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I. STATEMENT OF FACTS

The Lab School Education Association, IEA-NEA (the “Union”) petitioned the Illinois Educational Labor Relations Board (“Board”) to become the exclusive bargaining representative of a group of employees of Illinois State University’s (the “Employer’s”) Laboratory Schools. (C003).

A. The Laboratory Schools

The Employer operates two Laboratory Schools that are part of their College of Education. (R030). The Laboratory Schools consist of Thomas Metcalf Elementary School (“Metcalf”), which serves students Kindergarten through eighth grade. (R035). University High School (commonly referred to as “U-High”) serves grades nine through twelve. (R035). The Director of the Laboratory Schools, Anthony Jones, reports to the Dean of the College of Education, who reports to the Provost, who reports to the President. (R031-R034; E149). Mr. Jones is also an associate dean in the Employer’s College of Education. (R033-R034).

The Laboratory Schools receive funding from the Illinois State Board of Education, the Illinois Board of High Education, from the Employer itself, as well as revenue from “school fees” coming from a collection of Central Illinois school districts participating in the HILIA Program for students from their “home districts” to attend to attend the Laboratory Schools or their home school or itinerant districts. (R036; R40-R042). The Laboratory Schools use their revenue to pay employee salaries. (R037).

B. The Heart of Illinois Low Incidence Association

The Heart of Illinois Low Incidence Association (HILIA) is a public educational program formed in 1996 by six government agencies. (R075-R076; E004-E007). The purpose of the HILIA program is to maintain a continuum of services for students with low incidence disabilities of hearing and vision. (R075). The program serves students in a region consisting of four counties that covering over 30 school districts. (R075). The Employer is one of the partnering entities. (R075). The HILIA program serves about 17 students in its center-based (i.e., at the Laboratory Schools) programming and an estimated 200 students at their “home” school districts. (R078).

The HILIA program was organized by a five-member Board of Directors (the “HILIA Board”), which meets monthly. (R080-R081). The HILIA Board’s fiscal agent is the Regional Office of Education #17 (“ROE 17”). (R082). ROE 17 receives evidence-based funding. (R081-R082). The HILIA program is a joint educational cooperative established under the Illinois School Code at 105 ILCS 5/10-22-31a.

Lisa Kendall is the Employer’s HILIA Program Director. (R074). Ms. Kendall reports to Mr. Jones. (R326). Ms. Kendall, in her role with the Employer and pursuant to the Employer’s Faculty Associate Handbook, the Employer’s other policies, and the applicable rules of the State University Civil Service System, supervises the Employer’s HILIA program staff. (R60; R103). The Employer’s HILIA program office, where Ms. Kendall works, is located in Fairchild Hall, which is physically part of Metcalf. (R086).

1. The Employer’s educational services agreement with the HILIA Board and participating school districts

The Employer, the HILIA Board, and school districts participating in the HILIA program are parties to an educational services agreement (the “ESA.”) (E004-E007;

R085). Under the terms of the ESA, the Employer will “assume responsibility and authority for the administration of the educational programs...” (E006) and “[i]n cooperation with the directors of special education from the participating districts/cooperatives, the [Employer] will develop an appropriate educational program for the pupils enrolled in the Laboratory Schools under this agreement. The teachers’ instruction will be based on student IEP goals objectives [sic] and follow Laboratory School’s curriculum objectives as appropriate.” (E006). In addition, the ESA provides that the Employer is responsible for ensuring that staff meet applicable certification requirements and will provide certified and non-certified personnel as required by law.” (E006). The ESA further stipulates that the Employer and HILIA Board are independent contractors to one another. (E006).

The ESA requires the Employer to provide resources, including personnel, to fulfill the needs of the HILIA program. (E004-E005). As discussed further below, these include both Faculty Associates and non-certified employees that are either part of the State University Civil Service System or, in the case of one employee, designed by the Employer internally as an “Administrative Professional.” To serve the students in their home schools, some of the Employer’s HILIA program Faculty Associates go out to the different schools and teach students at those schools. (R113).

The ESA defines “educational services” as “instructional and related therapy services, assistive technology services, personnel, space, equipment, materials and supplies, and staff development opportunities. These services will be incorporated into an ROE/ISU budget as recommended by the Superintendent of the Laboratory Schools and approved by the governing board of HILIA.” (E004). The ESA defines “Approved

expenses” to include “personnel (salaries and benefits.)” (E004). When the Employer raises wages, as may occur throughout the school year, the Employer will account for the salary increases in the budget to the HILIA Board. (R099). ROE 17 then reimburses the Employer for expenses they approve contained in a budget the Employer recommends to the HILIA Board. (E004).

The ESA stipulates that “[ROE 17], as administrative agent for HILIA, will reimburse the University for approved expenses in accordance with the ROE/ISU budget for services to children with low incidence disabilities placed at the Illinois State University’s Laboratory Schools and for services provided to HILIA students in their home school district.” (E005; R114). As such, the Employer pays its HILIA program staff directly (R114). Meanwhile, the HILIA Board will then reimburse the Employer for expenses, including payroll, for the Employer’s HILIA employees, including those who travel to and work in home or itinerant districts. (R326-R327). The ESA goes on to say that “The University will...submit to the ROE a list of names and identifying numbers of certified and non-certified personnel employed and, for certified staff, ISBE required professional certificate numbers to implement the educational services provided under this agreement.” (E005). The ESA also contains a mutual indemnification clause. (E006).

2. The Employer’s HILIA Program staff

To fulfill its obligations under the educational services agreement, the Employer hires and manages Faculty Associates specific to their HILIA program in addition to their regular Faculty Associates. Some Faculty Associates teach at the Laboratory Schools, while others go out to the different participating school districts and teach at those schools. (R113). The Employer’s HILIA program Faculty Associates have email

addresses associated with the Employer such as “@ilstu.edu,” “@Metcalf.illinoisstate.edu,” and “@uhigh.illinoisstate.edu.” (R113-R114). A Faculty Associate at the Employer not part of their HILIA program would have to apply for a Faculty Associate position that is part of the Employer’s HILIA program, and vice-versa. (R054). A non-HILIA Faculty Associate would also have to apply for another non-HILIA Faculty Associate position at Metcalf. (R053-R054).

The Employer also hires and manages support staff that are part of the State University Civil Service System (SUCCS), including the Interpreters for the Deaf and Hard of Hearing, Senior Interpreter for the Deaf and Hard of Hearing, and the Special Ed Paraprofessionals. (R100-R101; E019; E022; E033; E148). Many of the terms and conditions of employment of the HILIA program’s Civil Service employees are set forth in the State University Civil Service Act and may not be modified absent collective bargaining and, upon agreement between union and state university, approval by the SUCCS’s Merit Board. 110 ILCS 70/36d(3). The Employer has incorporated these terms and conditions of employment into their policies for the Civil Service employees. (E189-E232). The Employer also has as part of its HILIA program one Specialist Ed Audiologist, whom the Employer internally classifies as an “Administrative Professional.” (R101; E028; E148). The Employer’s policies also cover the terms and conditions of employment for their Specialist Ed Audiologist. (E189-E232).

3. The Employer’s Faculty Associate Handbook and other employment policies

The Employer maintains a Faculty Associate employee handbook for both HILIA and non-HILIA Faculty Associates alike, as well as policies for non-Faculty Associate employees. (E037-E086; E189-E232). The Faculty Associate Handbook states that “All

HILIA staff are employees of Illinois State University. Faculty hired as teachers of students who are deaf and hard of hearing, teachers of students who are visually impaired, and the speech and language pathologist, are designated by the title Faculty Associate. HILIA Faculty Associates may be assigned to HILIA programming in the home school district, within the Laboratory Schools, or a combination of both. HILIA Faculty Associates, regardless of their role, will follow the guidelines outlined in the Faculty Associate Handbook” (E042)

The Employer’s Faculty Associate Handbook and their policies address a broad spectrum of terms and conditions of employment, including but not limited to hiring, compensation, benefits (sick days, personal days, bereavement, vacation days, jury duty, educational leave, FMLA, parental leave, tuition waivers), absence procedures, probationary periods, discipline and dismissal, a grievance process, performance evaluations, flexible work schedules, layoffs, and additional opportunities for compensation. (E037-E086; E189-E231). The record does not show that the HILIA Board maintains an employee handbook, or any sort of employment-related policies.

a. Compensation for the Employer’s HILIA Program Staff

The Faculty Associate Employee Handbook states that “The President of Illinois State University may approve salary increases, which may be merit-based, for University employees. Faculty Associates on a continuous contract may receive such increases in accordance with the eligibility established by the President. Salary increases are included in the employee’s base salary.” (E070). The Faculty Associate Handbook states that “[t]he Superintendent of the Laboratory Schools, the Dean of the College of Education, the Vice President and Provost, and the President have the final decision regarding appointment

and salary of new Faculty Associates.” (E047). The Employer has conducted salary studies for Laboratory School faculty that factor in salaries for HILIA Faculty Associates. (R098). Nothing in the educational services agreement requires the HILIA Board to approve reimbursements to the Employer for all compensation they wish to pay in furtherance of the HILIA program.

The Employer will approve salary increases for employees that could come throughout the year, which Ms. Kendall will notify the HILIA Board *post-hoc* when submitting the recommended budget. (R099). For the Employer’s HILIA program employees that are part of SUCCS, however, their compensation is set by the Merit Board and may only be altered by collective bargaining and Merit Board approval. 110 ILCS 70/36d(3). The Faculty Associate Handbook maintains a page for HILIA exceptions and additions. (E081).

b. Employee benefits for the Employer’s HILIA Program staff

Though employee benefits are expressly included among the “Approved expenses” the HILIA Board reimburses the Employer for (E004), the HILIA Board chooses not to reimburse the Employer for the cost of any employee benefits. (R098-R099). Rather, the Employer pays benefits to its HILIA employees and the HILIA Board does not reimburse them for those expenses. (R100; R116).

For the Faculty Associates, this includes health, dental, vision, and life insurance. (E055). The Employer also makes contributions to the State University Retirement System on their behalf, as well as for the Administrative Professional and Civil Service employees. (E055; R116; R191-192). They are also eligible for Employer-sponsored voluntary benefit programs and a supplemental retirement savings plan (E056). The

Employer also maintains policies for the HILIA Faculty Associates' sick time, personal days, bereavement leave, jury duty leave, educational leave, and leave under FMLA (E056-E057). The Employer also maintains miscellaneous benefits for HILIA Faculty Associates including a tuition waiver program, an Employee Assistance Program, an Adoption Benefit Program, and a Domestic Partner Benefit Program (E057-E058).

c. The Employer's Hiring of HILIA Program Employees

The Employer is responsible for hiring employees. Ms. Kendall will select a person for a role in consultation with the Director of the Laboratory Schools (R330-R331). Though the HILIA Board does approve the creation of a position, it has no role in approving a specific person for a position (R329). The need for positions prompting the HILIA Board's approval of their creation is determined by students' IEP teams. According to the ESA, students are placed based on the consensus of school personnel attending students' IEP conferences in accordance with state law. (E005).

d. The Employer's HILIA program employees discipline and discharge policies

The Laboratory Schools, through Ms. Kendall, has authority to discipline or discharge employees where warranted. (R116-R117). Ms. Kendall follows the process set up through the Employer's Human Resources department (R331). The HILIA Board does not sign off on disciplinary decisions of HILIA employees. (R330). The Employer's discipline and discharge procedures for Faculty Associates, HILIA or otherwise, are set forth in the Faculty Associate Handbook. (E065). The Civil Service employees' discipline and discharge procedures are set forth in the Employer's other policies and, as required, follow the State University Civil Service Act. (E222-E223); 110 ILCS 70/36o. The

HILIA Board does not appear to maintain any workplace rules, nor do they appear to have any policies for discipline and discharge.

e. The Employer evaluates the HILIA program employees

Ms. Kendall evaluates the Employer's HILIA program employees. (R103). U-High Principal Andrea Markert also sometimes participates in employee evaluations for the Employer's HILIA staff. (R044). Evaluations for the HILIA Faculty Associates are done in accordance with the Faculty Associate Handbook. (E051). Evaluations for the Employer's HILIA program's Civil Service employees are controlled by the Employer's policies. (E199-E200; E216-E217).

f. The HILIA program employees' other terms and conditions of employment

The employee handbooks and policies indicate that the Employer sets other terms and conditions of employment for their HILIA program employees. For example, the Faculty Associate Handbook, of which HILIA Faculty Associates are bound, contains provisions addressing instructional minutes (E047), external employment (E047), required trainings (E047-E048), standards of professional conduct (E049-E051), professional development and teacher evaluation (E051-E054), absence and call-off procedures (E059-E060), resignations and retirement (E061-E062), probationary periods (E063), continued service requirements (E063-E064), a grievance process (E067-E069), and mandated reporter and other emergency-related policies (E072-074; E084-E086). The HILIA Board does not appear to have any such policies of its own.

II. ARGUMENT

The Board's decision should be affirmed in all respects. The Board did not commit clear error in holding that the Employer is the sole employer of their HILIA program employees where it alone exerts significant control over the terms and conditions of its HILIA program employees. The terms of the ESA and other evidence indicates that the HILIA Board has little to no actual or theoretical authority over the terms and conditions of employment of the employees. Rather, the agreement shows that the HILIA Board merely contracts with the Employer for services that the Employer provides, including personnel, and that the HILIA Board merely reimburses the Employer for some (but evidently not all) of those costs and ensures the Employer is adhering to the ESA.

Most importantly, because the Employer both on paper and in actuality hires, disciplines, compensates, and provides benefits and day-to-day supervision to the HILIA employees, and because the Employer can and does make changes to their terms and conditions of employment without needing input from the HILIA Board, the Employer is the sole employer of the program employees and the HILIA Board's presence at the bargaining table is not necessary to effectuate meaningful or productive collective bargaining. To the contrary, the HILIA Board's presence in negotiations is more likely to prove disruptive to a stable bargaining relationship.

Finally, though the Employer did not discuss the issue in its Opening Brief, the Board did not clearly err in concluding that the "Extra Help – Semi Skilled" and "Extra Help – Semi Professional" employees belong in the bargaining unit, the Employer has forfeit its right to argue otherwise on appeal.

A. STANDARD OF REVIEW

Generally, a reviewing court must give deference to an administrative agency's interpretation of the statute it was created to enforce. *Cty. of Will v. Ill. State Labor Relations Bd.*, 219 Ill.App.3d 183, 185 (3d Dist. 1991). A significant reason for deferring to an agency's interpretation of its enabling statute is that the agency makes informed decisions based on its experience and expertise. *Id.* Judicial review of an administrative agency action extends to all questions of law and fact in the record. *Bd. of Trs. of Univ. of Ill. v. Ill. Educ. Labor Relations Bd.*, 2015 IL App (4th) 140557, ¶ 34. An administrative agency's findings on questions of fact will be reversed only if they are against the manifest weight of the evidence. *Id.* A decision is contrary to the manifest weight of the evidence only when, after viewing the evidence in the light most favorable to the administrative agency, the court determines that no rational trier of fact could have agreed with the agency's decision. *AFSCME Council No. 31 v. Ill. Educ. Labor Relations Bd.*, 197 Ill.App.3d 521, 525 (4th Dist. 1990). The Court should only reverse the decision of the Board if the Board's application of the Act to the facts of the case is so unreasonable that the opposite conclusion is clearly evident. *Id.*

An agency's application of a rule of law to established facts, or a mixed question of fact and law, will not be reversed unless it is deemed clearly erroneous. A determination is clearly erroneous if, based on the entire record, the court is left with a definite and firm conviction that a mistake has been made. *Bd. of Trs. of Univ. of Ill. v. Ill. Educ. Labor Relations Bd.*, 2018 IL App (4th) 170059, ¶ 84. The "clearly erroneous" standard is highly deferential to an administrative agency, though it doesn't relegate judicial review

to blind deference. *Bd. of Trs. of Univ. of Ill. v. Ill. Educ. Labor Relations Bd.*, 224 Ill.2d 88, 98 (2007).

B. THE JOINT EMPLOYER TEST

The test to determine whether joint employer status exists is “whether two or more employers exert significant control over the same employees – where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment.” *Orenic v. Ill. State Labor Relations Bd.*, 127 Ill.2d 453, 474-75 (1989). Relevant factors include the putative joint employer’s role in “hiring and firing; promotions and demotions; setting wages, work hours, and other terms and conditions of employment; discipline; and actual day-to-day supervision and direction of employees on the job.” *Id.*; *Vill. of Winfield v. Ill. State Labor Relations Bd.*, 176 Ill.2d 54, 60 (1997). The key consideration in determining joint employer status is the extent to which an entity is necessary to create an effective bargaining relationship. *Serv. Employees Int’l Union Local 73*, 21 PERI ¶ 178, II (IELRB Opinion and Order, Sep. 27, 2005) This Court has previously held that an entity is not a joint employer just because it has *some* influence on the terms of employment for some employees. *AFSCME v. Ill. Educ. Labor Relations Bd.*, 197 Ill.App.3d 521, 527 (4th Dist. 1990), citing *Orenic*, at 474-75. Rather, an entity must exert “significant” control over the terms and conditions of employment. *Id.*

In the event where there exists an intergovernmental services agreement between two putative joint employers, both of Illinois’s public sector labor boards have held that the terms of that agreement are important in deciding what public body or bodies actually have authority as the employer(s) over the employees in question. See *Quadcom Pub.*

Safety Commc'n Sys., 12 PERI ¶ 2017 (SLRB-SP 1996); *Elmhurst Park Dist.*, 16 PERI ¶ 2042, IV (SLRB-SP 2000); *Sterling Cmty. Unit High Sch. Dist. No. 5*, 2 PERI ¶ 1051 (IELRB Opinion and Order, March 25, 1986).

C. THE BOARD'S CONCLUSION THAT THE HILIA BOARD IS NOT A JOINT EMPLOYER WAS NOT CLEARLY ERRONEOUS

The Board faithfully applied the “joint employer” factors from *Orenic* and *Winfield* to the facts of this case to determine that the HILIA Board is not a joint employer of the Employer's HILIA program employees. The Board correctly concluded upon applying the joint employer factors that the HILIA Board does not exert “significant control” over the terms and conditions of the employees.

1. The Board applied the joint employer test to the petitioned-for employees in the Employer's HILIA program, not to the entire petitioned-for unit

The Employer initially contends that the Board erred by applying the joint employer analysis to the entire petitioned-for bargaining unit of about 123 employees rather than the Employer's HILIA program employees specifically. (Employer's Brief, at 8). In so doing, the Employer misreads the Board's analysis.

The Board wrote that “In this case, the record does not reveal how much of the University's funding comes from HILIA reimbursements. Approximately 123 employees are in the petitioned-for bargaining unit. Twenty-two of those 123 people are in HILIA positions. Even if the salaries of roughly 18% of the petitioned-for unit are funded by HILIA, that does not give HILIA the kind of control over the entire University budget that would render it a necessary party to an effective bargaining relationship between the Union and the University.” (C074).

The Board did not apply the joint employer test to the entire petitioned-for bargaining unit. Rather, the Board made the point that because the HILIA Board only provides the Employer with reimbursements for a small subset of the Employer's employees, constituting a small fraction of the Employer's total revenue, the Employer capable of providing compensation (and benefits) to their HILIA program employees beyond whatever the HILIA Board is willing to reimburse for. (C074). The Board made this point for the purpose of distinguishing cases the Employer had cited to, some discussed *infra*, in its exceptions in which third parties were found to be joint employers because of the significant funding they provided to the undisputed employers, for which those undisputed employers were entirely or almost entirely dependent.

By contrast, the Board was saying, the HILIA Board's financial influence over the Employer is so minimal that its limited reimbursements make the HILIA Board nowhere close to having the power over how much the Employer can compensate its HILIA program (and non-HILIA) employees, let alone exert control over any of their other terms and conditions of employment. The Board concluded that "Even if the salaries of roughly 18% of the petitioned-for unit are funded by HILIA, that does not give HILIA the kind of control over the entire Employer budget that would render it a necessary party to an effective bargaining relationship between the Union and the University." (C074).

As established at hearing, the Laboratory Schools get their revenue from a number of sources, including the Illinois State Board of Education, the Illinois Board of Higher Education, and the Employer itself. (R036; R042). In other words, the Employer does not need the HILIA Board's help with financing salaries or benefits for their employees, including the HILIA program employees. Few could fault the Employer for seeking as

much in reimbursements as it could get. However, even without the reimbursements, the Employer's considerable finances are large enough that the Employer is capable of agreeing to salary or wage increases for its HILIA program employees independent of whatever the HILIA Board is willing to reimburse. See *AFSCME Council No. 31 v. Ill. State Labor Relations Bd.*, 216 Ill.2d 569, 582 (2005) (no joint employer relationship found where contractor permitted to pay employees more than hourly rates set forth in agreement with putative joint employer and putative joint employer "may or may not reimburse [employer] partially for such overtime... Whether the [alleged joint employer] selectively decides to reimburse [the employer], [the employer] is bound legally and under the terms of its [CBA] to pay the employees such overtime.")

While the Board acknowledged the record was silent as to how much funding the Employer actually has, it was not unreasonable for it to surmise, based on its other sources of income, that it is not financially dependent on the HILIA Board for staff compensation and benefits – the latter of which the HILIA Board doesn't reimburse for at all despite the ESA stating it would. A reasonable inference that can be drawn in this case is that it was the Employer's considerable resources in the first place that prompted the HILIA Board to agree that the Employer would run the HILIA program, including by providing and managing staff.

2. The Employer alone controls their HILIA program employees' compensation and benefits and the HILIA Board is not empowered to restrict what the Employer pays

That the Employer pays more than what the HILIA Board is willing to is not theoretical. The Employer already exercises this power where it pays those employees benefits without the HILIA Board's help, despite the ESA providing that the HILIA Board would reimburse the Employer for the cost of benefits. (E004). In addition, Ms.

Kendall admitted at hearing that the Employer implements raises based on salary studies *before* Ms. Kendall submits a new proposed budget (that includes those increases) to the HILIA Board. (R098). This contradicts Ms. Kendall's later testimony that the HILIA Board must sign off on all compensation levels, or in other words can forbid the Employer from providing higher compensation than the HILIA Board would prefer them to provide. (R116). Therefore, it is hardly "undisputed" that the HILIA Board must approve the compensation levels of the Employer's HILIA program employees.

Additionally, as a practical matter the HILIA Board also has no power to bar the Employer from paying their HILIA program employees what they wish to pay them, or what they may agree to pay them in a future collective bargaining agreement, because the Employer, not the HILIA Board, is the entity that actually has a payroll department and issues the employees their checks. (R114).

U-High Principal Andrea Markert, for her part, testified that the Employer could not pay its HILIA program employees more than what the HILIA Board is willing to reimburse the Employer not because the HILIA Board can somehow forbid it, as Ms. Kendall claimed, but rather because "[the Employer has] limited resources so, you know, we have to really look...at what our reserves are and look at what our spending would be to determine if we can even afford to fund an increase for our employees. And if we choose to fund an increase for our employees, then that has to go through a whole University process and be approved by the University." (R194). Ms. Markert did not say there was any sort of HILIA Board-imposed prohibition on paying more, and indeed the ESA does not give them such a right. Rather, Ms. Market's explanation for why the Employer couldn't pay more is based on whether the Employer is able to afford

increases. Of course, whether an employer is able to afford increases in compensation is a normal question resolved in collective bargaining. It is hard to see how this scenario would be any different than a response to any wage proposal by a labor union as part of the bargaining process. No matter what the parties tentatively agree to during negotiations, an employer would have to look at what they can (or what they are willing) to afford. See *Univ. of Vermont/Vermont Educ. TV*, 258 NLRB 247 (1981).

The Employer's brief cites to some of the cases the Board rightfully distinguished in its decision, starting with *Cty. of Will v. State Labor Relations Bd.*, 219 Ill.App.3d 183 (3d Dist. 1991) ("*County of Will I*"). In that case, a union petitioned to represent employees of the Will County Board of Health and argued that the County of Will itself was a joint employer with the Board of Health. *Id.* at 184. The Board of Health obtained a significant 40% of its annual budget from the County. *Id.* at 185. In addition, the Board of Health was required to submit its annual budget to the County, which was subject to the discretion of the County Board's appropriation process, including the other 60% of their revenue they did not receive directly from the County. *Id.* at 186. The Board of Health consisted of eight members who were appointed to their positions by the County Executive with County Board approval and were even subject to removal by the County Executive with approval of the County Board. *Id.* at 186. The County Treasurer served as the Board of Health's Treasurer and controlled the Board of Health's purse strings by issuing the Board of Health's checks. *Id.* at 185. The County Auditor, meanwhile, audited all Board of Health receipts and expenditures. *Id.* In addition, Board of Health employees enrolled in the County's deferred compensation program available to all other County employees, and the County was listed as the employer of the Board of Health employees

and paid contributions to the Illinois Municipal Retirement Fund for the Board of Health employees. *Id.*

The Third District analogized the case before them to another in which a county sheriff was required to stay within the appropriations provided to them by the joint employer-county. *Id.*, see *Cty. of Kane v. Ill. State Labor Relations Bd.*, 165 Ill.App.3d 614 (2nd Dist.1988). The Third District concluded that because the County of Will was required to levy taxes that provided a significant 40% of the Board of Health's budget and because the full Board of Health budget was subject to the County's appropriations process, it was not against the manifest weight of the evidence for the Board to conclude that the County's participation as a joint employer in collective bargaining was necessary to effectuate a meaningful bargaining relationship.

The instant case is much different. The Employer does not derive 40% of its budget from the HILIA Board. While the record is silent as to what percentage of the Employer's revenue comes from the HILIA Board's reimbursements, it is not likely to be much in light of the Employer's revenue from ISBE and IBHE. Significantly, the Employer does not need to submit its entire budget to the HILIA Board for approval. Rather, the Employer submits a small budget for reimbursements for a handful of their employees and other expenditures to the HILIA Board, which the HILIA Board then approves, as opposed to direct revenue for initial payments like in *County of Will I*. No one claims the HILIA Board has any input in what the Employer does with their revenue that is not reimbursement from the HILIA Board. The Employer's leadership is, unlike in *County of Will I*, not subject to appointment or removal by the HILIA Board, and there is no HILIA Board treasurer or auditor working at the Employer, writing their checks for them, or

auditing all of their receipts or expenditures. Finally, the HILIA Board is not listed as the Employer's employees anywhere, the HILIA Board does not offer the employees a deferred compensation program, and they do not make contributions into SURS for them. Accordingly, *County of Will I* is distinguishable.

The Employer also cites to another Third District decision involving Will County (*County of Will II*) decided not long after. In that case, the court held that it was not against the manifest weight of the evidence for the Board to conclude that Will County was a joint employer of a bargaining unit of employees working under the Will County Executive. *Cty. of Will v. Ill. State Labor Relations Bd.*, 220 Ill.App.3d 62 (3rd Dist. 1991). There, the union filed an unfair labor practice against the County Board, naming them as a joint employer, after the County Board refused to bargain after negotiations with the Will County Executive were frustrated when the County Executive claimed they could not agree to certain proposals without approval from the County Board. *Id.* at 64.

The interdependence between the County Board and the County Executive was even stronger than that between the County Board and Board of Health in *County of Will I*, thus making *County of Will II* even more distinguishable from the instant case. The County Board was responsible for approving the County Executive's budget. *Id.* at 66 ("The County Board has *exclusive* control over funding") (emphasis added). The County Board also had the authority to fix the hours of business for the County Executive's office, thus controlling what hours the County Executive employees worked. *Id.* at 64. The County Board had even leveraged their authority over the Executive's entire budget when they had made known during negotiations between the County Executive and the

union as to what terms of a CBA they would agree with, such as that they would refuse to agree to “fair-share” language. *Id.* at 66.

The HILIA Board by contrast has no such power or capacity to influence collective bargaining like the County Board in *County of Will II*. The HILIA Board does not have the power to approve an agreement between the Employer and the Union by saying it would withhold all of the Employer’s revenue if the Employer agrees to terms with the Union that they don’t like. It does not control the entirety of the Employer’s funding, or even a significant share of it. The Employer does not submit its entire budget to the HILIA Board. The HILIA Board does not control the Employer’s hours of business. “The test for existence of joint employer status is ‘whether two or more employers exert *significant* control over the same employees – where from the evidence it can shown that they share or co-determine those matters governing essential terms and conditions of employment.’” *County of Will II*, quoting *Orenic*, at 474-75. The HILIA Board’s ability to approve reimbursements for the Employer in the fulfillment of the Employer’s obligation to provide educational services to low incidence students does not represent the exertion of *significant* control like that seen in either of the *County of Will* cases. Accordingly, these two cases are distinguishable. As the Board said in its opinion and order, the *County of Will* cases are “distinguishable from the instant case because the impact of the purported joint employers’ funding in those cases was so great that the initial single employers did not have complete control over the wages, hours and working conditions of their employees, which logically made the purported joint employers necessary parties to the creation of an effective bargaining relationship.” (C073-C074). As the HILIA

Board cannot dictate to the Employer what the HILIA program employees will be paid, the Board was correct to distinguish those decisions from the case at bar.

The Employer also relies on the specific facts of *Orenic* itself, rather than merely its test for joint employer status, to support a joint employer finding in the case at bar. (Employer's brief, at 13.) In *Orenic*, the Illinois Supreme Court held that requiring a joint employer relationship between non-judicial employees of courts and the counties which fund the judicial circuit courts for a bargaining unit of employees would conflict with separation of powers principles. *Orenic*, 127 Ill.2d at 465. The Illinois General Assembly had required county boards to fix and provide circuit court clerks' salaries. *Id.* at 476. The Employer cites to the *Orenic* Court's comment that "[t]raditional principles of labor law ... might arguably suggest that, upon viewing the totality of their economic relationships, the counties and the State are to be considered joint employers of court employees whose salaries the counties pay." (Employer's brief, at 13) (emphasis added.) However, the Court also said that "[T]he fact that a county pays the salaries of other nonjudicial employees in the judicial branch or even administers personnel policies covering them by agreement with the judicial branch, does not in constitutional or statutory terms make the county their employer. Rather, the State, personified by the chief judge of each circuit, is their employer." *Id.* at 476 (emphasis added.) The Board recognized this point in its opinion and order. (C073).

The Court in *Orenic* never performed a joint employer analysis with respect to the county executives due to the constitutional problems present in that case. In any event, the facts of the instant case are distinguishable from *Orenic*, which when looking beyond the constitutional issues is more analogous *County of Will II*. In both *Orenic* and *County*

of *Will II*, the county or county board had either significant or exclusive control over the budget or purse strings of the undisputed employer for purposes of paying its employees. The circuit courts, unlike the Employer in the instant case, had no independent ability or authority to set the rates of pay or supplement pay. *Id.* at 475-76.

A better analogy to the instant case regarding allocation of authority over employees between two potential employers is *AFSCME Council 31 v. Ill. State Labor Relations Bd.*, 216 Ill.2d 569 (2005). In that case, the Department of Corrections contracted with a vendor to provide health care services to inmates. *Id.* By law, the DOC was required to provide inmates with medical care, which they were permitted to do by contracting. *Id.* at 571. The contracts between DOC and the vendor identified the vendor as an independent contractor and stated the vendor must indemnify the DOC. *Id.* Under the terms of the contracts, the vendor supplied employees who worked in the prisons and the DOC prepaid the contract amount to the vendor and then throughout the course of the year, the vendor and the DOC conducted a reconciliation process, and adjusted the amount paid whenever necessary. *Id.* The vendor was signatory to a collective bargaining agreement with a union for the employees who worked at DOC, which contained a grievance procedure and addressed issues including appointment of employees to DOC committees. *Id.* at 572. Eventually, the union petitioned to represent those employees under the IPLRA and claimed the DOC was a joint employer. *Id.* The ALJ and Board found that the DOC was not a joint employer, but the Fifth District reversed. *Id.* at 574-75.

The Illinois Supreme Court agreed with the Board that the DOC is not a joint employer because the DOC's involvement in the employees' essential terms and conditions of employment did not rise to the level of shared meaningful control. *Id.* at

581. Specifically, the Court held that the vendor hired its own employees, set wages and overtime (pursuant to the collective bargaining agreement) which “the DOC may or may not reimburse [the vendor] partially for such overtime...”, approved paid-time off requests, disciplined and evaluated employees, and subjected them to the vendor’s rules and regulations. *Id.* at 581-584.

Because it was the vendor, and not the DOC, who actually controlled those employees’ terms and conditions of employment, the Court held that only the vendor was the employer, even though the DOC was interested in the employees’ working conditions as the party required by law to provide health care to inmates. *Id.* at 581-85. While it is true that this case involved an odd situation where a union that represented a group of employees of a private vendor under the National Labor Relations Act petitioned to have those same employees represented under the IPLRA, the point is that the Court provided a joint employer analysis independent of that issue. *Id.*

Just like how the DOC contracted with a vendor to provide health care services as an option to fulfill their own legal obligations, the HILIA Board contracted with the Employer to provide educational services as a means of fulfilling their own legal obligations to low incidence students, as the School Code expressly permits. 105 ILCS 5/10-23.31a. The HILIA Board contracted out those services to the Employer, who in turn hired workers and controls their essential working conditions to fulfill the program requirements. Critically, the Court specifically noted that even though the DOC provided a specific amount of money to the vendor under the vendor agreement, that agreement did not bind the vendor to adhere to those calculations in deciding what to pay its own employees. *Id.* at 582. The Court held that the Board did not clearly err in determining

that the DOC had little meaningful control over wages and compensation. *Id.* The Illinois Supreme Court's *AFSCME* decision supports the Union's position and shows that the Employer's HILIA program employees are not jointly employed with the HILIA Board. The Board did not clearly err in concluding that the HILIA Board has no meaningful control over the employees' compensation.

3. The HILIA Board has no control at all over the employees' other terms and conditions of employment

Next, the Employer contends that the HILIA Board exercises control over the terms and conditions of employment of the Employer's HILIA program employees such as hiring, discipline, evaluation, and work assignment decisions. (Employer's brief, at 14.) To support this contention, the Employer asks the Court to ignore the undisputed fact that Ms. Kendall works for the Employer and reports to Mr. Jones and instead conclude that the HILIA Board dictates employees' terms and conditions of employment for the employees through Ms. Kendall, whom the Employer now claim wears multiple "hats" as a dual agent of both the Employer and HILIA Board. (Employer's brief, at 14.)

a. The Employer previously conceded the HILIA Board doesn't control other working conditions

This represents an about-face for the Employer, which previously conceded before the Board that the Employer, and only the Employer, has control over the HILIA program employees' such terms and conditions of employment. In their fourth exception to the Board, the Employer wrote that they except to "the ALJ's undue reliance on the day-to-day direction, supervision, hiring, and discipline of HILIA employees, while ignoring HILIA's governing board's significant role in providing the authority in the first place to create and fill vacancies." (C035). The Employer elaborated that "[T]he ALJ relied more

heavily on the fact that the HILIA Board plays *no role* in selecting the particular applicants for hire; has no role in the discipline or discharge of HILIA employees; and does not supervise or direct employees than the significance of its role as the primary source of funding for the entire program” (C045) (emphasis added.) In its Opinion and Order, the Board explained that those factors, which the Employer has exclusive control over, are precisely what the ALJ was supposed to analyze under *Orenic*, lest he deviate from binding legal precedent. (C073).

The Employer also explicitly conceded the same point in its post-hearing brief to the ALJ, where it wrote that “The *Laboratory Schools* are responsible for the day-to-day operations of HILIA which includes delivering the necessary services, providing the space for center-based services, and *hiring, training, assigning, supervising, and managing the HILIA staff.*” (SUPP C086) (emphasis added.)

Now, however, the Employer claims that it’s the *HILIA Board* (through Ms. Kendall) that has had this power all along in addition to the Employer. The doctrines of invited error, waiver, and judicial estoppel prevent a party from taking a position on appeal different from their position at trial. *Sakellariadis v. Campbell*, 391 Ill.App.3d 795, 800 (1st Dist. 2009). This principle has been extended to a party taking a different position on appeal pursuant to administrative review. *Bd. of Educ. of Woodland Cmty. Consol. Sch. Dist. 50 v. Ill. State Charter Sch. Comm’n*, 2016 IL App (1st) 151372, ¶ 40; *Faculty Ass’n of Dist. 205 v. Ill. Educ. Labor Relations Bd.*, 175 Ill.App.3d 880, 885 (4th Dist. 1988) (“Where a party has presented his case to an administrative agency upon a certain and definite theory, it will not be permitted to change in court and prevail upon another theory and issue not advanced to the agency”) (citation omitted.) Generally, the theory upon

which a case is presented to a lower tribunal cannot be changed on review. *Faculty Ass'n of Dist. No. 205 v. Ill. Educ. Labor Relations Bd.*, at 884.

The Employer's position now is diametrically opposed to the position it articulated in its exceptions before the Board and to the ALJ in its post-hearing brief. The Employer's argument in its exceptions conceded that the HILIA Board lacked control over those terms of employment and instead argued that the ALJ should have focused on other factors to determine joint employer status such as the program funding source or the role the HILIA Board supposedly has in operating the regional program. (C035-C036). They also conceded in their brief to the ALJ that the Laboratory Schools are responsible for hiring, training, assigning, supervising, and managing HILIA staff as well. (SUP C086). Now, they seek to prevail on a brand-new theory despite their explicit concession that the opposite is true. Accordingly, the Employer should be barred from now claiming the opposite.

b. The Employer also waived its new argument that the HILIA Board controls day-to-day supervision and other working conditions in addition to conceding the point

Not only has the Employer previously taken the opposite position before the ALJ and the Board, but it has waived its right to argue that the HILIA Board exercises day-to-day supervision of the Employer's HILIA program employees before this Court. Generally, a party that fails to raise an issue below has waived it for purposes of appeal. *Faculty Ass'n of Dist. 205 v. Ill. Educ. Labor Relations Bd.*, 175 Ill.3d 880, 884 (4th Dist. 1988); *Dep't of Cent. Mgmt. Servs. v. Ill. State Labor Relations Bd.*, 278 Ill.App.3d 79, 85 (4th Dist. 1996); *Moore v. Ill. State Labor Relations Bd.*, 206 Ill.App.3d 327, 337 (4th Dist. 1990). The waiver principle applies equally to the review of an administrative decision. *Faculty Ass'n of District 205*, 175 Ill.3d at 884, citing *Leffler v. Browning*, 14 Ill.2d 225 (1958).

Here, the Employer failed to raise their argument regarding control of the day-to-day supervision of the Employer's HILIA program employees. Consequently, neither the Board nor the ALJ provided any analysis regarding this argument for this Court to review because the Employer never previously raised it to them. In fact, the Employer said that the opposite was true and instead criticized the Board for relying too much on the admitted fact that the Employer controls the day-to-day supervision, among other terms of employment. Because the Employer not only failed to raise this argument on appeal but had in fact conceded the opposite side of the argument, they should be waived from arguing it now. While the Union urges the Court to not consider the Employer's new argument, the Union will nonetheless address the Employer's new position on its merits.

c. The Employer, and only the Employer, controls the terms and conditions of employment of their HILIA program employees

Questions of fact are deemed *prima facie* correct unless they are against the manifest weight of the evidence. *Speed Dist. 802 v. Warning*, 242 Ill.2d 92 (2011).

Notwithstanding the Employer's flip-flop, it was not against the manifest weight of the evidence for the Board to conclude that the Employer, through their employee Lisa Kendall, is the only entity that exerts significant control over their essential terms of employment and their day-to-day supervision. The record in fact provides that this was the only logical conclusion and that it would have been against the manifest weight of the evidence for the Board to conclude otherwise. The notion that Ms. Kendall's supervision of the Employer's HILIA program employees is done as an agent of the HILIA Board is not only unfounded in the record but contrary to the undisputed evidence.

First, the Board adopted the factual findings of the ALJ. (C072). The ALJ found that the Employer, through their employees Anthony Jones and Lisa Kendall, have an

exclusive role in hiring, discipline, and actual day-to-day supervision and direction of employees on the job. (C021-C022; C027). The RD&O specifically found that the Employer “provides the teachers and operates the program day-to-day through Kendall.” (C022). Ms. Kendall testified repeatedly that she works for the Employer and, notably, at no point claimed that she was employed by the HILIA Board. (R074; R108-R109).

The ALJ noted that the HILIA Board, meanwhile, is per the ESA entitled to know the identities of the HILIA program’s employees and is permitted to determine the rate at which it will reimburse the Employer, but do not have a role in determining the actual salary, benefits, or personnel policies for such employees, or in their hiring, promotion, discipline or discharge.” (C027). The Board and ALJ’s findings in this regard were based on ample evidence in the record. First, the plain terms of the ESA do not empower the HILIA Board to have any control over such terms and conditions of employment for the Employer’s HILIA program employees. (E004-E007). This Court has previously recognized the critical role an educational services agreement under Section 10-22.31a of the School Code has in determining who an employee’s employer is and is not. See *Seim v. Bd. of Educ. of Cmty. Unit Sch. Dist. No. 87*, 21 Ill.App.3d 386, 393 (4th Dist. 1974);

The Board’s conclusions about the Employer’s and the HILIA Board’s relationship dynamic is further buttressed by the ESA’s stipulation that the relationship between the two entities shall be that of independent contractors. (E006); see *AFSCME Council No. 31 v. State Labor Relations Bd.*, 216 Ill.2d 569 (2005) (Department of Corrections not joint employer of employees of private health care vendor where vendor supplies personnel to perform work with DOC inmates and has actual day-to-day control of terms

and conditions of employment, even where warden has power to issue “stop order” and prevent certain vendor employees from working at DOC.)

Second, the Employer maintains detailed handbooks and policies for its employees, including its HILIA program employees. (E037-E086; E189-E232). With respect to the Employer’s HILIA program employees that are part of the Civil Service, those employees’ terms and conditions of employment are largely set by the State University Civil Service Act. 110 ILCS 70/0.01 *et seq.*

Tellingly, and in stark contrast with the Employer, the HILIA Board does not appear to maintain any of its own employment policies. The HILIA Board does not appear to have a disciplinary policy, a grievance procedure, or any equivalent of the Employer’s Faculty Associate handbook. By contrast, the Employer’s Faculty Associate Handbook and other policies contain detailed terms and conditions of employment for the HILIA employees. The Faculty Associate Handbook expressly clarifies that “All HILIA staff are employees of Illinois State University.” (E042). It also states that “HILIA Faculty Associates, regardless of their role, will follow guidelines outlined in the Faculty Associate Handbook.” (E042). The Faculty Associate Handbook is devoid of any reference to the possibility that the HILIA Board has the authority to control any of the terms and conditions of the Employer’s HILIA program employees’ employment.

As the Employer now seeks to prevail on a theory contrary to their previous position, the record is silent as to what would happen, under the new theory about Ms. Kendall’s multiple “hats,” if the Employer and the HILIA Board were to disagree about a specific course of action on a human resources-related decision. For example, if Ms. Kendall is a “dual agent” of the Employer and the HILIA Board, what would happen if the Employer,

through Anthony Jones, were to decide that a Faculty Associate who committed misconduct should be terminated but the HILIA Board upon voting decides a suspension for a given number of days is more appropriate? If the Employer through Mr. Jones were to decide that an employee's vacation days should be granted for the specific dates the employee requested but the HILIA Board believes they should not be, who must Ms. Kendall obey? This would present a real conundrum if the HILIA Board actually exerted significant control over the employees' working conditions through Ms. Kendall as agent, but they do not. Only the Employer exercises control over their working conditions.

i. The HILIA Board has no role in hiring employees

The Employer is responsible for hiring individuals. Ms. Kendall will select a person for a role in consultation with her supervisor, the Director of the Laboratory Schools (R330-R331). The HILIA Board has no role in approving a specific person for a position (R329). The Faculty Associate Handbook states that "[t]he Superintendent of the Laboratory Schools, the Dean of the College of Education, the Vice President and Provost, and the President [sic] have the final decision regarding appointment and salary of new Faculty Associates." (E047).

Here, the HILIA Board does not hire specific employees and does no more than the ministerial task of relaying to the Employer what the IEP teams have determined about students' needs (e.g., where students must be placed), and thus whether and how much staff is needed and where they must be placed. (E005). While the HILIA Board may relay that information to the Employer, that does not rise to the level of control over the program employees' terms and conditions of employment that would require them to be at the table to effectuate productive collective bargaining. This is because it is not the

HILIA Board that is exercising control over the employees' working conditions. Rather, the IEP teams are indirectly doing so.

ii. The HILIA Board has no role in determining the employees' hours of work

The HILIA Board likewise has no control over the Employer's HILIA staff's hours of work. The Employer's HILIA program employees work at either the Laboratory Schools or in the home school districts of the HILIA students. (R078). 17 students at the time the petition in the instant case was filed attended the Employer's "center-based" programming at the Laboratory Schools, while about 200 were in programming at their home school districts, in accordance with their IEP teams' decisions. (R078). Though the record provides little insight as to hours of work for the HILIA employees, a fair inference would be that the hours of work for the Employer's HILIA program employees that work at the Laboratory Schools are set by the Employer/Laboratory Schools, while the hours of work for the Employer's HILIA program employees that go out to the various schools participating in the program are determined by the school hours of those specific schools. It is possible that the IEP teams set school hours for the students that differ from regular school hours. However, there is no evidence at all that the HILIA Board has any role in determining hours of work for any of the employees.

iii. The HILIA Board has no role in determining the Employer's HILIA program employees' other terms and conditions of employment

The employee handbooks and policies indicate that the Employer, and only the Employer, controls other terms and conditions of employment for their HILIA programming employees. For example, the Faculty Associate Handbook, of which HILIA Faculty Associates are bound, contains provisions addressing instructional minutes (E047), external employment (E047), required trainings (E047-E048), standards of

professional conduct (E049-E051), professional development and teacher evaluation (E051-E054), absence and call-off procedures (E059-E060), resignations and retirement (E061-E062), probationary periods (E063), continued service requirements (E063-E064), a grievance process (E067-E069), and mandated reporter and other emergency-related policies (E072-074, E084-E086). The HILIA Board does not appear to have any such policies of its own.

The Faculty Associate Handbook's supplement of "Exceptions/Additions" for HILIA Faculty Associates provides that "In collaboration with HR, HILIA continues to be in the process of defining instructional minutes, plan time, etc. These conversations will include outlining a 'workload' for HILIA Faculty Associates I [sic] accordance with ISBE." (E081). Though the record does not make it explicitly clear, it is a fair inference that "HILIA" refers to the Employer's HILIA program, not the HILIA Board. As instructional minutes and plan time would have to depend on the staff's work location (e.g., the Laboratory Schools or one of the home school districts), Ms. Kendall as the person supervising the HILIA staff would be responsible for determining when plan time and instructional minutes would be allocated. Ms. Kendall works for the Employer, and there is no evidence in the record that the HILIA Board makes such decisions.

The supplement also states that in the event "support personnel cannot be found for HILIA student participation in extracurricular activities, the HILIA Program Coordinator may seek assistance from HILIA Faculty Associates to provide necessary support. Faculty Associates are not under obligation to assume this responsibility but will be compensated for time worked." (E081). It is unclear whether the HILIA Board has ever reimbursed the Employer for such supplemental pay. The Employer's HILIA supplement

to the Faculty Associate Handbook also provides for a number of orientation, workshop, committee service, and co-curricular opportunities for HILIA Faculty Associates as well. (E082). There is no evidence that the HILIA Board maintains any of their own policies in this regard to which the HILIA Faculty Associates are subject to. Lastly, the Employee Handbook provides that Faculty Associates at Metcalf are expected to participate in the outdoor education policy, for which they receive a stipend. (E083). It is unclear whether the HILIA Board reimburses the Employer for the stipend for the HILIA Faculty Associates at Metcalf who work the outdoor education program.

Meanwhile, the Employer also maintains detailed policies for its Civil Service and Administrative Professional employees, the former of which incorporate the rules of the State University Civil Service System. These policies cover vacation, teaching opportunities, performance appraisals, notification of non-appointment, flexible work schedules, layoffs, and probationary periods. (E192-E231). To suggest that the HILIA Board exercises control over the employees with respect to these working conditions would render the Faculty Handbook, the Employer's other policies, and the statutory Civil Service rules meaningless.

Even though the Employer maintains all of these policies, the Employer claims that Ms. Kendall's supervision of the HILIA program employees and application of these policies is done on behalf of the HILIA Board. The Employer's claimed arrangement is not contemplated by either the ESA or the School Code's provision covering joint educational programs. The ESA provides that the Employer provides certified and non-certified personnel, gives the HILIA Board their employees' names and ISBE professional certificate numbers, ensure they might licensure requirements, provide

classroom space, and otherwise assume responsibility and authority for the administration of the HILIA program. (E004-E006). Meanwhile, the School Code provides that school districts may enter into joint agreements with other school boards or public institutions of higher education to establish any type of educational program which any district may establish individually. 105 ILCS 5/10-22.31a. It goes onto say that the school districts are permitted to employ a director and other professional workers for such a program. *Id.* However, it also says that “The director and other professional workers may be employed by one district which shall be reimbursed on a mutually agreed basis by other districts that are parties to the joint agreement. Such agreements may provide that one district may supply professional workers for a joint program conducted in another district.” *Id.*

In the instant case, the Employer and the HILIA Board opted for the latter. Rather than choose to have Ms. Kendall and the professional employees who report to her be employed by the HILIA Board itself, they have chosen, as manifested in the ESA, to have Ms. Kendall and the Faculty Associates and other staff that work the HILIA program be employees of the Employer. In furtherance of that undoubtedly convenient arrangement, the Employer has created policies and rules that cover the terms and conditions of employment of their HILIA program employees, some of which are mandated by SUCCS. Thus, by the choice of the HILIA Board and the Employer, the HILIA program employees are employed solely by the Employer.

iv. The HILIA Board has no authority to discipline or discharge the Employer’s HILIA program employees

For discipline and discharge matters, Ms. Kendall testified she has authority to discipline and discharge employees through the Lab School. (R116-R117). When asked on cross-examination if it’s correct that “the *Lab School* through you has the authority to

discipline or discharge employees where warranted,” (emphasis added) she responded “Correct.” (R116-R117). Ms. Kendall further testified that to discipline or discharge an employee, she would follow the process set up through the Employer’s Human Resources department. (R331). The Employer’s discipline and discharge procedures for Faculty Associates, HILIA or otherwise, are set forth in the Faculty Associate Handbook. (E065). The Civil Service employees that are in the HILIA program are subject to discipline procedures in the State University Civil Service Act. 110 ILCS 70/36o.

By contrast, the HILIA Board does not appear to maintain any workplace rules or disciplinary procedures for Ms. Kendall to follow. Rather, Ms. Kendall conceded that she disciplines employees through the Employer. Accordingly, it was not against the manifest weight of the evidence for the Board to find that the Employer, and not the HILIA Board, has authority to discipline and discharge employees. (C072-C073; C081).

v. The Employer maintains HILIA employee layoff policies in accordance with their handbook and the HILIA Board does not

The Employer maintains actual policies that provide for what happens to its employees if enrollment in the HILIA program decrease. (E082). The policy states that “[t]he decision to dismiss HILIA Faculty due to enrollment will be made after other options have been considered such as acquiring a caseload of students in the Laboratory Schools and/or a caseload of students in the home district. (E082). A Faculty Associate not affiliated with HILIA would have to apply for a non-HILIA position at Metcalf, and vice-versa. (R053-R054). A non-HILIA Faculty Associate would likewise have to apply to become a HILIA Faculty Associate. (R054). Presumably, a HILIA Faculty Associate would have to apply to become a teacher at a participating school district.

The HILIA Board, by contrast, has no role in layoff (or recall) policy. As previously established, neither the HILIA Board nor the Employer actually control how many employees are needed to fulfill the needs of the HILIA program. Rather, that would be IEP teams in accordance with federal and state law. (E005; R078). The policies show that when program enrollment decreases, the Employer makes efforts to find alternative employment arrangements for them, if any. (E082).

This is consistent with the School Code, which provides that “For any teacher employed...as a full-time teacher in a program of a special education joint agreement, whether the program is operated by the joint agreement *or a member district* on behalf of the joint agreement, in the event of a reduction in the number of programs or positions in the joint agreement...the teacher in contractual continued service is eligible for employment in the joint agreement programs for which the teacher is legally qualified in order of greater length of continuing service in the joint agreement, unless an alternative method of determining the sequence of dismissal is established in a collective bargaining agreement.” 105 ILCS 5/24-11(j) (emphasis added.) Therefore, the Employer effectuates HILIA employee layoffs in accordance with the School Code, not the HILIA Board.

d. The Employer’s job descriptions for their HILIA program employees also indicate that Ms. Kendall supervises them as an agent of the Employer, not the HILIA Board

The record does not contain job descriptions for HILIA program Faculty Associates specifically, just Faculty Associates generally. (E010-E011). However, the job descriptions for the Interpreters and Senior Interpreter, the Special Ed Paraprofessionals, the Specialist Ed Audiologist all say that they report “to [the] HILIA Coordinator, who reports to [the] Director of the Laboratory Schools, who reports to [the] Dean of Education, who reports to [the] Vice President & Provost, who reports to the President.”

(E018, E021, E029, E032). Absent from each of these job descriptions is any mention that the HILIA Coordinator/Program Director reports to the HILIA Board. Nor is there any suggestion in the job descriptions that the HILIA Board is an entity to whom the different employees are accountable via Ms. Kendall. Rather, the job descriptions do much to establish that the HILIA program employees are fully organized under the Employer, as each description states under “College/Unit” that they are a part of the “College of Education,” which the Laboratory Schools fall under. (E017; E020; E028; E031; E039; R030). This is consistent with the ESA’s plain terms that the Employer is responsible for providing the employees to fulfill the objectives of the program. (E006).

e. The Employer points to weak evidence that Ms. Kendall supervises and directs the Employer’s HILIA program employees as an agent of the HILIA Board

To support their argument that the Board wrongly concluded that the Employer is solely responsible for supervising the HILIA program employees, the Employer points to Ms. Kendall’s testimony regarding a job title change, “promotional materials,” and an organizational chart. (Employer’s Brief, at 15-16.) None of this trivial evidence shows that the HILIA Board exerts significant control over the employees’ essential working conditions that would render them necessary to effectuate a meaningful bargaining relationship.

First, the Employer claims that “HILIA itself approved Kendall’s job title of ‘Director’ (having been changed from ‘Program Coordinator’) (R073-R074).” (Employer’s brief, at 15.) Of course, a job title change does not equate to a grant of authority to supervise employees. Moreover, a change of title from “Program Coordinator” to “Director” represents nothing more than uniformity with Section 10-22.31a of the School Code, which refers to a joint educational program “director” – not a

program coordinator. 105 ILCS 5/10-22.31a. As discussed *supra*, the evidence shows that the Employer and the HILIA Board chose under Section 5/10-22.31a to have the HILIA program director and the professional employees who report to her be employed and supplied by the Employer. While the record is silent as to the circumstances of Ms. Kendall's initial hire (i.e., which entity selected her for the position), the ESA suggests that the HILIA Board contracted management and administration of the HILIA program to the Employer, which in turn hired Ms. Kendall and her staff. A simple title change does not indicate actual or apparent authority by Ms. Kendall to supervise the HILIA program employees on behalf of the HILIA Board. As the ESA provides and School Code contemplates, supervision and management of the Employer's HILIA program employees is not authority the HILIA Board has that it can vest in an agent.

Next, the Employer points out that "HILIA advertises Kendall as its Director in promotional materials without any mention that Kendall is also affiliated with the University. (E156)." (Employer's brief, at 15.) First, the evidence does not suggest that the document contained in the record at E156-E157 ("Respondent Exhibit 6" at hearing) is "promotional material." Rather, Ms. Kendall testified that "[T]his particular document is just for all of us to have contact information, but I have it an additional document for our itinerant teachers and out member districts." (R092). There is no evidence in the record whatsoever as to who, if anyone, authorized Ms. Kendall to create that document, whether it be Mr. Jones of the Employer or the HILIA Board. Even then, just like the job title change, the creation of a document simply listing which employees are at which locations does not suggest the HILIA Board has authority it can grant to Ms. Kendall to make decisions as its agent about employees' terms and conditions of employment.

Similarly, the organizational chart the Employer points to also does nothing to show that Ms. Kendall acts as the HILIA Board's agent with respect to the Employer's employees' terms and conditions of employment. Ms. Kendall never testified that the HILIA Board directed her to make the organizational chart. Rather, she merely testified that she created it. (R096-R097).

Next, the Employer claims that Ms. Kendall supervises the HILIA program employees as an agent of the HILIA Board because she produces an annual budget for the HILIA Board to review and approve. (Employer's Brief, at 16). It is clear from the record that Ms. Kendall prepares this budget on behalf of the Employer, not the HILIA Board. Though the ALJ, whose factual findings the Board adopted, did not expressly say on whose behalf Ms. Kendall submits a budget to the HILIA Board, the ESA, in defining "Educational services," specifically states that services "will be incorporated into an ROE/ISU budget as recommended by the Superintendent of the Laboratory Schools..." (E004). As the recommendation of the budget is the responsibility of Mr. Jones as Superintendent of the Laboratory Schools, it follows that if Ms. Kendall recommends the budget to the HILIA Board, it is on behalf of Mr. Jones (i.e., the Employer), not the HILIA Board.

Lastly, the Employer points out that the ALJ found that the HILIA Board authorizes Ms. Kendall to create positions and hire staff when deemed appropriate. (Employer's Brief, at 16.) However, the authorization to hire for a position represents nothing more than the HILIA Board performing the ministerial task of informing the Employer how much staff is needed based not on the HILIA Board's determinations, but on those of the IEP teams of the students. That does not rise to the level of significant

control over the employees' essential working conditions required to show a joint employer relationship.

The Board correctly concluded that Employer, not the HILIA Board, is responsible for the day-to-day direction, supervision, hiring and discipline of their HILIA employees. (C073). As discussed *supra*, the Board did not discuss the HILIA Board's lack of this control over the Employer's HILIA program employees because the Employer conceded the point in its exceptions, opting instead to fault the Board for allegedly failing to appreciate the HILIA Board's role in funding and overseeing the program. The Board's adoption of the ALJ's conclusion that the Employer provides day-to-day supervision is "not so unreasonable that the opposite conclusion is clearly evident." See *AFSCME Council No. 31*, 197 Ill.App.3d at 525.

D. THE HILIA BOARD'S *AMICUS* BRIEF RAISES UNFOUNDED CONCERNS

The HILIA Board's *amicus* brief warns the Court of dire consequences that may result from its lack of participation in collective bargaining with the Union. In short, the HILIA Board claims that it is burdened by the responsibility of the administration of the program and potential liability resulting therefrom while having no say in collective bargaining decisions that could theoretically result in liability towards itself. To the contrary, their inclusion at the bargaining table would wreak havoc on the process as they'd be permitted to exert influence over negotiation of terms they do not control, obstructing progress towards agreement between the Union and Employer by seeking to impose their preferences on matters that are none of their concern.

The HILIA Board claims that it "remains legally and operationally responsible for the educational services by these employees." (*Amicus* brief, at 2). That claim is belied by the

plain language of the ESA, which states that “The *University* will assume responsibility and authority for the administration of the educational programs described in this agreement...The teachers’ instruction will be based on student IEP goals and objectives and follow the *Laboratory Schools*’s curriculum objectives as appropriate.” (E006) (emphasis added.) That section of the ESA also says that “[i]n cooperation with the directors of special education from the participating districts/cooperatives, the University will develop an appropriate educational program for the pupils enrolled in the Laboratory Schools under this agreement.” (E006). The educational program that the Employer consults the directors with is a managerial matter covered by Section 4 of the Act, not a matter of wages, hours, or other terms and conditions of employment that are subject to bargaining. 115 ILCS 5/4. Beyond the requirement that the Employer put forth an educational program in cooperation with the directors, nothing in the ESA whatsoever suggests that the HILIA Board is responsible for determining the wages, hours, or other working conditions of the Employer’s employees that it supplies to fulfill the objectives of the program.

Second, the HILIA Board expresses fear that they’ll be liable for the Employer’s acts or omissions arising out of collective bargaining with the Union. (*Amicus* brief, at 4). However, the HILIA Board is indemnified by the Employer (and vice versa) for any liability (including unfair labor practices) or other actions imposing potential liability that the Employer may commit. However, Paragraph 12 of the ESA provides mutual indemnification of the parties, thus protecting the HILIA Board from illegal acts by the Employer. (E006). Accordingly, the HILIA Board’s concerns about being liable for acts it cannot control are unfounded.

The HILIA Board also points out that the Employer's HILIA program staff's "day to day duties and working conditions vary greatly from the other University employees...which was not taken into account by the Board." (*Amicus* brief, at 3). Notwithstanding the Union's strong disagreement on that factual assertion, that is a matter relevant to a "community of interest" analysis, not the "joint employer" analysis. See 115 ILCS 5/7a. Though the Employer argued before the ALJ that the Employer's HILIA and non-HILIA program employees lacked a community of interest with one another, they elected not to contest that issue in their exceptions to the Board (or in this appeal.) Issues not raised before an administrative agency are waived and may not be raised on administrative review. *Chicago Teachers Union Local 1 v. Ill. Educ. Labor Relations Bd.*, 344 Ill.App.3d 624, 638 (1st Dist. 2003). Even if the HILIA Board's argument had merit, differing working conditions among employees represents a different question from who controls those working conditions.

The HILIA Board also warns that if the Board's decision is affirmed, "we may find other joint educational cooperatives bringing their operations in house or dissolving due to lack of authority and control over their own employees." (*Amicus* brief, at 3-4). Notwithstanding that the HILIA Board's claim is purely speculative, they ignore that the "joint educational cooperatives" section of the School Code empowers school districts and institutions of higher education a choice whether to structure employees and their director as employed by one entity party to the agreement or by the joint entity itself. 105 ILCS 5/10-22.31a. In the instant case, the ESA plainly shows that the parties agreed that Ms. Kendall and her staff work for and are provided by the Employer, rather than the HILIA Board or both. No matter the outcome of this case, school districts and institutions

of higher education that form joint educational cooperatives remain free to structure them as they wish in accordance with the School Code. Should other joint educational cooperatives decide to hire their own employees rather than a participating entity, unions will presumably name the cooperative as the employer instead.

The HILIA Board raises the issue of compensation as a bargaining subject to suggest that it will be dragged into a requirement to reimburse the Employer without having a say in what that reimbursement level will be. (*Amicus* brief, at 5-6). Again, the Employer sets employee salaries and lets the HILIA Board know later that the increases were approved. (R099). The Employer also pays employee benefits without aid or input from the HILIA Board. (R100). The HILIA Board claims that as the financial source of the Employer's HILIA program employees' salaries, that it is a joint employer. (*Amicus* brief, at 5). In discussing the Laboratory Schools's funding sources, it notes that the Laboratory Schools also get their funding from the Illinois State Board of Education and the Illinois Board of Higher Education. (*Amicus* brief, at 5). Nonetheless, the HILIA Board does not consider ISBE or IBHE as joint employers and apparently believes that only it would be deprived of means to advocate for operational feasibility, fiscal constraints, or student service centered considerations. (*Amicus* brief, at 5-6). The HILIA Board fails to explain how compensation levels agreed upon between the Union and the Employer, which the HILIA Board is not required to reimburse in full, would have any impact on operational feasibility, fiscal constraints, or student service centered considerations. The HILIA Board remains free to not reimburse for all wage increases, just like they don't reimburse for benefits despite benefits' listing as "approved expenses" under the agreement.

The HILIA Board next claims that they remain vulnerable to allegations from the Union that its actions interfere with bargaining members' rights. (*Amicus*, at 6). The HILIA Board vaguely claims they may face "administrative paralysis when attempting to simultaneously comply with obligations under the School Code, special education laws, funding requirements, and accountability standards, while attempting to avoid actions that could be construed as interfering with a labor agreement negotiated without its involvement." (*Amicus*, at 6). As the HILIA Board exercises no meaningful control over the terms and conditions of the Employer's HILIA program employees' employment and are indemnified for wrongful acts by the Employer, the HILIA Board's contention here is without merit.

The HILIA Board also argues that the Board's decision "allows repeated attempts to relitigate joint employer status." (*Amicus* brief, at 7) The HILIA Board apparently discounts the possibility that re-litigation of joint employer status could also occur due to operational adjustments if the Board had found the HILIA Board to be a joint employer as well. Subsequent litigation could also happen even if the HILIA Board and Employer got their way in this litigation. While this is entirely speculative, these potential changes simply represent labor law in motion. When the employees of one employer become employed by another, questions of whether the employer is a "successor" with a bargaining obligation arise. See *Nat'l Labor Relations Bd. v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972); *Metropolitan Cmty. Coll.*, 15 PERI ¶ 1046 (IELRB Opinion and Order, Feb. 10, 1998) (adopting federal labor law's "successorship" doctrine.) The NLRB and federal courts have contemplated such scenarios and have interpreted the NLRA consistent with the NLRA's policy of providing stable bargaining relations, as has the

Board. That same process should simply be permitted to play out here, in the unlikely event the HILIA Board becomes the new or a new employer despite the Employer's superior resources and the convenience the Employer's control of the employees brings to the program.

The HILIA Board claims that "[a]ny operational adjustment such as changes in supervision, program delivery, compliance monitoring, or reporting, may be seized upon as evidence that [the HILIA Board] exercises sufficient control to warrant joint-employer status." (*Amicus* brief, at 7). Notwithstanding that of those things only a change in supervision of the employees to someone outside of the Employer could impact a change in the lack of joint employer status of the HILIA Board, the Union cannot be more clear that it is not seizing on evidence of joint employer status.

Next, the Employer contends that the Board's decision defeats the purpose of the Act by supposedly destabilizing collective bargaining. (*Amicus* brief, at 7). Section 1 of the Act says that "It is the public policy of this State and the purpose of this Act to promote orderly and constructive relationships between all educational employees and their employers...Recognizing that harmonious relationships are required between educational employees and their employers, the General Assembly has determined that the overall policy may best be accomplished by (a) granting to educational employees the right to organize and choose freely their representatives [...]"

It is no accident that the Employer's HILIA program employees signed union cards to be represented by the Lab School Education Association, and not a separate local union that would solely represent the Employer's HILIA program employees. As the ALJ found, there is "strong evidence" the employees' desire to be in one bargaining unit

(C029), rather than wanting fragmented units as the Employer and HILIA Board do. At hearing, both employees that are part of the HILIA program and those that are not testified that their preference is to be one unit. (R215-R219; R283; R306-R307). The freedom of employees to freely choose their representative is an important public policy consideration and should override the HILIA Board's unfounded concerns about unstable collective bargaining. *Vill. of Bolingbrook*, 11 PERI ¶ 2020 IV.C (SLRB-SP 1995). As discussed more in detail below, the HILIA Board's presence at the bargaining table is what would be disruptive to stable collective bargaining.

Next, the HILIA Board claims that if it's not at the bargaining table, the Employer will be deprived of "essential institutional knowledge and perspective." (*Amicus* brief, at 8.) The HILIA Board specifies that budgetary concerns, statutory constraints and regulatory mandates would be lost on the Employer. (*Amicus* brief, at 8.) As previously established, the Employer has autonomy over its own budget, which it can and indeed does utilize to fulfill its staffing obligations (personnel, and their salary and benefits). With respect to statutory constraints and regulatory mandates, nothing prohibits the Employer from retaining counsel or consulting others as to what their statutory or regulatory obligations are. The HILIA Board does not have to be present at the bargaining table for the Employer to seek legal or "institutional" advice. Any educational employer engaged in collective bargaining must be mindful of statutory and regulatory constraints, as Section 10(b) of the Act prohibits parties from agreeing to contract terms that violate state law. 115 ILCS 5/10(b).

The HILIA Board also claims that their exclusion "encourages strategic behavior that the Act was intended to prevent. HILIA employees may direct grievances or pressure

toward HILIA, while it lacks authority to resolve them.” (*Amicus* brief, at 8). The Union is at a loss to understand why it or its members would direct grievances toward the HILIA Board instead of their employer. Section 10(c) of the Act mandates that all collective bargaining agreements “contain a grievance resolution procedure which shall apply to all employees in the unit and shall provide for binding arbitration of disputes concerning the administration or interpretation of the agreement. [...]” 115 ILCS 5/10(c). Section 10(c) provides the parties with an orderly and definitive process for resolving grievances. If the Union or its members have grievances, then those grievances would of course be filed with the Employer – not some third party. As the HILIA Board lacks capacity to adjust grievances over terms and conditions of employment it has no control over, it is unclear why the Union or its members would waste time going to them.

The HILIA Board also contends that the Board’s decision “has forced resources away from educational services and toward conflict management and disparate resolution and will likely continue to do so. Time and funds that should be devoted to public education are instead consumed by contract renegotiations, inter-entity disputes, and defensive legal costs.” (*Amicus* brief, at 9). In passing the Act, the General Assembly envisioned a statutory regimen in which educational labor disputes are resolved in an orderly fashion. 115 ILCS 5/1. The HILIA Board’s complaint in this regard boils down to a complaint about an employer’s obligations under the Act itself, rather than the Board’s holding regarding the HILIA Board’s lack of joint employer status.

Lastly, the HILIA Board claims the Board’s decision “strips it of its status as a joint educational legal entity” under Section 10-22.31a of the School Code. (*Amicus* brief, at 10). Not so. Section 10-22.31a of the School Code provides that when school districts

(including public institutions of higher education) form joint educational programs, the joint program may employ a director and other professional workers for such program. 105 ILCS 5/10-22.31a. However, the statute says they may also agree that the director and professional workers can be employed by one district. *Id.* Further, the districts could agree that one district “may supply professional workers for a joint program conducted in another district.” *Id.*

Here, with respect to the HILIA program, the educational services agreement and other evidence demonstrates that the Employer is to employ the director and professional employees and that the Employer supplies the professional workers for the program conducted at the Laboratory Schools and in the home districts. That arrangement, which is specifically contemplated by the School Code, does nothing to somehow erase or undermine the HILIA Board’s status as a joint educational legal entity. Rather, it simply means that it is not a “joint employer” because it does not exert significant control over the Employer’s HILIA program employees’ terms and conditions of employment.

The Union does not dispute that the HILIA Board, through its fiscal agent ROE 17, is a joint educational cooperative entity. Nor can it be disputed that the HILIA Board is legally capable of being an educational employer, as Section 2(a) of the Act specifically contemplates. However, just because an entity is eligible to be an educational employer under Section 2(a) of the Act does not mean that it is one where it does not actually control any of the employees’ working conditions.

E. INCLUDING THE HILIA BOARD AS A PARTY TO NEGOTIATIONS AS A JOINT EMPLOYER WOULD OBSTRUCT EFFECTIVE COLLECTIVE BARGAINING

By forcing an entity that exerts no significant control over the Employer's HILIA program employees terms and conditions of employment to be included at the bargaining table would be obstructive to meaningful and effective collective bargaining. The Employer, and only the Employer, exercises significant control over the employees' day to day work life and their terms and conditions of employment. The HILIA Board's inclusion at the bargaining table would wreak havoc on the process as they'd be permitted to exert influence over negotiation of terms they do not control, including by obstructing agreements or progress towards agreements between the Union and Employer by seeking to impose their preferences on matters that are none of their concern. If, as the Employer now claims, the Employer and HILIA Board exert the same control pursuant to the Employer's "dual agent" theory, the Union would need agreement from two different employers to reach agreement on the same subjects of bargaining. While such an arrangement may have been necessary in *County of Will I or II* where the county board controlled all or a significant amount of the undisputed employers' budgets or spending power, the HILIA Board has no similar power and is not an essential party for collective bargaining where they also do not exercise control through handbooks or policies.

F. THE BOARD DID NOT ERR BY DETERMINING THAT THE THREE EXTRA-HELP EMPLOYEES MAY BE INCLUDED IN THE BARGAINING UNIT

Finally, the Union would like to briefly address the other issue it understood the Employer was going to raise on appeal based on its inclusive docketing statement — the inclusion of three "Extra Help – Skilled" and "Extra Help – Semi Professional" employees of the Laboratory Schools in the bargaining unit. The Employer failed to raise

any arguments with respect to their position on this issue in their opening brief. As such, their right to reply on this issue is waived and forfeited. Ill. S. Ct. R. 341(h)(7); *Harleysville Ins. Co. v. Mohr Architecture, Inc.*, 2021 IL App (1st) 192427, ¶ 56; As the Employer has forfeited this issue, the Court should affirm the Board's decision on it.

III. CONCLUSION

The Board did not clearly err in holding that the Employer is the sole employer of their HILIA program employees. The evidence overwhelmingly demonstrated that only the Employer exercises significant control over the terms and conditions of employment of the HILIA program employees, including their hiring, day-to-day supervision, discipline and discharge, compensation, benefits, and other workplace policies. The ESA shows that the HILIA Board merely contracts with the Employer for educational services, for which the Employer hires and provides staff to fulfill the educational objectives of the regional program. The HILIA Board's role, according to the evidence, is limited to oversight of the Employer's overall effectuation of the HILIA program but does not in theory or in practice involve control over the employees' working conditions. As the Board did not commit clear error in finding the HILIA Board is not a joint employer, the Board's decision should be affirmed.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14,481 words.

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CERTIFICATE OF SERVICE

I certify that on February 26, 2026, I electronically filed the foregoing Response Brief of the Lab School Education Association, IEA-NEA with the Clerk of the Court of the Fourth Judicial District through the Odyssey eFileIL system.

I further certify that the other participants in this direct administrative review action, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via Odyssey eFileIL system.

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