DEPA[illegible]MENT OF ECONOMIC OPP[illegible]TUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. - 3123178
COMPKIDS INC
ATTN: BRANDY YSKA, PRESIDENT
3625 WILDERNESS WAY
CORAL SPRINGS FL 33065-6046

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 0019 3463 32-01

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated June 21, 2013, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY]* en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this 12 day of **May, 2014**.

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Shanedra Y. Barnes
DEPUTY CLERK

5-16-14
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the 16th day of May, 2014.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
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State of Florida
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PROTEST OF LIABILITY
DOCKET NO. 0019 3463 32-01
(2013-68112L)

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 21, 2013.

After due notice to the parties, a telephone hearing was held on October 28, 2013. The President of the Petitioner appeared for the Petitioner; the Joined Party appeared; a Tax Auditor II appeared for the Respondent. No proposed findings of fact or conclusions of law were received. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

Issue:
Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner began operations in July of 2010. It is a franchisee of a company, Compuchild, Inc., which provides educational enrichment activities for students from 2 years old up to 12 years old. The Petitioner is one of more than 70 franchisees around the country. The Petitioner arranges with pre-schools and other schools to have tutors come in to teach the basics of computer use to those students whose parents subscribe. The parents pay a fee to the Petitioner for a weekly series of educational sessions presented over a ten month school year.

2. The Joined Party worked as a tutor with the Petitioner from October 1, 2012 to May 9, 2013. During the time that the Joined Party worked with the Petitioner, the president and the Joined Party were the only two workers for the Petitioner.

3. Before the Joined Party started work with the Petitioner, the Joined Party advised the president of her existing job and schedule constraints. The Petitioner sent the Joined Party an offer of work by email setting out days and hours of work, and a pay rate that would allow the Joined Party to be paid $350 per week. Specifically, the offer stated a work schedule of Monday through Thursday, 9 a.m. to 1 p.m., and one hour on Fridays. Pay was to be at $14 per hour, 25 hours per week. The Joined Party accepted. The days and hours of work were designed to fit the Joined Party's personal schedule and the schedule of the schools where the Joined Party would be holding the tutoring sessions. The pay rate was designed to persuade the Joined Party to give up her then current teaching position and start work instead with the Petitioner. The Joined Party received $350 per week throughout the association with the Petitioner. The amount was paid semimonthly.

4. The franchisor advises franchisees that tutors should be independent contractors. The Petitioner has designated each of the tutors it has had as independent contractors. Before the Joined Party began holding tutoring sessions on her own, the president advised the Joined Party that she would be responsible for her own taxes. The Joined Party did not object. The Joined Party believed that she was an employee. The president of the Petitioner believed that the Joined Party was an independent contractor. There was no written agreement designating the Joined Party as either an independent contractor or an employee. The Petitioner did not deduct any amount for taxes. The Petitioner issued a 1099-Misc to the Joined Party for 2012.

5. The Joined Party was supposed to conduct four tutoring sessions per month for each pupil that signed up. The tutoring sessions were held at the pupils' schools, with up to five students at a time in each session. The Petitioner supplied the Joined Party with a suggested topic schedule that came from the franchisor. The topic schedule started with turning on the computer, and eventually worked up to using a word processing program. Some suggestions were included about activities to be performed at each session. Some of the presentation suggestions featured a doll in the form of a monkey. The Joined Party watched the president of the Petitioner present a couple of sessions, and then the Joined Party took over and began operating the sessions on her own. The president of the Petitioner did not observe the Joined Party after she started conducting the sessions at the schools.

6. Parents of the pupils would pay the Joined Party the fee for the sessions. The Joined Party would turn over the money to the president of the Petitioner from time to time when they met. This might be weekly, or sometimes it might be at longer intervals. The Joined Party would turn in attendance sheets at the same time. The president of the Petitioner would confirm with the schools that the sessions had been held.

7. Over the course of the association, some of the schools stopped having the Petitioner present tutoring sessions, thus reducing the number of sessions each week that the Joined Party would present. On the other hand, in late 2012 the president of the Petitioner became unable to hold the sessions that she was personally presenting, so the Joined Party took over those. With the extra sessions the Joined Party was holding about as many sessions per week as she had started out with. The pay to the Joined Party did not change in relation to the number of sessions or students she had.

8. If the Joined Party missed a scheduled session, it could be made up on Fridays. The Petitioner could withhold a pro-rated portion of the semi-monthly payment if the Joined Party did not conduct four sessions per month per pupil, but the Petitioner did not always make the deduction for a missed session.

9. The Petitioner supplied a shirt with the franchisor's name on it to the Joined Party. She was supposed to wear the shirt while conducting tutoring sessions. The Petitioner supplied the computer equipment and supplies used in the tutoring sessions. The equipment included a desktop computer and printer that the Joined Party would take to the various locations, and it could include five tablet computers for the pupils to use. The Joined Party would keep the equipment between sessions, unless the president of the Petitioner needed the equipment for her own sessions, or if the president needed to update the software. The Petitioner also supplied the monkey doll. The Joined Party could not use any computer equipment of her own, to make sure that the pupils were presented only with material suitable for them.

10. The president of the Petitioner was the primary marketing person, but the Joined Party could also engage in marketing activities. The Petitioner was prepared to pay the Joined Party more per week if the Joined Party arranged for some new clients of the Petitioner. Because the president was the primary marketing person for the Petitioner, the Joined Party did not engage in any substantial efforts to get new business for the Petitioner.

11. The association came to an end after the president of the Petitioner suggested to the Joined Party that $350 per week was too much for the Petitioner to pay, given the number of students that the Joined Party was tutoring. The president advised that a more appropriate amount would be $200 per week. The Joined Party sent the president a message declining the offer. The Joined Party did not finish all of the scheduled tutoring sessions. The president of the Petitioner held the remaining scheduled sessions herself.

12. The Joined Party filed a claim for reemployment assistance benefits effective May 12, 2013. After an investigation the Florida Department of Revenue issued a determination finding: "*the claimant performing services as Computer Teacher was an employee (not an independent contractor). This determination is retroactive to 10/01/2012. Your account is effective 10/01/2012 rather than 12/01/2012.*"

Conclusions of Law:

13. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

14. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 provides:
    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
    (2) The following matters of fact, among others, are to be considered:
        (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
        (b) whether the one employed is in a distinct occupation or business;
        (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
        (d) the skill required in the particular occupation;

(e) whether the employer or worker supplies the instrumentalities, tools, and a place of work, for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by time or job;
(h) whether or not the work is part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant;
(j) whether the principal is or is not in business.

15. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties. The factors listed in Cantor v. Cochran are the common law factors that determine if a worker is an employee or an independent contractor. See, for example, Brayshaw v. Agency for Workforce Innovation, 58 So. 3d 301 (Fla. 1st DCA 2011).

16. Section 73B-10.035, Florida Administrative Code, provides:
(1) (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.

17. The Joined Party worked as a key part of the Petitioner's business, providing the services that the Petitioner's customers were paying for. The locations at which the Joined Party worked derived from the Petitioner. The Petitioner provided the key tools with which to perform the work. The Petitioner paid the Joined Party by time, rather than by the job. This is shown by the Petitioner's offer to the Joined Party, and shown by the lack of substantial variation in the Joined Party's pay even though there was variation in the amount of work.

18. The Petitioner did not exercise close control of the specific communications that the Joined Party made to the students in the tutoring sessions. That may make it appear that the case is somewhat like that in VIP Tours of Orlando, Inc. v. Dept. of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984). In VIP Tours it was found that tour guides in Central Florida were independent contractors even though they wore company uniforms and worked on company buses. The tour guides accepted or rejected individual assignments. They were paid for each assignment according to a calculation based on an hourly rate times a projected tour time. The guides got the calculated payment however long the tour actually lasted. Tour guides could and did work for other tour operators in the area. The tour guides and the tour company considered the guides to be independent contractors. The provision of uniforms was found to be primarily for identification purposes. The tour company did not control the content of the tour.

19. In the current case, the Petitioner supplied the Joined Party with a shirt to wear, and that can be considered primarily an identification device. However, the current case is different from VIP Tours in significant ways. The Joined Party did not accept or reject individual tutoring assignments, but instead took on a series of assignments that were expected to last several months, performed in regular weekly increments. An employing unit has more control over how a worker performs when it is the gatekeeper to a sequence of tasks. The Joined Party was paid for the week's work, rather than for any individual assignment. The president of the Petitioner pointed out that the week's pay could be reduced if the Joined Party did not hold all of the expected tutoring sessions, but admitted that this was not always done, out of both compassion and convenience in light of the possibility of making up the work. In actual practice, the Joined Party was paid a weekly salary. The Joined Party did not work for other tutoring firms while she was working for

the Petitioner. There was no mutual agreement as to the status of the Joined Party. The Joined Party believed that she had one status, the Petitioner believed the opposite. The case of VIP Tours does not establish that the Joined Party must be considered an independent contractor.

20. Allowing a worker considerable discretion does not automatically make the worker an independent contractor, otherwise no public school teacher, trial attorney, actor, researcher, journalist, or upper level manager could be an employee: individuals in all of those jobs can exercise considerable creativity and still be employees. The fact that the Joined Party could exercise some freedom in presentation is not sufficient to establish that she was an independent contractor rather than an employee. In Florida Gulf Coast Symphony, Inc. v. Dept. of Labor and Employment Security, 386 So. 2d 259 (Fla. 2nd DCA 1980), the court considered what makes skilled professionals either employees or independent contractors. The court accepted the criteria used to decide the case, though it found that the criteria had not been applied correctly by the Department. In addition to the factors mentioned in Cantor v. Cochran, special considerations of control apply to professionals. Fla. Gulf Coast Symphony, at 262. Professional musicians must exercise professional skill, just as teachers and tutors do. If the principal can control when and where the skilled work is performed, it is more likely to be an employment relationship. The professional musicians in Fla. Gulf Coast Symphony were found to be independent contractors in spite of the control by the symphony over the final performance of specified pieces of music because, among other things, the musicians owned and used their own instruments (some of which were very expensive); some two thirds of the musicians' practice time was not subject to control of the symphony; the musicians earned a majority of their income from other endeavors; and the musicians were paid per job. Fla. Gulf Coast Symphony, at 264.

21. In the current case, the Petitioner controlled the circumstances of where and when the Joined Party performed her skilled work. In contrast with the musicians of Fla. Gulf Coast Symphony, the Joined Party in this case was required to use the Petitioner's tools exclusively, was paid a weekly salary, and the Joined Party was not deriving the bulk of her income elsewhere—she took the job with the Petitioner to the exclusion of, rather than in addition to, her prior employment. It has not been shown that the Joined Party had to spend more time outside of sessions preparing her presentation than she actually spent in the sessions. The greater weight of the relevant factors shows that services provided by the Joined Party to the Petitioner were services as an employee rather than as an independent contractor. See also, University Dental Health Center, Inc. v. Agency for Workforce Innovation, 89 So.3d 1139 (Fla. 4th DCA 2012)(dentist found to be an employee where the health center provided the tools, workspace, work schedule, patients, and controlled the fees charged). The Petitioner has not met the burden of proof on it of establishing that the Joined Party was an independent contractor. The evidence supports the finding of the determination that the Petitioner's liability to pay reemployment assistance taxes with respect to the Joined Party would begin with the beginning of the employment, October 1, 2012.

Recommendation: It is recommended that the determination dated June 21, 2013, finding that the Joined Party provided services as an employee and not as an independent contractor, with the Petitioner's liability to begin as of October 1, 2012, be AFFIRMED.

Respectfully submitted on December 31, 2013.

J.Jackson Houser, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envió por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

Shanedra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
January 2, 2014

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