IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI	**Case No. A1001252**
Plaintiff,	**JUDGE RUEHLMAN**
-VS-	
Dr. ROGER CONNERS, *et al.* 3491 Hillside Avenue Cincinnati, OH 45204	**Defendants' Motion for Judgment on the Pleadings**
Defendants	Maurice A. Thompson (0078548) 1851 Center for Constitutional Law 208 E. State Street Columbus, Ohio 43215 Tel: (614) 340-9817 MThompson@OhioConstitution.org

Now come Defendants, Roger and Deborah Conners (hereinafter "Dr. Conners"), by and through counsel, and respectfully request that this Honorable Court dismiss the February 10, 2010 Complaint of Plaintiff Board of Education of the City School District of the City of Cincinnati (hereinafter "CPS"), pursuant to Ohio Rule of Civil Procedure 12(c).

I. BACKGROUND

Dr. Conners wished to open a community school at Theodore Roosevelt School in Fairmount in August 2010. CPS' lawsuit is simply the latest in a long line of improper and baseless attacks on school choice in Ohio. CPS has continuously flouted Ohio's community school laws, and in a bold new policy initiative, now seeks to insulate itself from school choice

and competition by essentially spot-zoning community schools out of the city of Cincinnati. The reason for this animus is simple: Ohio's public community schools are funded through a "pass through" mechanism. In each instance where a student and his family choose to leave CPS for a community school, Ohio's school funding formula redirects approximately $5,732 from CPS, and to the community school. [1] As the Ohio Department of Education explains, "payments to community schools are deducted from the foundation payment of the school district where the community school student resides."[2] Accordingly, CPS and many other school districts perceive the need defend this $5,732 per pupil by attempting to limit the number of students who attend community schools within their district.

The initial tactic of CPS and other school boards was to attack the constitutionality of charter schools and the Ohio Community Schools Act, the statute which created them, altogether. In *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.,* CPS and others argued that the Community Schools Act was unconstitutional, specifically alleging that "the funding method used to support community schools diverts funds from city school districts, depriving them of the ability to provide a thorough and efficient system of common schools," and that "the community schools have made urban districts more reliant on local property taxes because *when a student leaves a district for a community school, the state reduces the state funding that the district receives for the student*."[3] Unfortunately for CPS, the Supreme Court of Ohio concluded that "[n]othing in the Constitution, however, prohibits the

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[1] See Ohio Department of Education website: http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=878&ContentID=2305&Content=52515.

[2] Id.

[3] *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.* (2006), 111 Ohio St.3d 568, 857 N.E.2d 1148. Emphasis added.

General Assembly from reducing funding because a school district's enrollment decreases,"[4] and accordingly, upheld the constitutionality of the Ohio Community Schools Act and charter school funding.

Having lost its battle to entirely eradicate charter schools, CPS has, in recent years, turned to more subtle attacks. In May 2009, CPS elected to offer nine buildings at public auction, and two, including Roosevelt School, at absolute auction. Despite the statutory right of first refusal granted to charter schools, none of these nine buildings were offered for sale to charter schools. Meanwhile, *all nine* were advertised with the "restriction" that they "may not be used as any type of educational facility [unless so used by CPS]."[5]

CPS sold one of these buildings, Roosevelt School, to Dr. Conners. After (1) failing to offer Roosevelt school for sale to charter schools; and (2) advertising Roosevelt school as further unavailable for school use, CPS insisted upon certain deed restrictions, at the time of auction, to forbid Roosevelt School for being used as a private school or community school. That restriction appears in the June 9, 2009 Purchase and Sale Agreement:

> Buyer agrees not to use Property for school purposes, and that the deed to the property will be restricted to prohibit future use of the Property for school purposes. Such deed restriction shall not apply to [CPS], and will not prevent

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[4] Id. (stating "If a child moves out of the district altogether, the state is permitted to reduce its funding to that child's district because state money follows the child. For example, if a child leaves a school district to attend private school, or to be schooled at home, the state is required to reduce its funding to that district. The same thing occurs when a child opts to attend a community school. R.C. 3314.08. Whenever a student leaves, for any reason, the school district's funding is decreased, and the district continues to receive state funding based on the students actually attending. Traditional schools still receive the full amount of state funds for the actual number of students enrolled." Further, "the state adjusts its level of funding to a school district based on enrollment, but the local share works differently, as a constant. The local share of funding remains the same no matter who attends the district school. If district enrollment decreases, the local share, being constant, constitutes a higher percentage of district funding. On the other hand, if district enrollment increases, the local share constitutes a lower percentage of district funding."

[5] Promotional Materials pursuant to Auction of Cincinnati Public Schools Surplus Properties, at p. 6, attached to Plaintiff's Complaint as Exhibit 1.1.

> [CPS] from repurchasing any portion of the property in the future and using the Property for school purposes.[6]

It also appears in the June 30, 2009 Quite Claim Deed:

> Grantee covenants not to use the property for school purposes, now or at any time in the future * * * this restriction does not apply to [CPS], and will not prevent [CPS] from repurchasing any portion of the Property in the future and using the Property for school purposes.[7]

Amongst all of the Cincinnati neighborhoods that CPS could have chose to deny an additional educational opportunity to parents and children, it has chosen the Fairmount neighborhood. This part of the city, which is where Theodore Roosevelt School is located, is precisely the type of community that the Ohio General Assembly envisioned assisting through the Ohio Community Schools Act: (1) 36 percent of its households make less than $10,000 per year, and 77 percent make less than $35,000 per year; (2) 70 percent of its residents are minorities; (3) 90 percent of schools' students would belong to a socioeconomic status that is eligible for free and reduced price lunches; and most importantly (4) local Cincinnati Public Schools that serve this low income minority community are in *academic emergency,* giving Fairmount residents little opportunity to change escape poverty through educational opportunity.[8]

Conversely, Theodore Roosevelt Community School, through an individualized, technology-focused curriculum, will have the capacity to create and improve lifelong opportunities available to the children of Fairmount. However, the realization of this capacity,

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6 June 9, 2009 Purchase and Sale Agreement, attached to Plaintiff's Complaint as Exhibit 2.

7 June 30, 2009 Quit Claim Deed, attached to Plaintiff's Complaint as Exhibit 3.

8 See Exhibit 5, p. 5, attached to Plaintiff's Complaint.

precisely what is envision by the OCSA, is derailed when those who would bring school choice to Fairmount are denied their statutory right to acquire basic facilities necessary to educate Fairmount children. Yet this is precisely what CPS' deed restriction, and accompanying lawsuit, attempt to accomplish.

Meanwhile, CPS representatives have noted that "[f]rankly, we are not that keen on the idea of our buildings going for additional charter schools,"[9] and that the Cincinnati Public Schools opposes "competition" from private and community schools.[10] Meanwhile, CPS has even dedicated a page on its website toward the derision of community schools.[11]

Below, however, it is demonstrated that, when selling a taxpayer-owned school building, CPS may not simply insist on contract terms in derogation of state law because it is "not that keen on the idea of 'our' buildings going for additional charter schools."

II. STANDARD OF REVIEW FOR JUDGMENT ON THE PLEADINGS

"[A] motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted."[12] The standard for review for a motion for judgment on the pleadings pursuant to Civil Rule 12(C) motion is similar to the standard of review for a motion to dismiss pursuant Civil Rule 12(B)(6).[13] However, under Civil Rule 12(C), the Court should consider both the complaint and

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9 August 22, 2005 statement of Cincinnati Public Schools Public Affair Officer Janet Walsh to Cincinnati Business Courier.

10 June 3, 2009 statements of Cincinnati Public Schools Real Estate Agent Andy Kahn to Rick Voss.

11 http://www.cps-k12.org/schools/charter/charter.htm

12 *Gawloski v. Miller Brewing Co.*, 96 Ohio App.3d 160, 163, 644 N.E.2d 731.

13 *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 569-70, 664 N.E.2d 931.

the answer.[14] The Court should only dismiss under Civil Rule 12(C) if the Court finds beyond doubt that the nonmovant could prove no set of facts in support of his claims that would entitle him to relief.[15] In making this determination, the Court should construe the material allegations in the counterclaim, along with all reasonable inferences drawn from them, in favor of the nonmoving party as being true.[16] Further, "When a document is attached to and incorporated by reference into the complaint, it may be considered as part of pleadings."[17]

In the instant matter, the analysis confronting the court is purely legal in character: the Court's decision will require no additional facts beyond those raised in the pleadings and attachments thereto. Quite simply, the question before the Court is a purely legal one. And that question is as follows: Does CPS' deed restriction forbidding taxpayer-owned school buildings from future use as private or community schools transgress Ohio's public policies in favor of (1) conveying taxpayer-owned school buildings and other infrastructure to community schools to reduce their start-up costs and lower their barriers to entry of the educational marketplace; or more broadly, (2) bringing parental choice and educational opportunity to inner-city Ohioans through the Ohio Community Schools Act. The analyses below demonstrate that the CPS deed restriction is in derogation of both policies, and is therefore void and unenforceable.

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14 Id., at 569.

15 Id., at 570.

16 Id.

17 See, e.g., *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 182.

III. LAW AND ANALYSIS

CPS is sure to opine that "a deal is a deal." While Defendants and their counsel are fully appreciative of the importance of honoring contractual obligations as anyone, Ohio public policy does not permit this deed restriction to stand. In Ohio, a contact's enforcement is not absolute merely because it was voluntary agreed upon: it must not transgress public policy. CPS' deed restriction is in derogation of Ohio's policy in favor of conveying unused taxpayer-owned school buildings to those who would use them for community schools. It is further in derogation of Ohio's public policy in favor of facilitating the growth of Ohio's community schools through diminishing start-up infrastructure expenses.

A. A contract term that violates public policy is void.

Deed restrictions "regarding the use of property are generally disfavored and will be strictly construed against limitation upon the free use of the property."[18] Moreover, deeds are contracts. Contract terms that violate public policy may not be enforced by Ohio courts. "Public policy" means the following:

> Public policy is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like. Again, public policy is that principle of law which holds that *no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy*. Moreover, actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations.[19]

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[18] *Loblaw v. Warren Plaza, Inc.* (1955), 163 Ohio St. 581, at paragraph two of the syllabus.

[19] *Eagle v. Fred Martin Motor Co.* (2004) 157 Ohio App.3d 150 809 N.E.2d 1161 (quoting *King v. King* (1900), 63 Ohio St. 363, 372, 59 N.E. 111).

Nearly 200 years ago, the Ohio Supreme Court explained that "the right of making contracts at pleasure is a personal privilege of great value, and ought not to be slightly restrained; but it must be restrained where contracts are attempted against the public law, general policy, or public justice."[20] The Court still holds fast to this principle, observing that "[l]iberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare. * * * [t]he public welfare is safeguarded, not only by Constitutions, statutes, and judicial decisions, but by sound and substantial public policies underlying all of them."[21]

The reason for this power to nullify contract terms is illuminating: *the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.* In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements.[22] This reasoning appears particularly relevant to a scenario where an agreement, in which one of the parties is a political subdivision, seeks to deprive an entire community of a legally mandated public education opportunity that may otherwise exist.

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[20] *Key v. Vattier* (1823), 1 Ohio 132, *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 184-185, 34 O.O. 73, 74, 70 N.E.2d 447, 448; *John Hancock Mut. Life Ins. Co. v. Hicks* (1931), 43 Ohio App. 242, 247, 183 N.E. 93, 95

[21] *J.F. v. D.B.* (2007), 116 Ohio St.3d 363, 879 N.E.2d 740, 2007 Ohio 6750, citing *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney* (1916), 95 Ohio St. 64, 115 N.E. 505. Note also, the that three dissenting justices in *J.F.* displayed the desire to nullify contract terms against public polices as broad as "safeguarding children." (Cupp, dissenting).

[22] *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.* (1987), 484 U.S. 29, 108 S.Ct. 364, citing *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983); *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 852-853, 92 L.Ed. 1187 (1948); *McMullen v. Hoffman*, 174 U.S. 639, 654-655, 19 S.Ct. 839, 845, 43 L.Ed. 1117 (1899); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356-358, 51 S.Ct. 476, 477-478, 75 L.Ed. 1112 (1931).

B. A contract term that hinders the purpose of a statute is void

Deed restrictions are void by public policy when they hinder or impede a result that a statute seeks to bring about. In one prominent example, the United States Supreme Court considered the propriety of a deed restriction in a case where "the plaintiffs ask[ed] to enjoin white property owners who [were] desirous of selling their houses to Negro buyers simply because the houses were subject to an original agreement not to have them pass into Negro ownership."[23] In refusing to enforce the racially-restrictive covenant, the Court reasoned as follows:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.[24]

More recently, a highly analogous Michigan case adjudicated the propriety of a deed restriction that prohibited the use of property as housing for the mentally disabled. In *McMillan v. Iserman,* a Michigan appellate court applied state contract law to conclude that because Michigan statutes favored "the development and maintenance of quality programs and facilities for the care and treatment of the mentally handicapped,"[25] the deed restriction was void. The Court further noted that the "deed restriction here, *specifically prohibiting state-licensed*

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[23] *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948).

[24] Id., at 34, 35.

[25] *McMillan v. Iserman* 120 Mich.App. 785, 327 N.W.2d 559 Mich.App.,1982 (quoting *Bellarmine Hills Ass'n v. The Residential Systems Co.,* 84 Mich.App. 554, 558, 269 N.W.2d 673 (1978), *lv. den.* 405 Mich. 836 (1979)).

residential facilities for the mentally handicapped, is manifestly against the public interest and thus unenforceable on public policy grounds."[26]

However, this Court need not rely upon, or even utilize federal or out-of-state law: Ohio courts have commonly applied public policy in a myriad of contexts. In the process, Ohio's courts have articulated somewhat differently-worded tests to describe when a contract term is void by public policy. In *Grange Mut. Cas. Co. v. Lindsey,* the Supreme Court of Ohio found a contract term void by public policy because it was "in derogation of the public policy and purpose of a statute."[27]

In *Eagle v. Fred Martin Motor Co.,* the court found a contract term to violate public policy because it was "injurious to the interests of the State."[28] More specifically, the court ruled that a confidential arbitration agreement for a dispute covered by the Consumer Sales Practices Act ("CSPA") was against public policy.[29] The court determined that, because the Ohio General Assembly enacted the CSPA, that it intended to "helps society become aware of unfair business acts and practices."[30] Since enforcing the contract would work against this state interest, the court determined that the confidentiality agreement violated Ohio's public policy and could not be enforced.[31]

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[26] Id., at 564. Emphasis added.

[27] *Grange Mut. Cas. Co. v. Lindsey* (1986) 22 Ohio St.3d 153 at 155, 489 N.E.2d 281. See also *State Farm Mutual Insurance Co. v. Grace* (2009) 123 Ohio St.3d 471, 476, 918 N.E.2d 135 (recognizing that later legislation superseded the result in *Grange*).

[28] *Eagle v. Fred Martin Motor Co.* 157 Ohio App.3d 150 809 N.E.2d 1161.

[29] Id.

[30] Id.

[31] Id.

The *Eagle* Court articulated several further guideposts for Ohio courts to rely upon when assessing a contractual term against public policy: the court, drawing upon past Ohio cases, reasoned that the particular term before it was void because it (1) impeded functions set forth in Ohio law; (2) brought about a result that Ohio law sought to prevent; and (3) directly hindered the purpose of an Ohio statute.[32]

Finally, even broader articulations of when a contract term is void by public policy can be found in earlier Ohio decisions. In *Dixon v. Van Sweringen Co.*, the Supreme Court of Ohio explained that a term is void when it "violate[s] some statute, or be contrary to judicial decision, or against public health, morals, safety or welfare, or in some form be injurious to the public good."[33] In *Key v. Vattier*, the Supreme Court of Ohio voided a term because it was "against the public law, general policy, or public justice."[34]

Amongst all of these slightly differing rules is a common denominator that this court should employ: a contact term is void by public policy, and therefore unenforceable, when it seeks to suppress, hinder, or impede a result that an Ohio statute seeks to create. In this instance, there can be no doubt that the deed restriction prohibiting Roosevelt school from being used as a school, unless by CPS, directly hinders the results that are sought to be created by R.C. 3313.41, R.C. 3318.08, R.C. 3318.50, R.C. 3318.52 and the Ohio Community Schools Act, i.e. getting unused, taxpayer-owned school buildings into the hands of community schools who will use the building to provide school choice to inner city youth.

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[32] *Eagle*, supra. (voiding a contract term for "impeding the remedial function of the CSPA," because it "brings about a result that the CSPA seeks to prevent," and because it "directly hinders the consumer protection purposes of the CSPA), citing *Crye v. Smolak* 110 Ohio App.3d 504, 512, 674 N.E.2d 779 and *Thomas v. Sun Furniture and Appliance Co.*, 61 Ohio App.2d 78, 81, 399 N.E.2d 567.

[33] *Dixon v. Van Sweringen Co.*, (1929), 121 Ohio St. 56, 166 N.E. 887.

[34] *Key v. Vattier* (1823), 1 Ohio 132; *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 184-185, 70 N.E.2d 447; *John Hancock Mut. Life Ins. Co. v. Hicks* (1931), 43 Ohio App. 242, 247, 183 N.E. 93.

C. CPS' deed restriction is void due to Ohio's public policy in favor of transferring taxpayer-owned school buildings to community schools.

CPS' deed restriction is void because it contravenes clear public policy, and thus this lawsuit to enforce it fails to state a claim upon which relief can be granted. Since the rationale underlying numerous state statutes is to facilitate the growth of school choice through community schools, and since this is done by creating legal entitlements to the acquisition of public school buildings, there is a public policy in favor of transferring taxpayer-owned school buildings to charter schools for their use as schools.

Several statutes demonstrate that the state of Ohio has a desire to lower community schools' barriers to entry into the educational marketplace. By advocating for the transfer of public school buildings to community schools, these statutes, and the legislators who drafted them, took account of the self-evident fact that the greatest barrier to entry into the educational marketplace is the acquisition of a brick and mortar facility that can serve as a school building.

First, R.C. 3318.08(U) specifically conditions Ohio Schools Facility Commission funding on (1) a school district board's notification of "the Ohio Community Schools Association when the board plans to dispose of facilities by sale * * *;" and (2) compliance with R.C. 3313.41. R.C. 3313.41 is entitled "sale or donation of real or personal property," and governs school districts' discretionary sale of school buildings. 3313.41(G)(1) requires that, prior to a school district disposing of a school building, "it shall offer that property for sale to the governing authorities of the start-up community schools established under R.C. 3314 * * * at a price that is not higher than the appraised fair market value of the property." That same section

only allows the school district to sell the school building to a party other than a community school "if no community school governing authority accepts the offer within sixty days * * *."

Meanwhile, R.C. 3313.41(G)(2) actually forces school districts to offer school buildings for sale to charter schools: when a school district has not used real property suitable for classroom space for one year, and has no plans for using the property, "it *shall* offer that property for sale to the governing authorities of the start-up community schools * * * located within the territory of the school district," and, again, must do so at "not higher than the appraised fair market value of that property."

The state has even established the "Community School Classroom Facilities Loan Guarantee Program" and the "Community School Classroom Facilities Loan Guarantee Fund" to help charter schools acquire school buildings at a lower cost.[35] The program supplies funds to charter schools to assist them with "acquiring, improving, or replacing classroom facilities for the community school by lease, purchase, remodeling of existing facilities, or any other means including new construction."[36]

This case is not about whether CPS has complied with some of the above statutes (although it certainly appears that it has not). This case *is* about the rationale underlying these statutes: the state of Ohio has evidenced a clear desire to get unused taxpayer-owned school buildings into the hands of charter schools, which are "part of the state's program of education,"[37] so that those charter schools can use them as educational facilities. In aggregate, these statutes reflect a state policy and legislative will to (1) *require* boards of education to sell

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35 R.C. 3318.50; R.C. 3318.52.

36 R.C. 3318.50(B).

37 R.C. 3314.01(B). (Emphasis added).

under-utilized school buildings to community schools so that community schools can use them as classroom space; (2) suppress the price that boards of education may charge community schools for public school buildings; (3) hold community schools' window of opportunity to purchase (essentially a "right of first refusal") open for a lengthy period (60 days); (4) financially assist community schools with the acquisition of school buildings.

CPS' deed restriction is in derogation of each of these policies. In fact, it seeks to prohibit the very things that these policies seek to create: the acquisition of a preexisting public school building at a reasonable cost, so that it may be used as a charter school. Accordingly, the probation on Roosevelt's use as a school, alongside CPS' system-wide policy of denying purchasers form using public school buildings as alternative schools, is void by public policy, and may not be enforced. Since enforcement of this void deed restriction is precisely what CPS seeks, it can prove no set of facts in support of its claim that would entitle it to relief.

D. CPS' deed restriction is void because it is in derogation of a statewide public policy in favor of effectuating parental choice and educational opportunity through community schools.

By arbitrarily limiting community schools' capacity to acquire and use taxpayer-owned school buildings as schools, CPS' deed restriction creates barriers, or at minimum increases costs, to opening a community school. This diminishes the number of community schools available in Cincinnati to serve the states' avowed purposes for them.

To reiterate the legal principles above, a contact term is void by public policy, and therefore unenforceable, when it seeks to suppress, hinder, or impede a result that an Ohio statute seeks to create. Here, it must first be remembered that "[a] community school created under this chapter is a public school, *independent of any school district, and is part of the state's program*

of education."[38] Through enacting the Ohio Community Schools Act, declared that the purpose of the Act includes "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."[39] The legislative declaration that the Act's purposes include "choice" for parents and students and "opportunity" for the educational community[40] display that the OCSA exists to enhance, through school choice the general welfare of parents, children, and all Ohioans. The Supreme Court of Ohio has further elaborated on this mission:

> [t]o achieve the goal of improving and customizing public education programs, the General Assembly has augmented the state's public school system with public community schools. The expressed legislative intent is to provide a chance of educational success for students who may be better served in their educational needs in alternative settings.[41]

Axiomatically, community schools can only achieve these purposes of (1) "improving and customizing public education programs;" (2) providing "a chance of educational success for students who may be better served in their educational needs in an alternative setting;" (3) "providing parents a choice of academic environments for their children;" and (4) "providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting" if it is financially feasible for the schools to open. It is further self-evident that this financial feasibility depends largely on the opportunity to acquire a school building at a reasonable cost.

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38 R.C. 3314.01(B). (Emphasis added).

39 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. (emphasis added).

40 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043.

41 *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.* (2006), 111 Ohio St.3d 568, 857 N.E.2d 1148.

CPS' deed restriction impairs the school choice purposes of the Ohio Community Schools Act by impairing the very likelihood that a charter school may open in Cincinnati, so as to effectuate them. Consequently, the deed restriction is void by public policy, and CPS' lawsuit, which is dependent on it, fails to state a claim upon which relief can be granted.

E. Although the deed restriction is void, the conveyance must remain valid.

Compelling legal precedent, policy reasons, and applicable contract terms dictate that the voiding of a contract term, due to public policy, does not void the entire contract.

First, where a deed restriction is void, it would be antithetical to the voiding of the restriction to void the conveyance of the property. For instance in both *Hurd v. Hodge* and *McMillan v. Iserman*, *supra*, the courts abstained from invalidating the entire conveyance of the properties to those who sought to use them in ways that violated the deed restrictions. The rationale for doing so is clear: if the party who seeks to unlawfully restrict a use can prevent the grantee who covets that same use from continuing to possess the property, then it can prevent the use *de facto*, by simply having a court entirely divest the grantee of the property. In *Hurd*, for example, this would have meant that African-Americans would have been divested of their interests in property containing racially restrictive covenants - - a result that would have accomplished the very purpose of denying African-Americans access to the property.

This rationale clearly applies to this case: if this Court were to void the entire transaction, then CPS will reap the full benefit of its unlawful deed restriction, for it will have prevented Dr. Conners from using the property for school purposes. Moreover, in the future, CPS could simply continue to use the restriction without concern for consequences: if the deed restriction is upheld, the property is not used as a school, while if the deed restriction is stricken,

any party who seeks to use the property for a charter school is divested of title before it may do so.

Moreover, the conveyance must be upheld because the Purchase and Sale Agreement, attached to Plaintiff's Complaint as Exhibit 2, contains a severability clause. Specifically, Section 18(E) of the Agreement, page seven, states as follows:

> In case one or more of the provisions contained in this agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision(s) had never been contained.

Accordingly, upon striking the invalid deed restriction, the remainder of the conveyance to Dr. Conners must stand.

IV. CONCLUSION

Cincinnati Public Schools' Complaint for enforcement of its deed restriction fails to state a viable claim because the deed restriction is void by public policy, and may not be enforced. The restriction, which prohibits Roosevelt School from being used as a school by anyone other than CPS, may not be enforced because it is in derogation of Ohio's clear public policy favoring the conveyance of taxpayer-owned public schools, and particularly unused ones such as Roosevelt, to charter schools. Further, it works to prohibit the very phenomena that the Ohio Community Schools Act seeks to create: the spreading of school choice and educational experimentation and opportunity through growth of community schools.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the parties specified below this third day of March, 2010.

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