BUTLER COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

ERIN GABBARD, et al.,

Plaintiffs/Relator,

v.

MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Defendants/Respondents.

Case No. CV 2018 09 2028

Judge Charles L. Pater

OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

(UNREDACTED VERSION)

Hearing Scheduled February 25, 2019

PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF

The defendants' motion for summary judgment reflects a fundamental misunderstanding of the question in this case. To them, the "simple" question before the Court is whether the Board "is permitted to authorize its employees to carry a concealed firearm on school property to protect the district's students." Defs' MSJ at 1. If the answer is "yes," they take it as carte blanche to implement whatever policy they see fit, then repeatedly claim they went "above and beyond" by requiring their staff to complete twenty-four hours of training before carrying a firearm all day, every day, with Madison's schoolchildren—less training than a manicurist, or a local little league umpire. *Id.* at 2, 5, 9, 10; Compl. at ¶39; Aff. of Ben Adams ISO PI at ¶4. But the defendants misperceive the relevant question (and hence the relevant statutory framework) here. The plaintiffs do not dispute that a local school board may authorize its employees to carry a firearm while on duty at school. *See* R.C. 2923.122(D)(1)(a). Instead, the critical question is *what training the state requires* of those employees who go "armed while on duty" at school.

The answer to that question rests with R.C. 109.78(D). By that statute's plain language, a school employee in a "position in which such person goes armed while on duty" must have "completed an approved basic peace officer training program" unless he or she has already served

for twenty years as a peace officer. *Id.* That includes staff who conceal carry at school pursuant to the Board's Resolution, because they are in "position[s]" where—in the Board's own words—they go armed "while on duty." *Id.*; *see* Pls' MSJ, Ex. J ("this letter authorizes you . . . to possess a firearm while on duty"). The defendants, however, admit that the armed staff do not have these qualifications. *See* Joint Stipulation ¶21. Accordingly, the Court should deny the defendants' motion for summary judgment, grant the plaintiffs' cross-motion for summary judgment, and declare the Resolution invalid.

ARGUMENT

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

Seeking to avoid the plain language of R.C. 109.78(D), the defendants ask the Court to focus solely on another provision—R.C. 2923.122(D)(1)(a). That statute, they say, "alone disposes of Plaintiffs' declaratory judgment claim." Defs' MSJ at 9; *see also id.* at 1, 9. Not so. Revised Code 2923.122(D)(1)(a) prohibits any person from bringing a firearm into a school unless such person falls into a narrow category of individuals, including being a "person who has written authorization from the board of education or governing body of a school to convey deadly weapons or dangerous ordnance into a school safety zone." And while R.C. 2923.122(D)(1)(a) itself imposes no training requirement on those authorized to carry firearms by a school board, Defs' MSJ at 9, it also says nothing about displacing or superseding any separately applicable requirements, like the training mandate imposed by R.C. 109.78(D). The Board's discretion in authorizing persons to carry guns in school is, in other words, still cabined by other applicable statutes.

Were it otherwise, the Board's expansive reading of R.C. 2923.122(D)(1)(a) would free it from every other applicable law. Nothing in the statute says that. The Board concedes as much by admitting that persons "authorized by a local school district board of education to carry a concealed weapon" at school "must do so in accordance with the State's concealed carry law,"

including the eight-hour training required by R.C. 2923.125 and other requirements of R.C. 2923.12. Defs' MSJ at 9. By the Board's argument, then, the staff authorized under R.C. 2923.122(D)(1)(a) are still subject to other statutory requirements; R.C. 2923.122(D)(1)(a) does not hand them unfettered discretion. And, the training requirement of R.C. 109.78(D) is just such a statutory requirement. The defendants do not (and cannot) point to any language in R.C. 2923.122(D)(1)(a) explaining why the concealed carry training requirement would apply to armed teachers but otherwise applicable training requirements (like R.C. 109.78(D)) would not. This is because the text of R.C. 2923.122(D)(1)(a) does not make any such distinction—it does not exempt those authorized by school boards from other parts of the code. The defendants might prefer the 8-hour conceal carry requirement of R.C. 2923.125 to the heightened training for those who carry while on duty at school in R.C. 109.78(D). But R.C. 2923.122(D)(1)(a) does not hand the Board the power to pick and choose which statutes it wants to comply with.

II. The Board's attempt to rewrite R.C. 109.78(D) must be rejected.

This case centers on the plain language of R.C. 109.78(D). The defendants say this statute applies only to "security personnel," but neither that phrase nor any similar limitation is found anywhere in the statute. Their various attempts to read this qualifier into the statute all fall flat.

A. The Board's plain language argument is wrong and contradicted by its own plain language use of the phrase armed "while on duty."

The defendants first argue that R.C. 109.78(D) does not apply to armed teachers and staff because they do not go "armed while on duty." Defs' MSJ at 12. According to the defendants, both "common usage" and dictionary definitions demonstrate that "armed while on duty" only means "someone carrying a weapon that is responsible for providing security." Defs' MSJ at 12. Not so.

The defendants defeat their own "common usage" argument by using these very same terms to describe the authorized staff. Most tellingly, the authorization letter the Board provided

to each armed staff member states: "This letter serves as written notification that I authorize you *to possess a firearm while on duty* at Madison Local School District." Pls' Mot. SJ, Ex. J (emphasis added); *see also id.* ("Please note that this letter authorizes, but does not require, you to possess a firearm while on duty."). There's no question the staff are "on duty" while at work, as the Board has signed legally binding documents saying as much. *See* Pls' Mot. for PI, Ex. F (Collective Bargaining Agreement between the Madison Education Association and the Madison Local Board of Education at 16, 28, 34 (July 1, 2016-June 30, 2019) (referring to, among other things, supplemental contracts for "extra duty assignments," teacher's "duty-free" lunch period, and "reporting to duty" after sick leave)). The Board has also repeatedly referred to its authorized staff as "armed." The Resolution itself is called the "Resolution to allow *armed* staff in school safety zone." Pls' MSJ, Ex. B (emphasis added). In short, the defendants have repeatedly referred to the authorized staff as being armed or "possess[ing] a firearm while on duty" (as well as separately being "armed" and "on duty"). They cannot now credibly contend that these words mean something different, and that their authorized staff are not "armed while on duty."

Resort to a dictionary also backfires for the defendants, as the dictionary definitions they offer actually support the plaintiffs' argument. According to the defendants, someone is "armed" if he is "furnished with weapons" and "armed with something that provides security, strength, or efficacy." Defs' MSJ at 12. By this definition, authorized staff are "armed"—they carry a gun at school, and a gun is a "weapon[]"that "provides security, strength, or efficacy." The authorized staff are also armed "while on duty," *i.e.* while performing their job. That is entirely consistent with the defendants' dictionary definition of "on duty" as "engaged in or responsible for an assigned task or duty." *Id.* Yet the defendants assert that—somehow—when you put the two terms together, the phrase "armed while on duty" means that the armed person must be the one on security duty

(*i.e.*, "responsible for providing security.") *Id.*[1] But nothing in the dictionary says that. And certainly nothing in the dictionary definition of "on duty" requires that a person's "assigned and primary task" be security, as the defendants contend. *Id.* In short, every definition provided to this Court of the phrase "armed while on duty" squarely describes the conduct of Madison schools' armed staff.

Without recourse in the text or dictionary, the defendants argue in passing that R.C. 109.78(D)'s failure to specifically mention "educators" somehow alters the interpretation of the provision. Defs' MSJ at 12. But the Legislature is not required to mention every single group that its training requirement would apply to; it can—and did—specify that all persons with a particular characteristic (*i.e.*, who go armed while on duty) have to complete the requisite training. The Legislature's drafting history of R.C. 109.78(D), as the plaintiffs described in their summary judgment motion (at 6–7), reveals just that. Though the first draft of R.C. 109.78(D) required training for only security guards and those in "similar" positions, the General Assembly ultimately decided the training should apply to all school employees who go "armed while on duty" generally. Pls' MSJ at 6. By doing so, it foreclosed the precise dispute over which positions would be covered that the Board raises here, thereby ensuring that no positions were overlooked and thus exempted from extensive training requirements. And it makes sense that the Legislature would be concerned that any person, irrespective of their position, who carries firearms around Ohio's children all day, every day at school is well-trained.

The defendants' reliance on a 2013 Attorney General opinion letter fails for similar reasons. *See* Defs' MSJ at 14. That letter argues that R.C. 109.78(D) only covers "security personnel" because the General Assembly did not use the term "'*any person* who goes armed.'" *Id.*, Ex. L. But the former Attorney General's desire to wordsmith the statute does not change the fact that the

[1] Further undermining the defendants' argument is the fact that the authorized staff members *are* "responsible for providing security," as addressed in Part III.A, *infra*.

words the Legislature actually used are unambiguous. The Legislature requires that a person employed by a school in a "position in which such person goes armed while on duty" must have the OPOTC-approved training. There is no exception as it is written.

In sum, the defendants' various attempts to "interpret" the plain language of R.C. 109.78(D) all lead to the same place: they add a term—"security personnel"—into the statute even though it is not in the text. The Court should decline their request to rewrite the statute. *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶11 (holding that when the language of a statute is "'plain,'" courts must "give effect only to the words the legislature used, making neither additions to, nor deletions from, the statutory language" (quoting *Jones v. Action Coupling & Equip., Inc.*, 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12)). Here, the Court need only follow R.C. 109.78(D)'s plain language to declare that the Resolution invalid.

B. The Board misunderstands the applicable canons of construction.

Putting the plain meaning aside, the Board points to several canons of statutory construction that, it says, limit the meaning of R.C. 109.78(D). The Court need not consider these canons because the plain text is clear. *See Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶8. "Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute." *Bd. of Edn. of Pike-Delta-York Local School Dist.*, 41 Ohio St.2d 147, 156, 324 N.E.2d 566 (1975). Even so, the canons offer the defendants no aid.

1. *Ejusdem generis* is not applicable. The defendants rely on the rule of construction (often called *ejusdem generis*) that a "catch-all term used to conclude a list . . . must be interpreted in accordance with the previous items in the list," here "special police officer" and "security guard." Defs' MSJ at 12. Under this canon, a "catch-all" term should be read to "embrace only things" with the "'definite features and characteristics'" of those items listed. *Id.* (quoting *State v. Aspell*, 10

Ohio St.2d 1, 4, 225 N.E.2d 226 (1967)). But this canon of construction has no application to R.C. 109.78(D) because there is no ambiguity about the scope of the "catch-all phrase."

Critically, the statute does not just say "other position"—it says "other position in which such person goes armed while on duty." As such, the General Assembly has already defined the relevant "definite feature[] and characteristic[]" that makes the training requirement applicable: whether the employee goes "armed while on duty." R.C. 109.78(D). And because the scope of "other position" is already limited by the statute, it would be improper for the Court to limit it further. *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588–589, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980) (refusing to apply the canon because there is "no uncertainty in the meaning of the phrase"); *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 349–350, 676 N.E.2d 162 (10th Dist.1996) (same). Doing so here would be particularly inappropriate because, as explained above, the Legislature considered limiting the statute in the precise way the defendants propose (*i.e.*, to "similar" security positions as special police officers and security guards) and *explicitly rejected it. See* Pls' MSJ at 6–7.

2. *The context of the statute as a whole reinforces the plaintiffs' position.* The overall context of R.C. 109.78(D) does not compel a different interpretation. The defendants note that subsections (A), (B), and (C) of R.C. 109.78 refer only to "persons engaged in law enforcement or security services." Ds' MSJ at 13. For defendants, it follows that R.C. 109.78(D) must be read to have the same constraints even though, unlike those subsections, there is no similar specific language in R.C. 109.78(D) limiting its scope. *Id.* The defendants get the law exactly backwards.

The Legislature's decision to limit some portions of a statute and not others must be given effect. "[T]he General Assembly's use of particular language to modify one part of a statute but not another part demonstrates that the General Assembly knows how to make that modification and has chosen not to make that modification in the latter part of the statute." *Hulsmeyer v. Hospice of Sw. Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶26). As a result, the

Legislature's decision to specifically limit the scope of 109.78(A), (B), and (C) to security personnel means that its choice *not* to do so in subsection (D) demonstrates an intent for (D) to apply more broadly—to persons beyond just security personnel. As the other subsections reflect, the Legislature knew how to limit these provisions to "special police, security guards, or persons otherwise privately employed in a police capacity," R.C. 109.78(A), or to those with particular licenses for security services, R.C. 109.78(B). *See also* R.C. 109.78(C) (substantially similar language to R.C. 109.78(A)). This Court cannot insert the exact limitation from other subsections—*e.g.*, to "persons otherwise employed in a police capacity"—into R.C. 109.78(D) even though the Legislature did not do so.[2]

If anything, the context of the statute as a whole supports the plaintiffs' argument that armed teachers and staff are covered by R.C. 109.78(D). All other categories of persons who the General Assembly excepted from the general ban on concealed carry in schools—including federal agents, state law enforcement officers, and SROs—must have peace officer or like training. *See* R.C. 109.78(D), 2923.122(D)(1)(a). It would upset this statutory scheme to allow teachers and staff alone to go armed in school with almost *no* required training.

3. *The defendants' view renders the term "other position" superfluous.*

Though the defendants invoke various canons of construction, they overlook a fundamental one: the canon against surplusage, which states that "[n]o part of a statute should be treated as superfluous." *State v. Noling*, 153 Ohio St.3d 108, 2018-Ohio-795, 101 N.E.3d 435, ¶ 75. Under this canon, every word enacted by the Legislature must have some meaning, and two separate statutory terms should not be interpreted to mean the exact same thing. *See id.* ¶ 78 (concluding

[2] The defendants also ignore that the Legislature originally enacted R.C. 109.78 without the language that later became paragraphs (B) and (C), and thus, these paragraphs shed no light on how the Legislature originally understood the phrase "other position in which such person goes armed while on duty." *See* 1969-1970 Ohio Laws at 2400.

that it would violate the canon against surplusage for "two separate statutory provisions" to "mandate" the same thing). 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).

The defendants' interpretation of R.C. 109.78(D) would violate this canon by making the term "other position" redundant with the term "security guard." The defendants interpret "other position" to mean only a position where the "assigned and primary task" is "providing security." Defs' MSJ at 12. But Ohio law already defines "security guard" as a "person[] whose primary duties are to protect persons or property." R.C. 4749.01(D)(1). As a result, the defendants' interpretation of "other position" as covering only other security personnel makes "other position" redundant with "security guard." Such an interpretation cannot stand.

C. The Board's interpretation does not follow "common sense" because it would allow armed staff at school with almost no training.

Moving away from the plain language completely, the defendants argue that "common sense" requires R.C. 109.78(D) be read only to apply to security personnel. Defs' MSJ at 14. In the Board's view, "complet[ing] an OPOTA-approved basic training academy" in its entirety is not necessary for "administrators, teachers, or support staff" to go armed at school. *Id.* at 15. But—even assuming that is so—neither does the Board's interpretation follow "common sense" because it would allow teachers, administrators, and others to go armed while on duty all day, every day with children with almost no training at all. As explained in the plaintiffs' motion for summary judgment (at 10–13), the defendants construe state law to require armed school staff to have only eight hours of concealed carry training (six of which can be completed online). *See also* Defs' MSJ at 2, 5, 9, 10. That interpretation of state law allows persons to carry firearms in Ohio classrooms

that neither have demonstrated the shooting accuracy nor the mental fortitude to endure the rigorous training that R.C. 109.78(D) requires. *See id.* That's not what the Legislature intended.

To support their "common sense" argument, the defendants again invoke former Attorney General DeWine's letter. But such reliance is misplaced. In 2014, 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, *Ohio may exclude teachers from gun accident liability*, Dayton Daily News (Jan. 28, 2014), https://perma.cc/WY99-JHKV (accessed Feb. 10, 2019). Accordingly, when lawmakers (in the wake of the tragedy at Sandy Hook Elementary School) considered exempting staff authorized to carry firearms by a local school board from R.C. 109.78(D)'s peace officer training requirement, they required that there be a new OPOTC-approved training program to ensure that all armed school state are adequately trained. *See* Pls' MSJ at 7. And under DeWine's leadership, in response to that potential legislation, OPOTC prepared a recommended training program consisting of approximately 150 hours before a school board could authorize staff to carry in the school building. *See* Supplemental Affidavit of Alla Lefkowitz, filed concurrently, Ex. X (email chain discussing proposed teacher training). The Buckeye Firearms organization, which runs FASTER, disputed that so much training was necessary. *See id.* (email chain discussing Buckeye's reaction to proposal). But the Attorney General's Office defended its position. As the OPOTC Director asked rhetorically, "Is it fair to anyone to leave the employee with only the option of deadly force and not include training on de-escalation/crisis intervention, subject control, or restraint tactics?" *Id.* Requiring only the concealed carry training before arming teachers at school is not "common sense."

This Court, of course, is not tasked with determining the appropriate amount of training as a matter of school security. And it may be that neither R.C. 109.78(D) as written nor the

defendants' interpretation provides the best answer as a policy matter. That is left to the legislature to figure out. But the defendants cannot invoke "common sense" in aid of their attempt to rewrite the plain language of R.C. 109.78. And the Legislature's instruction couldn't be clearer: school employees in a "position" in which they "go armed while on duty"—including the teachers and staff authorized by the Board under the Resolution—must complete the requisite training.

III. The Board's misinterpretation of R.C. 109.78(D) raises a factual dispute as to whether armed staff act as "security personnel."

Having rewritten R.C. 109.78(D) to apply only to "school security personnel" who go armed while on duty at school, the defendants then claim that their authorized armed staff do not fall within the statute for two reasons: (1) they are not "assigned the task of *providing security*," and (2) they "have been directed to be entirely defensive in nature." Defs' MSJ at 13, 15. The Court need not resolve this question because, as argued above, the defendants cannot rewrite R.C. 109.78(D) to add this "security personnel" limitation that does not exist in the text. But if the Court were to adopt that argument, then there is a material factual dispute as to whether the Board's armed staff count as "security personnel" under the Board's own definition of that term.

A. The authorized staff are expected to provide security to Madison school students and staff.

The defendants first argue that R.C. 109.78(D) does not apply to staff authorized to carry firearms in Madison schools because it "applies only to those assigned the task of *providing security.*" Defs' MSJ at 15. The defendants find this distinction (which nowhere appears in R.C. 109.78(D)) important enough to italicize. But that distinction favors the plaintiffs because the Board, by its own admission, authorizes staff to carry firearms under the Resolution specifically to provide security: "The District [ ] admits that the Board of Education passed a resolution that authorized certain District staff to carry a concealed weapon while in the school safety zone *in order to protect Madison students, staff, and others on District property.*" Answer ¶ 1 (emphasis added). When the

Resolution was passed, the Board president announced that the Resolution was for the "safety of each and every child." Compl., Ex. 9 (press release). And the letter granting each John Doe authority to carry a firearm at school explains: "You are granted this authorization as an additional safety measure to protect our students and staff from harm. You must only wield or use the weapon to protect students, staff, and other civilians from deadly harm." Pls' MSJ, Ex. J. The "law enforcement" insurance coverage the District obtained to cover *respondeat superior* liability for the actions of the armed staff, *see* Pls' MSJ, Ex. K, likewise indicates that that armed staff's role is to provide security. The result is unavoidable: the Board authorizes armed staff specifically to protect and defend students and staff, which is the very definition of security. *See e.g.*, Merriam-Webster's Learner's Dictionary, https://perma.cc/PY86-RJ5E (accessed Feb. 11, 2019) (defining "secure" as "to make (something) safe by guarding or protecting it"). So authorized staff are "security personnel" even under the defendants' (mis)interpretation of R.C. 109.78(D).

The defendants attempt to avoid this conclusion by stressing, again with italics, that the "Board directs the armed staff members *only* to protect *themselves* and *their immediate areas*." Defs' MSJ at 15; *id.* (armed staff "only serve to protect themselves, their immediate area, and if their students are with them, their students"). By this characterization, providing security to students is an afterthought, not the goal of the Resolution. But that is not what the Resolution states, not what the Board's official letter tells armed staff, and certainly not what the defendants tell parents and the community. It is not even what they say on page one of their brief—"the Board made clear the primary purpose for its decision: keeping Madison students and staff safe." Defs' MSJ at 1. And it is not what the defendants said in their motion for a protective order, where they argued that "the first people targeted are those known to be protecting the school's students," which, at Madison, are the SROs "and the armed staff members." Defs' Mot. for PO at 9. The defendants cannot now pretend that the staff carry firearms just for individual protection; armed staff are *providing security*

to students and the school community. They are thus "security personnel."

B. The defendants introduce a material question of fact into the case by arguing that armed staff are expected to be "entirely defensive."

In arguing that the authorized staff are not "security personnel" under their erroneous interpretation of R.C. 109.78(D), the defendants attempt to rely on an artificial line between employees that provide security by acting offensively, (*i.e.* those who would chase after a shooter who, the defendants apparently concede, would be subject to R.C. 109.78(D)'s training requirement) and those that act "defensive[ly]" only (*i.e.* those who would shelter-in-place who, the defendants say, are not). Defs' MSJ at 15. The defendants present neither evidence nor argument as to why a person who provides security defensively cannot be considered "security personnel" while a person who provides security offensively can be. That distinction, of course, does not exist in R.C. 109.78(D).[3] Even accepting that artificial line, however, there is a material question of fact whether staff authorized to carry firearms under the Resolution are, indeed, expected only to act "entirely defensively in nature." *Id.* Put simply, the defendants' belated claim that the armed staff are only to shelter in place and protect their "immediate areas" is not credible.

Consider, first, that the so-called policy to act "entirely defensively" does not exist anywhere on paper. By the Board's own admission, all of the key rules for armed staff are set forth in the Policy and authorization letters. *See* Joint Stipulations ¶ 23. Notably absent from the Policy is a direction to protect only one's "immediate area" or a prohibition on "pursu[ing]" an assailant. *See* Pls' MSJ, Ex. C. So too with the authorization letters, which explicitly instruct the armed staff that they can only "use the weapon to protect [against] deadly force," but nowhere limits the authorization to defensive action in one's immediate area. *Id.*, Ex. J. Such a pivotal part of the rules

[3] That asserted distinction also makes no logical sense. For instance, a jewelry store security guard who is ordered only to protect the property in the store, and not to run after and apprehend an attempted robber who flees the store, is still "security personnel."

(by the defendants' own argument) would surely be in some formal document. But the defendants concede it is not memorialized in writing anywhere. *See id.*, Ex. P (Jennewine Tr. 116:4-11); *id.*, Ex. D (Tuttle-Huff Tr. 48:23-50:2; 74:18-24).

Instead, the defendants appeared with this offensive-defensive distinction late in the litigation (barely a month ago) and began claiming they gave these rules orally to the John Does at an unspecified time without any written documentation whatsoever.[4] *See e.g.*, Pls' MSJ, Ex. R (French Tr. 158:1-12). The testimony pertaining to these purported oral instructions is contradictory and irreconcilable. *Compare* Pls' MSJ, Ex. D (Tuttle-Huff Tr. 35:19-36-6) (testifying that "clarifications" to Policy were conveyed to armed staff during the safety committee interviews) *with* Lefkowitz Supp. Aff., Ex. Y (Jennewine Tr. 44:5-11) (member of the safety committee testifying that there were no clarifications to the Policy); *compare also* Pls' MSJ, Ex. T (Doe 3 Tr. 19:5-21:4) (instruction allegedly given in meeting with Superintendent and Treasurer, with no Board member present) *with* Lefkowitz Supp. Aff., Ex. Z (Doe 2 Tr. 73:19-76:6) (instruction allegedly given in meeting(s) involving Board president and possibly two other Board members; Superintendent not present). Given this contradictory testimony and the total absence of documentary evidence, the defendants' claim is not credible.[5]

---

[4] The defendants have claimed, since before the litigation commenced, that R.C. 109.78(D) does not apply to its armed staff because they are not "security personnel." *See* Compl., Ex. 7 (Board Letter dated Aug. 15, 2018). Yet it was not until January 10, 2019, when depositions commenced, that the defendants claimed that they instructed armed staff to act only defensively, and hence were not "security personnel." Given the centrality of this fact to their argument that the authorized staff are not covered by R.C. 109.78(D), and the fact that no documentary corroboration exists, this late arrival is more than curious. If R.C. 109.78(D)'s applicability rests on whether armed staff act offensively or defensively, one may have expected that argument to appear in the defendants' opposition to the plaintiffs' preliminary injunction or in their answer. *See* PI Opp'n at 11 (arguing that armed teachers and staff are not security personnel because their "primary function" is education); *see generally* Answer.

[5] By the defendants' argument, the application of R.C. 109.78(D)—and whether someone needs training to carry firearms around children at school—can turn on an undocumented oral instruction to staff. It is hard to imagine that the General Assembly intended that.

Additionally, the fact that the defendants rely upon the FASTER program to teach the John Does how to respond to an active shooter contradicts their claim that the armed staff are supposed to act only defensively. The FASTER program focuses its tactical training on "hunting" down the shooter and canvassing rooms; it does not instruct staff to shelter in place. *See* Pls' MSJ at 14. The Board admits that it "relies in part on FASTER training to instruct Madison's armed personnel on . . . actions permitted by armed staff in response to a threat," and their "duties that relate to . . . possession of a firearm on District property." Joint Stipulations ¶¶ 22, 23. And because no documents instruct armed staff whether they can act offensively or defensively, the Board members point to the FASTER training as filling that gap. *See* Lefkowitz Supp. Aff., Ex. AA (Robinson Tr. 17:14-19:14; 86:22-88:10); Pls' MSJ, Ex. P (Jennewine Tr. 93:25-94:21).

The result: the defendants' erroneous interpretation of R.C. 109.78(D) and their own understanding of what constitutes "security personnel" (a term that does not exist in the provision) raise a material question of fact as to whether the operative rules actually require the staff authorized to carry guns while on duty to sit, wait, and act only defensively when there is an active shooter in the building. To be clear, the plaintiffs dispute both that R.C. 109.78(D) applies only to "security personnel" and that, if it did, who counts as "security personnel" would turn on whether armed staff were offensive or defensive. But even accepting these erroneous legal assertions, there would still be a question of fact regarding the rules governing armed staff, necessitating a trial. For this additional reason, the Court should deny the defendants' motion for summary judgment.

CONCLUSION

For these reasons, the plaintiffs respectfully request that the Court grant their motion for summary judgment, deny the defendants' cross-motion for summary judgment, declare the Resolution invalid, and enjoin the District from authorizing staff to carry firearms at school without the training required by R.C. 109.78(D). *See* R.C. 2721.09.

Respectfully submitted,

/s/ Rachel Bloomekatz

RACHEL BLOOMEKATZ (OHIO BAR NO. 91376)
GUPTA WESSLER PLLC
1148 Neil Avenue
Columbus, Ohio 43201
Phone: (202) 888-1741
Fax: (202) 888-7792
rachel@guptawessler.com

ALLA LEFKOWITZ (PHV-20596-2019)
JAMES MILLER (PHV-20599-2019
EVERYTOWN LAW
450 Lexington Ave. # 4184
New York, NY 10017
(mailing address)
Phone: (646) 324-8365
alefkowitz@everytown.org
jedmiller@everytown.org

February 11, 2019

Attorneys for Plaintiffs/Relator

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2019, a copy of the foregoing was served via email on the following:

Alexander L. Ewing
Brodi Conover
Frost Brown Todd LLC
9277 Centre Pointe Drive, Suite 300
West Chester, OH 45069
513.870.8213
513.870.0999 (fax)
aewing@fbtlaw.com

/s/ Rachel S. Bloomekatz
Attorney for Plaintiffs/Relator

FACSIMILE COVER PAGE

Court: Butler County Court of Common Pleas

Case Caption: Gabbard, et al. v. Madison Local School District Board of Education, et al.

Case Number: CV 2018 09 2028

Judge: Charles L. Pater

Attorney Information: Alla Lefkowitz
(PHV-20596-2019)
EVERYTOWN LAW
450 Lexington Ave. #4184
New York, NY 10017
(mailing address)
Phone: (646) 324-8220

Document Description: Plaintiffs' Opposition to Defendants' Motion for Summary Judgment **(UNREDACTED)**

Date of Transmission: February 28, 2019

Transmitting Fax No.: 917-410-6932

Number of pages: 18 pages (inclusive of this page)