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

BRIEF OF APPELLANTS ERIN GABBARD ET AL.
REQUEST FOR ORAL ARGUMENT
****REDACTED VERSION—FOR PUBLIC FILING****

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INTRODUCTION

The parties in this case are the parents of students in the Madison Local School District and the district's board and superintendent. All the parties share an urgent desire to make Madison schools as safe as possible. The entire community experienced a tragic school shooting in 2016, and the plaintiff parents and defendant school administrators alike want to keep schoolchildren safe. The parties may disagree over the best way to do that, and indeed there is a heated nationwide debate about how to best address school safety. But this case is not about policy preferences. It is not even about whether teachers and other employees can go armed at school. It is about *how much training* Ohio law requires armed school staff to complete. The Board's "Resolution to allow armed staff in [a] school safety zone," and its implementing policy, allow staff to carry firearms at school with only 24 hours of training. That violates Ohio law, which requires more than a long weekend of training before staff may carry guns in Ohio's classrooms. The trial court erred in concluding otherwise.

Because this dispute is about whether the Board is complying with state law, at the heart of this case is the plain meaning of R.C. 109.78(D). That statute requires any person who is employed by an educational institution, in a "position in which such person goes armed while on duty," to have "satisfactorily completed an approved basic peace officer training program," unless he or she has served for twenty years as a peace officer. By its plain language, R.C. 109.78(D) does not apply only to school staff who serve in a "police capacity," as the Common Pleas Court held. It applies to any employee who goes "armed while on duty," and that by its plain terms includes the staff authorized to carry arms at school under the Board's Resolution.

To support its contrary decision, the trial court impermissibly (and admittedly) added words to the statute ostensibly to make the text consistent with the statute's title. But not only does it violate cardinal canons of statutory construction to add words to a statute and to rely on a statute's

title, the lower court also got the title wrong — undermining its entire analysis. Neither the Board nor any court can rewrite a statute's text. If the Board believes armed teachers should be exempted from R.C. 109.78(D)'s training requirements, it can ask the Legislature to change the law (indeed, some groups already have). But unless and until the Legislature agrees, the Board's Resolution violates R.C. 109.78(D). The trial court's contrary conclusion must be reversed.

The trial court further erred in granting the defendants' request to keep parts of the trial briefing, hearing, and record secret from the public, purportedly to satisfy the Health Insurance Portability and Accountability Act (HIPAA) — a concern the defendants never raised. There is no basis in HIPAA or otherwise for sealing the psychological evaluations that the armed staff completed in order to receive authorization to carry a firearm at school — particularly with the individuals' names redacted. Those are quintessential public records, as the Ohio Supreme Court made clear in *State ex. rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 145, 1995-Ohio-248. The decision to hide these documents from the public must also be reversed.

STATEMENT OF THE CASE AND FACTS

A. Statutory Background

Ohio law broadly makes it illegal for anyone to carry a firearm on school grounds. *See* R.C. 2923.122(B). One of the few exceptions permits certain law enforcement and security officers to bring firearms into any part of a school safety zone, including a school building. *Id.* 2923.122(D)(1). For instance, school resource officers are allowed to carry firearms in school. *Id.* 2923.122(D)(1)(a). The same goes for other groups of well-trained law enforcement. *See id.* Another exception to the prohibition on carrying guns in school is for persons authorized by a school board. Section 2923.122(D)(1)(a) permits "[a] person who has written authorization from the [school board] to possess a deadly weapon . . . in a school safety zone . . . in accordance with that authorization."

Although R.C. 2923.122(D)(1) exempts certain persons from the general ban on carrying arms in school buildings if they have school board authorization, it does not override any other law, including the training requirements in R.C. 109.78(D). That statute provides that:

> No public or private educational institution . . . shall employ a person as a special police officer, security guard, or other position in which such person goes armed while on duty, who has not received a certificate of having satisfactorily completed an approved basic peace officer training program, unless the person has completed twenty years of active duty as a peace officer. *Id.*

The requirement imposed by this provision is clear: a person in a "position in which such person goes armed while on duty" must have completed the state's basic peace officer training program unless they have already served for twenty years as a peace officer. *See id.*

Basic peace officer training is governed by the Ohio Peace Officer Training Commission (OPOTC), which sets the rules and approves the programs for certified peace officer training. *See* R.C. 109.73, 109.78. The basic peace officer training program curriculum requires a minimum of 728 hours on subjects including firearm use, use of force, subject control, crisis intervention, de-escalation, and critical incident stress awareness, among others. *See* OPOTC Audit Sheet, T.d. 49, Ex. A. On several occasions, the Legislature has considered exempting teachers and other employees authorized to carry arms at school by a school board from the peace officer training requirement of R.C. 109.78(D). *See infra* at p. 9. But the Legislature has never done so, and accordingly, as the law stands today, there is no such exemption.

B. Factual Background

On April 24, 2018, the Madison Local School District Board adopted the "Resolution to allow armed staff in school safety zone." Resolution, T.d. 49, Ex. B. The Resolution, along with the Firearms Authorization Policy ("Policy") that implements it, allows "teachers, school support staff, administrators, and others approved" to carry firearms in the district's school buildings if they (i) have a concealed carry license; (ii) have completed 24 hours of active shooter training with an

approved vendor; and (iii) have been designated by the Superintendent after a mental health examination and background check. *Id.*; Policy, T.d. 49, Ex. C. It is undisputed that neither the Resolution nor the Policy requires that the armed personnel complete basic peace officer training or have twenty years' experience as a peace officer. Joint Pre-Trial Stip., T.d. 51, ¶ 16. While the basic peace officer curriculum is 728 hours, the Policy mandates that the armed staff complete just 24 hours of training through programs that have no OPOTC oversight.

Over the summer of 2018, several Madison staff ("John Does") completed the training through a 27-hour privately run program called "FASTER," and underwent mental health evaluations by a Board-selected psychologist. *See id.* ¶¶ 11, 13. Then, by letter, the district's superintendent authorized these individuals to "to possess a firearm *while on duty* at Madison Local School District" in order "to protect [ ] students and staff from harm." Authorization Letters, T.d. 49, Ex. J (emphasis added).

C. Procedural Background

On September 12, 2018, the plaintiffs brought an action against the defendants that included two claims: (1) a count for declaratory relief stating that the Resolution violates R.C. 109.78(D)'s training requirement; and (2) a petition for mandamus based on the defendants' failure to properly respond to public records requests. Complaint, T.d. 4. For the declaratory relief count, the plaintiffs filed a motion to preliminarily enjoin the Resolution, which the trial court consolidated under Rule 65(b)(2) with a hearing on the merits held on February 25, 2019.

Before the hearing, the defendants asked for a protective order over three types of information: (1) identifying information of the John Does; (2) the Policy; and (3) the psychological evaluations (with the John Does' names redacted) and related testimony. Defs' Mot. to Modify Mot. for PO, T.d. 74. They stated that their request was "solely" based on security concerns should that information be disclosed. Reply ISO Mot. for PO, T.d. 60, p. 4. On February 22, 2019, the

trial court granted in part and denied in part the motion. Entry (2/22/2019), T.d. 76. The plaintiffs agreed that there could be a security risk associated with disclosing the John Does' identities, and the lower court accordingly ordered the parties to keep the armed staff members' identities secret. *Id.* at 4. The trial court denied protective status to the Policy, noting that "[p]ublic policy is rarely served by courts prohibiting citizens from knowing the general policies as enacted by their elected officials." *Id.* at 6. Lastly, the lower court *sua sponte* raised HIPAA concerns over disclosing the redacted psychological reports and withheld public access on that basis alone. *Id.* at 7.

Following the hearing, on February 28, 2019, the trial court denied the plaintiffs' motion for declaratory judgment and granted the defendants' motion for summary judgment as to R.C. 109.78(D). Order, T.d. 90. The trial court correctly held that there was no conflict between R.C. 2923.122(D)(1)(a) which allows a school board to authorize people to carry guns in a school zone and R.C. 109.78(D), which addresses training for a school's armed employees. *Id.* at 4. But it concluded that it had to read R.C. 109.78(D) in light of its title, and then (mistakenly) stated that the "descriptive heading for this code section is 'Certification of special police, security guards, or ***other persons otherwise privately employed in a police capacity.***'" *Id.* at 5 (emphasis in original). Given this purported title (which was written by a reporter and not the Legislature), the trial court concluded that R.C. 109.78(D)'s training requirement does not apply to teachers or administrators, but only to "security guards" or to those in a position that "by its very nature it mandates the person holding it to go armed while on duty." *Id.* at 5 6.

As for the mandamus action, the trial court required the Board to disclose certain requested documents because they fell "squarely within the traditional notions of public records," including

basic information about the Board's decision-making and minimum standards for authorizing armed staff. Entry (2/6/2019), T.d. 54, p. 7 8. The mandamus action is not on appeal.

STANDARD OF REVIEW

Both assignments of error in this case are reviewed *de novo*. "In a de novo review, this [C]ourt independently reviews the record without giving deference to the trial court's decision." *State v. Kormos*, 2012-Ohio-3128, ¶ 13 (12th Dist.). The action for declaratory relief centers on a question of statutory interpretation that is reviewed *de novo*. *Id.* While grants of a protective order are often reviewed for an abuse of discretion, here the order rests on an interpretation of federal law and is therefore likewise reviewed *de novo*. *See Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13.

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). (*See* Order, T.d. 90, p. 4 6)

Issue Related to First Assignment of Error: Whether the training required by R.C. 109.78(D) applies to staff that a school board authorizes to carry arms at school.

I. The Resolution violates R.C. 109.78(D) because it allows school employees to go "armed while on duty" without the requisite training or experience.

This appeal centers on the basic rules of statutory construction. In interpreting a statute, the plain text is paramount. Here the text is clear: the Resolution violates R.C. 109.78(D) because it allows school staff to go "armed while on duty" without peace officer training. Even if there were

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The psychological evaluations, discussed in the second assignment of error, were created only after the plaintiffs made their public records request, and therefore fell outside the scope of the mandamus action. Because the Board represented that it had disclosed all existing responsive records during discovery, the parties agreed that the mandamus action is moot and it was dismissed by the Common Pleas Court. *See* Entry (3/21/19), T.d. 108.

doubt regarding the text, the legislative history and statutory scheme reinforce that R.C. 109.78(D) applies to all school employees who go "armed while on duty" not just "security personnel."

A. The plain text of R.C. 109.78(D) requires school employees who go "armed while on duty" to complete basic peace officer training.

The first step in interpreting a statute is to examine its plain language. "If 'the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation,' because 'an unambiguous statute is to be applied, not interpreted.'" *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8 (quoting *Sears v. Weimer*, 143 Ohio St. 312, 316 (1944)). When the language is plain, courts must "give effect only to the words the legislature used, making neither additions to, nor deletions from, the statutory language." *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, ¶ 11 (citing *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 19).

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 during the school day while going about their jobs. The district hires teachers, coaches, administrators, and others in various "position[s]" a word which, according to the dictionary (and common usage) means "job." *See Oxford English Dictionary*, https://perma.cc/5W2K-LJE3. Under the Resolution, some of those employees may go "armed" which means "equipped with or carrying a firearm." *See id.* at https://perma.cc/3D9N-ZL2A. And they are armed while "on duty" that is, while "engaged in one's regular work." *See id.* at https://perma.cc/6ASH-SW2C. The confluence of these three

prerequisites a *position* in which a person goes *armed* while *on duty* triggers the training requirement of 109.78(D).

This plain meaning of R.C. 109.78(D) is not only confirmed by common usage and dictionary definitions, it is the same language that the defendants *themselves* used in describing the armed staff. The authorization letters the Board provides to the armed staff state: "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). There's no question the staff are "on duty" while at work, as the Board has signed legally binding documents saying as much. *See* Collective Bargaining Agreement, T.d. 22, Ex. F (referencing "extra duty assignments," teachers' "duty-free" lunch period, and "reporting to duty" after sick leave). And the Resolution applies to "armed" staff. In short, the defendants have repeatedly referred to the authorized staff in terms that are synonymous with and in some instances identical to the statutory language. The result is clear: teachers who carry firearms at work in the school fall within R.C. 109.78(D)'s clear language and thus must meet the statute's peace officer training requirement.

B. The legislative history demonstrates that R.C. 109.78(D)'s training requirement applies to all armed school staff.

Because the plain language of the statute is unambiguous, the Court is bound to follow it even without considering other canons of statutory interpretation to discern legislative intent. *Jacobson*, 149 Ohio St.3d 398, 2016-Ohio-8434 at ¶ 8 (Courts "do not have the authority to dig deeper than the plain meaning of an unambiguous statute" lest they "invade the role of the legislature."). Even if the Court were to consider it, in this case the legislative history reinforces the plain meaning, leaving no doubt as to R.C. 109.78(D)'s meaning.

1. *Prior drafts of R.C. 109.78(D).* The prior drafts of R.C. 109.78(D) demonstrate that the statute was meant to cover *any* type of school employee carrying a firearm on duty. As initially

passed by the House in 1969, the provision that became R.C. 109.78(D) only required peace officer training for someone hired by a school as a special policeman, security guard, or person "in any similar position." *See* House Journal, T.d., 49, Ex. L at 1347. But the General Assembly ultimately rejected this language. It did not want to limit the peace officer training requirement to special policemen, security guards, or other "similar" security personnel in schools. Instead, the General Assembly chose much broader language to cover "other position[s] in which such person goes armed while on duty." R.C. 109.78(D). The key qualifying feature of the statute *as passed*, then, is not whether an employee has a "similar" position to a security guard (that word did not make it into the final statutory language), but whether he or she goes "armed while on duty." And it would be antithetical to the Legislature's choice of broader language to interpret the text as nevertheless limited to those positions "similar" to security guards, as in the rejected draft bill. A court should not add words or limits to a statute anyway, but especially not when, as here, the Legislature specifically rejected those exact limits. But that is what the Common Pleas Court did.

2. *Proposed Amendments to R.C. 109.78(D).* The General Assembly has also consistently *rejected* attempts to exempt teachers, staff, and other persons authorized by a local school board to carry a firearm at school from the peace officer training requirement in R.C. 109.78(D). For example, House Bill 8, introduced in 2013 in the wake of the tragic shooting at Sandy Hook Elementary School in Connecticut, would have created the precise exception that the defendants seek (and the lower court inserted). Specifically, it would have amended R.C. 109.78(D) to say that it "does not apply to a person authorized to carry a concealed handgun under a school safety plan adopted pursuant to section 3313.536 of the Revised Code." 2013-14 Am.Sub.H.B. No. 8, Section 109.78 (as passed by the House). Another similar bill was introduced shortly after the Resolution was passed. *See* 2017-18 Am.Sub.H.B. No. 693, Section 109.78 (as

introduced). Neither bill passed and, as it stands, R.C. 109.78(D) does not exempt teachers. Yet the trial court effectively and erroneously did what the legislature has declined to do.

II. The trial court's interpretation of R.C. 109.78(D) must be rejected.

The trial court's interpretation of R.C. 109.78(D) must be rejected because it departs from the plain text of the statute. It held that R.C. 109.78(D)'s reference to "other positions" in which "such person goes armed while on duty" applies only to "security guards" and those employed in a "police capacity." Order, T.d. 90, p. 5 6. That ruling requires adding words to the statute, which the lower court itself acknowledged it was doing. *See* Hearing, T.p. 89 ("Now I'm adding language, so I understand. I'm adding language to this . . . ."). That was error. When the text is clear, as here, a court is bound to follow it. *See City of Akron v. Brown*, 2018-Ohio-4500, ¶¶ 9 10.

A. The trial court impermissibly relied on the title (and misstated it).

The trial court's justification for adding words to the plain text of R.C. 109.78(D) was entirely based on the title of the statute which it got wrong. Order, T.d. 90, p. 5. Because it thought the title referred to "persons otherwise privately employed in a police capacity," it limited R.C. 109.78(D) to require peace officer training only for school employees who are "security guards" or serve in a "police capacity" (unlike teachers and administrators). *Id.* That was error.

To begin with, the lower court violated the Revised Code's first rule of statutory construction, namely that "Title, Chapter, and section headings . . . do not constitute any part of the law as contained in the 'Revised Code.'" R.C. 1.01. As a result of this rule, "[r]esort to a title in construing a statute is unnecessary and improper." *Warner v. Zent*, 997 F.2d 116, 133 (6th Cir.1993) (citing R.C. 1.01); *accord Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*, 70 Ohio St.3d 281, 284, 1994-Ohio-295 (holding that "headings and numerical designations are irrelevant to the substance of a code provision").

On top of that, the trial court used the wrong heading relying on what appears to be unofficial, editorially supplied language that is not even in the session laws. *Compare* Order, T.d. 90, p. 5, *with* 1969 1970 Ohio Laws 2398, 2400 (session laws); *see also Cosgrove* at 286 n.1 (Resnick, J., concurring) (explaining that "headings are publisher's aids to the user of the code. Neither is part of the code; neither is official.").[2] The mistake is fatal to the lower court's analysis because even the title of R.C. 109.78 in the session laws omits the critical phrase "persons otherwise privately employed in a police capacity" on which the court's entire analysis hinges. *See* 1969 1970 Ohio Laws at 2400 (reporting the title as "Certification as special policemen; payment of cost; special police-man for educational institution must have certificate"). An editorially-supplied heading is no basis to set aside Ohio's rules of statutory construction or ignore the text of R.C. 109.78(D).

B. Like the trial court, the Board and the Attorney General impermissibly add words to R.C. 109.78(D) that do not exist.

Like the trial court's decision, the defendants' and the former Attorney General's reading of R.C. 109.78(D) add modifying words to the statute that are just not there. In an unofficial, nonbinding letter from 2013, then-Attorney General DeWine opined that R.C. 109.78(D)'s training requirement applies only to school employees who are "considered 'security personnel.'" DeWine Letter, T.d. 49, Ex. M. But the term "security personnel" which he placed in quotation marks does not appear anywhere in R.C. 109.78(D). The defendants take it even further. They want to insert even more words to limit the statute to "school security officer[s]" or persons in a "like" position whose "*primary function* is to provide security to a school." Defs' Mem. in Opp. to SJ, T.d. 64, p. 8 (emphasis in original). These readings suffer the same flaw as the trial court's attempt

[2] The court may have copied this heading from a free website called LawWriter (available at http://codes.ohio.gov/orc/109.78). Reporters give various titles to statutory sections. Neither Westlaw nor Lexis use the "police capacity" phrase upon which the lower court relied.

to limit R.C. 109.78(D) to those "privately employed in a police capacity": they all impermissibly add words to the statute.

The Board may desire to rewrite the statute, but courts must give effect "only to the words the legislature used, making neither additions to, nor deletions from, the statutory language." *Wilson*, 150 Ohio St.3d 368, 2017-Ohio-1410, at ¶ 11; *see Wachendorf v. Shaver*, 149 Ohio St. 231, 237 (1948) ("The Legislature will be presumed to have intended to make no limitations to a statute in which it has included by general language many subjects, persons or entities, without limitation."). Indeed, adding words to the statute as here violates a cardinal rule of statutory construction meant to preserve the separation of powers between courts and legislators. *Bd. of Edn. of Pike Delta York Local School Dist. v. Fulton Cty. Budget Comm.*, 41 Ohio St.2d 147, 156 (1975) ("[T]his court does not sit as a superlegislature to amend Acts of the General Assembly.").

Moreover, by attempting to rewrite the statute, these atextual interpretations of R.C. 109.78(D) render words in the statute redundant (and superfluous), violating yet another rule of statutory construction. *See State v. Noling*, 153 Ohio St.3d 108, 2018-Ohio-795, ¶ 75 ("No part of a statute should be treated as superfluous."). Under this canon, the phrase "other position in which such person goes armed while on duty" must be interpreted to cover people who are not "security guards" or "special police officers," the two other classes identified in the text of R.C. 109.78(D). But the defendants and the trial court interpret the "other position" phrase to encompass only security guards. The defendants, for their part, say that "other position" means only a position where the employee's "assigned and primary task" is "providing security." Defs' MSJ, T.d. 48, p. 12. Yet that is the precise definition of a security guard under Ohio law. *See* R.C. 4749.01(D)(1) (defining security guard as a "person[] whose primary duties are to protect persons or property"). The trial court similarly held that plaintiffs would have to prove that the armed personnel are "security guards" in order to be covered by R.C. 109.78(D). Order, T.d. 90, p. 6. If the "other

position" clause covers only security guards, then it renders that phrase superfluous (and redundant), affording it no independent meaning. *See Noling* at ¶ 78 (concluding that it would violate the canon against surplusage for "two separate statutory provisions" to "mandate" the same thing). Such an interpretation cannot stand.[3]

The defendants' and former Attorney General's reasons for departing from the text fail. To support adding this non-existent language to the statute, they rely on the rule of construction (often referred to as *ejusdem generis*) that a "catch-all term" used to conclude a list should be construed in accordance with the preceding list. Defs' MSJ, T.d. 48, p. 12 13; DeWine Letter, T.d. 49, Ex. M. Because the statute mentions "special police officer" and "security guard," they contend that the following "other position" phrase should be construed to include only "like" security roles. But this canon only applies where the statute is ambiguous about the scope of the "catch-all phrase." *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 349 350 (10th Dist.1996) (holding that "the doctrine of ejusdem generis need not be applied" where "the words of the statute are clear"). Here, "other position" is clearly limited by the phrase "goes armed while on duty." *See* R.C. 109.78(D). If the Legislature did not place any additional limitation on the type of position that the armed employee must hold to trigger the peace officer training requirement, neither can this Court. *See Stewart v. Vivian*, 151 Ohio St.3d 574, 2017-Ohio-7526, ¶ 29 (rejecting interpretation because "the General Assembly did not qualify the term . . . or place any limitation on [its] meaning").

Again, ignoring the text of the statute, the defendants further argued that R.C. 109.78(D) must apply only to security personnel because, buried on page 3,050 of the last General Assembly's budget bill, there was an appropriation to the FASTER program. Defs' MSJ, T.d. 48, p. 6. But

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[3] To the extent this Court sets aside the redundancy problem and concludes that the armed personnel must serve in a security capacity to fall within R.C. 109.78(D) they unequivocally do. As the appellants argued below, the authorized staff are armed precisely to protect themselves and students. Pls' MSJ, T.d. 50, p. 13-15.

where, as here, an appropriations bill did not amend the statute, it should have little bearing on the analysis of the statutory text. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-90, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). Nothing about the appropriation states that the FASTER program alone is sufficient for concealed carry in school, so the appropriation cannot be read as amending R.C. 109.78(D) *sub silencio*. *Id.* No wonder the trial court did not rely on either the defendants' or the Attorney General's reasoning – both are wrong. Like the trial court's reasoning – they add words to the statute and therefore must be rejected.

C. The trial court's interpretation conflicts with the statutory scheme.

The statutory scheme further weighs against the trial court's interpretation. If R.C. 109.78(D) does not apply to armed staff, school boards could allow teachers to carry firearms with almost no training at all and without any state oversight. Yet, the statutory scheme requires all other persons who carry firearms in school buildings to be well-trained. *See* R.C. 2923.122(D).

Outside of R.C. 109.78(D), Ohio law places no meaningful training or other requirements on a district's employees who carry guns at school. The only training requirement appears to be the *de minimis* eight-hour training mandated for a concealed carry license (assuming teachers carry concealed). *See* R.C. 2923.125(G)(1). Of those eight hours, most can be completed online; only two hours must be "in-person training that consists of range time and live-fire training." *Id.* 2923.125(G)(1)(c). The trial court's decision that R.C. 109.78(D) does not apply therefore hands school districts *carte blanche* to impose whatever training requirements they want – or *none* whatsoever. And that stands in direct contrast to the statutory scheme developed by the Legislature, which broadly prohibits firearms in school buildings unless they are carried by thoroughly-trained individuals, such as law enforcement and SROs. *See* R.C. 2923.122(D)(1); *supra* at p. 2.

The statutory scheme demonstrates that the Legislature intended that those persons carrying firearms in school buildings have substantial training. And that makes sense; more than

eight hours (or a weekend) of training is necessary in order to avoid tragic accidents or mistakes by armed individuals at school, as even then-Attorney General DeWine said. *See* Sharon Wigmore Buggs, *Ohio may exclude teachers from gun accident liability*, Dayton Daily News (Jan. 28, 2014), https://bit.ly/2TBkxvj (DeWine states that it is "clear" armed teachers "should have more" training than is needed for a concealed carry permit).[4] Without requiring rigorous, state-approved training, local school districts can authorize persons to carry firearms around schoolchildren all day, every day, even if they lack adequate training, a proper understanding of when lethal force is appropriate, or the mental fortitude to complete a state-approved course. [redacted] The trial court decision means that those school personnel who are closest to Ohio's children can carry firearms with no real training or oversight. That turns the statutory scheme on its head, where all other persons who are allowed to carry firearms around kids at school must be highly trained.

III. The trial court's dicta regarding conflicting statutes is inapplicable.

At the end of its decision, the trial court in dicta noted that "[i]f" there were an "irreconcilable" conflict between R.C. 2923.122(D)(1)(a) upon which the defendants relied and R.C. 109.78(D)'s training requirement, then the former is a "later enacted," "special statute" that takes precedence. This hypothetical conclusion is both inapplicable and wrong.

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[4] In 2014, then-Attorney General DeWine, speaking on the topic of training for armed teachers, emphasized that it is about so much more than "just . . . can I shoot a gun." In his words, "[i]t's . . . [d]o I have enough training to be able to react so that my training goes into effect and I don't end up shooting someone who's innocent." Buggs at https://bit.ly/2TBkxvj.

There is no conflict between the statutes. For statutes to be in conflict, they have to be irreconcilable, such that they cannot both be given full effect. *See Davis v. Justice*, 31 Ohio St. 359, 360 61 (1877). The defendants never even argued that there was a conflict in their many stages of briefing. Revised Code 2923.122(D)(1)(a) exempts individuals from the ban on carrying a firearm in a school zone if they are authorized by a school board. And while R.C. 2923.122(D)(1)(a) itself imposes no training requirement on those authorized to carry firearms by a school board, it also says nothing about displacing or superseding any other applicable requirements, like the training mandate imposed by R.C. 109.78(D). Therefore, full effect can be given to both statutes: one allows persons to carry in a school safety zone, the other establishes a training requirement. Because they can be read harmoniously, they must be. *See Davis* at 360 61 ("Two or more laws must be so construed as that both can stand unless they are clearly repugnant," and "so contrary that they can not be reconciled."). Neither the Board nor a court can pick and choose among which statutes it wishes to follow. And this Court must give R.C. 109.78(D) full effect.[5]

Second Assignment of Error: The trial court erred in granting a protective order over the redacted psychological evaluations and related testimony. (*See* Entry (2/22/2019), T.d. 76, p. 7).

Issue Related to Second Assignment of Error: Whether HIPAA requires confidentiality over the redacted psychological evaluations that armed staff obtained as part of the authorization process, and related testimony.

The Common Pleas Court erred on a second issue when it granted the defendants' motion for a protective order over the *redacted* psychological reports (and related testimony) from the evaluations the John Does underwent in order to obtain authorization to carry a firearm at

[5] Even assuming there were some conflict, it is difficult to understand why R.C. 2923.122(D)(1)(a) is considered a special statute and R.C. 109.78(D) a general one. The lower court provides no explanation. If anything, R.C. 2923.122(D)(1)(a) is a general statute that generally opens the door to various persons carrying firearms in a school safety zone. Then R.C. 109.78(D) specifically addresses one aspect limiting that discretion: the particular training school employees must have if they go "armed while on duty."

school. These evaluations were reviewed by the Board as part of the authorization process for the armed staff, produced by the Board during discovery in this litigation, and relied on by the Board it its summary judgment briefs. *See, e.g.*, Defs' MSJ, T.d. 48, pp. 5, 10. Nevertheless, the lower court took the extreme step of sealing these court records and briefing from public view even though the names and other identifying information of the John Does were redacted. The trial court based its decision on a flawed understanding of HIPAA, which does not apply to documents maintained by a school district. Even beyond HIPAA, the defendants failed their burden to prove by "clear and convincing" evidence that the information had to be protected. *See* Rule of Superintendence 45(E)(2). Given the gravity of the public's constitutional right to open courts, "requests for protective and confidentiality orders should be viewed by trial courts with abundant skepticism and granted only begrudgingly." *Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 490 91 (1st Dist.2001). This Court, applying such constitutionally-mandated skepticism, should reverse.

I. HIPAA does not prevent the Board from disclosing the redacted evaluations.

The trial court's *sole* reason for granting the protective order over the psychological reports and related testimony was the Health Insurance Portability and Accountability Act of 1996 (HIPAA), codified at 45 C.F.R. 164.500 et seq. It held that the Board could not share the psychological evaluations "without violating individual HIP[A]A rights." Entry (2/22/2019), T.d. 76, p. 7. That holding was in error. Tellingly, even the Board did not argue anything about HIPAA. Quite simply, HIPAA does not apply to the Board.

HIPAA, by its terms, only constrains "covered entities" like health care providers or insurance companies from disclosing personally identifiable health information. 45 C.F.R. 164.502. School boards are not "covered entities." *See* 45 C.F.R. 160.103 (defining "covered entity"). "[T]here is judicial agreement that the legislature did not intend HIPPA to apply to noncovered entities." *State v. Straehler*, 307 Wis. 2d 360, 367, 745 N.W.2d 431 (2007) (collecting

cases); *see also Kern v. Burt*, No. 2:07-cv-13576, 2014 U.S. Dist. LEXIS 77751, at *1-2 (E.D. Mich. June 9, 2014) (denying plaintiff's motion to seal records pertaining to his HIV status and explaining that HIPAA "only applies if a 'covered entity' is requested to disclose [confidential health] information[.]"). As such, the Board categorically cannot violate HIPAA by releasing the psychological evaluations. And with the consent of all parties the evaluations and related testimony are redacted to hide the identities of the John Does, so there are no privacy concerns about revealing who is armed or a specific individual's health status.[6]

II. There is no safety concern or other basis under Superintendence Rule 45 for hiding these redacted court records from the public.

The defendants presented no other basis under Superintendence Rule 45 to block public access to these court documents, even though it is their burden to do so by clear and convincing evidence. *See* Rule of Superintendence 45(E)(2). Both the defendants and the plaintiffs referred to the mental health evaluations in their briefing; the defendants to show that the Board was exercising its discretion to arm staff responsibly, obviating the need for rigorous state training oversight, *see, e.g.*, Defs' MSJ, T.d. 48, pp. 5, 10; and the plaintiffs to support the argument that R.C. 109.78(D) applies to all armed staff because [redacted], Pls' MSJ, T.d. 50, p. 10 12. As with all court documents, the evaluations are presumptively accessible to the public, and there is no basis for shrouding them in secrecy here. *See Adams*, 143 Ohio App.3d at 490.

[6] To support its HIPAA rationale, the trial court assumed that the John Does had consented that the evaluating psychologist could only release the reports to the school district for "purposes of an employment decision," rather than having signed a general waiver. Entry (2/22/2019), T.d. 76, p. 7. The Board provided no such evidence, as it never argued that HIPAA or the John Does' consent was at issue. It was impermissible for the trial court to conjure such facts. Even assuming the trial court was right about the consent, however, it is irrelevant. The Board is still not a "covered entity" under HIPAA.

Weighing against sealing is the fact that these documents are a matter of public record under the Ohio Public Records Act. *See* Rule of Superintendence 45(E)(2)(b) (considering whether state law "exempts the document or information from public access").[7] In *State ex. rel. Multimedia, Inc. v. Snowden*, the Ohio Supreme Court rejected a police officer's claim that a psychological evaluation he underwent as part of the police hiring process was exempt from disclosure as a public record. 72 Ohio St.3d 141, 144 45, 1995-Ohio-248. Because the officer's psychological report was not created pursuant to his individual medical treatment but for employment it was *not* protected from disclosure, even with (unlike here) his name on it. *Id.* So too in this case. The redacted evaluations were generated as part of the selection process so that Board could evaluate potential armed staff. As in *Snowden*, they are public records. Not only are these documents relevant to the legal dispute, they shed light on the Board's evaluation process, allowing citizens to ensure their elected officials are properly vetting armed staff. This is the same type of information regarding employment decisions, "minimum standards," and "how those decisions were arrived at by a public body," that the trial court declared had to be public in the context of the plaintiffs' mandamus petition. Entry (2/6/2019), T.d. 54, p. 7; *see also Snowden* at 144 (recognizing that the Ohio Public Records Act values "the public's right to know how state agencies make decisions").

In its briefing and public statements, the Board has relied on the mental health evaluations to demonstrate its diligence in arming staff, stating that "if the board had concerns with anyone, they wouldn't have authorized them." Keith BieryGolick, *A failed firearm test and questions about mental health: Inside arming teachers at Madison,* Cincinnati Inquirer (Mar. 14, 2019), https://perma.cc/P6ZA-Q754. Even though the Board refers to the documents' contents, by insisting on secrecy the Board deprives the public of the ability to evaluate its elected leaders'

[7] As explained *supra* at n.1, the psychological evaluations were not at issue in the mandamus action because they did not exist at the time the public records were originally sent.

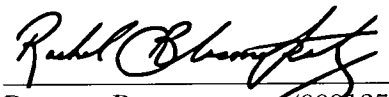
decisions and learn how its local government is implementing a policy that intimately impacts citizens' lives — the quintessential purpose of public records access.

So why does the Board want to hide this information? The defendants explained to the trial court that their desire to limit access to these documents and testimony is "solely premised" on security concerns. Reply ISO Mot. for PO, T.d. 60, p. 4. But while the lower court held (and the plaintiffs never disputed) that there were genuine security concerns with disclosing the identities of the John Does, it did not adopt the defendants' security rationale for the redacted psychological evaluations. [redacted]

Transparency and accountability are fundamental to democracy. That is why court records are presumptively accessible. And that presumption is not overcome by the trial court's erroneous HIPAA rationale or the defendants' self-contradicted (and nonexistent) security concerns.

CONCLUSION

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



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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was sent via email to Alexander Ewing (acwing@fbtlaw.com) and Brodi Conover (bconover@fbtlaw.com) on this 13 h day of June 2019. All counsel have consented to receiving service via email.

Attorney for Plaintiffs Appellants

APPENDIX

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
BUTLER COUNTY, OHIO

ERIN GABBARD, et al

Plaintiff,

vs.

MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al

Defendants.

Case No. CV 2018 09 2028

Judge Charles L. Pater

ENTRY AND ORDER GRANTNG THE DEFENDANT'S MOTION FOR PROTECTIVE ORDER IN PART, AND DENYING IT IN PART

This matter is before the court on the Defendant, Madison Local School Board of Education's, (Madison/The Board), motion for a protective order pursuant to Civ.R. 26(C), Rules of Superintendence 45(E), and Loc. R. 2.04(A)(2). Upon consideration of the motion, the pleadings, the arguments of counsel and the other matters of record herein, the motion is granted in part and denied in part.

Defendant's motion for a protective order is granted as to the requests contained in paragraphs 1, and 3 of its motion. The methodology for compliance with this directive shall be discussed later in this decision. The remaining portion of the motion is denied.

PROCEDURAL POSTURE

Plaintiff, Erin Gabbard, (Gabbard), and a coalition of other parents, filed a two count complaint challenging The Board's April 24, 2018 decision to arm district employees, in response to a February 2016 school shooting incident at Madison High School.

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The first count of the complaint seeks a permanent injunction barring Madison from implementing its decision to arm staff that have not completed the same training as required by peace officers under Ohio law.

Count two of the complaint sought an order of mandamus to force the release of documents by The Board that Plaintiffs maintain they are entitled to under Ohio's public records laws.

The first count of the complaint is set for a trial on the merits on February 25, 2019. Count 2 of the complaint was dealt with in a previous decision that granted part of the Plaintiffs' request for mandamus.

The Board now moves to protect any information contained in court records, deposition testimony, and/or trial exhibits that it labeled as "highly confidential" including:

1) The identities, and any identifying information, of individuals authorized to carry a concealed weapon under The Board's firearm policy,

2) The Firearm Authorization Policy and any testimony regarding specific details of it,

3) The mental health evaluations of the individuals authorized to carry a concealed weapon and any testimony regarding those evaluations.

Plaintiffs argue that most of the information Madison seeks to protect is already public, and, regardless, they maintain Ohio law creates a presumption in favor of access. *See generally*, Ohio Rules of Superintendence R. 45, *Adams v. Metallica, Inc.*, (2001), Ohio App. 1st, 143 Ohio App3d 482, 490, 785 N.E.2d 286.

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The Board maintains release of any information it deemed as "highly confidential" poses a clear and present danger to the safety and security of district employees and students.

DECISION

The court extensively reviewed many of the issues presented in this motion in its ruling on Plaintiffs' earlier request from the perspective of a mandamus action. Now, however, the matter has moved beyond the scope of Ohio's traditional position on public records and the exceptions carved out by the Ohio General Assembly to one of what court records the public may have access to.

The Ohio Rules for Superintendence of the Courts, R. 45, reads in the relevant parts:

> (A) [C]ourt records are presumed open to public access.
>
> (E)(1) Any party to a judicial action or proceeding or other person who is the subject of information in a case document may, by written motion to the court, request that the court restrict public access to the information or, if necessary, the entire document. Additionally, the court may restrict public access to the information in the case document or, if necessary, the entire document upon its own order.
>
> (2) A court shall restrict public access to information in a case document or, if necessary, the entire document, if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering each of the following:
>
> (a) Whether public policy is served by restricting public access;
>
> (b) Whether any state, federal, or common law exempts the document or information from public access;
>
> (c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

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The court will examine Madison's requests in the order presented within this framework.

The Board first seeks to block the identification of persons authorized by it under the district's policy to carry a concealed weapon while in a school safety zone. Here, the court can find no state, federal or common law that exempts the information from public knowledge. There does exist, however, a strong public policy in restricting unfettered access to such knowledge as it directly raises the likelihood of risk of injury to persons and public safety. In fact, even the parties agree, "there are articulable safety concerns backed by expert evidence . . . . to keep the identities of the armed staff members confidential." The court, therefore, agrees that the identities of persons authorized to carry concealed firearms on school district property is subject to redaction. The Board next seeks to block access to its firearms policy.

Prior to enacting any legislation a public body can decide how to draft and what information it will opt to include in any policy that the public may wish to access. Here, The Board could have drafted a generic firearms policy and encapsulated the particulars within its Emergency Plan. Instead, Madison opted to produce a policy with extensive detail, and shared most of the information with the general public in a newsletter. It now wants the court to agree with its position that all of that policy is part of the district's Emergency Plan and therefore exempt from public disclosure. Once again Madison falls back on claims that the release of any information it designated as "highly confidential" would raise the risk of injury to students, staff and personnel authorized by The Board to carry a concealed weapon. The court finds much of this argument unpersuasive.

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As stated earlier, The Board could have enacted a general policy for public view, and then included specific details of its requirements in a separate directive of the Emergency Plan. Here, regardless of Defendant's claims, most of the information contained in the policy has already been made public and is not much different from what one routinely finds in job postings for federal, state and local law enforcement positions.

Among the public information already disseminated in this matter are the minimum standards for personnel to be considered by The Board for authorization to carry a concealed weapon on school grounds, *i.e.* meeting the minimum requirements for licensure to carry a concealed firearm, completion of additional district ordered training, background checks and mental health evaluations. This information is no different from that government employers routinely disclose in seeking job applicants. The same can be said of the request to know under what conditions authorization would be withdrawn by The Board. As the court previously noted in its mandamus ruling, The Board failed in its burden to demonstrate that this information is exempt from disclosure. Nothing in that regard has changed.

Again, as it did earlier, The Board argues that the training requirements, firearm selection and ammunition to be utilized are part of its emergency management plan and therefore exempt under R.C. §149.433(A)(3) and R.C. §3313.536.

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R.C. §3313.536 reads in the relevant part:

> (2) [E]ach administrator shall also incorporate into the emergency management plan adopted under division (B)(1) of this section all of the following: (a) A protocol for addressing serious threats to the

> safety of property, students, employees, or administrators; (b) A protocol for responding to any emergency events that occur and compromise the safety of property, students, employees, or administrators. (3) Each protocol described in divisions (B)(2)(a) and (b) of this section shall include *procedures determined to be appropriate by the administrator for responding to threats and emergency events*, respectively, including such things as notification of appropriate law enforcement personnel, calling upon specified emergency response personnel for assistance, and informing parents of affected *(sic)* students. *Emphasis added*
>
> (I)Copies of the emergency management plan and information required under division (B) of this section are security records and are not public records pursuant to section 149.433 of the Revised Code.

The court previously found that the specifics of training for personnel responding to an active shooter situation is clearly a, "procedure determined to be appropriate by the administrator for responding to threats and emergency events" and not for public dissemination. The identification of vendors, suppliers, etc. of that training, however, does not fall within the definition of detailing specific training. Besides this information was already shared in the aforementioned newsletter.

As to the number of armed personnel, weapons choice and type of ammunition to be utilized, The Board could have included that as a separate entry in its Emergency Plan. Since it opted not to, and that type of information is readily available on the Internet, *e.g.*, "it appears the standard-issue OSHP, *sic* (Ohio State Highway Patrol) sidearm is a Sig Sauer P226 or P229 in .40 S&W" https://www.quora.com, the court cannot find that information is exempt under R.C. §149.433(A)(3) or R.C. §3313.53. Public policy is rarely served by courts prohibiting citizens from knowing the general policies as enacted by their elected officials. Likewise, no federal, state or local law exempts the majority of

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information in the policy from disclosure. In fact, nothing in the policy as presented supports a restriction of access beyond that which the court has already granted, *i.e.* that personal identifiers must be restricted.

Finally, The Board wants to block access and testimony on the results of mental health evaluations of those individuals it authorized to carry a concealed firearm.

Here, provisions of the Health Insurance and Patient Portability Act, (HIPPA), as codified in CFR 45 §65 FR 8446, support The Board's position. Unlike a personal injury action or similar tort, the individuals here have not granted counsel, the court, The Board, or medical treatment providers permission to access and/or release health information in furtherance of a legal claim. Rather, the individuals granted permission to the providers to share limited, specific information for purposes of an employment decision. That information may not be shared without violating individual HIPPA rights. Having found in its earlier decision on mandamus, and here again, that some information is precluded from public view, the court must now decide how best to secure the information for procedural purposes and, how to release information that the public may access.

According to The Ohio Rules of Superintendence, R.45(E)(3), the court "shall use the least restrictive means possible" to preclude public release. To that end the court orders the parties shall submit all depositions, trial exhibits and other evidence for its and other courts' consideration, un-redacted and under seal.

The court further directs the parties shall submit the exact same items for public consumption with: 1) all personal identifiers redacted; and 2) all references and testimony as to mental health evaluations redacted.

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IT IS THEREFORE ORDERED, AJUDGED AND DECREED, that Defendants' motion for a protective order is granted in part as to the requests in sections 1 and 3 of the filing.

IT IS FURTHER ORDERED, AJUDGED AND DECREED that Defendant's motion for a protective order is denied as to the remaining sections.

SO ORDERED.

ENTER,

Charles L. Pater, Judge

CC: Alla Lefkowitz, Esq.
James Miller, Esq.
Rachel Bloomekatz, Esq.
Gupta Wessler PLLC

Attorneys for Plaintiffs-Petitioners

Alexander Ewing, Esq.
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W. Joseph Scholle, Esq.

Attorneys for Defendants-Respondents

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
BUTLER COUNTY, OHIO

2019 FEB 28 AM 8:58

KAREN L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

ERIN GABBARD, et al

Plaintiff,

vs.

MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al

Defendants.

Case No. CV 2018 09 2028

Judge Charles L. Pater

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Final Appealable Order)

This matter is before the court on Defendants', Madison Local School Board of Education and others', (the Board's), motion for summary judgment, and Plaintiffs' Erin Gabbard and others', (Plaintiffs') motion for summary judgment. These competing motions address the only remaining issue in the case, count one of the complaint.

For the reasons set forth hereafter, the Board's motion is granted and Plaintiffs' motion is denied.

PROCEDURAL POSTURE

Gabbard and a coalition of other parents filed a two count complaint challenging the Board's April 24, 2018 decision to arm district employees, in response to a February, 2016 school shooting incident at Madison High School. Count two has been addressed already. In count one Plaintiffs seek a permanent injunction barring the board from implementing its decision to arm employees, unless those armed persons complete the same training as required by peace officers under Ohio law. The parties generally agree that there are no material

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issues of fact. Plaintiffs propose, however, that if the court's interpretation of law is contrary to their view of it, then a factual question for resolution is whether or not armed school staff are "security personnel."

Plaintiffs suggest that the sole legal issue is whether or not armed school staff are governed by the requirements of R.C.§109.78(D), which reads, in part: "[N]o public or private educational institution. . .shall employ a person as a special police officer, security guard, or ***other position in which such person goes armed while on duty***, who has not received a certificate of having satisfactorily completed an approved basic peace officer training program. . . ," Emphasis added. Their position is that the personnel authorized by the Board to carry firearms are employed by the Board precisely in such other positions in which they go armed while on duty. Plaintiffs' back-up legal position is that if the armed personnel are deemed not to have such "other positions," then they should be classified as security guards. This, of course, would result in the same training requirement for the armed personnel — the basic peace officer training.

Further, they argue, that any other code section [such as R.C. §2923.122(D)(1)(a)] granting, or seeming to grant a school board permission to authorize personnel to carry firearms on school property, does not abrogate the training requirements of R.C.§109.78(D).

The Board, curiously, does not challenge Plaintiffs' reading of R.C.§109.78(D). Its position is that the General Assembly specifically carved out an exception to the firearms training requirement in the peace officer statue, R.C.§109.78(D), when it later enacted R.C. §2923.122(D)(1)(a). The general thrust of this code section is that no one may convey into, or possess in a school

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safety zone a deadly weapon. This prohibition, however, is subject to exceptions. The exception carved out in (D)(1)(a) is "any other person who has written authorization from the board of education or governing body of a school to convey deadly weapons. . .into a school safety zone or to possess a deadly weapon. . .in a school safety zone and who conveys or possesses the deadly weapon. . .in accordance with that authorization." This exception, the Board contends, encompasses the armed personnel at issue here.

DECISION

Under Civ.R. 56(C), a trial court may grant a motion for summary judgment when there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and it appears that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. See, *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. The burden of demonstrating that there is no genuine issue of material fact is on the moving party. *Re v. Kessinger*, (2008), Ohio App. 12th, 2008-Ohio-167, ¶17, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. To prevail on a motion for summary judgment, the moving party must be able to point to evidentiary materials that show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Re v. Kessinger*, supra, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The court views the facts in a light most favorable to the nonmoving party. See, *Wilkerson v. O'Shea*, 2009, Ohio App. 12th, 2009-Ohio-6550, ¶11. However, in response to a properly supported motion for summary judgment, the nonmoving party must set forth specific facts which demonstrate

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that there is a genuine issue of material fact for trial, and may not rest on mere allegations or denials in the pleading. *Chase Manhattan Mtge. Corp. v. Urquhart*, (2005), Ohio App. 12th, 2005-Ohio-4627, ¶12; *Phoenix Presentations*, (1996), Ohio App. 12th, 116 Ohio App.3d 500, 506, citing *Dresher v. Burt*, supra; Civ.R. 56(E).

Regarding the Board's policy of allowing some of its employees to carry firearms, there is a seeming contradiction between R.C. §109.78(D) and R.C. §2923.122(D)(1)(a). The questions to be resolved are whether the apparent conflict is reconcilable; if reconcilable, how; and if not, which statute takes precedence.

R.C. §1.51 states that "[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." *State v. Conyers*, 87 Ohio St.3d 246, 719 N.E.2d 535, 1999-Ohio-43, (1999).

Looking at the first two questions together, the court holds that the two statutes do not contradict each other and any apparent conflict is reconcilable. The question then is how to reconcile them? Plaintiff's approach to the reconciliation is to posit that the statute permitting school boards to authorize certain of its employees to carry firearms does not abrogate the training requirement set forth in the other statute. This view is unpersuasive.

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The more reasonable way to read the two statutes together, giving full effect to each, is to keep in mind the context of R.C. §109.78(D). The descriptive heading for this code section is "Certification of special police, security guards, or ***other persons otherwise privately employed in a police capacity***." Emphasis added.

Division (D) of the statute prohibits educational institutions from employing certain types of persons unless they have basic peace officer training. One of the categories under the prohibition is a "position in which such person goes armed while on duty . . . ."

Plaintiffs' reading of this part of the statute results in the conclusion that the Board's armed personnel fit within this category. They maintain that these people have positions in which they go armed while on duty, and thus are prohibited from carrying firearms unless they have the basic peace officer training.

The plaintiffs' proposed reading of the statute is untenable based upon the context of the statute. The phrase at issue, "a position in which such person goes armed while on duty," in context, must refer to "persons otherwise privately employed in a police capacity." These are employees whose position is such that by its very nature it mandates the person holding it to go armed while on duty. Clearly teachers, administrators, administrative assistants, and custodians, along with most, if not all, other school employees are not employed by educational institutions in such capacity, unlike someone such as a school resource officer who is. Therefore, the school employees authorized by the Board to carry firearms on school premises are not under the training requirements as set forth in R.C. §109.18(D).

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Even if the above reading of R.C. §109.18(D) were incorrect and there were an irreconcilable conflict between that statute and §2923.122(D)(1)(a), Defendants would still prevail.

"After an irreconcilable conflict is determined to exist, the next inquiry is whether the provisions at issue are general or specific. See *State v. Chippendale* (1990), 52 Ohio St.3d 118, 120, 556 N.E.2d 1134, 1136. If one of the conflicting statutes is a general provision and the other is a special provision, then R.C. 1.51 applies and the special provision prevails." *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120, 122, 18 OBR 151, 152, 480 N.E.2d 412, 414; see, also, *Lake Cty. Natl. Bank of Painesville v. Kosydar* (1973), 36 Ohio St.2d 189, 191, 65 O.O.2d 404, 406, 305 N.E.2d 799, 801. Quoted in *State v. Conyers*, 87 Ohio St.3d 246, 719 N.E.2d 535, 1999-Ohio-43, (1999).

If the two statutes at issue were deemed to be irreconcilable, R.C. §2923.122(D)(1)(a) would be deemed a special statute and R.C. §109.78(D) a general statute. As such, the special statute takes precedence over the general one. Additionally, the court notes R.C. §2923.122(D)(1)(a) is the later enacted law.

In response to Plaintiffs' back-up legal theory, the court holds that nothing in the record supports the proposition that the Board's armed personnel are security guards.

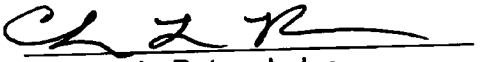
Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

In the present matter, Plaintiffs have failed to point to evidentiary materials showing a genuine issue as to any material fact, even when the court views the facts in a light most favorable to them. In response, however, Defendants are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, AJUDGED AND DECREED, that the Board's motion for summary judgment on count one is granted. Plaintiffs' motion for summary judgment is denied. This is a final, appealable order.

SO ORDERED.

ENTER,



Charles L. Pater, Judge

CC: Alla Lefkowitz, Esq.
James Miller, Esq.
Rachel Bloomekatz, Esq.
Gupta Wessler PLLC

Attorneys for Plaintiffs-Petitioners

Alexander Ewing, Esq.
Thomas B. Allen, Esq.
W. Joseph Scholle, Esq.

Attorneys for Defendants-Respondents

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

Agenda Item 7.02

Resolution to allow armed staff in school safety zone

WHEREAS the Madison Local School District, Board of Education believes that the safety of their students is paramount; that the ability of teachers, school support staff, administrators, and others approved; to be prepared and equipped to defend and to protect our students is essential in creating and preserving a proper learning environment.

THEREFORE, be it resolved that the Madison Local School District, Board of Education, pursuant to Ohio Revised Code Section 2923.122(D) (1) (a), will grant "written authorization" to approved volunteers, so that they may convey deadly weapons or dangerous ordnance into a school safety zone, or to possess a deadly weapon or dangerous ordnance in a school safety zone of the Madison Local School District for the welfare and safety of the Students.

WRITTEN AUTHORIZATION to convey deadly weapons or dangerous ordinance in school safety zone:

The Madison Local School District, Board of Education, pursuant to Ohio Revised Code Section 2923.122(D) (1) (a), hereby provides written authorization to certain person(s) designated by the Superintendent in writing to convey deadly weapons or dangerous ordnance into a school safety zone, or to possess a deadly weapon or dangerous ordnance in a school safety zone of the Madison Local School District School District, for the welfare and safety of the Students.

BE IT FURTHER RESOLVED, that any such person(s) designated by the Superintendent must be permitted under Ohio law to carry a concealed handgun and must undergo response to active shooter training and re-certify each year prior to being authorized to convey and/or possess deadly weapons or dangerous ordnance in a school safety zone of the Madison Local School District.

Adopted by the Governing Board of the Board of Education of the Madison Local School District on April 24, 2018, by the following vote of the Board:

	AYE	NAY
Dr. Jennewine Motion	✓	
Mr. Norvell	✓	
Mr. Robinson Second	✓	
Mrs. Whiteman	✓	
Mr. French	✓	

MADISON LOCAL SCHOOL DISTRICT

FIREARM AUTHORIZATION POLICY

EMERGENCY MANAGEMENT PLAN

The Superintendent shall ensure updating of the District's Emergency Management Plan and ongoing staff training.

FIREARMS POLICY PURPOSE

The Board adopts the following policy to address concerns about effective and timely response to emergency situations at schools, including invasion of the schools by an armed outsider, an active shooter, hostage situations, students who are armed and posing a direct threat of physical harm to themselves or others, and similar circumstances.

CONFIDENTIALITY

All parts of the District's Emergency Management Plan are confidential. All records, letters, written authorizations, revocations of authorization, and other documents related to the Firearms Authorization Policy shall be maintained in a secured location determined by the Superintendent or designee. No such documents will be issued to the public or circulated among unauthorized school employees. All authorized school employees and School Board members shall execute a confidentiality agreement as a condition of accessing the information in this plan. The confidentiality agreement shall state that the individuals agree that all parts of the Emergency Management Plan are confidential, and that the individual agrees to disclose any information that reasonably would reflect on their competence to convey or possess, or the wisdom of their conveying or possessing, a firearm in a school safety zone.

AUTHORIZATION

A. Board Authorization

Pursuant to its authority under Ohio Revised Code 2923.122, the Board authorizes certain person(s) designated by the Superintendent in writing to convey deadly weapons or dangerous ordnance into a school safety zone, or to possess a deadly weapon or dangerous ordnance in a school safety zone of the Madison Local School District, for the welfare and safety of the Students.

B. Authorization Process

The Board may authorize specific school employees to possess certain firearms on school property, at school-sponsored or school-sanctioned events, and at Board meetings. The Superintendent shall issue written authorization to approved employees who meet the qualifications of this Policy. The Superintendent shall make all authorizations under this Policy

in writing. The maximum number of authorizations the Superintendent may make is 10 authorized school employees.

C. Revocation

Any school employee authorized to carry a firearm may voluntarily revoke his or her authorization by providing notice to the Superintendent. The Superintendent may unilaterally revoke any such authorization at any time for any reason (or no reason at all). Any violation of this Policy may result in immediate revocation. Such authorization may be revoked if such employees receive any form of discipline. Revocations are not subject to any grievance or hearing process or procedure. Employees whose authorization is revoked (voluntarily or involuntarily) remain subject to the confidentiality provisions of this Policy.

D. Notice to Board

The Superintendent shall periodically notify the Board of Education in executive session of the individuals authorized under this Policy.

CONCEALED HANDGUN LICENSEES

Only those school employees who have obtained and maintain a current license, in accordance with state law, to carry a concealed handgun are eligible to be authorized to possess a firearm on school property. The Board may authorize certain school employees to carry a firearm on their person. Such authorized school employees must conceal their weapon at all times on school grounds. Any such firearm may only have a round chambered if the firearm is a striker-fired weapon and the firearm is carried in a holster with an appropriate trigger guard.

TRAINING

Only those school employees who have satisfactorily completed an approved active-shooter response and firearm instruction through an approved vendor are eligible to be authorized to possess a firearm on school property. Any such school employee must thereafter re-certify such training on an annual basis. Any school employee authorized to possess a firearm shall be provided additional training in crisis intervention, active shooter, management of hostage situations, and other training as the Board or designee may determine necessary or appropriate. Such employees must engage in proficiency training with on-going handgun practice.

REVIEW OF QUALIFICATIONS

All authorized school employees should have their qualifications to maintain their authorization under this Policy reviewed by the Board or designee on an annual basis. The required qualifications are as follows:

- Holding a valid Ohio Concealed Handgun License
- Completing a minimum of 24 hours of response to active shooter/killer training from an approved vendor, including the following:

  - Tactical Defense Institute
  - Chris Cerino Training Group
  - Butler County Sheriff's Office
- Have a handgun qualification certificate.
- Received training regarding the mental preparation in response to active killers by reading the work of Lt. Dave Grossman and/or attendance at a seminar provided by Lt. Dave Grossman.

BACKGROUND CHECK, DRUG SCREENING, AND ANNUAL EXAMS

Only those school employees who have passed a criminal background check and a mental health exam are eligible to be authorized to possess a firearm on school property.

All school employees authorized to carry a firearm must disclose to the Superintendent any circumstances that would impact their ability to possess a firearm on school property for any reason, including but not limited to: criminal arrest, citation or conviction, use of medication or other substance, any medical or psychological condition, or any other life event that may impact the employee's fitness or ability to possess a firearm under this Policy.

Such employees may be subject to annual evaluations and background checks and shall be subject to random and annual drug screening exams.

SELECTION OF FIREARMS

School employees authorized to possess firearms shall be trained on the firearms and caliber and shall only possess firearms of the caliber for which they have received training. Authorized school employees may possess and use personal firearms subject to the completion of training requirements stated in this Policy with the personal firearm.

IDENTIFICATION OF AUTHORIZED EMPLOYEES DURING EMERGENCY EVENT

The Board shall, in consultation with the Butler County Sheriff's Office, select a means by which authorized school employees will identify themselves during an emergency event. This identification shall be worn by the authorized school employees and shall be visible in a crowded, chaotic situation. Authorized individuals shall receive training on the location and use of such identification. The Superintendent may modify the identification method from time to time. However, the Board shall notify the Butler County Sheriff's Office of any change in identifier immediately.

PERMITTED AMMUNITION

Only hollow-point or frangible ammunition, i.e., ammunition designed to have reduced ricochet hazard, will be permitted in firearms authorized to be on school property under this policy.

June 13, 2019

Butler County Clerk of Courts
315 High Street, 5th Floor
Hamilton, OH 45011

Re: *Gabbard et al. v. Madison Local School District Board of Education et al.*,
Case No. CA2019-03-051 (12th Dist. Ct. of App.)

Dear Sir or Madam,

I have enclosed Appellants' opening brief, for filing in the above-captioned case. Please note that this brief contains information that is subject to a protective order issued on February 22, 2019, by the Butler County Court of Common Pleas in *Gabbard et al. v. Madison Local School District Board of Education et al.*, CV 2018 09 2028 (Pater, J.).

On June 11, 2019, the parties submitted a joint motion to the Twelfth District Court of Appeals seeking permission to file information subject to the trial court's protective order under seal in briefing submitted to the Court of Appeals. That motion is currently pending, and the Twelfth District Court Administrator has indicated that it will be addressed.

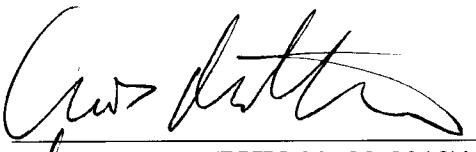
Pursuant to the trial court's protective order and the parties' June 11 joint motion, and subject to any forthcoming order by the Court of Appeals, I have marked four copies of this brief "****UNREDACTED VERSION—TO BE FILED UNDER SEAL****." These copies should be filed under seal and should not be made available to the public.

I have also marked four copies of this brief "****REDACTED VERSION—FOR PUBLIC FILING****." These copies should be publicly filed.

Please do not hesitate to contact me if you have any questions.

* * *

Respectfully submitted,



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Counsel for Plaintiffs-Appellants

** pro hac vice motion pending*

cc: Brodi J. Conover, Esq. & Alexander L. Ewing, Esq. (by e-mail)