

IN THE SUPREME COURT OF OHIO

ERIN G. GABBARD, et al. :
 : Case No. 2020-0612
 :
 Plaintiffs-Appellees, :
 :
 v. : Appeal from Butler County Court of Appeals
 : Twelfth Appellate District
 : Case No. CA2019-03-0051
 :
 MADISON LOCAL SCHOOL DISTRICT :
 BOARD OF EDUCATION, et al. :
 :
 :
 Defendants-Appellants. :

**AMICUS BRIEF IN SUPPORT OF APPELLEES,
CITY OF COLUMBUS, CITY OF CINCINNATI**

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I. Introduction

The theme of state vs. local regulation in urban and rural school districts is of central importance to this case. The Court is asked to interpret R.C. 109.78 and whether it controls local school boards to require any person armed on duty on school grounds to be certified by Ohio Peace Officer Training Academy's ("OPOTA") basic training program.

In general, Ohio sets the minimum statewide standards, or the "floor." Beyond the minimum, local school boards have the option to augment the standard to meet their local needs. Local decisions, therefore, must be more restrictive, but not less restrictive, than the statewide standard. In other words, if State law requires 728 hours of basic peace-officer training, a local requirement for training hours fewer than 728 would be considered less restrictive and thus not in accordance with the law.

By creating *ad hoc* criteria and requiring substantially less basic peace-officer training for persons armed while on duty at school, Madison Local School Board ("Madison") has circumvented R.C. 109.78, allowing fewer restrictive training standards. While Amici do not dispute local school boards are often better positioned to make local decisions, these decisions must be made within the confines of controlling state legislation setting minimum standards.

The 12th Appellate Court correctly reasoned that the plain meaning of R.C 109.78(D) unambiguously requires those employees armed on-duty in schools to have completed the statewide basic peace-officer training. A plain reading of the statute does not allow for any other training program unless one has twenty years' experience as an active duty peace officer. Any decision to arm faculty or staff must be done in accordance with the law, and supported by thorough and researched policies.

II. Status of Amicus Interest

The City of Columbus and the City of Cincinnati are Amici Curiae to this brief. Each of the Amici Curiae is a local municipal government throughout Ohio. Each city has a public and private school system and is responsible for maintaining a safe learning environment. Each Amicus city has an interest in supporting local decisions made within the confines of state legislation. In this case, Amici cities support Appellee Gabbard and the associated parents, recognizing the increased safety risk from persons armed on-duty who have not completed required basic peace-officer training.

At its core function, a government protects the health, safety, and welfare of its residents. The Ohio Constitution explicitly provides Amici cities with home rule authority to accomplish this fundamental purpose. *See Ohio Constitution, Sec. 3, Article XVIII.*

Tragically, too many United States cities have witnessed senseless school violence. Unfortunately, school violence cannot be completely predicted or prevented. However, one option to mitigate its severity is to authorize on-duty faculty and staff to carry a firearm on school property.

People who carry a firearm in order to be able to respond to an in-school security threat must have a consistent foundation of education and experience to de-escalate any threat. In Ohio, OPOTA's Basic Peace Officer Training provides a thorough foundation, preparing trainees for such a scenario. Persons without a strong foundation increase the risk of accident, mishap, or improper use of force.

To the extent faculty and staff go armed to protect student safety, they carry out functions similar to that of a peace officer, intervening in a crisis and/or de-escalating volatile situations, determining proper use of force, applying first aid or critical care, and most importantly,

understanding the purpose and use of firearms. Armed faculty staff may act as a deterrent against potential assailants. Consequently, faculty and staff must be required to have the same training as Ohio peace officers.

III. State of the Facts of the Case

A. Background

Madison passed a resolution, allowing Madison to authorize several employees to carry concealed firearms onto Madison school grounds. Madison solely relied on R.C. 2923.122(D)(1)(a), a criminal statute that excludes certain individuals from the penalties associated with the possession of a deadly weapon in a school safety zone. Although deemed “approved volunteers,” the persons Madison authorized to carry firearms were otherwise employed and paid as faculty and staff.

B. Relevant Ohio Law

i) R.C. 2923.122 is a criminal statute

Under R.C. 2923.122, persons are prohibited from knowingly possessing a deadly weapon in a school safety zone. *R.C. 2923.122(A)*. As a criminal law, the statute provides that any person who violates this section is guilty of “illegal conveyance or possession of a deadly weapon or dangerous ordnance in a school safety zone,” a 5th degree felony. *R.C. 2923.122(E)(1)*. The statute, however, does include exceptions for persons to possess a firearm who would otherwise be prohibited and subject to criminal penalties. Among the categories of persons exempted from criminal culpability, the statute provides the following:

“An officer, agent, or employee of this or any other state or the United States who is authorized to carry deadly weapons or dangerous ordnance and is acting within the scope of the officer's, agent's, or employee's duties, a law enforcement officer who is authorized to carry deadly weapons or dangerous ordnance, a security officer employed by a board of education or governing body of a school during the time that the

security officer is on duty pursuant to that contract of employment, *any other person who has written authorization from the board of education...* to convey deadly weapons or dangerous ordnance into a school safety zone and who conveys or possesses the deadly weapon or dangerous ordnance in accordance with that authorization.” R.C. 2923.122(D)(1)(a) (Emphasis added)

In other words, subject to a criminal penalty, no person is allowed to possess a firearm on school grounds except a state officer, a law enforcement officer, a security guard, or a person who is authorized by the local board of education. Nowhere does the statute provide any express or implied authority for a local school board to determine what and how much training is required.

ii) R.C. 109.78(D)

Fortunately, R.C. 109.78(D) provides the required guidance on the issues of training.

R.C. 109.78(D) provides in part:

“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 that person has completed twenty years of active duty as a peace officer. R.C. 109.78(D) (Emphasis added)

Where a faculty or staff member goes armed while on duty, such faculty or staff must have completed basic peace-officer training or have the equivalent experience of a twenty year peace officer.

C. OPOTA Basic Peace Officer Training

The Ohio Peace Officer Training Commission governs basic peace officer training in Ohio and has developed the training programs for statewide certification. *R.C. 109.79(A)*. The training requires a minimum of 728 hours of divided and subdivided course units. OAC 109:2-1-16. These units are divided into thirteen sections: (1) Administration; (2) Legal; (3) Human relations; (4) Firearms; (5) Driving; (6) Investigation; (7) Traffic; (8) Patrol; (9) Civil disorders; (10) Subject

Control; (11) First aid; (12) Physical conditioning; and (13) Homeland security. *Id.* These sections can also be categorized as Academic Knowledge based, Skills Based, or a combination of both. *Affidavit of Captain Howard Rahtz*, at paragraph 12.

Under basic training, firearms-related training consists of sixty hours with forty hours devoted to handgun and twenty hours related to shotgun. *Rahtz*, at 13. Of these sixty hours, a minimum of forty-six hours must be spent at the range. *Id.* The goals of the firearms training include safe handling of the weapon, review of primary safety rules, and the understanding of the cycle of fire. *Id.* Each trainee must also demonstrate competence in loading and unloading of a semi-automatic pistol. *Id.* To pass this section of the academy, a trainee must demonstrate proficiency on the OPOTA firearms qualification course. *Id.* at 14. This is a graded qualifications course with eighty percent set as the minimal standard. *Id.*

Additionally, the basic peace-officer training program provides significant number training relevant to the training of an armed, on-duty staff member. For instance, trainees receive courses on Ethics (5 hours), Arrest, Search, and Seizure (36 hours), Civil Liability and Use of Force (6 hours), Domestic Violence (12 hours), Crisis Intervention (20 hours), Subject Control Techniques (70 Hours), Impact Weapons (8 hours), First Aid/CPR and Critical Injury First Aid (8 hours each), Building Searches (12 hours), Physical Fitness and Conditioning (40 hours), and Critical Incident Stress Awareness (4 hours). *Id.* at 16-22.

D. FASTER Training Program

Designed by Buckeyes Firearm Association, the FASTER course is a privately administered program, not approved or subject to oversight by any state officials or agency. *Rahtz* at 25; <https://www.buckeyefirearms.org/training-teachers-school-staff> (Accessed Sept. 23, 2020).

Madison trainees all testified that they only completed the FASTER I Course, a three-day, twenty-seven hour course including classroom and firearms training. *See John Doe 1 Transcript pgs. 39-40, 46-48; John Doe 2 Transcript pgs. 65-67; John Doe 3 Transcript pgs. 29-30, 48, 53.* The classroom training included material on active killers, history, statistics and facts, mental preparation and legal issues and law enforcement response. *Id.* The firearms training includes fundamental shooting skills: shooting from close quarters to larger distance, weapon concealment and carry, shooting while moving, tactics including corner rounding, and decision-making drills. *Id.* at 28.

Scenario training also provided covering classroom situations, crowd situations, and dealing with responding law enforcement. *Id.* at 29. At the conclusion of training, participants completed the OPATA handguns qualification course plus an added stage on moving while shooting. *Id.* at 30.

i) In Practice, the FASTER Training Course Is Very Brief and Fast Paced

The FASTER Course is not as comprehensive and thorough as described in the program overview. Because FASTER crams everything from basic weapons handling to mental preparedness to first aid to scenario-based role-play into a single long weekend, each unit is covered in only “a few hours” and trainees acknowledge that the program is “very fast paced.” *John Doe 1 Tr. at 39.* Given this brevity, it is unsurprising that one of Madison’s trainees could not recall receiving training on something even as basic as the legal responsibilities of an armed staff person, even a few months after taking the course. *John Doe 3 Tr. at 53.*

Many FASTER trainees come to the program with little or no prior firearms experience. As a result, much of the course focuses on basic gun handling concepts like safely loading and unloading a firearm, “muzzle discipline” (i.e., not pointing the firearm at a person or object you

are not intending to shoot) and “marksmanship fundamentals” (meaning shooting stationary paper targets at a range). *See MSJ Ex. G (FASTER Level 1 Outline); see also John Doe 3 Tr. at 29* (summarizing program as covering “anything from just trigger control, on how to properly handle the firearm safely, how to holster/reholster, how to conceal the firearm,” as well as “first-aid, responding to injuries of like a shooting nature”). These basic skills – while important – do little to prepare trainees to respond to active shooters or carry safely in a school setting.

While FASTER touts scenario-based roleplay, its large class sizes mean that each trainee gets only a limited chance to practice more complex skills and decision-making. In fact, one of the Madison trainees testified that he had just a single opportunity during the entire weekend to practice being an armed responder during scenario-based training. *John Doe 3 Tr. at 48.*

For safety reasons, scenario-based training takes place with simulated (airsoft) weapons. Trainees get even less opportunity to practice real-world skills with their own weapon—i.e., the one they will be carrying at school. In fact one Madison trainee testified that outside of stationary shooting practice at the range, he got as little as ten minutes—a single drill—practicing school shooting scenarios with a working handgun. The rest of the time he used plastic training guns or roped firearms. *John Doe 1 Tr. at 48.*

Although FASTER claims that trainees must pass a more rigorous shooting test than OPOTA trainees, in reality they can fail repeatedly and keep re-testing until they finally pass. One Madison Trainee failed the qualification test twice before passing it at a later date. *John Doe 2 Tr. at 66-67.*

IV. Argument

PROPOSITION OF LAW: While R.C. 109.78(D) provides the minimum training requirement for any individual who carries a firearm in a school, a school district is free to require even more training or to prohibit armed employees completely.

A. Overview

As the 12th District Appellate Court correctly stated, “this matter does not call upon the court to decide the wisdom of permitting concealed firearms in a school safety zone.” *Gabbard v. Madison Local Sch. Dist. Bd. of Educ.*, 2020-Ohio-1180, ¶ 14 (12th Ct. App.) “Rather the issue is how much training a teacher or school employee must receive before carrying a firearm into a school safety zone while on duty, a matter that the General Assembly has decided.” *Id.*

Ohio has set the minimum training standard through the unambiguous text and plain meaning of R.C. 109.78(D), requiring that any person who goes armed while on duty at school shall be trained under and certified by OPOTA’s basic peace officer program. R.C. 2923.122 is a criminal statute prohibiting persons from carrying firearms on school property. While the statute does provide exceptions for persons from criminal culpability, it does not provide any explicit or implied authority for a school board to determine the amount and/or type of training.

Amici cities strongly support local decision-making authority. However, such decisions must be made within the confines of state legislation. A local action that is less restrictive than the state’s standard is impermissible. At its discretion, school boards may choose to have armed personnel or none at all. Should armed personnel be the choice, basic peace-officer training is required. After meeting the threshold standard, school boards may then choose to require additional components, such as additional training or continued education.

In the event of an active shooter or other critical incident, armed faculty and staff will often be making life-or-death decisions. Taking life-or-death actions, like a first-responder, armed

faculty and staff must have thorough training. By misconstruing and solely relying on R.C.2923.122, Madison took a position, in clear violation of Ohio law, which authorized armed faculty and staff without ensuring minimum state law training requirements. Such belief leaves Madison unbounded, suggesting that *any* training would be acceptable, as unreasonable as it sounds, *zero* training. Madison's use of R.C. 2923.122 as a blank canvas for training requirements is made more absurd because school board members creating the criteria had no training expertise or experience. Again, while Amici cities support local decision making, such decisions must be based upon thorough and researched policies.

Amici cities respectfully urge this Court to sustain the 12th District Appellate Court's plain meaning analysis and reasonable disposition requiring Madison faculty or staff who are armed while on duty to follow the basic peace officer training requirements of R.C. 109.78(D).

B. Ohio Sets the Floor for School Safety Issues

Madison and its amici suggest that applying R.C. 109.78(D), as written, to armed school staff is unreasonable because it “destroys any ability to make local decisions on this issue based on local conditions” in favor of “a one-size-fits-all mandate. *See Board Br. at 16; AG Br. at 26-27; School Dist. Amicus Br. at 6.* But statewide standards in the critical area of school safety are not only reasonable, but commonplace. Many examples exist under Ohio law which regulate minimum school safety standards without discouraging local decision making. For example, under R.C. 3313.53, the state requires administrators to submit emergency management plans determining threats to student and staff safety; to design protocols to address such threat; to prepare and conduct at least one emergency management test *R.C. 3313.536*. Under R.C. 3737.73, the state requires a principal to instruct children on emergency rapid dismissals at least six times a year; to conduct at least three school safety drills per year; and to determine an appropriate shelter location for a

tornado drill. *R.C. 3737.73*. Under *R.C. 3313.666*, the state requires a board of education to establish a policy prohibiting harassment, intimidation, and bullying; and to specify procedures for reporting, documenting and investigating incidents *R.C. 3313.666*

These statutory examples demonstrate the principle that the state traditionally sets the minimum standard while also providing discretion for local authority to augment requirements beyond the minimum. By requiring distinctively different training than *R.C. 109.78(D)*, Madison's decision was less restrictive and not in accordance with Ohio law.

C. R.C. 109.78(D) is Unambiguous and the Plain Meaning Controls

The primary rule in statutory construction is to give effect to the legislature's intention by looking at the language of the statute. *State ex rel. Clay v. Cuyahoga Cnty. Med. Exam'rs Office*, 2017-Ohio-8714, ¶ 1, 152 Ohio St. 3d 163, 163, 94 N.E.3d 498, 500. When there is no ambiguity, a court must abide by the words employed by the Ohio General Assembly and have no cause to apply the rules of statutory construction. *Id.* A court does not have the authority to dig deeper than the plain meaning of an unambiguous statute under the guise of either statutory interpretation or liberal construction. *Id.*

The 12th District Appellate Court held that the “plain and unambiguous language found in *R.C. 109.78(D)* makes clear that Madison Local is prohibited from employing a person as a ‘special police officer, security guard, or other position in which such person goes and armed while on duty’ unless that person has either completed an approved basic peace officer training program or has 20 years of active duty as a peace officer.” *Gabbard*, 2020-Ohio-1180, ¶ 17 (12th Ct. App.) Finding *R.C. 109.78(D)* unambiguous, the Appellate Court applied a plain meaning review and held that “though the school board may provide written authorization so that an individual is not subject to prosecution under *R.C. 2923.122*, the school board is still subject to the

training requirements mandated by the General Assembly in R.C. 109.78(D).” *Id. at 18.* “The express language of the statute does not suggest an intention to allow teachers or staff to carry a firearm while on duty with less training than indicated in the statute.” *Id.* Furthermore, an “approved volunteer” did not alter the conclusion that a Madison employee would still be “armed while on duty,” therefore subject to the 109.78(D)’s basic peace officer training requirements. *Id.*

R.C. 109.78(D)’s clause “other position in which such person goes armed while on duty” is straightforward. Here, the “other position” is that of a faculty or staff member. If the school board authorizes faculty or staff to be armed, they are then armed “while on duty.” While teachers, faculty, and staff do not stop being educators or administrators just because they are authorized to carry a firearm, once armed they are empowered to use their firearm to protect the health, safety, and welfare of the school’s population in just the same way as a school resource officer or security guard would.

i) Requiring Less Training than an Equivalence of Twenty Years of Active Duty Misconstrues R.C. 109.78(D)

The latter part of R.C. 109.78(D) states that basic peace officer training is not required where a person has twenty years of active duty as a peace officer. *R.C. 109.78(D)* If the Court does not follow the plain meaning of R.C. 109.78(D), the Court would be signaling that the experience of twenty years of active peace-officer duty is equivalent to or fewer than three days of FASTER training. As is Madison’s position, such an interpretation misconstrues the plain meaning of R.C. 109.78(D) and is counterintuitive to common sense.

ii) Construing R.C. 109.78(D)

Therefore, in interpreting R.C. 109.78(D) in conjunction with R. C. 2923.122(D)(1)(a), where a school board authorizes and employs a person to be armed while on duty, not only is such

person exempted from criminal culpability, but more importantly, such person must have also completed basic peace officer training or have twenty years-experience as a peace officer.

D. Without R.C. 109.78(D)'s Required OPOTA Training, School Boards Would Not Have to Meet Any Minimum Standards

The Ohio legislature has mandated that if school employees are going to be carrying firearms in close proximity to school children, such employees shall be well trained. OPOTA's basic training program is over 700 hours. Madison contends R.C. 2923.122 not only permits the authority to allow someone to carry a firearm on school property, but that because the statute does not proscribe or prohibit particular training, Consequently, Madison was not restricted in designing its own training criteria. Under this erroneous and unreasonable perspective, Madison would not have had to meet a minimum standard or require any minimum training.

i) By Circumventing R.C. 109.78(D)'s Minimum Standards, School Boards would not need to rely on Experience or Expertise

If allowed to design their own training criteria, local school boards will not be restricted to base such design on any relevant experience or expertise. Although claiming that local expertise guided Madison's decisions, Madison Board President David French was not aware of any board members with law enforcement experience, training, or expertise and had no personal experience in law enforcement. *Deposition of Carl David French, Board President*, pp. 108-109, January 10, 2019). He was not the only one. At the time, Board Member Pete Robinson was employed in "heating and air conditioning sales" while Board member Dr. Paul Jennewine was also without any law enforcement background. *Deposition of Pete Robinson*, pg. 8-9, March 7, 2019; *Deposition of Dr. Paul Jennewine*, pg. 11-12, March 7, 2019. Without any pertinent experience or expertise, the Board selected a training program based on "information that's out there" on the internet. *Depo. David French*, pg. 108-109.

ii) Amici Cities Support Affiant Captain Rahtz' Assessment of OPOTA Training

Amici cities agree with the additional observations and concerns of Affiant Captain Howard Rahtz, specifically, that there are too many unknown variables in ill-advised programs that when left to ambiguity could exacerbate an already dangerous situation. For instance, under FASTER, “weapons will only be accessed as a response to a substantial threat to pupils or school personnel” prompting the concern of what constitutes a “substantial threat.” *Affidavit of Captain Howard Rahtz*, at paragraph 38.” Does an armed staff member physically intervene in a school fight or use the firearm to gain compliance?” Rahtz asks. *Id.* If a staff member physically intervenes in a fight, a firearm is inadvertently inserted into the situation and the risk of having the weapon taken is high. *Id. at 38.* An already volatile situation then becomes potentially deadly.

Rationally, OPOTA trained persons in these situations have considerable advantage.

“The command presence developed through the OPOTA training, as well as effective tactical communication techniques allow the basic trained peace officer to have the skills to deescalate volatile situations. If physically confronted, they will have a wealth of defensive options to protect themselves and other students. The emphasis in OPOTA training on fitness will lessen the chances of the staff member being physically overwhelmed. FASTER trained staff receives neither defensive skills nor the condition provided by the OPOTA program.” *Rhartz at 39.*

Amici supports Rahtz’s notion that “the risk of an accident, misstep, improper or unjustified use of force would be significantly less for staff completing the OPOTA program. *Id.* The training is significantly longer and more comprehensive, providing more opportunity for performance under pressure and subsequent stress inoculation. *Id.* The development of skills in defensive tactics, crisis intervention training, de-escalation skills, knowledge on building searches and environmental weapons, and training on mental illness and emotionally distraught persons are all elements not proved for in FASTER. Training on these additional topics reduces the likelihood of error in judgment or tactics.” *Id.*

By requiring school boards to follow the State's requirement of basic peace officer training, the Court is ensuring that persons armed in schools have extensive, thorough training under OPOTA, and not subject to an *ad hoc* standard untethered to thorough and researched policies.

E. School Boards Can Still Determine What Is Best Within the Confines of State Legislation

Many examples outside the realm of school safety exist where Ohio school boards traditionally make decisions within the confines of state legislation. For example, the Ohio Legislature has set mandatory requirements for high school students to graduate. *R.C. 3313.603*. The state requires particular academic courses, and they must be followed. Local school boards may, however, decide to offer courses and activities beyond those required by state law. In another example, Ohio law provides that if a school adopts a dress code or uniform policy, that policy will not go into effect until the parents have been given a six months-notice. *R.C. 3313.665*. However, local school boards may choose to increase the time period for prior notice. As a final example, Ohio law requires local school boards to adopt a policy regarding suspension and expulsion, but leaves to the local school boards what specific misconduct qualifies. *R.C. 3313.661(A)*. In these examples, the state provides a framework and minimum standard without discouraging local decision making.

Local decision making is essential for schools to administer local education policies. Because of their access to information concerning students' diverse needs and learning styles, those closest to the academic setting are often better positioned to make decisions than those farther removed from the education system. <https://education.stateuniversity.com/pages/2386/School-Based-Decisionmaking.html> (Accessed Sept. 24, 2020). As they are more familiar with a school's academic environment, school boards must possess local discretion to choose how to defend

students. However, Amici cities' position is that such local decisions can and must be made within the confines of state law. Under this principle, a school board can hire a person trained as a peace officer, hire no armed personnel at all, or even mandate more training than what the state requires.

V. Conclusion

The 12th Appellate Court correctly reasoned that the plain meaning of R.C 109.78(D) unambiguously requires those persons armed in schools to have taken the statewide basic police officer training. A plain reading of the statute does not allow for any other training program unless one has twenty years' experience as an active-duty peace officer. Because of the potential for serious consequences related for carrying firearms onto school grounds, any decision to arm faculty or staff must be done in accordance with state law, supported by thorough and researched policies.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on October 5, 2020. Notice of this filing will be sent to all parties via e-mail.

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