECOT. The Court of Appeals said that "enrollment is a necessary predicate to funding." To put that language in context it is necessary to look at the statutory scheme in greater detail.

R.C. 3314.08 is a lengthy and often amended statute. Among other things, the statute establishes a system to distribute state funds to school districts and community schools. Paragraph (C) provides a mechanism to distribute state money to community schools based on the district of residence of the community school's students. Specifically, R.C. 3314.08(C)(1) states

(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;

The term “full-time equivalency basis” is not defined by statute. In the context of this section, however, the intention is to deduct and distribute the opportunity grant money, and other funds, to a community school based on the period of enrollment in the community school. In the case of a student who attends a district school for exactly one-half of the year, and then enrolls in a community school for the second half of the year, there does not appear to be any room to read this language as allowing distribution of more than one-half of an opportunity grant to the community school even if the student demonstrates more than one-half of the minimum hours of durational time participating in learning opportunities in the eschool. If, in this example, the community school could receive more than half of the grant, then the resident district would get half the grant, and the community school would get more than half of the same grant. Expressed numerically: $\frac{1}{2} + > \frac{1}{2} \neq 1$. That can not be a proper reading of the General Assembly’s intention.

This point is further clarified in the first portion of R.C. 3314.08(H). It provides that “[t]he department of education shall adjust the amounts subtracted and paid under division (C) of this section to reflect any enrollment of students in community school for less than the equivalent of a full school year.” Again, this language contemplates that the maximum payments to a community school is that fraction of a school year that the student was “enrolled” in the community school. The word “less” also suggests that the General Assembly never intended to allow a community school to receive opportunity grant funds equivalent to **more** than the period of enrollment.

Additionally, there is R.C. 3314.08(H)(3). It provides that “[t]he 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 ...is of the

total learning opportunities offered by the community school to a student who attends for the school's entire year." This language, while less clear, does express that the "percentage" of FTE is based on the "percentage of learning opportunities offered ... to a student who **attends**" for the entire year. (Emphasis added.) So, here too the percentage is tied to a student who attends for one year, and that is the outside limit. It is important to also be mindful that this section is addressing how to divvy up a single grant among more than one school.

Finally, there is the FTE Guidebook, *ECOT Ex. A-4*. While the Guidebook is not a promulgated rule, it does offer insight into how ODE interprets this section. An agency's interpretation of its empowering statutes is entitled to some degree of deference. *Lang v. Ohio Dept. of Job & Family Serv.*, 134 Ohio St. 3d 296, ¶12. The Guidebook has a "Topics/Issues" section that is akin to a glossary. Under the heading "FTE" it states:

That portion of a school year a student is educated, as determined by the number of hours of instruction provided to a student during a school year divided by its annual membership ... A student who enters at the beginning of a school year and is instructed for the community school's total annual membership units will generate an FTE of 1.0. Students who do not remain for the entire school year or who enter after the start of the year will have FTE's that reflect the total number of hours of instruction received during the time they were enrolled. No student will be funded for an FTE greater than 1.0.

ECOT Ex. A-4, p. 36. This language embodies a "one student, one FTE" reading of the funding statute that ODE applied to ECOT. Earlier in the Guidebook, there is an example of how to evaluate the FTE for a student in an "Internet or Computer-Based Community School." It states "[i]f student A was enrolled at the eschool for the entire calendar year and has 780 hours of verified

learning opportunities, then the FTE should be 0.85 FTE (780 hours divided by 920 hours of possible learning opportunities=0.85).” *Id.*, p. 17.⁵

With this statutory scheme in mind, the word “predicate” used by the Tenth District Court of Appeals is more meaningful. Throughout these proceedings, ODE has argued that one student can generate no more than one opportunity grant.⁶ This principle is a bulwark of its analytical framework. In contrast, ECOT argues that its funding is not tied to the period of enrollment. In part, it argues that if durational data about each student’s participation in learning opportunities is a limit to funding, then it ought to be available to expand funding as well. Thus, ECOT argues, if a student is enrolled for a full year with 920 hours of instruction, but can demonstrate that he participated in 1840 hours of learning opportunities then he should be counted as two FTEs. ECOT argues that this hypothetical 1840-hour student theoretically represents two years of achievement,⁷ and ECOT should be compensated for providing those two years of education. Outside the context of the statutory scheme, this argument might have some traction, but given the limits of R.C. 3314.08(C), ECOT’s argument derails. The state funding sources for all public schools are the sources listed in R.C. 3314.08(C). From that single unit, the resident district has monies deducted from its funding and paid to a community school based on a full-time equivalency “for each student

⁵ Moreover, the Guidebook specifically advises eschools that they “should estimate the student’s percent of time upon enrollment, and document and follow a procedure to update the student’s percent of time element periodically based on documented hours in comparison with hours needed at that point of the year to be on track for full-time status.” *Id.*, p. 18. ECOT ignored this admonition, and carried each of its students at 100% in the “percent of time” column of EMIS for the entire school year. In doing so, ECOT maximized the monthly payouts from ODE and put off the day of reckoning that would come in the final FTE review.

⁶ While the opportunity grant is not the sole source of funding for community schools under R.C. 3314.08(C), it represents the largest source of funding. Accordingly, to avoid having to repeatedly reference each separate funding source in division (C), the opportunity grant is used as a marker for all state funding to community schools.

⁷ There is no corresponding evidence that this is true.

enrolled.” R.C. 3314.08(C)(1). Under R.C. 3314.08(H), the department “shall adjust” the amounts paid under (C) “to reflect any enrollment in community schools for less than the equivalent of a full year.” ECOT’s reading of R.C. 3314.08(H)(3) requires that it be untethered from the rest of the statute. That was not what the General Assembly intended. The total of all payments made to a community school for each student are deducted from the resident district’s share of the sources listed in R.C. 3314.08(C). The community school receives a fraction of that amount based on the student’s enrollment. That fraction can never be greater than one because there is only one grant to divvy up.

When the enrollment period for each student is viewed as the basis to divide that student’s one and only unit of state funding as defined in R.C. 3314.08(C), the meaning of “predicate” in the Tenth District’s decision is illuminated. That is, in the context of an eschool, the period of enrollment, which forms the limit on the funding available to that school for each of its students, dictates the maximum fund available for each student. If the student’s period of enrollment in the eschool is one-half of a school year, then the maximum fund available for that student is equivalent to one-half of the R.C. 3314.08(C) funding that he would generate for his resident district. That is the base source of the money to reimburse a community school for its students, and it is statutorily limited to one per student. Each student’s maximum potential FTE amount, based on the period of his enrollment, is the “predicate” that is then adjusted depending upon how many of the available number of enrollment based hours the student has filled with learning opportunities. Under no circumstances can the reimbursement for learning opportunity hours ever exceed the number of hours in one full year’s potential FTE amount. That is because the amount of community

school funding for any single student is capped by the amount defined in R.C. 3314.08(C). There is no other source of funds.

Accordingly, based on the foregoing, ODE's interpretation of how to apply the enrollment period to determine an FTE is correct. It is therefore "reasonable and lawful." In contrast, ECOT's interpretation of how the enrollment should be applied does not comport with the language of R.C. 3314.08(C) because it allows for a single student to generate more than a single year's worth of funding. By severing the calculation of the available funds for each student from the resident district's allotment under R.C. 3314.08(C), ECOT's interpretation would allow each student to generate more than the annual amount payable to a community school under that provision. Therefore, the maximum allowable amount that an ECOT student may generate for the school is that amount which is deducted from the allotment to his resident district under R.C. 3318.14(C), determined by and limited to his period of enrollment in ECOT.

C. Application of the Durational Data

A clear holding of the Court of Appeals decision is that in calculating the FTE under R.C. 3314.08, "the duration of a student's participation is essential to determining whether a student has been 'offered,' or supplied with learning opportunities." *Electronic Classroom of Tomorrow*, 2017-Ohio-5607, ¶23. In addition, the Court found that "a plain reading of the statute compels the conclusion that although enrollment is a necessary predicate to funding, the amount of funding per student is dependent on a measure of student participation." *Id.*, ¶ 25. So, having determined that the appropriate measure of the "predicate" to apply to R.C. 3314.08(H) is the period of enrollment,

the next step is to examine the durational data to determine how many hours each of ECOT's students spent in "participation" in "learning opportunities."

The evidence adduced during the hearing revealed that over a period of several months ODE sought to obtain this information from ECOT, and that there was an ongoing effort to refine the durational data. At first, ODE provided a spreadsheet template, dubbed the "Pierson Tool." *ODE Ex. 5-1*. It was pre-populated with the identities of ECOT's students, and ECOT was instructed that it "could" use the template, but that it "is up to the school." *ODE Ex. 5*. The template was discussed at the May 11, 2017, "pre-review" meeting. The evidence is in conflict about what promises were made at that meeting, but it seems clear that by the time the parties met in July for their formal on-site review they disagreed about many matters.

The on-site review did not go well. Because she felt that ODE's Area Coordinator, Jack Pierson, was sending her school conflicting instructions, on July 24, 2017, ECOT Deputy Superintendent Brittny Pierson demanded in writing to meet with Aaron Rausch. *ECOT Ex. B-18*. Rausch responded on July 31, 2017, with a letter that laid out the problems with the durational data that ECOT had presented. *ECOT Ex. B-19*. Over the following weeks ECOT's data was refined several times. The refinements were presented in the form of spreadsheets, notably 1A and 2A, that calculated FTEs using various "predicates" to support differing percentages of FTEs. *See, e.g., ECOT Ex. B-21, B-22, B-24, B-25, B-27*. On August 30, 2017, ECOT submitted a revised 1A spreadsheet that had removed all the overlapping time, had adjusted the long blocks of continuous time to cease no more than ten hours after midnight, and had capped all time at ten hours per day per student. Although ECOT continued to present this durational data in alternative

predicates for calculating ECOT's FTEs, one of the calculations was a calculation that ECOT described as being "constrained" by the period of enrollment. *ECOT Ex. B-48*.

ECOT characterizes the prolonged period of data exchange between it and ODE (and it appears that it took place primarily over a six-week period from mid-July to the end of August), as a conspiracy to extract the highest possible finding. *Tr.*, v. 3, p. 621. ODE, on the other hand, views the period between the on-site review and August 30 as a "collaboration." It accuses ECOT of "an all-too-frequent pattern of willfully 'misunderstanding' what ODE was requesting, to avoid providing the appropriate information." *ODE Reply Brief*, p. 19-20. The evidence presented does not allow the Hearing Officer, as the fact-finder, to look into the hearts and minds of these parties. There was a period of growing and mutual frustration between them. Nevertheless, as Brittany Pierson testified, after she received Aaron Rausch's July 31, 2017 letter, *ECOT Ex. B-19*, she was better able to understand what ODE wanted. Motivations aside, there was a period of poor communication and frustration followed by a period of greater cooperation during which ECOT continued to refine its durational data until ODE was sufficiently satisfied to make its ultimate FTE calculation.

Due to the sheer size of the school and the volume of durational data that its students produce, providing durational information to ODE was a daunting task for ECOT. Simply because compiling the data required by the statute is difficult and time-consuming, however, does not obviate ECOT's obligation to provide accurate information. The General Assembly has clearly placed the burden on schools like ECOT to maintain accurate records of its student's participation in learning opportunities. R.C. 3314.27 provides, in pertinent part, as follows:

Each internet- or computer-based community school shall keep an accurate record of each individual student's participation in learning opportunities each day. The record shall be kept in such a manner that the information contained within it easily can be submitted to the department of education, upon request by the department or the auditor of state.

The statute specifically requires eschools to keep “accurate” records. The durational data that ECOT provided initially included overlapping (double counting for the same time slots) and was not capped at the statutory maximum of ten hours per day. It included, *inter alia*, an individual student who claimed participation in learning opportunities for 9000 hours for the year (there are 8,760 total hours in a year). It included time-borrowing where hours of one student with many hours were spread over to students with less hours. A dictionary definition of “accurate” is “free from error.” *Merriam-Webster.com*. Under that definition, the records that ECOT presented were not accurate, and they were not kept in a manner that was readily accessible by the department. But, after a period of prolonged communication between ODE and ECOT, and with the determined effort of ECOT’s data warehouse staff, ECOT produced a record that was “accurate.” That record, spreadsheet 1A, dated August 30, 2017, was the record that ODE used to calculate the findings.

Using the records of accurately documented hours of student participation in learning opportunities, provided to it by ECOT in *ECOT Ex. B-48*, and using the period of the student’s enrollment, also provided to it by ECOT in *ECOT Ex. B-48*, ODE calculated the “percentage of full-time equivalency based on the percentage of learning opportunities offered ... to a student who attends for the school’s entire year.” That is what R.C. 3314.08(H)(3) requires. That is what ODE did. The process is spelled out in *ODE Ex. 6*. ECOT reported 14,197.64 FTE using an incorrect “predicate,” and duplicative durational data. Once the proper “predicate” was used—the student’s period of enrollment at ECOT—and that was compared to the properly filtered durational

data found in *ECOT Ex. B-48*, ODE calculated that ECOT had 11,574.98 FTE. *ODE Ex. 6*. That exhibit states that the “final determination was based on the records provided by ECOT to the Department that documented durational participation time for internet- and/or computer-based learning opportunities as well as non-classroom, non-computer-based learning opportunities.”

D. ECOT’s Arguments

In its Post-Hearing Brief, ECOT advances several legal and factual arguments to support its position that ODE’s finding is irrational, unfair, and not lawful. These arguments can be reduced to five separate points of contention. First, ECOT contends that ODE’s review was not based on a clearly defined standard of how to measure durational time. Second, that ODE has unreasonably and unlawfully predicated the calculation of the FTE on the period of enrollment rather than a different standard. Third, that ODE did not conduct the review in a fair manner because it changed the basis of its review, and subjected ECOT to reporting standards that it did not apply to other similar community schools. Fourth, that ODE failed to schedule a pre-review conference in November 2016 thereby causing ECOT to miss the opportunity to capture relevant data. Fifth, ECOT seeks to expand its durational data with hours from “504 and related services,” and from its Collaborate software program, that were not submitted until after the review was completed and ODE had returned its written findings. Each of these points is addressed below.

1. ODE has no articulated standard for review of durational data

ECOT persistently argued that ODE has never adopted rules to define an acceptable method by which an eschool may document durational data for its students. ECOT cites the lack of written rules to support its contention that it was subjected to “ever-changing expectations” as

to what it needed to produce, and in what format. The evidence does not support this argument. To begin with, R.C. 3314.27, as amended effective February 2016, imposes a statutory duty upon ECOT that it “shall keep an accurate record of each individual student's participation in learning opportunities each day. The record shall be kept in such a manner that the information contained within it easily can be submitted to the department of education, upon request by the department.”

What ECOT describes as an “ever changing expectation,” was a persistent effort by ODE to verify the accuracy of the data that ECOT was submitting. This was true regarding the summary data as well as the granular data. For example, the initial attempt to produce durational log in and log out data for specific students was rejected by ODE because it was based on a first log in of the day and last log out of the day basis. That was unacceptable because it ignored what happened in between. *ECOT Ex. B-9*, Tr., v. 3, pp. 705-707. That data was not “accurate.” Likewise, data provided in July and August counted overlapping time for some students, had instances where students were credited for more than ten hours per day, had credits for long blocks of obvious idle time, and even included durational time-borrowing among students. Tr., v.3, pp. 709-714.

ECOT’s data warehouse manager, Michael Kubacki, agreed that the final spreadsheet that ODE ultimately used to make its final calculation of FTEs, was de-duplicated, had eliminated time borrowing, was capped at ten hours per student per day, and had eliminated the “long blocks” of idle time. It also included “system time” from the ActivTrak software, self-reported non-system time that was verified by the faculty, and non-duplicated time from ECOT’s Collaborate software. While ECOT ultimately used a different format than the Excel spreadsheet that was provided to the school by Jack Pierson in May 2017, *ECOT Ex. B-5*, that does not mean that the standard of what constitutes an “accurate” record could not be discerned from the start of the 2016/2017 school

year. Moreover, the FTE Review Handbook, *ECOT Ex. A-4*, elaborated upon what ODE required. For example, in the section titled “eSchool Review FTE Procedures,” the Guidebook describes the records that an eschool should maintain to include “the total amount of documented time a student participated in online learning opportunities that occurred within and were tracked by the schools [sic] online learning system.”

The variations in summary data that ECOT was able to recognize and report were apparent in spreadsheets 1A and 2A that ECOT produced. Superintendent Pierson testified that while spreadsheet 1A was fully de-duplicated, overlaps within and between “system” time and “self-reported” times remained in spreadsheet 2A (ECOT’s preferred spreadsheet). Tr. v. 3, p. 539. In spreadsheet 1A they were removed by Kubacki’s data warehouse team. ECOT was apparently able, at least by August, to remove overlapping times in records it was required by statute to maintain in an “accurate” fashion. So, to say that the ODE’s persistent demands to ECOT that it filter its durational data to promote accuracy, and this persistence on ODE’s part represents the lack of standards, seems disingenuous. In the final analysis, the “standard” that ODE was applying was accuracy, and accuracy is the standard that the statute required.

2. ODE used the incorrect predicate to calculate FTE

ECOT devotes a considerable portion of its argument to the point that ODE predicated the FTE calculation on the period of enrollment rather than a different standard. Most notably, ECOT argues that it should receive funding for one full FTE per student so long as that student demonstrably completes 920 hours of durational time regardless of how long the student is enrolled at ECOT. The crux of the argument is as follows: “ODE’s proffered approach *deprives* eschools

of funding to the extent they cannot prove actual participation time equal to a student's enrollment-period hours, but affords eschools with no corresponding payment to the extent they *actually provide* students with *more* learning opportunity hours then would be calculated under an enrollment methodology." *ECOT Post-Hearing Brief*, p. 9. While ECOT may feel deprived, the funding for eschools is created by statute and is limited to one funding unit per student. As set forth above, R.C. 3314.08(C) creates a system where the funding for community schools is derived from the funds that would otherwise be paid to the resident district. There is no provision for either the community school or the resident district to receive more than one year's worth of funding based on the student's achievement. So, just as the resident district does not get additional funds for students who skip a grade, or who do work for "extra credit," or who go to the library and read "outside" books to supplement their course work, a community eschool does not get additional funds because some of its students spend extra time reading source materials on their computers or re-watching classroom presentations. The statute makes it clear—one year's worth of funds per student.

3. ODE treated ECOT differently than other eschools

ECOT argues that it was treated differently than other eschools regarding the production of durational data, and that this "disparate" treatment was unfair. The basis of this assertion is the testimony of ECOT's data warehouse manager, Michael Kubacki, that he looked at the submissions made by several other eschools that ODE produced pursuant to a public record request, and he "did not see any evidence" that those schools filtered their durational data in the manner that ECOT did in spreadsheet 1A. He went on to testify that the process of doing that

using just “ActivTrak” is “insanely complicated.” Tr., v.3, 686.⁸ This assessment has some weight, but the figures on spreadsheet 1A do not appear to be filtered, yet Kubacki testified that they were. It seems that just looking at a spreadsheet does not give much of an indication of the accuracy of the data displayed. Moreover, Aaron Rausch testified that of the eleven schools that were reviewed in 2015/2016, all but three had to “make some adjustments” in order to substantiate their durational data. Tr., v.1, pp. 248-251. Of the eighteen schools reviewed by ODE for 2016/2017, eight had been reviewed the previous year, so they had reason to be aware of the expected level of compliance. Of the remaining ten, most were significantly smaller than ECOT ranging from Mahoning Unlimited with 65 FTE, *ECOT Ex. C-10*, to Ohio Connection Academy with 3,368 FTE, *ECOT Ex. C-15*.

Even if it were to be assumed, *arguendo*, that the evidence was sufficient to support the contention that these other schools were treated differently, and those schools were not asked to filter their data to the extent that ECOT was, that would not excuse ECOT from compliance with the statute. Under R.C. 3314.27, ECOT is obligated to “keep an accurate record of each individual student's participation in learning opportunities each day. The record shall be kept in such a manner that the information contained within it easily can be submitted to the department of education, upon request by the department.” That is the standard that ODE applied to ECOT. It demanded that ECOT provide accurate records. Even if ODE failed to do so with respect to other schools, and that was never proven, it would not prevent ODE from enforcing R.C. 3314.27. While the doctrine of estoppel is not strictly applicable here for several reasons, the time-honored principle

⁸ It is noteworthy that the example singled out by Kubacki, Findlay Digital Academy, *ECOT Ex. C-6*, shows that the FTE predicate is “capped at 1.” So, for the student on the bottom line of spreadsheet p. 000003, the school reported 1267.53 hours or 1.38 times the expected 920 hours. However, the second to last column from the right is headed “capped at 1” and the “FTE Detail” percentage in the last column is 100.

that estoppel does not apply to the state in the performance of its governmental enforcement powers, aptly fits here. *Ohio State Bd. of Pharm. v. Frantz*, 51 Ohio St. 3d 143 (1990). ODE's alleged failure to fully apply the law in one case would not prevent it from applying it in the next case.

4. The failure to schedule a pre-review conference

ECOT contends that ODE failed to schedule a meeting in the fall of 2016, as it argues was required by the 2017 FTE Handbook, *ODE Ex. 2*. ECOT claims that “as a result ... ECOT was left with no specific instructions or guidance from ODE as to how the 2017 FTE review would be conducted, what types of data would be accepted, and/or how such data should be collected and reported to ODE.” *ECOT's Post Hearing Brief*, p. 14. The Guidebook provides:

Area coordinators must schedule meetings with eschools and schools with authorized blended learning models at the beginning of the school year (September to November) to learn about the school's learning opportunity documentation methods and educational delivery system. Area coordinators need to know about the system and its capabilities/limitations prior to the review. This meeting is in addition to other meetings to discuss the FTE Review process and manual.

There is no dispute that this meeting did not happen in the period between September to November 2016. Attempts were made to schedule the meeting in March and April of 2017 that were cancelled by ECOT. It finally took place on May 11, 2017.

ODE explains the failure to schedule the meeting in 2016 by arguing that it already knew about ECOT's documentation practices by virtue of the 2015/2016 review and the ensuing litigation. It argues that the Guidebook is not a “rule.” It also argues that ECOT could have demanded a meeting, yet did not. The Franklin County Court of Appeals held, specifically, that

the Guidebook is not a “rule.” 2017-Ohio-5607, ¶ 30. Yet, the Guidebook’s language appears to create the expectation that the ODE area coordinator will schedule a pre-review meeting. The area coordinator in this case, Jack Pierson, did not testify. As a result, the Hearing Officer is left to speculate as to why the meeting was not scheduled until March. Given that the Guidebook instructs the area coordinator that he “must schedule” the meeting in September to November, it is reasonable to conclude ODE intended that a meeting should have been offered to ECOT. It is also apparent from the language used that the intention of the meeting is to assist the area coordinator, not the school. Moreover, just because ODE intended that the area coordinator should offer to hold a pre-review meeting with the school does not establish that the offer would have resulted in a meeting, or that a meeting held in November would have changed anything that happened.

The evidence shows that ECOT’s methods and practices were well known to ODE by virtue of the six-day trial that took place in September 2016. Moreover, ODE’s 2015/2016 review started in March 2016, and continued into July. So, there is validity to ODE’s contention that it did not need to meet with ECOT to learn about its methodology. However, it is also true the protracted litigation between the parties evolved from ECOT’s position that it did not provide durational data because it did not have it and that it had never been requested before. *Electronic Classroom of Tomorrow*, Franklin County Court of Common Pleas, Case No. 16CVH07-6402, *Final Decision*, p. 5. Thus, it would not appear that the litigation in 2016 yielded much in the way of information about the method and manner that ECOT used to account for durational data. The evidence did establish that when ODE scheduled meetings on March 14, and April 5, 2017, ECOT cancelled them. *ODE Ex. 3, 4*. On March 30, 2017, area coordinator Jack Pierson sent ECOT a

list of materials that would be needed at the “orientation” meeting. *ODE Ex. 4-1*. And, according to the testimony of Michael Kubacki, in November 2016 he brought to the attention of ECOT’s superintendent, Rick Teeters, and its Deputy Superintendent, Brittny Pierson, that the ODE Guidebook stated that there was supposed to be a meeting in November. He was rebuffed by ECOT’s leadership and told that it was up to ODE to schedule the meeting. *Tr.*, v. 3, pp. 702-705. So, while the meeting was delayed to a date five months after the date that the Guidebook says it should have been scheduled, it is not at all clear from the evidence that if an offer had been made in November that it would have been held significantly sooner.

When the meeting was held on May 11, 2017, it was focused on the nuts and bolts of reporting methodology. At the meeting, ODE informed ECOT that the method it was using to calculate the percent of time value was erroneous. In addition, there was a discussion about the need for “granular” data about each student’s system time. According to Rausch, he was promised that ECOT would recalculate the percentage of time to conform to ODE’s instructions. Brittny Pierson disputes that this was “promised.” Regardless of whether that was promised, by the time of the on-site review in July it is fair to say that the percentage of time was not recalculated in a manner that ODE could accept. Moreover, the durational data that was provided was problematic for ODE in a variety of ways. Given that outcome, it is hard to see how moving the “orientation” meeting up to November would have changed anything, primarily because the data that ODE used to make its final FTE calculation came from ECOT’s spreadsheet 1A, delivered in August. To the extent that ECOT seeks to invalidate ODE’s findings based on the failure to hold the orientation meeting in November, it was incumbent upon ECOT to demonstrate that holding the meeting earlier would have made a difference. ECOT failed to do so.

And even if it were assumed, *arguendo*, that ECOT had shown by the evidence that an earlier orientation meeting would have streamlined the review process, the fact remains that the findings in this case were ultimately the product of applying figures that ECOT itself produced. Keeping accurate records of the time spent in “participation in learning opportunities each day,” is a duty imposed by statute. R.C. 3314.27. This was ECOT’s obligation before the 2016/2017 school year started, and, based on the litigation between the parties, ECOT knew that durational data would be requested. In fact, according to Kubacki ECOT’s data warehouse team spent a great deal of their time at the start of the 2016/2017 school year communicating with their vendors to be able to assemble durational data that would satisfy ODE. Tr., v.3, p. 627. In the final analysis, ECOT knew what ODE wanted to see. Its problem seemed to be that it was difficult to assemble it in a way that did not include errors and inaccuracies. When, through a collaborative effort with ODE, ECOT was able to produce a spreadsheet that was free of those problems, ODE accepted it and used it to calculate the FTE. The fundamental bone of contention in this dispute has been that ECOT disagrees with how ODE predicates the FTE based on the period of enrollment. That dispute would not have been cured, or even affected by, an orientation meeting in November as opposed to April. Simply put, ECOT failed to show that if ODE had offered a “timely” orientation meeting that it would have made any difference in the outcome or findings.

5. ECOT should be credited for 504 and related services, and Collaborate data

ECOT argues that it should be credited with additional durational time that was not counted by ODE. These hours represent two different categories of time. The first is time for “504 and Related Services.” According to *ECOT Ex. D-1*, this time totals 267 hours. As Superintendent Pierson acknowledged on cross-examination, those 267 hours are dwarfed by the 13,058,056 hours

of durational time that ODE had allowed. Tr., v. 3, p. 601. Moreover, there was no evidence that these hours do not overlap with self-reported time, or that the students involved had not already achieved their full FTE potential time for the year. Finally, the data were not presented to ODE until after the September 26, 2017, finding letter was issued. The second category of data is from Collaborate software that ECOT used in conjunction with ActivTrak to log “system time.” According to *ECOT Ex. D-1*, Collaborate “added 654,082 records totaling 870,476.42 hours before removing any overlaps.” According to Michael Kubacki, the Collaborate software “notoriously had problems.” Tr., v. 3, pp. 688-689. He added that there was “nothing to validate it against, we’re just at the whim of hoping that they have sent us a full data set.” *Id.* He testified that somehow Collaborate “found” “large amounts” of missing data in October 2017. And when he plugged it into spreadsheet 1A it raised the percentage to 82.67%. Tr., v. 3, pp. 690-693. ODE was not presented with this data until December 2017, and ODE never reviewed it for accuracy. ECOT admits that the overlaps have not been removed. Given the admitted unreliability of Collaborate software, and ECOT’s acknowledgement that the data contains overlaps, the evidence does not support ECOT’s contention that it should be credited. Moreover, the fact that ECOT did not “find” it until at least one month after ODE had completed its review also leads to the conclusion that it should not be counted. At some point, the “review” phase of R.C. 3318.14 must come to an end. This data is both unconvincing and late. The Board should disregard it.

V. Findings of Fact and Conclusions of Law

Having heard the testimony of the witnesses and the oral and written arguments of counsel, and having examined the exhibits admitted into evidence, the Hearing Officer makes the following findings of fact and conclusions of law. To the extent that any findings of fact constitute

conclusions of law, they are offered as such. To the extent that any conclusions of law constitute findings of fact, they are so offered.

A. Findings of Fact

1. The Electronic Classroom of Tomorrow (“ECOT”) is a community school operated as an electronic or eschool. Its instruction is provided to its students primarily through computer-based learning opportunities that its students can access on demand. The number of students is variable as student enroll, withdraw, and, in some cases, re-enroll over the course of the school year.
2. Funding for ECOT is provided by the State of Ohio through deductions made to funds otherwise payable to the resident district of ECOT’s students. These funds include a variety of items set forth in R.C. 3314.08(C), primarily the opportunity grant formula amount.
3. Over the course of the year, ECOT and other community schools provide data to the Ohio Department of Education (“ODE”) that it uses to calculate a monthly payment. Under the funding statute, R.C. 3314.08, ODE can require a community school to submit to a review of its records to verify that the monthly payments made over the course of the school year are supported by the school’s records.
4. In 2015 ODE put ECOT on notice that it would be subject to review for the 2015/2016 school year. During the 2015/2016 school year ECOT became aware that ODE would be seeking data regarding each student’s actual participation in learning opportunities offered by the school. ECOT resisted ODE’s efforts to gather that data since it had never been required to provide it in the past. Ultimately,

ECOT informed ODE that it did not maintain this durational data, and shortly thereafter litigation ensued. ECOT sought a preliminary injunction against ODE in the Franklin County Court of Common Pleas. *Electronic Classroom of Tomorrow v. Ohio Dept. of Ed.*, Case No. 16-CVH07-6402. A multi-day hearing was held in the Court of Common Pleas, and that resulted in a ruling in favor of ODE and denial of an injunction. ECOT appealed that decision to the Tenth District Court of Appeals, which affirmed the trial court's ruling. *Electronic Classroom of Tomorrow v. Ohio Dept. of Ed.*, 2017-Ohio-5607. That decision has been appealed to the Ohio Supreme Court. The Supreme Court accepted the case as a discretionary appeal, and the case has been briefed and scheduled for oral argument in February 2018. *Electronic Classroom of Tomorrow v. Ohio Dept. of Ed.*, Ohio Sup. Ct. Case No. 2017-913.

5. Following the ruling of the Franklin County Court of Common Pleas in December 2016, ECOT's informal hearing on the ODE review of the 2015/2016 school year proceeded before a hearing officer. A decision was rendered on May 10, 2017. For the most part, the hearing officer upheld ODE's findings against ECOT. ECOT attempted to appeal that decision, but the appeal was dismissed by the Court of Common Pleas. ECOT has appealed that dismissal to the Franklin County Court of Appeals where it is pending. *Electronic Classroom of Tomorrow v. Ohio Dept. of Edn.*, Tenth Dist. Case No. 17AP-767.
6. Prior to the start of the 2016/2017 school year, based on ODE's requests for durational data as part of the 2015/2016 review, ECOT started to press its vendors for ways to capture durational data about student access of its electronic learning

opportunities. That effort continued through the school year and has absorbed most of the time of ECOT's five-member data warehouse team.

7. On September 26, 2016, ODE notified ECOT, in writing, that it would be reviewed again for the 2016/2017 school year.
8. ODE's Office of School Finance issued its *FY17 FTE Review Manual* on August 31, 2016. *ECOT Ex. A-4*. Under the heading "Contacting Schools that will receive a FTE Review," the Manual provides that "Area coordinators must schedule meetings with eSchools ... at the beginning of the school year (September to November) to learn about the school's learning opportunity documentation methods and educational delivery system. Area coordinators need to know about the system and its capabilities/limitations prior to the review. This meeting is in addition to other meetings to discuss the FTE Review process and manual."
9. The area coordinator assigned to the 2016/2017 ECOT FTE review was John Pierson. Mr. Pierson did not offer to schedule a meeting with ECOT until late February 2017. The meeting did not take place until May 11, 2017..
10. While ECOT contends that the failure to offer to schedule the meeting sooner should invalidate ODE's findings, ECOT failed to prove that making an offer to meet earlier would have altered the outcome or modified the findings that ODE ultimately made.
11. At the meeting in May it was agreed that the on-site review would take place in July. In the period leading up to the on-site review date ECOT continued to provide information to ODE through Mr. Pierson and Aaron Rausch, Director of the Office

of Budget and School Funding. ODE continued to express concerns about the accuracy of ECOT's durational data.

12. The on-site review took place as scheduled, but ECOT's deputy superintendent, Brittny Pierson, felt she could not rely on information from John Pierson. She demanded to meet with Aaron Rausch.

13. During July and August ODE found inaccuracies in ECOT's durational data submissions, specifically overlapping time, long blocks of apparent idle time, and time claimed beyond the ten hours per day statutory limit. ODE continued to demand that ECOT correct and resubmit accurate durational data.

14. ECOT and ODE fundamentally disagreed over the appropriate basis to measure an FTE in order to apply each student's participation in learning opportunities. Because of that fundamental disagreement, ECOT submitted several spreadsheets to ODE in which its data was presented alternatively. One of those spreadsheets was used by ODE to calculate ECOT's final FTE for 2016/2017.

15. Using the data contained in spreadsheet 1A, as set forth in *ECOT Ex. B-48*, ODE calculated ECOT's final FTE as 11,575.47. During the school year ECOT had been paid for 14,203.03 FTE. Accordingly, ODE determined that ECOT had been paid 18.5% more than it should have been paid. *ODE Ex. 6*. ECOT's state funding for the 2016/2017 school year was \$104,302,474.05. *ODE Ex. 1*. 18.5% of the state funds paid to ECOT is \$19,295,957.70.

B. Conclusions of Law

1. The Ohio State Board of Education has jurisdiction in this matter. The Board and ODE have complied with all procedural requirements of R.C. 3314.08, and all applicable rules.
2. ECOT is a community school subject to the provisions of R.C. Chapter 3314. It operates an “Internet- or computer-based school” as defined in R.C. 3314.02(A)(7). For ease of reference it is referred to as an “eschool.”
3. ECOT is part of the public-school system. R.C. 3314.01(B).
4. The funding mechanism for community schools is set forth in R.C. 3314.08. R.C. 3314.08(H)(3) provides that the “department [of education] shall determine each community school’s percentage of full-time equivalency based on the percentage of learning opportunities offered by the community school to that student ... is of the total learning opportunities offered by the community school to a student who attends for the school’s entire year.”
5. In *Electronic Classroom of Tomorrow v. Ohio Dept. of Ed.*, 2017-Ohio-5607, the Tenth District Court of Appeals held that to receive an FTE unit of funding under R.C. 3314.08, eschools, like ECOT, must produce “durational data” showing that its students participated in specific learning opportunities for the number of hours corresponding to “the total number of hours in the school’s academic year.” The Court went on to state that “we agree with ODE that a plain reading of the statute compels the conclusion that although enrollment is a necessary predicate to funding, the amount of funding per student is dependent on a measure of student participation.” 2017-Ohio-5607, ¶25.

6. Under R.C. 3314.27, amended effective February 1, 2016, “[e]ach internet- or computer-based community school shall keep an accurate record of each individual student’s participation in learning opportunities each day. The record shall be kept in such a manner that the information contained within it easily can be submitted to the department of education, upon request by the department or the auditor of state.” This duty to keep accurate records applied to ECOT during the 2016/2017 school year.
7. Pursuant to R.C. 3314.08(K), ODE is authorized to review the enrollment records of a community school to determine if money is owed to the state for FTE funds advanced under R.C. 3314.08(C) and (H).
8. Under R.C. 3314.08(K)(1) ODE shall issue a written notice of its findings regarding its review of the FTE payments made to a community school. “If the review results in a finding that the community school owes money to the state,” the school may, within ten days, request an “informal hearing.” Within “fifteen days of the conclusion of the hearing” the board’s designee “shall issue a decision.”
9. In this case, ODE determined that ECOT had been over paid by approximately \$19.2 million. ECOT submitted a timely appeal. An informal hearing was held in accordance with the statute. The hearing was concluded on January 5, 2018. This decision is rendered within fifteen days of January 5, 2018, and is timely under R.C. 3314.08(K)(2)(b).
10. During the informal hearing held in accordance with R.C. 3314.08(K), ECOT contended that the calculation of an FTE using durational data should not be limited by the student’s period of enrollment. By not limiting the FTE calculation to the

student's period of enrollment many of its students could, and did, accumulate more than 1.0 FTE per year per student.

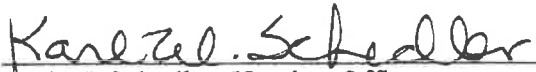
11. ODE interprets the funding statute differently, concluding that the basis for each FTE is the individual student's period of enrollment in the community school. Using the period of enrollment as its basis, ODE reviewed ECOT's durational data to calculate ECOT's final FTE for the 2016/2017 school year.
12. This Hearing Officer concludes that ODE's reading of R.C. 3314.08 is correct, and that the method used by ODE to calculate ECOT's final FTE, based on and limited to, each student's period of enrollment in ECOT, is lawful and reasonable.
13. Under R.C. 3314.08, an eschool's funding is based upon an FTE that is derived by first determining the student's period of enrollment, and then applying his durational data to determine if there are documented learning opportunities in which he participated to fill the period of his enrollment.
14. If the student is enrolled in an eschool for less than a full school year, then the student's FTE potential is reduced proportionately. The FTE payable to the resident district, if any, and the FTE payable to an eschool, based on documented participation in learning opportunities, can never exceed one FTE per year.
15. Once the potential FTE has been determined, the durational data is examined and the final FTE results from comparing actual participation in learning opportunities to the FTE potential. By way of example, if a student is enrolled in an eschool for one-half of the school year his FTE potential is .50 FTE. If the school year is 920 hours, he has an FTE potential for 460 hours of learning opportunities because that is his enrollment period (920 hours x .50 = 460 hours). If the student completes

460 hours of learning opportunities, and the school documents that he did, the student has reached his potential FTE, and the school is awarded the .50 FTE on his behalf. If the student only completes 230 hours of learning opportunities, he has reached one-half of his potential FTE and the school is awarded .25 FTE (.50 x .50 = .25). But, even if the student completes a full 920 hours of learning opportunities in the half year of his enrollment, the maximum FTE awarded to the school is his potential FTE, that is .50 FTE. That is because under R.C. 3314.08(C) the other half of his state funding must be paid to the student's resident district.

16. ODE reviewed the durational and enrollment data produced by ECOT in accordance with R.C. 3314.08(H). Pursuant to its FTE review of ECOT for the 2016/2017 school year, ODE concluded, in a lawful and reasonable manner, that ECOT was overpaid by 18.5%.
17. Since ECOT received state funding for the 2016/2017 school year in the amount of \$104,302,474.05, ECOT owes the state \$19,295,957.70 for the 18.5% overpayment.
18. At the informal hearing held in December 2017, ECOT presented, for the first time, additional durational data based on "504 and Related Services" totaling 267 hours, and newly discovered time from its Collaborate software program "totaling 870,476.42 hours before removing overlaps." According to ECOT this data would reduce the overpayment from 18.5% to 17.33%. Because the submission occurred after ODE's written review findings on September 28, 2017, and because the data is unsubstantiated and unreliable, this Hearing Officer concludes that it should be disregarded.

VI. Conclusion and Recommendation

Upon sufficient evidence that ECOT did not properly document that the total of 14,203.03 FTE that it reported and was funded during the 2016/2017 school year, constituting an overpayment of \$19,295,957.70, it is the recommendation of this Hearing Officer that the Ohio State Board of Education adopt this finding of overpayment, and authorize the Ohio Department of Education to take all measures necessary to collect the amount of the overpayment from the school.


Karl W. Schedler, Hearing Officer
88 S. Ardmore Rd.
Bexley, Ohio 43209
614-537-2315
KarlSchedler.Law@gmail.com

Date: Jan. 22, 2018

Not A Final Order

This decision is not a final order. Only the Ohio State Board of Education has the authority to enter a final order in this informal administrative proceeding. The Board has the authority to approve, disapprove, or modify this decision, and this decision is not final until and unless approved by the Board in the manner provided in R.C. 3314.08(K), Title 33 of the Ohio Revised Code, and all applicable rules promulgated thereunder. In accordance with R.C. 3314.08(K)(2)(d), the decision of the State Board is final.

CERTIFICATE OF SERVICE

I certify that the original of this document was served upon the State Board of Education/Ohio Department of Education by regular U.S. Mail to its offices at 25 S. Front Street,

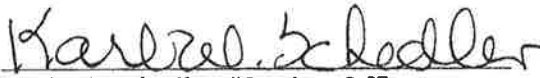
Columbus, Ohio, on this 22nd day of January 2018, and was served by regular mail and electronic mail upon counsel for the parties at the addresses listed below on this 22nd day of January, 2018.

Marion H. Little, Jr.
Christopher J. Hogan
Zeiger, Tigges & Little, LLP
3500 Huntington Center
41 S. High Street
Columbus, Ohio 43215
614-365-4113
Little@litohio.com
Hogan@litohio.com

Counsel for Electronic Classroom of Tomorrow

Douglas R. Cole
Carrie M. Lymanstall
Sean M. Stiff
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Columbus, Ohio 43215
614-481-0902
drcole@organcole.com
cmlymanstall@organcole.com
smstiff@organcole.com

Special Counsel to Ohio Attorney General Mike DeWine
Counsel for the Ohio Department of Education


Karl W. Schedler, Hearing Officer

Charlotte McGuire
Kara Morgan
Eric Poklar
Lisa Woods

Antoinette Miranda
Nick Owens
Jimmy Sheppard
Tess Elshoff

Motion carried.

VOTING ON THE REPORT & RECOMMENDATIONS OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION

President Elshoff called on Superintendent DeMaria for his report and recommendations.

President Elshoff presented the following recommendations (Items 1-2):

- 1. RESOLUTION TO ACCEPT THE DECISION OF THE HEARING OFFICER IN ELECTRONIC CLASSROOM OF TOMORROW'S APPEAL PURSUANT TO OHIO REVISED CODE 3314.08(K)(2).**

The State Board of Education hereby **ADOPTS** the following Resolutions:

Section 3314.08(H) of the Ohio Revised Code (ORC) sets forth a process for the Department to review the full-time equivalent (FTE) student funding that a community school has claimed and received for a given academic year;

ORC Section 3314.08(K) provides that the Department shall complete such an FTE review of a community school and issue its findings within ninety days of the end of the community school's fiscal year;

ORC Section 3314.08(K)(2) provides that if the Department determined that an overpayment was made to the community school, the community school may appeal the Department's FTE determination;

On September 28, 2017, the Department issued its FTE determination to Electronic Classroom of Tomorrow ("ECOT") finding that overpayment was made to ECOT for the 2016-2017 school year;

ECOT timely appealed the Department's FTE determination on October 12, 2017;

The matter was referred to a hearing officer on October 18, 2017 for an informal hearing;

The informal hearing occurred on December 4, 5 and 11, 2017 and during that hearing, the hearing officer heard testimony and received exhibits that were introduced;

The hearing officer issued his decision on January 22, 2018 based on the testimony and exhibits introduced at the hearing;

ECOT timely submitted its objections on January 30, 2018 and the Department has responded to such objection; and

The State Board of Education has reviewed the hearing officer's decision, the objections submitted by ECOT, and the Department's response to the objections.

NOW, THEREFORE, BE IT RESOLVED that the State Board of Education, based on its review of the hearing officer's decision, ECOT's objections, and the Department's response to the objections, hereby accepts the hearing officer's decision and finds that ECOT received an overpayment of 18.5 percent but modifies the hearing officer's report and recommendation to reflect the amount of the overpayment of \$19,234,109.11 and directs the Department to take such measures as are necessary to collect the overpayment from ECOT; and

FURTHER RESOLVED that the Superintendent of Public Instruction be, and he hereby is, directed to notify ECOT and its sponsor the Educational Service Center of Lake Erie West of this resolution.

It was Moved by Mr. Owens and Seconded by Ms. Johnson that the above recommendation (Item 1) be approved. Mr. Owens spoke in favor of the resolution.

President Elshoff called for a roll call vote.

YES VOTES

Pat Bruns	Stephanie Dodd
Cathye Flory	Linda Haycock
Nancy Hollister	Meryl Johnson
Laura Kohler	Martha Manchester
Charlotte McGuire	Antoinette Miranda
Kara Morgan	Nick Owens
Eric Poklar	James Sheppard
Tess Elshoff	

ABSTAIN

Lisa Woods

Motion carried.

2. RESOLUTION TO ACCEPT THE DECISION OF THE HEARING OFFICER IN CINCINNATI CITY SCHOOL DISTRICT'S APPEAL PURSUANT TO OHIO REVISED CODE 3314.16

The State Board of Education hereby **ADOPTS** the following background information and resolutions:

Ohio Revised Code 3314.16(B) sets forth a process for the Department to annually rate and assign an overall rating to entities that sponsor community schools;

ORC 3314.16(B)(7)(c) provides that community school sponsors rated poor have their sponsorship authority revoked as a matter of law, subject to a right to appeal;



Client View

Welcome Shawn Organ

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Reports

→ Recent Account Status Changes
→ Compass

Account Inquiry

If you are searching for accounts by name, please enter the name Last Name, First Name

IMPORTANT: Click here to view the Status Changes Report

Search By:

Search For: 15616617

Our Account Number inquiry results for 15616617

Printer Friendly

One item found.

1

Our Account	Name	Your Account Number	Client #	Placed Date	Placed Amount	Balance	Last Pay Date	Last Pay Amount	Status	Primary Account
15616617	ELECTRONIC CLASSROOMS OF	133413	EDUC100-CS	04/04/18	61996427.39	71915855.77		0.00	FSC	

Page viewed by Shawn Organ on Wednesday, April 04, 2018 9:51 AM

[Ohio Attorney General Home](#)

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April 6, 2018

614.481.0902 (direct)
drcole@organcole.com

Via U.S. Mail

Myron N. Terlecky, Esq.
Strip, Hoppers, Leithart, McGrath, & Terlecky Co., LPA
575 South Third Street
Columbus, Ohio 43215

Re: *Governing Board of the Educational Services Center of Lake Erie West, v. Electronic Classroom of Tomorrow*, Franklin County Court of Common Pleas, Case No. 18CV000324 (Holbrook, J.).

Dear Mr. Terlecky:

I am writing to you in your capacity as Interim Master in the above-captioned case, pursuant to the Court's Order entered January 24, 2018. One of your enumerated powers and duties in that capacity is to "afford reasonable opportunity for creditors to present and prove their claims." As more fully set forth below, we are writing in our capacity as special counsel to the Ohio Attorney General to advise you of one such claim by the Ohio Department of Education in the amount of \$61,996,427.39. We look forward to working with you regarding the appropriate steps to take to secure payment on that claim.

As you know, the Electronic Classroom of Tomorrow ("ECOT") is a community school pursuant to R.C. 3314.01. As such, ECOT is entitled to receive payment from the State for the educational services that it provides. Each community school receives funding during the year based on information that it self-reports to the Ohio Department of Education ("ODE" or the "Department"). The Department, however, retains the statutory right to perform full-time equivalency ("FTE") reviews to ascertain whether a given community school can substantiate the amount of funding that it received for a given academic year.

The Department performed an FTE review at ECOT in connection with the 2015-16 academic year. As a result of that FTE review, the Department issued a determination on September 26, 2016, finding that ECOT had been overpaid for the previous academic year in an amount of \$64,054,630. ECOT appealed that finding to the State Board of Education pursuant to R.C. 3314.08(K). A Hearing Officer heard evidence and issued a report on May 10, 2017, recommending that the Board find that ECOT had been overpaid by \$60,350,791. On June 12, 2017, the State Board of Education passed a resolution adopting the Hearing Officer's recommendation, and finding that ECOT had been overpaid in an amount of \$60,350,791. (Ex. A). By statute, the State Board's determination is "final." R.C. 3314.08(K)(2)(d).

More recently, the Department also conducted an FTE review of ECOT in connection with the 2016-17 academic year. As a result of that FTE review, the Department issued a determination on September 28, 2017, finding that ECOT had been overpaid by \$19,234,109 for the educational services it provided during that academic year. ECOT challenged that determination before a Hearing Officer. On January 22, 2018, the Hearing Officer issued a report recommending that the State Board of Education adopt the initial recommendation in full. On February 12, 2018, the Board passed a resolution adopting the Hearing Officer's recommendation. (Ex. B).

Thus, in total, for the 2015-16 and 2016-17 academic years, ECOT received overpayments in the amount of \$79,584,900.

As the Board's finding relating to the 2015-16 academic year became final on June 12, 2017, in August 2017 the Department began its efforts to recover the overpayments associated with that academic year from ECOT. Those efforts took the form of what the parties have referred to as a "claw back." More specifically, the Department reduced the monthly payments that it otherwise would have made to ECOT by an amount intended to effectuate the recovery of the overpayments over a period of time. As a result of those reductions, the Department collected \$17,588,472.61 of the 2015-16 overpayment amount.

In light of that recovery, the remaining amount due in connection with the 2015-16 and 2016-17 academic years is \$61,996,427.39. On February 22, 2018, the Department sent a letter to ECOT Superintendent Brittany Pierson advising her of ECOT's obligation to pay to the State that amount. (Ex. C). The letter further advised ECOT that, "if funds are not repaid on or before March 29, 2018," the Department would certify the debt to the Ohio Attorney General's Office for collection. Payment was not forthcoming.

Accordingly, the Department has now certified the above-described debt for collection, and the Attorney General's Office has retained our firm as counsel in connection with those collection efforts. We understand that the Court's Order appointing you as Interim Master provides that "all creditors, claimants, bodies politic, [and] parties in interest ... are enjoined and stayed from commencing or continuing any action ... to ... enforce any claim against ECOT ... without leave of [the] Court." Consistent with that language, the purpose of this letter is to advise you of the existence of this debt, and to ensure that we have an opportunity to seek recovery for these amounts from ECOT as part of the wind-up efforts that you are overseeing. To that extent, please advise us of any further steps that are necessary or appropriate at this juncture to preserve the Department's rights in connection with its claims based on the overpayments described above.

Very Truly Yours,

Douglas R. Cole
Special Counsel to Attorney General Mike DeWine

/Enclosures

cc: Mr. Richard F. Kruse, Assistant Master



Hylant Administrative Services

November 6, 2009

Michele D. Smith
Electronic Classroom of Tomorrow
3700 S. High Street
Columbus, OH 43207

Bond Type: Treasurer
Bond #: 104445340-10-5
Term: 1/1/2010 – 1/1/2012

Dear Ms. Smith:

We have enclosed the requested Treasurer bond renewal. Please be sure to sign the Treasurer bond where indicated above your name. We do not require a copy of the signed bond returned.

If you have any questions on this bond, contact your Underwriter:

Christine Cobourne (A-G)
(419) 724-1986
christine.cobourne@hylant.com

Carol Valentine (H-N)
(419) 724-1983
carol.valentine@hylant.com

Melody Landis (O-Z)
(419) 724-1979
melody.landis@hylant.com

Toll Free: (800) 288-6821

Fax: (800) 924-6615

Sincerely,

Hylant Administrative Services

Attachments

Hylant Administrative Services (HAS) administers the OSBA sponsored Bond Program for Public Schools, which is underwritten by St. Paul/Travelers. HAS also is the administrator for the Ohio School Plan (OSP), a public school property and casualty jointly administered self-insurance pool as authorized under Ohio Revised Code, Section 2744, which is also endorsed by the OSBA. Approximately 300 Ohio Public Schools, Educational Service Centers, Joint Vocational Schools, Council of Governments, Special Education Regional Resource Centers, and Mental Retardation/Developmentally Disabled entities are OSP members. The Underwriters shown above are also the OSP Underwriters.

811 Madison Avenue, 11th Floor • A/C Box 2053 • Toledo, Ohio 43603-2053
Toll Free: 800-249-3268 • Fax: 419-259-6399 • www.hylant.com

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Ex. 13--Bond

PUBLIC OFFICIAL BOND
(Definite Term)

Travelers Casualty and Surety Company of America
One Tower Square, Hartford, CT 06183

Bond No. 104445340-10-5

KNOW ALL MEN BY THESE PRESENTS, That we Michele D. Smith of Electronic Classroom of Tomorrow, as Principal, and Travelers Casualty and Surety Company of America, a corporation duly incorporated under the laws of the State of Connecticut, as Surety, are held and firmly bound unto State of Ohio, as Oblige, in the penal sum of One Hundred Thousand (\$100,000) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made, said Principal binds himself/herself, his/her heirs, executors, administrators and assigns, and said Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents.

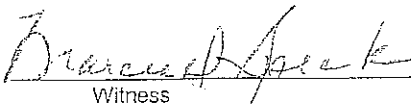
WHEREAS, the said Principal has been appointed to the office of Treasurer for a definite term beginning 1/1/2010, and ending 1/1/2012, and is required to furnish a bond for the faithful performance of the duties of the said office or position.

NOW, THEREFORE THE CONDITION OF THIS OBLIGATION is such that if the above bounden Principal shall (except as hereinafter provided) faithfully perform the duties of his/her said office or position during the said term, and shall pay over to the persons authorized by law to receive the same all moneys that may come into his/her hands during the said term without fraud or delay, and at the expiration of said term, or in case of his/her resignation or removal from office, shall turn over to his/her successor all records and property which have come into his/her hands, then this obligation to be null and void; otherwise to remain in full force and effect.

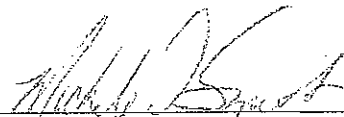
PROVIDED, HOWEVER, that the above named Surety shall not be liable hereunder for any loss of any public fund resulting from the insolvency of any bank or banks in which said funds are deposited; and, if this provision shall be held void, this entire bond shall be void.

AND PROVIDED FURTHER, that the Surety may cancel bond at any time during the said term by giving to the obligee a written notice of its desire so to cancel and at the expiration of thirty (30) days from the receipt of such notice by the obligee the surety shall be completely released as to all liability thereafter accruing. If this provision shall be held void, this entire bond shall be void.

SEALED and dated this 6th day of November, 2009.

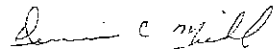


Witness

By: 

Michele D. Smith of Electronic Classroom of Tomorrow,
Principal

Travelers Casualty and Surety Company of America

By: 

Dennis C. Michel, Attorney-in-Fact



POWER OF ATTORNEY

Farmington Casualty Company
Fidelity and Guaranty Insurance Company
Fidelity and Guaranty Insurance Underwriters, Inc.
Seaboard Surety Company
St. Paul Fire and Marine Insurance Company

St. Paul Guardian Insurance Company
St. Paul Mercury Insurance Company
Travelers Casualty and Surety Company
Travelers Casualty and Surety Company of America
United States Fidelity and Guaranty Company

Attorney-In Fact No. 219286

Certificate No. 002709586

KNOW ALL MEN BY THESE PRESENTS: That Seaboard Surety Company is a corporation duly organized under the laws of the State of New York, that St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company and St. Paul Mercury Insurance Company are corporations duly organized under the laws of the State of Minnesota, that Farmington Casualty Company, Travelers Casualty and Surety Company, and Travelers Casualty and Surety Company of America are corporations duly organized under the laws of the State of Connecticut, that United States Fidelity and Guaranty Company is a corporation duly organized under the laws of the State of Maryland, that Fidelity and Guaranty Insurance Company is a corporation duly organized under the laws of the State of Wisconsin (herein collectively called the "Companies"), and that the Companies do hereby make, constitute and appoint

Dennis C. Michel, and Rebecca L. Swisher

of the City of Toledo, State of Ohio, their true and lawful Attorney(s)-in-Fact, each in their separate capacity if more than one is named above, to sign, execute, seal and acknowledge any and all bonds, recognizances, conditional undertakings and other writings obligatory in the nature thereof on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

IN WITNESS WHEREOF, the Companies have caused this instrument to be signed and their corporate seals to be hereto affixed, this 21st day of July, 2008

Farmington Casualty Company
Fidelity and Guaranty Insurance Company
Fidelity and Guaranty Insurance Underwriters, Inc.
Seaboard Surety Company
St. Paul Fire and Marine Insurance Company

St. Paul Guardian Insurance Company
St. Paul Mercury Insurance Company
Travelers Casualty and Surety Company
Travelers Casualty and Surety Company of America
United States Fidelity and Guaranty Company



State of Connecticut
City of Hartford ss.

By: [Signature]
George W. Thompson, Senior Vice President

On this the 21st day of July, 2008, before me personally appeared George W. Thompson, who acknowledged himself to be the Senior Vice President of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

In Witness Whereof, I hereunto set my hand and official seal. My Commission expires the 30th day of June, 2011.



[Signature]
Marie C. Tetreault, Notary Public

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

This Power of Attorney is granted under and by the authority of the following resolutions adopted by the Boards of Directors of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company, which resolutions are now in full force and effect, reading as follows:

RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President, any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary may appoint Attorneys-in-Fact and Agents to act for and on behalf of the Company and may give such appointee such authority as his or her certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors at any time may remove any such appointee and revoke the power given him or her; and it is

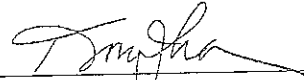
FURTHER RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President may delegate all or any part of the foregoing authority to one or more officers or employees of this Company, provided that each such delegation is in writing and a copy thereof is filed in the office of the Secretary; and it is

FURTHER RESOLVED, that any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact and Agents pursuant to the power prescribed in his or her certificate of their certificates of authority or by one or more Company officers pursuant to a written delegation of authority; and it is

FURTHER RESOLVED, that the signature of each of the following officers: President, any Executive Vice President, any Senior Vice President, any Vice President, any Assistant Vice President, any Secretary, any Assistant Secretary, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding on the Company in the future with respect to any bond or understanding to which it is attached.

I, Kori M. Johanson, the undersigned, Assistant Secretary, of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company do hereby certify that the above and foregoing is a true and correct copy of the Power of Attorney executed by said Companies, which is in full force and effect and has not been revoked.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seals of said Companies this 10th day of November, 2009


Kori M. Johanson, Assistant Secretary



To verify the authenticity of this Power of Attorney, call 1-800-421-3880 or contact us at www.travelersbond.com. Please refer to the Attorney-In-Fact number, the above-named individuals and the details of the bond to which the power is attached.

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER



IMPORTANT DISCLOSURE NOTICE OF TERRORISM INSURANCE COVERAGE

On November 26, 2002, President Bush signed into law the Terrorism Risk Insurance Act of 2002 (the "Act"). The Act establishes a short-term program under which the Federal Government will share in the payment of covered losses caused by certain acts of international terrorism. We are providing you with this notice to inform you of the key features of the Act, and to let you know what effect, if any, the Act will have on your premium.

Under the Act, insurers are required to provide coverage for certain losses caused by international acts of terrorism as defined in the Act. The Act further provides that the Federal Government will pay a share of such losses. Specifically, the Federal Government will pay 90% of the amount of covered losses caused by certain acts of terrorism which is in excess of an insurer's statutorily established deductible for that year. The Act also caps the amount of terrorism-related losses for which the Federal Government or an insurer can be responsible at \$100,000,000,000.00, provided that the insurer has met its deductible.

Please note that passage of the Act does not result in any change in coverage under the attached policy or bond (or the policy or bond being quoted). Please also note that no separate additional premium charge has been made for the terrorism coverage required by the Act. The premium charge that is allocable to such coverage is inseparable from and imbedded in your overall premium, and is no more than one percent of your premium.

ILT-1018 (9/04)