

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

MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM

(REDACTED VERSION)

Hearing Scheduled February 25, 2019

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIM FOR
DECLARATORY RELIEF AND MEMORANDUM IN SUPPORT**

In accordance with Rules 56 and 57, the plaintiffs, through their counsel, move for summary judgment on their claim for declaratory relief. Because the Madison Local School District Board of Education, under its "Resolution to allow armed staff in school safety zone," allows its employees to go "armed while on duty" without the training or experience required by R.C. 109.78(D), this Court should declare the Resolution and its implementing policies invalid and permanently enjoin the defendants from authorizing school personnel to carry firearms without the requisite training. In support of their motion, the plaintiffs submit the attached memorandum and evidentiary support. Pursuant to the scheduling order entered by this Court, any response to this motion is due by February 11, 2019 and no reply is permitted.

Respectfully submitted,

/s/ Rachel Bloomekatz

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February 1, 2019

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT ON THEIR CLAIM FOR DECLARATORY RELIEF**

The parties in this case share the urgent desire to make Madison schools as safe as possible. The entire community experienced a tragic school shooting in 2016, and the plaintiff parents and the defendant school administration alike want to keep all schoolchildren safe from harm. Although the parties disagree over the best way to do that, their policy preferences are not at issue here. This case is about whether the defendants are complying with state law when they authorize teachers and staff to carry firearms at school with only [REDACTED] hours of training.

At the heart of this case, then, is the meaning of R.C. 109.78(D), which requires any “person” who is “employ[ed]” by a “public . . . educational institution,” in a “position in which such person goes armed while on duty,” to have “satisfactorily completed an approved basic peace officer training program,” unless he or she has already served for twenty years as a peace officer. The defendants do not dispute that the Madison Local School District is a “public education institution” or that the Board’s Resolution to arm staff does not require the peace officer training set forth in R.C. 109.78(D). However, contrary to statute’s plain language, the defendants argue that R.C. 109.78(D) only applies to “security personnel” and that [REDACTED]

[REDACTED] The defendants are wrong on both the law and the facts.

By its terms, R.C. 109.78(D) does not just apply to *some types* of school staff; it applies to all employees who go “armed while on duty.” There is no “security personnel” limitation in the text. If the Board believes armed teachers should be exempted from the statute’s training requirements, it can ask the Legislature to change the law (indeed, some interest groups already have). But unless and until the Legislature agrees, the Board must comply with the statute. And even if R.C. 109.78(D) *were* limited to security personnel (which it is not), there is at least a material question of fact whether [REDACTED], precluding judgment for the defendants without trial.

STATUTORY BACKGROUND

Ohio law broadly makes it illegal for anyone to carry a firearm on school grounds. *See* R.C. 2923.122(B). One of the few exceptions permits certain law enforcement and security officers to bring firearms into any part of a school safety zone, including a school building. *Id.* 2923.122(D)(1). For instance, school resource officers (“SROs”), who have completed peace officer training are allowed to carry firearms in school. *Id.* 2923.122(D)(1)(a).

Another exception to the prohibition on carrying guns in school buildings is for persons authorized by a school board. Revised Code 2923.122(D)(1)(a) permits “[a] person who has written authorization from the board of education or governing body of a school to convey . . . or to possess a deadly weapon . . . in a school safety zone . . . in accordance with that authorization.”

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

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

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

Basic peace officer training is governed by the Ohio Peace Officer Training Commission (OPOTC), which sets the rules and approves the programs for certified peace officer training. *See* R.C. 109.73, 109.78. The basic peace officer training program curriculum requires a minimum of

728 hours on subjects including firearm use, use of force, subject control, crisis intervention, critical incident stress awareness, and physical conditioning, among others. *See* Ex. A.

FACTUAL BACKGROUND

On April 24, 2018, the Board adopted the “Resolution to allow armed staff in school safety zone.” Ex. B. Specifically, the Resolution authorizes “teachers, school support staff, administrators, and others approved” to carry firearms on the District’s campuses if they (i) are permitted under state law to carry a concealed handgun; (ii) have undergone “active shooter training” and received annual re-certification; and (iii) have been designated by the Superintendent. *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is undisputed that the FASTER Program is not a basic peace officer training program or subject to OPOTC oversight. [REDACTED] [REDACTED]

[REDACTED] While the OPOTC-approved curriculum is 728 hours,

FASTER’s curriculum totals only 27 hours. *See* Ex. G (FASTER Level 1 outline).

Over the summer, [REDACTED]

[REDACTED]

All exhibits are attached to the Affidavit of Attorney Alla Lefkowitz, filed herewith.

[REDACTED]

[REDACTED]

[REDACTED] The District also obtained “Law Enforcement Liability” insurance coverage [REDACTED] covering damages “resulting from the wrongful act(s) which arise out of the law enforcement activities.” *See* Ex. K.

PROCEDURAL HISTORY

On September 12, 2018, the plaintiffs brought an action against the defendants that included two claims: (1) a count for declaratory relief stating that the Resolution violates R.C. 109.78(D)’s training requirement; and (2) a petition for mandamus based on the defendants’ failure to properly respond to public records requests. Only the count for declaratory relief is at issue here.² Given the risk of irreparable harm to their children based on insufficiently trained staff members carrying firearms at school, the plaintiffs filed a motion to preliminarily enjoin the Resolution. The Court subsequently converted the preliminary injunction proceeding into one on the merits and scheduled a hearing or trial for February 25, 2019. The parties have completed discovery, and the plaintiffs now move for summary judgment because there are no disputed facts that preclude deciding as a matter of law that the Resolution violates state law.

ARGUMENT

Under Ohio Rule of Civil Procedure 56(C), a party is entitled to summary judgment “if the evidence, properly submitted, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 11. That is the case here.

² The defendants filed a partial motion to dismiss the petition for mandamus with respect to the public records claim. That motion has been fully briefed and is ripe for decision.

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

There is no dispute that the Resolution allows school employees to go “armed while on duty” without basic peace officer training or twenty years’ peace officer experience. [REDACTED]

[REDACTED] It therefore violates the text of R.C. 109.78(D). And both the legislative history and statutory scheme reinforce that conclusion.

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

The first step in interpreting a statute is to examine its plain language. “If ‘the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation,’ because ‘an unambiguous statute is to be applied, not interpreted.’” *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶8 (quoting *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944)). When the language is “plain,” courts must “give effect only to the words the legislature used, making neither additions to, nor deletions from, the statutory language.” *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶11 (quoting *Jones v. Action Coupling & Equip., Inc.*, 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12).

The requirements imposed by R.C. 109.78(D) are clear: any “person” “employ[ed]” by a “public . . . educational institution,” in a “position in which such person goes armed while on duty,” must have “satisfactorily completed an approved basic peace officer training program,” unless he or she has already served for twenty years as a peace officer. *Id.* This statute unambiguously covers teachers, administrators, and other District employees who carry guns during the school day while going about their jobs. Madison Local School District hires teachers, coaches, administrators, and others in various “position[s]” a word which, according to the dictionary (and common usage) means “job.” See *Oxford English Dictionary*, available at <https://perma.cc/5W2K-LJE3> (accessed Jan.

positions “similar” to security guards as in the rejected draft bill. The Court should not add words into the statute that the Legislature specifically rejected.

2. *Proposed Amendments to R.C. 109.78(D)*. The General Assembly has also consistently *rejected* attempts to either exempt teachers, staff, and other persons authorized by a local board of education to carry a firearm at school from the peace officer training requirement in R.C. 109.78(D), or to decrease the training requirements for teachers. For example, House Bill 8, introduced in 2013 in the wake of the tragic shooting at Sandy Hook Elementary School in Connecticut, would have created the precise exception that the defendants seek. Specifically, it would have amended R.C. 109.78(D) to add the following language: “This division does not apply to a person authorized to carry a concealed handgun under a school safety plan adopted pursuant to section 3313.536 of the Revised Code.” 2013-14 Am.Sub.H.B. No. 8, Section 109.78 (as passed by the House). The bill also would have required the Attorney General to create a new specified training course for armed school staff. Though House Bill 8 passed the Ohio House, it failed in the Senate, and never reached the Governor’s desk. Similarly, a bill was introduced last legislative session shortly after the Madison Resolution was passed that would have exempted armed staff approved by a school board from R.C. 109.78(D)’s peace officer training requirement, as long as they completed a training course that would have to be designed by the Attorney General. *See* 2017-18 Am.Sub.H.B. No. 693, Section 109.78 (as introduced). That bill lapsed. It is not the law.

II. The Board’s interpretation of R.C. 109.78(D) must be rejected.

Contrary to the statute’s plain language, the defendants argue that teachers and other staff authorized to carry a firearm under the Resolution do not need to have the requisite peace officer training because they are not “security personnel.” *See* Defendants’ Opposition to Preliminary Injunction Motion at 10–11. But the defendants’ interpretation of R.C. 109.78(D) must be rejected

both because it violates the text of the statute and would allow staff to go armed at school with almost no training, vetting, or oversight [REDACTED]

A. The Board’s interpretation of R.C. 109.78(D) improperly adds words to the statute that do not exist.

Relying on an unofficial, nonbinding letter written by the former Attorney General in 2013, the Board argues that R.C. 109.78(D)’s training requirement only applies to school employees who are “considered ‘security personnel.’” Opp. to PI at 10; *see also* Ex. M. But the term “security personnel,” which is placed in quotation marks in the Attorney General’s letter does not appear anywhere in R.C. 109.78(D). And the Board’s claim that R.C. 109.78(D) requires only “a special police officer, a security guard, and others *employed to provide security*” to have the requisite training suffers from the same flaw. Opp. to PI at 10 (emphasis added). It, too, requires adding words to the statute (since “employed to provide security” does not appear in 109.78(D)). The Board may desire to rewrite the statute, but that is not allowed. Courts must give effect “only to the words the legislature used, making neither additions to, nor deletions from, the statutory language.” *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶11.

To support adding this non-existent language to the statute, the Board has relied on the rule of construction (often referred to as *ejusdem generis*) that a “catch-all term” used to conclude a list should be construed in accordance with the preceding list. *See* Opp. to PI at 10. In the Board’s view, because the statute mentions “special police officer” and “security guard,” the following phrase “other position[s]” must be construed to include only similar security roles. But this canon only applies where the statute is ambiguous about the scope of the “catch-all phrase.” *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 349–350, 676 N.E.2d 162 (10th Dist. 1996) (holding that “the doctrine of *ejusdem generis* need not be applied . . . as the words of the statute are clear”). Here, “other position,” is clearly limited by the phrase “goes armed while on duty.” R.C. 109.78(D)

(“other position *in which such person goes armed while on duty*” (emphasis added.)). If the Legislature did not place any additional limitation on the type of position that the armed employee must hold to trigger the peace officer training requirement, neither can this Court. *See Stewart v. Vivian*, 151 Ohio St.3d 574, 2017-Ohio-7526, 91 N.E.3d 716, ¶29 (rejecting interpretation because “the General Assembly did not qualify the term . . . or place any limitation on [its] meaning”).

Ignoring the text of the statute, the defendants further argue that R.C. 109.78(D) must apply only to security personnel because, buried on page 3,050 of last year’s budget bill, the General Assembly appropriated funds to the FASTER program (including funds for emergency medical supplies). *See Ex. G to Opp. to PI*. But where, as here, an appropriations bill “did not amend the statute, it should have little bearing on our analysis of the statutory text.” *Sinclair Wyoming Ref. Co. v. U.S. Envtl. Prot. Agency*, 887 F.3d 986, 1002 (10th Cir. 2017). Moreover, nothing about the General Assembly’s appropriation to FASTER is inconsistent with R.C. 109.78(D). As the defendants’ own expert admits, FASTER also trains “*non armed* school staff to teach them various *non firearm* responses and also valuable [tactical casualty care]” so the appropriation cannot be read as an endorsement of the Board’s Resolution here, relating to training *armed* school staff. *Benner Aff., Ex. E to Opp. to PI*, ¶27 (emphasis added). Indeed, the allocation does not (1) direct training for armed teachers, (2) state that such training alone is sufficient for concealed carry in school, or (3) even mention armed teachers at all. *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-90, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (“When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful.”). The Board’s focus on such a nonspecific appropriation only underscores the weakness of its argument.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The comparison is staggering: The OPOTC-approved training covers all relevant material and is rigorous enough to weed out those without the mental fortitude to carry arms in high-stress situations. [REDACTED] the Legislature did not leave school

boards' discretion to arm teachers unbounded, mandating instead that all persons carrying firearms in school complete the peace officer training in R.C. 109.78(D). Adopting the Board's view of the law would mean that those school personnel who are closest to Ohio's children can carry firearms with no real training or oversight. That would turn the statutory scheme on its head.

III. Alternatively, armed teachers and staff are “security personnel” subject to R.C. 109.78(D)’s training requirement.

Given the plain language of the statute, the Court need not consider whether [REDACTED] should be considered “security personnel.” However, if the Court were to adopt the Board's erroneous view that R.C. 109.78(D) applies only to “security personnel,” there is (at a minimum) a genuine question of fact as to whether [REDACTED] precluding judgment for the Board without a trial.

As an initial matter, it is undisputed that the Board authorizes staff to carry firearms as a school security measure (as opposed to for their individual protection or convenience). [REDACTED]

[REDACTED] also Ex. B (purpose of armed staff is “to be prepared and equipped to defend and protect our students”); [REDACTED]

[REDACTED] Even the insurance that the District obtained [REDACTED] is “Law Enforcement Liability” coverage for damages “resulting from the wrongful act(s) which arise out of [] law enforcement activities,” reinforcing that covered staff assume the role of “security personnel.” See Ex. K.

[REDACTED]

[REDACTED]

There are numerous problems with this interpretation. *First*, [REDACTED]

[REDACTED]

Second, [REDACTED]

[REDACTED] the training program that the Board selected to train its armed staff centers on *offensive* steps for “hunting” down an assailant. *See* Ex. V (FASTER training presentation explaining “Your primary job is to STOP THE KILLING.”); [REDACTED]

[REDACTED]

[REDACTED]

The distinction that the defendants draw between who qualifies as “security personnel” and who does not highlights a *third* problem – it appears nowhere in the text of R.C. 109.78(D). Surely the Legislature did not intend for school districts and courts to engage in these kinds of semantic and fact-intensive debates [REDACTED]

[REDACTED]

Instead, the General Assembly drew a bright line in R.C. 109.78(D) – anyone employed at a public education institution who goes armed while on duty must satisfactorily complete basic peace officer training. At a minimum, [REDACTED]

[REDACTED] preclude summary judgment for defendants even under their erroneous reading of the statute.

CONCLUSION

For these reasons, the plaintiffs respectfully request that the Court grant their 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.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, a copy of the foregoing was served via email on the following:

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