

ORIGINAL

IN THE SUPREME COURT OF OHIO

HOPE ACADEMY BROADWAY  
CAMPUS, et al.,

Appellants,

v.

WHITE HAT MANAGEMENT, LLC, et al.,

Appellees.

CASE NO. 2013-2050

On Appeal from the Franklin County Court  
of Appeals, Tenth Appellate District,  
Case No. 12-APE-496

FILED  
AUG 04 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

**AMICUS BRIEF OF SUMMIT ACADEMY MANAGEMENT, LLC  
IN SUPPORT OF APPELLEES WHITE HAT MANAGEMENT, LLC**

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## I. INTRODUCTION

The General Assembly passed the Community Schools Act to provide parents and children “a choice of academic environments” and to provide the “education community with the opportunity to establish limited experimental educational programs in a deregulated setting.” *Cincinnati City School Dist. Bd. of Educ. v. Connors*, 132 Ohio St.3d 468, 2012-Ohio-2447, ¶13, 974 N.E.2d 78, citing Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. The schools are “purposefully designed to have greater operational autonomy,” and “autonomy is the key element that allows these schools to operate in a structure and environment that can be more flexible and responsive.”<sup>1</sup> The Ohio policy to promote autonomy mirrors policy choices made by the federal government, which defines a charter school as a school authorized by state statute and “exempt from significant State or local rules that inhibit the flexible operation and management of public schools.” 20 U.S.C. 7221i(1)(A). By their very definition, community and charter schools were intended to be flexible, autonomous, and deregulated.

Although still in its infancy compared to the long-standing traditional school model, Ohio’s community schools are proving to be of interest to Ohio’s parents and children. Students choose community school educations in increasing numbers each year.<sup>2</sup> According to the 2012-2013 Annual Report on Ohio Community Schools, “over 60 percent of community schools are adding academic value to their students.”<sup>3</sup>

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<sup>1</sup> Ohio Department of Education, *2012-2013 Annual Report on Ohio Community Schools*, p.5., <http://education.ohio.gov/getattachment/Topics/School-Choice/Community-Schools/Forms-and-Program-Information-for-Community-School/Annual-Reports-on-Ohio-Community-Schools/ODE-2013-Community-Schools-Annual-v4.pdf.aspx> (accessed July 30, 2014).

<sup>2</sup> *Id.* at p.20.

<sup>3</sup> *Id.* at p.9.

Ohio's statutory scheme for community schools provides express authority for the schools to contract with management companies to operate the schools. R.C. 3314.01 (B) and R.C. 3314.02(A)(8). An operator, by definition, is bound to the community school by contract, and contract alone. R.C. 3314.02(A)(8). The General Assembly did not mandate or limit any contractual terms between an operator and a community school, even though it could have.

Although the spirit of the Community Schools Act requires deregulation and the letter of the Community Schools Act requires freedom of contract, Appellants ask this Court to require a new and different judicially-imposed standard of conduct. Namely, Appellants ask this Court to force, by judicial fiat, all management companies of community schools to title assets purchased with their earnings in the name of the community school itself.

The issues before this Court are:

- (1) Does a management company's compensation remain a "public fund" until it is arbitrarily determined that the management company has satisfied all of its "contractual, statutory, and fiduciary obligations" to the community school?
- (2) Should this Court judicially require a management company to title all assets it purchases in the name of a community school when no provision of the Ohio Revised Code requires that result, and the Ohio Revised Code instead provides that management companies are governed by contract and operate in a deregulated setting?
- (3) Does a private entity become a public official merely by fulfilling its contractual obligations a governmental entity?

## **II. INTEREST OF THE AMICUS CURIAE SUMMIT ACADEMY MANAGEMENT: A NON-PROFIT MANAGEMENT COMPANY SERVICING THE NEEDS OF OHIO'S ALTERNATIVE LEARNERS.**

Summit Academy Management, LLC (“Summit Academy”) is an Ohio non-profit corporation managing 27 separate community schools—all focused on alternative learners, and specifically designed for students with Attention Deficit Hyperactivity Disorder, Autism Spectrum Disorders, and related disorders. Summit Academy offers educational programming for students with special needs from kindergarten through twelfth grade, ranging from age 5 to 22. Its schools operate throughout Ohio in Akron, Canton, Cincinnati, Columbus, Dayton, Lorain, Middletown, Painesville, Parma, Toledo, Warren, Xenia, and Youngstown.<sup>4</sup> More than 80 percent of Summit Academy students are on Individual Educational Plans.

Community schools choose to partner with Summit Academy for its expertise in providing specialized educational services for alternative learners. When community schools choose Summit Academy, they benefit from a highly-acclaimed educational approach. The Summit Academy Model deploys a strong, therapeutic-based learning environment to address all facets of a child’s development. Summit Academy’s approach incorporates speech and language services, occupational therapy services, a building-wide behavioral system reflecting the principles of Applied Behavior Analysis coupled with the services of a Behavior Specialist or a Performance Coach, and an Individual Educational Plan Coordinator to manage the special education process for all students. Community schools select Summit Academy as a management company because they are attracted to the Summit Academy Model and the aptitude Summit Academy has developed for a specialized area of educational services.

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<sup>4</sup> Summit Academy Schools-Our School Locations, [http://www.summitacademies.com/summit\\_academy\\_schools\\_school\\_locations.php](http://www.summitacademies.com/summit_academy_schools_school_locations.php) (accessed July 30, 2014).

Summit Academy submits this Amicus Brief in part to counteract the picture of community school management companies painted by Appellants and the Ohio School Boards Association. Management companies are not—as Appellants and the Ohio School Board Association suggest—driven solely by greed, corporate profit, and a scheme to “launder” public money for private purposes. Many management companies, like Summit Academy, are non-profit corporations, where the corporate focus is solely on providing an alternative educational model for children and their families—and not for the pecuniary gain of any private person.

Although many of the arguments before this Court turn on the precise language of the contract between the community schools and their management company—as well they should—Appellants propositions of law seek to cast a far broader net. While Summit Academy expresses no opinion concerning the interpretation of particular contractual language, as that language differs from Summit Academy’s contracts with its community schools, Summit Academy objects to Appellants’ attempt to judicially impose non-contractual restrictions and limitations unintended by the General Assembly on community school management companies.

The propositions of law advanced by Appellants would eviscerate community schools’ autonomy and flexibility to manage and operate alternative schools. Therefore, Summit Academy urges this Court to reject each of Appellants’ propositions of law.

**III. Summit Academy's Response to Appellants' Proposition of Law Number 1:  
PAYMENTS MADE TO MANAGEMENT COMPANIES OF A COMMUNITY  
SCHOOL DO NOT REMAIN "PUBLIC FUNDS."**

**Appellants' Proposition of Law Number 1:**

"Public Funds paid to a private entity exercising a government function, such as the operation of a community school, retain their character as public funds even after they are in the possession and control of the private entity. Although the private entity may earn a profit out of the public funds, such profit is earned only after the private entity has fully discharged its contractual, statutory, and fiduciary obligations."

Appellants ask this Court to endorse the unique proposition that public funds retain their public character until some uncertain time when the private company being paid to perform services has fulfilled all of its obligations. The test proposed by Appellants is unworkable, unnecessary, and unsupported by Ohio law.

**A. Appellants' Proposition that a Private Entity Can Only Earn a Profit  
After it has Discharged its Obligations is Unsupported by Ohio Law.**

No Ohio court has held that public funds remain public funds even after they are paid to a private entity as compensation for goods and services rendered. Appellants cite this Court's decision in *Oriana House, Inc. v. Montgomery*, 108 Ohio St.3d 419, 2006-Ohio-1325, 844 N.E.2d 323 for the following proposition: "The Court held that public funds flowing to a private entity performing a government function necessarily retain their public character." Merit Brief of Appellants Hope Academy Broadway Campus, et al., p.7, citing *Oriana House* at ¶15. In fact, the cited paragraph of this Court's opinion stated: "private entities receiving public funds, such as those receiving funds to operate the [community-based correction facilities], are subject to audit at the State Auditor's discretion pursuant to R.C. 117.10." *Oriana House* at ¶15. This Court did not state that public funds remain public after being paid to a private entity. Rather, this Court reached the precise result demanded by the plain language of the Ohio Revised Code—private entities receiving public funds may be audited. As the Court noted, R.C.

2301.56(D)(1)<sup>5</sup> plainly provides as much: “If a private or nonprofit entity performs the day-to-day operation of any community-based correctional facility and program or district community-based correctional facility and program, the private or nonprofit entity also is subject to financial audits under section 117.10 of the Revised Code.” R.C. 2301.56(D)(1). Far from supporting Appellants’ radical proposition that a private entity’s earnings are held hostage until some undetermined time when it has sufficiently fulfilled its obligations, *Oriana House* reached the unsurprising conclusion that a State Auditor has the power to audit a private entity when the General Assembly has explicitly granted that power by statute. *Oriana House* simply did not reach the issue of when public funds became the property of a private entity.

The court of appeals’ decision, relying on *State ex rel. Yovich v. Bd. of Educ. of Cuyahoga Falls City School Dist.*, 10th Dist. No. 91AP-1325, 1992 Ohio App. LEXIS 3323, 1992 WL 142263, was directly on point. Whereas *Oriana House* concerned the power to audit rather than the actual characterization of funds, *Yovich* directly addressed the time at which public funds become private. *Id.* at \*6. Specifically, the court stated: “the funds lost their chief characteristic of ‘public funds’ once the funds came into possession and control of CSO, a private entity.” *Id.*

Various opinions from the Office of the Attorney General of the State of Ohio have also found that funds paid by a public body to a private entity can be freely spent by the private entity. For example, in 1989 the Attorney General considered the relationship between a township and the nonprofit volunteer fire department it contracted with to provide fire protection services. 1989 Atty.Gen.Ops. No. 89-010. The township paid the nonprofit fire department 96

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<sup>5</sup> The relevant statutory provision was R.C. 2301.56(E)(1) at the time of the *Oriana House* decision, but was later renumbered to R.C. 2301.56(D)(1), effective October 12, 2006.

percent of the total fire tax levies it collected. *Id.* After a dispute concerning the interpretation of the contract arose, the nonprofit fire department used the funds it received from the township to pay its legal fees in the litigation against the township. *Id.* The Attorney General opined that this was acceptable as long as there was no contractual prohibition to do so. *Id.* The Attorney General explained that the township was statutorily authorized to contract with a private entity, and that “[n]o statutory limitations are placed upon the terms which such contracts may include,” and no statutory provision “restricts the purposes for which the private fire company may expend the moneys that it receives from the township for such services.” *Id.* As such, the money paid to the private fire company could be spent for any proper purpose, and “[i]n general, amounts paid by a public body to a private entity in exchange for goods or services become the property of the private entity and may be expended by that entity for any purpose for which it may properly expend its money.” *Id.*, citing 1988 Atty.Gen.Ops. No. 88-045 and 1983 Atty.Gen.Ops. No. 83-069.

More recently, the Attorney General reiterated this stance in an opinion involving payments from an alcohol, drug addiction, and mental health board to a private entity. 1997 Atty.Gen.Ops. No. 97-008. The opinion request explained that the public entities “seem to have taken the position that public funds never lose their public character, even after they are disbursed to private agencies.” *Id.* The opinion request further stated that “the providers believe that any property purchased with funds earned through the provider of services to the Boards is the property of the provider.” *Id.* The Attorney General agreed that the public entities do not have any continuing control or ownership over funds after payment to the private service provider. *Id.* Reasonable compensation paid to a service provider becomes the property of the private entity at the time of payment. *Id.*

The underlying rationale for this result was persuasively explained by another court in *State v. Davis*, 539 So.2d 803 (La.App.1989). The case concerned a dispute regarding fees paid from a governmental office (the DHHR) to district attorneys in exchange for services provided to enforce child support obligations. *Id.* at 803. Although the details of the dispute are not germane, the court's reasoning is persuasive. The court explained that funds paid from one agency to another pursuant to a contract for services become private funds at the moment they are paid, noting that any argument to the contrary "overlooks the fact that public funds always become private funds when they are paid in exchange for goods and services. This applies to the salary of the Governor of the State down to the least employees." *Id.* at 808. *See also Easter Missouri Laborers Dist. v. St. Louis County*, Miss.App. No 55214, 1989 Mo.App. LEXIS 394, 1989 WL 140024 (Mar. 21, 1989) ("When the County pays rent to the Council, that money loses its public character.").

Governmental functions are all carried out by individuals or entities that are paid for their work. These payments do not remain public funds pending some determination that the work is complete or satisfactory. The appellate court, the court in *Yovich*, and the Ohio Attorney General are correct. Public funds become private funds at the time they are paid in exchange for goods or services. Ohio law does not support Appellants' dramatic departure from this simple test.

**B. Appellants' Proposition that a Private Entity Can Only Earn a Profit After it has Discharged its Obligations is Unworkable.**

Appellants' first proposition of law, in addition to being legally unsupported, also invites confusion and conflict. Appellants' proposed test would mandate that funds held by a private entity be considered "public funds" until some undefined time when the entity has satisfied all of its "contractual, statutory, and fiduciary obligations." The problems with such a test are manifest.

Appellants' proposed test creates ambiguity at every turn. Under Appellants' test, a private entity would never have certainty regarding the status of its compensation. Appellants offer this Court no standard for determining the precise scope of an entity's "contractual, statutory, and fiduciary obligations." They offer no explanation regarding who will serve as an arbiter of whether the private entity's nebulous "fiduciary" obligations have been satisfied. They offer no mechanism for resolving disputes concerning the sufficiency of performance. Neither do Appellants offer any explanation for the effect of complaints concerning services provided by the private entity. Taking their test at face value, however, it appears that even a nominal deficiency in performance would require the private contractor's entire fee to remain categorized as "public funds," unavailable for use as "profits" until the contractor is deemed to have fully performed. In essence, Appellants' proposition will elevate every dispute over contractual performance into a matter of alleged misappropriation of public funds.

The test proposed by Appellants is further unworkable when analyzed through the lens of non-profit management companies like Summit Academy. Appellants' proposition states: "Although the private entity may earn a profit out of the public funds, such profit is earned only after the private entity has fully discharged its contractual, statutory, and fiduciary obligations." (Appellants' Proposition of Law No. 1). The very nature of a non-profit is that none of the fees earned by the non-profit will be paid as profits. Appellants' test is even more convoluted in this context. At what point in time can a non-profit entity receiving public funds apply its fee towards the purchase of assets where there is technically never a "profit" earned? Although Summit Academy never collects a profit from the fees it earns as a management company, it still purchases assets used to provide Summit Academy's service to its community school partners.

If Appellants' proposition was adopted, then Summit Academy, as a non-profit entity, would never be able to expend the funds paid to it by the schools it manages.

Aside from being unsupported by law, Appellants' proposition of law is indefinite, unworkable, and creates more problems than it attempts to solve.

**C. Appellants' Proposition that a Private Entity Can Only Earn a Profit After it has Discharged its Obligations is Unnecessary.**

Besides proposing a rule that is completely contrary to the intent of the community school system, Appellants' argument must also fail because it seeks to impose new regulations through judicial fiat when sufficient protections are already in place. Contrary to Appellant's suggestion, ample accountability exists for management companies of community schools. Management companies are accountable by statute, accountable to the community schools they serve, and ultimately accountable to the parents and students who will choose whether or not to attend the schools operated by the management company.

Appellants argue that the court of appeal's decision "effectively freed [management companies] from any real scrutiny or public accountability" and "there would be no meaningful accountability for their use of the funds." (Merit Brief of Appellants Hope Academy Broadway Campus, et al., p.10-11). Appellants raise the false specter of insufficient accountability to argue that this Court should "cure" a problem that simply does not exist. In doing so, Appellants seeks to fight a battle that has already been decided in the halls of the General Assembly. The necessary accountability for management companies is built directly into the statutory scheme provided in the Community Schools Act.

First, management companies are statutorily accountable. Management companies receiving in excess of 20 percent of the annual gross revenues of the school are required to provide a detailed accounting that includes "the nature and costs of the services it provides to the

community school.” R.C. 3314.024. This provision demonstrates that the General Assembly contemplated—and indeed approved—the community school’s entrustment of significant portions of its budget to a management company.

Secondly, management companies are accountable to the community schools they serve. If the community schools are unhappy with the management company’s use of its funds or provision of services, the community school itself can terminate its contract or elect not to renew that contract. R.C. 3314.026.

Finally, management companies are accountable to the public. A management company’s fee is dependent on the number of pupils who choose to attend its schools. If a management company fails to provide adequate service, it cannot hope to attract or retain students, and the management company will fail. The market itself provides accountability for the management company’s performance. This is precisely the type of deregulated accountability the General Assembly intended.

The community school is not without remedy if it is dissatisfied with its management company. In addition to terminating its contract with the management company, if the school discovered financial improprieties or a failure to fulfill the contract, the school could pursue a civil action for breach of contract, conversion, or fraud against the management company. Before raising the specter of being disarmed in its efforts to hold a management company accountable, Appellants should use the tools already supplied by the General Assembly and Ohio law.

A judicial finding that money paid as a fee to a private entity in exchange for goods and services remain part of a “public fund” after payment is neither wise, nor workable, nor necessary.

**IV. *Summit Academy's Response to Appellants' Proposition of Law Number 2:***  
**MANAGEMENT COMPANIES ARE NOT OBLIGATED TO TITLE ALL ASSETS THEY PURCHASE IN THE COMMUNITY SCHOOL'S NAME.**

**Appellants' Proposition of Law Number 2:**

When a private entity uses funds designated by the Ohio Department of Education for the education of public-school students to purchase furniture, computers, software, equipment, and other personal property to operate a community school, the private entity is acting as a purchasing agent and the property must be titled in the name of the community school.

Appellants' proposed requirement that all assets purchased by a management company be titled in the name of the community school is an imposition that is contrary to the freedom of contract and at odds with the flexibility necessary to provide the experimental, deregulated, and autonomous alternative to public schools that the General Assembly intended to provide. Judicially requiring management companies to title assets in the name of the community schools is contrary to the text, structure, and intent of the Community Schools Act.

**A. A Judicial Mandate to Title Assets in the Name of the School is Inconsistent with the Plain Text of the Community Schools Act.**

Ohio statutory law does not obligate management companies to title assets in the name of community schools. Instead, the Community Schools Act expressly contemplates that the relationship between a community school and a management company will be governed by contract. R.C. 3314.01 authorizes a community school to "contract for any services necessary for the operation of the school." R.C. 3314.01(B) (emphasis added). Among those permissible services includes the services of an operator or management company. The Ohio Revised Code's very definition of an operator of a community school reveals the intention of the legislature that the relationship be contractually controlled:

“Operator” means either of the following:

- (a) An individual or organization that manages the daily operations of a community school pursuant to a contract between the operator and the school’s governing authority;
- (b) A nonprofit organization that provides programmatic oversight and support to a community school under a contract with the school’s governing authority \* \* \*.

R.C. 3314.02(A)(8) (emphasis added). The plain language of the statute provides that the relationship between the community school and its operator or manager must be controlled by contract. No provision of the Ohio Revised Code places any limitation on that contract. No law requires the manager or operator to title all property in the name of the community school. In fact, the Revised Code specifically contemplates that a community school may lease, rather than purchase, school facilities. *See* R.C. 3318.50(B) (Providing assistance for community schools acquiring classroom facilities “by lease, purchase, remodeling or existing facilities, or any other means.”) Therefore, the text of the Community Schools Act provides that a school need not own all its own resources, but rather has the freedom to contract with another party to provide necessary resources.

The text of the Community Schools Act does not support Appellants’ position. According to the plain language of the statute, the economic relationship between a community school and its management company is governed by contract, and not by an arbitrary requirement that assets be titled in the manner Appellants deem fit.

**B. A Judicial Mandate to Title Assets in the Name of the School is Inconsistent with the Structure of the Community Schools Act.**

The structure of the Community Schools Act also demonstrates that the General Assembly did not intend to limit the contractual freedom of community schools and their

managers. The General Assembly could have legislated minimum contractual requirements for management companies. It chose not to.

Comparing the General Assembly's regulation of contracts between sponsors and community schools with the lack of regulation of contracts between managers and community schools is further evidence of the General Assembly's intent to permit freedom of contract between the school and its managers. The Community Schools Act imposes several minimum requirements on the contractual terms between the community school and its sponsor.<sup>6</sup> R.C. 3314.03 specifies that the contract must impose obligations on both the community school<sup>7</sup> and the sponsor.<sup>8</sup> In contrast, the General Assembly chose not to place any requirements on the content of the contract between the community school and its management company. The absence of any such requirement is telling.

In fact, the only provision of the Ohio Revised Code that places any obligation on management companies further emphasizes the freedom that community schools and management companies have in arranging their economic relationship. R.C. 3314.024 provides that "[a] management company that provides services to a community school that amounts to more than 20 percent of the annual gross revenues for the school shall provide a detailed account including the nature and costs of the services it provides to the community school." Thus, while the General Assembly limited the fee a community school may pay to its sponsor to 3 percent of total operating expenses, it placed no limit on the amount a community school may pay to a

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<sup>6</sup> R.C. 3314.03 outlines 25 separate items which must be specified in the contract between the school and its sponsor. R.C. 3314.03(A)(1)-(25).

<sup>7</sup> R.C. 3314.03(A)(11) states that the contract must obligation the community school to comply with 63 specific statutory provisions and 9 chapters of the Ohio Revised Code.

<sup>8</sup> R.C. 3314.03(D) requires the contract to include 6 separate statutorily-imposed duties on the sponsor.

management company for its services. *See* R.C. 3314.03(C). Indeed, R.C. 3314.024(C) contemplates that a substantial part of a community school's funding may be used to pay management company fees. The only obligation is that the management company must provide a detailed accounting to the community school. *See* R.C. 3314.024.

The structure of the Community Schools Act demonstrates that the General Assembly did not place any obligations on a management company to title assets in a certain way. The General Assembly could have placed minimum requirements on the community school's contract with management companies, just as it did with sponsors, but chose not to. The structure of the Community Schools Act demonstrates that the General Assembly did not intend the relationship between a community school and its management company to be highly regulated, and certainly did not intend to legislate how a management company would title assets it purchased.

**C. A Judicial Mandate to Title Assets in the Name of the School is Inconsistent with the Purpose of the Community Schools Act.**

The purposes of the Community Schools Act include “providing parents a choice of academic environments for their children and providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting.” *Cincinnati City School Dist. Bd. of Educ. v. Conners, supra*, 2012-Ohio-2447 at ¶13, citing Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. When interpreting a statute, “courts seek to interpret the statutory provision in a manner that most readily furthers the legislative purpose as reflected in the wording used in the legislation.” *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, ¶18, 969 N.E.2d 1166, citing *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513, 1996-Ohio-376, 668 N.E.2d 498 (1996), *United Tel. Co. v. Limbach*, 71 Ohio St.3d 369, 372, 1994-Ohio-209,

643 N.E.2d 1129 (1994), and *Harris v. Van Hoose*, 49 Ohio St.3d 24, 26, 550 N.E.2d 461 (1990).

In keeping with the goal of flexibility, experimentation, and deregulation embodied in the Community Schools Act, the General Assembly gave community schools the freedom to contract with a management company, and did not place any limitations on that freedom. *See* R.C. 3314.01(A). This Court has acknowledged the importance to the right to contract “as it applies to education,” explaining that “[t]he freedom to contract is a deep-seated right that is given deference by the courts.” *Cincinnati City School Dist. Bd. of Educ. v. Conners, supra*, 2012-Ohio-2447 at ¶15. The General Assembly has expressed its intent to deregulate community schools and to permit community schools to enter into relationships with operators that are, by virtue of the very definition of the term, governed by contract. R.C. 3314.02(A)(8).

The legislature intended to provide a deregulated setting for community schools. Imposing judicially-created requirements undercuts that policy. The legislature further intended to provide flexibility for community schools. Legislating the manner in which assets must be titled is the opposite of flexibility. Community schools will cease to provide an experimental alternative choice to Ohio’s learners if piece by piece the courts force community schools to look more and more like traditional public schools.

This Court should reject Appellants’ second proposition of law, because a judicial mandate controlling the manner in which assets are titled as between a community school and its chosen operator undercuts the spirit of deregulation and flexibility that was intended by the General Assembly and vital for community schools.

V. ***Summit Academy's Response to Proposition of Law Number 3:***  
**MANAGEMENT COMPANIES OF COMMUNITY SCHOOLS ARE NOT  
PUBLIC OFFICIALS.**

**Appellants' Proposition of Law Number 3:**

A private entity that agrees to operate all functions of a community school has a fiduciary relationship with the community school. Although the private entity may earn a profit for the services it provides, it must act primarily for the benefit of the community school.

Appellants claim that White Hat Management, LLC ("White Hat") is a fiduciary of its community schools pursuant to the terms of its contracts and because management companies are public officials. (Merit Brief of Appellants Hope Academy Broadway Campus, et al., p.2). While Summit Academy will leave the arguments based upon the particular language of the contract to White Hat, the suggestion that a private management company is a public official owing fiduciary duties merely because it contractually agrees to provide services operating a school is erroneous.

Appellants argue that because a management company agrees to perform a governmental function on behalf of a community school, the management company is necessarily a public official. Ohio law does not support that result. Appellants' primary authority for its position is this Court's decision in *Cordray v. Int'l Preparatory School*, 128 Ohio St.3d 50, 2010-Ohio-6136, 941 N.E.2d 1170. In *Cordray*, this Court found that a community school is a public office. *Id.* at ¶22. The Court further found that the treasurer of the community school, as an officer of a community school, is a public official. *Id.* at ¶19 and 29. The Court did not address whether a private entity who enters into a contract with a public office to provide traditionally governmental services is a public official.

Although analyzing the public official issue in the context of a public records request, this Court's analysis in *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193 directly addresses whether a private entity performing a

governmental function is a public institution and thus a public office. The Court noted that the community-based correctional facility was a public office, and that it gave 100 percent of its public funding to a private entity, Oriana House, who managed its day-to-day operations. *Id.* at ¶4, 6 and 16. This Court concluded that even though Oriana House received 100 percent of the community-based correctional facility’s public funding and was “performing a historically governmental function,” it was neither a public institution nor a public office. *Id.* at ¶28, 32, and 35. The Court noted that “[t]he fact that a private entity receives government funds does not convert the entity into a public office for purposes of the Public Records Act.” *Id.* at ¶29. The Court reasoned “It ought to be difficult for someone to compel a private entity to adhere to the dictates of the Public Records Act, which was designed by the General Assembly to allow public scrutiny of public offices, not of all entities that receive funds that at one time were controlled by the government.” *Id.* at ¶36. That reasoning is equally compelling here. It ought to be difficult to transform a private corporate entity into a public official. The implications of doing so are far broader than merely subjecting that entity to public records requests. The same reasons that compelled this Court to conclude that Oriana House was not a public office should compel a finding that a management company is not a public official.

## CONCLUSION

Amicus Curiae Summit Academy Management, LLC respectfully requests that this Honorable Court reject each of the propositions of law advanced by Appellants and affirm the decision of the Tenth Appellate District in all respects.

Respectfully submitted,



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**PROOF OF SERVICE**

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