IN THE COURT OF APPEALS
TWELFTH DISTRICT COURT OF APPEALS
BUTLER COUNTY, OHIO

ERIN GABBARD, et al.,	:	
	:	
Appellants,	:	**Appeal Case No. CA2019-03-0051**
	:	
v.	:	**Trial Case No. CV 2018 09 2028**
	:	
MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	:	
	:	
Appellees.	:	

BRIEF OF APPELLEES

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TABLE OF CONTENTS AND AUTHORITIES

INTRODUCTION

And I can remember thinking to myself, you know, here I am, the only thing standing between these kids, and I really just had a textbook in my hands. And I just was, like, this is not a fair fight. But all I could think of was that I have 25 other lives behind me and what am I supposed to do with a book? And that's when I started thinking that I would love, if ever the laws changed, at that point that I would be interested in carrying in the classroom.

- Doe Transcript, T.d. 97, Joint Exhibit XII, 26:9-19

A Madison student stood up in the cafeteria, repeatedly fired a gun at his classmates until he ran out of bullets, and then ran out of the school. Four students were injured; fortunately, no one was killed. While shots echoed through the building, Madison's staff—like the one above—had no real ability to protect their students or themselves. That shooting, along with other high-profile school shootings around the country, prompted the Madison Local School District's Board of Education (the "Board" or "Madison") to consider and implement numerous measures to ensure the safety and well-being of its students and staff. It was exactly the fear articulated above—fighting a gun-wielding would-be murderer with a textbook or stapler or whiteboard eraser—that led the Board to take proactive measures to keep Madison's students and staff safe. One step the Board took: authorize certain school employees to carry a concealed weapon on school property.

The question before the Court is simple: is a local school district board of education permitted to authorize its employees to carry a concealed weapon on school property to protect the district's students? The answer is yes. The Ohio General Assembly says so. The Ohio Revised Code says so. The Board, at all times, followed Ohio law in its decision to authorize certain administrators, teachers, and support staff to carry a concealed weapon on school property. Indeed, the Board demands *more* than what the law requires by mandating that prior to authorizing staff members to carry a firearm, he or she must attend training beyond what the Revised Code calls for. The training that Madison chose is specifically designed for a school's response to an active

shooter situation and is partially funded by the General Assembly. The District has complied with Ohio law at all times, and in fact has exceeded the requirements of the law. The trial court's order granting summary judgment in Madison's favor should be affirmed.

Appellants also take issue with the trial court's order restricting access to certain information in the case below. A direct appeal, however, is not the appropriate remedy to challenge a court's decision restricting access to court records under the Rules of Superintendence. Rather, Appellants could—and should—have filed a mandamus action (like the law requires). Their decision to directly appeal the trial court's decision is fatal to that portion of their appeal. Even so, the trial court's decision restricting access to a discrete set of documents (the authorized staff's mental health evaluations and related testimony) should be affirmed because, under Rule of Superintendence 45(E), permitting access will put Madison's students and staff at risk.

STATEMENT OF THE CASE

Appellants—five parents of students in the Madison Local School District (the "District" or "Madison")—brought a two-count complaint against the Board and the District's Superintendent alleging that (1) the Board illegally authorized certain administrators, teachers, and staff to protect the District's students and staff and (2) the District failed to comply with a public records request. Complaint, T.d. 4. Appellants moved to preliminarily enjoin the Board's decision to arm certain administrators, teachers, and staff, but the trial court consolidated the preliminary injunction with a trial on the merits under Civ.R. 65(B)(2) and set the matter for a hearing.

Prior to the hearing, the District filed a motion for a protective order to restrict access to three discrete items involved with its decision to arm certain administrators, teachers, and support staff: (1) the names and personally identifying information of the individuals authorized by the Board to carry a concealed weapon; (2) the District's Firearms Authorization Policy; and (3) the

mental health evaluations of those authorized to carry a concealed weapon and any testimony regarding the details of those mental health evaluations. District's Motion to Modify Motion for Protective Order, T.d. 74. The trial court granted the District's motion as to the names and personally identifying information of the individuals authorized by the Board to carry a concealed weapon and as to the mental health evaluations of those authorized to carry a concealed weapon. February 22, 2019 Entry, T.d. 76. The trial court denied the District's request to keep the Firearms Authorization Policy—part of its Emergency Management Plan—restricted. *Id.*

After the hearing, the trial court awarded the Board summary judgment. February 28, 2019 Order, T.d. 90. The trial court agreed with the Board that Ohio's statutory scheme permits local school boards of education the authority and ability to arm certain administrators, teachers, and support staff and that Ohio law did not require those authorized individuals to receive the training required of police officers in Ohio. *Id.* The parties moved to jointly and voluntarily dismiss the mandamus action against the District, which the court granted. Joint Motion for Voluntary Dismissal of Petition for Mandamus, T.d. 107; March 21, 2019 Order, T.d. 108.

Appellants now appeal the trial court's order awarding summary judgment to the Board on its authority to arm administrators, teachers, and support staff and the trial court's order restricting access to the mental health evaluations of the individuals authorized by the Board to carry a concealed weapon in a school safety zone. Notice of Appeal, T.d. 111; Appellants' Brief at 1-2.

STATEMENT OF FACTS

A. The Shooting at Madison

We had one teacher, didn't know what was going on, he locked his doors. He didn't know if it was a group of armed people or what. He's a coach. He passed out his duffel bags. Said kids, if someone comes through this door, I'll protect you at all cost. And he gave them baseball bats. That's all he had in control. That's it.

- *Board President David French*, French Transcript, T.d. 102, 174:1-8

In 2016, a student stood up in the Madison Local School District Junior-Senior High School cafeteria, pulled out a gun, and fired shots at his fellow students. Fortunately, no one was killed; still, four students were injured. Once shots rang throughout the building, the District immediately went into lockdown—all exterior, interior, and classroom doors were closed and locked, classroom lights were turned off, and all students, teachers, and staff hid and remained out of sight. Doe Transcript, T.d. 97, Joint Exhibit XI, 14:19-24, 15:1-3. That lockdown lasted for three-and-a-half hours until local law enforcement gave the all-clear. *Id.* 18:10-12.

At the time of the shooting, the District employed one school resource officer (SRO) from the Butler County Sheriff's Office, Deputy Kent Hall. Deputy Hall was armed while on duty the day of the shooting and was in the cafeteria moments prior to the shooting. Deputy Hall Deposition, T.d. 104, 91:6-9. When he heard the shots, Deputy Hall immediately returned to the cafeteria and pursued the shooter out of the building on foot. *Id.* at 91:10-15. Eventually, Deputy Hall and other local law enforcement officers apprehended the shooter. *Id.* at 91:13-15.

B. The District's Response

Because my daughter told me that in an ALICE training drill, her teacher's plan was to take the bullet from the intruder while throwing a stapler at the intruder. That was all she had. And that to me is just reprehensible that we are going to expect these adults to die for our kids, but that we don't allow them the same right that the State of Ohio and the United States allows them everywhere else.

- *Board Member Dr. Paul Jennewine*, Dr. Jennewine Transcript, T.d., 105, Tr. 115:13-18

After its own school-shooting experience and other school shootings across the country, the Board considered and implemented numerous measures to protect its students and staff. District's Motion for Summary Judgment (MSJ), T.d. 48, Exhibit A. This included improving the District's communication system, installing a new security camera system, hiring an additional SRO, putting a film over windows to prevent shattering, and installing more secure doors throughout the District's buildings. *Id.*

The Board also unanimously passed a resolution authorizing armed staff in a school safety zone. *Id.*, Exhibit B (the "Resolution"). That Resolution provided for the welfare and safety of the District's students by creating a policy and plan to respond to an active-shooter situation. *Id.*; French Transcript, T.d. 102, 15:5-9; Dr. Jennewine Transcript, T.d. 105, 58:1-12. The Board received overwhelmingly positive feedback from the Madison community regarding its decision to pass the Resolution arming staff. Dr. Jennewine Transcript, T.d. 105, 109:10-17.

Once it passed the Resolution, the Board engaged in conversations and forums with the Madison community to receive input on what would eventually become its Firearms Authorization Policy. District's MSJ, T.d. 48, Exhibit C (the "Policy"). The Board adopted the Policy to "address concerns about effective and timely response to emergency situations at schools, including invasion of the schools by an armed outsider, any active shooter, hostage situations, students who are armed and posing a direct threat of physical harm to themselves or others, and similar circumstances." *Id.* The Policy follows the authority granted to a board of education in R.C. 2923.122, which allows the Board to authorize certain individuals to carry a concealed weapon on school property. *Id.*; *see also* R.C. 2923.122(D)(1)(a).

The District's Policy requires an authorized staff member to go through a rigorous and thorough process to vet and train the employee prior to carrying a concealed weapon on school property. Because Ohio law requires it of anyone who carries a concealed weapon, the first requirement is that an authorized staff member must have a valid concealed handgun license. District's MSJ, T.d. 48, Exhibit C. While that is all the Ohio Revised Code requires of an authorized staff member, the Board demands more. In addition to a concealed handgun license, an authorized staff member in Madison must also: (1) complete a minimum of 24 hours of response to active shooter/killer training from an approved vendor, including but not limited to

Faculty/Administrator Safety Training and Emergency Response ("FASTER"); (2) have a handgun qualification certificate; (3) receive training regarding mental preparation in response to active killers; (4) undergo a mental health exam; (5) pass a criminal background check; and (6) pass an annual drug screening exam. *Id.*

The Board's decision to arm its staff members is just one piece of the puzzle to protect students and staff. *See* French Transcript, T.d. 102, 27:18-22; Robinson Transcript, T.d. 103, 80:24-81:14, 114:9-16. Each of the steps the Board took—including arming certain staff members—had one objective: ensure the well-being and safety of Madison students and staff.

C. The Response Outside of Madison

Madison was not alone in its efforts to protect students from the harm of an active shooter. The Tactical Defense Institute, along with the Buckeye Firearms Foundation and other organizations, created the FASTER Saves Lives program. District's MSJ, T.d. 48, Exhibit D. FASTER is intended to provide administrators, teachers, and staff with the ability to quickly and effectively respond to active-shooter situations in schools when seconds could mean the difference between a student surviving a school shooting or not. *Id.* The program recognizes that armed teachers are only one step that a school district can take to protect its students and staff. *Id.*

The Ohio General Assembly supports FASTER and the active-shooter training it provides to armed school staff across the State. In the most recently passed biennium budget, the Ohio General Assembly appropriated $75,000 in FY2018 and $100,000 in FY2019 to provide FASTER training for selected school staff "for the purpose of stopping active shooters and treating casualties." *Id.* at Exhibit E. Because of the bipartisan support of Ohio's Legislature, school districts from 77 of Ohio's 88 counties have sent staff to complete FASTER training in order to arm administrators, teachers, and support staff to protect Ohio's students. *Id.* at Exhibit F.

In addition to the efforts in Ohio, President Donald J. Trump organized the Federal Commission on School Safety, which was created to make recommendations to help prevent future school shootings in the United States. *Id.* at Exhibit G. The Commission included members from the United States Departments of Education, Justice, Homeland Security, and Health and Human Services. *Id.* One recommendation that the Commission made was the arming of "specifically selected and trained school personnel (including but not limited to SROs and SSOs) as a deterrent." *Id.* That is exactly what Madison did.

ARGUMENT

Appellants fundamentally misconstrue the statutory construction that the General Assembly implemented in allowing local school district boards of education to arm their staff. Rather than look to the statutes authorizing a local school district to permit its staff to carry a concealed weapon on school property, Appellants exclusively rely on a statute dealing with the Attorney General's duty to ensure that police officers are properly trained. The trial court's judgment should be affirmed because Madison, at all times, fully complied with Ohio law.

This Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311, 107 S.Ct. 2852 (1987). The trial court's analysis in finding that Madison followed the law is one way to decide this case. It is not, however, the only way. Indeed, this Court can (and should) affirm the judgment of the Butler County Court of Common Pleas finding in favor of the District without needing to adopt the reasoning found in the trial court's opinion. The end result is the same: Madison, at all times, followed the law and the trial court's judgment saying so should be affirmed.

I. Standard of Review.

This Court reviews the granting of summary judgment *de novo*. *Fannie Mae v. Winding*,

2014-Ohio-1698, ¶ 14 (12th Dist.). Because this case centers on statutory interpretation, which is a matter of law, the review is also *de novo*. *Id.* at ¶ 16. In addition, the Court reviews whether public access to information being restricted as confidential is appropriate under a *de novo* standard. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13.

II. RESPONSE TO FIRST ASSIGNMENT OF ERROR: The Trial Court Correctly Found That The Board's Decision To Arm Certain Administrators, Teachers, And Staff Does Not Violate Ohio Law.

The Ohio General Assembly is clear in what it requires of a local school district board of education in order for that district to arm its staff. Madison followed that straightforward path in arming some of administrators, teachers, and support staff. To be clear, this case is not about whether that decision is a good policy choice. It is entirely about whether Ohio law grants a local school district board of education the authority to authorize its staff members to carry a concealed weapon on school property. The Ohio Revised Code says yes. That ends the inquiry. The judgment of the trial court should be affirmed.

A. The Ohio Revised Code grants a local school district board of education the ability to authorize an individual with a concealed handgun license to carry a weapon on school property.

At all stages of this case, Appellants have glossed over—or completely ignored—the statutory scheme outlined in the Revised Code that grants a local school district board of education the ability to authorize individuals to carry a concealed weapon on school property. Time and time again, Appellants brush off the training requirements implemented by the General Assembly for *any* Ohioan to get a concealed handgun license as *de minimis* and not "meaningful training." Appellants' Brief at 14. They suggest that the General Assembly could not have actually meant for there to be no additional training for individuals authorized by a school board of education to carry a concealed weapon in a school safety zone. But what Appellants *want* isn't what the law *requires*. That matters—especially when the Board, at all times, complied with the law.

It is illegal to carry a concealed weapon in Ohio. R.C. 2923.12(A). That prohibition can be overcome, however, when an individual has a concealed handgun license. R.C. 2923.12(C)(2). Of course, the State regulates who can receive a concealed handgun license and heavily regulates the process for obtaining that license. *See* R.C. 2923.125. For example, a license holder must be over 21 years old, R.C. 2923.125(D)(1)(b), cannot have been convicted of various drug-related and child-abuse felonies, R.C. 2923.125(D)(1)(e), and cannot have been subject to a civil protection order, R.C. 2923.125(D)(1)(j). All individuals seeking a license must complete a certain level of firearms safety and training. R.C. 2923.125(B)(3); *see also* District's MSJ, T.d. 48, Exhibit H. The concealed-handgun-license training course must include at least eight hours of training in the safe handling and use of a firearm and also include two hours of in-person range time and live-fire training. R.C. 2923.125(G)(1); *see also* District's MSJ, T.d. 48, Exhibit H. In addition, a concealed handgun license holder must pass a competency examination—including a written test and the physical safe handling and firing of a handgun. R.C. 2923.125(G)(2).

An individual is prohibited from carrying a firearm—open or concealed—in a school safety zone. *See* R.C. 2923.122 (the "Authorizing Statute"). That prohibition, however, has a few exceptions outlined in the Authorizing Statute. For example, state and federal government agents who carry a gun in their ordinary course of duty, law enforcement officers who carry a gun, and school resource officers employed by a school to carry weapons on school property. R.C. 2923.122(D)(1)(a) and (b). The General Assembly has carved out one additional exception:

> [A]ny other person who has written authorization from the board of education or governing body of a school to convey deadly weapons or dangerous ordinance into a school safety zone or to possess a deadly weapon or dangerous ordinance in a school safety zone and who conveys or possesses the deadly weapon or dangerous ordinance in accordance with that authorization.

R.C. 2923.122(D)(1)(a). The Authorizing Statute is clear: a local school district board of education can authorize any individual—including any of its staff—to carry a weapon on school

property.

The Authorizing Statute imposes no additional training requirement for any individual authorized by a local school district board of education to carry a concealed weapon on school property. *Id.* The only requirement in the Authorizing Statute is that individuals have written authorization from the board of education. *Id.* Of course, to carry a concealed weapon anywhere in Ohio, authorized individuals must do so in accordance with the State's concealed-carry law. *See generally* R.C. 2923.12. But the Authorizing Statute and Ohio's concealed-carry law do not impose any additional training on an individual authorized by a local school district board of education to carry a concealed weapon on school property.

The Board's Resolution and Policy meet the Authorizing Statute's requirements. Each individual authorized by the Board to carry a concealed weapon on school property must have a valid concealed handgun license. *See* District's MSJ, T.d. 48, Exhibits B and C. Indeed, each of the individuals authorized by the Board does have a valid concealed handgun license. *See* District's MSJ, T.d. 48, Exhibits I-K. The fact that each of the individuals authorized to carry a concealed weapon on school property has a valid concealed handgun license is reason enough to affirm the trial court's judgment finding that the Board fully complied with the law.

But the Board goes beyond the training that the Revised Code necessitates by requiring more than just a concealed handgun license. The Board recognized that additional training aimed specifically towards responding to an active shooter situation in a school would further provide for the safety and welfare of its students and staff. Dr. Jennewine Transcript, T.d. 105, 19:20-24; French Transcript, T.d. 102, 105:16-106:16, 141:15-142:1. It is because of that desire that additional training, like the FASTER program, was chosen as an option for the District's armed staff to attend. Dr. Jennewine Transcript, T.d. 105, 108:14-109:9, 113:13-114:4; French

Transcript, T.d. 102, 105:16-106:16. The Board also requires all of its authorized individuals to re-certify in that training each year. *See* District's MSJ, T.d. 48, Exhibits B and C. Each authorized individual must also complete a mental health evaluation, an annual drug screening, and a criminal background check. *Id.* All of these requirements to become an authorized staff member at Madison are in *addition* to the Authorizing Statute's requirements. The Board cannot and should not be penalized for asking more of its authorized staff members than what Ohio law requires.

B. R.C. 109.78(D) does not apply to administrators, teachers, or school staff.

Instead of looking at the Authorizing Statute and the statutory scheme that permits a local school district board of education to authorize its staff members to carry a concealed weapon on school property, Appellants commit to R.C. 109.78(D) for the proposition that Madison's administrators, teachers, and support staff authorized to carry a concealed weapon on school property are actually police officers that need Ohio Peace Officer Training Academy ("OPOTA")-approved basic training or need 20 years' experience as a police officer. This proposition is unavailing for a few reasons: (1) the plain language of the statute is clear that it is not applicable to school staff authorized by a board of education to carry a concealed weapon on school property; (2) the legislative-history arguments put forth by Appellants fail; and (3) the Ohio Attorney General has stated that R.C. 109.78(D) applies only to security personnel. R.C. 109.78(D) simply does not apply to the Board's decision to authorize certain staff members to carry a firearm.

1. R.C. 109.78(D)'s language is plain and straightforward: it does not apply to administrators, teachers, or support staff.

Appellants' statutory interpretation argument starts with their position that R.C. 109.78(D) must apply to individuals authorized to carry a firearm on school property because they are armed while engaged in their regular work. Appellants' Brief, at p. 6-8. That interpretation, however, forgets the paramount and first concern in statutory interpretation: "consider the statutory

language, reading words and phrases in context and construing them in accordance with rules of grammar and common usage." *Fraley v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, ¶ 16. "When statutory language is unambiguous, a court must apply it as written." *Id.* Reading R.C. 109.78(D) within the context of normal rules of grammar and regular use reaches one result: if a school hires someone to carry a firearm and provide security, those individuals need to attend an OPOTA-approved basic training academy or have been a police officer for 20 years. The Court need only apply the statute as it is plainly written.

Pursuant to R.C. 109.78(D), persons employed by "public or private educational institution[s]" as "a special police officer, security guard, or other position in which such person goes armed while on duty" must complete a basic peace officer training program or have 20 years' experience as a police officer. R.C. 109.78(D). Not once in R.C. 109.78(D) is there reference to, or mention of, or suggestion that it applies to a local school district board of education's decision to arm its administrators, teachers, or support staff. The statute's training requirements apply to school districts in the limited context that it says: when districts employ a special police officer, or a security guard, or a school resource officer, or a school security officer, or some other position like those listed that requires someone to carry a firearm whose primary function is to provide security to a school. Notably, by its plain terms R.C. 109.78(D) does not apply to a school district's decision to arm administrators, teachers, or support staff.

Looking to the dictionary results in the same conclusion. "Armed" is defined as "furnished with weapons" and "armed with something that provides security, strength, or efficacy." Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/armed (accessed July 10, 2019). In addition, Merriam-Webster defines "on duty" as "engaged in or responsible for an assigned task or duty." Meriam-Webster, *available at* https://www.merriam-

webster.com/dictionary/on%20duty (accessed July 10, 2019). Thus, "armed while on duty" would mean someone carrying a weapon that is responsible for providing security. That would obviously not apply to teachers, administrators, or support staff—whose assigned and primary task is to educate a district's students. Had the General Assembly intended for the statute to apply to educators (and thus, authorized individuals), it easily could have done so. But it did not.

2. Appellants' various legislative history arguments are unavailing.

Recognizing that the plain language of R.C. 109.78(D) does not apply to armed administrators, teachers, and support staff, Appellants turn to novel, but unpersuasive, legislative-history arguments. Of course, a court only looks to legislative history when a statute is ambiguous—which R.C. 109.78(D) is not. *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8. Even so, Appellants' arguments fail.

First, Appellants suggest that prior versions of R.C. 109.78(D) shine light on the police-officer training provisions applying to administrators, teachers, or support staff. While amendments to statutes can be indicative of legislative intent, when the plain language of a current statute is unambiguous, courts must apply that language. *See, e.g., State ex rel. Beavercreek Twp. Fiscal Officer v. Graff*, 154 Ohio St.3d 166, 2018-Ohio-3749, ¶ 18-20. The language of R.C. 109.78(D) is unambiguous, so looking to prior versions of the statute is not needed. Still, the prior versions of R.C. 109.78(D) do not lead to a different conclusion. Here, that means that R.C. 109.78(D) does not place training requirements on the Board's authorized personnel.

Next, Appellants argue that proposed—*but never passed*—bills to amend R.C. 109.78(D) are relevant to interpreting the statute's application to the Board's decision to authorize certain staff members to carry a concealed weapon on school property. But a proposed and never passed bill has no impact on a court's interpretation of a statute that is in effect—especially one that is plain and straightforward, like the one here. Understandably, a bill that is put to a vote and then

rejected is "doubtless not conclusive as to the meaning of the bill in the unamended form." *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 96, 55 S.Ct. 333 (1935). There are thousands of legislative changes proposed and not passed each year—if each of those informed interpretation of a statute (as Appellants appear to suggest), courts would never be able to entirely settle what the *actual* law says. Appellants' argument, then, that amendments proposed but never passed into law have an impact on the interpretation of whether Madison staff can carry a concealed weapon and whether those teachers are actually peace officers strains credulity and is not persuasive.

3. The Ohio Attorney General opined that R.C. 109.78(D) applies only to security personnel.

Appellants argue that the trial court, the current Governor and former Attorney General, and the Board all "add modifying words to the statute that are just not there." Appellants' Brief, at p. 11. They dismiss the January 29, 2013 Ohio Attorney General opinion letter interpreting the Authorizing Statute and R.C. 109.78(D) as "unofficial" and "nonbinding." *Id.*; *see* District's MSJ, T.d. 48, Exhibit L. But despite Appellants' contention otherwise, applying a plain and commonsense reading of the Authorizing Statute and R.C. 109.78(D) does not result in "rewrit[ing] the statute" or "adding words to the statute." Appellants' Brief, at p. 12. Instead, the General Assembly, the trial court, the current Governor and former Attorney General, the Board, FASTER, Buckeye Firearms Association, and numerous other school districts across Ohio all have reached the same conclusion directly opposite of Appellants' proposition: the Authorizing Statute allows a local school board of education to arm its administrators, teachers, and support staff, and R.C. 109.78(D)'s training requirements do not apply to them.

Indeed, Appellants would have the Court entirely disregard the Attorney General's opinion. And while the opinion of the Attorney General on interpreting statutes is not binding on this Court, it is persuasive. *State ex rel. N. Olmsted Fire Fighters Assn. v. N. Olmstead*, 64 Ohio St.3d 530,

533 (1992). The fact that the chief legal officer for the State opined five years prior to Madison's implementation of its Resolution and Policy that the Authorizing Statute permits local school districts to authorize staff members to carry a concealed weapon and that they need not have attended an OPOTA-approved basic training academy or have 20 years' experience as a police officer unless his or her job duties rise to the level of being a "security personnel" matters. District's MSJ, T.d. 48, Exhibit L. Despite Appellants' contention otherwise, this Court should consider the Attorney General's interpretation of the Authorizing Statute and R.C. 109.78(D): a local school district can arm its administrators, teachers, and support staff without requiring them to attend an OPOTA-approved basic training course or have been a peace officer for 20 years.

III. RESPONSE TO SECOND ASSIGNMENT OF ERROR: The Authorized Staff's Mental Health Evaluations And Related Testimony Should Be Protected From Public Access Because Their Release Would Cause Harm To Students And Authorized Staff.

Appellants' second assignment of error—challenging the trial court's decision to restrict access to court records under the Ohio Rules of Superintendence—cannot proceed on direct appeal and, therefore, should be overruled. To challenge a court's decision restricting public access to court documents, an aggrieved party must pursue the challenge as an original action in mandamus. Appellants have not done that here. This is fatal to their second assignment of error.

Regardless, the District should prevail, and the authorized staff's mental health evaluations should be protected. The Board requires each of its authorized staff members to complete a mental health evaluation as part of the process for an individual to be authorized by the Board to carry a concealed weapon on school property. District's MSJ, T.d. 48, Exhibit C. Understandably, the District moved to restrict those mental health evaluations and testimony related to those mental health evaluations in order to protect the authorized individuals and also to protect Madison's students. The trial court agreed that the information should be restricted—but did so on grounds different than what the District argued in its motion for protective order. The trial court found that

the release of the mental health evaluations would violate the Health Insurance Portability and Accountability Act (HIPAA)—despite the fact that the District is not a covered entity and HIPAA does not apply to non-covered entities. This Court need not rely on the trial court's rationale in finding that the mental health evaluations of the authorized staff should be restricted under Ohio Rule of Superintendence 45(E)(2). Again, this Court reviews judgments, not opinions. The judgment of the trial court should be affirmed.

A. Appellants cannot directly appeal a trial court's decision to restrict access to court records under Rule of Superintendence 45(E).

As an initial matter, a direct appeal is not the appropriate remedy to contest a trial court's decision to restrict access to court records under the Ohio Rules of Superintendence. Instead, to challenge a trial court's decision restricting access under Ohio Rule of Superintendence 45(E), Appellants are required to file an original action in mandamus. Sup.R. 47(B). The Ohio Rules of Superintendence require that a "person aggrieved by the failure of a court * * * to comply with the requirements of Sup. R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731 of the Revised Code." Sup.R. 47(B). This is a "specific remedy," *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, ¶ 13, and the "*only* remedy," *State ex rel. Harris v. Pureval*, 155 Ohio St.3d 343, 2018-Ohio-4718, ¶ 11 (emphasis in original), provided by the Rules of Superintendence for a person aggrieved by the failure of the court to comply with the rules of public access. Courts across Ohio have repeatedly found that a challenge to a court's decision restricting access to court records cannot be accomplished on direct appeal, but must be done through mandamus. *State v. Helfrich*, 2019-Ohio-1785, ¶ 103-107 (5th Dist.); *State ex rel. Cincinnati Enquirer v. Hunter*, 2013-Ohio-4459, ¶ 8 (1st Dist.); *N.L. v. A.M.*, 2010-Ohio-5834, ¶ 8-9 (6th Dist.).

Appellants should not be allowed to circumvent the requirements of the Ohio Rules of

Superintendence. The Ohio Supreme Court and appellate courts across the State have made clear: a challenge to a court's decision restricting access to court records under the Rules of Superintendence must be challenged through mandamus, not direct appeal. Appellants' second assignment of error should be denied.

B. The authorized staff's mental health evaluations should be protected under Rule of Superintendence 45(E).

Even if the Court finds that Appellants' second assignment of error is properly before it, the mental health evaluations of authorized individuals should be protected. Despite Appellants' contention that the District moved to protect the mental health evaluations of its authorized staff members in a shroud of secrecy to hide information, the District made clear throughout the case below that it sought to protect this information for one reason: to protect Madison's students and staff from harm. The District moved the trial court under the Rules of Superintendence, which grants a court the authority to restrict public access to information when the presumption of allowing public access is outweighed by a higher interest in: (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; and (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. Sup.R. 45(E)(2). The District's attempt to restrict access to a very limited and discrete portion of the record below comports with exactly what Rule 45(E)(2) was intended to do.

1. Public policy supports restricting access to the authorized staff's mental health evaluations.

To first have public access to information protected, the moving party must show that public policy is served by restricting access. Protecting students from harm—an obligation that all school districts have—is a clear public policy. *Bd. of Edn. of Indep. School Dist. No. 92 of*

Pottawtomie Cty. v. Earls, 536 U.S. 822, 824, 122 S.Ct. 2259 (2002); *Cleveland Bd. of Edn. v. International Bd. of Firemen & Oilers Local 701*, 120 Ohio App.3d 63, 72 (8th Dist.1997). The release of the authorized staff's mental health evaluations will directly impact Madison's ability to protect society's most vulnerable: its children. John Benner, one of the country's most renowned experts on active-shooter response in schools, said that the operational success of a school's effective defense against an active shooter depends on confidentiality—especially in protecting its students. District's Motion for Protective Order, T.d. 47, Exhibit B at ¶ 15-16.

In addition, an act of the legislature can express public policy. *Cleveland Bd. of Edn.* at 72. The General Assembly has made clear that a school district's emergency management plan is exempted from release as a public record. R.C. 3313.536(I). There was testimony throughout the case below that the authorized staff's mental health evaluations are part of Madison's emergency management plan. Dr. Jennewine Transcript, T.d. 105, 111:12-15; Dr. Tuttle-Huff Transcript, T.d. 101, 132:22-133:2. The purpose of limiting disclosure of that information is to ensure that a school district's records regarding its response to an active-shooter situation are safeguarded. If this information is made public, the usefulness of the information is weakened, and students and teachers are put at a greater risk of harm. *See* District's Motion for Protective Order, T.d. 47, Exhibit B at ¶ 15-16. The General Assembly's decision to express a public policy in favor of restricting access to this type of information supports restricting access to information that would harm Madison's students and staff.

2. State law supports restricting access to the authorized staff's mental health evaluations.

As mentioned, the General Assembly already protects and restricts access to an authorized staff member's mental health evaluations because they are part of Madison's emergency management plan and, therefore, are a security record precluded from disclosure. R.C.

3313.356(I); R.C. 149.433(A)(1) and (B)(1). While being exempt under the Ohio Public Records Act does not automatically preclude a document from being accessed during litigation, *see, e.g.*, *Henneman v. City of Toledo*, 35 Ohio St.3d 241, 245 (1988), the Court should consider that Madison seeks to restrict access to this information to keep its students and staff safe and the General Assembly has already protected such information from disclosure. Failing to protect this kind of information—even in litigation—would set a harmful precedent that parties need only sue a public body in order to end-round the exemption from public disclosure and seek the information through discovery before disseminating it to the world (and potential bad actors).

Appellants' reliance on *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141 (1995), moves the goal posts and is not applicable here. In *Snowden*, the Ohio Supreme Court found that a psychological report of an applicant to be a police officer was not part of an applicant's medical treatment and did not fall under the medical-records exemption to the Public Records Act. *Id.* at 144-145. But at no point has Madison ever argued that the authorized staff's mental health evaluations are medical records and therefore should not be released under R.C. 149.43(A)(1)(a). Throughout this case, the District has maintained that the mental health evaluations are part of its emergency management plan and public access to those mental health evaluations poses a direct threat of harm to Madison's students and staff. *Snowden* is inapplicable to that analysis. The Court should not be distracted by the trial court's reliance on HIPAA nor Appellant's reliance on the medical-records exemption to the Public Records Act. Neither is at issue here.

3. There is a substantial risk of harm to Madison's students and staff if the authorized staff's mental health evaluations are exposed.

Madison simply wants to protect its students and staff. This prong of the Court's analysis weighs most heavily in favor of restricting public access to the authorized staff's mental health evaluations. Put simply, disclosing this information could result in serious physical harm to

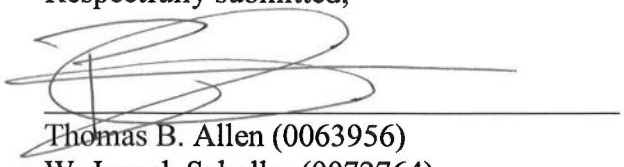
Madison's students and staff. Moreover, the authorized staff's privacy interests are at significant risk should the information be made public.

The first people targeted in an active shooter situation at a school are those individuals that are known to be armed. District's Motion for Protective Order, T.d. 47, Exhibit B, ¶ 13, 15. Part of Madison's authorized staff's advantage is that their identity is not known. *Id.* If those individuals are targeted and neutralized, they will be unable to defend a school district's students. *Id.* at ¶ 16. These security concerns are heightened because Madison has already had to experience the tragedy and devastation of a school shooting. Releasing the mental health evaluations will undermine the various steps the District has taken to protect its students and staff.

CONCLUSION

The Court should affirm the trial court's award of summary judgment in the District's favor because the Board, at all times, complied with Ohio law when it made the decision to authorize certain administrators, teachers, and staff to carry a concealed weapon on school property. In addition, Appellants improperly attempt to appeal the trial court's decision to restrict access to court documents under the Rules of Superintendence. The trial court's decision should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon the following individuals this 12th day of July, 2019 via email and United States regular mail.

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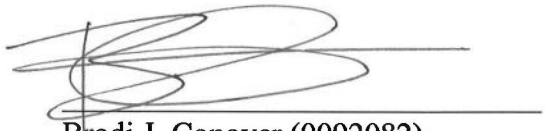

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