IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

ELECTRONIC CLASSROOM OF TOMORROW, Plaintiff, v. OHIO DEPARTMENT OF EDUCATION, Defendant.	Case No. 16 CV 006402 Judge Lynch

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Electronic Classroom of Tomorrow ("ECOT") requests the "extraordinary remedy" of a TRO based entirely on a false alarm. While one may not know it from reading ECOT's papers, the only activity that the Ohio Department of Education ("ODE") is currently undertaking at ECOT is ***a document review***. More specifically, ODE has scheduled for today (after earlier delaying at ECOT's request), ODE's year-end review of various records that ECOT maintains relating to the educational services that ECOT provides to Ohio school children—educational services that ECOT provides as part of Ohio's system of public education, and that are paid for with public funds. ECOT now seeks a TRO preventing that review based on its claim that the ODE cannot rely on the so-called log-in/log-out records in calculating the full-time equivalent ("FTE") number that is used to determine the amount of funding to which ECOT is entitled for the just-completed 2015-16 academic year. ODE disagrees as to the relevance of those records, but, for purposes of the current TRO motion, that entire dispute is beside the point. ECOT will have a forum to challenge whether the data is relevant to the funding decision, and, in any event, the final funding decision will not occur ***for months***. The only question ***now*** is whether ODE can move forward with its data review. Speculative claims about potential future harms that may

arise from potential future funding decisions do not provide the clear and convincing evidence of an immediate "irreparable harm" that is needed to justify a TRO.

ECOT's request likewise fails to meet the other settled prongs of the TRO test. To start, ECOT has not shown a likelihood of success on the merits. Again, the only question now is whether ODE can review the records at issue. ECOT claims "no" on the grounds that the records are irrelevant as a matter of law to the ODE's funding decision. But, that is an argument for another day, in another forum, not a reason that ODE should be barred from reviewing the records at all. And, even if that were the question, ECOT is simply wrong. ODE, as a faithful steward of public funds, is entitled to determine whether students are ***actually receiving*** the education for which the public is paying. That is true as a matter of statute, ODE practice, and, to the extent applicable, the funding agreement between ODE and ECOT. ECOT is wrong to suggest otherwise. Finally, the public interest and third-party harm prongs of the TRO analysis likewise preclude the relief that ECOT seeks here. The public interest lies in seeing that public funds are not wasted, and in documenting how they are spent. That is all that ODE seeks to do. And, to the extent that the public funds at issue did not properly go to ECOT, they should instead have gone to various local school districts, who thus will be harmed if ODE is prevented from moving forward with its analysis. For all of these reasons, the Court should deny ECOT's motion.

II. BACKGROUND

A. ECOT Is An Online Community School Receiving In Excess Of $100 Million In State Funds Annually.

Under Chapter 3314 of the Ohio Revised Code, community schools—commonly referred to as charter schools—are "public school[s]" and "part of the state's program of education." R.C. 3314.01(B). Community schools are formed either as nonprofit corporations or public-

benefit corporations. R.C. 3314.03(A)(1). While the schools are privately operated, they receive state funding and they provide a ***public*** education to their students. R.C. 3314.01, 08.

In general, there are two types of community schools: (1) "brick-and-mortar" schools, which can include blended learning models; or (2) "Internet- or computer-based" community schools (i.e., "eschools"), where students "work primarily from their residences on assignments in nonclassroom-based learning opportunities provided via an internet- or other computer-based instructional method that does not rely on regular classroom instructions," R.C. 3314.02(A)(7).

Every community school must have a sponsor (either a traditional public school district or an educational service center) approved and supervised by ODE. R.C. 3314.02(A)(1). The sponsor and community school enter into a contract, which is filed with ODE. R.C. 3314.03.

ECOT is an eschool sponsored by Educational Service Center of Lake Erie West ("ESCLEW"). ECOT is also the largest community school in Ohio. It received more than $291 million in state funds in aggregate for the 2012-13, 2013-14, and 2014-15 school years. It received more than $108 million in state funding during the 2015-16 school year.

B. Ohio Law Provides For The Funding Of Community Schools Based On The Amount Of Time A School Spends Actually Educating Students.

ODE pays community schools like ECOT based on the hours of "learning opportunities" that students participate in that the schools submit to ODE. R.C. 3314.08(C), (H). Each such school must provide a minimum of 920 hours of "learning opportunities" over the course of a school year to each student. R.C. 3314.03(A)(11)(a). Each 920 hours constitutes a "full-time equivalency," or "FTE." The school receives a set amount of per-student funding for each student FTE. Community schools also receive partial payments for partial FTEs, as determined by the number of hours of instruction provided to a student during a school year, divided by 920 hours. Thus, the FTE equation is as follows:

FTE = [hours of student education] / 920

For example, if per student full FTE funding for a given academic year was $6,000, but a community school only educated a student for 460 hours during that school year, that student's FTE would be 0.5, and the community school receive only $3,000 of the $6,000 in funding.

To assist in tracking this information, every month, each community school reports to ODE how many hours of learning opportunities its students received. ODE then makes an interim calculation of how many FTEs the community school would provide over the course of the school year assuming that monthly rate continues, and pays the school a monthly proportion of the amount due based on the total FTE. As discussed more fully below, because the ODE is essentially "taking the community school's word for it" with regard to the monthly reports, the ODE's payments of public funds to the community school are subject to later adjustment that is provided by law and is based on a subsequent ODE review of the accuracy of the school's monthly submission. Whatever public funds the ODE sends to a community school are deducted from the state monies otherwise sent to the traditional school districts where the students reside. R.C. 3314.08(C). That is, the state dollars follow the student, or in other words, go to the entity that is actually providing the public education to that student.

The amounts involved are significant. On a statewide level, over $930 million in public funds were transferred to community schools during the 2014-15 school year, with over $267 million of those public funds going to eschools. ECOT alone received more than $108 million of public funds for the 2015-16 school year.

Given the hundreds of millions of dollars of public funds at issue, the Ohio General Assembly not surprisingly granted ODE broad oversight to monitor community schools' FTE number submissions. Under R.C. 3314.08(H), ODE "shall adjust the amounts subtracted and paid . . . to reflect any enrollment of students in community schools for less than the [FTE]."

Enrollment is measured in terms of student participation. As ECOT concedes, R.C. 3314.08(H)(3) addresses FTE funding for community schools:

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

(Emphases added). Importantly, subsection (H)(2) of that same statute expressly provides that, "[f]or purposes of applying … divisions (H)(3) and (4) of this section to a community school student, 'learning opportunities' shall be defined in the contract [between the sponsor and community school], 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 [ODE]***." R.C. 3314.08(H)(2) (emphasis added). The plain language of these provisions read in context, then, provides both (1) that FTEs are to be measured by "***student participation***" (which, in the eschool setting, cannot exceed ten hours per day), and (2) that the ODE has the authority to establish the "criteria and documentation requirements ***for student participation***" in measuring FTEs.

Using student participation to measure FTEs in the eschool setting finds further support in another provision of the Revised Code, which addresses the maximum hours a student may participate in learning opportunities for purposes of FTE calculation. Under that statute, an eschool student may not "participate in more than ten hours of learning opportunities" in a 24-hour period of time, and any time exceeding 10 hours does not count toward the 920-hour minimum requirement. R.C. 3314.27. The statute further specifies that "[i]f 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." *Id.* Thus, Ohio law requires eschools to track their educational offerings in terms of actual student participation; not simply a single log-in by a student.

C. ODE Satisfied Its Statutory Mandate To Establish "Criteria And Documentation Requirements" To Measure FTE By Student Participation.

Because of the high stakes for both community schools (who receive funds based on FTEs) and districts (who lose funds when community schools provide FTEs), ODE has a thorough process for verifying FTE information. ODE reviews community schools every five years, but retains the right to conduct an FTE review more regularly, if needed. During the review, ODE verifies the accuracy of the enrollment and attendance data that the community schools report to ODE. In any academic year for which it performs a review, ODE completes an initial FTE review meeting with community schools by no later than April 1. The initial FTE review is essentially a walk-through of the year-end FTE review, a process that will be conducted a few months later at the conclusion of the school year (which typically ends sometime between May and June). In this case, ODE undertook its initial FTE review of ECOT on March 28-30, 2016, and the ODE's year-end FTE review for ECOT is scheduled to begin today—July 11, 2016.

The FTE review process is not a funding decision, but rather an information-gathering process that focuses on the schools' records relating to student participation. Pursuant to the statutory command in R.C. 3314.08(H)(2) that the ODE establish "criteria and documentation requirements for student participation," ODE has developed and maintains an "FTE Review and Community School Enrollment Handbook (ODE 2015)" ("FTE Handbook"). That handbook has been revised over the years, but the parties agree that the version that is relevant here was the

version that the ODE issued in January 2015. The FTE Handbook sets forth the criteria for determining how to count student educational hours in determining what portion of the full 920 hours of education occurred.

The handbook "delineates and describes the procedures and forms that are generally used to conduct FTE reviews" and addresses "what documentation should be collected and maintained by community schools." (FTE Handbook at p. 2). The FTE Handbook includes a section entitled "eSchool Review."

> 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***.

(*Id.* at p. 15) (emphasis added). That same section of the FTE Handbook explains what constitutes satisfactory documentation:

> An eSchool is also required to maintain student attendance records, as specified in the eSchool's written attendance policy. The reviewer will verify that the school has a written attendance policy.
>
> The reviewer will check the attendance record procedure maintained by the eSchool. The eSchool must be ready to display this program on screen for the reviewer to view for each student.
>
> The reviewer will check the individual attendance record for each student being reviewed. ***This attendance record should show when a student has logged on and off while accessing learning opportunities***. A learning opportunity for an eSchool student could be documented computer time for doing homework in any subject, reading resource documents, writing resource papers, taking tests, doing research, conferencing with teachers, etc.

(*Id.* at p. 16) (emphasis added). This log-on-and-off requirement was not new in 2015; it has been included in the handbook since the 2012 version of the manual.

The process for applying FTE standards and making any necessary FTE payment adjustments are set forth in the FTE Manual, as well as in R.C. 3314.08(K)—the statutory provision granting community schools certain administrative appeal rights. The process effectively involves eight steps:

- First, ODE conducts an initial, purely advisory, review of a school's records. An ODE representative visits the school, reviews its records, and gives the school a preliminary report on the sufficiency of its records. That report identifies deficiencies that need to be corrected before the year-end review. (FTE Handbook at pp. 9-10).

- Second, the ODE representative conducts a follow-up visit after the conclusion of the school year to re-review of the school's records. (FTE Handbook at p. 11).

- Third, the representative makes a report of what he or she sees, and provides copies to the school and ODE's Office of School Budget and Finance. (FTE Handbook at p. 11).

- Fourth, the school can make submissions to the Office of School Budget and Finance in response to the representative's report.

- Fifth, ODE's Office of School Budget and Finance issues a written decision of its findings.

- Sixth, within 10 days of the written decision, the school can file an appeal with the State Board of Education. R.C. 3314.08(K)(2)(a).

- Seventh, an appealing school receives an evidentiary hearing before the Board's designee, who issues a recommendation to the State Board. R.C. 3314.08(K)(2)(b).

- Eighth, the State Board accepts or rejects the designee's decision or issues its own decision. R.C. 3314.08(K)(2)(c).

Until each and every one of these eight steps occur, there is no final funding decision. In regards to ECOT, ODE is currently at Step 2 of these eight steps.

D. ECOT's Statutorily-Mandated Sponsor Agreement Requires Student Participation To Be Measured And Documented By Hours Spent Participating In Learning Opportunities.

Consistent with the statute and the FTE Handbook, ECOT's agreement with its sponsor, ESCLEW, likewise calls for ECOT to monitor students' ***participation***, not merely their log in. Under Section 6.14 of ECOT's agreement with its sponsor, ECOT and its governing authority must comply with the requirements set forth in Attachment 6.14. (Sponsor Agreement). Attachment 6.14, which appears to attempt to track some language found in R.C. 3314.27, provides that "[i]f the internet or computer-based community school's participation is based on days rather than hours, ***participate [sic] must amount to at least five hours per day***." (Emphasis added). That same section of the sponsor agreement provides that "Attachment 6.14 is statutory and the School shall comply with these provisions as now in effect, or, as the law may hereafter amend." *Id.* (emphasis added). Thus, ECOT's own policies require it to measure actual student ***participation*** in determining what educational opportunities are offered.

Further, ECOT's stated attendance policy is found in Attachment 6.13 to the agreement. Under a section entitled "Truancy Policy Statement" ECOT states that to avoid the serious consequences of being labeled truant, "it is crucial that the student logs in, checks e-mail ***and participates in*** coursework regularly (25 hours per week minimum) each week in order to avoid consequences mentioned above." (Attachment 6.13 (emphasis added)).

E. Despite Clear Participation Reporting Requirements, ECOT Has Refused To Provide Required Data During The FTE Review Process.

Under ODE's five-year FTE review schedule, ECOT was scheduled for review in 2016. Shortly before the date set for its preliminary review on February 22, 2016, ECOT indicated to ODE that ECOT's computer records might impact ODE's ability to verify ECOT's FTE, and

ECOT requested that the initial review be rescheduled. The initial review occurred on March 28-30, 2016.

The preliminary review revealed problems. On a positive note, the reviewer found that ECOT's computer records were in fact tracking how long each student actually participated in ECOT's programming, but, more troublingly, those records did not substantiate the number of educational hours for which ECOT had billed ODE. ODE offered suggestions about how ECOT could address the situation. The reviewer also suggested mid-June dates for the second review.

ECOT objected to further examination of its records, particularly its records of how much time its students spent logged in to their computers. It pushed back on scheduling the second review. After multiple delays at ECOT's request, ODE set the year-end review for July 11, 2016. ECOT responded by filing this case on July 8, 2016, apparently seeking to prevent ODE from obtaining additional information relating to the level of actual student participation in ECOT's community schools. Importantly, the ODE has not yet made any final funding decisions, and any such final decision would occur only after an administrative hearing at which ECOT could present evidence and argument relating to its view of the law.

III. STANDARD OF REVIEW

"Injunctive relief is an extraordinary remedy and is issued cautiously and sparingly." *OnX USA LLC v. Sciacchetano*, No. 1:11CV2523, 2013 U.S. Dist. Lexis 40238, at *6 (N.D. Ohio Mar. 7, 2013) (denying TRO and preliminary injunction). "A temporary restraining order is an injunctive form of relief intended to prevent the applicant from suffering immediate and irreparable harm." *Coleman v. Wilkinson*, 147 Ohio App.3d 357, 358 (2002) (per curiam). "In determining whether to grant a temporary restraining order, a trial court must consider whether the movant has a strong or substantial likelihood of success on the merits of his underlying claim, whether the movant will be irreparably harmed if the order is not granted, what injury to

others will be caused by the granting of the motion, and whether the public interest will be served by the granting of the motion." *Id.* (citing *Corbett v. Ohio Bldg. Auth.*, 86 Ohio App.3d 44, 49 (1993)). ECOT's burden is heavy. To establish a right to a TRO, as with other forms of preliminary injunctive relief, it must prove each of these elements by clear and convincing evidence. *See Hydrofarm, Inc. v. Orendorff*, 10th Dist. No. 08AP–287, 2008-Ohio-6819, ¶ 18 (preliminary injunction); *Abercrombie & Fitch Mgmt. Co. v. Mack*, C.P. No. 13-CV-008989, 2013 Ohio Misc. Lexis 11899, at *1 (Ohio Aug. 20, 2013) (TRO). Here, ECOT cannot establish any of the four elements, let alone each of them, by clear and convincing evidence.

IV. LAW AND ANALYSIS

A. ECOT Fails To Establish Irreparable Harm And Has Failed To Exhaust Its Administrative Remedies.

First, ECOT will suffer no irreparable injury absent a TRO. What ECOT asks this Court to enjoin is nothing more than a visit to ECOT by ODE officials who will review ECOT's log-in and log-out records to determine whether students are fully participating in ECOT's online educational program. This is a step in a process that has already begun and is far from complete.

In March 2016, ODE conducted its initial, advisory review of ECOT's records. Based on its review of a sample of the student log-in records, ODE found that most students logged into ECOT's online platform for only about one hour per day. Moreover, ODE found that ECOT does not keep certified logs of its students' offline work (which could be used to supplement the on-line hours). Based on this initial review, ODE tentatively concluded that it appeared that ECOT tracks student participation time, but that ECOT does not adjust its FTE submissions according to this participation data. On May 17, 2016, ODE communicated these findings to ECOT, and set a year-end review, pursuant to ODE's procedures, for June 2016. That date has

been extended at ECOT's request, and now ODE plans to conduct its year-end review of ECOT's records starting today and ending on Wednesday, July 13.

Pursuant to statute, once this review is complete, ODE will have until September 30, 2016, (90 days after the end of ECOT's June 30, 2016 fiscal year, *see* R.C. 3314.08(K)(1)) to provide written notice of ODE's findings. If this review results in a finding by ODE that additional funding is owed to the school, the payment of those additional funds must be made within 30 days of the written notice. R.C. 3314.08(K)(2). Conversely, if the ODE's review results in a finding that ECOT owes money to the State, then ECOT will have 10 days to appeal ODE's decision to the state board of education. R.C. 3308.14(K)(2)(a). The board or its designee then will conduct a hearing on the matter within 30 days of ECOT's appeal and must issue a decision within 15 days of the conclusion of the hearing. R.C. 3308.14(K)(2)(b). If, following the ODE's determination and any appeal to the state board of education, the ODE finally determines that ECOT owes money to the state, the state will gradually recover those amounts by reducing future monthly disbursements to ECOT over the course of several months. Moreover, if ECOT is dissatisfied with this process and its outcome, it can seek judicial review through, at the very least, filing a lawsuit seeking to recoup any funds that the ODE has withheld.

Accordingly, ECOT has rushed to this Court not to enjoin any immediate defunding of the school—let alone any defunding that could not be corrected, if necessary, through an action for money damages. To the contrary, the ODE has yet to determine whether ECOT will owe the state any money for the 2015-16 school year. That decision is not due until September 30, and if the decision is made that ECOT owes money, ECOT has the ability to appeal that decision to the state board. Only after that process, and only if ECOT's appeal is unsuccessful, would ODE start withholding some amount of funding to ECOT over the course of several months to recoup the funds that ECOT owes.

Instead, ECOT has rushed to this Court to enjoin a review of its log-in and log-off data, which ODE intends to perform starting today. This data is public record, as ECOT, like all community schools, is a part of Ohio's system of public education. And of course, any privacy concerns can be accommodated by redacting student identifying information in the data to be reviewed. In short, ECOT does not want the ODE to be able to review its student participation data, presumably because ECOT is concerned that this data will reveal a lack of participation by its students. Of course, this concern—that bad facts will come to light—is not a valid ground for an injunction, let alone an emergency TRO.

Indeed, in its Motion and Complaint, ECOT sets forth no assertion that the review itself (as opposed to a later funding decision that ECOT anticipates now) would cause irreparable harm, nor could it. Instead, ECOT attempts to assert that, should the ODE determine ***down the road*** that ECOT owes money to the state, the ODE's recovery of those funds (which would occur even further down the road) would then impair ECOT's existing vendor contracts and substantially impair its business operations. (Motion at 22). These assertions—which are the sole basis for ECOT's claim of irreparable harm—miss the point for multiple reasons. First, as noted above, no decision has been made regarding whether ODE will be recovering any money from ECOT. The only question ***now*** is whether the ODE may review the data in question. ECOT has abjectly failed to offer any argument as to why allowing ODE access to that data, in and of itself, will irreparably harm ECOT. And, to the extent that ECOT's concern is directed toward a potential future ODE recoupment decision, ECOT will have an opportunity to challenge (and appeal) that decision if and when it occurs. There is no need, nor any warrant, to allow a preemptive attack now on a decision that ODE may or may not make in the future after an administrative hearing, and that will be subject to appeal then. Moreover, even ignoring this crucial (and dispositive) point, ECOT also fails to set forth any actual facts to support its

conclusory statements that its contractual relationships and/or business operations would be harmed if and when the ODE decides to reduce ECOT's funding over a gradual period of time to recover any money that the ODE finds down the road that ECOT owes to the state.

Perhaps recognizing the lack of any true emergency, ECOT primarily attempts to rely on technical arguments to establish irreparable harm. ECOT asserts that when an improperly promulgated administrative rule takes money away from an affected party, that party's right to relief is equitable in nature rather than a request for monetary damages. (Motion at 19-21). ECOT also asserts that an immediate TRO is necessary to prevent multiple actions by eschools to recoup money each time ODE withholds funds based on attendance problems. (Motion at 21). Neither of these assertions is relevant here, as neither establishes a need for emergency injunctive relief that cannot wait for the typical litigation process to unfold.

A showing of irreparable harm is "the single most important prerequisite" for the issuance of emergency injunctive relief. *See, e.g., Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990). And, in answering that question in the context of a TRO, the sole question under Ohio law is "whether the movant will be irreparably harmed ***if the order is not granted***," *Coleman*, 147 Ohio App.3d at 358 (emphasis added). Thus, the only question before the Court in connection with the TRO here is whether irreparable harm will occur if the ODE is not allowed to move forward with its data review, not whether harm might occur at some later point down the road if some future relief is not granted.

In short, there is no emergency here. Regardless of the merits of ECOT's arguments (and for reasons explained herein, there are none), ECOT has utterly failed to establish any irreparable harm that will result absent an immediate, emergency TRO. Accordingly, ECOT's current motion should be denied, allowing the Court to decide the issues in this lawsuit (to the extent that ECOT has raised any valid issues) pursuant to the normal course of litigation.

Indeed, further evidencing the lack of irreparable harm, ECOT has failed to exhaust its administrative remedies before rushing to this Court. "It is a well-established principle of Ohio law that, prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal." *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111-12 (1990) (punctuation omitted). There are good reasons for that rule: "preventing premature interference with agency processes," "to permit an administrative agency to apply its special expertise," and "to compile a record which is adequate for judicial review." *Id.*

Here, ECOT's suit bypasses available administrative remedies. As explained above, ECOT still has an opportunity to make its case before any funding decision becomes final. That process could include ECOT making the same challenges it asserts here. The process also allows a full record to be developed, including the log-on and log-off records that ODE plans to collect. And no funding decision would be final until after ECOT has an opportunity to be heard. That is why ECOT faces no irreparable harm absent a TRO, and it is also why ECOT should be required to exhaust its administrative remedies before seeking relief from this Court, if necessary.

B. ECOT's Requested TRO Would Harm Third Parties And The Public Interest.

ECOT's request for a TRO also fails because a TRO would cause harm to other parties and would be against the public interest. The only thing that ODE currently seeks to do is review data that will allow it to determine the extent to which ECOT students are actually receiving an education. ECOT seeks to block this review, presumably out of fear that the data sought would reveal that ECOT students are not actually participating in ECOT's educational programming. It should go without saying that ensuring that children are actually receiving an education—a public education that is funded with public dollars—is in the public interest.

Likewise, it is in the public interest for ODE to ensure that public funds are properly spent. *See Oriana House, Inc. v. Montgomery*, 108 Ohio St.3d 419, 426, 2006-Ohio-1325 ("[I]ndividuals and entities who control public funds have a duty to account for their handling of public funds."). Here, ODE's data gathering efforts are part of its attempt to determine whether ECOT was really entitled to the large amount of public money ($108,610,808.18) that ECOT reported during the past school year. The log-on and log-off records are the best evidence of whether those bills were accurate, and denying ODE access to them would frustrate ODE's ability to "account for [ECOT's] handling of public funds." That is not in the public interest.

ECOT's requested TRO would likewise harm third parties—namely ECOT students and other school districts across the state. If an ECOT student is missing out on full participation in education, that student is undoubtedly harmed. Reviewing the data at issue here would help to identify and address that problem. Moreover, more than 99% of every dollar of state funding that ECOT received came from some other public school. ODE has legitimate grounds for verifying ECOT's billing. If ODE ultimately concludes down the road that ECOT was not entitled to all of the public funds that it received for the 2015-16 school year, then those state moneys will instead be transferred to those other districts. Accordingly, ECOT's efforts to deny access to the log-on and log-off records will hinder ODE's ability to protect those districts' interests, an undeniable harm to these third parties.

ECOT offers very little to meet its burden on these elements. ECOT claims that its requested TRO is in the public interest because it would ensure that ODE complies with Ohio law. (Motion at 23). But for all of the reasons explained elsewhere, ODE's review of the data at issue is fully compliant with relevant law. ECOT asserts that ODE's review of log-in and log-out data would "present a significant threat to Ohio's legislative policy favoring school choice." (*Id.*). But Ohio's community school program rightfully includes robust oversight of community

schools, including oversight designed to ensure good attendance by community school students, whether they are enrolled in eschools or elsewhere. Ohio's school-choice policy has never included a preference against ensuring that community school students actually go to school.

Indeed, lest there be any doubt, the General Assembly has confirmed that the review in question here is wholly consistent with public policy. As explained more fully below, R.C. 3314.08(H)(3) specifically provides that for purposes of funding, no eschool "shall be credited for any time a student spends participating in learning opportunities beyond ten hours within any period of twenty-four consecutive hours." This clear rule requires eschools to maintain data (and allow ODE to review data) regarding how long an eschool student is participating in online classes. Moreover, the General Assembly has recently added language to R.C. 3314.27, again re-confirming that a review of log-in and log-off data is fully consistent with public policy. *See* R.C. 3314.27 ("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."). In short, ODE's efforts to confirm that eschool students are actually receiving the education for which the state is paying public funds is the very definition of protecting the public interest, and ECOT's efforts to prevent the currently scheduled data review runs directly contrary to that interest.

C. ECOT Cannot Show A Substantial Likelihood Of Success On The Merits.

"To establish a likelihood of success on the merits, a plaintiff must show more than a mere possibility of success. A plaintiff must establish a ***substantial*** likelihood or probability of success on the merits." *Doe v. Ohio State Univ.*, 136 F. Supp.3d 854, 862 (S.D. Ohio 2016) (emphasis added). ECOT advances three merits claims, each with no likelihood of success, let alone a substantial likelihood. First, ECOT claims ODE has "violated" R.C. 3314.08(H)(3) by

requiring ECOT to submit evidence supporting its FTE submissions, including log-in and log-out records. Second, ECOT claims ODE violated rulemaking procedures requiring these records for FTE reviews. Finally, ECOT argues that using such data to confirm FTE would somehow violate a 2003 funding agreement signed by the parties. ECOT cannot show any of its three claims have a substantial likelihood of success on the merits, and therefore the TRO Motion should be denied.

1. The Express Statutory Language Of R.C. 3314.08 Requires ECOT To Submit Documentation To ODE For Student Participation, Including Log-In And Log-Out Records.

ECOT's first merits claim is—that R.C. 3314.08 prohibits ODE from evaluating eschool FTE submissions by using student participation—is directly contradicted by numerous provisions of Ohio law. Under ECOT's view of R.C. 3314.08, ODE is required for funding purposes to impute attendance to eschool students if a student logs in once during the day. That is not the law.

"It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law." *State v. Moaning*, 76 Ohio St.3d 126, 128 (1996). In doing so, courts "attempt to give effect to 'every word, phrase, sentence, and part of the statute' and to avoid an interpretation that would 'restrict, constrict, qualify, narrow, enlarge, or abridge the General Assembly's wording' or that would otherwise render a provision meaningless or superfluous." *San Allen v. Buehrer*, 8th Dist. No. 99786, 2014-Ohio-2071, at ¶ 77 (quoting *State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Educ.*, 131 Ohio St.3d 478, 483, 2012-Ohio-1484).

Under a plain, common-sense reading of the community school funding statutes, ECOT is required to track, and ODE to reimburse for, actual student participation. Finding otherwise would render numerous provisions in Chapter 3314 meaningless, and, as a more fundamental

matter, the statutory scheme would not make sense. ***First***, R.C. 3314.08(H)(2) expressly commands ODE to establish "criteria and documentation requirements ***for student participation***" to apply when calculating a school's FTE pursuant to R.C. 3314.08(H)(3). Thus the statute makes clear that student participation is what matters for FTE purposes. And ***second***, R.C. 3314.08(H)(3) requires consideration of specific hours, instructing ODE to drill down to percentages of hours. ODE must "determine [what] each community school student's percentage of [FTE] . . . is of the total learning opportunities offered by the community school to a student who attends for the school's entire school year." *Id.* That clearly requires consideration of actual time spent participating in learning opportunities. Subsection (H)(3) further reinforces this actual-time-spent requirement by noting that "no . . . 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." A generalized imputation of hours premised on merely making learning opportunities available cannot be squared with these statutory mandates.

Courts have likewise noted the need to measure actual hours and to go so far as to determine percentages of hours. *Harmony Community School v. Ohio Dept. of Education*, 125 Ohio Misc.2d 42, 2003-Ohio-5312 (Ct. of Claims), noted that the necessity of "properly documented hours of practical learning . . . included in FTE funding calculation," *id.* at ¶19, and ODE's authority to recognize fractional FTEs, *id.* at ¶ 11, ¶ 20, n.2. ECOT's blanket assumption of hours cannot be squared with that granular analysis.

R.C. 3314.27 further reinforces this conclusion by stating that no "student . . . 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" in order for a school to be paid. ODE ***must*** examine hours of participation to apply these statutes.

ECOT's claim that ODE's efforts "to impose a log-in time/duration requirement in determining proportionate eschool FTE funding . . . squarely contradicts it statutory mandate in R.C. 3314.08(H)(3)," is wrong and ignores key provisions of the statutes identified above. (Motion at 13). Again, R.C. 3314.08(H)(3) provides that ODE is to "determine each community school student's percentage of [FTE] based on the percentage of learning opportunities offered by the community school to that student." ECOT relies heavily on the word "offered" to insist that a student need only log in for one minute each day for it to receive funding for a full FTE. But such this argument ignores the noun which it modifies—"learning opportunities." "Learning opportunities," in turn, are discussed in subsection (H)(2), which specifies that learning opportunities must "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 [ODE].***" R.C. 3314.08(H)(2) (emphasis added). Reading the statutes together, as courts are required to do, inescapably leads one to the conclusion that FTE is to be measured in terms of student participation, not merely an eschool making online instruction "available." That is the common sense reading.

In fact, ECOT's own sponsor agreement with ESCLEW, including ECOT's attendance and truancy policy demonstrates that ECOT understood FTEs to be measured in terms of student participation hours, not mere log-ons. ECOT told its students that "it is crucial that the student logs in, checks e-mail and participates in coursework regularly (25 hours per week minimum) each week in order to avoid [truancy] consequences mentioned above." (Sponsor Agreement, Attachment 6.13). And, ECOT acknowledged that for purposes of meeting the 920-minimum requirement, students are "prohibited from engaging in more than 10 hours of learning

opportunities within a 24 hour period" and that for purposes of calculating a school day, a student's "***participate [sic] must amount to at least five hours per day***." (Emphasis added).

The cases that ECOT cites are instances where an agency directly ignored a legislative mandate that the agency take a certain action. For example, in *San Allen v. Buehrer*, 2014-Ohio-2071 (8th District), the Bureau of Workers' Compensation ignored its statutory requirement to create a retrospective-group rating plan and instead created a prospective plan. *Id.* at ¶ 82 ("Because former R.C. 4123.29(A)(4)(c) expressly required that employers be grouped 'for purposes of retrospective rating,' and there is no language in former R.C. 4123.29 authorizing the BWC to implement a prospective group rating plan, we find no error in the trial court's determination that the BWC's prospective group rating plan violated former R.C. 4123.09.") Contrast that with ODE's statutory obligation in R.C. 3314.08(H)(2) to establish "criteria and documentation requirements ***for student participation***" to apply when calculating a school's FTE pursuant to R.C. 3314.08(H)(3). Rather than taking action directly contrary to its statutory requirements, ODE is trying to ***comply*** with its statutory obligation. The two remaining cases ECOT cites fail to offer support for the same reason. *See Hoffman v. State Med. Bd.*, 113 Ohio St.3d 376, 380-81, 2007-Ohio-2201 (agency rule prohibiting anesthesiologist assistants to perform epidurals conflicted with express language of statute allowing assistants to assist an anesthesiologist in the performance of epidurals); *Taber v. Ohio Dep't of Human Servs.*, 125 Ohio App.3d 742, 750-51 (10th Dist. 1998) (rejecting agency's public assistance rules that directly conflicted with formula set forth in statute). No such conflict exists here.

Because Chapter 3314 plainly requires eschools to document student participation time for purposes of FTE calculations, ECOT has not established a substantial likelihood of success on this claim.

2. ODE Cannot Be Estopped From Enforcing The Documentation Requirements.

ECOT likewise cannot show a likelihood of success on its second claim—that the log-in and log-out documentation requirement violates Ohio Revised Code Chapter 119 rulemaking requirements. First, the argument fails because, as discussed at length above, ODE is simply carrying out an express statutory mandate set forth in the Revised Code. It is not required to make additional rules via Chapter 119.

Second, at bottom, ECOT's claim is that ODE should be estopped from enforcing its FTE documentation requirements more strictly than it has in the past. But, an agency's decision to take a different course is not actionable, and, in any event, ODE has been publicly announcing enforcement of the log-in and log-out data with specificity ***since at least 2012***.

Courts have consistently rejected any claim that state agencies can be estopped from enforcing the public's rights. *Besl Corp. v. Pub. Utilities Com.*, 45 Ohio St.2d 146, 150 (1976). Of more particular interest here, they have rejected claims against government agencies based on those agencies' prior enforcement practices with respect to regulated conduct. *State ex rel. Chevalier v. Brown*, 17 Ohio St.3d 61, 63 (1985); *Sun Ref. & Mktg. Co. v. Brennan*, 31 Ohio St.3d 306, 307 (1987); *State ex rel. Cooker Rest. Corp. v. Montgomery County Bd. of Elections*, 80 Ohio St. 3d 302, 307 (1997). Moreover, they have done so even when that resulted in hardship to the regulated party. *Chevalier,* 17 Ohio St.3d at 65. *Ohio State Bd. of Pharm. v. Frantz*, 51 Ohio St.3d 143, 146 (1990). There is good reason for that; "[t]o hold otherwise would be to grant [] a right to violate the law." *Frantz*, 51 Ohio St. 3d at 146.

That is exactly what ECOT seeks. It claims that ODE's previous approval of ECOT's FTE submissions during the 2011 review process somehow trumps the legal requirements discussed above. That is not the law.

Furthermore, ECOT had ample notice that ODE would be reviewing log-in and log-out records as part of the statutorily required FTE review process. ODE has expressly stated that it deemed this information to be part of the review process since the 2012 FTE handbook.

3. The Funding Agreement Has No Application To FTE Calculations.

The third and final claim ECOT advances is a declaratory judgment claim to enforce the terms of a 2003 funding agreement, arguing that ODE's use of log-in and log-out data to calculate FTE violates that contract. The 2003 agreement simply states that "ODE shall fund [ECOT] for all students enrolled as set forth in Section 1, ***pursuant to the Ohio Revised Code section 3314.08***." (Ex. A to Compl., Funding Agmt. at § 4 (emphasis added)). As discussed above, the documentation ODE seeks is required to determine FTE under R.C. 3314.08. Therefore, ODE's documentation requirement adheres to the express terms of the Funding Agreement.

Tellingly, ECOT does not identify which provision of the Funding Agreement ODE's log-in/log-out documentation requirement violates in either its Verified Complaint or its emergency TRO Motion. That is because it ECOT is unable to point to a provision of the agreement that ODE has even arguably violated. Instead, ECOT devotes pages to discussing cases addressing an agency's breach of a specific contract provision, something ECOT has not even attempted to do.

V. CONCLUSION

For the foregoing reasons, ECOT's Motion for Temporary Restraining Order should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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