IN THE COURT OF APPEALS
TWELTH APPELLATE DISTRICT
BUTLER COUNTY, OHIO

ERIN GABBARD et al., *Plaintiffs-Appellants,* v. MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al., *Defendants-Appellants.*	)	Case No. CA2019-03-0051 On Appeal from the Court of Common Pleas, Butler County, Case No. CV 2018 09 2028 **REDACTED VERSION TO BE FILED PUBLICLY**

REPLY BRIEF OF APPELLANTS ERIN GABBARD ET AL. REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS AND AUTHORITIES AND ASSIGNMENTS OF ERROR

Authorities for Second Assignment of Error:

Cases

Statutes and Rules

INTRODUCTION

The first rule of statutory interpretation is that statutes should be construed in accordance with their plain text and common meaning. Here, the plain text of R.C. 109.78(D) is clear: "No [school] . . . shall employ a person as a special police officer, security guard, or *other position in which such person goes armed while on duty*," unless he or she has "satisfactorily completed an approved basic peace officer training program," or has already served for twenty years as a peace officer. *Id.* (emphasis added). This statute unambiguously covers teachers, administrators, and other school employees who carry guns—*i.e.*, go "armed"—during the school day going about their jobs—*i.e.*, "while on duty." Thus, they must complete the requisite training.

The trial court recognized that the only way to rule for the defendants was to "add[] language" to the statute. Hearing, T.p. 89. It thought it was justified in doing so based on the title of the statute. Order, T.d. 90, p. 5. And while the defendants and the Attorney General make no attempt to defend the trial court's clearly erroneous reasoning, their interpretations suffer the same fatal flaw: they add words to the statute that are just not there. The Board would like to rewrite the statute so that the training requirement applies only to positions "like" security guards, whose "primary function" is to provide security. Response Br. at 12. Similarly, the Attorney General would like the statute to be limited to security guards and those in "comparable" positions. AG Br. at 2, 8, 9. But those limiting phrases are simply not in the statute.

Similarly, the defendants concede that the lower court's sole reason for granting a Rule 26(C) protective order over the redacted psychological reports was flat wrong. They instead argue that a direct appeal of a court order sealing documents cannot go before this Court; a proposition directly contrary to Ohio Supreme Court precedent. *See State ex rel. Richfield v. Laria*, 138 Ohio St. 3d 168, 2014-Ohio-243, ¶ 2. And they recycle the same arguments the lower court found unpersuasive. On both issues the Court should reverse.

ARGUMENT

First Assignment of Error: The Court of Common Pleas erred in concluding that the Resolution, which requires only 24 hours of training for armed staff, does not violate R.C. 109.78(D).

As demonstrated in the parents' opening brief, the plain language of R.C. 109.78(D) is clear—it covers a school employee in any "position in which such person goes armed while on duty." Opening Br. at 6–8. When the text is clear a court is bound to follow it. *See Sears v. Weimer*, 143 Ohio St. 312, 316 (1944). Having abandoned the trial court's reasons for jettisoning the plain text of R.C. 109.78(D), the defendants (and their *amici*) reassert the same arguments that the lower court declined to adopt. But they remain unpersuasive because the result—like the lower court's opinion—violates the cardinal rule of statutory construction: it rewrites the statute.

I. The Board's reliance on R.C. 2923.122(D)(1)(a) is misplaced.

Seeking to avoid the plain language of R.C. 109.78(D), the defendants first ask the Court to focus on another provision—R.C. 2923.122(D)(1)(a). Response Br. at 8–11. That provision prohibits any person (including a person with a concealed carry permit) from bringing a firearm into a school unless such person falls into a narrow category of individuals. One of the exempted categories is people who have received "written authorization" from a school board to bring a firearm into the school. R.C. 2923.122(D)(1)(a). That is why the parents do not dispute that a local school board may authorize its employees to carry a firearm while on duty at school. But while R.C. 2923.122(D)(1)(a) itself imposes no training requirements, it also says nothing about displacing or superseding any separately applicable requirements, like the training mandate imposed by R.C. 109.78(D). The Board concedes as much by admitting that the authorized staff can only go armed "in accordance with the State's concealed carry law," including the eight-hour training required by R.C. 2923.125.

By the Board's own argument, then, persons authorized to carry firearms at school under R.C. 2923.122(D)(1)(a) are still subject to other statutory requirements. Indeed, despite the trial court's alternative holding that R.C. 2923.122(D)(1)(a) supersedes R.C. 109.78(D) if the two statutes are in conflict, T.d. 90, p. 6, neither the defendants nor the Attorney General make any argument that the statutes conflict and that R.C. 2923.122(D)(1)(a) should override R.C. 109.78(D)—they instead argue that R.C. 109.78(D) is inapplicable to the authorized staff. Thus, the "simple" question in this case is not *whether* school staff may be armed—they can—but *how much training* must they complete? That question is answered by R.C. 109.78(D).

II. The Board's interpretation of R.C. 109.78(D) must be rejected because it violates the plain text of the statute.

Turning to R.C. 109.78(D), the defendants fare no better. The defendants would like to limit R.C. 109.78(D)'s training requirement to "security personnel" or those in "like" positions "whose primary function is to provide security." Response Br. at 12, 15. The Attorney General asserts repeatedly (at 2, 6, 8, 9, 13, 17) that R.C. 109.78(D) is limited to security guards and those in "comparable" positions and even argues that the statute applies only to positions *"requiring* the employee to go armed while on duty." *Id.* at 11 (emphasis in original). However phrased, none of these limitations exist in the text, and the Court should reject attempts to rewrite the statute. *See Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, ¶ 11.

A. The Board's textual argument fails and is contradicted by its own plain language use of the key statutory phrases.

The parties agree on one key point: R.C. 109.78(D) must be read in accordance with its plain meaning, applying "the normal rules of grammar and regular use." Response Br. at 12. Here, the defendants' own *regular use* of the key statutory language—"armed while on duty"—proves the parents' case. As the parents pointed out in their opening brief (at 8), the authorization letter that the Board provided to each armed staff member states: "This letter serves as written notification

that I authorize you *to possess a firearm while on duty* at Madison Local School District." Authorization Letters, T.d. 49, Ex. J (emphasis added). That is, the Board itself considers employees that it authorizes under the "Resolution to allow armed staff in [a] school safety zone," to be armed "while on duty." The Board cannot avoid the implication of its own use of this language.

Resort to a dictionary also backfires for the defendants, as the dictionary definitions they offer support the parents' argument. According to the defendants, someone is "armed" if he is "furnished with weapons" and "armed with something that provides security, strength, or efficacy." Response Br. at 12. By this definition, authorized staff are "armed"—they carry a gun at school, and a gun is a "weapon[]"that "provides security, strength, or efficacy." The authorized staff are also armed "while on duty"—which the defendants define as "engaged in or responsible for an assigned task or duty"—in their jobs as teachers, administrators, etc. *Id.* Yet the defendants assert that (somehow) when you put the two terms together, the phrase "armed while on duty" means that the armed person "is responsible for providing security." *Id.* at 13.[1] But nothing in the dictionary (or common use) dictates that. And certainly nothing in the dictionary definition of "on duty" requires that a person's "primary task" be security, as the defendants contend. *Id.* In short, every definition provided to this Court of the phrase "armed while on duty" squarely describes the conduct of Madison schools' armed staff.

Without recourse in the text or dictionary, the defendants argue in passing that R.C. 109.78(D)'s failure to specifically mention "educators" somehow alters the interpretation of the provision. Response Br. at 12. But the Legislature is not required to mention every single group that its training requirement would apply to; it can—and did—specify that all persons with a

[1] Further undermining the defendants' argument is the fact that the authorized staff members *are* "responsible for providing security." Response Br. at 13. Providing protection to students is the Board's own stated reason for passing the Resolution. Pls' MSJ, T.d. 50, pp. 13–15.

particular characteristic (*i.e.*, who go armed while on duty) have to complete the requisite training. By tying the training to any employee who goes "armed while on duty," the Legislature drew a bright-line rule that obviates the need for semantic debate about who counts as "security personnel" and the possibility that school districts could use job titles to evade the requisite training.

B. The Attorney General cannot use canons of construction to override the plain text and, in any event, he misconstrues them.

The Attorney General, as *amicus*, asks this Court to turn to canons of statutory construction to read these limitations into R.C. 109.78(D). He argues that R.C. 109.78(D) does not apply to positions that are not "comparable" to a police officer for "three reasons"—notably, none is the plain language of the statute. AG Br. at 9–13. But the plain language of the statute is unambiguous, and the Court is bound to follow it without considering other canons of statutory interpretation. *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8. In any event, the Attorney General is wrong about the "clue[s]" he says unlock the statute's atextual meaning. AG Br. at 11.

1. *Ejusdem generis* is not applicable. The Attorney General (at 10) first invokes *ejusdem generis*, the canon stating that an ambiguous "catch-all" term used to conclude a list should be interpreted to include things "of the same kind or species" as those listed. *See State v. Aspell*, 10 Ohio St. 2d 1, 4 (1967). But, as explained in parents' opening brief (at 13), this canon of construction has no application to R.C. 109.78(D) because there is no ambiguity about the scope of the "catch-all" phrase. Critically, the statute does not generally say it applies to a person serving in an "other position"—it specifies that it applies to "other position[s] *in which such person goes armed while on duty*." R.C. 109.78(D) (emphasis added). As such, the General Assembly has already specified the relevant "definite feature[] and characteristic[]" that makes the training requirement applicable: whether the employee goes "armed while on duty." *Aspell* at 4. And because the scope of "other position" is already limited by the statute, it would be improper for the Court to limit it

further. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588–589, 100 S.Ct. 1889 (1980) (refusing to apply the canon because there is "no uncertainty in the meaning of the phrase").

2. The context of the statute as a whole reinforces the parents' position. Next, the Attorney General invokes the overall context of R.C. 109.78(D). AG Br. at 10–12. But looking at the statute as a whole further *supports* the parents' interpretation. The Attorney General argues that the statute speaks in terms of "positions" and notes that subsections (A), (B), and (C) of R.C. 109.78 refer to special police, security guards, "and other private employment *in a police capacity*." *Id.* at 12 (emphasis in original). Thus, he argues, subsection (D) must also be limited to those "positions." But that gets the law backwards.

As the Attorney General acknowledges, R.C. 109.78(D) uses different language from the other subsections. *Id.* "[T]he General Assembly's use of particular language to modify one part of a statute but not another part demonstrates that the General Assembly knows how to make that modification and has chosen not to make that modification in the latter part of the statute." *Hulsmeyer v. Hospice of Sw. Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, ¶ 26. As a result, the Legislature's decision to specifically limit the scope of R.C. 109.78(A), (B), and (C) to security personnel means that its choice *not* to do so in (D) demonstrates an intent for (D) to apply more broadly—to persons beyond just security personnel if they go "armed while on duty." This Court cannot insert the exact limitation from other subsections—*e.g.*, to "persons otherwise employed in a police capacity"—into R.C. 109.78(D) even though the Legislature did not do so.[2]

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[2] The Attorney General's context arguments (at 10–12) make even less sense considering when the different subsections were added. The Legislature originally enacted R.C. 109.78 without the language that later became paragraphs (B) and (C), and thus, contrary to the Attorney General's argument, these paragraphs shed no light on how the Legislature originally understood the phrase "other position in which such person goes armed while on duty." *See* 1969–1970 Ohio Laws 2398, 2400 (session laws). Similarly, the Attorney General argues that the statute was really meant to target the "*state highway patrol*" and other state subdivisions, finding the mention of the

If anything, as described in the parents' opening brief (at 14–15), the context of the statute as a whole supports their argument that armed teachers and staff are covered by R.C. 109.78(D). All other categories of persons who the General Assembly excepted from the general ban on concealed carry in schools—including federal agents, state law enforcement officers, and SROs—must have peace officer or like training. *See* R.C. 109.78(D), 2923.122(D)(1)(a). It would upset Ohio's statutory scheme to allow teachers and staff—those closest to school children—to carry concealed firearms in school with only eight hours of training (six of which can be completed online). *See* R.C. 2923.125(G)(1).

3. The drafting history of R.C. 109.78(D) reinforces the plain text. Both the defendants and the Attorney General attack the parents' reference to the legislative history of R.C. 109.78(D). Response Br. at 13–14; AG Br. at 13–20. But they attack a strawman: the parents argue that the legislative history "reinforces" the plain text (or should be employed if the Court finds the text ambiguous), not that it justifies departure from the text. *See* Opening Br. at 8. Though the first draft of R.C. 109.78(D) required training for only special police, security guards and those in "similar" positions, the Legislature ultimately decided the training should apply to all school employees who go "armed while on duty" generally. *Id.* at 8–9. As the defendants concede (at 13), drafting history "can be indicative of legislative intent." Thus, the Court should reject the defendants' and the Attorney General's attempt to add the precise limitation into R.C. 109.78(D) that the Legislature jettisoned in favor of broader language.[3]

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highway patrol significant enough to place in italics. AG Br. at 12. Yet the "state highway patrol" was added into R.C. 109.78(D) over a decade after the Legislature had already set the training requirements for educational institutions that hire those that go "armed while on duty," so the highway patrol reference too has no bearing on the Legislature's intent with regard to schools. *See* 1987 Am.Sub.H.B. No. 419.

[3] The Attorney General argues that the legislative history also supports his view that R.C. 109.78(D) was "targeting only peace-officer-related positions" because the House Journal

<u>Second Assignment of Error:</u> The trial court erred in granting a protective order over the redacted psychological evaluations and related testimony.

The defendants (again) make no attempt to defend the trial court's reasoning with respect to the second assignment of error. Before the trial court, the defendants moved under Rule 26(C) for a protective order over the *redacted* psychological evaluations that the John Does underwent in order to obtain authorization to carry a firearm at school (and related testimony). Entry (2/22/2019), T.d. 76, p. 1. The trial court did not adopt the Board's so-called safety justification; instead it reached to HIPPA to rule that the mental health evaluations could not be public. *Id.* at 7. But HIPPA does not apply to a local school board, as the defendants concede (at 16), meaning the trial court erred as a matter of law—a categorical abuse of discretion that should be reversed.

I. The trial court's grant of a protective order under Rule 26(C) is properly on appeal before this Court.

Attempting to avoid the issue, the defendants first argue that the parents can challenge the protective order only by instituting a separate mandamus action, not by direct appeal. Response Br. at 16. The defendants are wrong. The Ohio Supreme Court *requires* that parties challenging a court order sealing court documents do so through a direct appeal, not mandamus. *State ex rel. Richfield v. Laria*, 138 Ohio St. 3d 168, 2014-Ohio-243, ¶ 2 (denying mandamus because petitioner "could have appealed the trial court's denial of its motion and the refusal to unseal the records"). As the Supreme Court explained, "mandamus cannot be used to direct judicial discretion or as a

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says the law's intent was to "'to prohibit circumvention of the requirements for appointment *as a peace officer*.'" *See* AG Br. at 17 (quoting House Journal, T.d. 49, Ex. L, at 386) (emphasis added by AG). That is wrong. The full sentence from the House Journal that the Attorney General selectively quotes reveals that it is referring to different code sections—not R.C. 109.78(D). It says the intent is: "To amend sections 109.71 and 109.77 of the Revised Code to define peace officer, and to prohibit circumvention of the requirements for appointment as a peace officer." Accordingly, House Bill 575 amended R.C. 109.71 to define "peace officer" and R.C. 109.77 to say that "no peace officer shall have his employment terminated and then reinstated with intent to circumvent this section." The sentence that the Attorney General quotes is not about R.C. 109.78(D).

substitute for appeal." *Id.* Accordingly, this Court routinely entertains direct appeals of protective orders. *See, e.g., Dunning v. Varnau*, 2017-Ohio-7207, ¶ 30 n.1; *Schmidt v. Krikorian*, 2012-Ohio-683, ¶ 29; *Golden v. Milford Exempted Vill. Sch. Dist. Bd. of Edn.*, 2011-Ohio-5355, ¶ 48.

None of the defendants' cited cases (at 16) show otherwise. Indeed, none involves a *party* contesting a protective order. Rather, all involve either nonparty press inquiries, or convicts whose failure to timely obtain records in underlying criminal cases left them no option but to file collateral public records requests. The defendants' citation to *State ex. rel. Harris v. Pureval* for the proposition that mandamus is the "*only* remedy" permitted by the Rules of Superintendence takes those words out of context. *Id.* That case was simply drawing a distinction between requests for public records under the Ohio Public Records Act, which allows for the issuance of a writ of mandamus plus statutory damages, and requests for court documents under the Rules of Superintendence, where mandamus is the "only remedy." 155 Ohio St.3d 343, ¶¶ 10–11. The case has no relevance here.

II. There is no security rationale to justify keeping these *redacted* court records from the public, and public policy favors disclosure.

Turning to the merits, the defendants argue that the redacted psychological evaluations should be sealed "to protect Madison's students and staff from harm." Response Br. at 17. But in making this argument, the defendants ignore the fact that the psychological evaluations are *redacted* so they do not include the names or any identifying information of the John Does. And the Board provides absolutely no explanation as to how releasing the *redacted* evaluations (or related testimony) would "directly impact" security. *Id.* at 18. Bald assertion cannot suffice.

[redacted]

T.d. 56, Ex. A (Tuttle-Huff Tr. 115:2–115:8). Nor can the defendants rely on their own expert's affidavit, which speaks solely to the safety rationale for preserving the "anonymity of armed staff

in schools." *See* Aff. of John Benner, Mot. for PO, T.d. 47, Ex. B at ¶¶ 13–16. Anonymity is not at issue here. The parents have never opposed keeping the identities of the John Does secret.

Finally, the defendants argue that the redacted psychological evaluations should be protected because they are part of the school's emergency management plan and, therefore, exempt from the Ohio Public Records Act. But, as the defendants admit (at 19), being exempt from public records disclosure does not mean a document gets sealed in the course of litigation. And, more critically, the John Does' individual psychological evaluations are not properly part of the school's emergency management plan; the Board cannot put them there just to shield them from the public. *See In re Story*, 159 Ohio St. 144, 148 (1953). Indeed, the trial court has already rejected defendants' efforts to shield "all documents" relating to armed staff as part of their emergency management plan, finding that only the Board's written "'procedure . . . for responding to threats and emergency events'" is properly part of the plan. Entry (2/22/2019), T.d 76, p. 4–7. It did so for good reason: the plan is a standardized form that neither requires nor allows inclusion of non-policy documents, like an individual's particular psychological report.[4]

The defendants, in sum, have presented no basis to overcome the strong public policy favoring disclosure of court documents—particularly those on issues of great public debate, as here. *See* Opening Br. at 19–20. These documents (and testimony) allow the public to understand and evaluate the decisions of their elected officials without compromising safety. They should be public.

CONCLUSION

The Court should reverse the trial court's denial of the plaintiffs' action for declaratory relief and its grant of the defendants' protective order with respect to the psychological evaluations.

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[4] The four elements of a school district's emergency plan are spelled out in Ohio Adm. Code 3301-5-01, and Madison's policy manual: (i) a *single document* addressing hazards that may negatively impact the school; (ii) a floor plan; (iii) a site plan; and (iv) an emergency contact sheet. *See* Manual, T.d. 56, Ex. C.; *see also* R.C. 3313.536(B)–(F).

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